IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1219/4/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

12th February 2014

Before:

HODGE MALEK QC
(Chairman)
PROFESSOR JOHN BEATH
MARGOT DALY

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC — Applicant

- and -

COMPETITION COMMISSION — Respondent

- and –

AER LINGUS — Intervener

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H E A R I N G
Day One

A P P E A R A N C E S

Lord David Pannick QC, Mr. Brian Kennelly and Mr. Tristan Jones (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared on behalf of the Applicant.

Mr. Daniel Beard QC, Mr. Rob Williams and Miss Alison Berridge (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. James Flynn QC and Mr. Daniel Piccinin (instructed by Cadwalader, Wickersham & Taft LLP) appeared on behalf of the Intervener.

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THE CHAIRMAN: Good morning, Lord Pannick,

LORD PANNICK: Good morning, sir, members of the Tribunal. I appear with Brian Kennelly and Tristan Jones for Ryanair. The Competition Commission is represented by Daniel Beard QC, Rob Williams and Alison Berridge, and the intervener, Aer Lingus is represented by James Flynn QC and Daniel Picinnin.

The Tribunal will have seen it is an appeal against the Decision of the Commission on Judicial Review grounds requiring Ryanair to divest itself of all but 5 per cent of its 29.82 per cent minority stake in Aer Lingus. The Commission found that Ryanair, through its minority stake has a material influence, and that resulted in a substantial lessening of competition between the two airlines.

The Tribunal will have seen we are taking six points; they are set out in para. 5 of our skeleton argument: the duty of sincere co-operation, procedural unfairness, error in law in failing to show a causal link between the material influence and the alleged substantial lessening of competition, no reasonable basis for the finding of a substantial lessening of competition, complaints about the remedy of divestment and the appointment of a divestiture trustee. We say that is disproportionate, and sixthly and finally, there is a jurisdictional point, which I am not going to develop, we are not abandoning it because there is a pending hearing in the Court of Appeal on the *Akzo Nobel* case, as I shall explain.

We have set out the relevant statutory provisions in our skeleton argument at para. 7 through to para. 19. I appreciate the Tribunal will be very familiar with them but it may just be helpful to look in authorities bundle 1.

There are four bundles available to the Tribunal, and there is a core bundle of documents, and there is a confidential bundle, and there are three documents bundles.

THE CHAIRMAN: I saw there was at one point a fourth authorities bundle.

LORD PANNICK: There is.

THE CHAIRMAN: We only have three at the moment.

LORD PANNICK: We can provide further copies if necessary, but for the moment I am asking the Tribunal please to go to tab 5 of authorities bundle 1. The Tribunal will find the relevant provisions of the Enterprise Act 2002. The starting point on the first page of the tab is s. 22 - the duty of the OFT to make a reference if they believe that it is or may be the case that a relevant merger situation has been created, and that it has resulted, or may be expected to result in a substantial lessening of competition within any relevant market. That is what the OFT decided.

Section 23 tells you when a relevant merger situation has been created.

Section 26 adds some detail on when two enterprises cease to be distinct and the relevant provision for our purposes is 26(2) which the Commission found in this case was satisfied. It is not an issue in this case but I draw attention to it.

Section 35, if we turn on to that, it is p. 35, and it tells us what questions are to be decided in relation to completed mergers.

> 35(1) Subject to [further subsections] the Commission", the Competition Commission "shall, on a reference decide the following questions:
>
> (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 United Kingdom for goods or services.

Subsection (2) tells us when there is an anti-competitive outcome. That is when "a relevant merger situation has been created and the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition" – that is the criteria, of course, in 34(1)(a) and (b), and I do not think I need to read (b).

35(3) tells us what the Commission must do in the event that it has decided that there is an anti-competitive outcome within the meaning set out. It must then, under 35(3) decide the following additional questions:

> "(a) whether action should be taken by it under s.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.
>
> (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
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> (c) in either case if action should be taken what action should be taken and what is to be remedied, mitigated or prevented.

(4) tells us that in deciding these questions the Commission 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."

Next, we turn, please, to s.41, which is on p. 46, and here we come to remedies. 41(2):

"The Commission shall take such action under section 82 or 84 as it considers to be reasonable and practicable:

(a) to remedy, mitigate, or prevent the substantial lessening of competition concerned; and

(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."

Section 82, as the Tribunal well knows, enables the Commission to accept undertakings to take specified or prescribed action and that is set out on p. 51, I do not think I need to go to the detail, certainly not at this stage.

Section 84, which is on p. 54 confers power on the Commission to make final orders by reference to the detailed powers that are set out in schedule 8. None of the detail matters, I think, for today's purposes, save that those powers do include a power in appropriate cases to make divestment orders.

Section 120 of the Act, p .55 confers a right on a person aggrieved to seek a review to this Tribunal. It is called, of course, a Competition Appeal Tribunal but technically it is a review, not an appeal, of the Decision. In any event, s.120(4) identifies the test to be applied:

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

Subsection (5) identifies the powers of the Tribunal. It may:

"(a) dismiss the application or quash the whole or part of the decision to which it relates; and

(b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Tribunal."

Those are the central statutory provisions. They may be a mention of others, but those are the core provisions the Tribunal will have well in mind.

The factual background before I come to the six points of law, we have set out the facts at paragraphs 20-29 of our skeleton argument. Again, taking it shortly because I anticipate this will be very familiar to the Tribunal, Ryanair has its 29 per cent or thereabouts shareholding in Aer Lingus which it acquired between 2006 and 2008 (this is paragraph 20) as part of our intended acquisition of Aer Lingus. Paragraph 21, we have sought on three occasions to complete our intended acquisition of Aer Lingus.

Our third bid was notified to the European Commission in July 2012. Paragraph 22, that third bid was prohibited by a decision of the European Commission in February last year. That decision, which I do not invite the Tribunal to go to at the moment, is in volume 1 of the bundle, the main bundle, at tab C7. We have appealed that decision, as we are entitled to do, to the General Court, and there is no hearing date for that decision as yet. That is paragraph 23.

THE CHAIRMAN: On the hearing date, have you got any idea roughly when you are likely to have a hearing date?

LORD PANNICK: I do not, and I am not aware that we have anything concrete, I am told that in the normal course of events we would expect to have a hearing date in the General Court at the end of this year 2014, or very early in 2015. That is the normal run of events.

THE CHAIRMAN: Yes.

LORD PANNICK: But we have had no notification of any specific date. We then turn, paragraph 24, to the findings of the Competition Commission and the Report, of course, in this case, the Final Report, is in the core bundle, if the Tribunal have that. It is at tab 9 in the core bundle. The first finding that the Competition Commission made is on p. 21 of the report at tab 9 and it is paragraphs 4.42 and 4.44. This is their conclusion on material influence. They say at 4.42:

> "We conclude that Ryanair's 29 [odd] per cent shareholding in Aer Lingus gives it the ability to exercise material influence over Aer Lingus".

And then at 4.44:

> "In light of the above, we conclude that Ryanair has acquired the ability materially to influence the commercial policy and strategy of Aer Lingus and as set out in paragraph 4.6" —

That is a paragraph on p. 14 which refers to section 26.3 of the Act in the footnote which I mentioned when I was taking the Tribunal through the legislation. They say at 4.44 in the light of that the material influence gives rise to legal control for the purposes of the Act. And that is not a matter in dispute in this Tribunal.

So that is the first part of the statutory test that the Commission determined. The second part of the statutory test is then addressed in section 7 of the Report — and I will of course go into the detail of this when I make my substantive submissions, but just so the Tribunal has the finding, the findings on the SLC test, the substantial lessening of competition test conclusions, begin at p. 68, and they are set out in detail, the Tribunal may already have noted that at paragraph 7.178 the Commission emphasised that in their view:

"One mechanism of particular significance [as they describe it] 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".

It is not the only matter, but they emphasise it as a matter of particular significance.

THE CHAIRMAN: It seems to be the most important one.

LORD PANNICK: For them, yes, indeed.

THE CHAIRMAN: But if you took that out of the equation, the others may not be so —

LORD PANNICK: Well, I think we are entitled to say, to invite the Tribunal to find, that if there were some legal error in relation to that analysis, the rest of the conclusions on SLC could not stand. The conclusions on SLC could not stand, given the significance which they, the Commission, attach to that particular mechanism. Their conclusion is at 7.188. They conclude in the light of their detailed reasoning, which as I say I will come to, they conclude that:

"Ryanair's acquisition of a 29 [odd] 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".

Then they turn to remedies in chapter 8 of their Report, and if the Tribunal please would go to 8.12 where they reject Ryanair's submissions in relation to EU obligations:

"We recognise [they say at 8.12] 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. [This is the question of sincere cooperation with the EU]. 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 [their] enquiry and that of the institutions of the EU as relatively remote. [It is not, with respect, clear relative to what]. In our view, the remedial action that we propose taking could not be said to jeopardize the attainment of the EU's objectives".

I will come back to that because that is the first —

THE CHAIRMAN: One of the things, Lord Pannick, that struck me reading paragraph 8.9 is that they list a whole load of factors that they considered, it does not tell you what they thought about each of them.

LORD PANNICK: Absolutely.

THE CHAIRMAN: If you look, for example, on the top of p. 73 they say that is a factor but we do not know what assessment they took of the likelihood.

LORD PANNICK: I respectfully agree. They do not tell us what view they took, or indeed what weight they attach to each of these factors.

THE CHAIRMAN: Yes.

LORD PANNICK: No doubt one could say that many of these factors are relevant in most cases, but what matters is the reasoning; and there is not a great deal of actual concrete reasoning here. That is our first ground, which I am coming to.

THE CHAIRMAN: Well, I am sure Mr. Beard will help us.

LORD PANNICK: I am sure he will, as he always does.

THE CHAIRMAN: Yes.

LORD PANNICK: He will assist the Tribunal as best he is able on these points.

Then at 8.49 is their conclusion, where they say that the remedies proposed by Ryanair would not be effective in addressing the SLC. Instead, what they, the Commission, decide is at 8.112 on p. 96:

> "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."

That is 8.112. At 8.121 they repeat that finding. That is their conclusion:

> "… an effective and proportionate remedy to the SLC would be a partial divestiture to reduce Ryanair's shareholding in Aer Lingus to 5 per cent … accompanied by obligations on Ryanair not to seek or accept Board representation or acquire further shares in Aer Lingus (unless clearance is given under the [merger regulation] for a concentration between Ryanair and Aer Lingus)."

They then turn, finally, to implementation of the remedy and they decide at 8.123 that:

> "(a) A Divestiture Trustee should be appointed … to sell the divestiture package to suitable purchasers.
>
> (b) The divestiture may be implemented via an upfront buyer process to a single purchaser …"

that is an approved purchaser -

> "… or via a stock market placement of the shares or by another process identified by the Divestiture Trustee and approved by the CC."

That is one of our complaints under the fifth ground of challenge that there was no proportionate basis for appointing a Divestiture Trustee. I shall come to that.

Those are, in essence, the findings of the Competition Commission. We respectfully submit that when the Tribunal considers the grounds of challenge on a judicial review basis to these conclusions, the Tribunal ought to have well in mind two fundamental points, the first of which is that, of course, what the Competition Commission are ordering has an impact on Ryanair's property rights under Article 1 of the First Protocol, which is, of course, incorporated into domestic law by the Human Rights Act. That means that proportionality applies, strict scrutiny should apply, and I will show the Tribunal the authorities in due course. It is important to emphasise that.

The other introductory point that I want to mention is that the context here is unusual in this respect, that there is no dispute by the Competition Commission that competition between Ryanair and Aer Lingus has been and remains intense - that is their word. Could I invite the Tribunal's attention to the Final Report at p.31, where they say under the heading "Conclusion on competition between Ryanair and Aer Lingus since 2006":

> "We conclude that, in line with the European Commission's findings, competition between Ryanair and Aer Lingus has remained intense since 2006. The extent of overlap between the operations of the two airlines has increased, largely as a result of Aer Lingus's Regional franchise agreement with Aer Arann."

They will go on to discuss the relevance. There is no dispute about that point.

They mention the European Commission's findings. That finding by the European Commission can be seen in hearing bundle 1 of 3, if I could invite the Tribunal's attention to the European Commission findings. It appears behind tab 7 of the bundle. The relevant paragraph is 478 under the heading "Closeness". The European Commission says:

> "The Commission considers that Ryanair is in competition with Aer Lingus. In this regard, the market investigation has not provided material indications that market circumstances have changed since 2007. If anything, competition may have increased between the Parties."

Then there is a lot of detail which we do not need to worry about. That is what the European Commission say, it is what the Competition Commission accept, and it is the background to this dispute.

May I then turn, unless there are other matters, sir, you want me to deal with in my general introduction, to Ground 1 and address that. That is the challenge concerning the EU law duty of sincere co-operation. Our case is that for the Competition Commission to implement the divestment decision, it would conflict with the EU law duty of sincere co-operation, because Ryanair's appeal in relation to its bid to acquire all of Aer Lingus is pending. It is pending in the General Court. It may, who knows, it may result in Ryanair receiving clearance in Luxembourg and in Brussels to bid for 100 per cent ----

THE CHAIRMAN: Lord Pannick, do we have a copy of any of the papers relevant to the appeal?

LORD PANNICK: We do not in the bundles. What we do have is a statement published in the Official Journal of the grounds of Ryanair's appeal, if that would assist.

THE CHAIRMAN: That would assist.

LORD PANNICK: I am very happy to hand it up.

THE CHAIRMAN: Can we find a home for it in the bundle somewhere.

LORD PANNICK: I will hand this up. (Same handed) This is the Official Journal announcement: "Action brought on 8th May last year, *Ryanair v. The Commission*". The form of order sought is to annul the decision of the European Commission declaring a merger to be incompatible with the internal markets and the EEA Agreement. "Pleas in law and main argument", so it is a summary of what is being said in support of the action.

> "The applicant relies on one plea in law alleging that the Commission erred in finding and failed to demonstrate to the requisite legal standard that the merger, as modified by the commitments offered by the applicant would significantly impede effective competition in the Common Market. The applicant also submits the Commission violated the principal of proportionality, the principle of sound administration and the obligation to state reasons. In support of its claims the applicant pleads that the Commission made manifest errors of assessment and violated the above-mentioned principles with regard to
>
> (a) the commitments relating to the divestiture of Aer Lingus' operations on 43 overlap routes to Flybe Group Plc,
>
> (b) the commitments relating to the Dublin-London, Cork-London and Shannon- London routes;

(c) the commitments relating to Aer Arran's operation on the 43 overlap routes which Flybe would operate; and

(d) the commitments relating to the routes on which the Commission identified potential competition concerns."

The Tribunal may find it convenient to slot this in at the back of the core bundle, and we can call it tab 10 if you like. That, in essence, is what Ryanair is saying.

THE CHAIRMAN: That gives me enough of a flavour.

LORD PANNICK: We do, indeed, criticise the reasoning of the Competition Commission on this point which is, to put it kindly, very unclear as to what they are focusing on, but we do also say and I want to make this clear, we say difficult, important points of law arise in relation to the scope of the duty of sincere co-operation, and that is why we have indicated in our skeleton argument that we take the view that the Tribunal may, at the end of the day, consider that the appropriate way to deal with this is to refer questions of EU law to the Court of Justice.

The duty of sincere co-operation is set out in the authorities bundle 1, if I could take the Tribunal to that, at tab 2. This is the Treaty on European Union. The relevant duties are set out at Article 4.3 of the Treaty:

> "Pursuant to the principle of sincere co-operation, 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."

So that is the general duty, and the European Court has had occasion to consider what this duty means, in particular in *Masterfoods Ltd* which is in the same bundle at tab 19 – it is the "ice cream wars" case. I hope I do not need to set out, because it is not necessary, the background. Can I just take the Tribunal to what was said by the European Court of Justice. It is on p. 11428, and para. 49 of the Judgment of the Luxembourg Court. It tells us:

> "It is also clear from the case-law of the Court that the Member States' duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from Community law and

> to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts."

So that is the obligation and we must all comply.

Over the page at para. 51 they tell us that the court has held in para. 47 of an earlier case, *Delimitis* :

> "that in order not to breach the general principle of legal certainty, national courts must …"

- so it is a duty:

> "must, when ruling on agreements or practices which may subsequently be the subject of a decision by the [European] Commission avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of the [relevant articles on Competition law] of the Treaty."

So that is the general obligation: do not decide anything which could conflict with a future decision.

Then at 57 the matter is taken a stage further.

> "When the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should …"

- so it is an obligation:

> "… in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts, unless [the National Court] considers that in the circumstances of the case, a reference to [the Luxembourg Court] for a preliminary ruling on the validity of the Commission decision is warranted."

So the obligation is not simply while the European Commission makes up its mind, the obligation extends to staying one's hand in London while the relevant decision works its way through the Community courts.

There is a limit to this principle in the *Delimitis* case, which is back at tab 14. The *Delimitis* case mentioned in *Masterfoods* – again, another Luxembourg decision and the relevant passages in *Delimitis* can be found at p.251 and 252. At the bottom of p. 251 the Tribunal will see para. 47 where the court says:

> "It now falls to examine the consequences of that division of competence as regards the specific application of the Community competition rules by national

courts. Account should here be taken of the risk of national courts taking decisions which conflict with those taken or envisaged by the Commission in the implementation of Articles 85(1) and 86. Such conflicting decisions would be contrary to the general principle of legal certainty and must therefore be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission."

Then, leaving out 48 and 49, para. 50:

"If the conditions for the application of Article 85(1) are clearly not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue. It may do the same if the agreement's incompatibility with Article 85(1) is beyond doubt and, regard being had to the exemption regulations and the Commission's previous decisions, the agreement may on no account be the subject of an exemption decision under Article 85(3)."

So there is a recognition that there are cases that leave no room for doubt, and therefore the duty of sincere co-operation does not prohibit national decisions taking place. All of that begs a number of questions, which I am going to come to. Just to be clear about this, our case is very simple indeed. We say that the General Court is going to decide at the end of this year/early next year, whenever it gets round to it, it is going to decide whether the European Commission was correct in law to prohibit Ryanair's bid to acquire Aer Lingus. And if the General Court allows the appeal — it depends on what grounds it allows the appeal — but it is perfectly reasonable to presume that Ryanair will be entitled as a matter of EU law to make a fresh bid. It depends on the grounds, but that is not —

THE CHAIRMAN: They could just send it back to the Commission.

LORD PANNICK: They could. They could.

THE CHAIRMAN: Yes.

LORD PANNICK: But it is also at least a realistic possibility in *Delimitis* terms that Ryanair will do better than that, and Ryanair may establish in the General Court that there is no basis in EU law for preventing a full bid. Our concern, our complaint, is that for the Competition Commission now to require Ryanair to divest itself of the 29 odd per cent would conflict with a future decision, a future possible decision, of the European Commission based on a successful outcome, if it occurs in the General Court, that Ryanair should be permitted to acquire Aer Lingus. Why would there be a conflict between the divestment decision and the contemplated decision in Luxembourg and in Brussels because if Ryanair is now

compelled to sell all but 5 per cent of its shareholding, it is going to be far more difficult, perhaps impossible in practice, for Ryanair to acquire 100 per cent of Aer Lingus if permitted to do so by the European Commission. There is evidence on this if one needs it, from Mr. Komorek, but the reasons are self evident. If Ryanair is permitted to acquire Aer Lingus and it still has at that time 29 per cent of the shares, it will not need to bid for or finance the acquisition of those shares. Without those shares, without the 29 per cent block, it is inevitably going to be much more difficult to persuade a significant block of shareholders to sell to Ryanair to acquire control of the company.

THE CHAIRMAN: But you are not saying in reality it is, you cannot actually say now it is impossible.

LORD PANNICK: No no. I am not putting it as high as that, but it is going to be much more difficult. It is going to be an impediment. In realistic terms if you have to sell so that all you have left is 5 per cent, you are inevitably going to find it much more difficult to obtain a controlling interest if allowed to do so — not least because if we are forced to sell 24 per cent there is a real risk that the shares will be acquired by one or more investors who will thereafter refuse to sell to Ryanair — they are perfectly entitled to refuse Ryanair — and our 29 per cent shareholding that we currently have makes it significantly less likely that a takeover bid could be blocked by others. That is the reality.

THE CHAIRMAN: So, you are saying that a takeover bid by someone with 5 per cent shares is going to be a lot harder than perhaps where you have got just under 30 per cent.

LORD PANNICK: Yes.

THE CHAIRMAN: Can you remind me, what do the Competition Commission say about this point?

LORD PANNICK: The Competition Commission do not say anything about this point because they set out, I am going to come to the detailed reasoning.

THE CHAIRMAN: Well, take me later then. I could not see it in the report where they deal with it.

LORD PANNICK: It is not, the passages where they address these matters, they set out, as you already reminded me, they set out factors that they take into account, and they form the view that they are entitled as a matter of EU law to look at all the factors and decide as a matter of their discretion what is the best way forward, and that there is no legal impediment, no legal impediment, to them making a divestment decision. And the arguments that are advanced against our contention under the duty of sincere cooperation by my friends which I have to deal with —

THE CHAIRMAN: Yes.

LORD PANNICK: — do not take issue, I think, with our contention that if we only have 5 per cent it is in practice going to be much more difficult to acquire Aer Lingus if allowed to do so. Their points are different points and they are points that I need to answer and will answer; but they do not put that point that we are wrong in being concerned at the forefront of their submissions.

THE CHAIRMAN: Yes. I am sure Mr. Beard will deal with that.

LORD PANNICK: He will. He will make all the points that he thinks it appropriate to do so. But that is not in the forefront of his objection to the point we are making. The main point, which I am coming to, which is taken against us is that the European Commission and the Competition Commission are looking at different matters. Their concerns are different. The CC say, and they are right, that the European Commission was not concerned with the legality in competition terms of owning 29 per cent. Their concern, the European Commission, was with the competition consequences of Ryanair owning 100 per cent.

THE CHAIRMAN: That is the front line objection.

LORD PANNICK: It is.

THE CHAIRMAN: But then the subsidiary objection is the one we have just dealt with, which Mr. Flynn expands in his skeleton which is that, "Well, the remedy does permit you to make a fresh bid if it is permitted".

LORD PANNICK: Yes, absolutely. The subsidiary point that is made is that the Competition Commission have been very careful to make clear that if we are given clearance to acquire 100 per cent, then nothing that the Competition Commission are saying prevents us from bidding for 100 per cent.

THE CHAIRMAN: Yes. That comes into your point which is the practicality point.

LORD PANNICK: Indeed.

THE CHAIRMAN: Yes.

LORD PANNICK: My answer to it is, "Well, that's all very well, thank you very much, but what you the Competition Commission are not taking into account, what you cannot answer, is that it is not of any comfort to Ryanair to say if Brussels allows you to bid for 100 per cent, we the Competition Commission will not stop you when the order to divest now, when we do not yet know the final result in Luxembourg and Brussels, will inevitably make it much more difficult for us to do what we all contemplate, including the Competition Commission, may be the result in under the EU system". So, that is the area of dispute. The practicalities

of what we are concerned with and practicalities, we say, are at the forefront of concern about these matters.

Now, as we have already identified —

PROFESSOR BEATH: Lord Pannick, might I —

THE CHAIRMAN: Of course, yes.

PROFESSOR BEATH: There are always obstacles to taking over a company. So, you are arguing that the divestiture proposal has significantly increased the obstacles for taking over a company? That is your —

LORD PANNICK: That is the submission.

PROFESSOR BEATH: Significantly.

LORD PANNICK: Very significantly.

PROFESSOR BEATH: Right.

LORD PANNICK: My submission is that in the real world if you already own 29·8 per cent of the company, the barriers to you taking control, if allowed to do so by Europe are significantly lower than if you only own 5 per cent of the company. I say that where we have here pending in Europe a determination on the legality of a takeover bid for 100 per cent, it is self evidently in conflict with that potential decision now, immediately, to require Ryanair to divest itself down from 29 per cent to 5 per cent. As I mentioned, if one needs evidence on this the evidence is before the Tribunal. There is a witness statement, I am not going to take you through it, from Mr. Komorek on behalf of Ryanair, in main bundle 1, B2, and it is his witness statement at para. 17. It says what I have submitted. I say these matters are self-evident in the real world.

If one goes to how the Competition Commission dealt with the matter, as I have already indicated, the relevant passages are at p.71 of the Report, which is tab 9 of the core bundle (p.71-74), starting at 8.4 headed "Duty of sincere co-operation". They mention at 8.4 that Ryanair's third public bid for Aer Lingus was prohibited and that Ryanair is appealing and those proceedings are pending. 8.5:

> "We considered …"

because, of course, Ryanair asked them to do so -

> "… the applicability of the duty of sincere co-operation with the institutions of the EU pursuant to Article 4(3) TEU … we discussed the relevance of the European Commission's findings to our substantive assessment in this case and concluded that they do not preclude the CC's finding of an SLC."

8.6 Ryanair stated that the CC must determine (on the facts) whether a particular decision could conflict with a decision of the European Court or European Commission."

Then they say this:

"This assessment may entail a balancing exercise."

I respectfully take issue with that. If the duty of sincere co-operation applies it is a duty and it is an obligation. They go on:

"However, once it is established that a decision could conflict with a decision under EU law the obligation not to reach a conflicting decision is absolute, being a matter of law … Consequently, Ryanair said that, in the light of the ongoing EU appeals process of the European Commission decision to prohibit its third bid for Aer Lingus, the CC was prohibited from reaching a decision on any divestment remedy, which must be stayed pending resolution of the EU appeals process."

Over the page:

"Ryanair stated that the CC had already recognised that it would not proceed to determine any issue of remedy … and would avoid taking a final decision that could conflict with a decision of the European Commission …"

I will show the Tribunal those references in a few moments.

Aer Lingus joined in. They said:

"… an order requiring divestment of the minority stake could not create legal conflict with any further decision of the European Commission, first because those two (hypothetical) decisions involved the application of different legal instruments to different facts, and second because Ryanair could reacquire the shares in the context of an approved bid.

8.9 We do not agree with Ryanair's submission that the CC is prohibited by its previous statements or those of the UK courts, from implementing remedial action. We believe that we must carry out a balancing exercise, taking into account all circumstances of the case in assessing whether Article 4(3) requires us to defer remedial action. We considered the following factors in reaching our decision."

Again, I, with great respect, do not accept that there is any question of a balancing exercise in determining whether there would be a breach of the duty of sincere co-operation. If the duty applies then it imposes a legal obligation. It is true that if there are various ways in

which the duty can be satisfied then the Commission does enjoy a discretion as to how best to proceed, balancing various factors. Our case is that here there is a duty. There is no choice, you simply cannot impose a divestment remedy when the matters that I have mentioned are pending in the General Court.

They then set out a number of factors that they have taken into account. I am not going to read them out. The Tribunal can see what they are and has already done so, but they are factors which the Commission says it has considered. All very well.

At 8.10 they note that this Tribunal:

> "… 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."

In other words, it is not a matter for Brussels, or indeed for Luxembourg to determine the competitive consequences of the 29 per cent stake, which I accept, and I am coming to that. That is what they note. At 8.11 they also note that they 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."

That is not our complaint. Then 8.12:

> "We recognise 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 …"

Those are the factors they have taken into account -

> "…. including the grounds of challenge in Ryanair's application in 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 …"

whatever that means..

> "In our view, the remedial action that we propose taking could not be said to jeopardise the attainment of the EU's objectives."

Then they deal with interim arrangements. I think it is fair to say they do not anywhere there address the matter that I have focused upon, the practical implications in the real world, of requiring a divestment now of all but 5 per cent in relation to Ryanair's ability to do that which we are contemplating Luxembourg and Brussels may allow. That is the reasoning of the Commission.

There is also domestic case law which the Tribunal will wish to bear in mind in relation to this issue. *Masterfoods* was considered by the High Court in the *National Grid* case, which is bundle 2 of the authorities, tab 31. This was a case concerning a follow-on for damages arising out of a European Commission decision which was, itself, the subject of an appeal in the European courts, and the issue was whether the domestic proceedings should be stayed. The Chancellor addressed the duty of the sincere co-operation at para. 23. There is a lot of detail, but could I just take the Tribunal to para. 23, where his Lordship, the Chancellor, says:

> "It is clear from paragraphs 55 and 57 …"

He is referring there to *Masterfoods*, which I have shown the Tribunal -

> "… that this court [the High Court] should take all the steps required to ensure that the trial does not come on before all appeals to the [Luxembourg] CFI and, if brought by any party, to the ECJ have been finally concluded. Accordingly, the minimum requirement of this court at this stage is an order to ensure that the action is not fixed for trial against any defendant before, say, three months after the exhaustion of all rights of appeal of that defendant from the Decision."

That is the European Commission Decision.

> "As I have indicated, the defendants contend that such a minimum order is not sufficient to protect them."

Then he goes on to consider whether more should be done.

THE CHAIRMAN: The issue in that case was not whether there should be a stay but from what point of view.

LORD PANNICK: Indeed, but I draw attention to para. 23 because the Chancellor recognises, correctly in my respectful submission that there are obligations here and they apply in relation to the conclusion of the decision-making at the European level. Of course, we have been over this ground ----

THE CHAIRMAN: Before you leave that, can we look at para. 37, and presumably you rely on that, do you not?

LORD PANNICK: Paragraph 37:

"What then is the likelihood of such a trial being held? The defendants contend that I cannot prejudge the outcome of the applications to the court of first instance, or of any subsequent appeals."

His Lordship agrees.

THE CHAIRMAN: The point I am making is that that must be your case as well. We cannot pre-judge what the outcome of your appeal is to the General Court. I am not sure what the position is of Aer Lingus on that, but I am sure you just rely on that. We will see what they have to say.

LORD PANNICK: I am grateful, sir. I certainly rely on that. I do not understand Mr. Beard to present as an answer to this point – he has other answers but he does not present as an answer to this point – any suggestion that this Tribunal should engage in crystal ball gazing and seek to predict the prospect of success in the General Court, far less what the consequence will be in the European Commission, and I think Mr. Flynn is telling the Tribunal that he, too, does not take that point. Again, he has got other points but that is not one of them.

THE CHAIRMAN: I am just cutting that one off.

LORD PANNICK: I am grateful and, sir, your intervention has clarified that that is not where we are going. There are difficult issues, no doubt, in this application but that is not one of them. You are not being asked to predict what is going to happen in Luxembourg, absolutely not.

As I mentioned, we have been over a part of this ground before, by "we" I mean this Tribunal, Aer Lingus, the Competition Commission and Ryanair, because we had a dry run on this point where Ryanair unsuccessfully argued that the duty of sincere co-operation prevented the Competition Commission from entertaining the issues in this case, that they should not have started the investigation and we lost. But we do say that it is quite revealing to see why we lost, because in our submission the Competition Commission and the Tribunal and, indeed, the Court of Appeal, were recognising that the reason that we lost was that we were challenging at an interim stage where as now, of course, we are dealing with a final decision, a decision to require us to divest and if, sir, Members of the Tribunal you would please look at vol. 3 of the authorities, you will find the decision of the Tribunal last time round, and this is at tab 44. This is the decision of this Tribunal rejecting Ryanair's complaint about the duty of sincere co-operation, when the Competition Commission began to investigate. At para 84 they say that they were rejecting Ryanair's contention:

> "We reject Ryanair's contention that, as a matter of law, the duty of sincere co-operation precludes the Competition Commission from taking any further steps in the investigation. Of course, as Mr. Beard QC, for the Competition Commission, accepted, the Competition Commission 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 Competition Commission is precluded, as a matter of law, from taking any further steps in the investigation."

So there is a distinction drawn at that stage between investigating and taking a final decision, and the reference to Mr. Beard's submissions, or his "acceptance" as it is described was a reference to his oral submissions. If we go, please, to bundle 1 of the main bundles of material, you will find, Members of the Tribunal, behind tab 4 the transcript of Mr. Beard's words of wisdom at that hearing, and the relevant passage is at p. 74. We know it is Mr. Beard because it says so in line 1, "Sir, I was just wrapping up", and at line 17 Mr. Beard says this:

> "… the Commission does have the possibility of an eight week extension within its discretion. If that were something that it needed to exercise in order to obviate risks of clashing final outcomes, then that is something that it could well use, and it would want to ensure that no concrete steps were taken in relation to remedies that compromised - I think that was the word the Commission …"

- he means the European Commission:

> "- used in its letter – the outturn that the Commission might take."

Sometimes when one reads these transcripts, certainly in one's own case, they make no sense whatsoever, this is very clear indeed. Mr. Beard is accepting, all his submissions are lucid and clear, it is a clear submission. It is all a different matter when one comes to final remedies, investigation is another matter.

What Mr. Beard was referring to there was a letter from the European Commission, which is in the same bundle in tab 3, of 26th July 2012 to the Competition Commission. My recollection is that the Competition Commission had asked the European Commission for its view on whether there was any conflict should the Competition Commission investigate? The answer came back from Brussels: "No", there is no conflict. What Mr. Beard was referring to in his submission is the penultimate paragraph where the European Commission say this:

"In our view, as a matter of Union law, parallel procedures by the European Commission and the Competition Commission are not excluded. However, national competition authorities should not, on the basis of their national law, take decisions that would compromise decisions, or possible decisions by the European Commission under the EU Merger Regulation."

That is where the term "compromise" comes from.

THE CHAIRMAN: We will take a short break now. Before we do, just two points. First, I have put all my scratchings on the skeleton that was served before, are there any differences of substance apart from things like the updated references, between the one I had before, and the one that I have been given today.

LORD PANNICK: The answer is "no".

THE CHAIRMAN: The second point is that, can you look at footnote 20 of Mr. Flynn's skeleton argument, just on the issue we discussed earlier, on the timing. You are saying that you hope you will have a hearing at the end of the year or, let us say, the first quarter of 2015. You do not need to answer now, but can you comment on that footnote on p. 6

LORD PANNICK: I am sorry, I missed the reference, Mr. Flynn's skeleton argument —

THE CHAIRMAN: Footnote 20.

LORD PANNICK: Footnote 20, thank you.

THE CHAIRMAN: On p.6. When we are back, can you just address the timing point.

LORD PANNICK: Yes, of course.

THE CHAIRMAN: I do have a sort of grip of when we think we are likely to get (a) the hearing; and (b) a judgment from the General Court.

MR. FLYNN: Sir, perhaps I could just point out we also make some submissions on timing in paragraph 4 of the statement of intervention, so it might be it will give you a comprehensive picture of what we say.

THE CHAIRMAN: Where will I find that, sorry?

MR. FLYNN: Paragraph 4 of our statement of intervention, which I think is at tab.7 in the core bundle.

THE CHAIRMAN: Yes. We will address timing when we come back, and then you can carry on with your submission.

LORD PANNICK: Thank you.

THE CHAIRMAN: So, we will rise for about ten minutes.

(LATER)

THE CHAIRMAN: Yes, Lord Pannick.

LORD PANNICK: Sir, you asked me to deal with the timing issue. The position is this — the interveners have until 20th February to file their written pleadings, and I am told we would expect a deadline to respond some time in March, a month or so to respond. The question then is how long before there would be an oral hearing. Mr. Flynn says that four years for competition law appeals in total is the expectation, is the average, and he refers to a document to that effect, but of course it all depends what sort of case. My instructions from those who know are that mergers are dealt with more speedily in general than cartel appeals, for obvious reasons. My instructions, again from those who know, are that we would expect in the normal course of events to have a hearing at the end of this year or the beginning of next year. How long it takes thereafter for a judgment is entirely out of our hands — out of anybody's hands apart from the court.

THE CHAIRMAN: But, last time round it was three years one month.

LORD PANNICK: Yes, from the institution of the appeal to the giving of the judgment.

THE CHAIRMAN: Yes.

LORD PANNICK: Yes.

THE CHAIRMAN: So really it is going to take some time, but no-one really knows how long.

LORD PANNICK: No.

THE CHAIRMAN: No.

LORD PANNICK: I am not suggesting that this is going to be a speedy process.

THE CHAIRMAN: No.

LORD PANNICK: The question is to what extent this is relevant to the issue of duty of sincere cooperation, and I need to show the Tribunal the recent *British Aggregates* case which is relevant to this issue.

THE CHAIRMAN: Which is quite an extreme case though, was it not?

LORD PANNICK: It is, it was ten years.

THE CHAIRMAN: Yes.

LORD PANNICK: But I will show the Tribunal that case in a few moments.

THE CHAIRMAN: Yes.

LORD PANNICK: Just before I forget, can I take the Tribunal to one other reference which is relevant to the question, sir, that you put to me as to the approach of the Commission, the Competition Commission, to what we say are the practical implications of being required to divest now before a decision in Luxembourg or in Brussels, and the relevant passage in the Report, which of course is core bundle tab 9, paragraph 7.124. Sir, if you go to p. 59 of the Report, paragraph 7.124, one sees that the Competition Commission itself concluded that

the holding of the 29 per cent made it much more likely that Ryanair would be able to make a bid to acquire 100 per cent. They say at 7.124:

> "We did however recognize that the minority shareholding would increase the likelihood of further bids by Ryanair relative to a situation in which Ryanair had not owned the shares. With a [29] per cent shareholding it would have a smaller absolute number of shares to acquire and there would be a reduced likelihood of a counterbidder. Ryanair said that it continued to want to acquire the whole of Aer Lingus …. We considered that full bids by Ryanair were likely to have impeded, or to impede, Aer Lingus's commercial policy …" etcetera.

So they then turn to a different point. This is in the context of the Competition Commission's assessment of whether or not there was an SLC. This is not in the context —

THE CHAIRMAN: It is a different context. But you are saying it must follow.

LORD PANNICK: Well, it strengthens my assertion, my submission, that it is strikingly obvious that if you are forced to go down from 29 per cent to 5 per cent you are going to find it much much more difficult to mount a full bid. It is strikingly obvious, but it is part of the Commission's own case on an SLC. Of course it is not a factor they look at in relation to the question of European law. But that is what they say on the merits of the issue on the facts.

I was making the submission that if one looks at the treatment of this point last time round, that is when Ryanair was challenging the investigation, one sees that an important part of the Commission's own case was, "Don't worry, because we can delay implementation of remedies", and the point travels further because in the Court of Appeal the skeleton argument for the Competition Commission can be found in main bundle 1, volume.1 of the bundle of materials, and it is at tab 5, it is C5, where I hope the Tribunal will find the skeleton argument that was submitted on behalf of the Commission by Mr. Beard and Miss Berridge, and if one goes, please, to para. 82 of the skeleton argument, it is on p. 19, one sees a further reference to the same point, what Mr. Beard and Miss Berridge say at paragraph 82, they say:

> "Furthermore, as noted at [84] of [this Tribunal's judgment, which I have shown this Tribunal] the CC has accepted that it remains subject to the duty of sincere cooperation and must avoid taking any final decision [I emphasise <u>final</u> decision] in respect of the minority shareholding which would (or would risk) conflicting with the European Commission's ultimate conclusion on the compatibility of the public bid with EU law. At present the risk that such conflict may arise is [emphasis] *entirely*

hypothetical, in particular given: (a) the fact that — as a result of delays … the European Commission will reach its conclusion significantly ahead of the CC; [in other words we will know what they have decided by the time we, the Competition Commission, make our decision — which of course does not allow for an appeal]; and (b) the tools available to the CC to avoid conflict, including liaising with the European Commission and, ultimately, delaying implementation of any remedies".

The Court of Appeal pick up on this in their decision last time round which is volume 3 of the authorities and it is at tab 45, Court of Appeal 31st December 2012, the familiar list of advocates. At para.60 Lord Justice Etherton, speaking for the court, says:

"First, it is common ground in this court (…) that the EC's jurisdiction does not extend to Ryanair's minority shareholding …"

It still is common ground -

"Whatever the EC decides, or any court on appeal holds, the UK has exclusive jurisdiction to consider the competition implications. Article 21(3) has no application."

That was the point that was dealt with.

"Secondly, even if there is a theoretical possibility that the analysis and decision of the Competition Commission on Ryanair's minority shareholding could be relevant to, and even inconsistent with, those of the EC on its investigation of the public, and vice versa, all parties before us appear to be in agreement that (subject to some exceptional and unforeseen circumstances), the EC's decision will in fact be delivered first. That is due to the extension of the Competition Commission's timetable … caused by Ryanair's non-compliance with the section 109 notice. Thirdly, and in any event, even if the Competition Commission's investigation were to be completed and its Report published first due to the Competition Commission's statutory duty to complete its investigation within the time specified … and it found there was an anti-competitive outcome and proposed remedial action, the Competition Commission would not be bound to implement the remedial action immediately. The Competition Commission would have the power under EA s.41(3), if it saw fit in the circumstances then prevailing and taking into account its duty of sincere co-operation, to defer such remedial action until the publication of the results of the EC's investigation and to re-consider remedial action in the light of the reasoning and decision of the EC."

That, of course, does not address the appeal.

The Competition Commission's response to all these various statements is that they are concerned with the decision of the Competition Commission not conflicting with a possible decision of the European Commission.

One sees this in the core bundle, tab 6, the defence of the Competition Commission, p. 17, paras. 59 and 60:

> "59 Ryanair points to a number of statements by the CC, European Commission, this Tribunal, the Court of Appeal and the Supreme Court …"

I have shown the Tribunal a selection, but they are all in our skeleton argument -

> "… which it says acknowledge that the Commission is not entitled to reach a final decision regarding divestment until the outcome of Ryanair's appeal to the European Courts and potential reconsideration by the European Commission is known.
>
> 60 These statements do not assist Ryanair. In so far as they are potentially relevant, they refer to the need for the CC to avoid reaching a conclusion before the *European Commission reached its conclusion on the third public bid*, as it indeed did. None focus upon subsequent proceedings in the European Courts or a future reconsideration by the European Commission."

I respectfully submit that the defect in that analysis is that if the duty of sincere co-operation requires the CC not to impose a divestment remedy while the matter is pending before the European Commission, it follows as a matter of EU law that the same must be true if the matter is pending in the Luxembourg court (see *Masterfoods*). There is no distinction in terms of the application of the doctrine of the duty of sincere co-operation between the stage of a matter being before the Brussels Commission and the matter being before the European Court (see *Masterfoods*, para. 57).

The argument that is being advanced by my friend, Mr. Beard, proves too much, because if the Competition Commission is entitled to order divestment now while the matter of the 100 per cent is pending in the General Court, it necessarily follows that it would be open to the Competition Commission to order divestment, even before the European Commission had decided on the legality of 100 per cent. That they, the Competition Commission, are careful to shy away from, for good reason.

So the distinction they are drawing, in my respectful submission, is unsustainable. They, the Competition Commission, supported Aer Lingus, present a number of arguments which I need briefly to address in answer to the duty of sincere co-operation. Their first point,

perhaps their main point, is in paras. 4 to 5 of the Competition Commission skeleton argument. What they say, and they are right, is that the EU authorities and the domestic authorities are dealing with different issues. They say the EU is concerned with the public bid to acquire 100 per cent of Aer Lingus. That is the jurisdiction of the European authorities.

The Competition Commission is concerned with something else. What is it concerned with? It is only concerned with the minority stake of 29 per cent, which is not, we all agree, a concentration with a Community dimension. It is outside the scope of the Merger Regulation. It is not within the jurisdiction of the European Commission or the General Court. That is what they emphasise, and there is no issue between us. As a matter of law, they are right. The European Commission, now the General Court, and the Competition Commission have a different focus. We recognise and we accept the distinction.

What we do not agree with, with respect, is the conclusion that is drawn from that premise by the Competition Commission and Aer Lingus. The EU is concerned, we all agree, with whether Ryanair may make a public bid to acquire all of Aer Lingus. That is the jurisdiction of the European Commission, that is what it is focusing on, that is what the General Court is looking at from a competition perspective. As I have already said, if the General Court and the European Commission do say that Ryanair is allowed in competition terms to bid for 100 per cent of Aer Lingus, then a decision now by the domestic authorities, by the CC, to compel us to divest ourselves of 24 point whatever per cent will have a very damaging effect on our ability to do that which we are assuming Luxembourg and Brussels will say we are perfectly entitled to do - that is bid for 100 per cent.

So I do not accept that the difference of jurisdiction provides any answer to the force of the point that we are making, the concern that we are addressing as to the practical consequences of the Competition Commission now compelling us to divest ourselves of all but 5 per cent.

The second point that is made against us is very similar, and it is made by the Competition Commission at para. 7 of its skeleton, is that there is no conflict, even if we win in Luxembourg and in Brussels in the future, because the divestment decision that the Competition Commission has made is very careful to provide for an exception if we are, in the future, allowed by Europe to bid to acquire 100 per cent. They do not take the position that these two matters are totally divorced, they write in an exception, and understandably so.

Aer Lingus make a similar point in their skeleton argument at para. 16(b). We do not need to go to it, but they are making a similar point.

Again, the weakness, in my submission, of their answer is that it ignores the practical reality. It is all very well to say, "If you win in Luxembourg and Brussels, Ryanair, of course you can make a bid for 100 per cent", but in practice what they are now compelling is going to make that much, much more difficult, as they, the Competition Commission, themselves recognise in the passage to which I drew attention, para. 7.124 of their Report.

The third point that the Competition Commission makes, para. 14 of their skeleton argument, is that even if there is a practical conflict, the national authorities are not required to postpone their proper decision making processes indefinitely, and they rely upon the recent Court of Appeal judgment in *British Aggregates*. Can we please go to that, it is volume 3 of the authorities, tab 49. It is a satisfactorily short Judgment of the Court of Appeal and it is a case about a levy which was said to be an unlawful state aid. The European Commission were considering the point, and the Court of Appeal decided that it was a matter for their discretion whether to hear a domestic appeal on the same issue. The Court of Appeal concluded that it was appropriate for it, the Court of Appeal, to consider the substance of the dispute, even though the Commission's decision was on appeal in the General Court. It was appropriate to do so because there had been 10 years of delay, extraordinarily.

I draw attention to the following features of the matter. First, para. 9 of the Judgment where both sides were accepting this was a matter for the discretion of the Court. So the case was a discretionary matter. I have made my submission that *Masterfoods* recognises that if the duty of sincere co-operation does apply, one is not simply concerned with listing decisions, and when you hear particular issues we are not concerned with discretion, we are concerned with duties. In our case, we are concerned with a divestment decision, we are not concerned with when a matter should be entertained, when it should be heard, we are concerned with remedies, which, of course, was not the case in *British Aggregates*. Had the court reached a conclusion and the question was: what shall we do about it, what remedies do we impose, it most definitely would not have been a matter of discretion.

Paragraph 14 refers, in the middle of the paragraph, to: "…any decision of this court may not be the end of the matter" which I understand to be a reference to there being a long way to go in even the domestic analysis of the issues. Of course, there the delay was quite extraordinary, and, so far as the Court of Appeal was concerned, unexplained. In the present case the appeal to the General Court is proceeding in the normal way. It may be

slow but it is in the normal way, there is nothing unusual about this case. So, in my submission, *British Aggregates* does not help the Competition Commission and Aer Lingus. There is a final point here that is made by the Competition Commission; it is an *ad terrorem*-type argument which is strongly supported by Aer Lingus. It is para. 16 of the Competition Commission skeleton argument: "If Ryanair are correct, this process of delay could go on indefinitely" they say. Aer Lingus make a similar point at para. 15 of their skeleton argument. They say that our argument leads to an absurd outcome because Ryanair could keep re-bidding at the end of each failure in the General Court, that is the substance of the point. What it ignores is the *Delimitis* principle. It ignores the control that is imposed by the European system, that the duty of sincere co-operation only applies if you have realistic prospects of success in Luxembourg and in Brussels. That is why it is of some importance that, sir, your question, was posed early this morning and answered through me by Mr. Beard and Mr. Flynn, that nobody is suggesting that this is a case which has no realistic prospects of success in the General Court. Nobody is asking this Tribunal to proceed on that basis. The premise is that we have a realistic prospect of succeeding in Luxembourg and then in Brussels in relation to the legitimacy in legal terms of a 100 per cent bid.

Of course, if we are abusing our rights, well established doctrine under EU law, then the duty of sincere co-operation could not possibly apply, but that is not what is being said to this Tribunal. This is a legitimate appeal with realistic prospects of success, although, of course, they are not involved in Luxembourg Aer Lingus reject the idea that we should succeed. But I do not accept the fact that it is going to take some time and the consequences that are suggested by my friend are realistic or have any force whatsoever. That is our case on the first issue.

We respectfully recognise that issues arise as to the scope of the duty of sincere co-operation, and we have therefore identified in para. 60 of our skeleton argument possible questions - we are not wedded to the language of those questions - possible questions in substance that arise which may need to be resolved in Luxembourg, it is a matter for this Tribunal to determine whether it thinks that a reference is an appropriate way of dealing with these matters, but that is our submission and it is based on the substance of what I have submitted. That is our case on Ground 1.

THE CHAIRMAN: And on the para. 58 the fresh evidence point, you are happy for us to deal with that when we give Judgment?

LORD PANNICK: Yes, I am not asking you to look at any further evidence ----

THE CHAIRMAN: But you are objecting ----

LORD PANNICK: I am objecting because it is unnecessary to look at any fresh evidence. Fresh evidence has no relevance whatsoever to any of the issues I have raised before the Tribunal this morning. Obviously, Mr. Flynn in due course can contest that, but that is my position and this is a judicial review test, and there is ample authority that you do not allow fresh evidence to be admitted on a judicial review other than in the most limited of circumstances. This Tribunal dealt with the matter – I will not take time on it, but I will just give, if I may the reference – in the *BAA v Competition Commission* which can be found, if the Tribunal wants to look at it, at vol. 3 tab 42, at para. 79. There is a helpful statement of the very limited circumstances in which fresh evidence can be admitted on a judicial review application in this Tribunal, which I adopt, but it has no relevance to any of the issues unless, which is not the case, Mr. Flynn is going to say our case in the General Court is hopeless, but he is not saying that. Even if he were, it would not be appropriate for this Tribunal to look at the material. That is my position but I am very happy that, rather than deal with it as a preliminary issue, and the Tribunal rule on it, it is addressed, insofar as it is relevant, which it is not, in the decision of the Tribunal.

THE CHAIRMAN: Given that no one is asking us to form a view on the likelihood of your prospects before the General Court, this evidence is not really going to be of any assistance.

LORD PANNICK: That is my submission.

THE CHAIRMAN: I thought it was only going to be relevant if – I assumed Aer Lingus might be trying to run the line that you were going to get nowhere in Europe, but from what you said earlier this morning they are not going to run that line, so I do not think the evidence referred to at para. 58 is going to take this exercise very far.

LORD PANNICK: I am grateful. It is not what I said, of course, it is Mr. Flynn's indication through me to the Tribunal. He was nodding and encouraging me to make it clear that it was not simply the Competition Commission who were not taking that line, it was Aer Lingus as well – very sensibly not taking that line because to persuade this Tribunal somehow to second guess what may be said in the Luxembourg court is, with great respect, a task that is beyond even an advocate of the distinction of Mr. Flynn, in my submission. (Laughter)

Can I turn to procedural unfairness, unless there is any more on that first issue?

Our second ground of challenge to the Report concerns procedural fairness. Our case is that it was procedurally unfair for the Competition Commission not to disclose to us, at the very least into a confidentiality ring, although we say fairness requires far more than that, greater

detail of the allegations are contained in the Report at section 7(a). Can I take the Tribunal back to the core volume at section 7(a) of the Report which begins at para.7.24, it starts, "Aer Lingus's ability to participate in a combination with another airline" and there is an awful lot of detail which takes the Tribunal, takes all of us, to up to para.7.84. That is the section. It is also dealt with in Appendix F to this Report which is headed, "Combinations involving Aer Lingus".

The importance of this matter, that is the extent to which the 29 per cent shareholding has impeded Aer Lingus in this respect, that is in relation to possible combinations with other airlines — the importance of this is emphasised by the Commission itself in the passage to which I drew attention earlier this morning, that is p.68 of the Report at 7.178, where they do say that they (they, the Competition Commission) had 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".

So this is a matter that is core to their findings, absolutely central. They say they have:

> "… identified a number of ways in which the minority shareholding might impede or prevent Aer Lingus from combining with another airline …. We found that [this is the finding at the end of 7.178] 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 it 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".

So, that is the finding, absolutely crucial to their reasoning in SLC. And it is a conclusion based in substantial part, it is not the only evidence, but substantially based on evidence from and evidence relating to other airlines who said, who told the Competition Commission or who Aer Lingus told the Competition Commission having had connections with these other airlines, that those other airlines would have entered into a merger or other association with Aer Lingus but for Ryanair's shareholding. And there is a lot of evidence about this but one sees it in particular, it starts at 7.80, sets out the conclusions (I will come to the evidence in a moment) at 7.80 it is "Conclusion on the impact of [the] minority

shareholding on Aer Lingus's ability to combine with another airline". They found that Ryanair's shareholding at 7.80:

> "… would be likely to be a significant impediment to Aer Lingus's ability to merge with, enter into a joint venture with or acquire another airline … likely to act as a deterrent to other airlines considering combining with Aer Lingus. The more significant the transaction being contemplated … the more likely Ryanair's shareholding would be to impede — or give Ryanair the ability to prevent — the combination from taking place".

We found in the absence (this is 7.81):

> "… 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 [etcetera, etcetera]".

And at 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 … considered … 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 [and this is the point] 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".

And there is a conclusion at 7.84 which is the same as we have seen already.

So, it is absolutely clear in my submission that this is a crucial part of the findings on SLC, that is that Ryanair's 29 per cent impedes and will impede Aer Lingus from entering into combinations with others; and an important part of the evidence upon which the Competition Commission formed that conclusion is what they were told by other airlines, and by Aer Lingus, about discussions which were frustrated, deterred or impeded or otherwise affected by Ryanair's 29 per cent shareholding. And yet we were not given any information as to who these airlines were or what they said, so we had no opportunity — no opportunity — to respond to what was being said on issues that we strongly disputed in relation to the impact of our 29 per cent.

I will come in a moment to what specifically we were not allowed to see, but before I do that, with that background, can I just remind this Tribunal of the legal principles which have been the subject of a detailed analysis by this Tribunal in the context of the 2002 Act in the *Groupe Eurotunnel* case. If the Tribunal, please, would go to authorities bundle 3 at tab 52, the Tribunal will find a decision given 4th December 2013 by this Tribunal, Chairman Marcus Smith QC, members, Heriot Currie QC and Dermot Glynn, which addressed the question of procedural fairness. It is a merger case and if I could just show the Tribunal the highlights on this point, at p.61, at para. 165 there is a reference to a Court of Appeal judgment *Eisai*, that is the case *Eisai v NICE*, the National Institute for Health & Clinical Excellence. The Tribunal say at para. 165:

> "*Eisai* was a case which concerned the judicial review of guidance issued by NICE in relation to the use of a particular drug. Although NICE's procedures involved a remarkable degree of disclosure and of transparency in the consultation process at para. 66, nevertheless the Court of Appeal considered that the procedural fairness required the release of still more material - in this case, the release of a fully executable version of an economic model used by NICE … so the consultees could fully check on the reliability of the economic model. Production of the 'read only' version limited the ability of Eisai to make an intelligent response on something that was central to NICE's appraisal process."

In other words, the fact that you have had a great deal of material does not mean that there is no breach of procedural fairness if that which you are denied is of central importance. At para. 167 the Tribunal set out basic propositions, which I do not think are in dispute between the parties. First, there is a general duty on an administrative body, such as the

CC, to act in a procedurally fair manner; (b) what is fair is not immutable, it all depends on the circumstances; (c) there are many aspects to fairness but what it undoubtedly means is that a person must know the case against him or her; (d) what is irrelevant includes the statutory framework, (ii) other aspects of context including the nature of the investigation. Then (iii) over the page, the significance of any individual item of information in the context of the investigation.

Paragraph 168:

> "There remains the question of how issues of procedural fairness are to be determined. What constitutes a fair process is one for the court (or here the Tribunal) as a matter of law."

That is crucial, because, with respect, this Tribunal is not applying a perversity approach. The issue is not whether the CC has reasonably concluded that no more needs to be disclosed. The question is a question of judgment for this Tribunal as to whether or not fairness required greater disclosure. It is true, as the paragraph goes on to emphasise, that in reaching its own decision the Tribunal will of course give weight to the views of the Competition Commission, but it is nevertheless a judgment for the Tribunal.

There is a recent authority, not mentioned in this judgment, although it was handed down earlier than this judgment, which I want to refer to because it is a Supreme Court judgment. It is in the same volume. I am coming back to the rest of *Groupe Eurotunnel*, but on this point, para. 168, could I invite the Tribunal to look at tab 55, which is the *Osborn v. Parole Board*. I do so because on p.1044 at para. 65, Lord Reed, who is speaking for the Supreme Court, sets out this principle with clarity. He says at para. 65:

> The first matter concerns the role of the court [or indeed this Tribunal] when considering whether a fair procedure was followed by a decision-making body such as the [parole] board."

He refers to a judgment of Mr. Justice Langstaff, who refused the application for judicial review on the ground that the reasons given for refusal to hold an oral hearing are not irrational. He then refers to a Northern Ireland case, which said that the decision was a matter of judgment for the Parole Board. He goes on:

> "These dicta might be read as suggesting that the question whether procedural fairness requires an oral hearing is a matter of judgment for the board, reviewable by the court only on *Wednesbury* grounds, That is not correct. The court must determine for itself whether a fair procedure was followed."

He cites another appellate committee of the House of Lords, Lord Hope of Craighead:

"[The court's] function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required."

That is the point.

Lord Reed goes on, and I also rely on this, to say:

"The second matter to be clarified concerns the purpose of procedural fairness."

At 67 he says:

"There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. As Lord Hoffmann observed however … the purpose of a fair hearing is not merely to improve the chances of the Tribunal reaching the right decision. At least two other important values are also engaged.

The first was described by Lord Hoffmann as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I [says Lord Reed] would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken."

There is a reference to Mr. Justice Byles' decision in 1863 and the point that even God, himself, did not pass sentence on Adam before he was called on to make his defence, even though, of course, God knew perfectly well what, if anything, Adam might say. The point is that one has got to give people the chance to have their say if justice is to be done.

At 70:

"This aspect of fairness in decision-making has practical consequences …

Courts have recognised what Lords Phillips of Worth Matravers described as 'the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result'."

At 71 there is a reference to the rule of law.

Sir, members of the Tribunal, I am not putting my case on the basis purely of resentment felt by Ryanair, but there is a real point here, that when one is asking what does procedural fairness require, one is not only concerned with the question of whether the decision might

have been different, one is concerned with the opportunity for those vitally affected to have a chance to respond, and that I say is what Ryanair was denied on what I submit, by reference to the paragraphs in the Report, was a central part of the reasoning of the Competition Commission.

Can I then go back to *Groupe Eurotunnel*, and I had reached para.168, which I would invite this Tribunal to supplement with what is said in the *Osborn* case. At 169 through to 187 the Tribunal say that the principles are not affected by the recent Supreme Court judgments in *Bank Mellat* and *Al Rawi*, but at 188 the Tribunal say (five lines down):

> "We consider that the decisions in *Al Rawi* and *Bank Mellat* say no such thing … At most, in the context of this case, these decisions constitute an important reminder that fairness requires a person affected by a decision to be able to see the material upon which that decision is based, so that that person can, if so advised, appropriately challenge it."

One passage from *Al Rawi* that may be of assistance, keeping open volume 3, if the Tribunal also has volume 2 of the authorities, tab 39, that is where we find *Al Rawi*. I do not want to get into the closed hearings, but what I do want to do is just draw attention to the statement of principle in the judgment of Lord Kerr which can be found at p. 592, and at para. 93 his Lordship says:

> "The defendants' second argument proceeds on the premise that placing before a judge …"

here the Competition Commission -

> "… all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive - for what, the defendants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge …"

here the CC -

> "… sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced."

Then this:

> "To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. it is precisely because of this that the right to know the case that one's

> opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, [at the Competition Commission], the proposed procedure hands over to one party considerable control over the production of relevant material, and the manner in which it is to be presented. The peril such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable."

That is true here because what we have is material before the Competition Commission, placed before it by Aer Lingus and the other airlines which is simply untested. Ryanair has had no opportunity to test this evidence. It is unscrutinised by reference to points that we could make. "It is insulated from challenge", to use Lord Kerr's phrase, and therefore may – I emphasise "may" because we do not know what is in it – positively mislead.

Going back to *Eurotunnel* at para. 195 and following, right up to para. 205, they set out the provisions of the 2002 Act, which emphasised the need to be careful about the disclosure of sensitive material, and there is absolutely no doubt that is what the Act contains.

They set out at paras. 206 to 209 the Guidance from the Commission. At para. 219 they refer to the earlier decision of *BMI Healthcare*, which I do not invite the Tribunal to turn up but for the purposes of your note it is vol.3 of the authorities, tab 48. The Tribunal emphasise in particular – and I emphasise – what is set out in subpara. 4 at the bottom of p.79:

> "The Act thus contains a fairly comprehensive code dealing with the duty to consult and the duty to protect confidential information. There is nothing in the Act which obliges the Commission to withhold material that ought to be disclosed pursuant to the Commission's s.104 duty to consult simply because that would involve the disclosure of specified information. Conversely, the Commission is not obliged to disclose each and every piece of specified information as part of its duty to consult. We consider that the Act contains a perfectly clear and workable code."

They had had in mind Lord Bridge's statement in *Lloyd v McMahon***.**

> "We do not consider it is necessary to imply into the Act anything by way of an additional safeguard. The provisions of the Act are quite sufficient for this purpose."

- that is to promote the attainment of fairness.

At 220:

> "We agree the Act establishes a duty in the Commission both to consult and to protect confidential information."

The duty is expanded upon in the guidelines. At para. 221 they reject Eurotunnel's general contention that the Commission must disclose everything – and that is not my submission. At 223, in the last line on the page, they state the test: "What procedural fairness requires, as was stated by Lord Mustill in *Doody*" – we have *Doody* in the bundle, but I do not think it is necessary to go back to it, but if you want the reference it is vol. 1, tab 15, p. 560. What is required is for the gist of a case to be disclosed, precisely how that is done is in the first instance for the Commission.

At 224 they refer again to their own decision in *BMI* , it was, in fact, the same chairman, Mr. Smith (authorities 3, tab 48). The Tribunal noted in connection with Lord Mustill's proposition:

> "Finally, while Lord Mustill's proposition refers to a person affected by a decision being informed of the gist of the case which he has to answer, what constitutes the gist of a case is acutely context sensitive. Indeed, 'gist' is a peculiarly vague term. Competition cases are redolent with technical and complex issues which can only be understood and so challenged and responded to when the detail is revealed. While it is obviously in the first instance for the Commission to decide how much to reveal when consulting. We have little doubt disclosing the gist of the Commission's reasoning will often involve a high level of specificity, indeed, this can be seen in the Commission's practice described in the guidance, of disclosing its provisional findings as part of its consultation process."

225: "We agree that the term gist is peculiarly vague and is acutely context sensitive" and there is a reference to the earlier Ryanair decision.

226: "In each case the question is whether the Commission acted fairly by giving Eurotunnel or, as the case may be, the SCOP a reasonable opportunity to put forward facts and argument in justification of its conduct of its activities before the Commission reached a conclusion that might affect them adversely. To put it another way: "Did the Commission provide Eurotunnel with the gist of the case that it had to answer." Then they go on to apply that in the particular circumstances of their case.

If there has been no fair disclosure of the gist – "gist" being understood to require a high degree of specificity, if there is no disclosure of what is required to ensure fairness, it is unlawful. It is no answer for the Commission to say: "This is sensitive material, there is a

strong public interest in not disclosing", there is no balance once a decision has been made that fairness requires disclosure to the individual or person concerned.

Those are the principles. We have set out in our skeleton argument, para. 65 – it might shorten matters if I just take you to it, it is p. 20 of our skeleton or it was in the version I had. We set out there the material we have not seen, all of which goes to the Competition Commission's consideration of whether or not our 29 per cent impeded the ability of Aer Lingus to enter into a combination.

Members of the Tribunal, sir, you can see from the references there – if we also have the Report open it may assist. The Report, we are looking at p. 44 of the Final Report, tab 9 of the core bundle. In the middle of the page there is the heading: "Evidence of potential combinations involving Aer Lingus in the period since 2006." So this is the evidence that the Commission relied upon in arriving at the conclusions that I read out a few moments ago.

The evidence that we draw attention to starts with para. 7.48, we have not seen the Booz & Co. report and we therefore are unable to challenge their shortlist of 22 potential partners and seven best fit merger partners for Aer Lingus – who are they? We are not able to make any submissions on the viability of the suggestion in relation to those companies. At 7.50 to 7.51, on p.45 of the Report, we are told: "Aer Lingus told us it had informal contacts with a number of other unnamed potential investors or partners", etc.

At 7.51 Aer Lingus described a possible combination between Aer Lingus and an anonymous company that had been considered. At 7.52 are more suggestions of discussions – none of these options has, as yet, materialised, and the submissions of Aer Lingus suggest that specific proposals outlined are for the time being unlikely to proceed for reasons unrelated to Ryanair's minority shareholding, but nevertheless there are various mentions there.

If we turn on to 7.68 ----

THE CHAIRMAN: Just to clarify, during the process which led to the Report you would not have seen the strategy document that is referred to here?

LORD PANNICK: We did not see any of the material that would identify for us the identities or any material ----

THE CHAIRMAN: I understand the identities point. But you are saying that you were not given a copy of the strategy document in any form.

LORD PANNICK: That is correct, yes. I was just confirming it, but that is correct, and it goes on - I do not want to take too much time on this - at 7.68:

"Aer Lingus told [the Commission] that the transaction [whatever it was] could have led to considerable cost savings [etcetera etcetera]"

Well, how are we supposed to respond? How are we supposed to make submissions on how realistic it was to suggest savings and synergies if we do not know anything about these relevant persons? If one goes to appendix F one sees similar material, in particular appendix F at the bottom of the page, F8. The appendices as you appreciate are helpfully numbered by reference to which appendix they are at the bottom of the page, and p.F8 at the bottom of the page, contains para. 54 which refers to the Aer Lingus board minutes:

"Aer Lingus's chief executive presented a number of specific opportunities to the Aer Lingus board that were under review"

Well, what were they? How are we going to respond if we know nothing about them? Appendix F at paragraphs —

THE CHAIRMAN: So again you would not have had access to the important bits.

LORD PANNICK: No.

THE CHAIRMAN: You were just told, just given whatever the summary is here.

LORD PANNICK: No.

THE CHAIRMAN: Yes.

LORD PANNICK: Paragraphs 57-77 give details which are entirely unilluminating of discussions with various airlines who are said to have been interested in combinations with Aer Lingus which were deterred or frustrated, impeded, so it is said, by the 29 per cent. We want to answer all of this, and we have no opportunity whatsoever, far less a fair opportunity, to answer any of this evidence without knowing the identity of the airlines or any of the detail which is said to support the conclusions. And this is the material which is the basis of the finding of the Competition Commission. I have mentioned a number of times the conclusion on how important this is, at 7.178, but it is the conclusions at paras. 7.80 through to 7.84, in particular para. 7.83. That is the evidence we, in my submission, are entitled to know at the very least the gist of the material which is the basis upon which this crucial finding is made. Far from seeing the gist of it, we have seen none of it because without detail as *Groupe Eurotunnel* recognises, you cannot make informed representations. You cannot test the accuracy, the strength of what is being put forward without sight of the relevant material.

THE CHAIRMAN: To say you have not been given anything is an exaggeration, but what you are really saying is that you have not been given the identity of the third party airlines and

you have not been given more of the details of the underlying material. You have been given something.

LORD PANNICK: Yes, we have certainly been given something.

THE CHAIRMAN: To say you have not been given anything is exaggeration.

LORD PANNICK: I entirely accept that, I accept that correction.

THE CHAIRMAN: Yes.

LORD PANNICK: We have seen something. The question is whether we have seen sufficient to constitute the gist, the gist being defined by reference to whether that which has been disclosed gives us a fair opportunity to answer the point which, as it happens, is a crucial point in the analysis by the Competition Commission. I do submit that in the absence of knowledge of the identity of the airlines concerned, it is almost impossible to make informed representations to answer the points that are being made upon which the Competition Commission has founded its conclusions.

THE CHAIRMAN: Just remind me, how many of the third party airlines are not identified? How many are there? The figures are in the papers somewhere.

LORD PANNICK: It is very difficult to —

THE CHAIRMAN: The CC will know, so Mr. Beard can deal with that.

LORD PANNICK: But he will tell, if he does not know the answer immediately —

THE CHAIRMAN: I do not need the answer today —

LORD PANNICK: No, he can tell the Tribunal in due course. For my part I am relying upon paras. 7.80 through to 7.84 which are the conclusions.

THE CHAIRMAN: Yes.

LORD PANNICK: I am relying on 7.178 which emphasises the importance of this material, and I am relying upon the statement by the Commission itself of the evidence upon which it has relied, which is 7.47 through to 7.55, plus appendix F which demonstrates what it was that we were not told. But in particular I do make the point that without knowledge of identity it is very difficult indeed to make informed representations that this evidence is either inaccurate or it is misleading or it needs to be put in context or that there are points which undermine it by reference to what the specific airlines have done or said. There are many ways in which one could respond, but one does not have a fair opportunity to respond on what is a crucial question without disclosure of what was concealed by us. And I emphasise, I am not taking my stand by reference to whether it is desirable or undesirable in the public interest for such material to be concealed. There may or may not be a public interest in concealment. The point is that the Competition Commission has a duty to act

fairly, and if it has not acted fairly in all the circumstances by reference to the information concerned, it is unlawful; and that is a matter, as I have said, for the judgment of this Tribunal.

These were all matters upon which we wanted to make submissions and we were unable to make effective submissions. I have mentioned the *Groupe Eurotunnel* approval of the *Eisai* case, but it is no answer to this complaint that there was a great deal of material disclosed. That is no answer if that which is concealed from you needs to be disclosed in order that fairness can be achieved.

As I have said, I accept that in principle fairness may be satisfied by communication of the gist, but the gist must be a fair gist that enables us to have a fair opportunity to answer, and I think unless there are other points, those are the points that I wanted to make on fairness.

I notice the time. It may be the Tribunal wants to break now and I can consider whether there is more that I want to say on procedural fairness. That is the substance of it.

THE CHAIRMAN: Yes, I think that is convenient. We will take a break until two.

LORD PANNICK: Thank you.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Lord Pannick?

LORD PANNICK: Can I conclude on procedural fairness. I was making the submission that we need to know more than we were told, particularly identities of airlines in relation to the suggestion that they would, or may, have merged with Aer Lingus, but of course it is not merely in relation to combination that we needed to know the identity in order to make useful submissions on a merger, it is also whether or not the combination would or may have led to efficiencies, whether it would or may have improved competition beyond the already intense competition as the Commission found it. It is for all of these reasons that are central to the findings of the Commission that we needed to know at least the identities of the relevant airlines. We were, of course, told the identities of the major airlines who were not interested in combinations with Aer Lingus, all the more reason for us to know the identities of those who were said to be potential partners and the subject of combinations which may or would have led to competition advantages.

One other point, we also point out - it is developed in our skeleton submissions, but I make the point because it is an important point - that we did not even know the identities of the relevant airlines in a confidentiality ring or in a data room. It would have been far from ideal for Ryanair's lawyers only to be given this information, because fairness, in my submission, required that Ryanair itself be able to contribute to making an informed

response, but it would have been better than the conclusion reached by the Competition Commission if at least the lawyers were told. At least then they could have made more informed submissions, testing the evidence that was presented and making such points as they were able. Even that was denied to us, and we say in breach of procedural fairness.

THE CHAIRMAN: What you are saying is that Ryanair would have needed to know the identities to give you proper instructions?

LORD PANNICK: Yes, one could have said something. One could have said more than we were able to say not knowing identities, but I certainly do not accept that disclosure to lawyers would have sufficed to satisfy procedural fairness in the circumstances of this case. I emphasise, as I have already done, it is not my submission that the Competition Commission is obliged to disclose all information on a merger inquiry, or any other inquiry. That is not my submission. One has got to look at what fairness requires and the particular circumstances of the particular case substantially by reference to the nature of the issue and its centrality, or otherwise, in the Final Report. That is the only way one can test this point. Here we say we have a strong case by reference to what the Commission itself has found as its central conclusion and the evidence to which it refers as relevant to the conclusion that it has reached. That is our case.

THE CHAIRMAN: I understand that.

LORD PANNICK: Our third ground of challenge to the Report is, we say the Commission erred in law in relation to the need for there to be a causal connection between the material influence and the SLC. The need for a causal connection is, we say, very clear from the statutory language. Could I take the Tribunal back to authorities bundle 1, tab 5. Can we go back to s.35(1), which is on p. 35. There we have the two limbs of the test that the Commission is deciding, 35(1)(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 an [SLC]."

So there is a causal requirement. Has the relevant merger situation resulted, or can it be expected to result, in an SLC. So a causal link is required. Our complaint is that, at least in some places in the Report, the Commission did not focus on whether there was this causal connection. We say that the legal error by the Commission was to rely on ways in which the minority stake - that is the 29 per cent holding - may result in an SLC which had nothing to do with the material influence which the Commission identified. It is para. 97 of our skeleton argument, and at para.97 of our skeleton argument we have set out, and I am not

going to take the Tribunal through it, a number of examples of where the Commission has referred to evidence of the shareholding, the 29 per cent minority stake, and its consequence for SLC. It is very clear, in our submission, that the minority shareholding factors which are there set out in the Report are nothing to do with a material influence. Those are all examples of them.

If we can take an example, just to try to make the point, if we take the first of them, and we go to the Report in the core bundle, tab 1, and we go to para. 7.30, p. 40, they say:

> "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 minority shareholder."

Then there is a reference to Air France.

> "Lufthansa said that having a competitor like Ryanair as a shareholding made Aer Lingus's shareholder structure rather challenging and made the airline rather less attractive."

No doubt, but it is not necessarily the result of a material influence. You can be a minority shareholder and it can put off an airline group, such as IAG, whether or not you have a material influence. Indeed, that is confirmed by the confidential version of para. 22 of appendix F, which I am not going to read out because it is confidential. The Tribunal can see there is a separate bundle, the confidential file, that makes the point.

Lufthansa's material is also to be seen in appendix F. If we go to para. 28, F5, one sees what the evidence was about Lufthansa:

> "One factor that would [X] was [X] …. In addition, Lufthansa said that Aer Lingus had a difficult shareholder structure. The presence of fierce competitors like Ryanair and Etihad, although its share was small, it was 3 per cent, as shareholders would make Aer Lingus a less attractive acquisition target, and that is the point. Nothing to do with material influence."

You only have a 3 per cent stake and yet, that of itself can deter – so it is said – other airlines from joining in, from combining. Our criticism is that this material is simply irrelevant on the statutory test unless the SLC is or may be the consequence, not of a minority shareholding but of material influence, and that is where the Commission went wrong. In our submission that is where the Commission went wrong, and one can see that they went wrong if one goes to their analysis which is at p. 41 of the Report, it is para. 7.34 where they rely on all the evidence that they have set out and there are many other examples

to the same effect in para. 97 of our skeleton argument, which I am not going to take time on, because the point is either a good one or it is a bad one, but if one goes to their analysis on p.41 it is para. 7.34(b) where they say:

> "potential partners might be deterred from entering into, pursuing, or concluding discussions with Aer Lingus if that combination would result in Ryanair appearing on their own share register, given Ryanair's position as an activist shareholder and a competitor."

And then there is a bit more detail that does not matter for this point. That approach, that is the conclusion by the Commission, it demonstrates the error of law of which we complain, because it is nothing to the point that potential partners may be deterred from entering into combinations with Aer Lingus because Aer Lingus has an "activist shareholder", even if that activist shareholder is a competitor. It is nothing to the point unless the SLC is the result of the material influence, and that is not what the evidence is focussing on.

I entirely accept that the Competition Commission is able to show that there was some material – at least some material – which addressed the right causal test. I am not suggesting all the analysis of the Commission is open to criticism by reference to this point that I am identifying. That is not my criticism. The question for the Tribunal is whether the fact, and it is a fact, that the Commission took into account at least some material which is not relevant to this issue, and suggested in at least part of the Report, para. 7.34(b), a wrong approach makes the Report invalid on this ground. This is a judicial review, so one looks at the judicial review principles - because it is a common problem in judicial review – how do you deal with a decision which, in some parts – it may be in many parts – does not betray an error of law but which in other parts contains the reference to an irrelevant factor or a suggestion of a wrong approach. How does one deal with this, and the answer is given by the Court of Appeal in the recent case, the judicial review brought by the FDA. This is in vol. 4 of the authorities, and the case can be found behind tab 72. *Regina (FDA and others) v Secretary of State for Work and Pensions and another*. The context, though no doubt very interesting, is not relevant. Can I take the Tribunal to the statement of principle. It is in the Judgment of Lord Neuberger, then the Master of the Rolls – this is a decision in March 2012 – and if the Tribunal would go to p. 461, there are three paragraphs, 67, 68 and 69, which set out the test.

At p. 461, para. 67, his Lordship says:

> "Where a decision-maker has taken a legally irrelevant factor into account when making his decision, the normal principle is that the decision is liable to be held to

be invalid unless the factor played no significant part in the decision-making exercise".

and there is some authority. Paragraph 68:

"Even when the irrelevant factor played a significant or substantial part in the decision-maker's thinking, the decision may, exceptionally, still be upheld, provided that the court is satisfied that it is clear that, even without the irrelevant factor, the decision-maker would have reached the same conclusion."

And there is more authority. Over the page, at p. 462, between B and C there is a reference to a Judgment by Lord Justice May, who says:

"Probability is not enough. The defendant would have to show that the decision would *inevitably* [his emphasis] have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision."

Cautionary words indeed.

At para. 69 Lord Neuberger says:

"There is, in theory at least, a possibility that, even if the court concludes that it ought otherwise to set aside a decision on the ground that a legally irrelevant factor was taken into account, it can none the less uphold the decision, if it is satisfied that it would be pointless to require the decision-maker to reconsider the question afresh, because he would reach the same answer. It appears to me that that is a theoretical point, at least in this case, because if the Secretary of State cannot succeed in showing that the irrelevant factor was not a significant factor in his thinking or that he would have selected CPI as the relevant index anyway, it is hard to see how you would hope to persuade the court there would be no point in setting aside the decision and requiring it to be reconsidered."

- which I think amounts to saying if the decision-maker fails on para. 68 he is most unlikely to succeed on para. 69.

THE CHAIRMAN: On para. 68 what do they mean by "exceptionally" there? Are they saying that even if you are satisfied the decision-maker would have reached the same decision you can still set aside the decision, or are they just saying it exceptionally happens on the facts?

LORD PANNICK: I think the latter. There are cases, at least theoretically, where even though a legally irrelevant factor has been taken into account and, because this is para. 67, it is a significant part of the decision, nevertheless, para. 68, there can be cases where you can be

absolutely sure that even though it was a significant part of the decision and it was legally irrelevant they would have come to the same conclusion.

THE CHAIRMAN: Are they saying that, as a factual matter, it is only going to be in exceptional situations where you will have such a decision?

LORD PANNICK: Yes, it is very unusual for a court or Tribunal to reach that conclusion, and Lord Justice May's principle is a cautionary guide. You have got to say it was inevitable, and there may be such cases. Those are the principles I respectfully commend to the Tribunal, that apply in this sort of context, if I have persuaded this Tribunal that something has gone wrong here.

The question then is Mr. Beard says, "Well, there's a lot about this Report that shows that they did look for a causal connection. They did take into account other evidence which was based on a causal connection". I say, "Well, at least some of the evidence was not and part of the reasoning was not". Then I say, "Well, let's apply the *FDA* principles". I say para. 67, that the Commission has taken, has at least taken a legally irrelevant factor into account, and it is not an insubstantial part of the reasoning, see 7.34(b). It cannot be said under para. 68 that one can be sure that without this irrelevant material the decision inevitably would have been the same. It may have been the same. It may not have been the same, but this is important material, all the material we criticise in our skeleton argument, it is all important material, para. 97 of our skeleton argument; and one certainly cannot say on an inevitability approach that if the Commission had excluded all this material that is not causally relevant from its analysis, it would inevitably have come to the same conclusion, and if that is right there is nothing on the facts of this case that enables the Tribunal to decide in favour of the Commission under para. 69 of *FDA*.

This, of course, is not an appeal on the merits. My friends emphasise that in relation to the next ground of challenge, which is unreasonableness, and I understand why they do so, but the corollary of that is that if the Commission has erred in law, it has taken into account something that it should not have taken into account, then it must pay the price, and the price of it being a judicial review is that the decision is quashed, it is sent back, unless — unless — the criteria in *FDA* exceptionally allow the Tribunal to say, most exceptionally, to say, "Well it made no difference".

THE CHAIRMAN: So, on three levels, so:

* firstly, has the Competition Commission taken into account an irrelevant fact? And you say yes, and we will see what Mr. Beard says about that;

* secondly, if so did that factor play no significant part in the decision making exercise, and you pointed to various passages in the Report; and,

* thirdly, if it did play a significant part, is it inevitable that the decision would have been the same?

LORD PANNICK: Precisely.

THE CHAIRMAN: Yes.

LORD PANNICK: But, those are the questions for the Tribunal.

THE CHAIRMAN: Yes.

LORD PANNICK: That is ground 3.

THE CHAIRMAN: Yes.

LORD PANNICK: Ground 4, we have challenged the Competition Commission's finding that the material influence has led or will lead to a substantial lessening of competition. We say that that is unsupported by evidence which reasonably enables the Commission to arrive at that conclusion.

Now here I accept we are in the realm of public law unreasonableness, and of course I accept that this Tribunal will be slow to overturn a substantive judgment that is made by the Commission by contrast with the first three issues which are matters for the primary judgment of this Tribunal, so we are in the area of fact, degree and judgment. But there comes a point where what the Commission has found is unreasonable in a public law sense, and the question is whether or not any of the criticisms that we make under ground 4 go over that threshold.

There is authority on the approach that the Tribunal should adopt. The *BAA* case, if I can refer the Tribunal, please, to volume.3 of the authorities.

THE CHAIRMAN: Yes.

LORD PANNICK: It is tab 42, and we have the decision of this Tribunal chairman, Mr. Justice Sales, in *BAA v Competition Commission* and if the Tribunal would start with para.20 on p. 10, and in para. 20 Mr. Justice Sales for the Tribunal sets out a number of principles. Can I draw particular attention to para. 20(4) which is on p. 12, Mr. Justice Sales says:

"… it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did",

and there is authority set out.

And then, at p. 15 at sub-para (7) Mr. Justice Sales amplifies that. He says:

> "In applying both the ordinary domestic rationality test and the relevant proportionality test under Article 1P1, where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset [there Stansted airport], the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor".

He refers to the case of the gay serviceman *ex parte Smith* as does the proportionality test:

> "But the adjustment required is not as far-reaching as suggested by Mr. Green [appearing there for the applicant] at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt".

THE CHAIRMAN: That is not a particularly concrete test, is it?

LORD PANNICK: It is not, no, it is a matter of evaluative judgment.

THE CHAIRMAN: Yes.

LORD PANNICK: But what I think is not in dispute when we are looking at rationality, is that I accept for my part this is not an appeal, it is not a question of what does this tribunal think is the right answer? I have to accept that. It is a review. It is a review by reference to reasonableness and there are two factors that are of central importance when this Tribunal is assessing the reasonableness of the conclusion. On the one hand, and this is in our favour, these are very important matters. You are ordering a company to divest itself of property because of a finding of an SLC, and that obviously attracts, no dispute about this, the right to property, Article 1 of the First Protocol, the Human Rights Act, and therefore the Tribunal will look with particular care, will scrutinise with particular care whether or not what the Commission has found satisfies the test of reasonableness.

THE CHAIRMAN: The problem that I have is that when it comes to primary facts we do not have before us the underlying evidence that led to the Report. I can understand "inference" that is a different thing but the Report is full of primary facts plus inferences to be drawn from those. Is there any distinction we can make on that?

LORD PANNICK: I entirely accept that. My criticisms take as read a great deal of what the Commission has found and the criticisms we make in our skeleton argument essentially address the degree to which it is reasonable for the Commission to arrive at the conclusions it has on the basis of its own primary fact findings. So this is not a case where I am inviting the Tribunal to substitute some other factual finding for that of the Commission. The question is what is it reasonable for them to conclude as to SLC in the light of the undisputed material before them?

THE CHAIRMAN: So really you are looking at the second level then?

LORD PANNICK: I have to.

THE CHAIRMAN: I think the underlying facts are difficult to challenge ----

LORD PANNICK: It is the conclusions ----

THE CHAIRMAN: It is the conclusions or the inferences that you can draw from those facts that you say are unreasonable?

LORD PANNICK: In the context of the whole Report and, as I say, there are two dimensions to this. One is particular care and scrutiny by the Tribunal, of course, a Tribunal or court says in answer to that: "We are always careful, we always look with care at submissions, but this is an area where particular care is required." But, on the other hand, I accept the Commission is entitled to a margin of discretion, of appreciation because it is the primary decision maker, and this is a review jurisdiction. There is no dispute between us, I think, on any of that. The question is how you apply those principles, and the more difficult question is how you apply those principles in this case.

What the Competition Commission says, it is in my friend's skeleton argument, he emphasises, Mr. Beard, that the Commission's task was to consider all of the material in the round and ask whether the relevant merger situation has caused or will cause a substantial lessening of competition.

Our answer is when one stands back and looks at the material that they set out in their Report, each of the mechanisms that they had identified is so improbable that it was unreasonable to conclude, even if you take them altogether, that there has been, or will be, an SLC.

We have set out in some detail in our skeleton argument what we say, I just want to highlight the matters. The first mechanism, as the Tribunal has seen, the main mechanism, was the impediment to Aer Lingus entering into a significant combination with another airline, and this starts at para. 110 of our skeleton argument, and in the Report we are

looking at para. 7.23(a) and the substance of it is 7.24 through to 7.84, that is where you find all the detail.

If one stands back from this, and one focuses on what we say is the inherent improbability of this mechanism actually causing an SLC, we say that is why the conclusions are unreasonable. We have set out, starting at para. 111 of our skeleton argument, four reasons why this mechanism – this main mechanism – is extremely unlikely in practice to cause an SLC. The first point is we say it is extremely unlikely that, absent Ryanair's minority stake, Aer Lingus would have or will combine with another airline, and we set out why that is so. The Commission itself found there was unlikely to be any interest from the large European carriers, and that is of particular significance given that almost all the evidence they rely upon in terms of a general trend for consolidation related to transactions involving one of the large European carriers. There was another range of reasons, as set out in the evidence, why in any event Aer Lingus was not an attractive combination partner. That is what they find at various places. So that is the first thing that has to be found if this mechanism is to cause an SLC, that Aer Lingus would have combined.

Secondly, you would also need to be shown that Ryanair's alleged material influence actually deters or inhibits that combination. You need the interest, then you need the inhibition. Thirdly, it has to be shown in any event that if this combination, had it occurred would have led to efficiencies, and one certainly cannot assume that that would be the case given that the European Commission rejected the suggestion that any combination of Ryanair and Aer Lingus would lead to efficiencies, and we have set out all the detail in relation to that, which I am not going to take time on.

There is a fourth point, even if all of that were established, at para. 119 we emphasise that, in any event, there would be a further test that would have to be satisfied. It would have to be the case that the combination, if it occurred, would not only lead to efficiencies but those efficiencies would lead to substantially greater competition on the routes between Great Britain and Ireland. Even if there were a combination, even if Ryanair's shareholding is inhibiting the combination, even if the combination would lead to efficiencies, that does not necessarily translate into greater competition. The acquirer of Aer Lingus, or the person combining with Aer Lingus might decide, of course, as we say to drop certain routes, and that would lead to less competition rather than more.

So we say it is inherently unreasonable to suggest that there was other than the smallest prospect that, but for Ryanair's 29 per cent shareholding there would have been, or even

may have been a substantial lessening of competition, by reason of the absence of a combination, the deterrence or inhibition ----

THE CHAIRMAN: It is very difficult to assess, is it not, without knowing what the combination is going to be. You say that the only one that is concrete and that has been identified is between you and Aer Lingus and when you put that to the European Commission they were not satisfied.

LORD PANNICK: There were two things we do know. We know that when there was an assessment of the combination between us and Aer Lingus, the European Commission said: "We are not worried about that", but we also know that the airlines which were identified, that is the large groups of carriers, that they were not interested. What we do not know is the identities of the smaller airlines that are said to be the subject of at least interest in combining. This point on reasonableness, in my submission, strengthens and supports the complaint I have already made about procedural fairness. It is very difficult for me to say more in relation to this element of the rationality challenge than I have already said, and to draw attention to the features which we say make it inherently unlikely that this would lead to an SLC precisely because I do not know – my clients do not know – the detail starting with the identity of the relevant airlines who are said to be the basis of this fundamentally important conclusion (see para. 7.178) which the Commission has arrived at.

If there is any force in these criticisms, that is by reference to this main mechanism, as I suggested to the Tribunal this morning, the Commission really cannot expect to sustain this Report by reference to the remaining mechanisms, which are not regarded as mechanisms of particular significance.

I say that the rationality challenge gives force to the procedural fairness challenge which I have already developed. It demonstrates why the procedural fairness point, far from being abstract is a very concrete and substantive complaint.

The second mechanism which the Commission rely upon in relation to an SLC, they say that Ryanair's shareholding hinders the ability of Aer Lingus to issue shares to raise capital. The Tribunal find this in the Report at 7.23(b) and then they develop the point at 7.85, through to 7.92, that is where we find it. We address this point in our skeleton argument at paras. 122 to 124. One of the points we make is that Aer Lingus, on the findings in the Report, has extremely large cash reserves. We are told at para. 2.13 of the Report, that the cash reserves of Aer Lingus as at the end of 2012 were €909 million, so very substantial cash reserves. The Commission itself accepted that at para. 7.89, if I could take the Tribunal to that, where they say:

"Given Aer Lingus's existing balance sheet strength and forecast financial performance under circumstances of stable trading, no new debt issuance or acquisition activity by Aer Lingus, we found it unlikely that Aer Lingus would need to raise equity to finance its current operations or its existing plans for a major aircraft replacement programme in the medium to long term."

So the starting point of the second mechanism that Aer Lingus may need to raise cash is, itself, inherently improbable.

THE CHAIRMAN: That is absent the three things they have listed. If there is going to be acquisition activity which links in to the first ground they may well need to get further -----

LORD PANNICK: Yes, which leads back to the question, which is the first.

THE CHAIRMAN: If you take that first point out then it does not seem to be much of a point.

LORD PANNICK: The second point does not add anything because it is dependent upon the first finding.

THE CHAIRMAN: Absent circumstances of unstable trading, let us say, but the most likely scenario if they needed substantial equity would be in relation to an acquisition?

LORD PANNICK: Absolutely.

THE CHAIRMAN: There are other possibilities, but that is the most likely.

LORD PANNICK: So if, contrary to my submissions, the Commission can sustain its case on the first main mechanism then any criticisms we have of the second mechanism are nothing to the point. If the Commission's approach to the first mechanism is deficient, whether for procedural fairness or rationality reasons, the second mechanism will not assist the Commission.

The third mechanism that the Commission was concerned with was that Ryanair might block the disposal of Aer Lingus's Heathrow slots. The references for the analysis of that - it is set out as a mechanism at 7.23(c), and it is addressed in the Report between paras. 7.93 and 7.107 (that is where we find the analysis), and we have set out our criticisms at paras. 125 through to 128. Here again, the starting point suggests that this is an unlikely scenario because the Commission itself says at 7.94 that the Heathrow slot portfolio is a major asset for Aer Lingus, it is likely to be worth in excess of €250 million. There is absolutely no evidence whatsoever that Aer Lingus wants to trade these slots. Why should it, unless I suppose it is a feature of the possible combinations which are being contemplated. If that is the point, again it does not add anything to the first point.

THE CHAIRMAN: Can you remind me, how many slots are there?

LORD PANNICK: I am not sure we are told that.

THE CHAIRMAN: I think I have read it somewhere in here, but I cannot remember where.

LORD PANNICK: I am sorry, sir, I do not immediately know the answer to that. Over 100 is what I am told.

THE CHAIRMAN: Mr. Flynn can tell me tomorrow, can he not?

LORD PANNICK: I am sure he can.

MR. FLYNN: I was just going to say, there are some numbers in the relevant section of the Report which you probably have open in front of you. 7.94 is by relation to value, but if you look at the footnote you will see what you have just said was accurate. The actual number I can find out.

THE CHAIRMAN: Just give me the actual number tomorrow.

MR. FLYNN: I will do that.

LORD PANNICK: It tells in the footnote, does it not, that they are worth €200 to €300 million at an average of about €10 million a slot. So we are talking, therefore, about what, 20 to 30. I think it is more than that.

THE CHAIRMAN: Can you clarify that for us tomorrow?

MR. FLYNN: Yes, sir.

LORD PANNICK: My point is that there is absolutely no suggestion that Aer Lingus are looking to dispose of these slots, and there is absolutely no reason to think that they would want to dispose other than for the purpose of facilitating some merger or other combination with another airline, in which case we are the main mechanism, number one, which I have already sought to address.

THE CHAIRMAN: You accept if there is a merger or some other form of combination then the Heathrow slots may be ----

LORD PANNICK: There may be, one does not know. It depends who they are combined with and for what purpose and what the circumstances are. That would be contingent upon the likelihood of there being some combination. It simply takes us back to issue number 1. It does not add anything to the first mechanism. In any event, we have made other points on the slots. The Irish Government are going to block the disposal of slots unless their connectivity criteria are satisfied. That is what we are told at 7.101, and we have addressed that in our skeleton argument. We say the circumstances in which those criteria were going to be met would be very limited indeed.

Finally, if it matters, in any event, there is absolutely no evidence that Ryanair would prevent Aer Lingus from trading its Heathrow slots. Indeed, on the contrary, we are told in the Report at para.8.22(d), p. 75, that Ryanair had proposed:

"… an undertaking (or order) preventing it from voting against Aer Lingus's board on the disposal of Aer Lingus's slots at London Heathrow."

So the point, in my submission, disappears completely.

That is the third concern, the third mechanism, that the Commission addressed.

The fourth potential mechanism which caused concern to the Commission, if we go back to 7.23(d), is that Ryanair:

"… might influence Aer Lingus's commercial policy and strategy by giving Ryanair the deciding vote in an ordinary resolution;"

and the analysis of this one is between para. 7.18 and 7.115.

THE CHAIRMAN: Can you give me that reference again?

LORD PANNICK: Yes, 7.108 on p.56 and the analysis concludes on this point at para. 7.115, the top of p. 58.

THE CHAIRMAN: Yes.

LORD PANNICK: That is where the Commission addressed this point, and we make our criticisms at para. 129 of our skeleton argument. That is where we address this point, and the finding, we can pick up the finding at 7.115, what they find at 7.115, they say:

"In summary, we found that: (a) Given the stated position of the Irish government, it was relatively unlikely that Ryanair alone would be able to achieve a majority in a shareholder vote". [They accept it is unlikely]. However, this could occur if other shareholders vote in the same way as Ryanair, the Irish Government were to abstain on a vote, or the Irish Government were to sell its shareholding to multiple buyers".

So on the Commission's own findings these are unlikely contingencies. They are remote contingencies. We say this is pure speculation, and it is particularly pure speculation rather than a reasonable basis for imposing a divestment order of the sort of which we complain when the Report itself notes, it is on p.17 and it is para.4.23 that in the last six years, that is the six years prior to the Report, that is while Ryanair has had its shareholding, 4.23, second sentence:

"During the period 2007 to 2013, Aer Lingus's shareholders have considered 76 ordinary resolutions. Ryanair opposed four of these, but was not successful in any of these challenges".

And then there is a reference to how close they came on the appointment of a board member. But this is a long way away in my submission from the concern that was expressed by the Competition Commission, far less that this reasonably supported the

suggestion of a substantial lessening of competition, because that is what we are concerned with. In my submission this is very very weak stuff indeed. It is speculative at best.

The fifth and final —

THE CHAIRMAN: So you say they have never successfully opposed —

LORD PANNICK: Never.

THE CHAIRMAN: An ordinary resolution —

LORD PANNICK: No.

THE CHAIRMAN: — in six years or whatever.

LORD PANNICK: And the Commission, and the Commission, have recognised in their analysis at 7.115(a) what would need to be stacked up if Ryanair were to succeed. It is not simply that they would have to succeed on a vote, it would have to be something that was relevant to a substantial lessening of competition. It is not good enough to say, "Well, they might win a vote on a particular, critical of a particular board member or reducing their pay or something of that sort", it would have to be something that is relevant to the issue with which we are concerned; it has to have some impact on substantial lessening of competition. I say that the suggestion that this mechanism provides that basis, if the others do not, is speculative indeed.

The final mechanism, number 5 —

THE CHAIRMAN: But when you look at the mechanism, they are not saying at 7.23(d) that that on its own would get them home, are they?

LORD PANNICK: I do not think they are, with respect.

THE CHAIRMAN: No.

LORD PANNICK: I think these are all aspects to be looked at in the round with the main focus being whether or not the 29 per cent shareholding is inhibiting Aer Lingus from entering into combinations with other airlines. That is what this is all about.

THE CHAIRMAN: That is the impression reading the Report, but obviously we need to hear from Mr. Beard on that.

LORD PANNICK: Well, Mr. Beard will say, if that is not correct and I am anxious not to pin my challenge to a basis that invites the Tribunal to do other than look at this in the round; because Mr. Beard's point, and it is a fair point, is that one has to look at this in the round.

THE CHAIRMAN: I understand. You could say that there are sort of five strands to it.

LORD PANNICK: Yes.

THE CHAIRMAN: But really if you took out, let us say strand D, I do not think it would make much difference to the ultimate decision.

LORD PANNICK: That is my submission.

THE CHAIRMAN: Yes.

LORD PANNICK: But I have to make a submission in relation to these, because I am concerned not to allow Mr. Beard to say, "Well, you focused on strand (a) which the Commission itself say is the primary strand".

THE CHAIRMAN: Yes.

LORD PANNICK: But Ryanair, they have got nothing they can say on the other points. That is not the case, but I do emphasise our understanding is that the strands are linked together and the reason why the Commission itself says at 7.178 that that is the mechanism of particular significance is because the others are supplementary to it. They are linked to it in obvious ways that I have identified. But they each have their deficiencies.

The final mechanism, just for completeness, that I ought just to address is at 7.23(e) and it is a concern that Ryanair may,

> "… raise Aer Lingus's management costs or impede its management from concentrating on Aer Lingus's commercial policy and strategy",

and this is analysed by the Commission starting at 7.116 and over to 7.125, we address it at paras. 130-131, and I think the substance of it can be seen on p. 59 of the Report at 7.124, where they say:

> "We did however recognize that the minority shareholding would increase the likelihood of further bids by Ryanair relative to a situation in which Ryanair had not owned the shares. … We considered [three lines down] that full bids by Ryanair were likely to have impeded, or to impede, Aer Lingus's commercial policy and strategy … However, we noted that alternative or additional strategic decisions might have been taken had the company not been in an offer period".

Well, this is very weak stuff, in my submission, that somehow Aer Lingus should be protected from the possibility that Ryanair may decide [is deciding] that it wants to take over Aer Lingus. And the only evidence apart from the general statement, the only actual evidence to which they refer is in the footnote, and the footnote says:

> "For example, the cessation of discussions with [X] when Ryanair's third bid was launched".

The only example that can be given is, again, an example that takes us back to what is undoubtedly the main concern of the Competition Commission which is that the 29 per cent may impede the willingness of third party airlines to enter into discussions with Ryanair. I have made my points on the first mechanism, and I repeat here again, we are unable to

answer the point that the Commission is making because we have no idea who this unidentified airline is. Apart from that, in my submission, it is pure speculation.

I, therefore, submit on behalf of Ryanair that if one looks at all of this material, none of the concerns expressed by the Commission disclose a real possibility that Ryanair's material influence has led, or may be expected to lead, to a substantial lessening of competition. It is simply an unreasonable conclusion. It all leads back to the first contention, the main mechanism, which requires a number of distinct events to occur, each of which is inherently unlikely, and in respect of which we are impeded in making our submissions, as a matter of substance, by the failure to disclose the core material to us. That is our case.

Ground 5: Ground 5 is the remedy of divestment. For the purposes of this ground, we assume, of course, that the Competition Commission has lawfully decided that the material influence has caused, or may be expected to cause, an SLC. The question is what remedy is appropriate in these circumstances? I accept - it is a point that the Commission have emphasised - that the purpose of remedial action, it is what s.35(4) says, is to achieve a comprehensive solution to the SLC. That is the statutory test, I entirely accept that.

Our point is that, in deciding what is required, the Commission are here obliged to comply with the principle of proportionality. It is not merely a reasonableness test, we are in the realms of proportionality because we are concerned with a remedy of divestment - taking away or forcing us to dispose of our property.

The criteria of proportionality are well established. They were set out by this Tribunal in the *Tesco* case. Could I remind the Tribunal of what those criteria are. They are in authorities volume 2, tab 33.

I notice the time. I do not know, sir, whether you wanted to take an afternoon break.

THE CHAIRMAN: We can take a break now if you want to.

LORD PANNICK: It is certainly a matter for convenience.

THE CHAIRMAN: We will take a break to 3.15.

(Short break)

THE CHAIRMAN: Ground 5, yes?

LORD PANNICK: Ground 5, divestment proportionality, *Tesco* case, tab 33, vol. 2 of the authorities. Paragraph 136 refers to a Luxembourg Judgment and at para. 137 that passage identifies the main aspects of the principles. They are the principles of proportionality.

> "These are that the measure: (1) must be effective to achieve the legitimate aim in question, (2) must be no more onerous than is required to achieve that aim, (3) must be the least onerous, if there is a choice of equally effective measures, and (4)

in any event must not produce adverse effects which are disproportionate to the aim pursued."

Those are the general criteria of proportionality. There is the authority of the *BAA* case in this Tribunal, if we can go back to that, where Mr. Justice Sales addresses proportionality. It is vol. 3 of the authorities and it is tab 42.

THE CHAIRMAN: That is all from *Tesco*?

LORD PANNICK: That is all I need from *Tesco*. Every little bit helps, and at tab 42 of vol. 3

MISS DALY: That is *Asda*.

LORD PANNICK: Was it? My joke was not only fatuous it was inaccurate as well.

MISS DALY: I am here to help.

LORD PANNICK: Yes, here to help, thank you. Avoid the jokes I think is good advice to any counsel. Volume 3, tab 42, the *BAA* case, para. 20. Mr. Justice Sales addresses proportionality at p. 13 of the Judgment, and says at para. 20(5).

… the Tribunal apply, whatever test the Tribunal think it right to apply, in relation to proportionality, the decision of the Commission cannot withstand scrutiny.

THE CHAIRMAN: Presumably you say that we should be not looking at the rationality test, rather the proportionality test in view of the rights involved of your client.

LORD PANNICK: The rights under Article 1 of the First Protocol.

THE CHAIRMAN: That is right, yes.

LORD PANNICK: Which Mr. Justice Sales accepts is an important dimension. There is no dispute between us and Mr. Justice Sales (see para.20(7)) that Article 1 of the First Protocol is an important dimension of this. But my submission is, with respect, it is wrong in law to suggest that it is a pure rationality test as if Article 1 adds nothing, the Human Rights Act adds nothing, proportionality adds nothing. It is a stricter standard than *Wednesbury* unreasonableness. And deliberately so, because one is concerned with the protection of fundamental rights, albeit, I concede, one should confer a margin of discretion on these issues on the decision maker, who are the CC.

So, that is the context. We then seek to identify what we say are a number of errors, proportionality errors, in the approach taken by the Competition Commission to the question of divestment. The first of the matters that we draw attention to is the legitimate aim which we address at paras. 143-146 of our skeleton argument. The Tribunal will recall that under the *Tesco* principles, the well established proportionality principles, authorities vol. 2, tab 33, para. 137 of the judgment of Mr. Justice Barling speaking for the tribunal, the first of the criteria of proportionality is that:

"The measure must be effective to achieve the legitimate aim in question".

So, the question is, the dispute is, what is the legitimate aim? And the Tribunal recalls that under section 41(2) of the Act, the Commission is charged with taking action to remedy, mitigate or prevent the substantial lessening of competition concerned and any adverse effects resulting from it. So, we say the legitimate aim is to address the substantial lessening of competition, and that means the substantial lessening of competition that they, the Commission, have themselves identified under section 35(1).

And we say it necessarily follows from section 35(1) that when we get to the stage of remedies, of divestment, the Competition Commission should ask itself whether or not a finding of an SLC would stand if the proposed remedy were in place. And if the answer is "no", that is the proposed remedy, by which I mean our undertakings, would lead to a conclusion that there was unlikely to be an SLC, we say it necessarily follows that an order for divestment is disproportionate. It is disproportionate to impose divestment if the undertakings which Ryanair has offered would mean there would be or would be unlikely to be an SLC. That is the essence of proportionality. You ask whether or not the statutory aim, SLC, would be obviated if the undertakings were granted, and the Commission, we say, did not adopt that approach. If one looks at the Report, one goes back to the core bundle, one goes back to tab 9 and one looks, for example, at paras. 8.37, this is p. 78 of the Report, para. 8.37, what they say is:

> "In our view an effective remedy should not focus solely on combinations with EU airlines implemented through schemes of arrangement or general offers [which is the substance of our undertaking] 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 they were able to pursue is, in our view, a substantial shortcoming of this approach".

And we say there is a defect in that approach, because what they are not asking themselves is whether were the undertakings implemented, there would in the view of the Commission not simply still be inhibitions, the question is whether there would still be an SLC. And the Competition Commission take issue with this. There is a fundamental dispute between the parties on this. The Competition Commission's skeleton argument, it is para. 89, it is p. 22, it is under "Issue 1, legitimate aim", and it is para.88 of my friend's skeleton argument. Paragraph 88 of the Competition Commission's skeleton argument, they say on p. 22:

"Ryanair says that the CC should have asked whether the remedies proposed by Ryanair would render an SLC unlikely. According to Ryanair, any remedy which seeks to do more than put the prospects of an SLC below 50% pursues an illegitimate aim".

Well, I am not putting my case on percentages at all, but I am saying this is the test for proportionality. At para. 89:

"As has already been explained, this argument reflects a misunderstanding of the CC's duties under the Act and what constitutes an effective remedy. The Act does not require the CC to render an SLC 'unlikely'. Once an SLC is established, the CC is required to identify a 'comprehensive' solution to that SLC. [That is section 41(2)] A solution which leaves a 49% likelihood of an SLC is not comprehensive. If Ryanair's argument were correct, it would substantially undermine the effectiveness of UK merger control".

With respect, that does not address the point. My point, as I say, is not about percentage likelihoods. My point is that the legislative aim is to address an SLC. That is the legislative aim. And the question for the Commission on the premise that an SLC is established, and that is the premise we are working on when we look at ground number 5, the question for the SLC when it is considering whether divestment is a proportionate remedy is to ask itself whether or not the remedies which are offered by Ryanair, that is the series of undertakings, would if implemented mean that there would cease to be an SLC in the view of the Commission. Any other approach, in my submission, fails to understand the principle of proportionality, and there is a dispute between us on this issue, a fundamental question, because Mr. Beard says, "No, that's not right. Once there's an SLC, the Commission is perfectly entitled to require the most comprehensive of remedies and it is nothing to the point whether or not the Ryanair undertakings would be sufficient to result in there being no SLC.

THE CHAIRMAN: You say that the Competition Commission should have asked itself whether there would still be an SLC if the undertakings were accepted?

LORD PANNICK: Yes.

THE CHAIRMAN: You say they did not ask themselves that question?

LORD PANNICK: They did not, and not merely did they not ask themselves that question, Mr. Beard says in his skeleton argument that it is the wrong question, and therefore it is not surprising that they did not answer it. If it is the right question the Commission's conclusion on divestment cannot stand.

THE CHAIRMAN: Apart from looking at the statute there are no cases or anything?

LORD PANNICK: Not that I am aware of, and none that Mr. Beard has cited.

THE CHAIRMAN: So you go back to principles.

MR. BEARD: There are, but ----

THE CHAIRMAN: You will deal with them in due course.

LORD PANNICK: None that Mr. Beard has cited in this part of his skeleton argument. He will make his submissions in due course and I will have an opportunity to respond in due course. I say that if one looks at the Act, and one asks what is the legitimate aim, the legitimate aim is to obviate an SLC and the consequences of it. If the undertakings would be sufficient to lead the Commission in their judgment to conclude that there would be no SLC, it is disproportionate to require a divestment simply because the undertakings would not address all possible detriments that may occur. That is our case. Anything else is disproportionate. That is the first criticism we have of the Commission's approach. It is a question of law. Our second objection to the divestment remedy is that in any event we say that Ryanair's proposed remedies, the undertakings, would be sufficient, would be effective, to remedy the SLC. We set this out in our skeleton argument at paras. 147 to 154. We say that the proposed undertakings which we have set out in our skeleton argument would be sufficient to meet all of the concerns identified by the Competition Commission other than minor residual concerns which simply do not justify, on a proportionality test so substantive a remedy as a divestment order.

What is between us on this point, as I understand it, is that the Commission say that they are entitled to be concerned about forms of possible combinations which could still be inhibited notwithstanding the undertakings that Ryanair offered. One sees this in the Report at p. 77 at para. 8.33:

> "However, there are other forms of combination which could still be inhibited by Ryanair notwithstanding these proposed remedies and which would otherwise impact on Aer Lingus's competitiveness."

to which we gave the answer, "Well, amend the undertakings so that they would cover these possible additional concerns", to which the Competition Commission responds and it is in its skeleton argument at para. 97, p. 24. They say:

> "… the Commission was entitled to conclude that even revised undertakings would not have provided a comprehensive solution. That is because, in a dynamic and uncertain sector, the Commission was not in a position to predict with confidence every form of combination in which Aer Lingus might wish to

participate, and on that basis prepare undertakings which addressed each scenario one by one. Ryanair has no doubt has no doubt applied considerable resources to the identification of a comprehensive set of undertakings, and has failed to identify one."

etc, to which our answer is that that is an inherently disproportionate approach. The Commission are insisting on divestment and refusing to accept undertakings because of unspecified possible forms of combination that no one can elaborate on at the moment. It is disproportionate, in my submission, for Ryanair to be required to dispose of all but 5 per cent of its shares in Aer Lingus because of the possibility that someone, not Ryanair, may be able to contemplate in the future some form of potential combination which neither Aer Lingus nor the Competition Commission has yet been able to identify. That is simply disproportionate. One is not dealing with real problems. One is dealing with hypothetical possible combinations that no one can specify. I say that it is disproportionate when one looks at this in the context of whether Ryanair should be required to dispose of its assets. That is the second complaint. There is more detail but that is the substance of it.

The third complaint that we have about divestment is that, in any event, the proposed divestment order would produce adverse effects that are disproportionate to ----

THE CHAIRMAN: Before you get to that can we just explore your response to para. 98?

LORD PANNICK: Paragraph 98 of the skeleton argument?

THE CHAIRMAN: Of the Competition Commission's skeleton, because their fourth point is that whatever undertakings you offer it is still not going to remedy the SLC because your presence on the share register acts as a deterrent factor.

LORD PANNICK: This is para.8 .39 of the Report and 8.40 of the Report. It is p. 78 of the Report. Paragraph 8.39 says:

"We considered that some potential partners may be deterred from entering into, pursuing, or concluding discussions with Aer Lingus, for fear of having to deal with a substantial Ryanair presence on their own share register post-combination.

8.40. We also formed the view that some potential partners may be deterred from combining with Aer Lingus (short of an acquisition of 100 per cent of Aer Lingus) by the possibility that Ryanair could use its existing shareholding as a platform from which to launch further bids for the whole of Aer Lingus …"

etc. Those are the points, I think, sir, that you are directing me to which are relied upon in the skeleton argument in para. 98, to which our answer is that there is simply no evidence,

far less any proportionate basis, for the Commission to conclude that these mischiefs would occur if, which is the premise upon which we are addressing this matter, all of the Ryanair undertakings were in place. That is the point. The point is if all the Ryanair undertakings were in place it is impossible, we respectfully submit, to understand on a proportionate basis why such potential partners would be so concerned.

THE CHAIRMAN: So you are saying that you have got the primary facts, this is an inference from the primary facts, and you say that, effectively, there is no reasonable basis for that inference?

LORD PANNICK: There is no proportionate basis. It is simply not proportionate to say, "You have given all these undertakings, or you are prepared to do so, but we are going to order you to divest, to dispose of all but 5 per cent of your property, and the reason we are going to do it is because of a possibility that notwithstanding your undertakings, others whom we will not identify, we do not give any evidence that anyone who has ever considered this is going to be deterred. It is simply not proportionate, given the nature of a divestment remedy, it is an extreme measure that needs to be addressed in the context of the alternatives that respect the right to property. Unless the Competition Commission is able to say on some evidential basis that there is some proportionate reason to think that these potential partners will be deterred in this way, even though Ryanair is inhibited by the series of undertakings that it is prepared to give – forced to give – by the predicament in which it finds itself, this point goes nowhere. That is our answer to it.

THE CHAIRMAN: So your answer is to say there is no evidential basis for the conclusion they drew.

LORD PANNICK: And/or these concerns are speculative. It says at 8.39: "We are concerned some potential partners may be deterred." 8.40: "We formed the view some potential partners may be deterred." First, what is the evidence? Secondly, this is so speculative in the light of the undertakings that it is simply not proportionate and a judgement has to be reached as to what is proportionate in all the circumstances of the undertakings that Ryanair is prepared to give. The undertakings are summarised at para. 139 of our skeleton argument.

The Competition Commission really has to address whether or not these concerns have any factual basis in the light of the series of undertakings that would inhibit Ryanair's action.

THE CHAIRMAN: But the problem is at 8.40 they do give a fact which they say might support their conclusion at 8.40, which is that some unidentified airline decided not to continue its discussions upon hearing that Ryanair was launching a third bid.

LORD PANNICK: Yes. The problem is we do not know who they are, or we cannot test that evidence at all, so it takes us back to the procedural fairness points but, in any event, of course in the light of the giving of the undertakings, Ryanair is very substantially handicapped as for the future. Again, it is not enough to show that Ryanair still wants to launch a further bid, not that it is able to do so at the moment unless and until the General Court overrules the European Commission, but one has to assess whether or not there is some SLC consequent on this, and that depends, as I have said, upon the nature of the undertakings and the effects. So that factual statement, unparticularised, procedurally unfair is, in any event, proceeding on the basis of the situation before the undertakings were proffered so it does not take anyone anywhere, in my submission.

The third issue that we raise in relation to divestment, is we say in any event the Competition Commission proposed order would produce adverse effects disproportionate to the legitimate aim, and we set that out at paras. 155 to 161, and we say here that the correct test is whether or not the additional benefits which are consequent on a divestment order, that is additional to the undertakings offered by Ryanair, to the additional benefits of a divestment order, justify on a proportionality test, the burdens of a divestment order. That is the test, in my submission, for the Competition Commission on a proportionality basis. Again, there is a dispute between us. The Competition Commission say at para. 85 of their skeleton argument that this is the wrong question.

> "Ryanair has sought to recharacterise the question under Issue 3 as whether the costs of a divestiture remedy are disproportionate to the *incremental* benefit of such a remedy over Ryanair's proposed undertakings. However, this is the wrong question."

They say it mixes up limbs of *Tesco*.

> "The principle of proportionality does not require the CC to compare an effective remedy with an ineffective one, nor does it involve some general 'horse trading' of costs against benefits as Ryanair appears to suggest. If Ryanair fails to show under Issue 2 that its proposed remedies were effective, the only remaining question is whether the costs of a divestiture remedy are disproportionate to the aim pursued under *Tesco* limb four."

We do not accept that. We say in principle if one is asking whether or not the adverse effects are disproportionate to the legitimate aim, one must take into account, as the Competition Commission seem reluctant to do, what will be achieved even without a divestment order. One has to start from that premise. The question is whether or not a

divestment order confers such additional benefits as to make divestment proportionate in all the circumstances.

Even if there are deficiencies in the undertakings, which we do not accept, even if the Commission is entitled to say the undertakings are not perfect, the question, in my submission, is whether the extra benefits to be obtained from a divestment order justify, on a proportionality test, the inevitable burdens which a divestment order will cause. That was point 3.

Point 4 I do not want to take a lot of time on. We say it is disproportionate to order divestment pending the outcome of the EU process. We have set that out in our skeleton argument, paras. 162 to 164. The Tribunal may think that that point adds little to the first issue in the application, so I do not want to take time on that.

I do want to emphasise the final point on divestment – final only because chronologically it comes last, but it is a very important point for Ryanair. We say it is disproportionate for the Commission to order a divestiture trustee and this is paras. 165 to 172 of our skeleton argument.

The Competition Commission address the question of a divestiture trustee at appendix K to the Report. If I could take the Tribunal to appendix K to the report and it is at para. 38. It is p. K7 of the Report. Paragraph 38:

> "The appointment of a Divestiture Trustee is generally used by the CC as a fall-back option if a party has not completed the divestiture at the end of the divestiture period …"

which, of course, is not the case.

> "… or in other relevant circumstances where the CC has reason to be concerned that an effective divestiture would not be completed, eg within the permitted time."

So that is when they appoint a divestiture trustee.

THE CHAIRMAN: I presume none has been appointed as of yet?

LORD PANNICK: As of yet, no. In this case the Commission, of course, has decided that it will appoint a divestiture trustee at the outset without, we say, any significant or even material risk that Ryanair would not dispose of its shares within any relevant period to a suitable purchaser.

One sees what the options are if one goes to para. 8.123 of the Report. I can take the Tribunal to the substance of the Report. It is on p. 98 of the Report. They say at 8.123(a) that they are going to appoint a Divestiture Trustee from the outset. Then at (b) they identify the options:

> "The divestiture may be implemented via an upfront buyer process to a single purchaser or via a stock market placement of the shares, or by another process identified by the Divestiture Trustee approved by the CC."

The first process would involve the Commission approving the purchaser in any event, so one does not need a divestiture trustee if that is the route that one is going along. All one needs is the power of the Commission, which they have in any event, to say whether or not they are going to approve of the purchaser.

The second option, which is the stock market placement of shares would be managed in the normal course of events by an investment bank. It is very difficult to see how, in such a process, Ryanair is going to be able to manipulate the process either in theory by instructions to an investment bank, which is the theory that the Commission hint at, although they do not actually say. All of this can be adequately dealt with by imposing requirements on Ryanair during the divestment process without the appointment of a divestiture trustee. Ryanair would have to undertake to impose any appropriate requirements on the investment bank handling the sale of the shares, but it is very difficult to see how there is a problem that requires a divestiture trustee. The Commission appears simply to have assumed that Ryanair could not be trusted to comply with any undertakings in this context. I say that because of para. 109 of the Commission's skeleton argument is dealing with the divestiture trustee. They say:

> "This is a case in which Ryanair has the continued and publicly stated aim of acquiring the whole of Aer Lingus. For this reason, there is particular sensitivity about the divestiture of the shares, and whether it will be made in a way which is designed to further Ryanair's explicit and continuing strategy. Ryanair's incentives are clear."

We respond: the fact that Ryanair's goal is to acquire Aer Lingus, which it is unable, of course, to do at the moment, cannot begin to justify the Commission proceeding on the basis that it is going to breach undertakings that it has given and requirements that the Commission may seek to impose in relation to divestment.

The Commission have suggested, it is appendix K to the Report, at para. 40, they say:

> "We have considered whether the CC might oversee a sale process and appoint a monitoring trustee to assist in reviewing the conduct of the sale process and ensuring there are no unnecessary delays in a process managed by Ryanair. However, the sale of a minority stake in a listed company raises particular

> difficulties for this type of monitoring arrangement. The risk will be very difficult to manage, particularly in the context of a stock market disposal."

i.e. process option 2. Of course, it is not a problem in relation to option 1, which is sale to a specific buyer.

> "In addition it will be hard for the CC or a monitoring trustee to distinguish between a legitimate delay in Ryanair's process to target an appropriate window for a stock market placement, and an intentional delay to place the shares and to retain them without an intention to implement the remedy.:

To which we respond – and again, the Commission is proceeding without any proper basis from the premise that Ryanair could not be trusted to comply with undertakings or requirements. It is inherently implausible that Ryanair could delay, first because that would reduce any window of opportunity for a sale detrimental to Ryanair and, secondly, because it is very difficult to see how, if you are conducting a sale process through the stock market, any delay is other than transparent. These are not hidden matters, these are matters of date which would be known to the Commission at which stocks are placed on the stock market. All of this is far from theoretical.

Ryanair's concern about the divestiture trustee is explained at para. 169 of our skeleton argument. There are real adverse effects of a sale by a divestiture trustee, and the point is that in the normal course of events, when you sell shares in a listed company you use a book builder, a placement agent, who has a financial incentive to acquire the best price, and it works to the advantage of whoever that agent is, and it works, of course, to the real financial advantage of the person who is selling the shares.

By contrast, the divestiture trustee, who is to be appointed by the Commission, would not, in the normal course of events, have any financial interest in the sale, and therefore would be most unlikely to secure a sale price which even approaches the sale price which Ryanair would obtain on selling its own shares through an appropriate agent. That is the concern. The Competition Commission's answer to this concern is in its skeleton argument at the end of para. 115, where they say: "In this regard, the CC noted in its Defence that the Divestiture Trustee could" – I emphasise "could" – "be given the same incentives to maximise the sale prices as a bank appointed by Ryanair." That is very far from the Commission committing itself to the appointment of a divestiture trustee on such terms. That is not what they are saying, and unless they are saying that the concern remains a very valid one. In those circumstances we do submit that the appointment of a divestiture trustee

is wholly unwarranted, is very damaging to Ryanair, and it is a disproportionate interference with Ryanair's rights to property.

THE CHAIRMAN: Do we not have a problem here because in 115 and 116 it seems to me that the Competition Commission are saying that the divestiture trustee could be an investment bank and the divestiture trustee could be given the same incentives – that is at 115.

LORD PANNICK: Yes, but that is a matter for them. They are not saying to us, far less to the Tribunal, that that is the basis upon which they will be appointing the divestiture trustee. It is their appointment, it is not for us. Mr. Beard will make his submissions in due course. If he is able to tell the Tribunal that the Divestiture Trustee will be appointed on that basis then of course that is a matter that would wholly or partly remove this criticism. The others would remain.

THE CHAIRMAN: Up until now, as I understand it, there have been no discussions between Ryanair and the Competition Commission as to the process?

LORD PANNICK: We have made the point, we have expressed the concern about the financial consequences of the appointment of a Divestiture Trustee. The answer that has come back from the Commission is that it is possible to appoint a trustee on that basis. We, of course, for our part, are objecting to divestment on a number of grounds.

THE CHAIRMAN: I understand that.

LORD PANNICK: This is the final one. If Mr. Beard is able to tell the Tribunal that that is the basis, that is the same investment bank basis, that will be the basis of the appointment of a Divestiture Trustee if our other grounds of complaint fail, then this fifth and final ground of complaint will either have limited force or no force at all. I am telling the Tribunal what the position is, and we are not comforted by the Commission telling the Tribunal that it is possible to appoint a Divestiture Trustee on this basis. It is their appointment, it is not our appointment. It is their appointment and it is their appointment or prospective appointment because they are not prepared to proceed on any other basis.

MISS DALY: Can I ask this: I thought I read somewhere in the documents that the process - correct me if I am wrong or if I am jumping the gun - was that Ryanair would propose some type of short list which the Competition Commission would have to approve and that not to be materially ----

LORD PANNICK: I think that is the identity of the Divestiture Trustee ----

MR. BEARD: It may be possible to take that point slightly further, I am happy to dispose of this. The Defence, para. 253, says, and I will read it out:

"The only point made by Ryanair is a merchant bank acting on its behalf would be offered particular financial incentives to maximise the sale price …"

A point that Lord Pannick has made.

"However, that is simply a particular means to the same ends. There is nothing to prevent Ryanair from including such a term in the Divestiture Trustee's mandate if it considers the term necessary. The point is entirely consistent with the CC's conclusion, and provides no grounds for judicial review of the findings."

You will see in the footnote which goes to para. 6 and 7 of the relevant annexes:

"Ryanair will provide the terms of the mandate subject to approval by the CC."

All that is then being said in the skeleton argument is , "You turn up with a mandate putting that sort of stuff in, we can see how that can work".

LORD PANNICK: The concern remains, it is a possibility that the Commission may decide that it is appropriate to approve such terms, they may not. I am simply raising this point to indicate a final concern about the financial consequences of a Divestiture Trustee. I hear what is being said by Mr. Beard. If he is able to give further assurance that, if the terms that are proposed by Ryanair are standard commercial terms, the Commission will approve them, that will no doubt help considerably. If he is saying that the Commission has a power to approve, and it may or may not, then the point remains.

THE CHAIRMAN: I think, for my part, the skeleton argument is fairly clear at 115 and 116, which is that the Competition Commission is willing to be flexible and if you come up with reasonable terms they are going to agree them. They are not going to commit themselves in advance as to exactly what those terms because you have not proposed them, but it seems to me that the door is at least slightly open for you for them to be flexible. It would be very difficult for them, further down the line, to walk away from what is in Mr. Beard's ----

LORD PANNICK: Can I reflect on this. If it is the Tribunal's view, having heard Mr. Beard, that the Commission's position is that, in principle, it has no difficulty with such an arrangement and it is willing to entertain it, then no doubt the Tribunal will wish to record that in its decision and we can all proceed forward on that basis.

THE CHAIRMAN: That is how I have read the defence anyway, unless I have misread it.

LORD PANNICK: If Mr. Beard takes issue with that he, of course, will have ample opportunity to say so. I am prepared for today not to push this any further forward on that basis of what the Tribunal understands the point to be. It is the fifth and final point on divestment. The other points of course are different and distinct and they are all maintained.

That is our fifth ground of challenge.

The sixth ground of challenge - I can, I hope, be very quick indeed - is the challenge on a jurisdictional basis. We have set out our case.

THE CHAIRMAN: Just give me one minute. (After a pause) Yes.

LORD PANNICK: The sixth and final point was the territorial jurisdiction point, which we have developed in our notice of application and in our reply. We have said in our skeleton argument that we are not going to take time on this, but we are not, I repeat not, abandoning this ground of challenge. The Competition Commission's skeleton argument acknowledges at para. 118 that, as we suggest, the Court of Appeal are about to consider the relevant legal principles in *Akzo Nobel* ----

THE CHAIRMAN: Is anyone here in that case?

MR. BEARD: Yes.

THE CHAIRMAN: How are we on the timing, Mr. Beard?

LORD PANNICK: There is a hearing on 24th and 25th March, I am told.

THE CHAIRMAN: So it is imminent.

LORD PANNICK: 24th and 25th March.

THE CHAIRMAN: Is that an expedited hearing?

MR. BEARD: Not especially expedited, no. I cannot remember when the hearing here was. It was a year ago nearly, so I do not think it has hurtled through the Court of Appeal.

THE CHAIRMAN: It seems likely that we will give judgment in this well before the decision in *Akzo*?

LORD PANNICK: I would imagine so.

MR. BEARD: I think that would be a sensible working assumption, yes.

LORD PANNICK: Sir, I am simply concerned to be understood, as I know I am, not to be abandoning this point. We will have to reconsider the matter in the light of the Court of Appeal judgment, and we may, if so advised, seek to raise the matter in the Court of Appeal - if so advised. We would obviously need leave from this Tribunal or from the Court of Appeal, but it does seem unnecessarily inappropriate to travel over this ground when the issues of principle are about to be analysed.

THE CHAIRMAN: You still expect us to give a ruling on it?

LORD PANNICK: I am realistic on this matter. Mr. Beard will say, and you will hear no argument from me to the contrary, that on the basis of the principles hitherto established, we cannot succeed in our intention.

THE CHAIRMAN: Mr. Beard, I would like you to take me through Ground 6 when you come to it, so do not assume it is all taken as read, but I think we would have assistance if you take us through *Akzo*, particularly as we have got lay members.

MR. BEARD: Certainly.

THE CHAIRMAN: So you are realistic that, in the light of *Akzo*, it is going to be very difficult for you to succeed?

LORD PANNICK: I entirely accept that. Otherwise I would be seeking to persuade this Tribunal. I repeat, I am not abandoning the point, and the point remains one that we may wish to pursue at a later stage.

THE CHAIRMAN: When we come to *Akzo*, we would be grateful if you could take us through what effectively are the grounds of appeal and what the other side to the story is, if you see what I mean.

MR. BEARD: The grounds of appeal being brought by Akzo?

THE CHAIRMAN: What test are they saying it should be, as opposed to the test that has actually been found?

MR. BEARD: I can deal with that because we have had sight of the relevant documents. I do not think we would be telling tales out of school by going through it.

THE CHAIRMAN: It would be very helpful if you could do that for us.

LORD PANNICK: I am grateful to my friend, as always. Those are the six grounds. We have set out in our notice of application, which is core bundle, tab 4, para. 188, the relief that is sought if particular grounds are upheld. The relief is slightly different. I will not take the Tribunal through that, but it is there at para. 188. That is what we are seeking.

Those are my submissions. I am grateful for your patience. I would be very happy to try to answer any other questions.

THE CHAIRMAN: I think what we will do is if we have other questions we will deal with that when you come to your reply.

LORD PANNICK: Certainly, sir.

THE CHAIRMAN: It has been very helpful, thank you.

LORD PANNICK: Those are my submissions, thank you very much.

THE CHAIRMAN: Mr. Beard, you can start at 10.30 tomorrow if that is all right.

MR. BEARD: Certainly.

THE CHAIRMAN: There is no point in starting now.

MR. BEARD: I can start on Ground 1 if it is food for thought.

THE CHAIRMAN: No, let us just have a clear morning. How long do you think you will be? The whole day probably?

MR. BEARD: Yes, I think I am easily going to be the whole day.

THE CHAIRMAN: And then Mr. Flynn half a day?

MR. FLYNN: I doubt half a day, but give the width of the grounds I would certainly need a couple of hours on Friday morning.

THE CHAIRMAN: So we will easily finish by close of business on Friday.

MR. BEARD: I would hope so.

MR. FLYNN: Certainly.

LORD PANNICK: I am sure you hope so as well.

(Adjourned until 10.30 am on Thursday, 13th February 2014)