IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1219/4/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13th 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 Two

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.

MR. BEARD: Mr. Chairman, members of the Tribunal, may I start with Ground 1. Could we take authorities bundle 1, and turn up tab 2, this is an extract from the Treaty on European Union. There are now two Treaties, the Treaty on the functioning of the European Union and the Treaty of the European Union, and this is the latter of them. The reason it is here is because Article 4.3 of the TEU is the relevant provision that sets out the terms of the duty of sincere co-operation. It can be found on the second full page:

> "Article 4
>
> 1 In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States."

It was an interesting point. If you go down the page to Article 5, it says:

> "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality."

Of course, subsidiarity was one of those terms that was roundly mocked when it was coined in European phraseology, particularly amongst politicians in the UK. It is described under 5.3:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competences, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

That is the principle of subsidiarity articulated in Article 5, which starts off Article 4, and emphasises that unless specific powers are confirmed on the Union those powers remain with the Member States.

Going back up to Article 4.2:

> "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

Emphasising here that we are dealing with an arrangement of powers between the Union and the Member State, it is a situation which does not simply subordinate Member State to the EU. That is borne out when we come to Article 4.3:

> "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."

So it is mutual respect, it is not simply subordinating Member States to the EU. Obviously, in a scheme operating under the rule of law, it is important that the EU has uniform application of law across all Member States.

Then we come to the second part of Article 4.3:

> "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 acts of the institutions of the Union."

Then the third paragraph, which is the one that is the focus of this case:

> "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."

4.3 is referred at the duty of sincere co-operation and there have been various ways in which the duty of sincere co-operation has affected European law and the law across the Member States. The first is to require Member States to ensure their procedural rules do not deprive Union law of its full force and respect. The second is to disapply national laws where they conflict with Union law, and thirdly, requires Member State to avoid legal or administrative decisions which jeopardise the attainment of the Union's objectives.

The reason I labour these points is because when we come to Ground 1, there are essentially two simple issues. The first is that the Competition Commission in the UK and the European Commission in Brussels are considering separate transactions under separate jurisdictions. The Competition Commission is considering the minority shareholding acquisition by Ryanair, and the European Commission is considering only the public bid for the outstanding shares. It is not considering the minority shareholding at all. There is no overlap of jurisdictions.

Lord Pannick has accepted that in his submissions, but the consequence of that is absolutely fundamental to the consideration of this operation of duty of sincere co-operation. The only thing he now says, given that there is no overlap in relation to these two transactions, well, if the Commission, which has said actually you cannot put in a public bid for the remainder

of the shares is overturned by the European Court on appeal, an appeal which, of course, relating to the commitments offered by Ryanair - it is nothing to do with jurisdiction, it is only the commitments offered by Ryanair to the Commission, which is said in Ryanair's terms to have reduced the competition problems by divesting routes, and so on, where there are overlaps - the Court will accede to Ryanair's appeal. It will go back to the Commission, the Commission will say that, given these wide ranging commitments, or further commitments that are given on re-scrutiny, or whatever, you can in relation to this separate transaction go ahead with it.

In the meantime, under the remedy that is being put in place by the Competition Commission in its Report, in relation to the minority shareholding in relation to which it has exclusive jurisdiction, Ryanair will have been required to divest some shares down to 5 per cent.

The only point that Lord Pannick hangs his hat on now is, "If, second time round, the transaction we have sought, the third bid, is cleared, we might make a fourth bid for 100 per cent, and we might find it harder to get all of the 100 per cent of the shares if we only start off from 5 per cent rather than 29 per cent". Initially he relied on evidence from Mr. Komorek, but then he said that no fresh evidence was admissible in these proceedings, so I do not think we place any weight on that.

We do accept that there must be a risk that it would be harder, but the essence of the error that Lord Pannick and Ryanair make is that they are conflating the Union's objectives with Ryanair's objectives. Nothing in what the Competition Commission does undermines the Union's objectives here.. It might possibly, hypothetically, rather remotely, make life a bit harder for Ryanair if it wanted, on a fourth bid, a separate new transaction to buy shares. That objective of Ryanair's might be made a bit harder. Whether or not Ryanair says it is the world's favourite airline or Europe's favourite airlines, its objectives are different from the Union objectives, and Article 4.3 of the TEU is talking about jeopardising the Union's objectives.

A point that Lord Pannick specifically did not develop a point run in his skeleton argument, that it was the policy of the European Union to favour combinations consistent with the provisions of the European Merger Regulation, and we will come on to look at that, but that is not an objective of the EU. He did not maintain that, yesterday, rightly. So there is no jeopardy to any EU objective by an order, or possibly an undertaking from Ryanair pursuant to this Report, that it did divest its shareholding down to 5 per cent. That really is the end of this matter because if you have no overlap of jurisdiction, no challenge in relation to some

sort of conflicting reasoning between the Competition Commission's Decision and what is going on in Europe, because that is not a point that is being taken by Ryanair at all. The only issue is Ryanair's life might be made harder in relation to a putative transaction further down the line. There is just no engagement with 4.3. Elegantly though Lord Pannick merged the considerations of Ryanair and the EU they are not – perhaps unsurprisingly – entirely synonymous.

With that introduction, I will take Ground 1 in four parts. I will deal with some of the case law, particularly some of the case law that Lord Pannick referred to yesterday. I will look at EU objectives in the area, just to give the Tribunal some background, so I will go through the EUMR.

I will also go through a little of the history of this case, just to explain to the Tribunal why it is that historically there was a problem and now there is not. Then I will round off by concluding by reference to the Report why the Competition Commission's approach is right, why 8.12 of the Report, which concludes there is no jeopardy to the objectives of the EU is correct, but you already have the outline of the Competition Commission's submission.

If I may, I will turn to the case law. If we go to authorities bundle 1, tab 19. Lord Pannick was scrupulous to say "Do not worry about the facts" in relation to this case – well, we do! We worry quite a lot about the facts in relation to this case because the facts and the situation that is being dealt with explain why it is that the conclusions that have been reached here are significant but do not give Lord Pannick the sort of breadth of interpretation of the duty of sincere co-operation that he is talking about.

The facts, unfortunately, are a little tortuous. It does relate to the "ice cream wars" as they are referred to – not the Glaswegian ice cream wars, but Dublin ice cream wars.

If we could start at para. 3 of the Judgment, p11415, under the heading "The disputes in the main proceedings".

This was essentially a proxy war between Unilever and Mars in the guise of HB and Masterfoods respectively. HB was a subsidiary of Unilever.

> "3 For a number of years HB supplied ice cream retailers with freezer cabinets free of charge or at a nominal rent, while retaining ownership of the cabinets, provided that they are used exclusively for HB products."

Masterfoods, a subsidiary of Mars wanted to enter the Irish ice cream market in 1989. You will see from 5 that various retailers began to stock and display the Masterfoods products. HB demanded that the exclusivity clause be complied with by those retailers. Paragraph 6:

> "In March 1990 Masterfoods brought an action before the High Court of Ireland seeking, *inter alia* a declaration that the exclusivity clause was null and void under [what was then] Articles 85 and 86 of the EC Treaty"

Obviously, since then those Articles have gone through various mutations, they are now Articles 101 and 102 of the TFEU. So 101 – the prohibition on unlawful agreements, 102 – prohibition on the abuse of dominance.

> "HB brought a separate action for an injunction to restrain Masterfoods from inducing retailers to breach the exclusivity clause."

So there are two actions both focusing on the same issue and cross-claims for damages. "In April 1990 the High Court granted HB an interlocutory injunction." i.e. interim injunction allowing the operation of the exclusivity clauses. Paragraph 8:

> "… the High Court gave judgment in the actions brought by Masterfoods and HB respectively, dismissing Masterfoods' claim and granting HB a permanent injunction …"

In other words, upholding those exclusivity clauses. Masterfoods then appealed those judgments to the Supreme Court of Ireland, in parallel with those contentious proceedings Masterfoods lodged a complaint with the European Commission under what was then Article 3 of Council Regulation No.17, claiming breach of relevant competition law. Paragraph 11 – the Commission issued a statement of objections concluding that the HB distribution system infringed 101 and 102.

There is a little wrinkle in 12. As I am sure you know, under Article 101 an agreement is void unless it is exempt under 101.3. At that time national courts and authorities could not grant an exemption under what is now 101.3, it could only be done by the European Commission, so if you had an agreement that, on the face of it, fell within 101.1 and was restrictive, you had to notify it to the Commission and the Commission then had to sanctify it if you wanted to carry on.

HB, having had an indication in the SO that its system was infringing 101 and 102, said that they would notify their arrangements and ask for clearance under what was then 85.3, now 101.3. However that application was effectively not successful because a further statement of objection was issued by the Commission in 1997. Then they concluded their inquiry with a decision in 1998 saying that the freezer cabinet agreements – the exclusivity arrangements – were in breach of Articles 101 and 102, and there was rejection of the exemption of 101and you can see that from para. 15.

Needless to say, after all of this, HB was not happy with the position and so it brought an appeal to the Court of First Instance against the Commission's infringement decision in relation 101 and 102.

The problem was you then had a situation where there was a Commission Decision that was saying that the exclusivity arrangements were unlawful pursuant to European law and, of course, you had a pending decision of the High Court saying that they were absolutely fine. You also had an appeal going up to the Supreme Court against this. The Supreme Court said: "Wait a minute, we have a problem here. We are looking at the same exclusivity arrangements, we are looking at the same issues, yet I have conflicting decisions. We are dealing with an appeal from the High Court saying these exclusivity provisions are fine". Meanwhile the European authorities are saying: "No, you cannot do this, you cannot operate this scheme".

The Supreme Court then did what is the equivalent under European law of "phone a friend", and sent off a preliminary reference to the European Court of Justice saying: "What do we do here?" That is how we got into the discussion that ensued and considered the duty of sincere co-operation, because you have the most stark conflict here. In relation to these exclusivity provisions you have a national finding saying "Yes, you can", and a European finding saying: "No, you cannot".

Given the terms of what is Article 4.3 of the TEU, what was it that the Supreme Court should do in Ireland?

Then if we turn on to p.11427, starting at para. 45 you will see it is the findings of the Court:

> "… The principles governing the division of powers between the Commission and the national courts in the application of the Community competition rules should be borne in mind."

Paragraph 46 talks about how the Commission has been given the task of dealing with applying Articles 85 and 86. In particular, if you look at 47 it talks about this issue where only the Commission has competence; it has exclusive competence to offer exemptions under what was then 85.3 now 101.3. And it talks about, in 47:

> "National courts continue to have jurisdiction nonetheless to apply the provisions of 85.1 and 86, so 1011 and 102 now.

Then it says, in 48:

> "Despite that division of powers in order to fulfil the role assigned to it by the Treaty, the Commission cannot be bound by a Decision given by a national court in the

application of 101 and 102. The Commission is therefore entitled to adopt at any time individual Decisions because of the division of competences in relation to the application of competition law".

And then we have got 49, which was the paragraph to which Lord Pannick took you:

"It is also clear from the case law of the Court the member state's duty under Article 5 of the EC Treaty" —

Again, this is not Article 5 to which I have just taken you, this is Article 5 that later became Article 10 and is now Article 4.3 of the TEU. It is just to ensure you can never do consistent case law searches when you are preparing for any case.

"It is also clear from the case law of the Court the member state's duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of 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 for matters within their jurisdiction",

and that includes the courts. It includes the courts and administrative authorities, just to be clear. Then, 51, which Lord Pannick also took you to:

"The Courts held in para.47 of *Delimitis* [which was the previous case to which Lord Pannick took you] that in order not to breach the general principle of legal certainties, national courts when ruling on agreements or practices which may subsequently be the subject of a Decision by the Commission avoid giving Decisions which would conflict with a Decision contemplated by the Commission in the implementation of Articles 85.1 and 86 and 85.3 of the Treaty. It is even more important that when national courts rule on agreements or practices which are already subject to the Commission Decision, they cannot take Decisions running counter to that at the Commission, even if the latter's Decision conflicts with the Decision given by a national court of first instance".

So, 51 is saying, "If the Commission is seized of the same matter with which you as a national court or a national authority are seized, then you cannot take a conflicting Decision; and even more so when the Commission has actually taken the Decision you cannot then proceed as a national court to take a Decision that conflicts with the Commission's own Decision".

And then, 55:

"If as here in the main proceedings the addressee of a Commission Decision has within the period prescribed in the fifth paragraph of Article 173 of the Treaty brought

an action for annulment of that Decision pursuant to that Article, it is for the national court to decide whether to stay the proceedings until a definitive Decision has been given in the action for annulment or in order to refer a question to the Court for a preliminary ruling".

Well, it is not really surprising that that is the position being adopted here where you have got this absolutely stark and direct conflict.

"It should be borne in mind in that connection that application of Community competition rules is based on the obligation of sincere cooperation between national courts on the one hand and Commission and Community courts on the other in the context of which each acts on the basis of the role assigned to it by the Treaty".

"57 When the outcome of the dispute before the national court depends upon the validity of the Commission Decision [depends upon the validity of the Commission Decision] it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community courts unless it considers that in the circumstances of the case a reference to the Court of justice for preliminary ruling on the validity of the Commission Decision is warranted".

So, it is rather repetitive at 55, but the sense is there. When you are dealing with a national Decision that depends upon the outcome of a Commission Decision and that Commission Decision is being questioned in the European Court, you cannot just plough on. You either stay or you refer a question to the ECJ. And then 58 says you can take interim measures. But the point I am emphasising is just the closeness, the proximity of the issues there. And that is actually brought home in the opinion of the Advocate General. You do not actually have copies of that in the bundle, but could I pass them up because it is just useful, because the Advocate General actually engaged in a bit of consideration about how this tension works.

THE CHAIRMAN: We can put this at the beginning of this tab, can we not?

MR. BEARD: Yes, the beginning or end, wherever, but we would just think you slot it into this tab, yes. So, I know the Tribunal is familiar with the process of the European Courts, but before the European Court of Justice the normal process is for an Advocate General to give an opinion on the referred questions, and then it is adjudicated upon by the ECJ. So, the Advocate General's opinion is not binding, but it is instructive in particular where, as here,

the out-turn of the conclusions are similar. The reason it is useful is, if we turn on just on internal numbering, 1-11376, so this starts at the top left hand side of the page:

> "The need to avoid inconsistency between the Decisions of national courts and those of Community bodies".

So, we are in that territory.

Paragraph 14 talks about the different competences and refers the danger that arises, as the Court observed in *Delimitis* of a clash between domestic and European Decisions where you have got shared competences:

> "When does a risk of inconsistent Decisions arise?
>
> (a) Generally
>
> 15 The following introductory remarks must be made with regard to the question of when there is a conflict or the risk of a conflict between, on the one hand, a decision of the Commission applying … 85(1) and 86 … and, on the other, the decision of a national court on the same question".

And, at 16:

> "In order to establish such a form of conflict, a connection between the legal problem which arises before the national courts and that being examined by the Commission is not in itself sufficient".

Note the footnote there:

> "Such as, for instance, when national courts are examining the legality of an exclusivity clause in respect of the use of ice-cream freezer cabinets and the Commission is assessing an exclusivity agreement on the use of a newspaper distribution network".

You can see that in those cases the sort of analysis you would carry out in relation to these matters might be rather similar. But the Advocate General is saying, "No, no, no, that doesn't engage it because although you have got a legal question that is being considered, that does not engage the problem, essentially, because you have got to take into account the different factual context":

> "Nor is the similarity of legal problem where the legal and factual context of the case being examined by the Commission is not completely identical to that before the national courts".

And then there is footnote 5:

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

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

So, he is there emphasising you really have to have a very close proximity of issues that is required here. It is the legal problem that has to be relevantly identical here, and of course when we are talking about this case the point that I will be coming to is that of course we have a situation where the legal issue that is being considered by the Competition Commission is different from the legal issue that is being considered by the European Commission. Ryanair has conceded that. That is fundamentally undermining its case here.

> "The Commission's decision may provide important indications as to the appropriate way to interpret [the relevant competition provisions], but in this case there is no risk, from a purely legal point of view, of the adoption of conflicting decisions. Such a risk only arises when the binding authority which the decision of the national court has or will have conflicts within the grounds and operative of the Commission's decision."

When it says "grounds and operative parts", Commission Decisions have lots of recitals and then some conclusory Articles at the end and they are the operative part.

> "Consequently, the limits of the binding authority of the decision of the national court and the content of the Commission's decision must be examined every time."

Bear in mind, this is in a field of shared competence. We are in the territory, which is accepted, of separate exclusive competence in relation to this minority shareholding and the other bid.

I will just direct you to a couple of other paragraphs here and then move on. He goes on to talk about the present case, and actually worries about whether or not the overlap is sufficient - you can see that in para.17. Then he goes over the page and at (b) deals with the case law of the Court of Justice, and at 22 through to 25 talks *Delimitis*, and in para.25 just note, the present case is not covered by the *Delimitis* case law, and then highlights a number of distinctions. Those are perhaps paragraphs to be read at leisure. Indeed, the rest of the Advocate General's judgment is of interest.

I cite the Advocate General. It is not unfamiliar in these proceedings. It was material that was considered in the two CAT proceedings, *Ryanair v. OFT*, which, just for your note, is in authorities bundle 2 at tab 28, para.60, and indeed in the CAT judgment in *Ryanair v. Competition Commission*, authorities bundle 3, tab 44, para.38. This material is not

material that has not been considered before, but it is nonetheless instructive in relation to what we are talking as regards this duty of sincere co-operation.

Of course, this reflects the underlying issue which I highlighted at the start in relation to Article 4 and Article 5 of the TEU. Here you have got divisions of competence is mutual respect, and therefore, unsurprisingly, you have a situation where the European institutions are not just blindly steamrollering across anything that Member States may do. They are concerned that the duty of sincere co-operation is a mutual one, and where Member States have particular functions they should be able to get on with them.

The next case I am going to go to is another case that Lord Pannick went to. I will not go to *Delimitis*. We recognise that *Delimitis* talks about scarcely any risk, but it is important to consider *Delimitis* in the context of this further case law and the observations that are made in relation to it.

Can we go to *National Grid*, authorities bundle 2, tab 31. I only need deal with this relatively briefly. Lord Pannick, with fleet footwork, moved across what was going on here relatively swiftly. Again, the facts matter. Can we look at para.2 of the judgment of the Chancellor. It set out the fact that in 2007 the European Commission took a decision finding that there was a breach of Article 101 by a number of large engineering companies, which manufacture equipment called gas insulated switch gear which is used in the construction of electricity grids.

One of the people that buy this heavy industrial kit for building electricity grids is, of course, National Grid in the UK. National Grid, having seen this decision, thought, "Hang on a minute, if we were buying off a cartel we must have been suffering some loss in relation to the purchase of all this gas insulated switch gear". So they brought a claim relying upon that Commission Decision. You can see that from para.4:

> "The action is a 'follow on' action, in that it relies on the Decision for establishing the infringements on which it relies by reason of Articles 10, 81 and 249 EC Treaty and Council Regulation 1/2003/EC of December 2002."

A key provision there is Article 81, which is 101.

> "[Grid] claims damages in the sum of £249m. I shall refer to the Particulars of Claims in greater detail."

The key thing is that it is a follow on claim based on a Commission infringement decision. So it is saying, if you think of this as a breach of statutory duty claim, which requires a finding of breach of statutory duty and causation and loss, essentially what is being said is

that Commission Decision is the binding finding of infringement - in other words, the breach. Therefore, we are into the causation and loss stuff.

The defendants in the action - in other words, the people that have been subject to the findings of infringement by the EU Commission - did not go quietly into the night in relation to the infringement decision. Some of them had been fined extremely heavily, and they, therefore, appealed this decision out to what is now the General Court in Luxembourg, which was then the Court of First Instance. You can see that at para.5:

> "Between 18th February and 5th March 2009 all the defendants to the action issued applications seeking a stay of all further proceedings in the action pending the conclusion of their applications to the Court of First Instance and of any subsequent appeals to the European Court of Justice."

What you have here is that the defendants in this follow on claim are the people who are bringing appeals against the very decision that is relied upon in the follow on claim. In other words, if they are successful in their appeals in knocking over some or all of the Commission Decision, then some or all of the infringement finding that has been relied on by Grid will fall away. In other words, it is again, four square, precisely the same legal issues.

What you then see in the Chancellor's judgment, after a description of the pleadings and appeals, is consideration of the parties' submissions and conclusions from para.20 onwards, where there is effectively a consideration of those paragraphs of *Masterfoods* to which I have already taken you. What was being said by the defendants was, because there is a risk that we will knock over that Commission Decision when we go to the courts in Luxembourg, there is no point in doing anything now in these proceedings because it may be there will be no basis for these proceedings in due course. The Chancellor said, "I can see that here, we are in *Masterfoods* territory because it is the same legal issue, you are relying on an infringement that may be overturned in Luxembourg, I, plainly, cannot reach a final finding saying there is an infringement and you are entitled to these amounts of damages over it, I cannot do that, because that could be in conflict with a decision of the European Court saying, actually this Commission Decision does not stack up, it does not exist for the purposes of your damages claim". So you would have directly conflicting decisions. The Chancellor says, "I cannot do that, but what I can do is order you to get on with your pleadings, and I can order you to get on with disclosure". The defendants say, "Yes, but that could be a waste of costs", and the Chancellor says that will come out in the wash.

National Grid is not a good authority for Lord Pannick in this case, because all it does is show what agonies have to be gone through, even when you have got the absolute congruence of issues in proceedings in the UK and in Luxembourg.

I should just refer you to - I think Lord Pannick took you to it - the Chancellor describing the essence of the duty in *National Grid*. The object is to avoid any decision running counter to that of the Commission or the Community Courts. Given that objective, it is for the national court to consider, in accordance with its own procedures, how best to achieve it. As I say, a stay was put in place of the final trial. As it is the final trial is starting in June, so the appeals did not quite pan out as the defendants had hoped.

There are references to the Ryanair cases, I will come back to that because I am going to do a bit more history in relation to this particular situation. The other case I think it is perhaps worth just picking up is the *British Aggregates* case, which is at tab 49, authorities bundle 3. I am just going to summarise a little what is going on here. In that case the Treasury had sought to impose a levy on the sale of aggregates, which the appellants challenged on State aid grounds, both before the English Courts and the European Commission. Both Mr. Justice Moses and the European Commission took decisions in 2002 concluding that the levy did not comprise State aid and therefore could be put in place. Both those decisions were appealed, so the question of whether or not there was State aid in this levy was being considered both in the national courts and at a European level, and both of the first instance decisions – one by the High Court, the other by the European Commission, were being appealed respectively to the Court of Appeal in the UK and to the General Court.

Given the overlap between those cases, the appeal in the English Court of Appeal was stood out. 10 years later, the European Courts had completed their consideration and remitted the question of State aid back to the European Commission for a further Decision.

In 2013, while that Decision was still awaited, the appellants applied for a stay of the English appeal to be lifted. This is where Lord Justice Longmore considered the duty of sincere co-operation and concluded that, although there was plainly a risk of inconsistent decisions, in relation to the same levy and the same State aid arguments nonetheless it was consistent with the duty of sincere co-operation that the UK Court of Appeal went ahead anyway.

Lord Pannick did not really attempt to explain how that fitted with his account of the duty of sincere co-operation, but he did suggest three distinctions in relation to the case which meant, I suppose, that he thought this case should be distinguished, because on the face of it what this is saying is that that allocation of responsibilities, the mutuality of respect, means

that after a while the duty of sincere co-operation, even in relation to absolutely overlapping legal issues means that the national court should carry on. The first point of distinction was he said this was an outlandish case because 10 years had elapsed. He is right that it is a very long time. He is also right that, of course, here we are only dealing with eight years, eight years since the acquisition of the minority shareholding and the matter being considered by the Commission; there is a difference, we accept that. But, to suggest therefore that there is somehow a salient distinguishing difference between the two cases we are not sure we understand. The second point he makes is that here, what Lord Justice Longmore was considering was his discretion whether or not to be able carry on, and he exercised his discretion to do so. We say this duty of sincere co-operation means that the Competition Commission cannot carry out its statutory obligations here, notwithstanding that there is no overlap of jurisdiction at all, you are saying that this case should be distinguished because there was a discretion to carry on. That does not seem to assist Lord Pannick. If the Court of Appeal is there saying they have a relatively broad discretion in relation to the operation of the duty of sincere co-operation, the Competition Commission is here in a much stronger position, not weaker. It does not distinguish this case at all.

THE CHAIRMAN: I am not sure if they are saying they have a broad discretion. They are saying the circumstances are fairly exceptional, and they say the position would have been different had there been a clear timetable and some knowledge of when the European system would do its stuff. I think the Court of Appeal just got fed up with waiting.

MR. BEARD: That may well be right but, of course, if Lord Pannick is right that effectively the duty of sincere co-operation is this sort of bright line obligation, it means that, notwithstanding our duty we cannot carry on and complete our remedies, that is not suggesting that somehow we have got it wrong, that is suggesting actually there is a margin of discretion in relation to the duty of sincere co-operation.

THE CHAIRMAN: If there is a conflict in the first place?

MR. BEARD: If there is a conflict in the first place, and we are saying there is no conflict in the first place, but we do also say ----

THE CHAIRMAN: If there is a conflict you say you have resolved it by the form of the undertakings that they can reacquire shares if they wish, if they have clearance from the European side.

MR. BEARD: There is just no clash here at all. The point I was making was that this was Lord Pannick's point of distinction and I am saying it is not a point of distinction and, if it does anything, it goes in the Competition Commission's favour here.

The third point he refers to here is that it is not to do with remedies. That is just not right. It is a Court of Appeal decision dealing with the first instance matter, and the first instance matter was determining whether or not there was State aid, and so if the Court of Appeal overturns the court of first instance plainly it is ingoing to be able to make relevant legal changes to the position of the levy and, even if it were a matter of remittal you are still in a position of creating a change in the legal situation of the Treasury in relation to those levies, and you can see that from paras. 12 and 14.

The three putative bases for distinction of this case simply do not assist Lord Pannick at all.

THE CHAIRMAN: What happened in the Court of Appeal? Has the Court of Appeal given judgment yet?

MR. BEARD: I do not think so.

THE CHAIRMAN: I have not seen it.

MR. BEARD: It was April last year, I do not know when the hearing was. We can make inquiries because it is respective people from chambers and along this bench that are in it. Apparently it may not be going to full appeal is what Mr. Williams tells me.

I will go back through any of the other case law. We have referred to more of the case law in relation to the duty of sincere co-operation in our defence, but I think the point is tolerably clear from the key authorities that Lord Pannick relied upon: *Masterfoods* and the *National Grid* authorities, and his attempts at distinguishing *British Aggregates* that he is nowhere close to establishing that in this case where he has accepted that there is a separation of jurisdiction – there is no overlap in jurisdictions here – that the duty of sincere co-operation is not going to tell you anything in relation to these matters, in circumstances where the only additional issue you are putting forward is a potential practical impediment to Ryanair in relation to a further future bid.

I said the second strand I was going to go to was in relation to those EU objectives, and what it is that we are dealing with in relation to the EUMR. This is not a particularly exciting excursion into the legislation but it is, perhaps, important just to look at what the EUMR does. It is in authorities bundle 1 at tab 4. It is entitled "the EC Merger Regulation" but since we are now dealing with the EU, we refer to it as "the EUMR" and it has not materially changed.

I will just refer you to a couple of the recitals. We start at recital (3):

"The completion of the internal market and of economic monetary" —

LORD PANNICK: Would you mind reading the second —

MR. BEARD: Of course. Yes, certainly.

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

(3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations".

So I guess there are two things to be taken for this. The EC Merger Regulation is being put in place as part of the system of regulation to ensure that the internal market works across the EU; and the internal market is made up of a series of freedoms to trade, reducing barriers to trade between member states enabling establishment enable capital and so on. And clearly the concern is that as those freedoms are exercised and the internal market operates people will want to merge and those mergers may create difficulties, and one can see that from recital (4):

"Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community. (5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it".

And that phrase "significantly impede effective competition" is the sort of substantive test but we will come on to that. At (6):

"A specific legal instrument therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations".

So, this is the regulation that controls concentrations.

"Regulation …4064/89 [that is the preceding merger regulation] allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In

accordance with the principles of subsidiarity and of proportionality as set in Article 5 of the Treaty [and that is Article 5 to which I have already referred you] this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact on which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a 'one-stop shop' system and in compliance with the principle of subsidiarity. [So this is subsidiarity working upwards because it used to be before the EU Merger Regulation you could end up with a situation if you have a major European company or global company you would have to get merger clearance in all sorts of member states, and that was an onerous process. It is more efficient if it can be dealt with by one-stop shop clearance system, which is what is being referred to here]. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States".

So, subsidiarity upwards for those that fall within the scope of the Regulation, but if they do not it is explicitly saying, "This is left to member states to deal with".

"(13) The Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information.

(14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible".

And then if we just move on to (20):

"It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate

to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time".

Now, the reason I just emphasise that part of Recital (20) is because — I know the Tribunal is familiar with the history, and I will go through it in more detail — back in 2006 Ryanair over a period of transactions in a short period of time acquired around 29 per cent of Aer Lingus. At the same time it made a public bid for the remainder of Aer Lingus. That is what is referred to as "the first bid".

That whole bundle of arrangements was then scrutinised by the European Commission in its first Decision. It was treated as a single concentration, all of it, because all the transactions including the bid happened within the relevant period.

THE CHAIRMAN: The ten day period or whatever.

MR. BEARD: Yes, it is slightly longer with one of the provisions, but yes, broadly right.

THE CHAIRMAN: Yes.

MR. BEARD: And so it said all of that could happen together. Of course now the reason why you have two separate mutually exclusive jurisdictions is because the CC is still considering that minority shareholding that was acquired back in 2006 whilst the Commission is considering what is referred to as "a third bid" for the remainder of the shareholding which came many years later. And therefore this is not a case where the provisions of recital (20) apply, and that is why you get this situation where in the past there was a consideration by the Commission. Now there is not, and you get this mutual exclusivity.

I think obviously the recitals to any directive and regulation are compelling reading, but I leave it there and move on to the substantive provisions if I may, just briefly.

THE CHAIRMAN: Yes.

MR. BEARD: Article 1, "Scope":

"Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article".

And then there are various thresholds as to what levels of aggregate and worldwide and Community turnover of the parties concerned in a merger will constitute a Community dimension to a concentration, and I will not go through those. Then you have got Article 2, "Appraisal of concentration":

"1 Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market. In

making this appraisal, the Commission shall take into account: (a) the need to maintain and develop effective competition [and so on]".

And then:

"2 A concentration [in other words a concentration with a community dimension] which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market".

In other words, if you do not significantly impede competition, then the EU rules are not going to stop you proceeding with it. That is the structure. There is nothing here that says, "We are going to make it easier for you". There is nothing here that says, "Well, once you've crossed this threshold shareholders in the company you are bidding for should jolly well hand over those shares". There is nothing in the EU Merger Regulation that is intended to facilitate mergers, apart from the fact that you can go through a one-stop shop clearance process and avoid the bureaucratic problems that you had previously of multiple notifications.

The Article 3, "Definition of Concentration":

"A concentration shall be deemed to arise where a change of control on a lasting basis results from [merger or acquisition]."

Then 2, and the reason I just draw attention to this is because the control threshold that means that minority shareholdings do not get caught by European merger control.

"Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to considerations of fact and law involved, confer the possibility of exercising decisive influence on an undertaking …"

The decisive influence threshold is subject to guidance and case law, and all sorts, but, essentially, above 50 per cent is a broad rule of thumb we are talking about, which means that European law is not concerned minority shareholdings.

There are all sorts of debates going on at European level as to whether or not the EU merger control regime should be extended, but it is a salient difference between the UK regime and the European regime that we do consider shareholdings below 50 per cent where only material influence is conferred. That is not the test at European level.

Article 4: in contrast to the domestic regime the European regime actually requires you to notify a merger. So the domestic regime is a voluntary regime. You are not required to

notify a merger in the UK. You can do, but you do not have to. At European level you have to.

Just in passing, and I think this is important to bear in mind in relation to those sorts of allocation of competences, under 4.5:

> "With regard to concentration as defined in Article 3 which does not have a Community dimension …"

so it is not big enough -

> "… which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in para.2 may, before any notification to the competent authorities, inform the Commission by means of a reasoned submission, that the concentration should be examined by the Commission."

So this is an exception. If you have got a situation where your merger does not cross the relevant thresholds that are referred to in Article 1, you can actually get together and say, "Look, rather than having to notify the number of Member States which we may have to, let us all agree that the Commission deals with it".

Article 5 is about the calculation of turnover for those thresholds. Article 6 sets out the process for examination and notification and the initiation of proceedings. Very broadly, what you have is in 1(a) and (b), what is referred to as "Phase 1 procedure", which is, are there any real concerns in relation to this merger? If there are not then we will say, "We are not stopping you", but if there are then it goes on to Phase 2. You get, later on in Article 10, time limits for those exercises, and Phase 1 is much shorter than Phase 2, as you would expect.

Just to note, Article 7 actually suspends the concentration. So there is an automatic suspension provision. You have got to notify it and then it is automatically suspended.

There is a funny little wrinkle in relation to public bids, where you are allowed to actually complete a public bid if you have put it through, but then you cannot do anything with the shares you have acquired. It is just so that you do not end up with conflict between takeover rules in various jurisdictions and merger control rules.

Then Article 8, the powers of decision of the Commission. It can declare a concentration compatible, it can do so only after certain undertakings to modify the concentration have been put forward, or it can say, "We are concerned that there is a concentration and it is not compatible with EU law". If it finds that that concentration has already been implemented

then it can take specific steps to have that unwound, and it may take interim measures as well under Article 8.5. So, not surprisingly, there is a range of a powers it can have.

Just note Article 9, "Referral to competent authorities of the Member States". The reason I am just emphasising these provisions is because, although it is a one-stop shop, there is close liaison between the different authorities and there are all sorts of situations where mergers that would otherwise be dealt with by Member States can be passed up to the Commission, and mergers that are dealt with, on the face of it, can actually be dealt with by Member States, and this is one of the latter examples:

> "The Commission may, by means of a decision notified without delay to the undertakings concerned … refer a notified concentration to the competent authorities of the Member State concerned …"

This is essentially where you have crossed the European dimension turnover threshold, but most of the concerns arise in relation to one Member State's market.

There have been some cases, for instance, in relation to beer supply in the UK that had a European threshold because of the size of the companies concerned, but actually the overlaps between the companies mainly related to the UK so they were then dealt with in the UK and under the domestic merger control laws, so that when it comes back to the Member State they do not apply European merger control, they apply domestic merger control.

Article 10 I have dealt with. I am not sure I need to deal with many of the other provisions. I just note Article 19 about liaison with the authorities of Member States.

Mr. Flynn suggested it might be worth picking up 10.5 before we go any further:

> "Where the Court of Justice gives a judgment which annuls the whole or part of a Commission Decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1).
>
> The concentration shall be re-examination in the light of current market conditions.
>
> The notifying parties shall submit a new notification or supplement the original notification, without delay …"

I think there are two points to draw from that. First of all, I think Lord Pannick, although he initially said his appeal out in Luxembourg could result in some sort of final determination in his favour, resiled from that and recognised that even if he were to be putatively successful out in Luxembourg it would have to come back to the Commission, and that is

what this is saying. It is also saying that you then carry out a new assessment in the light of the relevant conditions.

Then on 19, another provision about "Liaison with the authorities of the Member State": the idea that these are bodies are not co-operating is just not right. The duty of sincere co-operation that is manifest in that fundamental Treaty provision has been built into all sorts of relationships because necessarily there is a complexity in the relationships in dealing with these matters between the Member States and the European Commission, particularly when you have these thresholds that move stuff into a European dimension when you have decisive control, and yet you have national laws that apply in relation to different levels of control and in relation to different sales of merger.

Then Article 21, just to emphasise, this is effectively the provision that makes the EU Commission a one-stop shop for concentrations with a Community dimension:

> "1 This Regulation alone shall apply to concentrations as defined in Article 3 … except in relation to joint ventures that do not have a Community dimension and which have as their object or effect co-ordination of the competitive behaviour of undertakings that remain independent.
>
> 2 Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.
>
> 3 No Member State shall apply its national legislation on competition to any concentration that has a Community dimension."

That, as I will come on to, is really the key one-stop shop provision that means that, if you are being dealt with in relation to a transaction at a European level, national law cannot get involved which, to anticipate the history, is why the OFT initially in relation to this minority shareholding did not get involved and could not get involved because the European Commission was looking at the whole of the first big transaction and the reason that matters, to go back to what I was saying about the duty of sincere co-operation is you had a straight clash between jurisdictions. You had the OFT, if it had gone ahead, and of course the interesting story is that Ryanair subsequently argued it should have done, but we will leave that to one side for the moment, the OFT was saying that if it went ahead and considered this minority shareholding that is what the European Commission is doing. That means they will both be looking at the same transaction, part of the same transaction. That is squarely in *Masterfoods*' territory. In those circumstances we could not go ahead and 21.3 says we should not be applying our legislation when it is being dealt with at

European level. We are not in that territory any more. The world has changed and moved on.

Just note 22, this is another of those mechanisms by which you can refer a case up to the Commission where there is not a Community dimension but a number of Member States are affected. Again, it is this interrelationship between the two sets of authorities. It is important to go through that.

The very simple point that comes out of it is that this regulatory regime has been put in place (a) dealing only with concentrations with the Community dimension and the minority shareholding is not one of those; and (b) it enables the EU to stop concentrations through the notification scrutiny process if they are going to significantly impede effective competition, but what it does not do is, if it says they are compatible, do anything to facilitate that. During the course of a phase 1 and phase 2 inquiry it might well be that all sorts of share dealings will have gone on in relation to a company in respect of which there might have been a public bid that had not been completed, life might have become all sorts harder for a putative bidder that has had to go through an EU process. The EU process simply does not care. That is the way the world works. Indeed, on occasions, people do not launch bids just because they know that they are going to have to go through a process where a rival bidder will not because there are not, for instance, overlaps, and they know in those circumstances they are in a strategically disadvantaged position. Again, that is just the way that regulatory schemes work sometimes.

THE CHAIRMAN: So you are saying that Europe does not care if the bid does not go ahead at the end of the day?

MR. BEARD: No, it does not care.

THE CHAIRMAN: They do care to the extent of stopping a transaction, but you are saying to the extent they say a transaction is permissible it is not an objective of European Community policy or law but it should actually go ahead, and you say many things could have happened in the interim.

MR. BEARD: It is a freedom to complete that you are then afforded, but it is not an objective to facilitate.

THE CHAIRMAN: Shall we have a break?

MR. BEARD: Yes, I am sorry.

THE CHAIRMAN: 10 to 12.

MR. BEARD: Thank you.

(Short break)

MR. BEARD: I will try and move along a little bit faster.

THE CHAIRMAN: Do not feel under any pressure as to time. This is all very helpful.

MR. BEARD: I am grateful. If I may, then, with that indication, I will just go through a little bit of history. Authorities bundle 2, tab 27 – just the briefest of backgrounds. You have a situation where Aer Lingus was listed in October 2006 and in days Ryanair built up a substantial shareholding, and then at the back end of October 2006 was making a public bid for the entire share capital still building its minority shareholding incrementally. Ryanair notified the European Commission of its bid at the end of October. Eventually, the Commission gave a decision prohibiting Ryanair from acquiring control over Aer Lingus. The Commission also decided that although it had taken a decision in relation to the entire concentration, it was not going to require Ryanair to divest the minority shareholding.

Aer Lingus, as no doubt Mr. Flynn will attest to in due course, was not wildly happy about that and decided it would take action; it wanted to challenge the European Commission Decision in that regard, and actually elicited a formal decision from the Commission that it was not going to require minority shareholding divestiture. So it brought an appeal in the General Court in relation to that matter; it also brought an application for interim relief in the General Court, saying, "Whilst we are appealing, on the basis that the minority shareholding should be divested, we want to make sure that nothing happens with this minority shareholding, Ryanair does not do anything we wouldn't like".

Of course in the background Ryanair also not wildly happy about the Commission Decision prohibiting its bid, it was appealing, and so you got, eventually, parallel decisions of the Court of First Instance. But what I wanted to go at tab.27 is just the decision of the President of the Court of First Instance in relation to the interim relief proceedings, partly because it is a handy place just to pick up some of the history, but it also explains why it is that we have ended up where we are, to some extent.

So the order of the President and his reasoning begins at p.418 with a recitation of some of the relevant provisions of the EUMR Article 3 and Article 8. When I was going through the EUMR at Article 8 I mentioned the fact that the Commission may take interim measures and take action to unwind a concentration with a community dimension, and what the Commission said was that that was not appropriate in these circumstances. And if we go down to 421, we have just got a useful recitation of the facts about Aer Lingus, shares being admitted to trading on 2nd October; Ryanair built up a substantial stake; para.5, Ryanair lodged its notification with the Commission; para.7, the Commission adopted the decision initiating the phase two proceedings.

Then if we go over the page you will see, probably para.8 that is just the June 2007 date for the Prohibition Decision.

Following the Prohibition Decision, Ryanair acquired more shares, that is para.10, so that is how we have ended up with the 29 per cent.

> "During the proceedings before the Commission prior to the Prohibition Decision, Aer Lingus submitted that the Commission should take a decision under Article 8(4) of the Regulation requiring [divestment of the minority shareholding]".
>
> On 27 June, the Deputy Director General … addressed a letter to the applicant [saying] … the Commission did not have the power under Article 8(4) of the Regulation to order Ryanair to divest itself of its minority shareholding",

and for the same reasons said no power under Article 8(5). That was then followed, as you can see from para.14 by a more formal Decision from the Commission in relation to that matter, which is then contested. And so the contested Decision is described in para.15:

> "In the Contested Decision, the Commission took the view that, pursuant to Article 3 of the Regulation, a concentration arises only where an undertaking acquires control, control being defined as the possibility of exercising decisive influence. As to Article 8(4) of the Regulation, the Commission recalled that this provision allows it, where a concentration has already been implemented, to require the undertakings concerned to dissolve the concentration, in particular through the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration.
>
> 16 However, the Commission found that the concentration assessed in the present case had not been implemented [because it had not gone through with this public bid] in so far as Ryanair had not acquired control of Aer Lingus. The transactions that were carried out during the Commission's proceedings could therefore not be considered to constitute implementation …"

And:

> "… the Commission underlined that the minority stake … did not [afford] *de jure* or *de facto* control … within the meaning of Article 3(2) of the Regulation".

And then if we move on there is a challenge brought by Aer Lingus, and if we go to p.442 at 82:

> "The applicant submits, in essence, that the Commission wrongly refused to take action under Article 8(4) and (5) of the Regulation against Ryanair's minority shareholding …. In that respect Aer Lingus contends that the minority shareholding

in question has substantial negative effects … and submits that the Commission was wrong …",

And then down at the bottom of the page, 443:

"Based on the parties' arguments, as set out above and discussed during the oral hearing, the main question to be addressed by the President in the current proceedings for interim measures, as far as the requirement of a *prima facie* case is concerned, is whether the applicant has adequately demonstrated that, *prima facie,* the Commission wrongly interpreted the expression 'implemented' in Article 8 to imply an acquisition of control and that, on the other hand, the 'implementation' requirement should be construed to be satisfied by any actions or steps taken by the notifying party with a view to consummating the concentration. In other words, the issue is whether 'partial implementation' or implementation of any of the elements … can constitute 'implementation' [under 8(4) and 8(5)]".

And the President goes on and concludes that it cannot and that Aer Lingus has failed to demonstrate that prima facie case.

And if I could just turn on to 448 at para.100:

"Finally, the applicant argues that the interpretation of Article 8(4) and (5) adopted by the Commission, in conjunction with the Article 21(3) prohibition of Member States applying their national legislation on competition to any concentration having a Community dimension [which we have seen] gives rise to a lacuna which is incompatible with the aim of the Regulation. In this respect it should first be noted that the same factual scenario whereby an undertaking enjoys a minority shareholding in a competitor, not giving rise to control, and that such competitor might consider that the minority shareholding in question is harmful to competition, could very well in cases where such minority shareholding is not acquired in the context of a concentration. In this scenario, the Regulation would clearly not apply, and the impossibility for the Commission to scrutinise the minority shareholding in question under Article 8(4) and (5) … would clearly not be deemed to constitute a lacuna in the ability of the Community to secure undistorted competition".

And then in 101 is this consideration of Article 21(3), it must be read in conjunction with Article 21(1). And then if I start just halfway down:

"On this basis, as the Commission sets out in its written observations, Article 21(3) cannot be said, *prima facie,* to apply since there is no concentration in existence, or contemplated, to which the Regulation alone must apply. The remaining minority

shareholding is, *prima facie*, no longer linked to an acquisition of control, ceases to be part of a 'concentration' and lies outside the scope of the Regulation. Accordingly, Article 21, which under recital 8 to the Regulation is aimed at ensuring that concentrations generating significant structural changes are reviewed exclusively by the Commission in application of the 'one-stop shop principle', does not in principle, under these circumstances, prevent the application by national competition authorities and national courts of national legislation on competition".

And the fact that it is being challenged does not make any difference to that, it is said there, so the out-turn of this decision was that the President is saying, "Well, although when the Commission considered it, it considered it all as a single concentration, when it comes to implementation and remedies, actually the minority shareholding cannot be dealt with as we do not have power at all".

Now Aer Lingus, having lost on interim relief, persisted through to its appeal, and that is found at tab.35 in this bundle. I will not go through the background because there are a number of matters raised, but if we could just go on to 3730 because these issues were again ventilated. But at para.89, so this is not the interim relief, this is the substantive appeal by Aer Lingus, the 2010 judgment:

"Finally, it should be noted that the Commission stated, in the contested decision, that Article 21(3) of the merger regulation merely imposed an obligation on the Member States and did not confer any specific duties or powers on the Commission".

So, it is quite an interesting perspective in and of itself. Lord Pannick is trying to talk about obligations on the Commission and the objectives of the EU.

"It therefore considered that it did not have the power to give a binding interpretation of that provision and that it was not in a position to act in response to Aer Lingus' request for an interpretation.

Like the Commission, the Court points out that Article 21.3 of the Merger Regulation states that no Member State shall apply its national legislation on competition to any concentration that has a Community dimension and that it thus does not confer the power on the Commission to adopt a measure producing binding legal effects of such a kind as to affect Aer Lingus' interests. The Commission can therefore not be criticised by having reiterated in its response the legal framework applicable to the present case and the consequences to be drawn from it …

91 In addition, the applicant's argument in the present case invite the Court to examine a hypothesis which is invalid in so far as the application of Article 8(4) and 8(5) of the merger regulation is not based on erroneous conclusions as claimed by the applicant. Where there is no concentration with a Community dimension, the Member States remain free to apply their national competition law to Ryanair's shareholding in Aer Lingus in accordance with the rules to that effect."

That was the situation. As I say, on the same date as this judgment of 6th Jul 2010 there is a *Ryanair* appeal judgment where Ryanair's appeal is refused.

That judgment having come out, the question then arose of whether or not ----

THE CHAIRMAN: Is that judgment in the bundle? I cannot remember.

MR. BEARD: The *Ryanair* judgment is not in the bundle. There is no difficulty in providing it. It is a bit of a whopper and I am not sure that anyone is specifically referring to it. We can provide copies of it if that would be of use.

THE CHAIRMAN: It would be.

MR. BEARD: Certainly. In any event, the question then arose as to what should happen with the minority shareholding. At that point, or rather more exactly in September 2011, for reasons that do not matter for these purposes but after this judgment, the OFT who act as effectively phase 1 in domestic merger control, informed Ryanair that they would be investigating whether there was a relevant merger situation, which is the term that is used in the statue, which I will come to in relation to Ground 3. It is a term that Lord Pannick took you to. Ryanair was not wild about that idea because, of course, what Ryanair was concerned about was that the minority shareholding could be found not to confer decisive influence but to confer material influence, and that could give rise to a concern about substantial lessening of competition and potentially a reference to the Competition Commission and in due course ----

THE CHAIRMAN: Between all of this we have the second bid. Can someone give me the precise dates? I know I have got a date of December 2008, but I want the actual date, as well as the date on which it was abandoned.

MR. BEARD: I am very sorry, I do not have that in my notes, but we will provide it.

THE CHAIRMAN: Those two dates.

MR. BEARD: Sorry, the second bid date and?

THE CHAIRMAN: The date it was abandoned in January 2009.

MR. BEARD: It was fairly shortly afterwards.

THE CHAIRMAN: I know it was fairly shortly, I just do not have the precise date.

MR. BEARD: We will track that down. I am sorry I do not have that to hand here. We will be able to get it from the judgments.

In any event, obviously the second bid was for the incremental portion.

Ryanair were not wild about the idea that the OFT would then be investigating the minority shareholding, and in particular concerned that the European Court and the President in the interim relief proceedings were saying, "Look, this minority shareholding, it is not a matter of EU law, it is not within the scope of the EUMR, national laws can apply to it". So Ryanair then turned round and said, "OFT, you could have applied national law some time ago, you should have applied national law in relation to the minority shareholding some time ago", and, as we will come on to see, the OFT only has jurisdiction in relation to mergers that have occurred within the past four months, and four months had, by then, long lapsed since 2006.

It was at that point that the OFT said, "No, we think there is a specific provision which says if we could not carry out an investigation because of what is going on at a new sea level that four month clock does not run, and because the four month clock does not run we can start now because there were no further appeals from this". So the first round of litigation in this saga was a challenge by Ryanair to the OFT even picking up the pen and looking at the minority shareholding back in 2011.

What was said by the CAT, and just for your notes that judgment is at authorities bundle 2, tab 28, was that the OFT was right, it could not carry out that investigation whilst the court proceedings were still going because the court proceedings challenged whether or not the acquisition of the minority shareholding could be retained by Ryanair, which was part of the Ryanair appeal, or should have been divested pursuant to EU law, which was the subject of the Aer Lingus appeal - in other words, the subject matter, that transaction, that acquisition of those shares, was the subject of consideration in the appeals before the European Court. Therefore, on Ryanair's application for judicial review saying the OFT has no power to go forward, the CAT rejected that. It then was appealed to the Court of Appeal, and this judgment also is not in the bundle, but we can provide copies of it for completeness. The Court of Appeal upheld the CAT's decision which meant the OFT went on and considered phase 1 in relation to the minority shareholding.

THE CHAIRMAN: I think I have read that, that is the December 2011 one, but it would be useful to have another copy of it.

MR. BEARD: I will provide it. The outcome of it was that the OFT decided that the relevant test under s.22, which I will come back to, of the Enterprise Act was met and therefore the matter should be referred to the Competition Commission for what is effectively the domestic phase 2 inquiry. At that point Ryanair decided that actually it would make another bid within days of the reference to the Commission, and that is the third bid.

Having made that third bid, it then notified that to the European Commission and then said "CC, you cannot continue with your investigation, because we have notified our new third bid to the European Commission and if you carry on your investigation will clash with what is being done at a European level". That was the subject of the judicial review that was considered in the CAT, and that judgment is at authorities bundle 3, tab 44, because that is *Ryanair v. The Competition Commission.* I am sorry, the reference was on 15th June, and the announcement of the bid was on 19th June, so it is four days after the reference. Then the challenge is brought saying it would be in the breach of the duty of sincere co-operation to carry on with this in circumstances where the European Commission is scrutinising the third bid. I am not going to go through this in detail, but the conclusion is at para.82:

> "This is not a case of 'overlapping jurisdictions' as that term is used by the Chancellor in the *Ryanair* Court of Appeal decision …"

So that is the *Ryanair* decision in the Court of Appeal that is not in the bundle, the challenge to the OFT.

> "In this case, there is no prospect - even contingently - of the exclusive jurisdiction conferred on the European Commission by Article 21 of the EC Merger Regulation, the Minority Holding does not. This fact distinguishes the present case from that before the Court of Appeal in *Ryanair* Court of Appeal Decision: there Ryanair's minority shareholding in Aer Lingus was part of the same concentration with a Community dimension as Ryanair's first public bid, with the result that the entire concentration – including the minority holding – was subject or potentially subject to the EC Merger Regulation.
>
> 83 This is a case where there are parallel or concurrent jurisdictions:
>
> (1) In the case of the Public Bid, the European Commission has exclusive jurisdiction.
>
> (2) In the case of the Minority Holding, the European Commission has no jurisdiction, and the matter falls within the purview of the OFT and the CC. There is no prospect, as regards the Minority Holding, of Article 21 applying, let alone reviving.

84 Accordingly, we reject Ryanair's contention that, as a matter of law, the duty of sincere co-operation precludes the CC from taking any further steps in the investigation.".

That is the core of it Lord Pannick said.

"Of course, as Mr. Beard QC, for the CC, accepted, the CC remains subject to the duty of sincere co-operation and must avoid taking any final decision in respect of the Minority Holding which would, or could, conflict with the European Commission's ultimate conclusion on the compatibility of the Public Bid with the common market. That does not mean that the CC is precluded, as a matter of law, from taking any further steps in the investigation."

Of course, if previously the situation had been misstated by the Competition Commission that would obviously be important. Whether or not it has any impact on the legal analysis here is a separate issue entirely. However, with respect to Lord Pannick, nothing being said there is wrong or inappropriate. The domestic authority remains subject to the duty of sincere co-operation. It will do throughout. At that time, when you have the European Commission carrying on its investigation, and the question is: should the Competition Commission down tools entirely or carry on, all you need to know at that point was whether or not it was a requirement to down tools. You did not have to work through all of the possible permutations of when there might or might not be some issue that might arise in relation to duty of sincere co-operation.

As time has gone on, what is at issue has become clearer, and as it is put against us today it is only one point that is raised against the Competition Commission. But, at the time, out of an abundance of caution, it was being recognised that if there could be some sort of issue raised under the duty of sincere co-operation it was being made clear that would continually apply. Really, that is then carried through ----

THE CHAIRMAN: What would happen if, for example, the European Commission Decision was that there should be no prohibition on the bid?

MR. BEARD: If it had been entirely cleared?

THE CHAIRMAN: Yes.

MR. BEARD: We do not know the answer to that. One would have to ask the group on a hypothetical basis the extent to which they might take that into account in consideration of the minority shareholding.

THE CHAIRMAN: So you are saying if the Commission had said: "We give clearance to this" you are saying it would be in breach of the duty of sincere co-operation for the Competition Commission to issue a divestiture order?

MR. BEARD: Not as a matter of legal course, but obviously the group would properly have to consider that and that was made clear in submissions and skeleton arguments that if those issues arose then those would be matters that the group would have to consider and consider how and to what extent the duty of sincere co-operation did bite in those circumstances, notwithstanding that you had separate jurisdictions. One of the points that is raised at the time of these submissions and the submissions in the Court of Appeal is that because of the way that timings had panned out it became clear that the Competition Commission would know the outcome of the European Commission Decision before it had to reach a conclusion, so at this stage it was clear no one needed to worry about that as a hypothetical, and therefore it was just left open as a question that if that were to arise that is something that was clearly of importance, that the Competition Commission would have to consider, no doubt about it, but that would not necessarily mean that the duty of sincere co-operation meant no further steps could be taken in the investigation or dictate what should happen in relation to any subsequent orders that should be made. So that issue is not one upon which any determination has been reached.

What was considered at the time was the possibility of outcomes of differences of substantive reasoning between the two, and whether or not any differences in substantive reasoning could end up creating a difficulty under the duty of sincere co-operation; that was contemplated. Notably, that is no part of the case being brought today. That is not what Lord Pannick hangs his hat on. Lord Pannick is very clear it is all to do with the potential impediment with Ryanair in the future and, of course, it is understandable he says that. It must have been the reasoning of the EU Commission Decision. It has been taken into account by the Competition Commission in its decision and it is clear there is no problem. I will come on to it, but it is difficult to see on what basis there could potentially be any conflict of reasoning, even if this appeal that Lord Pannick's clients are bringing succeeds, because that is all about consideration of the commitments that were offered and whether or not they were sufficient and adequate in all the circumstances. That is not something that was of concern to the Competition Commission. The Competition Commission was concerned with the dynamics of competition issues that the European Commission was concerned with and that is what is referred to repeatedly in the Decision. Just to anticipate what I am going to say about 8.12, when it talks about "relatively remote" it is talking

about, in particular, substantive issues in relation to the analysis. It is very difficult to see how, even if that went through, there could be any substantive clash and one leaves aside whether if there were actually the duty of sincere co-operation would be engaged. The Commission is saying there really is not any prospect of that and that is not challenged today. What is challenged today is the outturn conclusion in 8.12, which is there is no jeopardy to the EU's objectives on the basis of a putative impediment to Ryanair in relation to a fuller bid in due course. We say there is just nothing there on that challenge. That does not take them anywhere at all. They perfectly sensibly recognised that issues to do with reasoning and so on would not get them anywhere, so they have moved to this alternative, but this alternative does not take them anywhere here. That is why there was a degree of caution in the way that the Competition Commission was putting its case and, indeed, of course, yesterday what was said was: "But, Mr. Beard, you were talking about the possibilities of the duty of sincere co-operation in terms of the submissions that were being made at around this time ----"

THE CHAIRMAN: You are saying that effectively you could have stopped at paras. 82 and 83, and you did not need para. 84 at all?

MR. BEARD: I am sorry, let me go back. It remains true that the Competition Commission is a public body subject to Article 4.3; it is not pretending that it has omniscience about the way in which things might work. Looking back on it, it is now difficult to see how it is, on the basis of what has happened, that there could be any breaches of the duty of sincere co-operation. That is when hindsight is a truly wonderful thing. At the time there was not that sort of anticipation. As was recognised in the Judgment the focus was on no overlapping jurisdictions, but the fall back position is that we are a conscientious regulator. If you come to us and say that there is good reason why the duty of sincere co-operation bites, for whatever reason, we will consider that. We are not shutting that out. It is for that reason that, in particular, issues to do with substantive reasoning differences will continue to be borne in mind in relation to these matters.

There is a separate question whether or not that is being over cautious in relation to this situation, the duty of sincere cooperation, but that does not matter for today because the only question is, is the impediment that is being supposedly placed on Ryanair, if putatively it is successful through its various lines of appeal, somehow undermining the objectives of the EU.

THE CHAIRMAN: Okay.

MR. BEARD: I am loath to say that 8(4) is somehow inappropriate for a public body to say or for the CAT to make observation upon in those circumstances.

THE CHAIRMAN: We will see.

MR. BEARD: Yes. It is probably just worth turning on, whilst we are here, to the Court of Appeal in 45.

THE CHAIRMAN: Yes.

MR. BEARD: Now, the key discussion occurs from para.55 onwards; at 59:

> "The issue in the present appeal is at the end of the day a very short one. If it is approached as a matter of first principles and without regard to the decision of the Court of Appeal in *Ryanair v OFT* the analysis of the Chancellor in that case, there can be no doubt that the stay of the Competition Commission's investigation at the present time is neither necessary nor appropriate pending the conclusion of the EC's consideration of the public bid. The reasons are clear:
>
> * first it is common ground in this Court that the EC's jurisdiction does not extend to Ryanair's minority shareholding. Whatever the EC decides, or any Court on appeal from the EC's decision holds, the UK has exclusive jurisdiction to consider the competition implications of Ryanair's minority shareholding 21(3) has no application;
>
> * Secondly, even if there is a theoretical possibility that the analysis and the decision of the Competition Commission on Ryanair's minority shareholding could be relevant to or even inconsistent with those of the EC in its investigation of the public bid and vice versa, all parties before us appear to be in agreement that the EC's decision will in fact be delivered first. [So this is just bearing out the point I was making, that this was a live consideration].
>
> * Thirdly, in any event, even if the Competition Commission's investigation were to be completed and its Report published first due to the CC's statutory duty to complete its investigation, and it found there was an anti-competitive outcome and prepared for remedial action the Competition Commission would not be bound to implement that action immediately. The Competition Commission would have power under 41(3) if it saw fit in the circumstances then prevailing and taking into account its duty of sincere cooperation to defer such remedial action until the publication of the results of the EC's investigation and to reconsider remedial action in the light of the reasoning and decision of the EC".

So that all that is being said here is, first, no overlapping jurisdictions; second, of all the CCs alive to these analysis and substantive analysis issues; and thirdly, you have always

got this emergency brake in relation to remedial issues. So at that point the Court of Appeal does not need to reach any conclusion for the purposes of determining whether or not the investigation should continue; whether or not any putative analytical issues might arise; or whether or not it was in fact going to be required under the duty of sincere cooperation to defer remedial action. All that it needed to know was, if such things could arise, they could be dealt with at that stage.

THE CHAIRMAN: But here the Court was deciding no more than was necessary to get to the result of that case.

MR. BEARD: Yes.

THE CHAIRMAN: It does not address the issue of an appeal, does it?

MR. BEARD: No.

THE CHAIRMAN: The Commission Decision.

MR. BEARD: No it does not, there is no doubt about that, but that is also why the submissions that are being held back against us are not informative, because that is all that was being dealt with there; what is it that needs to be determined now on this application? Ryanair's application was an ambitious one, "down tools now".

THE CHAIRMAN: Yes.

MR. BEARD: It was not seeking to determine anything more than that. And if we go to some of the — (After a pause) Mr. Williams refers also to para.66, but I think, if I can come back to that.

THE CHAIRMAN: Do not worry, I have read it.

MR. BEARD: Yes. I think that is just highlighting the *Masterfoods* doctrine about the closeness of proximity of overlap and mutual destructive nature of judgment as giving rise to the problems. But if we go then to just pick up the points that were raised in relation to the submissions, hearing bundle 1, and it is always somewhat embarrassing seeing your own witterings transposed, but if we could just go to p.74 which was the — I am so sorry, it is C4 in the first hearing bundle.

So, the bit that Lord Pannick highlighted was about line 17:

> "I think as I highlighted when I was going through, 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 used in its letter — the outturn that the Commission might make".

And I think in relation to this I will go to the letter. But before I do it is just worth noting further up the page, up at the top:

> "I hope I have made clear that we do accept that there are two doctrines, albeit that in that particular case the risk of infringement of Article 21(3) fed into the analysis of the duty of sincere cooperation. I hope I have also made clear that the duty of sincere cooperation is a duty that Competition Commission takes seriously and continues to subsist".

And then there is a discussion,

> "… about avoiding a clash of final outturn decisions still continues to apply to the Competition Commission. It does not duck that [but what it does not mean is] that tools must be downed [now] as a matter of law. [It is only] part of the analysis and the consideration".

And then if we go down below that to 23:

> "Beyond those rather general propositions it becomes rather difficult to identify precisely when conflicts might arise and in what circumstances conflicts might arise. The longer one thinks about it the more possible permutations of dates and times and conclusions one can look at, some of which raise no problems whatsoever, some of which might, on Ryanair's analysis, raise problems. Aer Lingus may have a different account of it, and one would have to think about those further down the line. I am just talking about it in very simple terms and not holding the CC to anything specific in relation to these, but if one thinks about the European Commission going through potentially having concerns with the Ryanair merger, the public bid element that it is considering, and then going on through a phase two and then not clearing the matter, it is difficult to see why any potential conflict really arises with whatever the Competition Commission does".

And then there is a bit more speculative wittering from me about that, and then on p.75 at 21:

> "The problem is that it is very difficult to think about these things at this [I think it should be 'remove' unless I may have mis-spoken] at this time. The principal submission is not now".

So I think in context there, what we have is the position being adopted by the CC as one of caution, but nonetheless recognising that here we have a situation where it is actually quite difficult to work out why there is any issue. But since we do not need to determine it, that is not something that needs to be part of the CAT's determination.

The same point can be made in relation to the skeleton that was held up against us —

THE CHAIRMAN: At the top of p.75 you are saying:

> "If it were to say that that were to be divested, again it is difficult to see how any conflict, even on Ryanair's case at its very highest".

MR. BEARD: Yes. The position was being maintained.

THE CHAIRMAN: It was, yes.

MR. BEARD: We were cautious. We do not pretend omniscience in these circumstances. And, really, unsurprisingly, the same can be said of the skeleton argument that was held up against us at the next tab 5, tab 5 ----

THE CHAIRMAN: What is happening is, you are being accused of inconsistent, but when you look at the whole of the page and the top of the next page you are necessarily being inconsistent at all.

MR. BEARD: We are just being cautious, and we did not need to reach a landing on these issues at that stage in order to determine that application, which is precisely the basis on which the CAT proceeded and then you see the Court of Appeal proceeding. It is not saying anything inconsistent.

THE CHAIRMAN: No one really contemplated the scenario we are in at the moment?

MR. BEARD: Obviously, at that stage everyone was aware that there were outcomes of the CC determination that would be there is no problem for Ryanair, there is a problem for Ryanair but whatever remedial consequences are trivial, or there is a problem for Ryanair and the remedial consequences could be significant. Everyone will have known of that. I am not going to pretend that those were not within the purview of those advising on all sides. That was not the challenge that was being brought. The challenge that was being brought was, the reference is made on 15th June, the bid is then made on 19th June, and then Ryanair say, "Down tools now, you can do nothing, you must not carry out your statutory obligation to do an investigation because the duty of sincere co-operation says you cannot", and that was what we met in that application. We did not have to determine what the final outcome issue was going to be and how the duty of sincere co-operation fitted with that.

THE CHAIRMAN: Yes, I see.

MR. BEARD: Just for completeness because Lord Pannick went through it I will just go to the skeleton argument, next tab on, C5, p.109. It was para.82, I do not really have anything more to say about that. All we said was that the issues that Ryanair are raising are entirely hypothetical. Even on Ryanair's case, at its highest, it does not get them home on the

application they are making. As I say, I do not want to labour the point but there is any inconsistency in what was being said.

What might be of a bit more relevance if we turn back to tab 3 in this same bundle, because this is a letter from the European Commission written on 26th July 2012.

> "On 15 June 2012, the UK Competition Commission ('CC') had referred to it the acquisition by Ryanair of a minority interest in Aer Lingus. Shortly afterwards, Ryanair announced its intention to make a public bid … By email of 13 July, you informed the Directorate-General for Competition that Ryanair made an application to the CAT for judicial review of the CC's investigation to continue its investigation. Ryanair is challenging the CC's jurisdiction to investigate its holding its holding of the minority interest in Aer Lingus under UK merger law.
>
> On 25 July 212, the CC sent an email to the Directorate-General for Competition, asking whether the CC has jurisdiction to review the minority stake …"

This is all part of the interaction between the authorities in circumstances where one is being sued on the basis that it should not pursue these matters because Ryanair has, how can one put it charitably, made a timely bid for the remaining shareholding.

> "We recall that most of the minority shareholder was acquired in the context of Ryanair's first bid for Aer Lingus … The Commission concluded that the entire operation, comprising the acquisition of shares before and during the public bid period as well as the public bid itself constituted a single concentration within the meaning of Article 3 of the EU Merger Regulations."

So that is what they did in relation to the first Decision.

> "On the day that the Commission took this decision, the Directorate-General for Competition wrote to Aer Lingus, informing it that the Commission's services took the view that the Commission did not have the power to order Ryanair to divest its minority shareholding. The letter mentioned that this was without prejudice to the Member States' powers to apply their national legislation to Ryanair's acquisition of a minority shareholding in Aer Lingus after the adoption of the prohibition decision. At the instigation of Aer Lingus, the Commission adopted a formal decision rejecting the request to open proceedings against Ryanair … which was appealed by Aer Lingus. The President of the General Court rejected Aer Lingus'application for interim

relief, holding *inter alia* that in the circumstances of the case, Article 21 of the EU Merger Regulation '*does not, in principle, prevent the application by national competition authorities and national courts of national legislation on competition'*. The General Court reached the same conclusion in its final judgment."

I have taken you to both of those passages.

"On 24th July 2012, Ryanair notified a proposed concentration by which it acquires Aer Lingus by means of an all-cash public offer for all of Aer Lingus' outstanding shares not already owned by Ryanair … The notification does not claim that the an of the minority stake in 2006 or any subsequent purchases of shares are part of the proposed concentration. We understand that the last purchase of shares took place in 2008, which is indeed well beyond the reasonably short period of time on the basis of which transactions can be treated as a single concentration, as set out in recital 20 of the Merger Regulation."

It was that part I highlighted to you previously.

"Consequently, we can confirm that the minority shareholding is not part of the concentration notified on 24 Jul 2012 that the European Commission will examine under the EU Merger Regulation."

So that is pretty clear. That is the relevant authority spelling out the issue.

Then it says:

"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.

This letter reflects the opinion of the services in charge of Merger Control … and cannot bind the Commission itself."

They are careful not to say this is a formal Commission Decision, but this is DG Comp who deals with mergers and that is what they are saying.

THE CHAIRMAN: It is an extremely quick response, is it?

MR. BEARD: Yes, but I think the CC may have indicated to DG Comp that there was an issue coming before a Tribunal rather urgently. I am not going to pretend that the CC had not said, "We want something back quickly", because they would have done. They wanted to be able to say, "Look, we are not making this up, there is something here, you have entered

into your timely bid, you have notified it to the European Commission within the days of the reference, you are now JR-ing us in relation to this and saying this is some sort of dreadful breach of the duty of sincere co-operation, I wonder what the European Commission who are the body that are charged out that investigation think", and this is their response.

At the time, Ryanair tried to place weight on that little boiler plate paragraph, or the penultimate boiler plate paragraph about parallel procedures, and say this is important because they are saying you cannot compromise decisions, or possible decisions, of the European Commission. That is why there is a reference in the text to which I referred you in the submissions to compromise.

THE CHAIRMAN: Presumably you have got no equivalent letter in respect of where we are today?

MR. BEARD: Funnily enough, we do not have a precisely similar letter, but we do have a letter that is something that has to be dealt with in confidential circumstances. I believe the Tribunal has copies of it.

LORD PANNICK: Can I just make it clear, this assertion of confidentiality does not come from us. We are not asserting confidentiality, it is the European Commission, as I understand it.

MR. BEARD: Absolutely.

LORD PANNICK: I am not criticising you. I just want to make it clear that from Ryanair's point of view we do not understand what is confidential about this.

MR. BEARD: I think the CC was a little surprised that this letter had not been referred to in any of the extensive documents submitted by Ryanair in its appeal and skeleton argument, but we will leave that to one side for the moment.

It goes without saying that in judicial review proceedings there is an obligation to disclose relevant material. We did contact the European Commission to check whether or not this could be put before the Tribunal and it can.

If I may, I will just hand up a copy of the interim order, because that is what is referred to, and it is a Competition Commission document. (Same handed) This is the interim order that was put in place during the course of the investigation saying that Ryanair cannot do various things with its shareholding, including voting it. There are two ways one could deal with this, either we can deal with it in private, or if the Tribunal simply just wants to read through this letter.

THE CHAIRMAN: I have read the letter more than once, so you do not need to worry about that. What I was really asking is whether or not there is an equivalent in relation to what has

happened, because this goes back to a complaint in December 2012, I was wondering whether there was a subsequent complaint in relation to the actual Competition Commission's Final Report?

MR. BEARD: Not as far as we know.

THE CHAIRMAN: As you say, if there was one we would know about it because this is akin to a judicial review and ----

MR. BEARD: I am sure they would have disclosed it.

LORD PANNICK: I can confirm there was no such letter. If there had had been of course, we would have disclosed it.

MR. BEARD: I am grateful to Lord Pannick, of course, but it is perhaps a shame that this was not disclosed previously, but we will leave that.

THE CHAIRMAN: There is no criticism there, do not worry, Lord Pannick, you do not need to respond. The fact is we have the letter now.

MR. BEARD: Yes, but the point is that although it relates to the interim order I just highlight the two paragraphs over the page, just above the subheading "2".

THE CHAIRMAN: (After a pause) Are you saying that that reasoning would apply whether it is an interim order or the final order?

MR. BEARD: In fact, if you look in s.1, the penultimate paragraph.

THE CHAIRMAN: Which I have just read, yes.

MR. BEARD: In the context of which – so, yes" is the answer, plainly. Of course, we have seen the analysis in interim relief applications being carried over into final orders when we have looked at the order of the President going through to the Aer Lingus appeal. To be fair to Lord Pannick I did not hear him in his submissions earlier trying to distinguish interim and final position in relation to these matters.

THE CHAIRMAN: If he wants he can cover that in reply.

MR. BEARD: If that is the way it is now going to be run then obviously I reserve the position to comment upon it but you have our principal submission in relation to that.

The point overall is there are entirely separate jurisdictions in relation to these inquiries, and the one point that is said to create this conflict, the breaches, the duty of sincere co-operation is not anything to do with jeopardising the objectives of the EU.

With that, if I may, I will just go to s.8 of the Report, tab 9 of the core bundle. I have, to some extent, I think, anticipated the submissions I am going to make on this. This is just the section on the duty of sincere co-operation. Picking it up at 8.6, Lord Pannick made a slightly surprising submission in relation to 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. This assessment may entail a balancing exercise."

I think I heard him to suggest that that was not something he stood by. This is, in fact, verbatim from Ryanair, so this is actually what Ryanair said. Lord Pannick looks quizzical, it is the provisional findings response, para. 132.

THE CHAIRMAN: My understanding of the point, and I am sure Lord Pannick will correct me, is that he is not moving away from that first sentence, it is the second sentence he disputes. He says that: "This assessment may entail a balancing exercise". His point is that once you decide that there could be a conflict, and he emphasises the word "conflict" in the Regulation, that is it, it is not a question of a balancing exercise. Lord Pannick, have I understood you correctly?

LORD PANNICK: Sir, you are absolutely right.

MR. BEARD: I understand that to be his case. I think the point was also made that he was suggesting that this was not what Ryanair had said. This is actually Ryanair's submission in the provisional findings, that is the only reason I highlight it. I can go to it if it helps ----

THE CHAIRMAN: I do not think it does.

MR. BEARD: No, I do not think it takes anyone anywhere.

THE CHAIRMAN: What would be helpful is you addressing his main point that it is not a balancing exercise at all if there is, in fact, a conflict.

MR. BEARD: The best way, perhaps, of doing that is just to turn back to our defence at paras. 28 to 31, tab 6 in the same bundle. This submission I make in addition to the points I have already made in relation to *Masterfoods* and *National Grid* spelling out the close proximity of the overlap that is required in order for the duty of sincere co-operation to apply. In this context para. 66 of the Court of Appeal Judgment that Mr. Williams highlighted, which talked about the mutually destructive effect is also material. So all of the case law that we are dealing with is not just saying that any old conflict will do. Lord Pannick has no account to distinguish the *British Aggregates* case where plain conflict seems to be arising, or potential for conflict seems to be arising and the Court of Appeal says: "No, but we can carry on". The additional points that we make here are, first, that Article 4.3 is not saying whenever there is a possible conflict, because he says "could be a conflict", that you must not do anything, because that is not the wording of 4.3, it is to refrain from any measure that could jeopardise the attainment of the Union's objectives in the context of the Union's objectives including that mutual respect between national authorities and European

authorities. There is, therefore, scope for judgment and discretion in determining which potential conflicts could jeopardise the attainment of the Union objectives. Therefore the idea that as soon as you trigger some imagined possible conflict then the duty of sincere co-operation comes down like a guillotine on you as a national authority. It is simply not consistent with the wording and structure of the relevant provisions, and it is not borne out by the relevant case law.

THE CHAIRMAN: What do you say "could" means in that context.

MR. BEARD: "Could jeopardise"?

THE CHAIRMAN: Lord Pannick puts a bit of emphasis on the word "could".

MR. BEARD: "Could" is going to be one of those words, as I say and is set out in our defence, that it is going to involve a degree of judgment as to whether or not something could jeopardise. In many circumstances terms are used "must", "never", "could", "would" ----

THE CHAIRMAN: I know, they are not very helpful.

MR. BEARD: -- that are not inordinately helpful, but there is also a danger in trying to attach some kind of spurious scientific definition to such terms. I will not go back to the *Global Radio* case that is in the bundle. That was an interesting discussion about trying to attach a degree of precision, as Lord Pannick put it, I think, to the term "substantial" in "substantial lessening of competition". There again, one of those terms where it was said that it is not one of those terms where you can attach some sort of precise meaning, there is an element of judgment in relation to it, and "could jeopardise" is a term that again will afford a degree of judgment. Frankly, that is the real ratio of *British Aggregates*, that in fact it is being said actually we do not think this jeopardises the overall attainment of EU objectives, because actually it is important that both Member States authorities and European authorities get on with things as well as avoiding conflicting decisions.

I am sorry not to provide you with a neat definition of "could" but I think there is a specific danger in seeking to do so.

Secondly, and this is a related point that actually identifying a potential conflict is a matter of assessing facts and hypothesising about the future. The danger with Lord Pannick's formulation is that a creative mind might find the possibility of conflict in all sorts of potential future scenarios, but that is not a good reason that means a national authority must prevent every potential risk of such conflict.

Lord Pannick emphasised the *Delimitis* test of scarcely any risk, but of course what we have seen in *Masterfoods*, where the *Delimitis* test was specifically considered, was that hanging

too much on this "scarcely any risk" test and turning it into some kind of bright line threshold is also extremely dangerous.

We highlight there the interpretation of *National Grid* and *Ryanair* that they are simply concerned with the ways of avoiding the possibility of conflict, and not with whether or not there can be an assessment of potential risk. He fails properly to grapple with them and certainly does not grapple with the *British Aggregates* issue.

The third point that we make is that Ryanair's expansive view of what constitutes potential conflict is inconsistent with its rather absolutist approach to the duty of sincere co-operation because, as I say, if every potential conflict must be avoided this will make Article 4.3 potentially relevant to a much wider range of decisions and could undermine the sorts of national decision making processes that are actually necessary to the functioning of individual Member States in the European Union itself. This is precisely the sort of issue that the Advocate General in *Masterfoods* was considering. If you are over inclusive in your creative mind approach to potential conflict you will see them everywhere, and that would be entirely contrary to the effective functioning of both the EU and the Member States and given that Article 4 and Article 5 are talking about the States and the Union acting effectively together, in those circumstances you would actually be undermining the very purpose of Article 4 and Article 5 by taking this narrow view that Lord Pannick espouses.

THE CHAIRMAN: Is that a convenient moment?

MR. BEARD: It is.

THE CHAIRMAN: We will adjourn until 2 o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Beard?

MR. BEARD: There are just a couple of points. You asked, Mr. Chairman, the dates of Ryanair's second bid.

THE CHAIRMAN: Yes.

MR. BEARD: And it was launched on 1st December 2008, withdrawn 30th January 2009. The second thing is just following on from Lord Pannick's indication that Ryanair did not have any concerns about the confidentiality of that letter that I took the Tribunal to just before the short adjournment, over the short adjournment someone behind me dropped an email to the Commission, who said "Well, if that's the case, if Ryanair don't have any confidentiality concerns, it can be passed to Aer Lingus", and so we have now done that, and I think that there is no confidentiality issues arise in relation to it.

THE CHAIRMAN: That is helpful for the judgment anyway.

MR. BEARD: Yes, I thought I would just mention it before I forgot and moved on.

I think I had just finished up on ground one. I was looking in the Decision at 8.6 and then went off to the defence to discuss the situation if there was found on balance to be a conflict how you breached the duty of sincere cooperation assessment and the difference between us and Ryanair and our submissions on that. As I said, our primary point is you do not need to go there, but as a secondary, we have spelled out our position by reference to those paragraphs in the defence.

I will just try and move through this relatively quickly, 8.7 Ryanair's submissions that the CC had already recognized that it would not proceed to determine any issue of remedy and would avoid taking a final decision. These were submissions by reference to points that had been made by the CC in the previous proceedings, we have already traversed those. It is therefore not that surprising that in 8.9 the position was taken — we do not agree with Ryanair's submission that the CC is prohibited by 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 the circumstances of the case…".

Then looked at a whole range of factors that were put forward in relation to that, and the Tribunal, I know, has been through those.

THE CHAIRMAN: The point I wanted you to address me on, on that, was that you list a whole load of factors, but it does not give me any indication as to whether you have accepted it or

MR. BEARD: No, well, can I just clarify that, because it is really the answers lie in 8.10, 11 and 12, because what happened was there was an awful lot of material that was considered in this process.

THE CHAIRMAN: Yes.

MR. BEARD: But, 8.10:

> "We note that the CAT, the Court of Appeal and the General Court have confirmed that the CC has exclusive jurisdiction to analyse the competitive effects …
>
> 8.11, We also note that we have analysed the impact of Ryanair's minority shareholding in Aer Lingus on the latter's effectiveness as a competitor on routes between Great Britain and Ireland, taking into account the relevance of the European Commission's decision where appropriate. In our view there is a conflict arising from the CC's finding of an SLC and the European Commission's SIEC findings".

So, it is a finding there is no conflict arising between those two. And then it says:

"8.12, We recognize that Ryanair has challenged the European Commission's assessment of the final commitments offered by Ryanair".

So this is on the basis of what we have got there is no conflict issue arises because of course we have seen —

THE CHAIRMAN: Yes, there is no conflict as at 8.11.

MR. BEARD: Yes, and then they say, "But we know that there is an appeal going on, but it is in relation to the final commitments, a point that I was making earlier about the scope of the appeal.

"We are also mindful of the importance of complying with our EU obligations and we have therefore considered the matter with care. However, having had regard to the matters mentioned in paragraph 8.9, including the grounds of challenge in Ryanair's application to the General Court, we view the prospect of a conflict between the substantive analysis or outcome of the C C's inquiry and that of the institutions of the EU as relatively remote".

So that is looking at the substantive outcome looking at the analysis we have carried out and saying relatively remote. That is saying there is no any real material chance that there is a conflict on that analysis. Of course that is not challenged, that is not part of the challenge today. So it is effectively saying negligible conflict risk there.

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

So there no conflict.

THE CHAIRMAN: That is where the battleground lies, is it not, really, between you and Lord Pannick.

MR. BEARD: On the objectives, the remedial action point.

THE CHAIRMAN: Yes.

MR. BEARD: Yes. Yes, only this is — To be fair to Lord Pannick, he is not bringing a reasons challenge, he is saying "You're wrong, you must conclude that because of our putative fourth bid on the basis of our appeal potentially succeeding such that remittal goes back to the Commission on which we will then succeed, and that means that if you had ordered us to sell the shares in the meantime life would be harder for us if we are then cleared to bring the fourth bid". That jeopardises the attainment of the EU objectives.

So it is a clear decision. It is, in our view, unimpeachable. It is not a reasons challenge in any event. There is not any challenge on the substantive analysis issue being canvassed previously; and in those circumstances that really disposes of the matter. So, obviously, a

number of those submissions had been anticipated in what I had said this morning, but that really is the conclusion. It is that last line, because the last line in 12 is talking about "the remedial action".

Obviously, I have taken an awfully long time to circle back to the same point that I started off with by reference to Article 4(3) but the simple point is the objectives of the EU and the objectives of Ryanair are just different things.

Unless I can assist further on Ground 1 ----

THE CHAIRMAN: Let me just make sure I have not missed anything. That is fine, thank you.

MR. BEARD: I am grateful. I will move to Ground 2. To some extent - I am always cautious about agreeing too readily - I am not sure that there is a vast gap between us on the legal test in relation to procedural fairness, because although Lord Pannick went through, very elegantly, a number of cases what he ended up saying was, it is about the gist, and had Ryanair been given the gist? Our simple submission is, yes, they plainly had the gist of the relevant considerations that the Competition Commission were taking into account, they were able to put forward their case. In particular, they did not need to know specific identities of specific airlines.

If I may, just to short-circuit a little the submissions on law, could I go to our defence which is at tab 6 of the core bundle. The place where I was going to start was para.69 on p.20. I am going to move through this relatively quickly and then go to the *Eurotunnel* judgment, which Lord Pannick touched upon, but I think probably canvasses sufficient of the other case law that is a useful place just to work through. Just to trail what is then covered in *Eurotunnel*, this defence was put in before the *Eurotunnel* judgment came out and therefore does not refer to *Eurotunnel*. To pick up the basic propositions we put forward, 69:

> "First, the underlying principle is that a decision making authority must afford the affected party an effective opportunity to understand, and respond to, the case being made that will affect its interest."

There is a quote from Auburn, an extract of which is in authorities bundle 3.

> "Second, it is clear that that this does not necessarily require disclosure of all evidence relied upon …"

Then there is the somewhat infamous quote from *Doody* of Lord Mustill:

> "'Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case against him'."

"will often require that he is informed of the gist".

Then there is a discussion of *Al Rawi*, which I will come back to, but the broad proposition is that *Al Rawi* is a different sort of situation.

There is then a reference to *BMI,* which is picked up in *Eurotunnel*, that *Al Rawi* and *Bank Mellat* are not of great assistance here.

> "74 Third, and reflecting the relevant case law … as this Tribunal held in *BMI v. CC*, 'what constitutes the "gist" of a case is acutely context-sensitive'."
>
> 75 Fourth, while al of the circumstances must be considered in the round, certain factors can be identified as relevant to determining what the 'gist' requires in any given situation. In particular:
>
> a. The nature of the argument or finding in question …
>
> b. The nature of the evidence in question …
>
> c. The relationship between the evidence and issue in question and the adverse finding …
>
> d. The nature of the interests at stake."

Then we move to the fifth proposition:

> "… the sensitivity of evidence is not, as Ryanair contends, simply irrelevant."

Lord Pannick really did not properly cover the existence of a scheme within the Enterprise Act which particularly governs sensitive material and how it is to be dealt with by the Competition Commission. We have dealt with it briefly here, but since it is covered in *Eurotunnel* I will deal with it as I go through that.

> "Sixth, all of these questions determining what material should be provided are for the CC to determine …"

So there is a broad discretion in relation to the assessment -

> "… subject to the scrutiny of this material."

What we do accept is that what constitutes a fair process is a matter of law which this tribunal is to determine, and the *BMI* quote sets this out:

> "… 'whilst what is a fair process in the context of the Act is one for the Tribunal as a matter of law, the [CC]'s approach in any given case is entitled to great weight' …"

So we are not trying to suggest that it is not a legal question, but the way that the CC approaches these things does matter for the Tribunal's assessment.

With that set of headline points, if I may I will just move to *Eurotunnel*, which is in authorities bundle 3, tab 52. As I say, I am going to use *Eurotunnel* a little bit as a shorthand for going through the rest of the case law, because there is an extent to which the

arguments of Lord Pannick were already run by Mr. Green, now Mr. Justice Green, in the *Eurotunnel* litigation. Can we go to para.49. I should say in this case I was against the CC. Eurotunnel and an organisation called the SCOP were challenging the CC's decision to prohibit a merger between Eurotunnel and the former entirely that was Sea France, and the SCOP was an organisation that compromised various former employees of Sea France. There were various grounds run and Eurotunnel ran an argument that the way in which it had been provided with information was during the course of the investigation and the investigation had proceeded very much applying the same guidance and rules as have been applied in this case. They were in breach of the rules of natural justice, and there was a general challenge that lots of evidence underlying the decision should be provided, but there was also a challenge in relation to particular redactions and particular pieces of evidence.

> "124 As was noted in paragraph 23(b), Eurotunnel's Ground 1 contains both a general contention that the Commission's procedures were in breach of the rules of natural justice, and a series of more specific points that in a number of cases the Commission had failed to give Eurotunnel and/or the SCOP a fair hearing. This section deals with Eurotunnel's general contention."

The general contention started, or it was a part of the submissions that two recent Supreme Court decisions - this is at para.127:

> "… *Al Rawi* and *Bank Mellat* - had fundamentally altered the law in relation to closed procedures."

Then two lines were run - one, everything has changed and you must let everything be available to an effective party like Eurotunnel; and a less extreme submission which was whether it is a key indicator that more should be let out.

The next part in relation to out of time appeal and limitation is not of relevance here. Can we turn on to p.55, this is the start of the consideration of the law, and there is a discussion about EU and domestic standards of review, which I think does not take matters much further for the purposes of these proceedings. There is a reference to Article 1 of Protocol 1, but I will come back to those sorts of issues by reference to *BAA* and *Somerfield* in due course.

Page 58:

> "*The English law*
>
> The law prior to *Al Rawi* and *Bank Mellat*"

Here is the reference to the House of Lords in *Hoffman-La Roche* and *ex parte Doody*, and there is a quote from Lord Diplock in *Hoffman-La Roche*, and this is actually concerning the

Monopolies Commission, as it then was, which becomes the Competition Commission in due course. Perhaps I can pick up the underlined part of the quote:

> "The Commission makes it own investigation into facts. It does not adjudicate upon a *lis* between contending parties. The adversary procedure followed in a court of law is not appropriate to its investigations. It has a wide discretion as to how they should be conducted. Nevertheless, I would accept that it is the duty of the commissioners to observe the rules of natural justice in their investigation - which means no more than that they must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely."

Then we have got *Doody*. The next relevant paragraph is at 161, another case involving the MMC, *ex parte Elders*, where "Mann J noted fairness is a flexible concept, whose content is dependent on the situation under consideration."

Then citation with approval of Lord Justice Sachs in *Re Pergamon Press* saying:

> "… it is only too easy to frame a precise set of rules which may appear impeccable on paper but may yet unduly hamper, lengthen and, indeed, perhaps even frustrate the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted, and its objective."

There is then reference to *Re D* and *ex parte B (Governing Body of Dunraven School*) I am not going to take the Tribunal through those. The *Eisai* case is picked up at 165. Lord Pannick placed weight on this. The *Eisai* case concerned the judicial review of guidance by NICE in relation to the use of a particular drug. He said:

> "Although NICE's procedures involved 'a remarkable degree of disclosure and of transparency in the consultation process' nevertheless the Court of Appeal considered that 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, and not merely a 'read only' version – so that consultees could fully check and comment on the reliability of the economic model upon which NICDE had based is decision."

So that was a very specific circumstance where you had a situation where a body would effectively have operated a sausage machine that carried out an assessment of what I think

are called 'qualies', years of life of a particular quality and decided whether or not it was economically efficient to allow the drug to be licensed, and had decided that operating sausage machine, it should not. Therefore it was understanding how that sausage machine operated that was critical to the outturn decision. Therefore, the fact that there had been discussions or disclosure of certain materials did not enable you to actually work out how the sausage machine worked. That does not tell you anything about the circumstances of this particular case. It does, I accept, mean the fact that you have had a large volume of material does not necessarily answer the question of fairness, but it takes you no further than that.

Then there is a reference to *Sports Direct* which was a case involving the Competition Commission concerning redaction of working papers. Then 167 sets out the key propositions to emerge: that a general duty on administrative bodies to act in a procedurally fair way. What is fair is not immutable. The standard of fairness has many aspects, one of which, and this is an aspect with which the Tribunal was concerned at that time, is that a person affected by the decision is entitled to have an opportunity to make representations. "That, in turn, means that such a person must know the case against him or her."

> "(d) As, no doubt, is the case with all aspects of natural justice, this is right to make representations is coloured by many factors …
>
> (i) The statutory framework within which the Tribunal operates. Of course, some tribunals (albeit not the Commission) do not operate within a statutory framework at all … However, the important point to note is that statutory frameworks can be supplemented, and are to be read in the light of, the common law."

We entirely accept that, but we do say that you have to have regard to the statutory framework.

> "(ii) Other aspects of context, including in particular the nature of the investigation.
>
> (iii) The significance of any individual item of information in the context of the investigation.

Then, as I say, 168, we entirely accept that what constitutes a fair process is one for the court and this echoes the position taken in *BMI*.

> "That said, the process taken by the administrative Tribunal is entitled to great weight."

I think the points we raised, those six points, we did not get them in quite the same order, in quite the same list as Eurotunnel, but we are pretty much there, I think.

THE CHAIRMAN: No criticism was made of 167 by Lord Pannick, so I think you both accept it was the same test.

MR. BEARD: Then there is a more extensive discussion of *Al Rawi* and *Bank Mellat*, where there were various submissions made by Mr. Green focusing on those cases. I think what is perhaps important to bear in mind, Lord Pannick took you to the quote of Lord Kerr, which is at 174 – he actually took you to the Decision but it is that quote. Just going above, in 173, it is worth emphasising that this is concerned with the features of a common law trial. Then there are various quotes from Lord Neuberger. Then there is consideration of Mr. Green's submission, and at 182:

> "The problems with Mr. Green's contentions is that – whichever alternative is adopted …"

- so whether it is his very expansive case all evidence, or whether it should really should colour the way in which procedural fairness operates here -

> "they prove too much. The logical consequences of Mr. Green's submissions is that the principles of natural justice, as they apply in the courtroom, are imported wholesale into every form of administrative process that is subject to the rules of natural justice, without regard to the role of the administrative decision maker or the type of decision being taken. Essential of Lords, according to Mr. Green, a 'one-size fits all' approach would have by the Supreme Court, without expressly discussing the point, and without overruling, or even disapproving, a single one of these authorities."

Then it picks up issues of cross-examination. At 184:

> "It was suggested to Mr. Green that much of the Commission's Guidance as to the treatment of confidential information must be unlawful, at least if Mr. Green's primary contention was correct …"

And that was then considered by the Tribunal. Then at 186:

> "That tension is resolved when it is appreciated that, in both decisions, the Supreme Court was considering the permissibility of closed procedures (as defined in those decisions) in the context of criminal and civil trials. *Al Rawi* concerned a civil action for damages, and *Bank Mellat* a review of an administrative decision done on a judicial review standard. Both Lord Dyson in *Al Rawi* and Lord Neuberger in *Bank Mellat* made it clear that this was the question before them, not the wider question of what 'fairness' required in administrative proceedings generally.

On 187, second sentence:

> "Indeed, it is noteworthy that in *Bank Mellat*, Lord Sumption referred to and cited with approval Lord Mustill's speech in *Doody* (see paragraph 159 above).

It then goes on to say at 188:

> "That disposes of Mr. Green's primary contention. Mr. Green's primary contention was that the recent Supreme Court case law 'demonstrates that there is a very powerful and fundamental objection to closed procedures and that guidance given by case law would in almost every case require some form of confidentiality ring'. We consider that the decisions in *Al Rawi* and *Bank Mellat* say no such thing about the need for confidentiality rings in administrative decisions. 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."

Then we have a consideration of the Commission's procedures, starting with some European case law which I will not go through. Then "The relevant statutory provisions under the Act". At 194:

> "The Act makes provision both for the protection of confidential information and for the Commission to consult with persons interested in a merger reference."

In the bundle we do not have s.104. I have a copy here, it is obviously set out broadly there, but you may want to have a copy just to slot into your authorities bundle 1. We have had it copied so that it can be slotted in in tab 5 of authorities bundle 1, just before p.55, so that it is in order.

THE CHAIRMAN: I will call it 54A.

MR. BEARD: The reason it is important is that one should not consider these issues in isolation. It is plain that you have to look at the statutory framework. It is primary legislation. We recognise that the requirements of natural justice must apply, but they are to be applied having regard to the legislative structure, and 104 says:

> "Certain duties of relevant authorities to consult — subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers is likely to be adverse to the interests of a relevant party".

That will include a merger decision where the acquirer is blocked or made subject to some sort of conditions.

"The relevant authority shall, so far as practicable, consult that party about what is proposed before making that decision. In consulting the party concerned, the relevant authority shall so far as practicable give the reasons of the relevant authority for the proposed decision. In considering what is practicable for the purposes of this section the relevant authority shall in particular have regard to any restrictions imposed by any timetable to making a decision and any need to keep what is proposed or the reasons for it, confidential. The duty under this section shall not apply in relation to the making of any decision so far as particular provision is made elsewhere by virtue of this part of the consultation before making of that decision".

It is just important to recognise that confidentiality is specifically picked up in a statutory provision dealing with these issues. Obviously Lord Pannick did not refer to that.

If we go back, then, to *Eurotunnel*, 196:

"Section 104 of the Act contains a duty on the Commission to consult. Essentially, by virtue of section 104(1), where the Commission is proposing to make a decision following a merger reference to it pursuant to section 35 of the Act which the Commission considers is likely to be adverse … the Commission must: [and then it repeats those provisions]".

And then 104 is repeated in 197. So the gist of it is there.

Turning to the need to protect confidentiality articulated in 104(4)(b) Part 9 of the Act contains a series of provisions dealing with information coming to the Commission. Now these are also in vol.1 of the authorities, in fact they begin a couple of pages on from where we were, after 120 at p.57. This again is an important context. Lord Pannick completely ignored this entire primary legislative structure in his submissions.

Section 237, this section applies to specified information which relates to the affairs of an individual, any business of an undertaking, and it says:

"Such information must not be disclosed during the lifetime of the individual or while the undertaking continues in existence, unless disclosure is permitted under this part", and this part is Part 9. Sub section (2) does not prevent disclosure of any information if it has been disclosed to the public previously. And it does not affect, under sub (5) nothing affects the Competition Appeal Tribunal — and obviously there are further provisions.

Then, 238, which is covered in *Eurotunnel* at para.198 sets out what is specified information. Information is specified information if it comes to a public authority in connection with the exercise of any function it has under or by virtue of part 1, 3, 4, 6, 7

or 8 which encompasses the merger control provisions of this Act, although I will have to go and check my purple book in relation to which section it is, I think it is part 3.

"An enactment specified under schedule 14 … legislation", and if one goes down to section, no, I think that that probably is all that is needed in relation to that.

But what is made clear in *Eurotunnel* for the present purpose is:

> "Information is specified information if it comes to the Commission in connection with the exercise of the Commission of any function it has (I am sorry, I was wrong, it is not 3 it is 4) under Part 4 of the Act. This is so whether the information came to the Commission before or after the passing of the Act".

And then at 199 in *Eurotunnel*:

> "It follows, therefore, that most, if not all, of the information obtained by the Commission following the reference to it will be specified information".

And, rather than working through the legislation I will just stick with *Eurotunnel* for its description of the relevant provisions, because I think it deals with them relatively comprehensively, but they are in the bundle.

So, at para.200 there is a recapitulation of 237 and the notion of specified information. And then, 201:

> "Part 9 then contains a series of provisions permitting information to be disclosed …
>
> (a) where [it] has … been disclosed to the public; [that is] section 237(3);
>
> (b) where the disclosure is consented to: section 239
>
> (c) where the disclosure is required for the purpose of an EU obligation; section 240
>
> (d) where the disclosure is for the purpose of facilitating the Commission's functions: section 241; and
>
> (e) where [it is] done in connection with civil … or criminal proceedings … or to an overseas public body.
>
> 202 For present purposes, the only one of these provisions that needs to be considered further is section 241 … for the purpose of facilitating the statutory functions".

And then the Tribunal quotes 241, I will not read it out, but I would invite the Tribunal to read that.

THE CHAIRMAN: Yes.

MR. BEARD:

"It was not disputed before us that the Commission's duty to consult under section 104 constituted a 'function' of the Commission under the Act.

203 Section 244 of the Act sets out certain conditions relevant to the disclosure of specified information:

(2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest.

(3) The second consideration is the need to exclude from disclosure … (a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates [and (b) is private affairs]

(4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure".

204 The importance of the due protection of specified information … is clear. Disclosure other than by means of an authorised statutory 'gateway' is a criminal offence [pursuant to] section 245.

205 The Act thus creates a regime which makes provision for both the protection of confidential information and for the disclosure of (potentially confidential) information in the interests of consultation. Given these provisions, it seems to us that Mr. Green's suggestion … that Parliament had not regulated for this falls very wide of the mark".

And, as I say, it is important to have in mind that statutory scheme. Then we have got consideration by the Court of the guidance published by the Commission entitled: "Chairman's Guidance on Disclosure of Information in Merger Enquiries, Market Investigations and Reviews of Undertakings and Orders", that is referred to as "CC7" and for your notes that is in authorities bundle 3 at tab.59.

I would invite the Tribunal to read at least the extracts of that guidance which are set out in *Eurotunnel*, which set out how the CC actually approaches these issues in relation to the consideration of confidentiality in circumstances where it is under a duty to publish a report, it is under a duty to ensure that there is fair procedure, but it has also got these countervailing considerations about the sensitivity of material that are set out in primary legislation. And, not surprisingly, because of course when you are carrying out an enquiry of this sort, you are going to be wanting to obtain sensitive commercial information and

there is going to be a real concern that the very crucible of an investigation does not operate as a place where rivals obtain detailed commercial information which outside the confines of the CC would not be communicable without potentially falling foul of competition law legislation.

Furthermore, it is important for the CC to be able to obtain sensitive information from third parties. If you are not able to offer a degree of protection to the confidentiality of third party material, third parties are not going to come forward and provide that information to the CC. That will undermine the regime we have in the United Kingdom for enabling these sorts of Phase II investigations. These are important public interest considerations that the CC conscientiously takes into account when it is deciding what it is that should be redacted, and they are factors that go to the question of whether particular individual pieces of information which are sensitive should be and need to be disclosed in order to fulfil this requirement that a gist of the case is provided to an interested party.

Then there is a description of how the Commission approach matters in this case, which I do not think we need detain us. And if we move on to the conclusions at para.218:

> "We set out our conclusions as to what the law requires of administrative bodies by way of natural justice [at] 167 …. We noted … 167(d)(i) that the statutory framework within which the Commission operates is a matter that particularly needs to be taken into account".

Then there is a consideration if *BMI Healthcare*:

> "The Tribunal considered the Commission's market investigation jurisdiction … we consider the comments apply equally here:
>
> > (1) The starting point in considering the Commission's duty to consult must be the Act, which deals expressly with the Commission's responsibilities in this regard, and which also makes provision for the protection of confidential information … Sections [104](2)(3) of the Act require the Commission to consult … and to give reasons …. It is qualified ('so far as practicable'), in particular by the Commission's duties in relation to specified information …
> >
> > (2) However, as is clear from section 241, the protection of specified information.
> >
> > However, as is clear from section 241, the protection of specified information can give way 'for the purpose of facilitating the exercise by the authority of any function' …"

One of the functions of the Commission is duty to consult.

"The Act thus establishes both the duty to consult and the duty to protect confidential information. Section 244 … then describes three conditions to which the Commission should - 'so far as practicable' - have regard 'before disclosing any specified information."

This is (4), the one paragraph that Lord Pannick did take you to here.

"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. But, conversely, the Commission is not obliged to disclose each and every piece of specified information as part of its duty to consult. We consider the Act contains a perfectly clear and workable code. Although we have had in mind the statement in *Lloyd v. McMahon*, that 'it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness', we do not consider it is necessary to imply into the Act anything by way of additional safeguard. The provisions of the Act are, in themselves, quite sufficient for these purposes."

We then go on to 221.

"The essence of Eurotunnel's general contentions on Ground 1 was that, in withholding in the manner it did (i.e. by using summaries of information provided, redacting, anonymising and using ranges), the Commission acted unfairly. As a broad proposition, this can only succeed if, as a matter of general principle, the Commission was obliged to disclose to Eurotunnel all inculpatory and exculpatory material including transfers or summaries of evidence … For the reasons we have given, we reject that argument."

Lord Pannick decries that and he says, "I am only looking for specific measures", but this background is important in understanding what is required by way of gist.

Then Lord Pannick took you to paras.223, 224, he did not take you to 225, but that is a reference to the *Ryanair* previous case which is in the bundle.

" 'We agree that you do have to look at the facts of each case. At one end of the spectrum there may be a case where numbers are involved [the *Eisai* type case] and you need to be able to see the relevant numbers or data in order to understand the gist of what is being put. In other cases, more like the present, you need to know what the general position is'."

That was the paragraph that Lord Pannick did not take you to.

Then, having done that, we move to specific natural justice challenges. This is the flip side of what was going on. Tempting though it is to go through those details, what I will do is just highlight the first of them, p.87. Here Eurotunnel's key contention was that it had not an adequate gist of material in relation to a company called DFDS's anticipated exit from the Dover-Calais market and its timing. This may feel like a very obscure and narrow point, and, to some extent, that might be right. I think it is just worth highlighting what is done here, because in this case what was being said was that Eurotunnel had acquired the ex-Sea France vessels, and the Competition Commission said staff, and had created a new entity. So it controlled the tunnel and some ferries. P&O operated on a short channel crossing between Dover and Calais, and DFDS was another ferry line that had also entered. The question that was being raised was, if Eurotunnel had this what was called "My Ferry Link" company that it had established, was it going to create a substantial lessening of competition because it could drive out competitors and essentially push up its prices thereafter. The key competitor was in this context DFDS. What was being said by DFDS is, "Look, if you allow this merger to go ahead, we are out of here, that means you lose a player on the market, and so instead of having P&O, DFDS and Eurotunnel operating the tunnel, you have P&O and Eurotunnel with also some ferries, and that is not good for the market". That was the very essence of the case that was made on the SLC.

Eurotunnel said, "We need to be able to understand what the basis is for DFDS asserting that it is going to be the first out if we are operating, because if we cannot scrutinise that then this whole infrastructure of your analysis falls to pieces".

What is done here is a careful consideration of the redactions that were made in relation to the details of DFDS's evidence, and Eurotunnel says, "We need to be able to see this because this is the very core of the case". The Court says, "You know what the case is in relation to who goes first, you are able to put forward your arguments about exit from the short sea straight perfectly adequately, there is a perfectly adequate gist here, the high level statements are perfectly sufficient, even though it is based on detailed numbers that were being put forward by DFDS".

I am not going to take you through the details of it, but that is the first of those. We say that the Tribunal was right in relation to those matters, and that is *a fortiori* the present case, because, as we come on to see when we look at the details of the particular claims, they are very limited in terms of the possible materiality of any of the redactions that are being talked about to the overall case that has been put forward by the CC, and in relation to which Ryanair was able to put forward its propositions.

I am going to focus on the points made in Ryanair's skeleton argument at para.65, because those are the particular examples it relates upon, and I will need to go through them. I am also conscious that, for the purposes of Grounds 2, 3 and 4, consideration of section 7 of the Report is important, so what I was going to do is go through section and pick up along the way the key provisions that are highlighted by Ryanair in para.65 of its skeleton argument as being the passages where it says it needed to be afforded detailed evidence. Of course, it is worth bearing in mind that the claim that has been made in the notice of application and the reply is that the disclosure should be into a confidentiality ring.

In submissions Lord Pannick said it will have to go to Ryanair in due course in order for them to be able to give instructions. That does put Lord Pannick in something of a difficulty because, of course, the sensitivity of any information is much greater if it is going to business clients in these circumstances, but Lord Pannick makes the point presumably because he recognises it is very nice producing material to lawyers but they really cannot comment very much upon it. I am sorry, that is not true, and obviously lawyers can comment at great length, it is the worth of those comments that may be more questionable.

It is important to note that in its skeleton argument Ryanair contends that it was procedurally unfair for the Competition Commission to withhold as a minimum the disclosure into a confidentiality ring of the allegations contained in 7A and appendix F of the Final Report, and the evidence relied on by the Commission in support of those allegations. I think the second point has fallen away and it is only the first point that Lord Pannick pursues. He refers to them as allegations in his skeleton; they are not. The important point is it is disclosure to the confidentiality ring at a minimum these materials. That is para. 62 of his skeleton argument, p.20

THE CHAIRMAN: Are you saying he has abandoned 62.2?

MR. BEARD: That is what I heard him to be saying, but may be I misunderstood.

THE CHAIRMAN: I did not understand that.

LORD PANNICK: (No microphone) That is not ….

MR. BEARD: I am grateful. It makes no difference to the submissions I am about to make, but I had understood that he was saying that he did not want the underlying evidence.

LORD PANNICK: I have not repeated every paragraph in the skeleton argument in the interest of time, you would have been there for three days if I had gone through it all. Unless I have quite specifically abandoned something it is part of our case, but I have been selective in what I have shown the Tribunal both in terms of the paragraphs in judgments and paragraphs in skeleton arguments.

MR. BEARD: I quite understand, it was my misunderstanding of the point that you had made.

LORD PANNICK: That is all right.

MR. BEARD: If we could turn to the Decision itself, I note that the first of the paragraphs that Lord Pannick and Ryanair is at 7.48, but since this is relevant to Grounds 2, 3, and 4 I am just going to start at the beginning of s.7, which is on p.35. This is obviously the chapter on the Assessment of the Competitive Effects of the Acquisition. 7.2 effectively gives you a map of where the Commission is going on relation to the remainder of the chapter, but it is useful.

> "We start by discussing the relevance of the European Commission's findings to our own assessment. We then discuss whether Ryanair's minority shareholding is reduced or may be expected to reduce Aer Lingus's effectiveness as a competitor by influencing the commercial policies and strategies …"

That is paras. 7.12 to 7.30.

> "Next we discuss alternative ways in which Ryanair's minority shareholding may affect competition. We then consider whether entry or expansion by another airline would be likely to offset any adverse effect. In the final section we set out our conclusions on the SLC test."

The reason I highlight that is just to show the broad outline of the considerations that have been brought to bear and the broad structure of the considerations by the Commission. "Relevance of the European Commission's finding to our assessment." They are obviously important because here is that consideration of no clash between the European Commission's assessment and that of the Competition Commission. We note in passing that Ryanair has maintained throughout:

> "that the evidence of competition between Ryanair and Aer Lingus on the routes between Great Britain and Ireland since the transaction demonstrated comprehensively that Ryanair had not used its minority shareholding to create a lessening of competition."

7.5 is just emphasising jurisdiction and duty on the CC to carry out its own assessment. 7.6 is just picking up the duty of sincere co-operation point that we have already dealt with effectively in relation to Ground 1.

> "7.7 In the present case, we consider that the appropriate course of action is to take into account the European Commission's assessment of competition between Ryanair and Aer Lingus in making our assessment of competitive effects. It has been helpful to us in understanding the intensity of competition between Ryanair and Aer Lingus … We have not reached any findings that are in conflict with those of the European Commission on these points.
>
> 7.8 However, we do not agree with Ryanair's submission that we are bound to conclude on the basis of the European Commission's assessment of that competition, that the acquisition of the minority shareholding has not resulted and will not result in an SLC."

They say they have looked carefully at these matters.

> "7.10 In our view, the finding that Ryanair and Aer Lingus compete intensely (and that the extent of overlap between their U K operations has increased since 2006) neither precludes, nor is in conflict with our findings that, absent Ryanair's shareholding, competition during the period since 2006 may have developed differently and could have been more intense. Many of the potential competitive effects of the transaction that we considered would manifest themselves in terms of the absence of an action that might otherwise have been taken by Aer Lingus (for example, Aer Lingus being prevented from combining with another airline or from disposing of Heathrow slots in the context of optimising its route network and timetable). We therefore cannot determine whether the transaction has reduced competition relative to the counterfactuals solely from observing the competitive actions.
>
> 7.11 In addition, we need to consider not only whether the transaction has, to date, led to a reduction in competition, but also whether competition between the airlines may be affected in the future."

I know that the Tribunal is well aware of the prospective nature of this inquiry, but it is, nonetheless, extremely important when one comes on to look at the section on the effects of the acquisition on Aer Lingus' commercial policy and strategy.

> "The evidence presented in the European Commission's decision, whilst informing our understanding of the current level of competition between the parties, is a

> factor among others that we have taken into account. …For example, we were also conscious of Aer Lingus's view that its competitiveness would be eroded over time as it faced an inevitable 'cost creep' if its participation in the trend of consolidation in the airline industry were limited, as well as Ryanair's view that Aer Lingus did not have a future as an independent airline."

I will come back to that. So, careful consideration of the Commission's Decision, recognition of the Commission's finding that there was competition between Aer Lingus and Ryanair. In many ways that is not surprising. These are airlines operating on routes in and out of the UK. It is the fact of that competition gives rise to the concern about cross-shareholdings. There is nothing radical or surprising about that. It is not the end of the story, it is the beginning.

Then we move on to "The effects of the acquisition on Aer Lingus' commercial policy and strategy". 7.12 then provides the map for the remainder of this section.

> "We considered whether Ryanair's minority shareholding would reduce Aer Lingus's effectiveness as a competitor by affecting the commercial policies and strategies available to it. We first considered Ryanair's incentives to use its influence to weaken Aer Lingus's effectiveness as a competitor."

We heard nothing of this from Lord Pannick. It is critical to the analysis that the Competition Commission carried out.

> "We then looked at various mechanisms through which Ryanair's shareholding might influence the commercial policies and strategies available to its rival, considered the likelihood that such effects might arise and assessed the scale of the potential impact on Aer Lingus.

Then 7.13 is important:

> "In our assessment, we focus primarily on strategic issues affecting Aer Lingus. Such strategic issues are often long-term, low frequency but high impact in nature. We are also, unusually, considering an acquisition which took place more than six and a half years ago. We are therefore necessarily considering effects over a long period of time, both looking back to 2006 and looking forwards for a t least a similar period of time.

7.14 is Ryanair suggesting there is an exceptionally heavy burden on the Competition Commission. That is rejected and it is no part of Ryanair's challenge here.

7.15:

> "Ryanair also said that the incentives and perceptions of third parties did not form part of Aer Lingus's own commercial policy and strategy."

"Ryanair was consistently trying to say do not worry about the third party deals." Then we turn to Ryanair's incentives. 7.17:

> "As set out in Section 5, we found that Ryanair and Aer Lingus are close competitors, with both airlines' actions having a significant impact on each other, and the two airlines being the only operators present on a number of routes. All else equal, the closeness of competition implies that Ryanair would be likely to benefit significantly from a weakening of Aer Lingus's effectiveness as a rival, as passengers diverting away from Aer Lingus's services would be likely to travel using Ryanair's services instead. We therefore formed the view that Ryanair would have an incentive to take actions that ultimately had the effect of reducing Aer Lingus's effectiveness when deciding how to exercise the influence afforded to it by its shareholding".

Absolutely critical. The closest rivals: one buys a chunk of the other. It is not a radical and surprising finding that it has all the incentives to weaken that rival as a competitor. Now it says, at 718:

> "Ryanair as a partial owner of Aer Lingus will also have a financial interest in Aer Lingus. Given this, Ryanair might not always take every action that would weaken Aer Lingus's effectiveness as a competitor, irrespective of the cost to itself. Rather, we would expect Ryanair to use its influence in a way that best served its interests as both a shareholder in and a competitor …
>
> 7.19 Generally speaking, we would expect Ryanair's incentives as a competitor to outweigh its interests as a shareholder" —

and it explains why in 719.

> "Furthermore, we took into account Ryanair's stated strategy of acquiring the entirety of Aer Lingus … and its ongoing bids for the outstanding shares …. We considered that this strategy could also affect Ryanair's incentives with respect to its shareholding. In particular, Ryanair would have an additional incentive to use its influence to weaken Aer Lingus's effectiveness as a competitor if this would make it easier to acquire the company, and an incentive to oppose any strategies that Aer Lingus might follow that would make it more difficult for Ryanair to acquire Aer Lingus".

So, not just the ordinary incentives for one competitor to weaken the other and take the benefit of it, but further incentives given the declared strategy of wanting to get all of Aer Lingus. At 7.21:

> "We noted Ryanair's submission that when it had opposed Aer Lingus's management, it had done so only to protect the value of its shareholding. It told us that it would not oppose an acquisition by Aer Lingus if it were in the interests of shareholders … has made various public statements saying that it was willing to consider an offer for its shareholding …. [It] also told us that there was no evidence that it would oppose the sale of additional Heathrow slots. It highlighted that it had been willing to divest Aer Lingus's Heathrow slots as part of the commitments proposed to the European Commission".

Very generous of it to divest someone else's slots in order to get clearance to acquire them, but (7.22):

> "… for the reasons set out in 7.17-7.20 (and in particular given the closeness of competition between Ryanair and Aer Lingus and Ryanair's desire to acquire the entirety of Aer Lingus) we found that Ryanair would have the incentive to use its influence to weaken Aer Lingus's effectiveness as a competitor and we would expect Ryanair to act on these incentives. The incentive to weaken Aer Lingus's effectiveness would not exist for a shareholder which was not in competition …".

That is a core finding, because then what follows under the following head is "Mechanisms by which Ryanair shareholding could affect Aer Lingus's commercial policy and strategy", and what the Competition Commission is asking itself is notwithstanding the fact that Ryanair has these massive incentives to influence Aer Lingus, that it has spelled out, and which are unchallenged, does it actually have mechanisms by which it could do so? And then the question that is being asked is, really, are we saying here that Ryanair simply cannot act on those powerful incentives? And the answer that the CC comes back with is "No, there are a whole range of mechanisms that can impact on the way in which Aer Lingus can operate to compete". It is in that context that one has to consider these issues about potential combinations. It is a broad question that is being asked, "Are there mechanisms out there by which Ryanair can act on its incentives?" Not, "Did Aer Lingus have discussions with airline X or airline Y?", but "Is there in reality a mechanism out there?" And in considering that of course the CC looks at material it can that is provided by Aer Lingus, by Ryanair, by third parties, but in doing so it is making a broad assessment, in particular about the future, and the broad proposition that covers all of the submissions in

relation to procedural fairness is "You do not need to know those redactions in order to be able to put forward your case in relation to those issues". It is only by completely taking those points out of context and not seeing this as the complete report. Failing to comply with the case law that says, "You must read the report as a whole", that you can ever get to a point where you say you can possibly make the submission that says, "Oh well, we haven't even seen the gist".

Now, I am conscious of the time. I do not know whether it is sensible to have a short break now.

THE CHAIRMAN: We will have a short break now, that is fine. Quarter past three.

MR. BEARD: Thank you.

(Short Break)

THE CHAIRMAN: You were just going through the point that the core finding has been challenged about the incentives?

MR. BEARD: (without microphone) … we are at 7.23. We recognised that we could not predict with certainty all the ways in which Ryanair's shareholding might affect Aer Lingus's commercial policy and strategy. However, we looked in particular at, and then we have the five mechanisms. One can see them as transmission mechanisms for anti-competitive effect exercising those incentives. What the Commission is asking itself is, "Are these credible mechanisms". That is what this section is all about.

We then move on to the first of the mechanisms and the one on which Ryanair has concentrated its fire in relation to really Grounds 2, 3 and 4:

> "… Aer Lingus's ability to participate in a combination with another airline."

7.24 is again one of these mapping provisions:

> "We considered whether Ryanair's shareholding might weaken the effectiveness Aer Lingus as a competitor by restricting Aer Lingus's ability to manage its costs at a competitive level and/or expand or improve its offering via a combination with another airline."

So all the dynamics of competition that you would expect in a company, is there a way in which Ryanair, with these very clear incentives, going to be potentially able to do that? We cannot be certain about mechanism it will be use, but are there credible mechanisms out there.

> "We first set out how Ryanair's minority shareholding might influence Aer Lingus's ability to combine with another airline. We then consider evidence related to the likelihood of Aer Lingus being involved in a

combination absent Ryanair's minority shareholding, discussing the general trend in consolidation in the airline industry, the views of airlines, internal documents of Aer Lingus and discussions between Aer Lingus and other airlines since 2006."

So a whole range of material.

"Finally, we discuss the potential impact of being impeded from combining with Aer Lingus on its effectiveness as a competitor."

Then 7.25 is again critical:

"Combinations between airlines are inherently unpredictable and opportunistic, and so it is inevitable that our assessment will require an element of judgment. … We do not consider it to be either feasible or necessary to catalogue all potential transactions involving Aer Lingus and another airline and assess the likelihood of each of these having taken place in the period since 2006 or taking place in the foreseeable future."

That is really important for this procedural fairness stuff. It is not the exercise in which the Competition Commission is engaged to try and adumbrate who Aer Lingus' closest possible friends might be, how it might integrate and what is going on in relation to them. It is just worth noting footnote 74:

"For instance, we were aware that the two airlines with which Aer Lingus had entered into discussions regarding substantial combinations in 2012 and 2013 were not mentioned as likely combination partners in our discussions with third party airlines which were asked about the likelihood of Aer Lingus being involved in a combination."

It just goes to the unpredictable element that we are talking about. Going back to 7.25:

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

That is the gist of the case that is being considered here. Then we have "The Role of Ryanair's minority shareholding." So this is essentially the how. At 7.27:

"We identified of ways in which Aer Lingus and another airline could combine. These ranged from a full merger involving the integration of business activities and assets (including an acquisition of Aer Lingus by another airline, an acquisition by

Aer Lingus of another airline, and other combinations based on the relative contribution of Aer Lingus and its merger partner to the enlarged business), through a joint venture (with close cooperation but less extensive business integration than a full merger), acquisition of a strategic investment in Aer Lingus via a minority shareholding by another airline, to franchises, codeshares and bilateral alliances with no integration. We set out different possible forms of combination in more detail in Table 1 in Appendix F."

THE CHAIRMAN: There is a vast number of potential combinations, are there not.

MR. BEARD: That is the issue.

THE CHAIRMAN: And on so many different levels.

MR. BEARD: Absolutely. There are vast numbers of combinations. As we will come on to see there are vast numbers of ways of doing each of the types of combination. The creativity of corporate lawyers and investment bankers how to structure deals is, if not infinite, stretches into the far distance.

The Competition Commission is not trying to nail this sort of thing down. It looks at the overall incentives and it looks at whether or not there is a credible mechanism here. Ryanair, to use its shareholding, in relation to these sorts of relationships, what impact does the shareholding have? Aer Lingus' comments are at 7.28:

"Aer Lingus said that Ryanair's shareholding allowed it to control the destiny of Aer Lingus, making it 'kingmaker'. It told us that because of the minority shareholding, Aer Lingus was known as a target for a Ryanair takeover rather than a successful and profitable airline, and that this was an impediment to partnership negotiations."

On the other hand, at 7.29:

"Ryanair told us that it would be open to offers for its shareholding on their merits, and had repeatedly said so in public. Ryanair also said that it would not oppose a proposed acquisition if it were in the interests of Aer Lingus's shareholders, and would support Aer Lingus if it sought to raise capital by taking up its quota of shares in any rights issue. Ryanair said that its shareholding could not prevent Aer Lingus from acquiring another airline, as it could use its cash reserves or debt to finance an acquisition."

7.30:

"Third parties told us that any acquirer of Aer Lingus would be likely to be concerned by Ryanair's minority shareholding."

Then there are comments from IAG about not contemplating buying a controlling interest with a significant minority ongoing shareholder.

> "Air France said that Ryanair's presence as an existing shareholder in Aer Lingus was not considered a deterrent to another airline acquiring an interest in the airline. However, there would be concerns over the illiquid share block of shares."

This was not Ryanair alone, it was the Irish Government, Ryanair and employees.

> "Overall, Air France said that it would be difficult, but not impossible, for another airline to take a stake in Aer Lingus given its current share register. Lufthansa said that having a competitor like Ryanair as a shareholder made Aer Lingus's shareholder structure rather challenging and made the airline rather less attractive. Aer Arann told us that a potential suitor would have concerns about acquiring an airline in which the largest shareholder was also a competitor."

Those were the two bits of this section that I think Lord Pannick read to you. 7.31:

> "We found that Ryanair's minority shareholding would give it the ability to impede possible acquisitions of Aer Lingus by another airline. Significantly, Ryanair could prevent a bidder from acquiring 100 per cent of Aer Lingus by choosing to retain its shares. If Ryanair decided not to sell, an acquirer would need to accept Ryanair remaining as a significant minority shareholder, with different incentives to its own, and with, for example, the ability to block special resolutions and the entitlement to the proportionate share of the dividends and profits of Aer Lingus. In such circumstances, the acquirer's ability to integrate the businesses would be significantly restricted."

So how could it do this? Is there a mechanism? The Competition Commission finds the minority shareholding would give it the ability to impede possible acquisitions. 7.32:

> "We also found that the shareholding would affect Aer Lingus's ability to merge with, enter into a joint venture with, or acquire another airline, by forcing Aer Lingus to seek Ryanair's approval for certain types of transaction. First, Ryanair's ability to block a special resolution means that it could prevent a merger between Aer Lingus and another airline via a scheme of arrangement or under the Cross Border Merger Regulations Ryanair could also prevent Aer Lingus from issuing new shares to a potential partner via a private placement and could prevent other forms of corporate restructuring or reorganisation (for example, a repurchase of the company's shares, a reduction of share capital … which would be required in certain types of transaction. Second, Ryanair could hamper Aer Lingus's ability to

> issue shares for cash in order to raise the capital needed to acquire or merge with another airline … This is discussed in more detail in paragraphs 7.85 to 7.92. Third, if Ryanair were able to command a majority in an Aer Lingus general meeting paras.7.108 and 7.114)"

I just say in passing, Lord Pannick made great play of what he said were the second and fourth mechanisms when he dealt with Ground 4 and how they did not amount to very much, and they were linked to the first mechanism. It is not really a criticism of the Competition Commission because the Competition Commission was looking at issues concerning ability to issue shares for cash and says that is dealt with in another section here, and also in relation to ordinary resolutions for a class 1 transaction. So the Competition Commission was alive to the fact, although it divided them up, it recognised that the first, second and fourth mechanisms might concern issues to do with combinations.

7.33:

> "We considered there to be a significant likelihood that potential combinations that, absent the minority shareholding, Aer Lingus might have been or would in the future be involved in would trigger one or more of these mechanisms".

So you have got the incentives, you have got a finding that Ryanair's minority shareholding would give it the ability to impede, and you have got a finding that there is significant likelihood that potential combinations that it would have or would in future be involved in would use one of the mechanisms which Ryanair could impede and had the incentive to impede.

> "The transactions being proposed would have been likely to involve significant restructuring of Aer Lingus's share capital and/or corporate structure, which would have required the approval of Ryanair. In general terms, the more significant the transaction being contemplated (all other things being equal), the more likely Ryanair's shareholding would be to impede – or give Ryanair the ability to prevent – the combination from taking place, as a larger transaction would be more likely to require a shareholder vote …".

And this is in a context of dealing with strategy which is long term and concerned with combinations between airlines that are inherently unpredictable. So, the case on that mechanism (a) is well spelled out here.

> "In addition to these direct effects [there are secondary effects] we considered that the minority shareholding would be likely to affect Aer Lingus's ability to be acquired,

merge with, enter into a joint venture with or acquire another airline even without Ryanair needing to take any particular action".

This matters for the ground (3) points.

THE CHAIRMAN: Yes.

MR. BEARD: And essentially the answer is this is passive influence that is being talked about. It is still material influence, but it is passive. So when we have got in 7.34(a):

"Ryanair's influence, combined with its incentives as a competitor to Aer Lingus, would create significant execution risk for airlines …"

And (b) which was the provision on which Lord Pannick hung his hat:

"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. This … might arise, for example, if an airline merged with Aer Lingus and shares in the respective airlines were exchanged, via a scheme of arrangement (or via the EU Cross-Border Merger Regulation)".

Those mechanisms referred to previously, those are being impaired by the very presence of Ryanair. So, holding a shareholding in your rival impedes that rival in relation to its ability to merge with or acquire other airlines. You do not even have to do something because the perception is, having you there is problematic. Does it have an influence on Aer Lingus and its strategy in commercial decision making? Plainly, yes.

"(c) potential partners might be deterred from entering into, pursuing, or concluding discussions with Aer Lingus by the fear that Ryanair would use its existing shareholding as a platform from which to launch further bids …",

Well, given that it is the express strategy of Ryanair to do so, that would not be an outlandish conclusion. But it is also worth noting 7.35:

"We thought that Ryanair's shareholding would not directly impede Aer Lingus's ability to enter into less significant forms of cooperation such as codeshares, franchise agreements and alliances".

So there is a careful distinction being drawn here between combinations of a more significant sort and franchises and codeshare agreements which the CC in its judgment considered would not be impeded by Ryanair.

The next section starting at 7.36 is again very important. Ignored in opening submissions, ignored in the various pleadings that we have seen by Ryanair, the trend of consolidation in the airline industry:

"Ryanair [in submissions had] highlighted the trend in consolidation, saying that Europe's airlines were inexorably consolidating into five large scheduled airline groups led by Air France, British Airways, easyJet, Lufthansa and Ryanair.

Aer Lingus told us that in the near to medium term [so not in the long term, near to medium term] there was likely to be a continuing pattern of significant consolidation in the airline industry.

7.37 The … trend of consolidation in the industry was also recognized in our discussions with other airlines, with the desire for revenue and cost synergies, as well as the financial pressures on certain airlines identified among the potential drivers of this trend. We were told by several airlines that consolidation in the European airline sector was part of a worldwide trend of consolidation that would continue in the future, with the US airline industry in particular exhibiting a significant amount of merger and acquisition activity …"

And then there are various examples of European airline M&A and, 7.39:

"We found that there was a pattern of consolidation in the airline industry, for which a primary driving force was the need to exploit economies of scale and contain or reduce the costs per passenger …. We formed the view that this trend of consolidation involving European airlines was likely to continue in the future".

So you have got incentives for Ryanair to act, to impede a combination. You have got the findings that it has the ability to do so. You have got findings as to how these sort of combinations could take place. You have got findings as to why it is in order to remain competitive, and we will come back to this in relation to scale and efficiencies, that people will want to combine, and you have got an evidence and finding of a trend in relation to consolidation. This is all to do with whether or not Aer Lingus entering into combination with another is a credible mechanism by which Ryanair could exercise its influence and impede competition.

"Views of airlines on the likelihood of a combination involving Aer Lingus", so we are at 7.40, and it is also in appendix F which I will come to. First of all at 7.41 you have got Aer Lingus's account. What is interesting in 7.41 is the fact that you have consideration by Aer Lingus being expressed that there are different options for growth:

"Aer Lingus said that it had been and remained interested in attracting investment, and that its management had identified a need for growth and was actively considering both inorganic and organic options for expansion. … it was constrained by the size of

its home market; however, it needed to grow in order to achieve greater scale to avoid the company's cost competitiveness eroding over time".

It is this costs creep issue. It is scale and efficiencies ebbing away for smaller airlines against the backdrop of this trend for consolidation.

"Minutes from a meeting held in 2013 where Aer Lingus's board considered the strategic options available to the company following publication of the European Commission's prohibition decision show the board resolving in favour of inorganic growth (provided this was consistent with its revenue model)".

So, it is looking for combinations, not just organic growth.

"7.42 Aer Lingus … did not have a weak balance sheet … said that rather than being acquired, it might [actually] look to acquire another airline.

7.43 Ryanair told us that Aer Lingus had no future as an independent airline because of its small scale, its peripheral location and its repeated failure to expand outside of Ireland. It said that Aer Lingus would not be around as an independent airline in five years' time".

Now that rather fits with the trend in consolidation in the airline industry and the concerns about scale and reducing costs:

"Its cash pile would continue to dwindle, although the time period could be shorter or longer, depending on how the airline dealt with issues such as the pensions deficit and its high overheads. It told us that nobody believed that there was a bright future for peripheral sub-scale carriers in Europe".

It really can tell it nicely, Ryanair.

"7.44 Ryanair said the only long-term future for Aer Lingus was as part of a bigger stronger Irish airline … with Ryanair".

That is it. This is Ryanair's case. Yes, there is a drive towards combinations. Yes, that is driven by the economics of scale and efficiencies. Yes, Aer Lingus is a potential candidate for those sorts of combinations because otherwise it will dwindle and die; but the only arms into which Aer Lingus could ever possibly fall are Ryanair's.

"It said that although Aer Lingus had shopped itself around, it had been unsuccessful in finding a partner because no other airlines were interested Aer Lingus (despite the fact that Aer Lingus could be relatively easily acquired, given that a prospective buyer would only need to acquire the shares of two shareholders …. It told us that easyJet, Air France, British Airways and Lufthansa had all said in the last five years that they were not interested in acquiring Aer Lingus".

So Ryanair is well able to put its case that there is no-one but Ryanair for Aer Lingus.

THE CHAIRMAN: could I just ask one point of detail?

MR. BEARD: Yes, of course.

THE CHAIRMAN: I understand that the Competition Commission would have spoken to a number of airlines and we see in appendix 8 there is quite a few, and someone is going to give me the numbers.

MR. BEARD: I actually have that. The answer is 13.

THE CHAIRMAN: Yes, so 13 airlines in appendix F, yes?

MR. BEARD: Yes. That is right.

THE CHAIRMAN: And Ryanair's case is that unless we know the identity of those 13 airlines, we cannot really comment on what is said there, right?

MR. BEARD: Yes. It appears to be.

THE CHAIRMAN: Is it known by you, and I am not asking Lord Pannick to answer, whether or not Ryanair made their own enquiries of other airlines, or was it simply relying on you to do the work to make enquiries as to how likely a combination would be?

MR. BEARD: Well, obviously I cannot —

THE CHAIRMAN: Because I have not seen the submissions between Ryanair and the Competition Commission, but does that come out in the submissions, that they did their own exercise?

MR. BEARD: One would assume that Ryanair, being a very successful airline, is well conversant with the airline industry and had all sorts of scope to make all sorts of enquiries of all sorts of people. Whether or not it did so, I have no idea, and I do not know whether Lord Pannick can answer that.

THE CHAIRMAN: You have gone out and got evidence, speaking to various airlines.

MR. BEARD: Yes.

THE CHAIRMAN: And we have seen the results of that in appendix F.

MR. BEARD: Yes.

THE CHAIRMAN: We understand what Ryanair's point is, saying "Well, we can't really comment on that without knowing the identity".

MR. BEARD: Yes.

THE CHAIRMAN: But theoretically it would have been possible for them to go out and speak to other airlines as get their own evidence, but I just do not know whether that comes out of the correspondence between —

MR. BEARD: I do not think that, I do not believe that there are details of Ryanair's investigations, as it were.

THE CHAIRMAN: Yes.

MR. BEARD: Ryanair plainly could do that sort of thing.

THE CHAIRMAN: Well, just depending on confidentiality because it may be other airlines would not be willing to talk.

MR. BEARD: I mean, the point is that in the paragraph I was just referring to Ryanair obviously have a lot of intelligence about the airline generally. After all, they are operating very successfully in it. They clearly have their own quite trenchant views about how that industry is developing and how different players it competes with might or might not be joining up with other people.

THE CHAIRMAN: You have got a positive assertion there by Ryanair that no other airlines would be interested. I am wondering whether that is just an assertion or it is an assertion based on their own inquiry?

MR. BEARD: I do not know the answer to how they got that information. Ryanair puts this sort of information forward and we assess it on the basis of the level of detail, the nature of the information, and so on. It is taken in the round as part of an investigation. I am not sure I am going to be able to assist further in what enquiries Ryanair did make, but plainly Ryanair has very great scope, just as anyone else in the industry would do, to make enquiries and indeed make prognostications about the industry. We are, after all, taking about an assessment of the future as well. When we are talking about likelihood of combinations, we are not talking just about the past. Indeed, it is only in the next section that we come on to discuss the position vis-à-vis 2006. We are talking about possibilities, and so on. The idea that you need to know the identity of any of the airlines concerned in order to deal with this, none of the contentions here are ones that have been highlighted as of concern in the skeleton at 65 in relation to this. In relation to the particular procedural fairness point, I do not think actually anything arises here.

THE CHAIRMAN: Not yet, no, but we will come to it.

MR. BEARD: In relation to this section there are not any, so here we are looking at likelihood of possible combinations and Ryanair, putting forward its case, know that Aer Lingus will not be involved in any possible combination, and because it will not be involved in any possible combination, other than with us, in those circumstances, notwithstanding the general trend of consolidation in the industry, there is no mechanism by which we can actually impede its strategy, because its strategy is entirely foreclosed. It only has Ryanair or nobody.

THE CHAIRMAN: The point I was just putting to you is that Ryanair could have gone out and done its own research, and I was just trying to find out you have any hint as to whether that exercise had been done.

MR. BEARD: No, we do not. When the Competition Commission has a merger referred to it, of course it is put on the website and the industry knows about these things. It is publicised, people come forward who are interested and provide evidence to the Competition Commission. That is true of airlines, it is true of any industry with which we are dealing. The CC is obviously conscious that people plead from their own self-interest when they are giving evidence. The CC has powers to require information from people, but in the main there is a great deal of response to informal requests, and so on, as well.

THE CHAIRMAN: Yes, all right. I did not mean to divert you.

MR. BEARD: I am not sure, I confess, that I have really assisted in relation to that question. Unless those behind me say otherwise, I am not sure we can help any more.

THE CHAIRMAN: No, that is fine.

MR. BEARD: We were just looking at what Ryanair said in 7.44. Then 7.45:

> "Third parties identified a number of features which could make Aer Lingus an attractive partner for a combination, including its strong financial position, its brand, its attractive slot portfolio and its position in the Irish market."

So people were giving these comments and indicating what the sorts of features were. Just to be clear, of course, the identification of these sorts of features making Aer Lingus attractive to people other than Ryanair were, of course, the sorts of matters that are raised earlier on in the process and raised in provisional findings, and so on. So the essence of what it is that makes Aer Lingus attractive is plainly all spelled out and there to be commented upon.

> "Several parties, including Aer Lingus, told us that, in the short to medium term, a transaction involving Aer Lingus and one of the three large European carriers …"

So this is in, again, the short to medium term, not the long term -

> "… one of the three large European carriers was relatively unlikely …"

It is saying, we recognise in relation to those particular carriers, in the short to medium term, that is not going to be a likely combination, so we are recognising certain restrictions in relation to these issues, but overall there is the clear view of the reasons why Aer Lingus is an attractive notwithstanding Ryanair's submissions to the contrary. To be clear, Ryanair is of course saying that it is attractive to Ryanair, but to no one else.

THE CHAIRMAN: Yes. I was really trying to explore with you what was behind that statement, but you cannot help me on that.

MR. BEARD: No.

> "Evidence of potential combinations involving Aer Lingus in the period since 2006."

So this is looking backwards. Again, all of this is in the exercise of the question, is combination a credible mechanism through which Ryanair could exercise its incentive to impede competition.

7.47, was there any reason to think that the evidence from 2006 to date suggested that Aer Lingus was not, in fact, a credible partner. You have got all this material on incentives, on trends, on reasons why Aer Lingus would be a potential combination partner, and you are cross-checking against the period that elapsed since 2006.

Just to jump ahead to the conclusion at 7.55, in this section:

> "We concluded that there was significant evidence from the period since 2006 that Aer Lingus has wanted to pursue inorganic growth as part of its commercial policy and strategy."

That is the key finding here. As you will remember, there was discussion about the position in 2013 that Aer Lingus was wanting to pursue inorganic growth, but there was significant evidence in the period since 2006 that Aer Lingus had wanted to do.

> "The internal documents of Aer Lingus suggested that in 2011 Aer Lingus reached the conclusion that an acquisition by one of the large European carriers was unlikely to take place."

So that fits back with what we saw in 7.46.

> "As set out in para.7.10 to 7.47 …"

so those are the preceding bits -

> "… we are unable to observe what discussions regarding potential combinations would have taken place since 2006 in the absence of Ryanair's minority shareholding."

So you are effectively blind to that, because Ryanair has been sitting there.

> "However, the discussions that have taken place while Ryanair has had its minority shareholding, although not ultimately pursued, suggest that possible combinations arise and other airlines have considered Aer Lingus to be a credible partner."

That is the gist of this section. Is Aer Lingus a credible combination partner. You are cross-checking against the material you have had since 2006. Ryanair is well able to challenge that, and did so.

If we go back to 7.47, the introduction:

> "We considered evidence of potential combinations involving Aer Lingus in the period since 2006, including both Aer Lingus's internal assessments of M&A opportunities and evidence of discussions between Aer Lingus and other airlines."

So the fact of the discussions is what is critical here.

> "Further details of this evidence are provided in Appendix F. We were conscious in assessing this material that any discussion with other airlines or internal analysis of potential combinations would have been carried out in the context of Ryanair's minority shareholding …"

but again we were not able to assess what would have taken their place absent it.

Then 7.48:

> "We were aware of various internal Aer Lingus strategy documents from the period assessing possible options for inorganic growth, confirming that Aer Lingus had actively considered combining with another airline. In 2010 Booz & Company presented an M&A Opportunity Assessment to Aer Lingus. This report identified a total universe of 116 merger partners for Aer Lingus and presented the results of a systematic screening exercise. It identified a shortlist of 22 potential partners and identified seven best - fit merger partners for Aer Lingus. We note that since this report was prepared the trend of airline consolidation has continued, reducing the pool of potential merger partners available to Aer Lingus."

Then it gives an example, and that is redacted. But the challenge, and this is the first of the challenges on a fair procedure basis. In para. 65.1 of the skeleton:

> "Without access to a Booz & Company report it is impossible for Ryanair to challenge the contention that there were 22 partners for Aer Lingus, or make submissions on the viability of the combinations with any of them."

Let us just pause there. 7.48 is not making a finding that there were 22 viable partners or, indeed, that there were seven best-fit merger partners or, indeed, that there was a total universe of 116 partners. What 7.48 is saying is that we are aware of various internal Aer Lingus strategy documents from the period, assessing possible options for inorganic growth.

That is what it is talking about, and it says that actually, there was a management consultant report on this.

Is Aer Lingus serious about inorganic growth? Yes. That is what is being said here. That is, in fact, all the gist that you would ever need for these purposes. Actually, it goes on and says more here and refers to a particular document, but "Without access to the Booz & Company report it is impossible for Ryanair to challenge the contention there were 22 potential partners" - there is not even a finding. All it is talking about is what Aer Lingus was doing. So the idea that somehow, because they have not had this report, Ryanair are unable to comment on whether or not Aer Lingus is a credible merger partner for the period from 2006 is just remarkable. It is without any merit whatsoever. It does not matter what test you impose in relation to fair procedure.

THE CHAIRMAN: Your point is that the first two and a half lines is what matters.

MR. BEARD: Yes.

THE CHAIRMAN: And the rest is evidence in support that they were assessing their options.

MR. BEARD: Exactly.

THE CHAIRMAN: But you are not relying on the Booz & Company report, either for the facts contained therein, or for the validity of the conclusions drawn.

MR. BEARD: Absolutely, that is exactly right. That fits completely with what we have said we are doing here. We are not going through and trying to consider and catalogue all possible transactions. It could not have been clearer in para. 7.25 that that was the exercise that is being undertaken. It is a general assessment, it is not trying to catalogue. That is why all of these fair procedure challenges are wholly flawed, because the Competition Commission was not trying to catalogue, it was not trying to identify whether or not there was specific merger combination propositions. It was looking at the general criteria for assessing whether or not Ryanair would have a mechanism by which it would be able to impede competition.

That is even without going back to anything to do with the sensitivity and confidentiality of a report like that that is prepared for a particular entity. Obviously, the date may have an impact on the value and sensitivity of material in a report, we quite accept that, but actually these sorts of reports, which are prepared by consultants for particular companies will betray an external analysis of the details of a company's thinking, or underlying data and expectations that is inordinately valuable to other players in the market, not least of all your closest competitor. So even if there was any case here that this sort of material needed to be disclosed, this is the sort of material that you would have to be extraordinarily cautious

about, putting through the Part 9 process and saying: "It is necessary that this is disclosed, certainly to Ryanair, and if it is going to a confidentiality ring, what is the point of that". As I have said at the outset, the challenge was that this material should have gone to a confidentiality ring. So that is the first of the specific procedural fairness points that are raised.

Then we come on to 7.49:

> "While various documents from 2010 show that Aer Lingus considered acquisition as a desirable route to achieving growth at this time …"

Then 7.50:

> "Aer Lingus told us that it had had informal, exploratory contacts with a number of other unnamed potential investors or partners in the period since 2006, and that it had emerged clearly in these contacts that Ryanair was seen as a major deterrent to investment in Aer Lingus. We were aware of discussions that had taken place between Aer Lingus and [X] about the possibility of Aer Lingus acquiring [X] and about the possibility of Aer Lingus acquiring [Y] and in 2011 about the possibility of acquiring its acquiring [Z]. These transactions did not ultimately proceed for reasons unrelated to Ryanair's minority shareholding."

We do not understand on what basis it could ever be said that in relation to 7.50 you could possibly say that Ryanair needs to understand why it is that those discussions failed for reasons unrelated to Ryanair's shareholding. That is the second of the particular claims that is being made.

THE CHAIRMAN: It is half the second.

MR. BEARD: I am sorry, yes. I am coming on to 7.51. Going to 7.51:

> "Aer Lingus also described a possible combination between Aer Lingus and [A] that had been considered in early 2012. The transaction was ultimately abandoned as a result of Ryanair's third bid for the outstanding shares in Aer Lingus. [A] told us that the shareholding of Ryanair in Aer Lingus was a [X] consideration when considering what could be achieved as a result of these discussions with Aer Lingus: it was clear that any proposal that Aer Lingus and developed would need to be acceptable to Ryanair."

So here is a situation where it is being said by Ryanair that it is impossible to verify whether the discussions with unnamed partners involved in 7.51 happened at all, or what was their content, or whether there was any realistic prospect of those discussions resulting in a

combination. It is impossible to verify whether it is correct to say the unnamed airline abandoned the transaction as a result of Ryanair's third bid, or to take steps to ascertain whether that unnamed airline had told the Competition Commission the full story. Let us deal with that.

First, what we are talking about here is whether or not Aer Lingus was interested in organic growth during the period. In 7.48 and 7.49 there are discussions of the documentary material from Aer Lingus, then in 7.50 and 7.51 it is Aer Lingus had talked to people. It is not going through the hows, whys and wherefores of those discussions. It does not require consideration of the specific identities. All it is doing is asking whether or not Aer Lingus really is a credible partner in all the circumstances. In other words, is it interested in combinations? Not with any particular party because we are not interested in cataloguing, we recognise that combinations are inherently uncertain and opportunistic. You do not need to know the details of the identities of the persons concerned in relation to this, and the suggestion that Ryanair, or more exactly its lawyers, should have been told the name of the unnamed airline that abandoned the transaction does not leave Ryanair unable to answer the central contention which is, "Is Aer Lingus a credible combination partner?" That gist is crystal clear from these provisions.

I should say the letter I used there, I was using it *ad hoc*, of course we are talking here about a situation where these complaints are made in circumstances where the Tribunal has ordered that the material goes into a confidentiality ring on an anonymised basis, so this is the height of Ryanair's case in relation to this, but I am not using the particular anonymisations that have been employed.

THE CHAIRMAN: Yes.

MR. BEARD: I think we are then on to, sorry, just on the second limb, to take steps to ascertain whether the unnamed airline had told the CC the full story. Well, Ryanair is not some kind of Witchfinder General here. We have set out very clearly in the defence and it is a passage that I will come back to in relation to BAA, that it is for the CC to decide what enquiries are to be made as part of an investigative process, unless it is acting irrationally, that is not a matter upon which it can ever be criticised. Ryanair, any interested party, is not there as some kind of total auditor of everything that the CC looks at. It is not there to be provided with every piece of information in relation to every hearing and then to be able to go away and cross-examine whoever it was that gave that information. That is not required by fair procedure in relation to a merger enquiry. At 7.52:

"It is impossible to ascertain [this is skeleton 65.4] whether there is any realistic prospect that the combinations referred to at 7.52 … might materialise, and if so, whether there is any real reason why Ryanair's minority shareholding might deter such combinations".

Well, what does 7.52 talk about?

"Aer Lingus's board considered a strategy document summarizing three possible growth options available to the company: organic growth coupled with restructuring to reduce the cost base; growth as a subsidiary of a larger entity; and inorganic growth …. Aer Lingus resolved in favour of the third option … and various combinations were explored, including a merger with [X]; a potential combination … and the creation of a new joint venture … [to pursue opportunities that were identified for expansion primarily on European routes not presently serviced by either party]. None of these options has, as yet, materialized …".

So the CC is not asking itself whether or not these particular instances might materialise, that misrepresents the case,

"… and the submissions of Aer Lingus suggest that the specific … proposals outlined are for the time being unlikely to proceed [and again] for reasons unrelated to Ryanair's minority shareholding".

So, when it says in 65.4:

"It is impossible to ascertain whether there is any … reason why Ryanair's minority shareholding might deter such combinations",

the answer is actually in para.7.52. Then we come to 7.53:

"In relation to the potential combination with … Aer Lingus internal documents relating to the transaction show that under the combination being discussed, … would have become a large minority shareholder in Aer Lingus. Given this, it is likely that Ryanair's approval would have been required for the transaction to go ahead".

THE CHAIRMAN: Sorry, where are you reading from?

MR. BEARD: It is 7.53.

THE CHAIRMAN: Yes.

MR. BEARD: So, again, it is consideration of documents, looking at whether or not Aer Lingus really was a credible combination partner. We are then down to 7.55 in the Conclusions, which I have already taken you to.

THE CHAIRMAN: Yes.

MR. BEARD: And then we move on to "Other factors affecting the likelihood of Aer Lingus being involved in combinations", including the position of the Irish government and external restrictions on acquisitions. And then we get to the "Impact on Aer Lingus's effectiveness as a competitor" at 7.59. I will keep going through here because the next one in 65 it relates to 7.68. If one looks at 7.60 and 7.61:

> "There are various ways in which Ryanair's influence over Aer Lingus's M&A strategy could affect the airline's effectiveness",

because we are now looking at how the impact on the M&A strategy would affect Aer Lingus as a competitor.

> "Given its incentives as a competitor we would expect Ryanair to be more likely than an independent shareholder to oppose any combination which it expected to strengthen Aer Lingus's position".

So, again, we are going back to the general theme about the incentives and Ryanair as a rational operator being considered by the CC and the way in which it could impact on Aer Lingus's effectiveness.

> "7.61 The impact of any particular combination on Aer Lingus would necessarily depend on the identity of the combination partner and the specific nature of the transaction being contemplated. We have not sought to assess the probability of any particular transaction involving Aer Lingus … we therefore do not seek to carry out an analysis of the impact of any specific combination. Rather, we take into account a range of evidence — particularly relating to the importance of scale to Aer Lingus and to the airline industry more generally — to reach a view on the likely importance of a combination, or sequence of combinations, to Aer Lingus's competitiveness".

So having had a section which looks at in the past whether or not Aer Lingus had been considering inorganic growth we are going back to the main theme which is, is there an economic driver for Aer Lingus wanting to be part of a combination, because we know Ryanair has the incentives and the ability to impede that? And then in 7.62 there is an account here of the importance of scale to airlines:

> "Both Ryanair and Aer Lingus referred to the importance of scale to airlines in order to keep costs down. Aer Lingus told us that in the absence of an ability to build scale, it will face an inevitable 'cost creep' over time eroding its competitiveness".

And then it goes on to spell out why it is that that was so important.

> "This created a need for growth (eg by sharing overheads over larger volumes), in order to reduce costs and remain competitive. Internal strategy documents produced

by Aer Lingus confirm the importance it attached to building scale in order to remain competitive, and the need for inorganic growth to achieve this".

And then we have got, in 7.63, 7.64, 7.65, 7.66 a discussion about synergies, in other words the sorts of benefits that could come through combinations that will enable costs savings in addition to just costs savings made through scale. So the economic drivers for the mechanism, and I just highlight 7.66, a number of possible costs synergies were identified, bargaining power in procurement, elimination of duplication in back office functions, consolidation of maintenance and training programmes, diversification of operations and so on.

And then 7.67, "Several airlines gave us examples of cost synergies". And then at 7.68,

> "Aer Lingus told us that the [particular] transaction could have led to considerable costs savings (in addition to synergies in the areas of [X] in a short timeframe. It told us that the synergies associated with the … transaction would have enabled the combined entity to compete more effectively in existing markets, as well as potentially providing a platform for entrance into new markets and routes. Internal documents relating to the proposed combination … show that Aer Lingus estimated annual cost synergies resulting from the increased scale of the resulting business to be in the range of £[30-50] million, with particular savings in the areas of maintenance costs and overhead reductions".

So here we have a situation where Aer Lingus is saying, "In line with what many others have said and indeed with which Ryanair appears to agree, that synergies will bring cost savings. They could be significant through combination, and the proposition that is put forward suggesting that this is not a sufficient gist for Ryanair to be able to put forward its evidence in relation to synergies, costs savings, the way in which combinations work, it says it is impossible to evaluate the assertions made by Aer Lingus at 7.68, because it is impossible to identify Airline B. Without that information Ryanair cannot make submissions as to the realism of the alleged savings and the synergies that were alleged to be possible in combination with that airline. It is simply misconstruing the report again. This is all about, are there possibilities of synergies through combinations? The answer is plainly yes. This is something that Ryanair agrees with, this was a particular occasion in relation to which there was documentation. You can answer the gist of the issue to do with synergies and scale without knowing the identity of Airline B.

Then we come on to 7.70 which is to do with Ryanair and its dealings with the submissions to the European Commission, and I will not, of course, point out the irony of Ryanair being

very insistent that it is important that its submission are kept confidential in relation to these matters, but obviously they are sensitive to Ryanair, just as they are to any other player in the circumstances.

7.72 is considering the European Commission's findings on efficiencies arising from the third bid. It is said that this is inconsistent with our own findings.

Lord Pannick did not really develop this point, did not take you to the particular passages in the decision of the European Commission, but it is interesting, if one wants to, to look at those passages, because much of it is concerned with the fact that the Commission considers that Ryanair did not put forward a sufficient evidential case that there were such efficiencies.

> "The European Commission considered the possible efficiencies arising from the merger between Ryanair and Aer Lingus in order to determine whether any such efficiencies were sufficiently verifiable, merger-specific and to the benefit of consumers that they would be sufficient to counteract the substantial competitive harm likely to arise as a result of Ryanair's bid for entirety of Aer Lingus. It concluded that Ryanair had not provided sufficient evidence to demonstrate that this was the case. In contrast to the circumstances being considered by the European Commission, in the event of a combination between Aer Lingus and another airline of the type we are considering here, we would ex Ryanair to remain as a strong competitive constraint to Aer Lingus, and so efficiencies would ultimately be passed on to consumers."

Then in 7.73, again an important strand of analysis, the CC looks at Aer Lingus's cost structures. So it does not just look at internal documents, it does not just take the views of third parties, it does not just take the views of Ryanair, it looks at Aer Lingus's cost structures and sees whether or not it thinks there is room for these sorts of synergies and benefits, and that is what is being referred to in 7.73. So another important strand here going to why it is that Aer Lingus would be a credible combination partner.

7.74, Ryanair just disagrees with this. It says, "No, actually you could most of these savings and advantages through lesser combinations, the minority investments, franchises, codeshares, etc. The CC just disagree with that, and 7.75 says:

> "However, most of the airlines that we talked to told us that the majority of potential cost synergies would be restricted to fuller combinations such as mergers, because such synergies generally required a greater level of integration between the parties' operations. We agreed with this view."

It is hardly radical. If you have a full merger the available synergies are much more likely to be large than they are in relation to a much more limited franchise or codeshare agreement.

Then 7.76:

> "Ryanair said that the cost synergies identified by the CC would be unlikely to be realised in the context of an acquisition by Aer Lingus - any airline that Aer Lingus was capable of acquiring would be a small peripheral airline, which would have a negligible impact on Aer Lingus's cost base."

So unless it is Ryanair it is some other utterly useless airline that will not give any cost benefits of synergies. The CC just disagrees with that.

THE CHAIRMAN: I am sure they are not really saying it is a useless airline.

MR. BEARD: I am sorry, I paraphrase. What we say about that is that Ryanair puts its case strongly in relation to why it is that there is not an underlying case for cost synergies and scale benefits. There is no reason to think that they misunderstand the position. That is borne out by 7.77 and 7.78.

Then we get the conclusions at 7.79 in general terms:

> "The submissions of Ryanair and Aer Lingus suggest that scale is important for Aer Lingus's overall competitiveness as an airline …"

so that is Ryanair and Aer Lingus -

> "… and we expect this to apply equally to the routes that it operates between Great Britain and Ireland (which make up a significant part of Aer Lingus's short-haul operations and are core to its business). If achieved, many of the cost synergies discussed above would apply at group level and so even a combination that did not involve another active in Great Britain or Ireland could improve Aer Lingus's effectiveness as a competitor on routes across the Irish Sea by increasing its overall scale and thus reducing its unit costs."

Then we get to the main conclusions in this section, which Lord Pannick did take you through. I am conscious of the time. I do not want to re-read, but it is important to read these conclusions in the light of all that has gone before:

> "We found that as a consequence of its minority shareholding Ryanair would be able to impede another airline from acquiring full control of Aer Lingus, and that its shareholding 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. This would be likely to act as a deterrent to other airlines considering combining with Aer Lingus …"

THE CHAIRMAN: I do not think you need to read those two paragraphs. We are quite familiar with them.

MR. BEARD: In relation to the fair procedure point, I would just highlight at 7.83:

"The extent to which we can draw inferences from evidence of discussions between Aer Lingus and other airlines in the period since 2006 is limited because of the presence of Ryanair's minority shareholding throughout this period. Nevertheless, the discussions between Aer Lingus and other airlines which had taken place in the period since 2006 suggested to us that possible combinations arise and other airlines considered Aer Lingus to be a credible partner for a combination."

That is the gist. Obviously it is filled out in the preceding paragraphs, but that is what is being talked here, and none of the procedural matters assist at all.

If I may, I will deal briefly with Appendix F, and then I shall probably be done with.

THE CHAIRMAN: It is important that you deal with the ones specifically set out at 6 to 9 under para.65.

MR. BEARD: Yes, those are the Appendix F ones, so that is what I was going to deal with, if I may.

THE CHAIRMAN: You should be able to finish this topic today.

MR. BEARD: Yes, I will be done with this. These are the two most substantial. As I say, having been through that material on section 7, I hope to be able to get through Grounds 3 and 4 much more quickly tomorrow.

THE CHAIRMAN: Before I forget, can someone give me a copy of your skeleton with all the cross-references to the bundles?

MR. BEARD: Yes, certainly. It may be useful also to have one for the defence, because our defence includes a lot of the relevant citations.

THE CHAIRMAN: I think I have already got a version which has got cross-references.

MR. BEARD: I do not believe you have.

THE CHAIRMAN: I have got two copies of it. You are saying they are the same, are you?

MR. BEARD: I think one is paginated.

THE CHAIRMAN: That is all it is?

MR. BEARD: That is all it is, yes.

THE CHAIRMAN: Do not bother to do it for the defence, just the skeleton will be enough.

MR. BEARD: Appendix F, combinations involve Aer Lingus. Forms of combination, this is just drawing on what has gone before. Airline ownership:

> "Views on the likelihood of Aer Lingus combining with another airline."

Obviously you have got Aer Lingus's views, you have got Ryanair's views, you have got views from IAG, you have Lufthansa, you have got Air France, easyJet, Flybe, Aer Arann. I make no complaint about any of this material. Obviously this is all material that has been taken into account in relation to the main report. No complaint is made in relation to it. The first complaint is in relation to para.49 under "Other parties".

THE CHAIRMAN: Are you saying that the other airlines, apart from the ones that are named, they total 13 - is that right? Or is the total number 13?

MR. BEARD: There are 13 letters in the anonymised material that was provided to you. I think that is what we thought.

THE CHAIRMAN: When I made the order, I wanted a separate letter from each airline.

MR. BEARD: We have done that.

THE CHAIRMAN: If you have done that then it should be ----

MR. BEARD: There are 13 letters, but what you cannot assume is that the letters are additional to named airlines elsewhere in the document. You have a situation where some of the airlines that are named in certain places said something confidential that they did not want to disclose. So you cannot do a summing up of named airlines and then anonymised airlines. That would not be right.

THE CHAIRMAN: Thirteen airline names have been anonymised?

MR. BEARD: Yes. Back to 49, this para. 65.6.

> "A shareholder said that Aer Lingus might be an attractive investment due to its Heathrow slots. Ryanair's and the Irish Government's shareholding in Aer Lingus might, however, be an inhibiting factor to any potential acquirer."

The contention is made that it is unfair that Ryanair does not know the identity of the shareholder, but the answer to this is absolutely obvious. The proposition that is being put is that Aer Lingus might be an attractive investment due to its Heathrow slots. That is a proposition that plainly Ryanair can make submissions upon, so when it says that it is impossible to know whether the unnamed shareholder might have their own reasons for wanting to persuade the Competition Commission to find against Ryanair, it is just difficult to see what the possible relevance of that is. You have got the gist of what is being put forward there - in fact, you have the proposition, never mind the gist.

The next one is at 54. This is a review of Aer Lingus' 2013 Board Minutes. Sometime in 2013 Aer Lingus' Board discussed the fact that Aer Lingus had a higher cost than its low cost competitors. It goes on: "The Board therefore considered three growth options." We have seen all this before, this is in 7.41, which is not a section in relation to which it is suggested that the gist is not available. Then in 54:

> "Aer Lingus' chief executive presented a number of specific opportunities to the Aer Lingus Board that were under review."

He was saying that there were a number of matters that were under review that Aer Lingus was looking at. Ryanair says:

> "Ryanair is unable to respond to the various optimistic suggestions that there were opportunities for combinations in the 2013 Board minutes created while the Competition Commission inquiry was taking place."

Again, it is not for Ryanair to be going around saying that at Aer Lingus' Board they considered X, Y and Z, but actually X, Y and Z were not in any way likely to happen, and that is critical to the way that the Competition Commission analyse these things. If one actually goes back to 7.41you can see what the Competition Commission drew from this in the final sentence.

> "Minutes from a meeting held in [at some point in 2013 where Aer Lingus's board considered the strategic options available to the company following publication of the European Commission's prohibition decision show the board resolving in favour of inorganic growth …"

That is what is drawn from it. Why it is that Ryanair should supposedly be able to test - it is not disputed that the Aer Lingus chief executive did put to the Board, optimistic or otherwise - and it goes back to the much more general point that what was being looked at in relation to that particular section in s.7 was not the likelihood of the combination involving Aer Lingus and have used the airlines on that, because that has already been dealt with, it is evidence of potential combinations involving Aer Lingus in the period since 2006, was Aer Lingus a credible combination partner in that period? Answer: "yes", you do not need to know if you are optimistic or otherwise, the proposition is put forward by Aer Lingus' chief executive to a Board meeting in order to be able to answer that.

Then at 65.8 we have the wide-ranging request so that anything redacted in relation to discussions with airlines who are sensitive about their identity because of concerns about confidentiality mean that:

"Ryanair is entirely unable to engage with this material without knowing the identities of the airlines in question. It was unable to comment on the likelihood of those combinations proceeding, nor, without knowing the detail of the discussions, can it investigate or test the extent to which its presence, the minority shareholder, influenced the outcome."

We have been through the relevant sections of the Report dealing with these matters. I have emphasised that this was not a matter of trying to catalogue particular examples. It was a matter of looking at whether or not Aer Lingus was a credible combination partner, whether or not there are internal documents dealing with that? Yes, there were. They are referred to. Was Aer Lingus resolving in favour of inorganic growth? Yes, it said so. Was it having discussions with people? Yes, it was. Were some of those discussions failing because of Ryanair? Aer Lingus says in certain cases it was, and in certain cases it was not, but the key issue is that there were discussions going on, that is all; nothing more than that. Is it credible that Aer Lingus was a relevant combination partner. You do not need to have all the details of the identities of with whom these discussions occurred in order to be able to put your case in relation to these matters.

In 65.9:

"It is impossible to know whether any of the combinations with unnamed airlines could or would have led to the efficiencies of the kinds claimed by the Competition Commission or whether those claimed efficiencies would have led to greater competition on the GB and Ireland routes."

That is not what the Competition Commission undertook. It did not try and do that. It would have been a fool's errand to try and do that sort of exercise. Instead what it did was looked at the overall scope for scale and synergy efficiencies looking at a whole range of material including Aer Lingus' costs, material, but also taking into account material that both Ryanair and Aer Lingus agreed on in relation to the trend of consolidation in the market, and the economic drivers for it.

Then 10:

"It is also impossible to know more generally whether the Competition Commission discharged their responsibility properly to test the evidence before it."

I have already referred to the fact that that is not a judicial review challenge to the Competition Commission and it is not a fair procedure challenge in any event.

Those are the particular passages that have been said to give rise to the procedural fairness. They only arise when you effectively misread the Report and take these matters out of

context as to what it was that the Competition Commission was doing. As soon as you do that you see plainly that any measure of gist that you wish to apply, applying the relevant case law is covered in these sections of the Report.

Unless I can assist you further on Ground 2?

THE CHAIRMAN: So have you finished that topic?

MR. BEARD: I have finished that topic, so unless I can assist further on Ground 2 ----

THE CHAIRMAN: You have finished on Ground 2?

MR. BEARD: Yes.

THE CHAIRMAN: We will adjourn until tomorrow.

LORD PANNICK: Sir, can I, through you, ask my friend how much longer he is planning to be. He has taken a day on two points. That is not a criticism, but it is a three day case and I am anxious that obviously I should have time ----

THE CHAIRMAN: You do not want to be squeezed ----

LORD PANNICK Not at 5 o'clock tomorrow.

THE CHAIRMAN: Mr. Flynn has said he is going to be two hours, so we know that. How long do you think you are going to be in reply?

LORD PANNICK: An hour is a reasonable time, maybe an hour and a quarter.

THE CHAIRMAN: Mr. Flynn, if you get on at 12 you would finish by 3?

MR. FLYNN: Yes.

THE CHAIRMAN: Would you like to start early tomorrow?

MR. BEARD: I think it might be sensible, given that ----

THE CHAIRMAN: Yes, we will start at 10 tomorrow.

MR. BEARD: I am grateful.

(Adjourned until 10.00 am on Friday, 14th February 2014)