IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1219/4/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

14th 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 Three

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: Yes, Mr. Beard.

MR. BEARD: Yesterday I had just finished up on ground two, why it was that sensitive third party information did not need to be provided in the light of the context terms of the report to Ryanair in the interests of procedural fairness, given the overall scheme of the Act.

I am now moving on to ground three.

THE CHAIRMAN: Yes.

MR. BEARD: As we understand it, Ryanair's case on ground three as is set out in their notice of application and skeleton is that the Competition Commission can only take into account in considering an SLC effects caused by material influence, and Ryanair refers in the skeleton to certain specific passages, in particular the Final Report para.7.30, 7.34(b) and bits of appendix F which it says are relied upon and are relied upon in error on the basis of its account.

There are three reasons why Ryanair's case on ground three is wrong and the report is in no way undermined:

* the first is a legal issue that Ryanair is mistaken in its restricted view of the statutory test.

* the second is that, even on Ryanair's supposed causal link test, the relevant findings in question were sufficiently linked; and

* thirdly, even on Ryanair's own case, in particular in relation to para.7.34(b) the FDA test that was articulated by Lord Pannick would not be met.

But I will deal with the first and probably the most important of these arguments if I may, by turning back to the Act which is in the authorities bundle at tab.5. It is vol.1 of the authorities bundle. If I could just start back at section 22, Lord Pannick took you to the start of 22. This is the test that the OFT applies as the first phase of domestic merger control.

"The OFT shall, subject to subsections (2) and (3), make a reference to the Commission [the Competition Commission] if the OFT believes that it is or may be the case that —

(a) a relevant merger situation has been created; and

(b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom …".

We can leave aside subsections (2) and (3) for the moment, but what is necessary is to turn on to section 23, to which I do not think you have been taken, which defines relevant merger situations.

"Relevant merger situations —

(1) For the purposes of this [Act] a relevant merger situation has been created if —

(a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and

(b) the value of turnover in the United Kingdom of the enterprise being taken over exceeds £70 million"

Subsection (2) is in fact an alternative:

"For the purposes of this Part, a relevant merger situation has also been created if —

(a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and

(b) as a result, one or both oft conditions mentioned in subsections (3) and (4) below prevails or prevails to a greater extent.

Subsections (3) and (4) are that in relation to the supply of goods (subsection 3) or services (subsection 4) of any relevant description, are supplied by one and the same person of one quarter of the goods or services at least, or an increase above one quarter, i.e. 25 per cent of the goods or services in question by reason of the enterprises ceasing to be distinct. This is not necessarily the clearest scheme, but what is being done here is that in section 23(1) you have what is called "the turnover threshold", so for there to be an RMS two or more enterprises have to be ceased to be distinct and the value of turnover of the enterprise being taken over is £70 million, so that is the turnover threshold.

Or, two or more enterprises cease to be distinct under subsection (2) and the share of supply of goods or services is increased either beyond 25 per cent or above 25 per cent is increased. So, you have got those two tests.

The key thing there that I want to focus on is the fact that you are talking about a relevant merger situation being one where "two or more enterprises have ceased to be distinct". That is the critical issue here. Section 24, which is referred to in section 23, is the time limit provision, and this is the provision that effectively means that the relevant ceasing to be distinct has to have occurred within four months in order for the OFT to be able to consider the matter for a reference. It is a slightly strange structure. Something is not a relevant merger situation if it occurred more than four months ago. In most statutory schemes you would say, "There's a merger situation and then you've got four months to deal with it". Here, it is actually baked into the definition of "relevant merger situation". A slightly odd way of doing things, but that is how you get the timing issue in. There are certain very limited provisions in relation to timing and 25, but just moving on to 26:

"Enterprises ceasing to be distinct enterprises:

(1) For the purposes of this Part any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control)".

So it is the bringing together of two enterprises that is critical for this relevant merger situation, and it refers there to common ownership or common control, and subsection (2) sets out some particulars, enterprises that become interconnected bodies corporate, enterprises carried on by two or more persons they are under common control, and so on. And then (3):

"A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for the purposes of subsections (1) and (2) be treated as having control of it".

Now, this is where the material influence threshold is brought in the scheme, so effectively you have three levels of control. You have full ownership; you have control; and as part of control material influence is deemed to be control. Those are the three levels.

And you also have, it is just worth noting in subsection (4) the slightly unusual situation that if you move from a position of material influence to control or control to ownership, that is each time a new relevant merger situation. Again, that is something that people find a little surprising, because it means that two enterprises can cease to have been distinct by reason of material influence being brought one over the other. Yet when that acquirer or, say for the sake of argument 30 per cent, goes on and gets more shares to above 50 per cent, that becomes a new relevant merger situation.

Now, the reason all of this matters is because when we look at section 35 and the relevant questions that have to be dealt with by the Competition Commission which mirror the relevant questions that have to be considered by the OFT at first phase, albeit the OFT just has to decide that it may be the case that there may be an RMS, there may be an SLC, the Competition Commission has to decide on the balance of probabilities about these matters. But the key point is the Competition Commission and before it the OFT had two questions. One is this strange creature, an RMS, has it occurred, so the timing, the turnover or the relevant share supply questions all have to be dealt with as well as these control questions in section 26. And, once you have identified that there is an RMS, you then consider whether

that ceasing to be distinct of two enterprises is something that gives rise to an SLC, and that is the causal scheme, that is the extent of linkage.

That means that what you are considering is that whether or not the ceasing to be distinct has given rise to the substantial lessening of competition, the existence of the RMS, you do not then have to go through some separate exercise focusing on pinning down one element of the ingredients of the RMS, in other words the control element, which is what Lord Pannick is referring to in this case, material influence being the control element, and somehow thread a causal link through from that to your consideration of the SLC. Once you have got an RMS, you are looking at whether or not competition is going to be greater or lesser by reason of that RMS existing, and you are just doing that as an independent question. You consider the world without the RMS and with the RMS. That is the counterfactual exercise you are engaged in in considering the SLC question. You do not need to get into this additional strand of reasoning about material influence.

That, essentially, is what is wrong with Ryanair's approach, they are trying to add some sort of other causal chain which simply is not necessary. They are over-complicating this. The question on its face in 35(1)(a) is, if so whether the creation of the relevant merger situation has resulted or may be expected to result in a substantial lessening of competition. That is the autonomous question you ask yourself: that RMS having occurred in the case of a completed merger situation, or it is going to occur in the case of an anticipated situation, is that going to affect competition? You do not just have to focus on the control that gave rise to the RMS. That really is the end of this. Essentially, it is just asking the wrong test here. It is trying to over-complicate matters. It is complicated enough dealing with what constitutes an SLC and how you carry out the counterfactual without adding some sort of spurious causational count-back to underlying elements of the RMS test.

THE CHAIRMAN: It is quite clear that you cannot both be right on this, but we will have to make our view known later on.

MR. BEARD: This the key legal difference between us, and we say that you do not need to go through the extra exercise in relation to material influence. So that is the first and key legal argument in relation to Ground 3.

THE CHAIRMAN: I understand the arguments on both sides. That is fine.

MR. BEARD: As I say, what was important is that you saw what an RMS is, because they seem to be distinct, and that, of course, what the overall purpose of merger control here is. Where entities are coming together that cease to be distinct, does that mean overall that there is a lessening of competition, because the overall purpose of the legislation is to say that

structural changes in markets can operate to the detriment of customers and consumers. Once you have got those structural changes where they are completed or anticipated, we need to worry about what the competition ramifications are. We do need to work out precisely whether or not it is a particular element of control that leads to that outcome, because that is not the overall purpose of the Act and that is why you have got the assessment of SLC. RMS is the necessary predicate, as a lot of logicians would say for your SLC assessment, but you do not need a separate causal link to the control element within RMS.

As I say, that really disposes of these matters. Just a couple of additional points. If Ryanair was about this legal test, so that you had to go through this causal link - in particular, let us just focus on a material influence case, you end up missing out on key components of a potential adverse competitive effect analysis. The first of these is that when two enterprises cease to be distinct, the control may mean that the acquirer can do things with, and inhibit the actions of, the acquired entity. That is obviously what we are talking about in relation to, for instance, Ryanair's ability to block special resolutions of Aer Lingus. There is also the possibility that the acquirer, because it has an interest in the acquired entity, will, itself, behave differently, not in relation to the acquired entity's conduct, but, for instance, it might compete less fully because, for example, it might get a revenue stream through the acquired entity. That is not, so far as we can see, on Lord Pannick's test, an exercise of material influence by the acquiring entity. We do not understand him to be saying that. If it is, then there may end up being nothing between us because the causal link is so tenuous at that point that it does not matter. What we are concerned with there is the actions of the acquirer itself, and the structural changes in the market are meaning that overall customers and consumers are doing less well - customers and consumers of the acquirer are doing less well. That is plainly something that should properly be taken into account in any substantial lessening of competition analysis.

So if Lord Pannick is right and he takes a narrow view of causation, as he appears to be doing, it results in a problem for certain sorts of potentially important adverse effects in merger transactions.

The other one that is worth highlighting is co-ordinative effects. Most of the time we are talking about what are referred to in merger parlance as "unilateral effects", but you can also get co-ordinative effects where players in a market will tacitly co-ordinate their behaviour and reduce the quality of their offering, increase their prices, because they are feeling less competitive pressure overall.

Those effects will tend to depend upon the overall structure of the market. For instance, if you have got three players in a market, two of whom merge, so you have only got two players in a market, it is easier in very broad terms for those players, without actually communicating with one another directly just tacitly to soften their competitive offerings. There is a wealth of literature about the nature of tacit co-ordination. Professor Beath is nodding, he may have suffered with having to ---- I certainly do not need to go further into tacit co-ordination.

The point is this, that because of the change in the structure of the market you can end up with adverse effects on competition because it enhances the ability of the remaining players, normally in oligopolistic markets to co-ordinate their behaviour and soften competition to the detriment of customers and consumers. That can be, in and of itself, a substantial lessening of competition. We cannot see how that could ever be linked causally to the specific control being exercised, whether it is material influence, control or ownership, because it is the change in the structure of the market that matters there.

As I say, going back to the purpose of the statute, if Lord Pannick is right he ends up eliminating from the consideration of the SLC test potentially very important factors, and that cannot be right.

Just for your notes, in fact both of these issues - the effect of the merger on Ryanair's activities and indeed co-ordinative effects - were both considered in this Report. It is Final Report, paras.7.137 to 7.148 in relation to Ryanair's competitiveness, and 7.149 to 7.159 in relation to co-ordination. I am not going to take you to it. The conclusion of the Competition Commission was that, in fact, in this case neither of those effects arose, so they did not count towards the analysis of SLC here. It did not add anything. The point I am making is a much simpler one, which is that on Lord Pannick's account the CC is doing the wrong thing even looking at that apparently, because those effects, or those potential effects, do not on his account link back causally to the control element. So there is a whole range of reasons, not only looking at the words of the statute, the purpose of the statute, wanting to stop substantial lessening of competition however it manifests itself in a market, but then we can see specific examples of the problem even in this report. Therefore, overall, there is a whole range of reasons why Ryanair's legal case on this is wrong. As I say, that disposes of Ground 3.

I should also perhaps say that Ryanair's analysis will create all sorts of difficulties in distinguishing between the fact of a shareholding and the exercise of a shareholding, or the potential exercise of a shareholding when one is sufficiently causally linked to the material

influence or control and when it is not. There are all sorts of other practical difficulties, but I do not think we even need to get into those given the points I have already made about terms, purposes and consequences of the approach in question.

Let us just go further than that, because it is worth just looking at what it is that Ryanair in its skeleton says are the matters which have been relied upon by the Competition Commission, which it says are not sufficiently causally linked to material influence. It picks out two paragraphs in the Final Report. It is perhaps worth turning those up. The first is 7.30. I am identifying these by reference to Ryanair's skeleton argument para 97. I am not going to labour 7.30, we looked at it yesterday. It was the one paragraph in this section that Lord Pannick took you to. Obviously, we are in the overall section in the effects of the acquisition on Aer Lingus' policy and strategy. It is in the section on mechanisms, and it is in the section on the role of the minority shareholding. 7.30 begins: "Third parties told us". 7.30 is therefore a description of evidence that is being given. It is not, in fact, a finding. We went through in some detail the findings in relation to these sections which are critically made in relation to 7.31 and 7.32.

> "IAG told us that it would not usually contemplate buying a controlling interest in an airline with a significant ongoing minority shareholding."

That is no part of the findings in 7.31 and 7.32. These are an account of what we are told about these matters. Therefore, it is difficult to see why it is being said that this is a finding of SLC which needs to be linked to material influence, because 7.30 is just not about that. It is part of the background of the consideration and then the findings are made in subsequent paragraphs.

You see that in 7.31, 7.32 and 7.33, all of those are about the use of rights and it is only down at 7.34 that we get into: "In addition to these direct effects", and then we get to 7.34(b):

> "potential partners might be deterred from entering into, pursuing, or concluding discussions with Aer Lingus"

That is the second paragraph that they identify in the Final Report as being one where there is not a sufficient linkage, but actually 7.30 itself does not do anything in terms of making a finding in relation to SLC, so the first of the paragraphs they refer to just does not take them anywhere. The second is 7.34(b) which I did look at yesterday, and here it is saying that having the shareholding of Ryanair on Aer Lingus' shareholder acts as a deterrent to various forms of transaction, and that is the finding that is being made, and it is being said that that is in addition to the key direct effects that are found in 7.31, 7.32 and 7.33. As I said

yesterday, this is a product. It is a product of the passive influence of Ryanair's shareholding. Ryanair knows about how this market works. It knows about how other airlines will perceive its position, no doubt, but the key thing is that Ryanair, by placing itself on Aer Lingus' shareholder register does have an impact. So, having that collection of rights that are constituted by that shareholding is something that concerns other parties that might potentially want to combine with Aer Lingus, depending on the mechanisms. So we say, even if you are looking for this sort of causal link, we would say at 7.34(b) there is sufficient causal connection. It is not active influence, but it is a passive influence on the strategic options and commercial options that exist for Aer Lingus, so even if we go down this tortuous course of looking at causation, which we say is unnecessary, the first Final Report reference is just not relevant, the second would cross this causal threshold in any event, and then the third category of material that is referred to is all in relation to Appendix F, and the paragraphs that are referred to in the skeleton, just for you notes are Appendix F, 22, 28, 40, 45, 47 and 49. All of those paragraphs are paragraphs that are simply describing what the CC has been told by various people. We did not go through them all yesterday. We did touch on 49, you will recall that 49 was the paragraph that said that a shareholder said that Aer Lingus might be an attractive investment due its Heathrow slots, this is all just descriptive material, and the only element of the Final Report that is identified, which is actually saying: "There is this effect by reason of the RMS and the way in which Ryanair is operating" is 7.34(b) in relation to these indirect effects.

You can see where I am going to go with the third argument. The second argument is even if a causal test was required the only element that we are talking about is 7.34(b) so far as we can see because that is the only one that is identified, whether it is an active finding. There, there is a causal link.

However, if we go further and apply the FDA test that Lord Pannick was articulating and, Mr. Chairman, you summed up as having three limbs: has the decision maker taken into account an irrelevant factor? Was it a significant part of the Decision? If it did play a significant part, is it nonetheless inevitable that the decision would be the same? We say it did not take into account an irrelevant fact because they applied the wrong legal test. We say that even on their causal test it did not take into account an irrelevant fact in relation to 7.34(b) because this was a finding that it was entitled to make even on their causal test. Then we ask: is it a significant part of the Decision? The answer is "plainly not". It is not a significant part of the Decision. You can anticipate this because the key findings in relation to these matters are made at 7.31, 7.32 and 7.33. Then at 7.34 it says: "In addition to these

direct effects", and there are three indirect effects referred to, and it is only one part of those that has been identified.

This is then made good because if you go on to the conclusions in relation to this section, that we referred to yesterday, which are at 7.80 through to 7.84 it is clear that 7.34(b) is not, by any means, a significant part of these conclusions. Whichever way one looks at this there is nothing in Ground 3. There might be an important legal question at the outset in Ground 3, but actually there is nothing to see here one way or the other.

Unless I can assist further on Ground 3, I am going to move to Ground 4.

THE CHAIRMAN: That is it for Ground 3, thank you.

MR. BEARD: Ground 4 is Ryanair's case that the Competition Commission's finding of an SLC is unsupported by the evidence and unreasonable, and its findings on all five of the mechanisms were so improbable as to make the Competition Commission's conclusions irrational. This is plainly a very, very high threshold that Ryanair is seeking to get over, and I do not think Lord Pannick, to be fair to him, shied away from that.

The Competition Commission has set out in its defence the relevant legal framework relevant to this ground of review which imposes that high threshold and just for you notes that is in Defence paras. 116 to 129, but I will just go to one or two of the authorities, if I may, just to highlight one or two key passages.

If you could take authorities' bundle 2, tab 37. This is the *Stagecoach* judicial review. I will not go through the details of it but you can see from above para. 37 on p.12 that ground 2 was an irrationality challenge, a Wednesbury unreasonableness challenge, and if we go on to para. 45: "We accept the Commission's analysis of the case law on this point." This is the relevant point, having reviewed *BSkyB*, which is a case I will come on to in a moment, and other material:

> "We agree that the hurdle Stagecoach has to overcome in order to make good its challenge under Ground 2 is a high one. Where Stagecoach asserts that there is no or no sufficient evidence to support one of the Commission's key findings, Stagecoach must show either that there is simply no evidence at all to support the Commission's conclusions, or that on the basis of the evidence, the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to Stagecoach, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be wary of a challenge which is 'in reality an attempt to pursue a challenge to the merits of the

> Decision under the guise of judicial review' which is how the Commission characterised Stagecoach's ground 2".

So, high threshold. The other matter, as I say, we have set out various pieces of case law in our defence, but the other matter highlighted by Lord Pannick was the relevance or otherwise or Article 1 of Protocol 1 of the ECHR. In respect of that if I could take you to authorities bundle 1, tab.25. This is the *Somerfield* judicial review. Somerfield had wanted to buy a number of stores, supermarket stores, from Safeway, if I recall correctly. They were stores that (I am grateful to Mr. Flynn, I should remember this, this is the Alzheimer's kicking in because I was actually involved in this) it was Safeway divestment at the time when Safeway and Morrisons were merging and various stores were being divested, and Somerfield picked some of them up.

The consideration of that by the Competition Commission was that in certain local areas by Somerfield buying the local Safeway store you are effectively getting too high a concentration in local areas. And then there was a debate about what the remedy should be, and needless to say Somerfield were saying, "Well, we're not very happy to be told that we've got to divest particular stores".

One of the things that was raised by Somerfield in the course of the proceedings was, "Well look, we own these stores now, we've bought them, they're our property rights, we should jolly well not have to get rid of them and you will have to show to a very high standard, given that we are talking about possessions that fall within Article 1 of Protocol 1". So, if one goes on to p.42, para.118 sets out Article 1 of Protocol 1:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

And then, 119:

> "In our view it is abundantly clear that the control of mergers — which exists in virtually every State party to the ECHR is within 'the public interest' or 'the general interest' referred to in the first and second paragraphs respectively of Article 1. It does not seem to us arguable that the way the CC approached the question of remedies

in this case went outside the scope of the legitimate protection of those interests, bearing in mind also that the 'possessions' in question had only very recently been acquired by Somerfield in full knowledge of the risk that their acquisition would be subject to scrutiny under the Act and of the principles applicable, as set out in the CC merger reference guidelines".

In other words, if you go out into the market buying stuff, you know that merger control in the public interest operates both at a European level and at a domestic level. That is relevant to the consideration of a balancing exercise in relation to the operation of Article 1 of Protocol 1. And that is an important factor to bear in mind here and it is a reason why in fact Article 1 of Protocol 1, although it may be highlighted as a separate provision does not in fact add anything of any real significance, the consideration of these matters when it comes to relevant legal assessment on challenges such as these. That is why —

LORD PANNICK: Could you just read paragraph 117? You do not need to …

MR. BEARD: Certainly, yes, absolutely.

THE CHAIRMAN: It is dealt with in more detail in the *BAA* case, is it not?

MR. BEARD: Yes, which is just about where I am about to head on to. The reason I have referred to it is because the encapsulation in 118 is not something that is specifically referred to in *BAA*, but it is clearly material. If I could go to *BAA* then, tab.42 in authorities bundle 3. I just want to bear something in mind in relation to *BAA* as compared to a merger case. In *BAA* we are talking about a market investigation, and the market investigation was in relation to the ownership by BAA of multiple airports. Those airports had been acquired by BAA as a consequence (it is 42 in authorities bundle 3, I am sorry, Mr. Chairman).

Just one issue of background in relation to *BAA* —

THE CHAIRMAN: You are saying this is not a merger case, here?

MR. BEARD: It is not a merger case. BAA had acquired all of the airports in question by dint of the privatisation. The ownership of BAA had changed over time. Ferrovial was the owner at the time. But of course this was not a case where BAA had gone out into the market and acquired Gatwick or Stansted. This was a case where they had been transferred as part of the privatisation and the ownership of the overall company had changed over time. There were various enquiries being made, and of course they culminated in this market investigation, but here if there were a protest about Article 1 Protocol 1 rights, they are much stronger in many ways than in a merger situation, because there is not the same conditionality on acquisition. But nonetheless, as we have already seen in *Park*, when we turn on and look at what the court there found, it is perhaps just worth noting para.19, "The

judge had very fully in mind the terms of Article 1 Protocol 1" and indeed returned to the Human Rights Act under which it operates in UK law, and quotes that at 19. Then at 20, he is referring to section 179(4) that is just the equivalent to section 120 in relation to market investigation, so it is what gives the judicial review function, and there is no dispute that the test is the same.

Then we go on to sub (2) in 20:

> "In light of the relevance of the Convention right in Article 1P1 in this context … HRA requires that sections 134 and 138 should be read and given effect in a way compatible with that Convention right, which means that any such remedies must satisfy proportionality principles".

So this is when you are doing remedies in relation to market investigation, which are under 134 and 138 of the Enterprise Act. But we entirely accept that the same analysis applies in relation to remedies in relation to merger control, no doubt about it.

And then there is consideration of, first of all, *Fedesa*, which is referred to by reference to what had been applied by the Competition Commission. There is then quotation from *Tesco*, so it was specifically considered by the court there. Then, just in passing, I note

> "(3) The CC, as decision-maker must take reasonable steps to acquaint itself with the relevant information …".

And if one just turns on to the bottom of this (I am sorry, this is a slight digression) section 3, you will see a reference to a case called *Khatun* and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea ex p. Bayani* quoted with approval in *Khatun*:

> > "The court should not intervene merely because it considers that further enquiries would have been desirable or sensible. It should intervene only if no reasonable [authority] … could have been satisfied on the basis of enquiries made."

That was a point I picked up yesterday, and, since we are going through, I thought I would just refer you to it.

That is to do with the role of the reasonable decision maker. Then 4, it is a rationality test which is properly to be applied in judging whether the CC had sufficient basis in the light of the totality of evidence available to it for making the assessments and reaching the decisions it did. There must be evidence available to the CC of some probative value.

Then there are quotations from *Ashbridge, Mahon, OFT v. IBA* and *Stagecoach*.

"(5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised is discretion 'reasonably, carefully and in good faith', but will include examination 'whether the reasons adduced by the national authorities to justify [the interference] are 'are relevant as sufficient'."

There is the reference to *Vogt* and *Smith* and *Grady*.

"However, exactly what standard of evidence is required so that the reasons adduced qualify as 'relevant and sufficient' depends on the particular context. Where social and economic judgments regarding 'the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken' are called for, a wide margin of appreciation will apply."

This was the part that Lord Pannick took you to, and the "manifestly without reasonable" test in *James*. Then it goes on:

"Where, as here, a divestment order is made so as to further public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the 'manifestly without reasonable foundation' standard which applies."

Of course, we would interpolate here the same applies in relation to mergers and an SLC.

"One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law …"

Then there is the citation of *Upjohn*.

"Accordingly, in the present context, the standard of review appropriate under Article 1P1 … is essentially equivalent to that given by the ordinary domestic standard of rationality."

I think this is the only part that Lord Pannick really took issue with, and what we would say is there may be cases where Article 1P1 does involve more scrutiny, but here the court is carefully saying that when you are talking about social and economic assessments by an expert body - and we would say, *a fortiori*, in the merger situation, because here of course

we are talking about the market investigation - the margin of appreciation that is to be afforded to the body means that the test applicable is going to be effectively indistinguishable, and that is all that the court there is saying. It is not saying in all cases, it is not saying that the underlying law is the same, but in practice that is the way that things are going to turn out. That is essentially what is then picked up.

Then (6) talks about the specialist Competition Tribunal, but how it has to operate on the basis of judicial review principles.

(7) is talking about this very issue. In other words, Article 1P1 may well bite where you have got an intrusive of requiring divestment, here of something that you legitimately owned and is the largest ever divestment that has been ordered in a market investigation, I believe, the divestment of Stansted Airport. It was argued here that there was a very significant adjustment to be required in those circumstances as to the level of scrutiny, and the court just said, no, because of the margin of appreciation, the degree of evaluative discretion to be accorded to the CC, which modifies such width to some limited extent. The limited extent means only in circumstances where you can properly distinguish the outcome on the basis of some sort of operation of Article 1P1, could you find any real difference. In most cases you just will not find that because of this wide margin of appreciation to the authority, which is entirely permissible under Article 1P1.

THE CHAIRMAN: What do they mean in the last two sentences in sub-para.(7)?

MR. BEARD: Yes:

> "It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion …"

It is there talking about the fact that it is an intrusive step that is being taken there.

THE CHAIRMAN: Should there be heightened scrutiny by the Tribunal in a case where Article 1P1 is engaged?

MR. BEARD: No, we say, in practice, there is not any heightened scrutiny because, on the basis of Article 1P1, where you are dealing with economic assessments of this sort you have to afford the decision maker a broad margin of appreciation. What you are also dealing with are effectively conditional rights because you have taken the risk. You know that there is that general interest out there of merger control to protect competition. That goes to why it is there should be such a broad margin appreciation. If you are saying that the body that is carrying out the primary scrutiny needs a broad margin of appreciation, it is not then

consistent with that to be saying that we need a detailed level of scrutiny. The two things then end up in tension.

What is being said here is that, because of the particular circumstances of the general interest and the margin of appreciation that should be given to the body that is carrying out the assessment of that general interest, effectively it is not heightened scrutiny here.

THE CHAIRMAN: Presumably this paragraph has not been considered by the Court of Appeal?

MR. BEARD: It is not precisely considered by the Court of Appeal, no, but it is worth just noting the Court of Appeal did have before it ----

THE CHAIRMAN: When you come to your submissions in reply can you cover that, Lord Pannick?

LORD PANNICK: Indeed.

MR. BEARD: It is just worth turning on a tab to the Court of Appeal, because in the Court of Appeal issues as to proportionality analysis and the outturn remedy were the bases of the grounds that were being brought by BAA. You will see in the judgment of Lord Justice Sullivan at para.3:

> "Before the Tribunal, BAA challenged the lawfulness of the 2011 report on four grounds. The Tribunal rejected all four grounds. In this court, there are two grounds of appeal … Before considering those grounds, it is helpful to outline the structure of the Tribunal's lengthy decisions, which runs to 92 paragraphs. Having set out the background to the challenge to the 2011 report … the Tribunal set out the legal framework in paragraphs 16 to 21 of its judgment. It then summarised the relevant findings in both 2009 and the 2011 reports … Against that legal and factual background, the Tribunal analysed and rejected the four grounds … Before this court, there is no challenge to the Tribunal's statement of the applicable legal principles."

So there is no suggestion that the Tribunal got anything wrong here. Mr. Green, who had represented BAA in the court below again represented them in the Court of Appeal. I am not saying that this is explicitly going through each paragraph of the Tribunal's judgment and saying, "You have got this right, you have got that right, you have got the other right", but it is plain that the Court of Appeal has had sight of all that. None of that analysis was challenged before the Court of Appeal and the Court of Appeal does not in any way demur, notwithstanding the fact that it was of the essence of the challenges concerned with proportionality of the remedy that that legal analysis was the very basis on which things had proceeded below.

So we would say it is more than obiter, but it is not, we accept, specifically going through and explicitly approving ----

THE CHAIRMAN: There may be two issues. One is, is the test accepted by all parties here? Does everyone accept (7) is accurate, but then, even if you do accept it, what does it, in fact, mean? You are saying it really does not make much difference at all, and I need to understand what Lord Pannick is saying about that, but he can cover that in reply.

MR. BEARD: I should add that, as was the position in relation to the situation in relation to *BAA*, we would say that, in any event, whatever measure of Article 1, protocol 1 scrutiny you are putting in place, there is no basis to impugn the findings of SLC in this report in any event, but since the legal issues put in play it is important that this Tribunal sees how it was dealt with in *BAA* and there was no demurrer in the Court of Appeal in relation to those matters. I think it is important to bear in mind that what the Judge in *BAA* is talking about is the practical impact of it in the context of this sort of general interest or, more exactly, in the general interest of someone that has held an asset for a very long time being told that they have to divest it. Here we are dealing with a situation where someone has acquired an asset knowing that they are going to be subject to general interest scrutiny under merger control. That is Article 1, protocol 1, the Court of Appeal and CAT in *BAA*. I will not go to this case now, I will come to it in relation to the next Ground, but in *BSkyB v ITV* both the Tribunal and the Court of Appeal made clear that it is not necessary for the Competition Commission to prove that each element of its case on substantial lessening of competition is likely on the balance of probabilities, and just for your notes that is paras. 75, 80 and 82 of the Tribunal's Judgment, and para. 69 of the Court of Appeal. The Tribunal's Judgment is at authorities 2, tab 29 and the Court of Appeal is at authorities 2, tab 36. Instead, the relevant test in relation to the SLC question is by reference to the overall civil standard on the balance of probabilities, was there is likely to be an SLC and that is precisely the test that the Competition Commission applied, indeed, they explicitly say that at 7.177 of the Final Report. The only other point to emphasise - and it is a point that we have highlighted in our defence, it almost does not need authority, but *Tesco* and *The National Housebuilders* cases both emphasise it – is that the report in this regard must be read as a whole. There is a real danger in elegantly dancing round particular little extracts of the report and saying: "This does not stack up" you have to read the report as a whole. I think perhaps yesterday afternoon may have illustrated to some extent that there is quite a lot of material. I was only going through one part of s.7 yesterday it took a while, there is a lot of material in there. It has to be read as a whole quite properly.

As I took time yesterday going through s.7 I will deal with the first mechanism criticism in relation to Ground 4, in other words the mechanism of a combination involving Aer Lingus relatively briefly. The criticism is that there is not a good evidential basis for the CC to find that actually Ryanair would be able to influence the competitive environment involving Aer Lingus in relation to Aer Lingus' ability to enter into competition with other airlines, whether buying or being bought. I spelled out yesterday, and I will not go back through the passages, why it is that the Competition Commission found there were a range of clear and compelling incentives for Ryanair to do that. It plainly had the ability to do that. There was a likelihood of Aer Lingus wanting to enter into combinations due to the trend of consolidation in the industry, that that trend of consolidation in the industry was not arbitrary, it was driven by economic reasons involving the benefits of scale and efficiencies that would arise and this was tested against the background of what other information could be gathered from Ryanair, Aer Lingus and third parties. Ryanair recognised the trend and the benefits of scale and efficiencies. It did not consider that there were any other likely combinations other than with Ryanair. Aer Lingus thought that organic growth was the way forward for it. It thought that there were possibilities of combinations in the future and it had had discussions in the past and that in the circumstances for the Competition Commission then to decide on the basis of all that material that there was an impact on Aer Lingus' strategic and commercial effectiveness, its ability to compete over the long term was plainly a finding that was open to it. That does not matter whether you are in irrationality territory, Article 1, protocol 1 territory, or any other basis. There was just plainly a basis for the Competition Commission to reach those conclusions; it was well open to them. Aer Lingus was a credible partner for combination, it had decided to pursue inorganic growth as a future strategy and had to enter into a combination in due course in order to generate the scale required to remain competitive.

In those circumstances it was likely that Aer Lingus, absent the shareholding would have been involved in a combination in the period since 2006, or would be involved in the foreseeable future in a significant combination or joint venture, absent Ryanair's shareholding. That really is the mechanism on which Lord Pannick placed the greatest emphasis and there really just is no case on that, whatever the legal test is you are applying.

The second mechanism, and again it is worth emphasising this is mechanism, so all of the material in relation to incentives remains in play because the problem is with this focus upon particular elements of the report one ends up missing the overall picture of what it is

that is being assessed here and how the Competition Commission is exercising its Judgment.

The second mechanism was the ability to raise equity, that is dealt with in the Final Report at paras. 7.85 to 7.92. Ryanair's broad case is that it thinks it is improbable that it will want to raise equity and that it is improbable that Ryanair's shareholding might hamper Aer Lingus' ability to raise capital by issuing shares. It says that because Aer Lingus has large cash reserves and therefore does not need cash, and because Ryanair has offered to undertake to support a resolution to supply pre-emption rights to shareholders outside Ireland.

The Competition Commission's response is summarised in its defence at paras. 133(b) and then 148 through to 152.

The findings on this point are plainly neither improbable nor irrational, nor on any other basis without foundation. The Competition Commission, indeed, expressly noted (Final Report para. 7.89) the point about Aer Lingus' cash reserves. It found that, given Aer Lingus' existing balance sheet, strength and financial forecast, it was unlikely that Aer Lingus would need to raise equity in the medium to long term, other than in relation to a corporate transaction, or to optimise its corporate structure. However, the Competition Commission noted that Aer Lingus might need to issue shares for cash were it to need to fund a significant acquisition or strategic investment in future. There is simply a disagreement between the Competition Commission and Ryanair in relation to that point, but that is a conclusion that was well open to the Competition Commission in relation to these matters.

Two other points: the reference to an offer of an undertaking to support a resolution disapplying certain pre-emption rights, that does not tell you anything about the validity of the Competition Commission's finding on the mechanism, that is all to do with remedies.

Secondly, it is just worth noting the finding at 7.86 that Ryanair, over six years where it has had a minority shareholding, has persistently blocked the standard pre-emption rights disapplication resolution every year.

That then takes us to the third mechanism by which Ryanair would be able to impede Aer Lingus competing, and that relates to disposal or trading of Heathrow slots.

THE CHAIRMAN: Have we got the figure of that, yet?

MR. FLYNN: I can give you the figures straightaway, sir. Heathrow slots, Aer Lingus has 22 slot pairs in the summer timetable, and 20 slot pairs in the winter timetable.

THE CHAIRMAN: Thank you very much.

MR. FLYNN: Those that it owns, and those are the ones to which the — daily, I am sorry, yes. And those to which the Condition and the Articles of Association relates. Obviously it leases others, but that is not —

THE CHAIRMAN: Yes. Thank you.

MR. BEARD: Well, I think there is no dispute that slot pairs, so, in and out slots, at Heathrow capacity constrained hub airport are extremely valuable, there is no doubt about that. The consideration of the Heathrow slots issue is at Final Report paras.7.93-7.107. The evidence before the CC supported its conclusion that Ryanair's shareholding would limit Aer Lingus's ability to manage effectively its portfolio of slots and this could have a significant impact.

Now, none of the three points that Ryanair makes in particular at paras.126-128 of its skeleton supports any suggestion that this approach that was taken by the CC in analysis of these very valuable slots at Heathrow was irrational or inappropriate under any legal test.

First of all, Ryanair is incorrect to say that there was no evidence that Aer Lingus wants or will want to trade its slots or that the evidence points strongly to that conclusion. The CC noted that this was Ryanair's view and explained for good reason it did not agree that the evidence suggested that Aer Lingus was extremely unlikely to seek any disposal of its slots or trade them, and that is just at 7.99 of the Final Report. This is really just a dispute about evidence on this. The CC makes a finding. Ryanair does not agree with it. That is fine. It is no basis for impugning the CC's finding on any relevant legal test that might apply in judicial review, whether it is *Wednesbury* or Article 1 Protocol 1.

The second point that is made is in relation to the role of the Irish government, but it is important to note that the Competition Commission took account of the view of the Irish government specifically in the Final Report at 7.101 and 102, Ryanair now asserts that all of the scenarios that the CC considered, in particular at 7.103, that meant that Aer Lingus might seek approval to dispose of Heathrow slots are highly unlikely.

But Ryanair does accept that there has already been an example of disposal of slots in April 2003, and it would be able to control the outcome of disposal of this kind in the foreseeable future if it so wished. There is nothing irrational or inappropriate about the CC's analysis. The likelihood is that given the importance of slots and their centrality to Aer Lingus's UK operations, that it may wish to re-balance its portfolio of slots at some point, in other words, trading slots. It is incorrect to suggest the CC did not consider the likelihood of this occurring. Given that Ryanair has been able to control the outcome of slot exchanges since

2007 it is not surprising that there are not more examples, and in this regard, I will leave it to Mr. Flynn, but that is something that is referred to in his Statement of Intervention.

And then there is a question that Ryanair raises about it not understanding how inability to make small slot disposal might result in an SLC. Well, this is trying to chop things down into too smaller pieces. What is being talked about here is a mechanism of Ryanair being able to influence key strategic and commercial decisions that Aer Lingus would want to take. It might decide not to trade slots, it might decide not to sell slots in future, but if it did want to trade, if it did want to sell, Ryanair could impede those actions.

The other point that is made by Ryanair is that, it says that there is no evidence that it would prevent Aer Lingus from trading its slots. Again, the problem here is that Ryanair is overlooking the fact that it has a whole range of incentives to do precisely that and that is what the CC has found.

So, you cannot just read these issues separately. You have to read the consideration of this mechanism in the light of the earlier paragraphs in particulars 7.17-7.22 concerning incentives, as the CC has explained, the presence of Ryanair's veto could be enough to deter other parties from dealing with Aer Lingus and in fact Aer Lingus gave a couple of examples of that having occurred since 2006 which are summarised in Final Report para.2.97.

Finally, in this connection, again Lord Pannick suggested that there has been an offer of an undertaking in relation to slots and that will solve the problem:

(a) it does not; and

(b) it is not relevant to the consideration of ground four and whether or not these matter.

Just one final observation — I think at certain points Lord Pannick tended to suggest that these issues to do with the slot trading or slot sales mechanism were intimately linked to the combinations issue. That is not correct. As I pointed out when going through s. 7, the second mechanism concerned with raising equity is concerned —

THE CHAIRMAN: This one is not —

MR. BEARD: But this one is not.

THE CHAIRMAN: It is separate.

MR. BEARD: This is separate.

THE CHAIRMAN: But what Ryanair say is that they have got no interest in blocking any trading of their slots, and it has come up once so far as they have been asked and they have not raised any objection.

MR. BEARD: No, they have not, but they could, and there are good reasons for them doing so because they have incentives to do so. It depends what the slot or sale is, because if the slot trade was to be one that would enable Aer Lingus to compete against Ryanair, then it is not really that hard to see why Ryanair might not feel so warmly about it.

We are then on to the Ordinary Resolutions matters which are covered by 7.108 —

THE CHAIRMAN: There is just one, I am sorry, Ryanair, Aer Lingus is paying out dividends now, is it not?

MR. BEARD: I believe that is right.

THE CHAIRMAN: And for how long has it been paying dividends?

MR. BEARD: I am going to defer to Mr. Flynn.

THE CHAIRMAN: Mr. Flynn can deal with it — for the last two years, yes. But for a long time they were not paying dividends were they, yes. And if someone can calculate what those dividends are for Ryanair, Lord Pannick, can you do that by the time you stand up on your feet? Thank you.

MR. BEARD: I think it is also just worth bearing in mind, and it is the point that the Competition Commission has raised repeatedly in carrying out the analysis of past evidence rather than thinking about the future.

THE CHAIRMAN: Yes.

MR. BEARD: That of course throughout this period Ryanair has been under scrutiny and has known it would be under scrutiny by the relevant authorities, and so the CC, as I showed you yesterday in relation to section 7, says, "Well, we have never been able to look at how Aer Lingus would act without the minority shareholding", and, yes, it is quite right that in relation to that one slot trade example Ryanair did not block it; but that is not what the CC is dealing with here, it is dealing with whether or not there is a mechanism by which Ryanair could act upon its incentives. As I referred you to in relation to section 7, the finding of the CC is not that Ryanair will just block anything that Aer Lingus is doing — it will only want to act when it is in its own interests to do so.

I am just going to move quickly on to the fourth mechanism, which is the Ordinary Resolutions matter. Again, this can be a matter that could relate to issues concerning combinations, but it could relate much more broadly to the commercial actions and strategic decision making of Aer Lingus.

Now, what the Competition Commission says in relation to ordinary resolutions is, with a 30 per cent shareholding, a 29 per cent shareholding, obviously Ryanair is not, if there is a full turn out, going to be able to block ordinary resolutions. The maths tells you that. But

what it then goes on to recognise is that whilst there is a lower chance of Ryanair being able to block ordinary resolutions, those blocks, if they were to succeed, could have a very high impact on the commercial and strategic position of Ryanair. So lower likelihood, but significant impact, and when you are thinking about whether or not there is a substantial lessening of competition, or more exactly whether there is a mechanism by which Ryanair may well be able to act, this is, therefore, material to the analysis that is carried out in the round by the CC.

The CC found in its Final Report, and it is paras.7.108 to 7.115, that it was relatively unlikely that Ryanair alone could influence the outcome of an ordinary resolution, but this could occur if other shareholders voted in the same way as Ryanair, or the Irish Government were to abstain on a vote or were to sell its shareholding to multiple buyers, and we have set that out in our defence at para.133(d).

Ryanair says this is impermissible and unexplained speculation. It just is not unexplained speculation at all. The findings in the section that I am referring to, Final Report, 7.109 to 7.115 draws upon quite a detailed analysis of voting patterns that were undertaken. That is in Appendix C. What the CC found was that Ryanair's 29.82 per cent stake in Aer Lingus achieved an average effective voting power of over 10 per cent higher. Actually, that ranged between 40 and 45 per cent in broad terms because of turn-out issues.

In those circumstances the concern was that you cannot predict how other shareholders are necessarily going to vote, but there are circumstances where Ryanair's very substantial block of shares could put it in a position to have the ability to block an ordinary resolution depending on shareholder turn-out.

THE CHAIRMAN: Whilst Ryanair is a shareholder, the Irish Government's position is that it is going to keep its shareholding. Secondly, if you have a make or break resolution, one would hope that you would have a higher turn-out that just an ordinary resolution?

MR. BEARD: I think there are two points to make in relation to that. First of all, what the Irish Government does with its shareholding, whether it continues to decide to hold it or to get rid of it, is something within the gift of the Irish Government. Although that position is taken account of, explicitly taken into account of, by the CC - it is taken into account - nonetheless, it is a matter that only goes to the overall likelihood. One of the key concerns is an Irish Government abstention. If the Irish Government abstains, essentially that neutralises the second largest block of shares. At that point the impact of the Ryanair shareholding becomes much, much greater. Indeed, that is one of the key concerns that is being identified here by the CC. There is nothing in what the Irish Government have said

that tells us, in particular if political issues arose in relation to what you refer to, Mr. Chairman, as a critical issue, how the Irish Government will act.

All of this taken into account. The point is not that this is very likely to happen. Indeed, the CC does not say it is likely to happen, but it carries out a full analysis on the basis of evidence and makes an assessment about it. Is it a relevant mechanism to make a finding in relation to it? Yes, it plainly is. Is it mere speculation? No, it is not.

Mr. Williams points out that in 7.133 there is a specific consideration of where the Irish Government might well abstain.

THE CHAIRMAN: I have seen that, yes.

MR. BEARD: I am not sure I am going to be able to take this much further - lower chance but higher impact, obviously got a proper evidential basis. Again, rationality challenge, the Article 1P1 test. Whatever it is that you are talking about, plainly there is an account here that is open to the CC to reach a conclusion on as it did. As I have emphasised, one does have to look at this overall in the context of Ryanair's incentives. It is just impossible to say that it is manifestly without foundation or irrational.

Then we turn, finally, in relation to these five mechanism challenges, to the management impact section at 7.116 to 7.125, and Ryanair here is challenging the proposition that the inconvenience of Ryanair's bids can amount to an SLC. That is not the right question to be asking oneself here. It is one of the possible mechanisms that might be the way in which Ryanair can act upon its incentives. It is that considered with other mechanisms, but it is not considering the probability of each mechanism separately and asking whether each mechanism results in an SLC. It is asking, is there an incentive for Ryanair to impede competition? Has it got ways of doing so? We cannot work out all of the possible ways. We have looked at five. We have looked at the combinations. That is one that there is particular account given of. The raising equity is another. Heathrow slots is another. Any of these, if they were to come to pass as an operative mechanism, could have a real impact on the way in which competition operated. But we do not try and identify that as a test in and of itself.

The CC summarise the respects in which Ryanair's bid impacted on Aer Lingus in the Final Report, para.116 to 121. Those findings are simply entirely reasonable and findings that it is open to the Competition Commission. Whether you do this as an irrationality challenge or a manifestly unfounded challenge under Article 1P1, whatever test you are applying, it was plainly open to the CC to conclude that there would be a number of aspects of the distractions of management resources and an impact on the management and direction of

Aer Lingus which would affect Aer Lingus's effectiveness as a competitor in the market if Ryanair is able to distract the management by making these bids drawing effort of Aer Lingus and others into dealing with them.

It did find that the increased likelihood of a full bid could significantly disrupt Aer Lingus's commercial policy and strategy and had done when Ryanair's third bid was launched, and that alternative and additional strategic decisions might have been taken had the company not been in an offer period. It is impossible to find any error in this conclusion. Indeed, it is precisely what we would expect. A rival able to use its position to require management to be facing in two directions at once does create an impact on management. Dealing with Ryanair and its actions will distract Aer Lingus, and of course Ryanair made absolutely clear that it is their strategy to seek to acquire all of Aer Lingus. So again, plainly it has a proper basis. There is a legal discussion at the outset of this Ground, but frankly, as with *BAA*, it really would not matter how you applied the legal test because none of the arguments that are put forward by Ryanair really have legs in relation to Ground 4.

Unless I can assist further I was going to go on Ground 5 now.

THE CHAIRMAN: Remember, you have got to finish by 12. We have a break now until 11.25, so six or seven minutes. Thirty-five minutes should be enough.

MR. BEARD: Ground 5 I am hoping to do relatively quickly, and then, Sir, you wanted to be taken through Ground 6, which again I was not intending to spend an inordinate amount of time on.

THE CHAIRMAN: On Ground 6, I just really wanted you to take me to *Akzo* and where the areas of dispute are.

MR. BEARD: I was going to do that and also I going to very briefly indicate what our case is on that.

THE CHAIRMAN: So you will easily finish by 12?

MR. BEARD: Mr. Flynn very kindly said if I needed more time then he would give me some time, but I do not think I will need that.

THE CHAIRMAN: Lord Pannick needs one and a quarter, so as long as Mr. Flynn finishes by three, you will be all right?

LORD PANNICK: I will finish by 4.15.

THE CHAIRMAN: That is fine. Thank you.

(Short break)

THE CHAIRMAN: Ground 5?

MR. BEARD: Ground 5. There are five issues set out by Ryanair on Ground 5, they are set out in Ryanair's skeleton at para. 133. The first two are that the Competition Commission erred in identifying the legitimate aim and that Ryanair's remedies would have been sufficient to remedy the SLC. Both of these issues are concerned with what the CC refers to as "the effectiveness of remedies". The Competition Commission's position is that it has to identify what is or are effective remedies once it has found an SLC and then it has to consider proportionality. If there are two effective remedies, as in fact there were in this case because there was full divestiture or partial divestiture, it then considers imposing the least intrusive of them. If there is only one effective remedy a proportionality assessment is also undertaken, but in most circumstances it will be proportionate to impose an effective remedy.

Lord Pannick says the key issue is a legal test. He says, as I understand it, a remedy is effective if it removes the SLC and his client's undertakings did that, they removed the SLC even if they left a series of problems and holes. It was good enough to mean there was not a substantial lessening of competition any more.

Perhaps the easiest way to deal with this is to go to the case of *Sky v ITV,* which is in authorities 2 at tab 29, and I am going to draw essentially three points from it. The first is that the Statute says one has to look for a comprehensive solution as reasonably practical. There is a very wide margin of discretion afforded to a regulator in deciding what remedy to impose in relation to a finding of SLC and the third point to pick up is that structural remedies will generally be effective, because this distinction between structural and behavioural remedies and, of course, undertakings will generally involve behavioural remedies – not always – is an important issue.

Just a little bit of background, Sky, in this case, bought a chunk of ITV. It bought about 18 per cent of ITV, around the time when Virgin was mooting that it wanted to buy ITV, and Virgin did not proceed with its bid. So Sky was a company which was obtaining a significant strategic stake in a rival, albeit a lesser stake than the one we are talking about today. In the case the matter of this acquisition of 18 per cent of ITV by Sky was referred to the Competition Commission and there were two strands that got dealt with in this case, one was competition issues, and the other was to do with media plurality. That latter strand is completely irrelevant for today. But it was done on the basis that there was material influence found at 18 per cent, and an SLC was found. In particular because it was found, but even at 18 per cent, because of voting patterns, there would be an ability to block special resolutions affecting acquisitions and financing.

There are a number of obvious parallels to be drawn between this case and that, and I am going to focus on the issue concerned with the remedies. Before I get there, and just as a slight digression to pick up a passing comment I made in relation to Ground 4, if we could turn to para. 82, I mentioned the *Sky* case when I was going through the legal issues in relation to Ground 4. I think if the Tribunal would just want to read paras. 82 and 83, they are just instructive as to how it is one assesses SLC.

(After a pause) The outturn of the Competition Commission's report in relation to this 18 per cent shareholding was that there should be a divestment of shares, obviously Sky had come forward with a set of alternative undertakings in this case, saying: "We do not need to divest any shares" and then, in the alternative, "you are asking us to divest too much", because the Competition Commission said: "We want you to divest down to below 7.5 per cent of shareholding." Sky challenged that remedy, indeed, the challenge was brought by Mr. Flynn, amongst others. The consideration of it is at p.84 at the beginning of para. 281. At 281, Sky's initial contention was that the Commission had started from the wrong end of the telescope and its analysis of potential remedies by starting looking at full divestiture first. If we just pick it up at the bottom of 281:

> "The only adverse public interest found in the present case related to the SLC, and therefore under subsections 47(7) and (9) the Commission was required to decide whether action should be taken to remedy that SLC. The SLC should have been the starting point."

The reference to the "only public interest" is the fact that in relation to the media plurality issue there was not an adverse public interest, so it was all focused on competition.

> "The effect of the Commission's approach was to ignore these statutory requirements and to focus instead on dealing with the RMS."

Then the respondents' reply is summarised.

> "283 In our view there is no substance in Sky's complaint.
>
> "284 It is not in dispute that the Commission and the Secretary of State have a margin of assessment with regard to appropriate action for remedying the SLC created by a merger. (See *Somerfield* para. 88)
>
> 285 In deciding what remedy to recommend to the Secretary of State the Commission is required by subsection 47(9) of the Act in particular to have regard to the need to achieve as comprehensive a solution as is reasonable and practical to the SLC and consequent adverse effects on the public interest."

The only reason the Secretary of State is referred to here is when you have a media plurality issue, formally the decision is taken by the Secretary of State, but the Secretary of State is bound by competition findings from the Competition Commission in its inquiry, so the interposition of the Secretary of State does not matter. "286 The CC Guidelines …" they are in the bundle at authorities 3, tab 60, the version now, and if I have chance I will go to those.

> "… state that the Commission's starting point will normally to be to choose the remedial action that will store the competition that has been, or is expected to be substantially lessened as a result of the RMS. The CC Guidelines further state that remedies that aim to restore all or part of the market structure, prior to a merger are likely to be a direct way of addressing the adverse effects".

Going to structure will directly deal with the SLC issues.

> "287 In *Somerfield*, in the context of the selection of a remedy for SLC under subsections 35(3) and 35(4) of the Act (which are expressed in very similar terms to subsections 47(7), (8) and (9), the Tribunal said:
>
> > '…. in our view, it is not unreasonable for the CC to consider, as a starting point that 'restoring' the status quo ante' would normally involve reversing the completed acquisition unless the contrary were shown. After all, it is the acquisition that has given rise to the SLC, so to reverse the acquisition would seem to us to be a simple direct and easily understandable approach to remedying the SLC in question.'

And that has been approved. Then we move on to 290, which is whether the Commission acted inappropriately in requiring a divestment down to 7.5 per cent. At 290 Sky's assertions are set out:

> "Sky asserts that as the only source of SLC found by the Commission was as a result of Sky's ability to exercise material influence over ITV, there can be no justification for any divestiture beyond that which is required to remove the material influence. Sky argues that the appropriate level for divestiture can be identified with some precision in the present case. In that regard, it refers to the fact that the SLC in question is predicated on Sky having the ability to use its shareholding to block a special resolution. In Sky's submission the Commission acted irrationally in selecting the divestiture level of 7.5 per cent"

It submits there is not a wide margin of appreciation in assessing how shares will be voted. It wrongly took into account levels of abstentions at meetings. It ignored some points in a

report that was prepared relating to voting patterns: "that any attempt by Sky to block a special resolution relating to a matter of ITV's strategy, against the advice of ITV management, would be extremely contentious, thereby galvanising shareholder turnout", which is rather, I think, the point, Mr. Chairman, that you were referring to, and then

> "wrongly considered the voting rights of other shareholders, and effectively attributed those votes to Sky, and, in any event, perversely ascribed to Sky an excessive amount of votes of other shareholders."

The reason it gets into the details is because this is a standard Articles of Association company, you need more than 25 per cent in order to block a special resolution, so it is the same as the situation here. Sky only had 18 per cent, and yet the finding of SLC was Sky actually had sufficient ability to block a special resolution even though it had a shareholding less than 25 per cent in this case. So Sky is turning round and saying: "All you need to do is to reduce our shareholding to a level where we will not have the ability to block a special resolution based on your analysis of the voting patterns, so it is the same, just pull it down incrementally, just do enough Competition Commission and no more in order to undermine your finding of SLC and that is it, nothing more is permissible." Paragraph 291:

> "Sky contends that these matters led the Commission to assume a 60 per cent effective shareholder turnout whereas the minimum it was entitled to adopt on the evidence before it was 70 per cent. As a result, the Commission erroneously overstated Sky's effective voting rights to a very significant degree. Sky submits that had the Commission correctly assessed the expected effective turnout, a divestiture to below 15 per cent (or a reduction of voting rights to that level) would have been adequate to provide an effective remedy for the SLC found by the Commission."

Paragraph 293:

> "These arguments fall to be considered in the light of the Commission's statutory obligation to have regard to the need to achieve 'as comprehensive a solution as is reasonable and practicable' to remedy the SLC and its adverse effects on the public interest. The Tribunal considers that in the light of this obligation the Commission was clearly entitled to consider whether, and if so at what level, a partial divestiture would ensure that there would be no realistic prospect of Sky being able to exercise material influence over ITV strategy. We agree with the Commission that this is not simply a matter of calculation but includes a significant element of judgement on the part of the Commission.

So, what is being said here is that it is not a matter of just trying to engineer matters so as to ensure the situation whereby you have just done enough that the analysis of the SLC you have undertaken is undermined. You are entitled, given that statutory framework, given the broad margin of appreciation to reach a judgment whereby you treat a remedy as effective where you have ensured that there is no realistic prospect of there being any SLC.

And at 294 it is just worth noting that the Tribunal specifically says, "The Commission was entitled to adopt a cautious conservative approach to future turnout" when carrying out the analysis. And at 296:

> "The 7.5% figure was the Commission's assessment of the highest realistic percentage of votes against a special resolution of ITV, not including those cast by Sky. Given that an assumption was necessary and that the Commission was entitled to make an assumption which was conservative, we do not consider that 7.5% can be said to be unreasonable or excessive in the light of the material which was before the Commission".

So, here we do have a situation where there has been an assessment of how it is remedial action by the Commission should be considered. The starting point, the legitimate starting point, is a structural remedy that will reverse the acquisition, will purge the SLC. That is going to be a comprehensive remedy and it is practicable. You can consider behavioural remedies as alternatives or more limited structural remedies, but you are entitled to adopt a cautious approach. It is a matter of assessment and the Commission is entitled to consider that a remedy that eliminates, so there is no real prospect of material influence in this case, no real prospect of an SLC is appropriate and a broad margin of appreciation is allowed there. That is essentially the approach that was adopted in this case, as can be seen from section 8 of the Final Report.

Whilst we are in *Sky*, if I may, I will just go on. As I say, Sky had proposed a raft of undertakings concerning what it would do with its shareholding, and saying, "Well, look, we won't vote them in certain circumstances or we'll actually put them in a trust so that it is not us, it is not our own incentives that will be brought to bear or they can be sterilised".

And 2.98:Sky argues that both non divestiture remedies would

> "Sky argues that both non-divestiture remedies would directly remedy the SLC identified by the Commission, namely Sky's ability to block a special resolution through exercise of its voting rights attached to its shareholding. Accordingly, it was irrational for the Commission to reject Sky's remedial offers".

So, again, what it is saying is, "Look, our undertakings would get rid of that SLC concern you have. They'll do enough to dial it down, and in those circumstances you could not reject them". But if one turns over the page to 302 it says:

> "Whether a remedy, structural or behavioural, will provide as comprehensive a solution as is reasonable and practicable to address the SLC together with any adverse effects resulting from it, must be examined by the Commission on a case-by-case basis in the light of the available evidence and using the experience and knowledge of the members. The fact that behavioural remedies typically require ongoing monitoring and enforcement, and the associated risks, are relevant consideration for the Commission. Despite the general concerns about such remedies outlined in the CC Guidelines, the Commission did not dismiss the voting trust or undertaking not to vote out of hand but rather assessed them in the light of the facts of this case".

They decided they were not effective because they continued to require monitoring. So the test is not whether or not you have got rid of the SLC but you have left the residual monitoring problem, it is the remedy that you are talking about overall effective to remedy the SLC, and it is not just some kind of incremental test that you are applying?

If one goes on to 305, it discusses how reduction of the maximum turnout would make it "significantly easier for another shareholder to block a … resolution". That is about halfway down.

> "Furthermore, the existence of concerns as to the remedy's effectiveness may derive from several factors which, taken separately, are not necessarily determinative. In the present case, the Commission reasonably relied on a number of concerns — for example, difficulties of monitoring the voting trust, the risks of non-compliance, and the issues discussed above which arise from Sky's retention of the economic interest in its shareholding — in addition to the possible distortion of ITV's corporate governance".

The distortion is if you have a situation where you agree not to vote shares, effectively you distort the voting weight that is accorded to the remaining shares, so corporate governance does not operate on an ordinary basis in those circumstances, even though you will have removed the acquirer's particular power to vote in a particular way.

I will also, because we are going to go on to proportionality and since we are in the case, if I may just deal with 306 through to 308, because a proportionality challenge was also brought in relation to these remedies:

"The main thrust of Sky's challenge to the Commission's reasoning on this issue concerned the view … that the costs which Sky would incur if required to dispose part of its shareholding … were irrelevant. At the hearing Sky referred to *Interbrew*",

which was another merger judicial review case, and I would ask the Tribunal just to read that quote from Mr. Justice Moses.

THE CHAIRMAN: Yes.

MR. BEARD: And then, having that in mind it moved on, at 307:

"This authority provides no support for Sky's argument which in our view is misconceived. The Commission expressed its conclusions on proportionality [in its Report]. It stated that when choosing between remedies which the Commission considers would be equally effective it would choose the remedy that imposed the least cost or that is least restrictive. In the present case the Commission took the view that full or partial divestiture of Sky's shareholding in ITV would be an effective remedy. [That obviously mirrors the present case] As between those remedies the Commission concluded that partial divestiture was the more proportionate because it was less intrusive in that it required Sky to divest a smaller proportion of its shareholding".

One could almost substitute in there the word "Ryanair".

"308 Having already concluded that neither of Sky's proposed remedies would be an effective remedy, there was no need for the Commission to examine the proportionality of those remedies vis-à-vis the divestiture remedies or at all. In those circumstances it does not assist Sky to contend that the partial divestiture remedy was proportionate when compared with its own proposals. As in *Interbrew*, no question arises of weighing the merits of either of the behavioural remedies against the cost to Sky of the partial divestiture of its shareholding …. In any event, the Commission noted that Sky's proposals would themselves be likely to be far from cost-free in view of the monitoring and enforcement requirements and other implications set out in the Report".

So if we go back to whether or not there is a legitimate aim and look through chapter 8, what the Commission is plainly doing is asking itself whether or not the remedies proposed by Sky are effective — I am sorry, by Ryanair (a Freudian slip) — by Ryanair were effective. It begins at 819, Ryanair's proposed remedies, and what one sees at 8.29 is the discussion on the effectiveness of Ryanair's proposed remedies. Now in the time available I am not going to be able to take the Tribunal through this.

THE CHAIRMAN: We are sure that we have read this a number of times.

MR. BEARD: But the point is obviously well made at 8.46 as to why the CC does not, concludes that the Ryanair remedies are not effective.

On the basis of the authority in *Sky*, there is no basis for saying that the Commission has got it wrong. What the Commission has found is that the Sky undertakings do not offer as comprehensive a solution as is reasonable and practicable. In particular, they leave open certain sorts of combinations potentially being impeded by *Sky*. *Sky* said they are relatively trivial, that is the wrong approach, that is not the way in which you deal with this. Again, it reflects on the way they have analysed those mechanisms. What the CC was doing was saying, "Incentives ability, when we look at ability what mechanisms might be used. There are a range of mechanisms, we want to make sure that those mechanisms cannot be used". That is comprehensive solution. We are entitled to conclude that making sure those mechanisms do not work is what we are charged with under the statute unsurprisingly, and it is not a matter of just incremental changes.

I will not take you to the guidance, but, as I say, the Guidance on remedies is at authorities bundle 3, tab 60, which talks more about structural remedies, behavioural remedies, how the exercise is to be carried out.

In the circumstances, the approach of saying we have got the legitimate aim wrong is simply incorrect. The second element that Ryanair's remedies is something that we rejected.

That really disposes of the first two issues. The third issue is that the costs are disproportionate to the aim pursued. Ryanair's argument proceeds on the basis that Ryanair's proposed remedies meet all the significant concerns identified by the Competition Commission and therefore the Competition Commission should have considered whether the incremental benefits of the divestiture remedy outweighed the costs. That is set out in their skeleton, paras.156 and 160.

As explained, that is just the wrong approach, because the CC did not consider that Ryanair's proposals were effective. It did weigh up full and partial divestiture. Those issues were looked at 8.113 through to 8.121, and it was concluded at 8.119 that partial divestiture was less intrusive; and also at 8.120 assessed in relation to partial divestiture whether the nature of the adverse resulting from the SLC justified the level of intervention proposed. So it was looking at proportionality issues, but it is to be noted that Ryanair has made no challenge to the CC's reasoning in that paragraph, which, in any event, was an

exercise of judgment which was only be reviewable on a *Wednesbury* basis, so there would not be any basis for a challenge.

In any event, the costs on which Ryanair relies in this regard are not relevant to the proportionality assessment. That is actually set out in our defence in paras.220 to 225. The points that Ryanair has made against us in this regard - in other words, that the costs of divestment of the shares, where it is suggested that it will lose money as compared to the price that it paid for the shares - the fact that Ryanair is not able to complete a transaction, or is having to unwind a transaction which is prohibited by UK merger control laws because of its adverse effect on competition, the fact of that unwinding is not a relevant cost for the purposes of the proportionality assessment.

The CC's Guidance on this, which, as I say, is in authorities 3, tab 6, is clear that the cost of divestiture will not be taken into account because it is an avoidable cost. You took the risk of entering into this transaction, you bear the risk of the costs of coming out of it. That is specifically considered in the *Eurotunnel* judgment, authorities 3, tab 52, paras.425 and 426.

I think the best way of dealing with this is just to go to *BAA* in the Court of Appeal, authorities bundle 3, tab 43

This is the *BAA* decision on appeal, and the reason I take you just to the Court of Appeal decision, if we could just turn on to para.29, BAA were saying, "If we have to sell Stansted because we are mandated to do so, there will be a big cost to us". Of course this is a situation where BAA had not bought Stansted as part of a merger, as I have explained.

Paragraph 29 actually quotes para.76 of the Tribunal's judgment:

> "'Secondly, and more fundamentally, where after a market investigation the Commission concludes, in accordance with the principles set out in *Tesco plc* … that a company must divest itself of a business in order to remedy an AEC and ensures that the company has an appropriate opportunity to realise a fair market price for that business (as the Commission did in this case) …"

in other words, give you enough time to sell the asset so that it is not a fire sale -

> "… there is no further complaint that can properly be made that the action of the Commission is disproportionate. In such circumstances the Commission has found that remedial action must be taken in the form of divestment in order to address the harm to the public interest arising from the AEC and absence of proper competition in the relevant market; the divestment requirement imposed by it to address that harm will necessarily involve depriving the company of its ordinary freedom of acting regard disposal of that business (that is the very

> nature of a divestment order or requirement); and provided the company is given an appropriate opportunity to obtain the fair market value for its asset, its interests will have been sufficiently taken into account and protected. Since, in the scenario under analysis, the public interest requires that the company should not continue to own the business and the company is enabled to obtain the fair market value of that business, that requirement satisfies the proportionality test set out in *Tesco plc* and there is no further ground for complaint that the action is in any way disproportionate.
>
> I respectfully endorse the Tribunal's reasoning in that paragraph of its judgment."

I invite you to read the rest of para.30. So again, *a fortiori*, the present case.

I think that disposes of issue three on costs and proportionality.

Issue four, the action is disproportionate pending the EU ruling. I am not sure whether or not this goes anywhere beyond Ground 1. Ryanair says there is no good reason why the CC should not await the outcome of the EU process. That is wrong. The CC has a duty to achieve a comprehensive solution. Timeliness of remedy is an aspect of that effectiveness. Unless required to delay action by EU law the CC is both entitled and required to take remedial action now rather than potentially in several years' time. In any event, the CC expressly found that there was no effective remedy which could be maintained in the interim until the EU decision is made. That is, for your note, Final Report, para.8.103. So this issue simply does not assist Ryanair at all.

It also depends on issues relating to Ground 1 and we have set out the position more fully in our defence, 227 to 233.

The final of the five points in relation to Ground 5 was the divestiture trustee point. I am not sure, in light of the exchanges we had previously, how much remains in relation to this. The Competition Commission decided that in the particular circumstances of the present case a divestiture trustee, independent of Ryanair and Aer Lingus should be appointed to divest the Ryanair stake in Aer Lingus. Ryanair claims this is a significant interference with its property rights which is disproportionate. First, this is a case where Ryanair has continued and publicly stated its aim of acquiring the whole of Aer Lingus for this reason, there is a particular sensitivity about the divestiture of shares, and whether it will be made in a way which is designed to further Ryanair's explicit and continuing strategy. Ryanair's incentives are clear. In contrast the Competition Commission observed a divestiture trustee would have "no vested interest other than performing its mandate". (Appendix K, para. 40)

Secondly, there are significant practical concerns relating to the divestiture, although it is standard for the Competition Commission to require a right of approval over divestitures made as part of a Competition Commission remedy, the present divestiture would potentially take place in a way which would, as a matter of practicality, prevent the Competition Commission from exercising any right of approval over potential purchasers, and that is the share dispersal option, which could take place extremely rapidly. We refer to this in our defence at paras. 239 to 243.

The Competition Commission would not, however, wish to preclude this mode of divestiture which could result in Ryanair receiving best value for its stake, so we do not want to prevent that happening rather than just a private placement. A solution is to put the divestiture under the control of an independent person in lieu of a process of Competition Commission approval, which would create practical problems.

In those circumstances an independent person, who would be an investment bank who would be well aware of issues to do with book building and so on - it could be an investment bank unless Ryanair is now objecting to it – and can be subject to a mandate which will incentivised, provide financial incentives, to the divestiture trustee to ensure it is getting best value.

As we say, we are not trying to structure a remedy process to mean that Ryanair does not get a market price for its shares at all. We are trying to ensure that it can get best value for its shares whilst ensuring the public interest is sufficiently protected and in this regard it is the potential purchasers which ordinarily we might apply an approval condition to, but here, because of the options that would be available in relation to share dispersal, we just do not think that is going to work; it will stymie the possibility of that option for Ryanair and therefore the divestiture trustee works more effectively in those circumstances, and as we made clear at the outset we are willing to consider what the terms of that mandate will be in order to structure in financial incentives for that divestiture trustee to get best value for Ryanair on its sale. In those circumstances we just do not understand where the possible disproportionality arises in relation to this issue here.

Unless I can assist further on Ground 5 that covers the five issues, I think.

If I may, I will very briefly go to Ground 6?

THE CHAIRMAN: Yes.

MR. BEARD: Ground 6 is essentially whether Ryanair Holdings carries on business in the UK.

We have explained the significance of this point in the defence, because the shares in Aer Lingus are actually held by Ryanair Limited, and Ryanair accepts that Limited carries on

business in the UK and that the Competition Commission can make an order against it and prohibit it from reacquiring shares. The concern is that Limited could comply with that remedy but that the shares might be re-acquired by another company in the group so the issue here is about ensuring the Competition Commission's remedy cannot be circumvented.

Similar sorts of issues arose in relation to *Akzo Nobel*, and it is perhaps just worth turning up the case, it is in authorities 3, tab 47. This concerned a merger between Akzo Nobel, which is a Dutch company and Metal Holding, which is an Italian company. The concern that was raised by Akzo Nobel was that it, as a Dutch company, was not carrying on business in the UK. If we just turn on to p.13, para. 43 sets out s.86 of the Act. There are not, in fact, copies in the bundle, we have had some copies made, if you would like them, to slot in, but obviously this sets out key provisions of it.

What is important is it is only to do with enforcement orders, it is not the duty to scrutinise, it is the enforcement provision.

> "It may extend to a person's conduct outside the United Kingdom if (and only if) he is:
>
> (a) a UK national;
>
> (b) a body incorporated under the law of the United Kingdom or any part of the United Kingdom;
>
> (c) a person carrying on business … in the United Kingdom."

What the case turned on in relation to any order being made against Akzo Nobel was whether or not it was carrying on business in the UK. As you will see from p.46 there was a factual analysis of that question by the Commission in its report (paras. 11.88 to 11.99). Essentially the essence of Akzo Nobel's challenge was on the basis of what is referred to in para. 48 in relation to the corporate structure: "Akzo Nobel was a pure holding company" and therefore was not carrying on any business in the UK, and Akzo Nobel, in those circumstances as a holding company, could not be subject to any enforcement order under s. 86.

It is perhaps just easiest if we turn on to para. 62, which sets out the overall conclusion in relation to the arrangements that were in place within the Akzo Nobel Group, which were key to its findings in its report.

> "The Commission's overall conclusion as to these arrangements … stated at 11.98 of the Report:

> ‘The arrangements described by Akzo Nobel in its submission to us and in the Authority Schedule are complex. The Group carries out operations in the UK and business operations are part of Sub-Units, Business Units and Business Areas. We have observed that Akzo Nobel MV has structures in place such that the operations of the Group’s various business activities are ultimately controlled by it. While appreciating that there are several steps of upward referral before the functional member of the Executive Committee or Akzo Nobel NV takes a decision, the structure in place in our view is one in which the operations within the Group are essentially monitored and directed which limits autonomy within the Business Units and Sub-Units in practice. In our view, the organisational structure and arrangements we have described above, including the relevant business units, is the means through which Akzo Nobel NV carries on business, including in the UK.”

It is a large group of companies with all sorts of subsidiaries, but what is being said is that because of the organisation of that what was being put forward as a holding company is actually active in operating the relevant business which is occurring in the UK. When it comes to the consideration of the issues, the first part – if I could highlight this – is at para. 74, p.23. The first argument is about the interpretation of the words “carrying on business in the UK”, and should that be given a particular interpretation in the context of the Enterprise Act 2002. That goes on to para.89 where the conclusion is “no”, it should not. The second part of the discussion then begins at para. 90 and it is about what is referred to as the single economic unit .. and the extent to which you are entitled to treat the activities of a subsidiary as the activities of the parent. That involves consideration of company law, case law, including in particular *Adams v Cape* and *Salomon v Salomon*. That runs on to para. 106, where essentially it is saying you cannot generally do that because it will be contrary to company law principles.

It then takes us on to the third set of considerations which is whether or not the business activities under examination are those of the parent company as such.

This is at 108:

> “It is inherent in the concept of separate personalities established by the *Salomon* principles that those activities may adhere to the parent company independently of the businesses of the operating subsidiaries. There is, therefore, no question of conflating the businesses of the parent and subsidiary, and, most importantly, there is no question of fixing the parent company with the rights and liabilities of its subsidiaries.

> 109 Consideration of that issue raises two questions in the context of section 86(1)(c): first, what activity of the parent company constitutes the carrying on of a business and, secondly, is that activity carried on in the United Kingdom? We are, of course, mindful of the fact that these questions cannot simply be answered by reference to the exercise of control over a subsidiary's business: were that approach to be adopted, it would be a clear breach of the *Salomon* principles. It is a question of fact and degree in each case whether the activities of the parent company are such as to be treated as carrying on business activities that are properly attributable to it as a legal person".

And it is then on that basis that the final decision is made, and you can see that para.113, I am skating through 111, 112, spelling out some of the thinking. Paragraph 111 is making the observation that it would be very surprising if one said that a parent company did not carry on business in Holland where it is based, so is the parent carrying on business somewhere, the question is, is it in the UK?

Paragraph 112 then makes this point that, two questions in 109 are connected, because once you know what the activities are you can consider where they are carried on. The remainder of the judgment is really on the facts. But if you go to 113 about six lines from the bottom,

> "The Commission's central conclusion was that the organisational and decision-making structure of the AN Group is based upon its functional units rather than its operating subsidiaries. Strategic decisions are made within the functional units, as evidenced by the absence of a strategic plan for subsidiaries".

And so that is the overall assessment that is being made here.

Just to carry this over to the present case, the case is being approached on the basis of the para.109 questions and what the activities of Ryanair holdings are and the discussions or the submissions of the CC in relation to these matters, just for your notes, defence, 255-297; and skeleton, paras.118-133. The key findings in the report are in appendix B, and in essence the CC found that Ryanair Holdings is active in the provision of air passenger services and other airline related activities including scheduled services and operating fleet of aircraft, and that carrying on business is in the UK in part. It is not a particularly radical reading because most of the observations in appendix B are taken almost verbatim from Ryanair's own materials. There was a suggestion at one point that the CC had mis-read that material, but I do not think that is now, well, certainly Lord Pannick has not been pursuing that. He has obviously preserved his position in relation to these matters. So on the basis of

the *Akzo* test and the material used, the CC says it was entitled to hold that Holdings carried on business in the UK, and that is the conclusion it then reached at para.8.125 of the Report.

You asked about the appeal in *Akzo*. There are, in essence, two grounds I think in the appeal. The first is the contention that *Akzo Nobel*, by just monitoring and directing others who carry on business in the UK is not itself carrying on business, thus it is contended that the Commission did not find that Akzo Nobel was actually doing anything commercial in relation to UK business, and a person does not carry on business merely because he exercises a degree of control over persons that do carry on business in the UK; and Akzo Nobel is effectively arguing that the Commission's findings in this case are no more than Akzo Nobel can exercise control and therefore it amounts to the same thing as what it says is the discredited single economic unit approach which is subject of criticism by the CAT itself.

I do not think I would give away any secrets by saying that the CC does not accept that interpretation of either the judgment or the factual analysis, but I think that probably fairly summarises the way the point is put against us.

The second ground is even more fact specific, it is that the tribunal's reasoning does not actually reflect the CC's findings, so it is saying that the CC has made certain findings that the Tribunal has worked on the basis of a misinterpretation of those findings. In granting permission Voss LJ actually noted that this was a particularly fact specific issue, but since it was linked to ground one, permission was given on both grounds.

I should make clear, it does not seem to us that the appeal will necessarily have significant implications for this case, but we will know in a few months.

THE CHAIRMAN: Thank you very much.

MR. BEARD: I hope that covers it. I am sorry I have trespassed on the quarter of an hour that Mr. Flynn —

THE CHAIRMAN: Well we will have a quarter of an hour less for lunchtime if that is all right, Mr. Flynn.

MR. FLYNN: Sir, thank you for abridging the lunchtime, I probably was not going to have anything anyway!

In general, perhaps I could say firstly I gratefully adopt what Mr. Beard has said without demur over the last day and a bit, and what he said will enable me to shorten what I was going to address the Tribunal on anyway. Secondly, of course, we maintain in full the position that we have set out in our statement in intervention and in our skeleton. And like Lord Pannick, I am not going to be trying to take you to everything in that, but I would

count, as I know I can, on the Tribunal having read it and taken it into account. So, with that short preliminary, I go straight into Ground 1, if I may.

Under Ground 1, the application of the duty of sincere cooperation, Ryanair, as you appreciate, is trying to set up a conflict, a legal conflict between the Competition Commission's divestment remedy ordered in the Final Report (the "FR" as amusingly shortened in their pleadings) and a conflict between that and the possible outcome of the General Court appeal against the Prohibition Decision in relation to the third bid.

Our primary position on this is, of course, that there is no conflict whatsoever.

The first point to make is that the duty of sincere cooperation arises in a number of contexts as has been said context is everything, context is fact specific and it is context is law specific. Starting with the legal context here, it is accepted by all, including by Ryanair, that the Competition Commission's looking at the minority shareholding and the European Commission's looking at a potential acquisition of decisive influence are two wholly distinct legal situations. They are being done under different powers for different purposes and so on. But the consequences of accepting that fundamental difference have not been fully taken on board by Ryanair, if I may say so with respect.

The first consequence is that some of the cases that have been cited to you on how the principle of sincere cooperation applies are not readily transposable to the current context. You have had cases cited to you in the anti-trust competition law context, *Masterfoods*, *National Grid*, *Delimitis*, and so forth. The first point I would like to make, and I am going to try to avoid too much citation of authority because you have had a lot of it, but you have seen the Court of Appeal in our previous outing in this saga, which I think Lord Pannick described as a dry run for the present occasion. Perhaps we should have a quick look at that, which is authorities bundle 3, and if you go to para.55 of that, you will see it is headed "Discussion". I think you have had this read out and drawn to your attention, so I will not spend too long on it, but the first paragraph there makes good the point that I was making, that it is a fact sensitive issue and all depends on the context.

Paragraph 56, this is Lord Justice Etherton, with whom the other two judges agreed:

> "Caution must, therefore, be exercised in transferring the reasoning in one judicial decision about the requirements of the duty in that particular case to another case in which the court is considering a quite different factual situation. Important statements about the principle are to be found in *Masterfoods* and *National Grid*. As Mr. Flynn pointed out …"

and I am only saying that because Mr. Beard has just spent half an hour reading cases where I have obviously made no impact on the court!

> "As Mr. Flynn pointed out, however, the context of those cases was (what are now) Articles 101 and 102 of the Treaty on the Functioning of the European Union where there are truly concurrent jurisdictions in respect of antitrust prohibitions on anti-competitive agreements and abuse of dominant positions. The context of the present case has been described in the written and oral submissions of the parties as 'overlapping' jurisdictions …"

and he says that is wrong, it is strictly inaccurate, they are mutually exclusive jurisdictions when you come to merger control. At the end of that para.58:

> "If the jurisdiction of the EC is engaged, it has exclusive jurisdiction. If it is not engaged, then, as between the EC and the Member State, the jurisdiction of the Member State is necessarily exclusive."

One could read on, but I think you have had the paragraphs from there probably drawn sufficiently to your attention.

So in the anti-trust type of case, *Masterfoods*, *National Grid*, *Delimitis* cases, the national court and the European institutions are looking at precisely the same agreement or practice involving the same parties and under the same provisions of law, Article 101 or 102, whatever it may be.

Actually, as we have pointed out consistently in these proceedings, if the national court is looking at a different agreement or different parties, even in the anti-trust context, it is not bound to follow what the European Commission does even if the factual situation in front of it is materially identical to cases which the European Commission is handling. That sort of example comes out in the Advocate-General's opinion from *Masterfoods*, to which you have been referred and the practical and legal illustration of it, which we cite in our pleadings, is the *Crehan* case in the House of Lords where the High Court had to consider agreements of Courage and Inntrepreneur (brewers' leases) and make an assessment as to whether those terms fell within Article 101 because of a foreclosure effect on the UK market. The judge said there was no such foreclosure effect. Despite the fact that in decisions involving other brewers' leases, Scottish & Newcastle and Bass, and so forth, the Commission had decided there was such foreclosure. The Court of Appeal said he could not do that and the House of Lords very clearly said that he could and that it would be a dereliction of judicial duty to do otherwise. So it is only in limited circumstances, even in

the anti-trust context, that the high point of sincere co-operation that you get in the type of *Masterfoods* or *National Grid* case applies.

In the current context, where there is no identity of the legal provision, entirely different consequences flow, and that is what Lord Justice Etherton is saying in the dry run appeal from last time.

With these entirely different jurisdictions as between the Enterprise Act and the Merger Regulation, you also get entirely different substantive considerations, and that was a point made by Mr. Glynn in the Tribunal when we appeared here the last time round.

That is also the view once again, as we now see from yesterday, of the European Commission in the letter which was referred to yesterday and which is now not a confidential letter. I do not know if that found a place anywhere in the bundles because we only saw it yesterday.

THE CHAIRMAN: It has not got a home yet in the bundles.

MR. FLYNN: I believe there was an insertion of tab 10, so this may be now tab 11.

THE CHAIRMAN: Have you got extra copies to put in there?

MR. FLYNN: I have not any further copies, as I assumed you had them. I can hand one up.

THE CHAIRMAN: That is fine.

MR. FLYNN: I assumed you would have it somewhere, but I did not quite know where. This is a letter, for what it is worth, from the European Commission Services responding to a complaint by Ryanair suggesting that the Commission should institute infringement proceedings against the UK for failing to fulfil its obligations under the Treaty and the Commission says it is not minded to do so. It is actually put under two headings. The first is "The duty of sincere co-operation", which was the point we are on, and the second is points made under the Charter of Fundamental Rights in the European Union. Ryanair is suggesting that its freedom to conduct business and property rights were also infringed by the Competition Commission's interim order as was discussed yesterday.

The Commission's reasoning sets out in what is probably now familiar form why the investigation by the Competition Commission of the minority shareholding is not part of the transaction, the concentration constituted by Ryanair's third bid for Aer Lingus. It explains that and says these two reviews relate to distinct issues. The conclusion they draw is that, contrary to the complainant's allegation the duty of sincere co-operation under EU law cannot be considered as having been breached in the case at hand.

Interestingly, under the Charter point, the second point that they make, they conclude that Ryanair cannot invoke the infringement of fundamental rights under the Charter on the

ground that, when making the interim order against Ryanair, the Competition Commission did not act within the scope of EU law. The interim order is a national measure which lies outside the scope of EU law. That is the Commission's conclusion, for what it is worth. In principle, one would say, the Competition Commission is entirely free to go ahead. There is no EU law angle to this. Ryanair's case is that it is not right because there is a possibility that it will succeed in its pending appeal before the General Court.

It was said, and I am not sure where it came from but it was suggested that we might be going to say that Ryanair will not succeed in that case. That is no part of our case. We do not invite the Tribunal to make any such finding and it would be, for reasons Lord Pannick said, extremely difficult for any advocate, still less me, given my performance in other cases, to persuade you to do so. I am happy to say I think it is a stretch, and it is a bit like Ground 4, it is essentially a rationality challenge to a conclusion by an expert body, but we will see. That is not the point we are on.

THE CHAIRMAN: Have I been provided with the first decision of the General Court? I asked for that yesterday, as well as one of the Court of Appeal decisions in *Ryanair*.

MR. BEARD: We have copies of both of those.

THE CHAIRMAN: Let us do that at the end of the day. Carry on.

MR. FLYNN: Yes, you wanted the first Ryanair appeal that ran parallel with the Aer Lingus appeal.

The question which the Tribunal has to consider is what would success in the General Court of the pending appeal, or any further appeal to the ECJ, what might that actually bring, or do for Ryanair, and what conflict would such success give rise to?

One has to consider what would be the effect of a possible favourable Judgment? First, it is not – most definitely and unequivocally not – as Lord Pannick occasionally has said, approval from Luxembourg to acquire the whole of Aer Lingus. You were shown yesterday Article 10(5) of the EU Merger Regulation, but perhaps again it might be sensible just to open that quickly, that is in authorities 1, tab 4. This is EU law, and the Court of Justice which, we know, includes the General Court. If either of the Luxembourg courts "gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article …" which this is, "… the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1)."

You saw Article 6(1) is an examination by the Commission when it decides – this is the phase 1 stage as it was put to you – is there a problem? Is it in the scope of the Regulation, yes or no? Does it raise serious doubts, if not, the Commission must decide "not to oppose

it", but if there are serious doubts then it goes to phase 2. That is what the Commission will have to consider.

Back to Article 10(5), second sentence:

> "… the concentration shall be re-examined in the light of current market conditions."

It is not a remittal with directions, for example it is not "We find you have made a mistake, your decision is incorrect, now issue a decision that is correct", it simply goes back to the Commission and it starts the procedure again, it has to be considered in the light of current market conditions.

If I could then ask you just to have a quick look at what I think you did mark as tab 10 in the core bundle, which is the Official Journal Notice of Ryanair's appeal. You will see there that the case is given a number, the applicant is Ryanair Holdings, represented by other counsel than those in court. You will see the form of order to annul the decision, so therefore if it wins it is 10(5) which is engaged, and the pleas in law and main arguments. The particular point is just the last paragraph in the corner of the page, you see there that the basis on which Ryanair puts its case is: "That the Commission made manifest errors of assessment and violated principles of proportionality, sound administration and the obligation to state reasons with regard to …" the particular elements of the commitments, which Ryanair offered, in other words the remedies package which Ryanair offered to overcome the Commission's objections on competition grounds to an acquisition by Ryanair of decisive influence over Aer Lingus.

There is no challenge, as you can see from that, to the Commission's substantive competition assessment. The best Ryanair can hope for is a Judgment which indicates that in some way the Commission's appraisal of the various queried elements of the remedies package was in some way defective. That is the best they can hope for.

Then, if they get that, that is just something the Commission will have to take into account when? When it is faced with a further new bid.

What we have pointed out in our statement in intervention is that the remedies package which Ryanair offered back then could not just be re-offered now, because the point we particularly made there was a lot has gone on with Flybe. We do not accept that that is new evidence as such, it is certainly not a matter of new evidence in a judicial review going to the Competition Commission's exercise of its Judgment. This is simply making an illustrative point that things can change, things do change. Ryanair itself has changed quite a bit, as we all know, from the Press.

When the Commission comes to look, if it does, at a fourth bid there may be another remedies package, it may look something like the current one, or it may look something completely different; we just do not know.

That is why we say, in the first place, that one of the major flaws in the argument that has been put to you, success in Luxembourg is not necessary for Ryanair to make a bid. It can actually re-bid as I am instructed under current Irish takeover rules, it could make a bid from 28th February, and it could do that irrespective of the fact that its appeal was pending in Luxembourg. You have, I think the dates – you asked in relation to the dates of the second bid ----

THE CHAIRMAN: We have those dates now, yes.

MR. FLYNN: You have them, but if you look at para. 3.5 of the Report. That refers to the second bid, broadly saying it was launched in December.

THE CHAIRMAN: That is why I asked for the precise dates.

MR. FLYNN: Exactly, you asked for the precise dates, and I can only add a little precision by saying we understand that the notification to Brussels under the merger regulation was withdrawn on 23rd January 2009, but it is in that period of between December and January.

THE CHAIRMAN: Yes.

MR. FLYNN: But if you look just above that, if you look to the previous paragraph, there you will have dates which will explain to you that that bid was made while the first appeal was happening.

That is why we say in our statement in intervention that success in Luxembourg is neither necessary nor sufficient to say Ryanair is allowed to acquire decisive influence, we say, over Aer Lingus. Actually, success in Luxembourg, in my submission, is irrelevant to the argument that is being put forward to you.

The argument actually must be, when you boil down to it, that it is the mere prospect of one day of securing a favourable decision from the European Commission in relation to a future bid, whether that be the 4th, 5th or whatever, it is that mere prospect however that bid might be structured and whatever remedies package might come with it, it is that their argument must be which creates the conflict with the CC decision. But even that, in our submission, is not good enough because you have to ask yourself the question which in my respectful submission my learned friend did not answer, which is what EU objective is being jeopardised by making such an hypothetical bid harder or even impossible to bring off? And I think its case is only being put as significantly harder. We say there is no EU objective which is remotely, there is no EU objective that you can characterise that is

remotely being put in jeopardy here, and we have explained that in our skeleton, in our statement of objection. As Professor Beath said the other day, there are actually many obstacles which might arise in the course of a public bid. There are all sorts of things which might happen along the way. And the question that you have to ask yourself here is, in the same way as I was just suggesting that you would need to ask — what is the value to Ryanair of a favourable judgment in Luxembourg? At this point of the argument you have to ask, what is the value, what is the worth, of a positive Decision under the EU Merger Regulation.

THE CHAIRMAN: But, do you accept at this moment in time, given the order of the Competition Commission that unless Lord Pannick can set aside the order, they cannot launch a fresh bid?

MR. FLYNN: No, no. The order is not in place, number one; secondly, the bid — and this is a point I am coming to, because another — let me take it now. What you have been told a number of times is that this is about acquiring 100 per cent of Aer Lingus. It is not, or at least that is not what the EU Merger Regulation is concerned with, it is concerned with an acquisition of a decisive influence which controls, so, something over 50 per cent. It can obviously be well below 100.

THE CHAIRMAN: Just look at 8.121 of the Report. One of your points is you are saying that Aer Lingus can bid at any time.

MR. FLYNN: Ryanair.

THE CHAIRMAN: Ryanair, yes.

MR. FLYNN: This is where the exception comes in. The question at the moment is, what is the obstacle to imposing the divestment order now, and is there an EU obstacle to imposing the divestment order now? And I say no, there is not. There is absolutely no legal principle or EU interest that is being jeopardised as matters stand by virtue of the pending appeal, by virtue of a prospective bid or whatever.

THE CHAIRMAN: So, your point is that there may be domestic prohibition, but there is no EU prohibition. That is what you are saying.

MR. FLYNN (After a pause): I am being pointed to 8.102, this is what I was just saying. What the Commission says is, getting down to 5 per cent, if you look at the end of 102, this is where they rejected Aer Lingus's proposal that Ryanair should simply be prohibited from launching a new bid. They say that is not appropriate. The Commission will have to look at any future bid and 5 per cent, you see there:

"… we judged that a level of shareholding at around 5 per cent would not provide a sufficient platform for future bids to justify imposing a permanent prohibition on such bids following the reduction of the shareholding".

The get-out applies, it can make a bid. What it cannot do is complete the bid without the Commission's approval in the future of a hypothetical future bid. It is all in the mechanism of the report. As Mr. Burnside puts it, it cannot do what it did the first time round and build a stake in parallel, but it can certainly make a bid, and it will have its 5 per cent shareholding as a platform at the time.

But the prospective decision that they are looking at, "merger regulation clearance" as it is sometimes called, what that really is, and Mr. Beard went over this to some extent, is a declaration that the EC itself has no objection to the transaction, the acquisition, whatever it might be, on competition grounds in the interests of the European Union. It is not conferring any right to complete that concentration with a Community dimension. It is not some form of laying on of hands, saying that this transaction, this merger, has now become something which must happen in the interests of the European Union, so there is no obligation on Member States not to oppose it on permitted non-competition grounds. There is certainly no obligation on counterparties or shareholders to accept the bid. We give the, I submit, telling example in our statement of intervention of the Irish Government stake. If Ryanair's argument were right that Member States could not put obstacles in the way of completing an approved CCD then the Irish Government would not be able to vote against it. We say that simply cannot be right. Furthermore, of course, the bidder, or the would be acquirer does not have to complete the transaction. They may get the clearance, but they are not then obliged to press it home.

The value of this mythical prospective clearance is, we say, limited.

THE CHAIRMAN: You are saying it is not really a Community objective that someone should be able to complete a transaction?

MR. FLYNN: It is absolutely not a Community objective that you should be able to complete a transaction to which the Community, on the basis of the Merger Regulations, simply has no objection. It does not have any positive bent towards it. It is simply saying that would not raise competition problems, it is not an EU objective.

That means, in fact, that the timing of the General Court proceedings on which questions were asked, is essentially a secondary issue because our primary position is that it does not matter what happens in Luxembourg or how long it will take.

I should say that we were surprised to hear that the view was being expressed on the other side that there could be a hearing either side of the Christmas vacation in this case.

Lord Pannick said he had taken instructions from those who know. I think I can do at least as well as that, because those who are representing Aer Lingus in this case are in this very room, indeed behind me and to my right. The *Ryanair* case, the pending case, is a particularly complicated one procedurally. It is not a bog standard merger case, even if there were such a thing, and, as we have said in our statement of intervention, the average time taken for competition cases, including merger cases, is four years from start to finish. That is the average and we point to the most recent example, which was longer than that, a merger case, which took longer, so there is no reason to think that this would be a particularly average case. No expedition has been applied for. It is taking its course and its course involves the fact that there are no fewer than four interveners. As well as Aer Lingus there is Flybe, there is IAG and the Dublin Airport Authority who have got to put in their statements of intervention by, I think, the end of next week.

At that point, the principal parties will be given the opportunity to comment on those four statements of intervention. There will have to be a Ryanair reply. There will have to be a Commission rejoinder. No deadlines are set for any of these. There is a procedural application in respect of effectively a disclosure order by Ryanair asking for a great deal of confidential information from the Commission's file, and it is suggesting what they call in Luxembourg an "informal meeting", but might to our eyes look more like a case management conference, and all of these issues are, of course, bedevilled by confidentiality, so there is going to have to be some solution to a confidentiality ring, or some sort of mechanism will have to be put in place to protect this, none of which is exactly standard practice in Luxembourg and all of which takes time. It is most unlikely, in our view - most unlikely - that the written pleadings will be complete by the end of the year, never mind a hearing. As you know, all the documents will then have to be translated into French once they are all in, and they are lengthy and complex documents.

I do not think I need to labour this. There is indeed a recent authority from the Court of Justice which sets out typical lengths of proceedings, because one of the issues that has arisen in more than one case is, were defence rights compromised by the length of time taken in the General Court and should that lead to a reduction in fine or should that be pursued by way of damages? So we have a recent Advocate General's opinion, which I am more than happy to hand up, telling you just how long these things are likely to take.

THE CHAIRMAN: It is very unlikely that you will get a decision before three years, because it took three years and one month last time, and now you have got all these interveners and disclosure applications.

MR. FLYNN: Exactly. The court's workload has increased. This is a particularly complex case. You get a long time between close of pleadings and the hearing, and you get at least as long again, and sometimes longer, from the close of the hearing to the judgment. So to get to the same result as last time I think is almost impossible now, and it is much more likely to be at the court's average or probably, if one were a betting man - and I am happy to take a bet with those behind Lord Pannick - it is likely to beat the average.

The reason we are making the timing point is not because that is directly relevant to the principle of sincere co-operation, but to show how on Ryanair's case the current situation, which is that the UK authorities, while fully within their rights to investigate the minority shareholding now - that is now accepted - it is fully within their rights for the Competition Commission to exercise the statutory powers that it has - obviously they will be challenged but there is no challenge to its jurisdiction - so despite the fact that it has a putatively defensible conclusion that the stake should be divested it should be hands-off for potentially many, many years. Clearly that is not just the length of the General Court proceedings, plus any appeal to the Court of Justice, because the whole process can be set off again by a new bid which would then fall to be reviewed by the European Commission.

This is not some kind *in terrorem* point, as I think my friend characterised it, it is what is actually happening. It is happening now, and it has been happening for some time. There have been three bids in seven years. A fourth is being gaily talked about. Each time there is a prohibition decision there is an appeal, and we quote in our statement of intervention and annex public statements by Mr. O'Leary, the chief operating decision maker, to say that is indeed the game they were playing. That is why we say, if there were a conflict, this would actually be a worse case, a more extreme case than *British Aggregates*, where, as you have seen, the Court of Appeal said, "Let us go ahead despite the risk of conflict". They did that because there is no end in sight, as Lord Justice Beatson said, no indication of when the European Institutions would do their stuff.

What you have in the present case is Ryanair making it its business to ensure that the EU always has stuff to do. That is what going on here - and saying that the CC just has to stay its hand despite its admitted jurisdiction.

I think I can probably wrap up on Ground 1, if this is a convenient moment. I will reserve the position to come back afterwards, but essentially our position therefore is that there is no

conflict on the substance, that is our primary case. In any case, it is all catered for by what I would call the proviso that it would be lifted if, in fact, Ryanair succeed in getting the approval from the Commission. As we have seen, that is also the position of the body which is responsible, sometimes called, rather preciously, the "Guardian of the Treaties", but that is, for what it is worth, the European Commission's view.

Sir, I do not know if you wish to stop now?

THE CHAIRMAN: No, that is convenient. We will be back at a quarter to two.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Flynn?

MR. FLYNN: Sir, members of the Tribunal, I had essentially finished with Ground 1. We did not have a lot of time immediately before the adjournment and I would just like to draw your attention to Articles that we append to our statement of intervention, and they are to be found in tabs 50 and 51 of the hearing bundle, Tab 50, heading: "Michael O'Leary: "Ryanair's row over Aer Lingus? It's like a Monty Python script". It is a good read, as usual.

The point I wanted to make, to make good what I was saying earlier is on p.4 of the extract. You will see Ryanair argues the Competition Commission will not be able to force the sale of its stake until the appeals process in Europe has been exhausted, meaning the regulatory battle could roll on for years to come. It could go on for another 10 years yet, says O'Leary. That was really to make the point that that is what the game is, as I said earlier.

THE CHAIRMAN: That is all I need to read of this document.

MR. FLYNN: I recommend the whole of it, but ----

THE CHAIRMAN: I am only going to read what I need to.

MR. FLYNN: I am only pointing you to that specifically for what I need. The next tab is an extract from the "Financial Times", heading: "Ryanair told to cut Aer Lingus stake." This is therefore clearly following the Final Report. Again, on the second page of that extract, I really just wanted to make it clear that Ryanair itself understands that, despite the order, it can bid. The last two paragraphs: "Analysts pointed out that if Ryanair pursued further appeals the process could take years. Moreover, Mr. O'Leary has not ruled out launching a fourth bid for Aer Lingus, which could delay a resolution even further.

"It is one of the options that remains open to us", he told the Financial times in an interview. "My understanding is that if we launch a fourth bid that it would reset everything back to zero." That is, as it were, from the horse's mouth and that is why ----

THE CHAIRMAN: You see my comment that it is very unlikely there would be a fourth bid at this stage, you say that is a bit too charitable.

MR. FLYNN: I could not comment on the likelihood. I can only comment on the ----

THE CHAIRMAN: You say it is possible.

MR. FLYNN: It is possible, and as is being said by several voices behind me: "They have done it before", and that is why I took you in relation to the second bid. It is technically possible, it has happened before, further than that we are in speculation.

Ground 2, if I may, which is the procedural fairness ground. Really five points on this.

THE CHAIRMAN: Can I just make a note? (After a pause) This article, is it 10th January 2013? It says "last updated", but when was it originally published?

MR. FLYNN: I can only read what it said, without making further inquiries, "last updated" ----

THE CHAIRMAN: Sometimes that is not the actual date it came out, is it, that is the trouble. At the top it says: "10.1.13".

MR. FLYNN: We will make inquiries. If we are right in our statement of intervention (tab 6) it was on 28th August from the "Financial Times" and this is an attempt to access that online.

THE CHAIRMAN: It is the date when a report comes out, yes. Thank you. So you say when the report comes out, one of the first comments you get is a reference to a possibility of a fourth bid.

MR. FLYNN: As an option remaining open, yes. I am not doing more than that, it was really just to justify comments that I had made before.

THE CHAIRMAN: I agree, now you have shown me something.

MR. FLYNN: So I can move on to Ground 2, and in respect of that could I ask you to take up Ryanair's reply, which is tab 8 of the core bundle, paras 35 and 36 "Scope of Ground". The point I wish to make on this is that Ryanair's appeal, the proceedings before this Tribunal, only relate to allegations contained in s.7A and appendix F of the Final Report, and evidence relied on by the CC in support of those allegations, insofar as they were not disclosed into a confidentiality ring, that is the scope of the appeal as pursued. As 35 says: " … the broad contention that it was unfair to withhold any allegation or any evidence" is not pursued. So when we talk about Ground 2 we are only talking about allegations in relation to parts of the report, and we are only talking about disclosure into a confidentiality ring.

In that connection, I note that, of course, the Tribunal's order at the first case management conference was for a measure of what I think is inelegantly called "unredaction" in relation

to those materials, and for it to go into a confidentiality ring. There has been no querying, challenging, or application to vary that order.

THE CHAIRMAN: The other point was I said if anyone wanted to apply for disclosure they would have to make a proper formulated request in the normal way.

MR. FLYNN: Make a full and particularised application with a skeleton.

THE CHAIRMAN: We have never had that, no.

MR. FLYNN: We did not have that. That is the scope of the Ground in relation to procedural fairness.

The second point I wanted to make was that, following your order, the material that was revealed to Ryanair is essentially uninformative. In other words, what they are acknowledging is that the material where the veil was lifted did not allow them to say that some essential element of the gist had been withheld from them, because I think we are absolutely all agreed that the only question in relation to procedural fairness is whether the Commission gave enough to allow Ryanair to make an informed response to it, to know and to make an informed response to the case against it, formulated in many ways in all these cases.

THE CHAIRMAN: I understand. We had the unredacted versions. We have the response of Ryanair on that, and they say: "Really, it does not take it very far", and the focus of Lord Pannick has really been on his point that I cannot really make sensible representations in the absence of knowing the identity of the unnamed party. I think that is where the heart of it lies.

MR. FLYNN: That I think is where it has to be.

THE CHAIRMAN: Yes.

MR. FLYNN: All that is left is essentially, and that is pursuant to your order, who airlines A-M are, that is what is left out, they are not specifically named, and there was other material not unredacted that might have led to them being identified.

My third point is that that material, what is still confidential, which is essentially the identity of those airlines, is of the utmost confidentiality,.Even what is in the public version of the report has led to a great deal of unhelpful speculation in the industry as to who Aer Lingus might have been talking to at various times. That of itself could hinder, limit the willingness of other potential counterparts to enter into discussions, and we say that is SLC in action, but if that information were to be disclosed it would be catastrophic, and not just for the Commission's procedures, as Mr. Beard was explaining, but for Aer Lingus. It would simply be a disaster if people thought that if you talked to Aer Lingus, because of the

position it is in with Ryanair as the significant minority shareholder, it has got to get out, that would be — I put it highly — disastrous. So that is really the third point.

The fourth is, what is the relevance? What is the relevance of the identity of the airlines in these still active parts of the report. And there I really have nothing to add to the careful demonstration that Mr. Beard performed yesterday afternoon that it simply is not relevant. You do not need to know who those airlines are to make intelligent representations to the Competition Commission in answer to the case that they are raising against you in Ryanair's case.

Now, you asked, sir, yesterday, did Ryanair itself ask other airlines what they had to think about Aer Lingus.

THE CHAIRMAN: That was in the context of a reference in the report where Ryanair was submitting that no-one else would be attracted to entering into a combination with you apart from themselves.

MR. FLYNN: Yes.

THE CHAIRMAN: But I just wondered whether in the communications with the CC they put forward anything equivalent to, let us say, your Booz & Company report whether — that is all I was trying to find out.

MR. FLYNN: Yes, and you had the CC's answer.

THE CHAIRMAN: Yes.

MR. FLYNN: We cannot give you a, you know, that is for them.

THE CHAIRMAN: Yes.

MR. FLYNN: Whether Lord Pannick can give you a fuller answer —

THE CHAIRMAN: No, I do not need it, because the only point here is, as I have not seen all the communications between Ryanair and the Competition Commission I was wondering whether they had their own analysis to support this the assertion in that paragraph where they had gone out to, let us say, some agency who had done enquiries but —

MR. FLYNN: Yes. As I say, that question is essentially for the Commission, possibly Ryanair, but I have one little —

THE CHAIRMAN: Yes, Mr. Beard answered.

MR. FLYNN: Mr. Beard answered that, but I have one little point to make, and this comes from, it is another press report, and I will hand it up.

THE CHAIRMAN: Yes.

MR. FLYNN: The headline on this one is "Ryanair wooed for Aer Lingus".

THE CHAIRMAN: And I presume, Lord Pannick, you have seen this before, have you?

MR. FLYNN: No, I am just —
LORD PANNICK: Not as far as I am aware.
THE CHAIRMAN: Do you want to look at it before I look at it, just to make sure you have got no objection?
LORD PANNICK: That is very kind of you. (Documents handed) I have got no objection to you seeing it.
THE CHAIRMAN: Okay.
LORD PANNICK: But I am in a difficulty in that I cannot be expected to respond to factual matters that are raised for the first time at, whatever it is, two o'clock on the final day with no notice whatsoever.
THE CHAIRMAN: So, if you have got nothing additional to say, then —
LORD PANNICK: Well I may have.
THE CHAIRMAN: I am just saying you can put it by way of a letter by next Friday.
LORD PANNICK: Is that all right?
THE CHAIRMAN: Yes, that is fine.
MR. FLYNN: I really, really did not do this in any way to ambush my friend.
THE CHAIRMAN: This it is just that — litigation is not to be played like a game of snap, and if you are going to hand up a document like that you should have given it to Lord Pannick before anyone else, so if he had any objection to raise —
MR. FLYNN: I accept the sense —
THE CHAIRMAN: Let us have a look at it.
MR. FLYNN: It is an Article from The Independent headed, "Ryanair wooed for Aer Lingus", and it purports to be an account of what Mr. O'Leary said at the annual meeting of shareholders, simply saying it has had a number of approaches to buy its stake in Aer Lingus. He refers to the bid. He says they have offered remedies to the Commission, he said somewhere between 30 and 35 rival airlines had shown an interest in taking over routes, which both Ryanair and Aer Lingus currently fly. That really is the very simple point I am making and it was only in answer to a question which you raised yesterday.
THE CHAIRMAN: Yes.
MR. FLYNN: As it would appear that Ryanair certainly had some opportunity to talk to other airlines about what they think about Aer Lingus.
THE CHAIRMAN: No, I can see how it is relevant. Do not worry.
MR. FLYNN: I am making no more point than that, and it is just simply relevant to a question you asked yesterday.

THE CHAIRMAN: Shall we decide a home for this? Shall we just put this at the back of the core bundle?

MR. FLYNN: Let us do that.

THE CHAIRMAN: That is tab.12.

MR. FLYNN: I am not sure it will feature very strongly again, but there it is.

The last point I wanted to make on procedural fairness is that given the scope of the appeal on this issue, the question is, what would putting it into a confidentiality ring have achieved? That is the question. And, in my submission, there is absolutely nothing that Ryanair's lawyers could have done with the information to test the issues that they say they wish to test, whether discussions actually happened, because they do not seem to believe that they did, what was said in them, and the content of those discussions.

THE CHAIRMAN: Are you saying that what may have happened, then, if it went into a confidentiality ring, that the next stage would have been the lawyers asking for permission to show it to their clients.

MR. FLYNN: Naturally.

THE CHAIRMAN: Yes.

MR. FLYNN: And I think I said as much at the CMC, and the consequence of that, as I have already said, would have had to have been no, I suspect.

THE CHAIRMAN: Yes.

MR. FLYNN: Or that very special arrangements would have had to have been put in place. But, yes, so given the scope of the appeal which is only should this have been put into a confidentiality ring was it unfair not do that? I say it would have been pointless because by the terms of any ring the lawyers would be limited to their own knowledge or what they could find from public sources.

THE CHAIRMAN: Exactly, yes.

MR. FLYNN: So, even if there were anything in the unfairness point in that you actually need to know who these people are to make observations, putting it into a confidentiality ring would not have helped. Just to repeat, those were the terms on which the debate has happened in front of this Tribunal and you offered every facility for that to be reconsidered, and it is simply not being done.

I think that really is all that I need to say on Ground 2, given the extensive demonstration that Mr. Beard carried out yesterday, unless there is anything the Tribunal would like assistance on.

THE CHAIRMAN: I think that is fine on that issue.

MR. FLYNN: I am happy with that, if you are, sir. Again, Ground 3, which is the issue of whether there has to be some kind of causal link between the material influence and the substantial lessening of competition. We entirely endorse, and I think have made a similar demonstration ourselves, the legal analysis that Mr. Beard explained this morning. The question is, the creation of the relevant merger situation, is that expected to lead to SLC not the exercise of ----

THE CHAIRMAN: It is really just that short point in para.25 of your skeleton that goes to the heart of it. As I said, you are either right or you are wrong on that.

MR. FLYNN: Exactly. As you said earlier, we cannot both be right. One or other side must be right and that is the point we are on.

Mr. Beard this morning also explained various theories of harm of competitive effects that a merger control authority might wish to be able to examine, which they would not be able to examine if Ryanair's argument is correct. For what it is worth we add another, it is para.49 of our statement of intervention, tab 7 of the bundle. Towards the end of that paragraph we refer to - slight 'geek-speak' - vertical foreclosure theories of harm, the example being that the acquirer, so the person who acquires control, at whatever level, material influence or full control, will cease to supply competitors of the target. So if you imagine an important supplier of a raw material acquires a processor of that raw material and there are processors in the market left high and dry, the reason the acquirer does not supply processors B, C and D, is not through any exercise of control over the target, the new subsidiary, it is an act further upstream.

We give the reference to the Merger Assessment Guidelines in the footnote. I think those particular paragraphs have not made it into the bundle. Again, we are happy to supply copies of it

THE CHAIRMAN: Do you have copies with you now?

MR. FLYNN: I think we do. I can also give a reference to ----

THE CHAIRMAN: I am going to put it just behind your tab 7.

MR. FLYNN: I will hand up copies of those. (Same handed)

THE CHAIRMAN: You do not need to read it now.

MR. FLYNN: I do not seek to draw any further point from this. It illustrates the concerns that might arise in what could be called a vertical merger or a non-horizontal merger as it is called here. That would not be, on Ryanair's theory, something the competition authority would be able to look at because it would not be an exercise of the control they have acquired over the target.

I move on to Ground 4. It may be that the place to start is our skeleton at para.26. I am not going to read it on to the record, but at that point we focus on what I think has been called the first of the mechanisms. You will see what we say there, the mechanisms of SLC, and this the M&A limb of the five mechanisms. In particular, because we think we are particularly well placed to do so, in para.29, you will see a summary of our case in relation to synergies to counter, as we would have it, a bare assertion by Ryanair. You will see it is quote there. In para.29 we say that the CC does indeed consider efficiencies in relation to the kinds of transactions that it was concerned with. Ryanair says in response to that, if the European Commission thinks that a combination between Ryanair and Aer Lingus would not lead to efficiencies, it is very unlikely that a combination with any other airline would do. We say in our statement of intervention, and we explain it in more detail in the paragraphs which are referred to there, it is not what the Commission says. It says simply that Ryanair have not convinced them and, for reasons which we give, that assertion that they are the only ones who could provide those efficiencies is simply not right. Again, I think this is characterised in Ryanair's skeleton and reply as new evidence, which we do not think it is, it is simply a response to that assertion. It is a matter of logic really. We set that out in the referred paragraphs, paras.53 and 54 of the statement of intervention.

At the end of 53 you will see that we say, on the contrary, contrary to the Ryanair proposition that Ryanair is necessarily the one to provide the greatest synergies , there are others that could provide greater synergies, and you will see the points we make there about costs of airport and handling costs, maintenance costs; and then 54, other types of synergy, not those that Ryanair relied on, that seemed to us that seemed to be potentially available from others, not necessarily anyone specific. All this is really to say that you should not take as read that Ryanair is the only one can provide such synergies.

While we have that document open ----

THE CHAIRMAN: I am just looking at your para.54.

MR. FLYNN: That was para.54, again I am not going to take up the Tribunal's time by reading all this out, but the points are made there and I am just trying to put them in context.

While we are in that document, if we can go to the next page, para. 55, you will see that there we are also challenging what Ryanair has to say in relation to pre-emption rights. Not only by supporting what the Competition Commission have to say about it, but also by providing evidence in the form of a witness statement from Mr. Hegarty which counters evidence from Ryanair's Irish solicitor, Mr. Casey.

Oddly enough, Ryanair accepts that that evidence is admissible as countering what Mr. Casey has to say.

THE CHAIRMAN: They cannot exactly put that evidence forward and then not allow you to respond to it, can they?

MR. FLYNN: Yes, that is one category of evidence where the admissibility is not in question, and we simply say that what Mr. Hegarty has to say there does counter the Ryanair point and support the Competition Commission's analysis. Again, I do not think the Tribunal's time will usefully be taken up ----

THE CHAIRMAN: I have read it, thank you very much.

MR. FLYNN: The last point we make in this section of the statement of intervention goes to slots where we have already had a certain amount of discussion, where I think the points are made there. First, it is not right that slot disposals would necessarily proceed on a large basis, the entire portfolio, or a large chunk of it. Nor, as I think was discussed this morning, would it necessarily arise in the context of an M&A transaction; this is a free-standing matter, because there may simply be deals of trading slots. I think it was said that there was no evidence of any intention by Aer Lingus to dispose of slots.

THE CHAIRMAN: That is right, but the point before we get to that stage is they say there is no evidence to support the finding that Ryanair would, in fact affect disposal given that the only one that was brought forward was one they consented to and they have not shown any sign that they want to block any further ones in the future.

MR. FLYNN: Yes.

THE CHAIRMAN: That is the point that Lord Pannick is making.

MR. FLYNN: Yes. That is right, and that, I think, is what he says, but he also says there is no evidence that Aer Lingus particularly want to dispose of slots.

THE CHAIRMAN: That is the next level.

MR. FLYNN: First, the very transaction to which they did not object is indeed evidence of a willingness to do precisely that, and we are talking about 7.97 of the report, and the example you have just given is the example at (b). But you will see in (a) it is somewhat redacted, but there was a proposal with an unnamed airline to exchange Heathrow slots, but concern was expressed by the other airline on the basis that, as it says, the deal could be brought to an EGM where it would be exposed to Ryanair's veto.

THE CHAIRMAN: What you are saying is, although they have not blocked one before, the fact that they have the power may deter other people from swapping slots with you?

MR. FLYNN: That is the point in a nutshell, and that is exactly the point I was seeking to make. The only other point I was going to make on SLC just related to a discussion that was had this morning in relation to ordinary resolutions and that is in 7.113 of the report. I just wanted to draw your attention to it. There was some discussion this morning about the position of the Irish Government shareholding, and I thought it is important to have on board the conclusion at the end of 7.113 that the Competition Commission positively makes a finding, having assessed the evidence said: "We thought it likely that the Irish Government might have to abstain in the event of shareholder vote on a related party transaction. We also noted that in the future the current or future Irish Government might be unwilling to take a position on a particular issue for political reasons."

Just so you appreciate where that came from, there is analysis which supports that finding in Appendix C, which is called: "Aer Lingus Corporate Governance Issues." If you go to p.C8 you will see that paras. 23 to 29 of that appendix contain some considerations in relation to the Irish Government's potential abstention. There is some reference to related party transactions, that was the first part of 7.113 and then in 27, some evidence of situations in which the Irish Government would, in the past, have found it difficult to vote on Aer Lingus' case in relation of the withdrawal of a Shannon to Heathrow route, and Hangar 6, which is a question of who has their headquarters at Hangar 6. Those were political issues in Ireland, and certainly made into media issues, and while those themselves did not go to a vote, Aer Lingus said at the end of that paragraph that it was possible that similarly politically sensitive issues might arise in the future, might come to a shareholder vote in which the Irish Government could abstain and that is what underlies the Competition Commission's conclusion in 7.113 to which I have just taken you. Then the Competition Commission in this appendix goes on to consider what the consequences might be.

THE CHAIRMAN: I understand that.

MR. FLYNN: That was all I wanted to say on Ground 4.

THE CHAIRMAN: On Ground 4, do you have any comments to make on para. 20(7) of the *BBA* decision, over and above what Mr. Beard has said?

MR. FLYNN: What a very good question. Not immediately, is the answer.

THE CHAIRMAN: I am just trying to get to grips with the standard of review, given that the property rights are engaged. You have nothing further to add over and above what Mr. Beard has already said?

MR. FLYNN: I had not intended to add anything on that point. As he was saying this morning, these tests, the rationality and proportionality tests are much the same in this context, and Article 1 Protocol 1 does not change the matrix materially, as I understand it.

THE CHAIRMAN: Yes, that is fine.

MR. FLYNN: So, I was certainly not intending to make — either repeat something he said or make a different submission.

THE CHAIRMAN: Yes, that is fine.

MR. FLYNN: So it is probably an unhelpful answer.

THE CHAIRMAN: No, if you agree that there is no point in going over it, that is fine.

MR. FLYNN: We certainly have no reason to disagree with what was said this morning. In relation to Ground 5, again, I really have not got much to add. We have set out some matters in our pleadings. It is in our submission important that unless there is anything in the sincere cooperation argument, which for reasons we have submitted at some length there is not, in our submission, then part of being effective is being prompt and getting on with it and not waiting for the EU, on anyone's view of how long the EU has got to wait, they will call it a wait, is part of being prompt, and that really goes to the effectiveness of the remedy and the action that the Commission is obliged to take to achieve a comprehensive solution.

If I could make a couple of fairly disparate points. One is as to certain elements of the SLC essentially caused not by actual voting or anything of that sort, but simply by being there, as a sort of passive influence, and it is hard to devise any kind of remedy short of divestment that could overcome that problem. It is simply being there. I will not make any extravagant analogies, it is just the presence of an unwelcome person on the share register with significant powers and willingness to take positions that is causing trouble, and hard to see how anything short of — if that is a problem, that is SLC, what else can you do except say "Stop being there so much".

I think there was a reference this morning to para.8.33 of the — we were in that territory — 8.33 of the report, again, on a discussion of remedies because what Lord Pannick is saying is, "Well, any concern you have we have offered undertakings for, and if you have got additional concerns, we will give undertakings for that". And, you know, at some point you have to stop that, because, we would say that if you look at paragraph 8.33 it makes a perfectly valid and important point in relation to the proposed remedies, and it gives a specific example of a potential transaction which at least was discussed last year, which would have led to a deal structured in a partnership form that would not be covered by Ryanair's proffered undertakings.

THE CHAIRMAN: There are so many things that go into the mix as to the precise form of combination that you have.

MR. FLYNN: Yes.

THE CHAIRMAN: It could be related to your share structure, it could be related to your banking facilities. Quite often the bank facilities have provisions about combinations.

MR. FLYNN: Yes.

THE CHAIRMAN: You just say there are so many different permutations.

MR. FLYNN: So many permutations.

THE CHAIRMAN: Yes.

MR. FLYNN: And as I think Mr. Beard said, there is no end to the ingenuity of those who devise structures for corporate transactions, lawyers, bankers, investors, company executives — there is just no end to the fertility of their imagination, and the idea that you can pin all that down in a set of undertakings that you can police is really unrealistic.

We have focused most of our fire on this ground in relation to the divestiture trustee because in our submission the immediate appointment of a divestiture trustee is not harmful for Ryanair because the trustee would be required to secure value, full value. We make what you might think is a debating point in para.60 of our statement of intervention that Ryanair does not put a high value on the shares anyway. And we say it is a reasonable and defensible choice, certainly not one to be struck down on judicial review by the Competition Commission, given the documented incentives that Ryanair has to delay the process.

THE CHAIRMAN: A lot will depend on the terms of the appointment, and you have seen what —

MR. FLYNN: You have made the point well.

THE CHAIRMAN: — the CC said on that.

MR. FLYNN: Yes, exactly. We do not know exactly the terms, but the very fact of choosing it at this stage, which I think is under attack in these proceedings, is in our submission fully defensible, it is not something where the CC is bound to "suck it and see" with some other arrangement first. It is not only a fall-back, it is perfectly open to it in appropriate cases to move straight to that step; and to the extent that that is challenged in these proceedings, we say it is fully defensible.

And that is really all I have in Ground 5 in addition to what we have already put forward.

THE CHAIRMAN: Yes.

MR. FLYNN: I should explain our position on Ground 6 just briefly. We are obviously as it were leaving it over, having —

THE CHAIRMAN: Well you say you are leaving it over. Lord Pannick wants to have his cake and eat it. He still wants some sort of ruling on it.

MR. FLYNN: He wants a ruling.

THE CHAIRMAN: So, I have got to get it right.

MR. FLYNN: Precisely, sir, and so our position, I do not know if you have a skeleton nearby —

THE CHAIRMAN: I have been following your skeleton, yes.

MR. FLYNN: — set out in short in paras.33-36. I think everyone is agreed that the relevant question here, given the terms of section 86 which you were taken to this morning is, does Ryanair Holdings carry on business in the United Kingdom? That is the question. It is also not in question that you cannot simply attribute to the parent activities that are actually carried on by the subsidiary, Ryanair Limited. So that is the context we are in. And Mr. Beard has explained the Commission's position in relation to why it is that activities are carried out by Holdings include airline activities in the United Kingdom. What we do is to make an additional point, and perhaps it would unfair to assume that you remember the *Akzo Nobel* judgment, but that judgment makes the point in para.111 that holding company activities are business activities. So the characteristic activities of a holding company are to be treated as business activities sufficient to bring you within the meaning of carrying on business in s.86. That is essentially what para.111 says. It says, if you recall - I think Mr. Beard read this this morning, "If we were asked the question, does Akzo Nobel, the Dutch company, carry on business in the Netherlands, if we were asked to answer that question as a matter of English law, we would say, yes". So the typical holding company activities are carrying on business.

What we have done is to provide in the second part of Mr. Hegarty's witness statement evidence to show that Ryanair carries on business in the UK. That evidence has not been in any way challenged or countered, either by further evidence or in submission.

Lord Pannick has ----

THE CHAIRMAN: He just says it is simply not admissible.

MR. FLYNN: He says it is not admissible, that is the point. We say it is admissible and we spell it out more in the letter which is attached to our skeleton argument. We say it is admissible because s.86 is essentially a jurisdictional provision of the Act, and this is a question on which the Tribunal must satisfy itself. In addition to the reasons that are given by the CC in the Report, we say that this is one of those exceptional bases on which evidence will be

admissible in a judicial review, evidence which goes to whether the jurisdictional test is satisfied is something to which the court can have regard. That is essentially the point we are making there. I doubt whether at this stage you will want to turn Mr. Hegarty's witness statement up, but he shows in relation to certain activities of Ryanair Holdings what activities are carried on in the United Kingdom. Those relate to matters such as capital raising pursuant to their London listing - that is probably the most important - involvement in the airline business, having significant employee incentives and providing a parent company guarantee. Those are the matters to which he deposes, and to which there is no answer.

Lord Pannick has said that is simply not admissible. We do not know on what basis ours is inadmissible but theirs is admissible. It could counter the evidence of Mr. Komorek on those issues ----

THE CHAIRMAN: You say it is reply evidence?

MR. FLYNN: We say it responds to their evidence. The CC has taken the position that none of the evidence is admissible, not Mr. Komorek ----

THE CHAIRMAN: I have seen that.

MR. FLYNN: You have seen that. Those are the positions. That is an outline of the position we have taken. You are invited by Ryanair to rule on their ground and if you do so then we submit that you should also take a position on what we have said. You may take the position that it does not add very much, that the CC is right for the reasons that it has given, and that is good enough. To the extent that you consider this evidence admissible, we say it supports and supplements the reasoning that is given because it goes specifically to the business activities of a parent company, as opposed to the business activities of the group or an operating division, or whatever it might be.

That is our position on Ground 6. I do not know if I can usefully elaborate on that.

THE CHAIRMAN: No, that is helpful. You have kept to your timetable, which is really helpful. We will come back in at 2.50 and then we will hear Lord Pannick.

MR. BEARD: I am sorry, just one moment, Mr. Chairman, Mr. Flynn quite properly said, and you recognise that we do oppose the admissibility of this evidence. I do not know whether you need any submissions from us in relation to those matters.

THE CHAIRMAN: I understand what the arguments will be for and against, if that is what you mean. We will come up with a decision when we finally give our ruling, unless you feel you need to say something.

MR. BEARD: I am slightly concerned that this has been put forward as an issue of jurisdictional fact, I think, by Mr. Flynn.

THE CHAIRMAN: It was not treated in that way in the *Akzo* case, was it?

MR. BEARD: No, it was not.

THE CHAIRMAN: There are two ways you can get it in. One is simply reply evidence to the evidence of Lord Pannick, but then you say that … The other way is jurisdictional fact. Those are the two ways it has been put forward.

MR. BEARD: The difficulty is that Lord Pannick then has to argue that it is jurisdictional fact on his side, and I do not understand that to be the case. It is difficult to see where we go with this, but, as I say, I am very happy to go through and deal with those issues in more detail.

THE CHAIRMAN: Can I give you the same liberty that Lord Pannick has got, if you write by next Friday with any submissions on the admissibility of that evidence, but keep it short. Thank you.

(Short break)

THE CHAIRMAN: Yes, Lord Pannick.

LORD PANNICK: The clock is ticking!

THE CHAIRMAN: It is.

LORD PANNICK: Duty of sincere co-operation, could I take you back, please to bundle 1 of the authorities, at tab 2, where the test is set out in Article 4(3). The core of the test is in the final part of Article 4(3):

> "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."

In my submission there are two core questions. The first question is: "What are the Union's objectives, and what are the relevant Union's objectives, and secondly, is the divestment decision one which could jeopardise those objectives. Those are the two questions.

THE CHAIRMAN: I did ask what does "could" mean in this context?

LORD PANNICK: You did and I will come to that. Can I deal first with objectives?

THE CHAIRMAN: Yes.

LORD PANNICK: It is the submission of both my friends that in the present case, as Mr. Beard put it, it is only the objectives of Ryanair that are in issue, not the objectives of the EU, that is the submission that I need to answer. The reason why both Mr. Beard and Mr. Flynn make that submission is they say the EU is concerned only to stop inappropriate mergers,

mergers which do not satisfy the relevant criteria not to facilitate mergers which comply with the relevant criteria.

The answer, we submit to that submission is to be found in the Merger Regulations, which is tab 4. Can I invite the attention of the Tribunal to Article 2, p.24/6. On the right-hand side of the page are Articles 2.2 and Article 2.3, and they look at the matter from the competing directions.

Article 2.2:

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

That is the positive part, and 2.3 is the negative:

> "A concentration which would significantly impede effective competition … shall be declared incompatible with the common market."

It deals with both of them. The recitals, in my submission, make it plain that it is the objective of the common market, of the EU, to facilitate those concentrations which meet the criteria.

Can I take the Tribunal to the recitals at the beginning of this regulation, on the first page, and it is recital 2 – the first sentence I do not need to read, the Tribunal can see it. It is the second sentence of recital 2:

> "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 EU, the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.
>
> (4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community."

It is absolutely clear, in my submission, that there are two objectives. Objective no.1 is to prevent that which is contrary to the substantive criteria, and objective no.2 is to welcome, to facilitate that which complies with the important criteria.

I do not want to conceal from the Tribunal anything. Recital (6) I think has been emphasised, particularly by the Commission and I direct attention to that. I think it was particularly the second part of recital (6):

> "In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, 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."

Nothing there, in my submission, detracts from recitals (2), (3) and (4) positively welcoming, encouraging and recognising as an objective the facilitation of that which complies with the criteria set out in the body of this regulation.

So my answer to the first question: what are the objectives of the EU? I say for the purposes of Article 4(3) the Union's objectives include facilitating those concentrations which do not breach the substantive criteria in the Merger Regulation. That is my submission.

If that is right, we turn to the second question, and the second question is whether or not a divestment order now by the Competition Commission could jeopardise the attainment of these objectives. We emphasise each of those words, the word is "could" not "would", and that is not simply a terminological point, it is a point that is recognised and given force by the European Court of Justice's decision in *Delimitis*. The Tribunal will remember – I will not go back to it [authorities 1, tab 14] – it was the case where the European Court made clear that national courts may take a decision which does jeopardise objectives only "if there is scarcely any risk of the Commission taking a different decision", that is the test, and "could" means what it says. It means possibilities are sufficient and it has to be possibilities because no one can know until the decision is taken by the Commission and on appeal by the courts what decisions will be taken. I respectfully say in answer to Mr. Beard that the *Delimitis* test cannot just be swept aside by his submission: "It is unhelpful to seek to identify the degree of risk or to hypothesise about the future", that is exactly the point that *Delimitis* addresses.

"Jeopardise" is the other word, "could jeopardise". What does "jeopardise" mean? It means to put in danger, that is what "to jeopardise" means. It is not "prevent", the word is

not "make impossible". The question, and it is a realistic question, is whether an order for divestment in this case could put in danger Ryanair's ability thereafter to mount a full bid if allowed to do so by the General Court and the European Commission.

Mr. Flynn, incidentally, said that it is not "make a full bid", it is not bid for 100 per cent, he points out, correctly, that the test is decisive influence. But of course if you want to bid for 30 per cent or more you have to bid for 100 per cent because of the takeover rules, both in this country and, more relevantly, in Ireland. That is why I have repeatedly referred to a bid for 100 per cent. That is what we are talking about in practical terms.

So, that is the question — would a divestment order put in danger the ability of Ryanair to bid for 100 per cent? Now, Mr. Beard accepts that an order for divestment will in practice make it much harder for Ryanair to mount a bid to acquire Aer Lingus if Ryanair are cleared to do so, and he can hardly do otherwise because that is what paragraph 7.124 or his own report says, that the 29 per cent stake makes further bids more likely.

We say that it is self evident that if you only have 5 per cent, the prospects of successfully mounting a contested bid in the future are very very much lower than if you start from the basis of 5 per cent, and it is simply no answer for Mr. Beard to emphasise that the Commission, the Competition Commission has allowed Ryanair to make a bid for 100 per cent if in the future such a bid is cleared in Brussels. The point is that a divestment order puts in jeopardy our ability thereafter to make such a bid. And we invite the Tribunal to test this point by reference to the question and you, sir, the Chairman, put to Mr. Beard yesterday. And the question was — what if the European Commission had cleared the 100 per cent bid while the Competition Commission was still in the process of considering the 29 per cent holding? Would the CC then have continued and proceeded to a divestment order, and it is a very difficult question for Mr. Beard, a question to which he was very reluctant to give a clear answer. But the only sensible answer is "No, the CC of course would not have proceeded to a divestment decision". It is, I submit, quite impossible to understand how it could be other than in conflict with the assumed EC Decision on this hypothesis, a decision that has been made by the European Commission, "Yes, you can bid for 100 per cent". For the CC to say the next day that "Ryanair I am ordering you, we are ordering you, to divest yourself of 24 per cent-odd, all but 5 per cent of the 29 per cent". It is logically inconsistent for Ryanair to be allowed to bid for 100 per cent and on the same day be told, "You must dispose of all but 5 per cent of your 29 per cent holding".

And if that is right, if that is right, if the CC could not sensibly have ordered divestment the day after the EC had cleared 100 per cent bid, then the obligation on the Competition

Commission must apply equally while the European Commission is considering whether to clear the 100 per cent bid. The two are exactly the same. It does not matter whether the Competition Commission are considering this the day before the European Commission decide or the day after. And if that is right — if that is right — the duty must equally apply if the European Commission turned down Ryanair's bid, they say "You cannot go ahead because on European law principles the conflict must be avoided while the matter is pending before the General Court". That is the logic. I appreciate it is very unattractive to the Commission, but it is the legal position, in my submission.

Mr. Flynn then asked the Tribunal to consider this afternoon what success in the General Court for Ryanair would mean. He made a submission based on what he said were the realities, and he submitted, and I respectfully agree, that if Ryanair succeeds in the General Court the matter goes back to the Commission under regulation 10(5).

And Mr. Flynn says, "Well, circumstances have changed and when the Commission comes to look at a fourth bid all will depend on the circumstances at that time", which again I have no quarrel with. What I do have a quarrel with is the suggestion that Ryanair can in practice make a fourth bid at the end of this month with any realistic prospects of success. The reason why I say that is that Ryanair does not think that it can satisfy the criteria which have been laid down by the European Commission in the decision under challenge. There is absolutely no point in making a further bid if you cannot satisfy the conditions, the criteria, that the European Commission has laid down and which are applicable unless and until they are overturned by the General Court. What we do think is that we can satisfy the criteria and the result which we are hopeful, confident (does not matter) which we are asking the General Court to lay down in their decision. And if we succeed in the General Courts in overturning the Commission decision, then we take the view that we will be able to satisfy the relevant criteria, and of course we will then make a fourth bid. It does not answer our point if it is otherwise valid for Mr. Flynn to say that in theory we are not prevented from making a fourth bid at the end of this month.

THE CHAIRMAN: Is Mr. Flynn right, that your appeal is confined to the commitments issue?

LORD PANNICK: No.

THE CHAIRMAN: Because I find that difficult to — it is the notice of the Official Journal.

LORD PANNICK: We are challenging the commitment, yes.

THE CHAIRMAN: That is what I am saying. Is he right that it is just confined to the commitments issue?

LORD PANNICK: Well, it is confined to the issues that are set out in the second part of tab.10. They are issues of principle on the commitments, yes.

THE CHAIRMAN: Exactly. So, it is confined to —

LORD PANNICK: It is confined to the commitments by reference to the principles and by reference to the detail.

THE CHAIRMAN: That is right.

LORD PANNICK: Yes. But we hope to succeed, we expect to succeed, however one wants to put it. Ryanair is appealing and it is contending that by reference to principle, by reference to detail, on the commitments point the Commission got it wrong. And if we succeed on that, then as Mr. Flynn says, the matter goes back to the Commission, and we will then make a fourth bid on the basis of being able to satisfy the European Commission by reference to the European Commission's new approach which will have to be consistent with the decision of the General Court.

Mr. Flynn's point is not assisted by an immediate response from Mr. O'Leary when the report was published. He referred to a newspaper report in which Mr. O'Leary made some observation, but that cannot determine the question of whether or not a fourth bid at the end of this month is realistic. It is not. Nor can the issue be determined by Mr. Flynn's other jury point that the second bid was launched while an appeal was pending. It was launched on 1st December 2008, it was withdrawn on 30th January 2009 ----

THE CHAIRMAN: You are saying that, as a matter of reality, it is unlikely that there would be a fourth bid at this stage?

LORD PANNICK: It is more than unlikely. There is not a fourth bid, and there is not a fourth bid for a very good reason, and that is that the European Commission have rejected the third bid and it would be absolutely pointless to make a fourth bid before the European Commission unless we thought that we could satisfy the criteria, the approach, that the European Commission has, itself, laid down. We cannot. There is no suggestion that we can. It is all very well for Mr. Flynn to say, "You can make an application". One has to be realistic. There is mirth from Aer Lingus, but one has to be realistic about whether or not such a bid could succeed. If I am otherwise right in this contention, then it is not answered by reference to a hypothetical possibility that you can make a fourth bid. We want to make a bid that has the best prospects of success. There is nothing unreasonable about that, there is nothing unrealistic about that.

Mr. Beard relied on the narrow criteria stated by the Advocate General in *Masterfoods*. The Tribunal will recall Mr. Beard's reference to what the Advocate General said. It was at

para.16 of *Masterfoods*. It is volume 1 of the authorities, tab 19. Mr. Beard is absolutely right, the Advocate General adopted a narrow approach, but the relevant point is that his criteria were not approved by the European Court of Justice. They adopted a more liberal approach. Their approach, para.51, the ECJ, was to state a test on a conflict with a contemplated future decision referring back to *Delimitis*.

Mr. Beard relied, and Mr. Flynn as well, on *British Aggregates*. The Court of Appeal cannot have intended - it cannot have intended - to suggest some general principle that there is no duty of sincere co-operation, that it is all a matter of discretion. That would be contrary to any reading of *Masterfoods*. The Court of Appeal was plainly concerned with an exceptional case where the European process had been extensively delayed for no apparent reason.

Although Mr. Flynn made submissions on how long it would take before the General Court determined the present appeal, there is no suggestion, nor could there be, that the case before the General Court is proceeding other than in the normal way. It is very different from *British Aggregates* where something had plainly gone badly wrong in consideration of the matter in Brussels and Luxembourg. Nor is there any suggestion, nor could there be, that Ryanair is somehow seeking to delay those proceedings.

Again, Mr. Flynn thought it appropriate to refer to press comments as to what was apparently said by Mr. O'Leary, a time estimate of ten years. With the greatest respect to my client, Mr. O'Leary is not the person best placed to determine how long proceedings are going to take in Luxembourg, and I do not think anyone suggests it is going to take ten years. Even if it did, so what? If that is the length of time that it takes, that is the length of time that it takes. This case is proceeding in the normal standard way.

I appreciate all of the points that are made about the implications and the consequences and the length of time that cases will take. The principle of sincere co-operation is a legal principle, and it has to be applied, in my submission. It is nothing to the point that Mr. Beard, Mr. Flynn and their clients may find that uncomfortable, if we are right on the legal analysis.

Mr. Flynn emphasised that the application of the duty of sincere co-operation depends on the factual context. I say that whether, and if so, to what extent, the duty of sincere co-operation applies in this case at the stage of divestment, because we are concerned with a very specific and important point, was not the subject of any argument of the decisions or in the Court of Appeal when Ryanair challenged the decision of the CC to go ahead with the investigation.

Indeed, as I think Mr. Flynn showed the Tribunal the reference this afternoon, in the Ryanair challenge to the CC investigation - volume 3 of the authorities, tab 45, para.56 - Lord Justice Etherton specifically emphasised the cases in this context vitally depend on the factual situation.

Finally on this point, Mr. Beard and, I think to some extent, Mr. Flynn relied on the Commission's letter of 13th November 2013 - this was the previously confidential letter. That was simply not addressing the specific issue, the factual issue, of divestment and its consequences.

Those are the submissions I want to make in reply on the duty of sincere co-operation.

May I turn to procedural fairness? Mr. Beard rightly accepts, in my submission, that it is for this Tribunal to decide where there has been procedural unfairness. The test is not the reasonableness of the approach adopted by the Competition Commission. I accepted in opening, and I repeat, that it is not my case that fairness requires communication of all the information available to the Commission.

I repeat, I accept that fairness can be satisfied by communication of the gist. The test is fairness, and the Commission must disclose, whether by gist or otherwise, what is needed for Ryanair to have a fair opportunity to respond. A gist may be more or less expansive. This was the point made by the Tribunal in *Groupe Eurotunnel* approving *BMI Healthcare*. It is *Groupe Eurotunnel*, para.224, authorities 3, tab 52. Disclosing the gist will often involve a high level of specificity.

Mr. Beard emphasised that the 2002 Act contains a number of provisions which protect commercial confidentiality. Mr. Beard emphasised, understandably so, that the proper operation of the merger control system depends on the co-operation of third parties. Those third parties have confidential information which they will be reluctant to disclose.

Mr. Beard said incidentally that I ignored those statutory provisions. I did not. What I did was refer to the paragraphs in *Groupe Eurotunnel* which specifically set out all of the statutory provisions. They were paras.195 to 205. Could I take this Tribunal back, please, to *Groupe Eurotunnel* to see what conclusion this Tribunal reached on that point. It is authorities 3, tab 52. The Tribunal will recall, starting at p.72, which is what I referred to as an extensive section of the decision which sets out all the relevant provisions. It starts at para. 196, with s.104, which is the positive duty to consult. It is the duty to act fairly, and there is then a number of provisions that are set out in paras. 199 to 205 which protect confidentiality. Then there is a reference to the Guidance. The point is that having considered both sides of the argument, that is the positive duty that you must consult, and

the protective provisions, the Tribunal came to a conclusion. Just above para. 218 is the heading "Conclusions" and at 219 they set out passages they approve from *BMI Healthcare* and the relevant passage – this is from para. 39 of *BMI Healthcare*, is (4):

> "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 duty of sincere co-operation 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 …"

And then they refer to *Lloyd v McMahon*.

At para. 223, they summarise the position:

> "What procedural fairness requires – as was stated by Lord Mustill in *Doody* – is for the 'gist' of a case to be disclosed. Precisely how it is done is, in the first instance, for the Commission."

Then there is the reference to the need to disclose a gist which may involve a high level of specificity in this area, and then they state the test at 226.

> "In each case, the question is whether the Commission acted fairly by giving [the parties] a reasonable opportunity to put forward facts and arguments in justification of its conduct …did the Commission provide Eurotunnel with the gist of the case that it had to answer."

The point is that if they, the Competition Commission, did not, it is no answer that this would involve the disclosure of confidential material. There is no defence that it involves confidential material, the duty is to act fairly, and to act fairly by disclosing sufficient of the gist to give the party concerned a fair opportunity to respond.

THE CHAIRMAN: Lord Pannick, if, say, looking at the facts of this case you say that the duty to consult would mean they would have to disclose the names of the 13 airlines in those passages so you could comment, and the Competition Commission say: "in order to discharge our duties of confidentiality we feel we cannot do that" would the consequence be that they just should not rely on that evidence ----

LORD PANNICK: Precisely so. They have no duty to disclose, in the abstract. What they have is a duty to disclose sufficient of the material that they rely upon to give us a fair opportunity to respond. If fairness would require disclosure of material, which the Commission think, for public interest reasons should not be disclosed, they are perfectly entitled to say: "We are not going to disclose it and we are not going to rely upon it", that is

their choice, and this is a position that is adopted in many, many areas, of course, of public law. It is the basic principle of public interest immunity.

THE CHAIRMAN: That is what I had in mind, simply that you just do not belong in the limited world at all.

LORD PANNICK: Yes, you do not rely upon it. But what you cannot do is rely upon material when fairness requires disclosure and you are refusing to disclose. I emphasise I am not criticising the Commission in the sense that they are obliged to disclose that which they think the public interest means non-disclosure of. They have a choice, it is not an attractive choice, I do not suggest that it is an easy answer. The law says, in crystal clear terms – see this decision and many, many others, that they cannot take a decision adverse to the interests of a person without acting fairly, and the whole point of *Groupe Eurotunnel* is that there is nothing in the 2002 Act, albeit that it seeks to protect confidentiality, there is nothing in the Act that excuses this Commission from acting fairly; that is the point.

Of course, the question that arises in this case is: did fairness require disclosure, but if it did it is no answer that the material is confidential. That is obviously a very important issue of principle, but I say it is decided by *Groupe Eurotunnel* and rightly decided in that way.

THE CHAIRMAN: You rely on the reasoning in *Groupe Eurotunnel*?

LORD PANNICK: I say it is correct.

THE CHAIRMAN: You say they got the test right?

LORD PANNICK: I say they did, yes. I am not quarrelling with *Groupe Eurotunnel* other than on one point that I mentioned in opening, where I submitted that they wrongly, with great respect, suggest too great a degree of weight should be given to the views of the Competition Commission, and I suggest that that is not consistent with the Supreme Court Judgment in *Osborn*. I also criticise them, respectfully, because *Osborn* emphasises that the object of the exercise of procedural fairness is not just to arrive at the right result, it is also to ensure that people do not go away with a sense of injustice. But on the main issue that is the *Doody* issue – can fairness be achieved by disclosure of the gist and not everything? I agree, with respect, and I say they are right to emphasise that high degree of specificity is required in relation to what ----

THE CHAIRMAN: What was the paragraph you did not agree with?

LORD PANNICK: 168 is the one that I was critical of. I do not understand it to be crucial to their approach, but I respectfully suggested that the reference to Lord Justice Lloyd and *ex parte Guinness* should now be replaced.

THE CHAIRMAN: Replaced by *Osborn*?

LORD PANNICK: Yes. Plainly, the Tribunal will want to pay careful regard to what the Competition Commission says, but there is a danger in treating the reasoning of the Competition Commission and its approach as deserving great weight, because one then leaps from that into a "reasonableness" challenge, and it is not a reasonableness challenge, it is a case of this Tribunal forming its own judgment on all the material of whether what happened was fair or was not fair. That is the law.

The question then is whether we had a fair opportunity to respond given that the identity of the airlines, who were said by themselves and by Aer Lingus to be potential partners for Aer Lingus, was not disclosed, and was not disclosed either to Ryanair's lawyers, or to Ryanair.

Let me take it in stages. Why do I say it was procedurally unfair? I say so for these reasons. First, because this information that is the airlines being prepared to enter into combinations with Aer Lingus was relevant to the core finding, or at least a core finding of the Competition Commission, and that is para. 7.178, if I could take the Tribunal back to that.

We are not dealing with peripheral matters here. We are dealing with the section of the report on p.68, which is under the heading conclusions on the SLC test. This is where the Commission set out their conclusions, and they do so over two and half pages. They say at 7.178 that the mechanism that they refer to as the one of particular significance was the question of:

> "… the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a joint venture with or acquiring another airline."

So we are in the heart of their findings on SLC in relation to mechanisms.

Mr. Beard's response to that point was that the Competition Commission also found that Ryanair had incentives to use its influence to weaken Aer Lingus' effectiveness as a competitor, and if we go back in the report – this is what Mr. Beard took the Tribunal to; he focused on 7.12, which is the introduction, and the passage is starting at 7.16, which is the heading: "Ryanair's incentives". If you go back to 7.12, one sees the approach that the Commission took:

> "We considered [they say at 7.12] 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 …. We then looked at various mechanisms through which Ryanair's shareholding might influence the commercial policies …".

So there are two parts to the analysis. What the CC did not do and rightly so, was just look at incentives, or indeed Ryanair's ability to impede Aer Lingus. It also focused as a crucial second part, complimentary part, of its analysis of mechanisms. As I have said, when they come to their conclusions on SLC, that is a central part of their reasoning, 7.1, 7.8.

So that is the first point. We are not dealing with peripheral matters. We are dealing with a core part of the finding.

The second point that I emphasise is that the material which we did not see, that is the identity of the airlines, was absolutely central to the Commission's conclusions that it was a consequence of Ryanair's shareholding that other airlines were inhibited from combining with Aer Lingus, and that such combinations could well have promoted efficiency and increased competition. This was a core part of their analysis, and we see that in their conclusions on p.50, because p.50 has a heading in the middle of the page:

> "Conclusion on the impact of Ryanair's minority shareholding on Aer Lingus's ability to combine with another airline".

This is what 7.178 calls "the mechanism of particular significance". And this is the detailed conclusions, and the detailed conclusions on this aspect consist of five paragraphs. And para.7.83 is central to this analysis. It is not the only point, but it is central to it because at 7.83 in the third line they say:

> "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 [etcetera etcetera]".

So, again, it is not peripheral. This is not the only evidence, but central evidence that the Commission themselves focus on in their own conclusion on this core mechanism. So, that is the second point as to why this is of fundamental importance.

The third aspect of our concern, from a point of view of procedural fairness, is that it was Ryanair's case that Aer Lingus was not attractive to other airlines as a potential partner. You have seen that, but it is stated at 7.44. That was our view, it was our view based on all the information that we had.

You, sir, the Chairman, asked yesterday, you asked Mr. Beard, whether Ryanair could obtain information from the other airlines, or had obtained information from these other airlines who were said by the Commission to be interested in a combination with Aer Lingus.

THE CHAIRMAN: I think what I was really addressing was at 7.44 whether you had done any of your own research or got someone else —

LORD PANNICK: Well I can tell you the answer. The answer is we did not have that information. Those are my instructions, and it is not surprising we did not have that information, for this reason — we are potential rivals because everybody knows we are anxious to take over Aer Lingus. We are rivals with any other airline who wants to take over or combine with Aer Lingus. Why should not those airlines who are said by Aer Lingus and said by themselves to be airlines interested in combining with Aer Lingus, why should they tell us their plans?

THE CHAIRMAN: I was not necessarily looking for that, Lord Pannick. If you look at 7.48, for example.

LORD PANNICK: Yes.

THE CHAIRMAN: Aer Lingus had gone to Booz & Company to do an analysis, I was just wondering whether you had sent any form of analysis to the CC.

LORD PANNICK: Mr. Beard has not suggested, sir, and I am not aware, that we did so.

THE CHAIRMAN: Yes, exactly.

LORD PANNICK: Absolutely not. There was a point raised — I would just deal with this — in Mr. Flynn's new newspaper matter which you have kindly given us until next Friday to respond to if we wish. My immediate response is that the second paragraph is the paragraph that says:

> "Mr. O'Leary told shareholders at the annual meeting that the approaches were from other airlines and from financial institutions who wanted to break up Aer Lingus".

That is the point. These other airlines did not want to combine with Aer Lingus, they wanted to break it up, and that is not what we are here in this application, we are not concerned with that. It does not help Mr. Flynn, it does not help Aer Lingus, to refer to the fact that there were airlines who, far from wanting to combine with Aer Lingus, wanted to break it up, and there is nothing inconsistent in that with what we told the Commission, indeed the report of the Commission at 6.4 refers to this, because it refers to Ryanair's views at 6.4 and it is the final sentence of 6.4:

> "If Ryanair's offer for Aer Lingus was unsuccessful, Aer Lingus was likely to be acquired by another airline or financial investor that would break up Aer Lingus, sell off its valuable … slots … and close its loss-making short-haul routes to the UK and Europe".

In other words, reduce competition rather than increase it.

So, that is the third point. This was a core element of our case, and the fourth point on procedural fairness is this — without knowledge of who these airlines were, we did not have a fair opportunity to make informed representations to challenge what we are being told was said by those airlines and by Aer Lingus about their interest in combining with Aer Lingus. Unless you know who the airlines are, what their identity is, you cannot make effective submissions on: first, the credibility of a combination, how credible is it that airline X can combine with Aer Lingus, secondly, you cannot make informed submissions on whether the combination required clearance and what the prospects of getting clearance were. Thirdly, you cannot make submissions on the likely competitive consequences of coordination, would it lead to efficiencies, increased competition; and fourthly, and I make no allegations here, but it is a fact of life, you cannot make informed submissions on whether these third party airlines might just possibly have reasons of their own to exaggerate their interest in Aer Lingus because they are commercial rivals to Ryanair.

So, for all those four reasons this is not a peripheral matter, this is absolutely central to the operation, and it is no answer - no answer - for my friend Mr. Beard to say that the Competition Commission's conclusions are not focused on any specific combination. They have not found that Aer Lingus would or might combine with Airline X. The finding is a more general one. That will not do, with great respect for him, because in reaching its conclusions, the Competition Commission's conclusions, on the general availability of combinations which are said to be impeded by Ryanair's shareholding the Competition Commission has relied as the basis for that general conclusion on the detailed evidence and allegations about the candidate airlines. They could not do otherwise. They cannot make a general finding in the abstract. It is based, as we have seen from the report, on the specific information that they have seen. That is why I say that any concept of procedural fairness in this area, particularly when the consequence is to order us to divest ourselves of our property, requires at a minimum that we be told the identity of the airlines concerned. That is our case.

We say that it is particularly a breach of procedural fairness that we are not even told the identity of the airlines in a confidentiality ring. Had the lawyers been told the names of the airlines they certainly could and would have made effective representations on all the points that I have mentioned - the likelihood of combination, whether clearance was needed, the likelihood of efficiencies, the competition consequences, and indeed issues relating to the credibility of the suggestion of a combination.

As the Tribunal will appreciate, many of the lawyers are very familiar indeed with the facts relating to Aer Lingus having been involved for some years in this battle.

Mr. Flynn said, "If there was disclosure to the lawyers there would have been a claim to disclose to Ryanair". It is my case that procedural fairness does not just require disclosure to the lawyers, it also required disclosure to Ryanair. I do not need to go that far for today's purposes, but I certainly say that in the circumstances of this case.

Mr. Flynn pointed out that we did not pursue this matter after the case management conference. The answer to that is that we are entitled to formulate a fairness complaint in the light of the substantive findings of the Competition Commission, and until we see the report and until we know what they have relied upon and how they have relied upon that we cannot do that. That is the point at which a fairness complaint can be most effectively made. That was the finding of the Tribunal in *Groupe Eurotunnel*. I will not take you through it because of the time, but it is volume 3 of the authorities, tab 52, and at paras.132 to 148 the Tribunal rejected a contention that to wait until the report was published meant you were too late to formulate your procedural fairness complaint.

THE CHAIRMAN: Even before that I remember seeing some correspondence.

LORD PANNICK: We certainly raised it in correspondence.

THE CHAIRMAN: You did?

LORD PANNICK: Oh, undoubtedly, undoubtedly so, but even if we did not my point is that you are perfectly entitled to raise it once you see the report. You have no duty to take points at an earlier stage. In fact we did. That is why I say this is a very strong ground of challenge. There is procedural unfairness here.

Issues 3, 4 and 5 I can deal with much more briefly. Issue 3 is causal link, and as you, sir, said, the first and most important issue is a very short issue based upon the language of the statute. It is s.35(1), which is at bundle 1, tab 5. I understand the point that Mr. Beard has made, that the causal link has to be between (a) the relevant merger situation; and (b) the SLC. So one has to focus on whether it is the RMS that has resulted, or may be expected to result, in a SLC. There is still a causal link, and it is absolutely vital that the Competition Commission focus, and focus only on whether the SLC has resulted, or may be expected to result, from the relevant merger situation. That means that it is simply not open to the Commission to rely, in relation to the SLC, on that which results from any shareholding by a rival. Our complaint, as the Tribunal will recall, is that part of the reasoning of the Competition Commission is to focus on a concern that emanates from a shareholding, even if it is only 3 per cent, of a commercial rival airline - para.7.30, 7.34(b), and appendix F.

That will not do. It is simply impermissible. It is impermissible of the language of the statute.

If that is right the only question is whether or not the Competition Commission can satisfy the onerous criteria of the FDA test. In my submission, if there is so fundamental an error of law, the Tribunal would only in the most extreme circumstances be prepared to find that the impermissible approach and the irrelevant material was irrelevant to the result by the Competition Commission. Who knows?

THE CHAIRMAN: If you are right, Lord Pannick, it is very interesting that this issue has not arisen before.

LORD PANNICK: There are many, many cases where issues that have not risen before, when they are raised they are right.

THE CHAIRMAN: I am not saying you are wrong.

LORD PANNICK: Sometimes they are wrong, but there are many cases where they are right. I am not aware of any authority on this point. I do not think Mr. Beard referred to any authority on this one way or the other.

THE CHAIRMAN: No, it is straight construction.

LORD PANNICK: Indeed, it is a matter for the judgment of the Tribunal, but I say that the clear causal link is there set out.

That is issue 3.

Issue 4, unreasonableness of the SLC finding: I only wanted to mention two points on that. First, you, sir, invited submissions on *BAA*, para.20(7), and that can be found in bundle 3, tab 42, p.15. Page 15 is the relevant paragraph in the decision of Mr. Justice Sales for this Tribunal. As the Tribunal will recall, this was said by the Court of Appeal in the next tab not to be the subject of any challenge in the Court of Appeal in that case.

THE CHAIRMAN: That does not mean it is right or wrong, they did not even consider it.

LORD PANNICK: No, indeed. Can I focus on what is actually said. What Mr. Justice Sales says is this:

> "In applying both the ordinary domestic rationality test and the relevant proportionality test under Article 1P1, where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset like Stansted airport, the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem affecting the public interest it assesses is required."

So the first point is that the Tribunal must take account, and the CC must take account of the fact that divestment is a seriously intrusive step. That is proposition number one. Proposition number two, which is linked to that same sentence, is that therefore the CC should have exercised particular care in its analysis. They go together.

He goes on:

> "The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor …"

and he refers to *ex parte Smith* -

> "… as the proportionality test (see *Tesco plc*) …"

So the second or third, however you look at it, proposition is that what he calls the "ordinary rationality" test is to be adjusted, so you are not applying pure Wednesbury principles, you are adjusting it, as he says, to a degree, to take account of the fact that it is a seriously intrusive step, and that is plainly in favour of the applicant.

He then goes on to add that Mr. Green was taking the matter too far. He says:

> "It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent."

He is emphasising there that although there is an adjustment, although there is a modification one has to be careful how far one goes. The final proposition is that it does not transform the proper approach to review of the decision which the Tribunal should adopt. That is all concerned, as I understand it, with the rationality test and, he says, the relevant proportionality test.

I accept all of that, save that I do not accept that once we are in the realms of proportionality a Wednesbury approach is applicable. That is, with respect to confuse two different matters. What I do accept is that just as the Wednesbury reasonableness test is flexible, so proportionality is flexible, and depends upon the context; I do accept that. But, as Mr. Justice Sales himself says, one has to bear in mind that one is dealing with a seriously intrusive step, i.e. divestment, so I am not sure there is a lot between myself and, with respect, Mr. Justice Sales, or between myself and Mr. Beard on this point.

THE CHAIRMAN: That is fine, thank you.

LORD PANNICK: That is all I would want to add on that. The only other point on this fourth Ground of challenge is that you, sir, asked me about the dividends received by Ryanair from its shareholding in Aer Lingus.

THE CHAIRMAN: We have got H2 but that is for 2011/2012.

LORD PANNICK: Yes, I have the figures for 2012, the dividend was €4.7 million, and the dividend for 2013 was €6.4 million.

THE CHAIRMAN: Shall we just look at H2, para.7.

LORD PANNICK: The figure there is €4.8 million. I think I gave you the figure of €4.7, and €6.4 is the 2013 figure.

THE CHAIRMAN: Just give me your figures again?

LORD PANNICK: My figure for 2012 is €4.7 million and my figure for 2013 was €6.4 million. It may be that the figure that is reported in para. 7 – it says at 2/2011, I am not sure whether that is 2011/2012, possibly. It may be the same figure. It may be that the figure I have given you of €6.4 million is 2012/2013. Can we check that, sir?

THE CHAIRMAN: I just want to check that that is the figure.

MR. FLYNN: I have been handed a note, which probably suggests this is something to do with rounding, this is from Aer Lingus, based on Ryanair's shareholding, if you want the precise number of shares it is 159,231,025, a July 2012 dividend of 3 cents per share – the dividends are dominated in Euros – and the precise figure I have is €4,776,931, so you could round that to €4.8. May 2013 a dividend of 4 cents per share, giving €6,369,241, so I suggest it is accurate. If you want the total it is €11,146,172. That is all the assistance I can give.

LORD PANNICK: I am grateful. On issue 4 I do not want to add anything on the detail, particularly given the time. You have my submissions, you have the competing submissions, the Tribunal will form its view.

Issue 5: there is an issue of law on issue 5, because my friend, Mr. Beard, relies on *BSkyB* – I will not take you back to it, but you may recall it was authorities 2, tab 29 and it is para. 293. My friend's contention is that it is wrong in principle for the Commission to ask, or to be required to ask, whether a reduction to 5 per cent is necessary to avoid an RMS or an SLC. He says that is the wrong approach.

We say that what proportionality requires in this context is only the divestment of that which will leave Ryanair in a position which does not involve an RMS or, if it does, does not involve an RMS that leads to an SLC. The reduction of Ryanair's shareholding to 5 per cent is disproportionate and unlawful because a share well above 5 per cent would not lead to the statutory mischief, that is the point. Mr. Beard's argument, as I understand it, is that once there is an RMS leading to an SLC it is open to the Commission to take such steps as

they think appropriate to address that mischief in a comprehensive manner. That is his case and he relies upon s.41, s.35(4) to that extent.

My answer is that nevertheless, the Commission are bound by the proportionality test and his approach, I respectfully submit is wrong in principle, because what it comes to is this: if we buy 29 per cent, we can be ordered to divest ourselves of all but 5 per cent, even though if we only bought 10 per cent or 15 per cent in the first place, the Competition Commission could not intervene because there would be no RMS leading to an SLC.

MR. BEARD: I am just concerned this is a completely new line of argument that has not been trailed in any of the submissions. There was a proportionality challenge put forward, but the idea that there should be a different level of shareholding divestiture has not been mooted. It is not like in ----

THE CHAIRMAN: I do not think he is suggesting there should be a different level of divestiture. He is using that as an example to make his point. That is how I understood it.

LORD PANNICK: Indeed.

MR. BEARD: That is the rhetorical flourish then …

LORD PANNICK: It is a rhetorical flourish, I hope there is some principle behind it but the submission is, as I submitted in opening, and as my friend has disputed for the reasons he has given, I do not accept that it is open to the Commission in addressing remedies once they have found, and they are entitled to find if we are wrong on our earlier complaints, that the RMS leads to an SLC, to adopt an approach to remedies that seeks comprehensively to remove any impact of the SLC to the extent that it takes the matter below the statutory mischief which are seeking to, and which they are empowered to, address. That is why I made a number of submissions on divestment, particularly under the first two grounds, to that effect. I am using the example of the proportions in order to illustrate the point of principle.

My friend's answer to this point is that he says that proportionality will not assist Ryanair at this stage because he relies upon the *BAA* case. He took the Tribunal to *BAA* in the Court of Appeal which blessed a later paragraph in the Tribunal's decision. This was tab 43 of volume 3. At para.29 the Court of Appeal set out para.76 of the Tribunal's judgment in the *BAA* case, and at para.30 that is endorsed. My friend relies on what is set out in para.29, repeating or setting out para.76 of the Tribunal judgment. I simply emphasise the first sentence. It says:

"Secondly, and more fundamentally, where after a market investigation the Commission concludes, in accordance with the principles set out in *Tesco plc* … that a company must divest itself …"

I stop there. The whole point is that it is if, and only if, the divestment satisfies the *Tesco* proportionality principles. Once that is satisfied of course, as the Tribunal goes on to say, there is no further room for a complaint that a divestment takes away property. Of course that is right. The whole point is that there must be a proportionality analysis, and the proportionality analysis, in my submission, is excluded by the Commission's approach that one has an RMS leading to an SLC the Commission is perfectly entitled - this is their case - to adopt a comprehensive approach that removes any mischief that is associated with the SLC.

Similarly, the argument which I raised in opening and which my friend has replied to, he says we are wrong in our contention that the approach which the Commission should adopt is to assess whether it is proportionate to order divestment in the light of what additional benefits divestment gives over and above what will be secured by the undertakings. My friend says that is the wrong approach, that is the battleground. I say, with respect, that is to ignore the principle of proportionality as set out in *Tesco*, as approved in *BAA* in the Court of Appeal. That is the battleground between us on issue 5, or at least the legal battleground.

The other points: I have made again my submissions in opening and I am not going to repeat them. It will not assist the Tribunal if I do so.

Issue 6, I have nothing to add, and I have almost complied with my hour and a quarter.

THE CHAIRMAN: Just to see where we go. You have got until next Friday to write a letter on the ----

LORD PANNICK: What we will do, if this is convenient, is write a letter, but it may simply say that we have nothing to add to what I have said this afternoon.

THE CHAIRMAN: Thank you very much. Mr. Beard, on your jurisdictional point, can you do it by Wednesday?

MR. BEARD: Yes, I am sure we can.

THE CHAIRMAN: If Lord Pannick or Mr. Flynn have anything further to say they can respond to that by Friday.

MR. BEARD: No problem at all.

THE CHAIRMAN: So two o'clock on Wednesday, and two o'clock on Friday.

MR. BEARD: I have also got homework from yesterday, various documents. I should say in relation to that final case it is important to read the final paragraph of the Court of Appeal's judgment there.

Here are other Court of Appeal judgments, and the Ryanair General Court.

THE CHAIRMAN: Have we got a home for them?

MR. BEARD: We do not particularly. We did have a fourth bundle of authorities, which has been fairly untrammelled, I think. We are up to 72 in there. We could make these 73 and 74 - 73 for the General Court decision and 74 for the Court of Appeal. Miss Berridge, much more efficiently, has handed up copies of our skeleton argument, as requested, with references. (Same handed) In accordance with your indication we have not done the defence. If you do want that ----

THE CHAIRMAN: That was not necessary, as I have annotated that so much.

Thank you very much, gentlemen, you have given us a lot of things to think about. There are lots of chestnuts in this case to which the answer is not self-evident. We hope to give you a decision within four weeks. You will not get it in two weeks, but it will not take longer than four weeks.

MR. BEARD: I am most grateful.

LORD PANNICK: Thank you very much.