IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1239/4/12/15

Victoria House,
Bloomsbury Place,
London WC1A 2EB

3 July 2015

Before:

HODGE MALEK QC
(Chairman)
PROFESSOR COLIN MAYER
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC — Applicant

- and -

COMPETITION AND MARKETS AUTHORITY — Respondent

- and –

AER LINGUS GROUP PLC — Intervener

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H E A R I N G

A P P E A R A N C E S

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

Mr. Daniel Beard QC, Miss Alison Berridge and Mr. Rob Williams (instructed by CMA Legal) 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, Lord Pannick.

LORD PANNICK: Good morning. I appear with Brian Kennelly for Ryanair. The CMA is represented by Daniel Beard, Rob Williams and Alison Berridge, and Aer Lingus is represented by James Flynn and Daniel Piccinin. The Tribunal will have seen that Ryanair is challenging under s.120 two matters: the CMA's Decision of 11th June, that there has been no material change of circumstances since the Final Report on 28th August 2013. That decision is in volume 2 of the bundle at tab 40. We are also challenging the Final Order made by the CMA on 11th June, which requires the appointment of a Divestiture Trustee who will dispose of Ryanair's 29.82 per cent minority stake in Aer Lingus.

THE CHAIRMAN: Down to 5 per cent.

LORD PANNICK: Down to 5 per cent. That is volume 2, tab 42.

Sir, we are making two points today. These are the points I want to focus on. The first point is we say that the CMA Decision is irrational because the bid from IAG - the bid for Aer Lingus, IAG being one of the world's largest airline groups, it is the holding company, of course, of BA and Iberia - is plainly a material change of circumstances. It undermines the basis of the CC's report that no other airline would want to consider acquiring Aer Lingus while we, Ryanair, retain our 29 per cent stake. As part of that first point, we say, alternatively, the Decision of the CMA has failed properly to consider factors relevant to that issue.

Our second ground of challenge, we say that the CMA has erred in law, because it failed to consider whether the remedy of divestment is proportionate in the new circumstances of the IAG bid, and it has irrationally failed to conclude that divestment is disproportionate.

The legal framework in which these issues arise will be very familiar to the Tribunal. Can I very quickly take the Tribunal to the relevant statutory provisions. I hope you, sir, members of the Tribunal, have an authorities bundle. Behind tab 1 are the relevant provisions of the Enterprise Act. We can pick it up at s.35. Unfortunately these pages are not numbered, but if you could turn, please, to s.35, "Questions to be decided in relation to completed mergers", we see that on a reference - in those days, of course, from the OFT :

> "(1) … the CMA shall, on a reference under section 22, decide the following questions -
>
> (a) whether a relevant merger situation has been created …

to which the answer is yes -

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

The CC answered that question (b) "Yes".

Subsection 2 defines when there is an anti-competitive outcome. I do not think I need to read that. Under (3) "the [CMA]" (then the CC):

". . .shall, if it has decided on a reference … that there is an anti-competitive outcome [it shall] decide the following additional questions:

(a) whether action should be taken by it under s.41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition."

I do not need to read (b).

"(c) . . .if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented."

Subsection 4 requires as comprehensive a solution as is reasonable and practicable.

Then if we turn over a page we come to s.41, a "Duty to remedy effects of completed or anticipated mergers", and it is s.41(2) which has been referred to in 35(3)(a). Section 41(2):

"The [CMA] shall take such action under s.82 or 84 as it considers to be reasonable and practicable:

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

(b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition."

Then s.41(3): "The decision of the [CMA] under subsection (2)", this is the crucial provision for today:

"shall be consistent with its decisions as included in its report by virtue of s.35(3) or (as the case may be) s.36(2) unless there has been a material change of circumstances since the preparation of the report or the [CMA] otherwise has a special reason for deciding differently."

No one, I think, has suggested here, there is any question of any special reasons.

"(4) In making a decision under subsection (2) the [CMA] shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable". etc.

THE CHAIRMAN: Lord Pannick, what you are saying is that your whole case hinges on whether there has been a material change of circumstances.

LORD PANNICK: Yes.

THE CHAIRMAN: You are not relying on the last part.

LORD PANNICK: No.

THE CHAIRMAN: And are you saying, or is it part of your case that, even if there has not been a material change of circumstances, they still have to look at, let us say the proportionality of the remedy, only in the light of the changed circumstances?

LORD PANNICK: I say that if, on analysis the remedy is no longer proportionate in the new circumstances that, of itself, is a material change of circumstance.

THE CHAIRMAN: It all really does hinge on you showing that there is a material change in circumstances?

LORD PANNICK: Yes, either in relation to substance or in relation to remedy.

THE CHAIRMAN: Yes.

LORD PANNICK: But I say it will be quite extraordinary if, in the new circumstances – not deciding the question of whether or not it is material – if in the changed circumstances the remedy that had been identified in the report is no longer a proportionate remedy, if, nevertheless, the CMA is obliged – because that would be the consequence – it is obliged to impose that remedy even though it is now disproportionate. The way to avoid that, I say, is that if that is the case, if I can make out the submission that on the new facts the remedy of divestment is disproportionate, that is a material change of circumstances - material relative to the report that the CC adopted. That is our case. We put it by reference to the substance of the report and by reference to the remedy of divestment. Those are the two points that I want to develop.

Then over the page, ss.82 and 84, which have been referred to in s.41(2). Section 82 is the power of the CMA to accept undertakings; and s.84 is their power to impose an order. The order may require anything permitted by schedule 8, which of course is in very broad terms. There is no dispute that in an appropriate case a divestment order can be made.

Those are the statutory provisions. Next, can I just remind the Tribunal, please, of the contents of the report, which is in volume 1 of the documents bundle, tab 3. It is the report of the CC dated 28th August 2013. As the Tribunal knows, this is the report that Ryanair's 29 per cent odd shareholding from Aer Lingus was causing an SLC in the market. That is on routes between----

THE CHAIRMAN: Lord Pannick, I cannot tell you how many times I have read this report, but do not assume that the other two know it in the same detail. If there is any relevant part----

LORD PANNICK: I will highlight, if I may, the relevant parts, but in substance the report found that Ryanair's 29 per cent shareholding in Aer Lingus was causing a substantial lessening of competition in the market - that is on routes between Great Britain and Ireland. As I shall remind the Tribunal in a few moments, that conclusion was the subject of earlier proceedings which are not yet concluded. We lost in the Tribunal, we lost in the Court of Appeal. There is a pending application in the Supreme Court, which, unless someone tells me has been decided this morning, has not yet been decided.

THE CHAIRMAN: We will just have to see when it comes.

LORD PANNICK: Yes, indeed. This is still subject to challenge, but this is the CC's conclusion. An important aspect of the reasoning in this report was that Ryanair's shareholding in Aer Lingus, the 29 per cent shareholding, was preventing Aer Lingus from entering into a combination with another airline, was deterring other people coming forward, and that such a combination would enhance competition on routes between Great Britain and Ireland.

THE CHAIRMAN: Is it fair to say that it is your position that, absent that finding, there would be no real basis for the conclusion in that report?

LORD PANNICK: Yes, it was absolutely central.

THE CHAIRMAN: I think that is the view I took, but whether that is right or not…

LORD PANNICK: I do not think that has ever been disputed, at least to this extent: that finding was a core finding of the report, and without that finding - if that finding were undermined legally or factually, then the CC, now the CMA, would need to start again. Indeed, it was that finding that was the subject, as, sir, you will remember, of the legal criticisms that we made in the last round of proceedings and which went to the Court of Appeal. It was never, so far as I can recall, Mr. Beard's position that all of that was irrelevant because the report could stand on its own, even if that part of the report could be dismissed. It is an important part. At the very least, it is a crucial part of the reasoning in the report. We shall see the relevant paragraphs.

I will take it briefly, but I will highlight what was said by the CC. It is para.7.127. Here the CC say:

> "In reaching our conclusion …"

that is the conclusion on the SLC -

> "… we formed the view that the potential for Ryanair's minority shareholder to impede or prevent Aer Lingus from being acquired by merging with, entering

into a joint venture with or acquiring another airline was of particular significance."

That is why we focused on this, it was a matter of particular significance.

"We identified a number of ways in which the minority shareholding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines …"

We highlight the word "considering", So it is "considering"

"… other airlines combining with Aer Lingus, of by allowing Ryanair to block a special resolution, restricting Aer Lingus's ability to issue shares. We found that absent Ryanair's shareholding, it was likely that Aer Lingus would have been involved in the period since 2006 or would be involved in the foreseeable future in the trend of consolidation observed across the airline industry through an acquisition, merger or joint venture. By impeding or preventing Aer Lingus from combining with other airlines, Aer Lingus's ability to increase the scale of its operations and reduce its unit costs would be limited. This would be likely to have reduced or to reduce the effectiveness of the competitive constraint Aer Lingus could impose on Ryanair on routes between Great Britain relevant to the counterfactual."

So the Tribunal sees that it is a matter of particular significance. If we turn on to para.7.178, we see very similar language. This is in the section that begins in the middle of that page, p.68 of the original report, "Conclusions on the SLC test". So here we are dealing with the substantial lessening of competition conclusions. At the bottom of the page, para.7.178, the CC says:

"We formed the view that one mechanism of particular significance that would affect Aer Lingus's commercial policy and strategy was the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a joint venture with or acquiring another airline."

There is a lot of detail that is very similar to what the Tribunal has already seen. Further detail was given in the report, as the CC found it, to the deterrent effect of Ryanair's shareholding on other airlines even considering discussions with Aer Lingus. If we turn back in the report to para.7.34, p.41 of the original report, the CC tell us:

"In addition to these direct effects, we considered that the minority shareholding would be likely to affect Aer Lingus's ability to be acquired, merge with, enter

a joint venture with or acquire another airline even without Ryanair needing to take any particular action for the following reasons:

(a) Ryanair's influence, combined with its incentives as a competitor to Aer Lingus would create significant execution risk for airlines considering Aer Lingus as a potential partner, and would therefore be likely to deter some airlines from entering into, pursuing, or concluding discussions with Aer Lingus."

So the Ryanair shareholding would deter someone even from considering a combination.

THE CHAIRMAN: What you say - correct me if I am wrong - that you are still on the share register and that is despite the point being made against you, which is that the bid is conditional upon you being taken out as a shareholder one way or another. You say what it has not done is deter IAG from concluding discussions with Aer Lingus.

LORD PANNICK: Absolutely.

THE CHAIRMAN: The conclusion of those discussions is in your bundle B, or whatever, where the bid is the subject of a recommended offer accepted by the board?

LORD PANNICK: Absolutely.

THE CHAIRMAN: That is what you are saying.

LORD PANNICK: It is certainly true IAG will only go ahead if they acquire all of Ryanair's shares but the existing shareholding has not deterred IAG from coming forward with the bid, indeed, coming forward at a time when IAG have no guarantee, far from it, that the divestment is going to occur in time for them to complete the bid. They are anticipating they will have to negotiate with Ryanair in order to acquire the shares, and I will show you, sir----

THE CHAIRMAN: Then presumably what they are saying against you – we have seen what we have at 7.34, but if you look at the earlier paragraphs you have directed me to, that is not in terms of really stopping at the stage of concluding discussions, but it is at the stage of actually having a combination or a takeover. I think what they are trying to say is: "Look, it may or may not have deterred discussions" and you say it clearly has not with the case of IAG, but what it may do is deter, let us say, or prevent the next stage, which is the logical conclusion of any discussions.

LORD PANNICK: That is not the way it has been put. The way it has been put, even now, is that there is no material change of circumstances – this is the CMA's case, supported by Aer Lingus – because they say it is only because of the report and what it contains that IAG have come forward, that is their case. Their case is not that they were concerned only with

the final stages. The report, I say, is very clear indeed. The report proceeds on the basis that while Ryanair owns 29 per cent other airline groups are simply going to be deterred even from coming forward. This is not, in our case, a question of discussions, preliminary consideration, it is a bid by IAG, a serious bid, which has been accepted by the Aer Lingus Board. We are very far advanced in relation to the IAG takeover of Aer Lingus. That is why I am showing you, sir, and members of the Tribunal these paragraphs because they are not drafted on the basis that the concern was that the bid could not be completed. The concern was that the Ryanair shares would deter anyone from even coming forward or discussing or presenting a bid. That is what all of these paragraphs focus on.

MS. POTTER: Sorry, Lord Pannick, could I just ask your comment on note 80, which is to para.7.34?

LORD PANNICK: Note 80:

> "We note that the minority shareholding did not act as an absolute deterrent. Discussions between Aer Lingus and other airlines have taken place since 2006 despite Ryanair's minority shareholding (see paragraphs 7.47 to 7.54)."

That is dealing with arguments that were put forward that there were some discussions but at paras.7.47 to 7.54 what the CC found was that although these preliminary discussions took place, all these potential bidders were put off by the Ryanair shareholding, that it did not go further than really very preliminary discussions. What has changed with IAG is that that, of course, is not the case. We are now in a very different situation which I say is radically different from what the CC envisaged would occur. They would envisage that no serious bidder, no airline group would come forward.

If we can, please, turn to para.7.80 which is on p.50 of the report:

> "Conclusion in the impact of Ryanair's minority shareholding on Aer Lingus's ability to combine with another airline
>
> We found that as a consequence of its minority shareholding Ryanair would be able to impede another airline from acquiring full control of Aer Lingus, and that its shareholding would be likely to be a significant impediment to Aer Lingus's ability to merge with, enter into a joint venture with or acquire another airline. This would be likely to act . . ."

This is the point:

> "This would be likely to act as a deterrent to other airlines considering combining with Aer Lingus. The more significant the transaction being contemplated . . . the more likely Ryanair's shareholding would be to impede - or give Ryanair the

ability to prevent - the combination from taking place . . .we considered that Ryanair would have the incentive to use its influence to oppose any combination which it expected to strengthen Aer Lingus's effectiveness as a competitor, or make it harder to acquire the company itself."

THE CHAIRMAN: Are you basically trying to put the second sentence as the only scenario that supports the first sentence? Is that what you are doing, in the light of para.7.34(a)?

LORD PANNICK: It is not just para.7.34(a) it is the concluding paragraphs to which I drew attention, which were para.7.178----

THE CHAIRMAN: Can we just look at that again.

LORD PANNICK: And 7.127. (After a pause) Particularly 7.127, if we go back to p. 60, 7.127:

"In reaching our conclusion, we formed the view that 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 was of particular significance. We identified a number of ways in which the minority shareholding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines considering combining with Aer Lingus."

And 7.178 was the “mechanism of particular significance,” and the power of the Ryanair minority shareholding to impede or prevent, and the conclusion at the end of 7.178 is that this is why people have not come forward. It does not really matter, from our point of view whether one focuses, as I have, on the deterrent as the CC put it, to people coming forward, or the impediment to a successful bid. What matters is that there has been a radical change of circumstances in that contrary to everything that was expected by the CC, there is now a major airline group which has come forward and which is eager and willing to acquire Aer Lingus. That is simply not contemplated – on the contrary – by the CC report.

I do not need to persuade the Tribunal that there could not have been a report by the CC, contrary to Ryanair's interests, had the CC known in 2013 of the IAG bid. I simply need to establish that there has been a material change of circumstances - that is the first stage - which then it is irrational of the CMA to have ignored. Their position is that there has been no material change of circumstances at all. Nothing of significance has changed. I say it plainly has - it plainly has - and they need properly to consider it.

So those are the relevant paragraphs of the report. As I mentioned a few moments ago, Ryanair challenged that report. We came to this Tribunal which dismissed our challenge. It is tab 5 of the main first bundle. The Tribunal, chaired by you, sir, granted Ryanair

permission to appeal. That is at tab 9. Sir, you gave us permission to appeal on two grounds. One related to the procedural fairness of the CMA's approach, and the other was the duty of sincere co-operation under EU law.

THE CHAIRMAN: You say we did not get the clarification we asked for on the first one?

LORD PANNICK: Indeed. We went to the Court of Appeal who granted us permission to appeal also on a third ground. That is at tab 11, and the third ground was whether, as we put it, the CC, the CMA, could only impose a remedy which would ensure on a balance of probabilities that no SLC would occur. We said you cannot take us down to 5 per cent, you can only take us down to that percentage which is consistent with no SLC. The Court of Appeal said that was a properly arguable point. We then had the substantive appeal. That was on 26th and 27th November 2014. The Court of Appeal heard argument and a couple of months later they gave judgment, which is at tab 16, dated 12th February 2015. They gave judgment and they dismissed our substantive appeal. We then urgently applied to the Supreme Court for permission to appeal, and, as I mentioned, the decision of the Supreme Court, some four months later, is still awaited.

THE CHAIRMAN: I have not looked at it recently, but are you appealing on all three grounds.

LORD PANNICK: All three grounds, yes, are still in play. Meanwhile, on 18th December of last year, IAG had announced a possible bid for Aer Lingus. This is tab 12. I will not go into the detail of it, but they announced a possible bid which at that stage the board of Aer Lingus rejected, because they said it undervalued the airline.

On 26th January - the Tribunal appreciates the case is still pending at that stage in the Court of Appeal - IAG publicly proposed a bid for Aer Lingus - that is at tab 14 - and that bid was accepted by the Aer Lingus board. It was recommended to the shareholders. We see that at tab 19, but I do not think there is any dispute about any of this. That is 26th January.

As I mentioned, the Court of Appeal handed down its judgment on 12th February 2015. On the same day, tab 17, Ryanair wrote to the CMA asking it to investigate our contention that there had been a material change of circumstances - s.41(3).

THE CHAIRMAN: You anticipated the Court of Appeal might decide against you.

LORD PANNICK: No doubt we had been preparing since we heard of the bid, particularly the successful bid - it is successful in the sense that the Aer Lingus board had approved it, and we knew that on 26th January. I assume - I can take instructions if you want, sir - that we have been preparing since 26th January at the latest, a possible MCC application to the CMA. It so happens that it was sent in on the same day that the Court of Appeal handed down judgment. Of course, as you will know, sir, we are informed a few days earlier of the

contents of the judgment. We do not hear on the day, we hear a few days earlier, so we can identify with the other parties any factual errors or typographical errors in the judgment. So we would have known earlier. I cannot remember precisely when we were told, but it would not have been on 12th February. That is the date of handing down. Of course, we would not write to the CMA, although they would know of the judgment, it would not be a public judgment until 12th February. Anyway, that is when we write to the CMA.

We submit that there has been a material change of circumstances, an MCC, and if, sir, members of the Tribunal, you look at tab 17, p.2 of that document, para.5 summarises what we were saying. We say in para.5 of this application:

> "The findings in the Final Report have now been contradicted and disproven by events, which demonstrate conclusively that Ryanair's shareholding in Aer Lingus does not prevent Aer Lingus from merging with, being acquired by, or otherwise entering into combinations with other airlines, and which fatally undermine the lawfulness of the proposed divestment remedy. As the CMA should be aware, IAG has made an approach to acquire Aer Lingus, notwithstanding Ryanair's presence as a minority shareholder. The Aer Lingus Board has issued a statement saying that it is willing to recommend IAG's most recent proposal. Finally, the reaction of the Irish Government to these announcements has confirmed what Ryanair always said (and the Competition Commission dismissed), namely that the Irish Government, and not Ryanair, represented the only obstacle to Aer Lingus' combination with any other airline."

We have mentioned that in our written submissions, and I do not abandon any of that, but I am not going to focus on that today, sir.

That is what we said.

THE CHAIRMAN: Could we just look at your para.12.

LORD PANNICK: Yes, para.12:

> "Taken together, if there is plausible evidence of a material change of circumstances, the CMA is obliged to carry out a full and proper investigation of that evidence. Where, following investigation, the CMA concludes there has been a material change of circumstances since the Final Report, the CMA may only impose remedies that are necessary and proportionate in light of those changed circumstances."

THE CHAIRMAN: What I am trying to get from you is just to understand what your position is.

Clearly they have done some form of investigation because they have gone through

consultation, they have got submissions, and all the rest of it. They have concluded that even if there has been a change of circumstances, it is not material. Are you challenging whether or not the investigation they have done is a full and proper investigation of that evidence? I understand you challenging the conclusion as to whether or not there is a material change. Are you challenging whether or not they have done a proper investigation?

LORD PANNICK: I am not challenging the investigation, no. I am challenging the conclusions and I am challenging in particular whether they have focused on all relevant factors, because I want to show the Tribunal exactly what IAG said during the MCC investigation. I am not saying that they have not conducted a proper investigation. Plainly they have given all relevant persons the opportunity to have their say.

THE CHAIRMAN: I am just trying to pin you down as to what the view is.

LORD PANNICK: I am not challenging the process of the investigation.

THE CHAIRMAN: Thank you.

LORD PANNICK: There is then a process, and during that investigation Ryanair makes submissions to the CMA. We find those at volume 2 of the documents, tab 30. That is the response that Ryanair puts in after it has seen the other comments. In particular, could I just show you the summary at para.1. We comment at para.1 on the submissions of others that there has been no MCC since the CC's report, and we say in para.1:

> "Yet, the very thing that the Competition Commission said was unlikely to happen so long as Ryanair retained its minority shareholding has in fact happened: another airline has announced its intention to acquire Aer Lingus. It is impossible to assert that these events could be anything other than material to the conclusions reached in the Final Report."

There were various submissions that were made by the other interested persons to the CMA, but in particular can I invite the Tribunal's attention to what IAG said, and that appears in the first volume of documents, tab 24. It is on the basis that the CMA reached the conclusions which they did, to which I am coming in a moment. Tab 24 is the response and it is a short response, none the worse for that, from IAG dated 11th March. The first paragraph sets out the context that Ryanair's submission:

> "… refers at length to IAG's proposed acquisition of Aer Lingus. We therefore take this opportunity to respond to your [the CMA's] invitation to comment. IAG first seriously contemplated its proposed acquisition of Aer Lingus in August 2014, bearing in mind the prospect of (a) Ryanair being required to

divest its stake in Aer Lingus (down to no more than 5%) and (b) resolution of certain pension issues at Aer Lingus. Following two rejected proposals, IAG made a third approach to Aer Lingus on 26 January 2015."

They give the finances.

"IAG's proposal is conditional on, among other things, the receipt of irrevocable commitments from Ryanair (29.82% shareholding) and the Minister for Finance of Ireland (25.11% shareholding) to accept the offer. The Aer Lingus board announced that it would be willing to recommend an offer on these terms, subject to being satisfied with the manner in which IAG would address the interests of other stakeholders.

As IAG explained some two years ago to the Competition Commission during its review of Ryanair's minority shareholding in Aer Lingus, IAG would not usually contemplate buying a controlling interest in an airline with a significant ongoing minority shareholder. Furthermore, in the absence of support from Aer Lingus' largest two shareholders, IAG will not be able to meet the 90% acceptance condition to be able to 'squeeze out' any remaining shareholders and take full ownership of Aer Lingus. An irrevocable commitment from Ryanair to sell to IAG the entirety of its shareholding in Aer Lingus is therefore a prerequisite for IAG being willing to proceed with its current proposal to acquire Aer Lingus. Accordingly, there has been no material change of circumstances since the time of preparation of the CC's report."

THE CHAIRMAN: You are not going to take us to the last paragraph?

LORD PANNICK: Yes, I am.

THE CHAIRMAN: You are.

LORD PANNICK: Oh, yes.

THE CHAIRMAN: Before you do so, can you just give me the reference, unless you are going to take me to it later, to the material for the first sentence in that paragraph, in the Final Report, I just want to have the paragraph.

LORD PANNICK: I cannot immediately, I am sorry.

THE CHAIRMAN: Can we do it later on. Perhaps someone can give it to me.

LORD PANNICK: If Mr. Kennelly or someone behind me can find it, we will give it to you.

THE CHAIRMAN: Thank you very much.

LORD PANNICK: Then, over the page, they say: "As regards" – and this paragraph is not mentioned in the MCC Decision, but I say it is of some importance as regards the proposed

appointment of a divestiture trustee to effect the sale of the majority of Ryanair's shareholding, that is all but 5 per cent, of course:

> "We encourage the CMA to refrain from taking this step for the time being and instead to grant its written consent to Ryanair granting an irrevocable commitment to accept IAG's proposed offer in respect of the entirety of Ryanair's shareholding. Only if the CMA subsequently ascertains, after having granted such consent, that Ryanair has failed to give such an irrevocable commitment should the CMA proceed to appoint a divestiture trustee. We therefore urge the CMA to proceed to grant such consent so that Ryanair may provide an irrevocable commitment to IAG."

The importance of that is that it goes to the proportionality of the divestment remedy because the Tribunal sees that IAG for their part did not think that it was necessary or, indeed, appropriate for the CMA to appoint a divestiture trustee and, as I will show the Tribunal in a few moments, Ryanair at the time of the CC Report had been prepared to give undertakings which would have met what has become the IAG concern to acquire all of the shares. My complaint, under the second ground, which I am coming to is that it is disproportionate for the CMA now to proceed to appoint a divestiture trustee without even considering – because there is no mention of it – whether undertakings would suffice in this context.

THE CHAIRMAN: You said that you are prepared to give that undertaking, or you offered it two years ago, whenever it was?

LORD PANNICK: Yes.

THE CHAIRMAN: Have you offered that undertaking again?

LORD PANNICK: It has never been withdrawn. I do not have any instructions to give undertakings today. My complaint is that this is a judicial review process and the CMA have simply failed to ask themselves the relevant question, and it is not a hypothetical question, because these undertakings were given in 2013.

THE CHAIRMAN: Well, they were offered.

LORD PANNICK: I am sorry, they were offered in 2013. They were rejected by the CC, as I shall show the Tribunal in a moment, not because they were inadequate to deal with the sort of bid there now is, but because they did not deal with other possible types of combination that----

THE CHAIRMAN: If I remember rightly you were prepared to undertake to accept if 50 per cent of the shareholding was accepted, I think that is what it was.

LORD PANNICK: We would not stand in the way if 50 per cent of the shareholders said "yes" to the bid, we would then sell all our shares.

THE CHAIRMAN: Your point is you have never been asked again whether or not----

LORD PANNICK: No, and it is of particular relevance, this is not a hypothetical point, it is of particular relevance because that is exactly what IAG say to the CMA in the course of this process of looking at whether there is an MCC, but I will come back to that. I just wanted the Tribunal to see at this stage that that was before the CMA at the time when they were coming to their decision.

The cross reference that supports the opening sentence of the final paragraph on p.1 is appendix F of the report, para. 22, which the Tribunal will find – in fact, we can turn it up – at tab 4 of this bundle, and it is at p.252, which corresponds to F5.

THE CHAIRMAN: Yes, that is very helpful.

MR. KENNELLY: (No microphone) It is para.7.30.

LORD PANNICK: Para.7.30, thank you very much. If we can just look at para. 22, which is on F5, at tab 4:

> "IAG said that it would not really contemplate buying a controlling interest in an airline with a significant ongoing minority shareholder."

And para.7.30, to which my friend refers, can be found at p.40 of the report, this is tab 3, and is a reference----

THE CHAIRMAN: That is all right, I have read that, I have it now.

LORD PANNICK: That is the evidence that there was before the CMA. They give their decision on the MCC application on 11th June, and the decision is in the second volume of documents at tab 40: "Final Decision on possible material change of circumstances". There is a lot of background that I will not read, and I just highlight the crucial paragraphs.

If we turn, please, to p.5 in tab 40, para. 21:

> "The CC formed the view that one mechanism of particular significance that would affect Aer Lingus's commercial policy and strategy. . ."

- this is the view it formed at the time of the report.

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

The decision then noted at paras. 26 and 27 Ryanair's contentions, I do not think I need to read that out, but they set out what we were saying.

Then, if we turn to para. 40 they come to their summary of IAG's position. They say at para. 40:

> "IAG told the CMA that it first seriously contemplated its proposed acquisition of Aer Lingus in August 2014, bearing in mind the prospect of:
>
> (a) Ryanair being required to divest its stake in Aer Lingus (down to no more than 5%); and
>
> (b) the resolution of certain pension issues at Aer Lingus.
>
> 41. IAG said its proposal was conditional on, among other things, the receipt of irrevocable commitments from Ryanair (in respect of its 29.82% shareholding) and the Minister for Finance of Ireland . . . to accept the offer.
>
> 42. IAG reiterated what it had told the CC during the inquiry, namely that it would not usually contemplate buying a controlling interest in an airline with a significant ongoing minority shareholding. It said that, in the absence of support from Aer Lingus's two largest shareholders, it would not be able to meet the 90% acceptance condition to be able to 'squeeze out' any remaining shareholders and take full ownership of Aer Lingus. It said that a commitment from Ryanair to sell to IAG the entirety of its shareholding in Aer Lingus was therefore a prerequisite for IAG being willing to proceed with its current proposal to acquire Aer Lingus. Accordingly, IAG was of the view that there had been no MCCs since the time of preparation and publication of the Report."

Then, if we go, please, to para. 56 – it starts just above para.53 with the heading: "Does IAG's bid undermine the CC's findings regarding the deterrent effect of Ryanair's shareholding on combinations involving Aer Lingus", and at para. 56 they give their conclusion:

> "In our view, Ryanair's argument that the IAG bid constitutes an MCC fails to recognise the relationship between the occurrence of the bid and the CC's Report, including its decision as to what would constitute an appropriate remedy. A bid that was made in the context of and having regard to the CC's Report, including the remedy, is not itself evidence that there has been an MCC. Rather, the bid has proceeded on the basis of a set of circumstances in which the majority of Ryanair's shareholding is required to be sold. The existence of such a bid in these circumstances does not cast any new light as to what would have happened if Ryanair had been permitted to maintain its shareholding, given that the CC's

finding of an SLC was predicated on Ryanair maintaining its shareholding in Aer Lingus.

57. Given the above, we took the view that the circumstances relating to the IAG bid were consistent with the CC's decision in the Report."

So the way it is put against us is that, yes, there is now an IAG bid, but that bid has to be understood as made in the context of the CC's report including its divestment remedy. So that is the ground upon which the CMA found their answer to our submissions. I ought also to mention para.65, which makes a second point against us. They also deal with other matters, the Irish Government, and matters of that sort, but I am not going to take time on that.

"65. While we have focused above on the circumstances of the proposed offer by IAG, the CC's findings did not relate to the impact of Ryanair's shareholding on possible combinations with specific airlines. Rather, in addition to the finding that Ryanair's shareholding would affect Aer Lingus's ability to combine with another airline by requiring Ryanair's approval for certain types of transactions, the CC found that Ryanair's influence over Aer Lingus, combined with its incentives as a competitor, would create significant execution risks for airlines considering Aer Lingus as a potential partner, and would therefore be likely to deter some airlines from entering into, pursuing, or concluding discussions with Aer Lingus. This remains true. The fact that one particular bidder (ie IAG) has announced its intention to make an offer for Aer Lingus despite the heightened execution risk (and we note that IAG has made it a condition of any bid that it receives acceptances in respect of Ryanair's shares) does not undermine the findings in the Report that some airlines might be deterred from contemplating a combination with Aer Lingus. For example, the Report cited evidence that another airline had broken off negotiations with Aer Lingus in 2013 when Ryanair launched its third bid for Aer Lingus. Should the proposed offer by IAG not succeed, for any reason, then the adverse impact of Ryanair's shareholding on the prospect of other possible combinations would remain while Ryanair remains a significant minority shareholder in Aer Lingus."

So, there are essentially two points that the CMA take in answer to our contention that the IAG bid is an MCC. They say, first, that bid is being made in the context of the CC report, and they say, secondly, that in any event, leaving aside IAG, other airlines may be deterred from coming forward because of the Ryanair shareholding. It was for those reasons that the

CMA concludes - there is other material dealing with other issues in this document, but that is the guts of it - at para.73, the final paragraph, that in the light of their assessment in paras.53 to 71 above:

> "… our view is that there had been no MCCs since the preparation of the CC's Report that require us to consider remedial action that is different from that set out in the Report and that, in line with our duty under section 41 of the Act…, we will proceed to implement the remedial action identified in the Report."

What is very striking, I say, and this is our second point to which I am coming, is that there is no consideration at all of the proportionality of the divestment remedy in the light of the IAG bid.

One final factual matter which is that after that decision - that decision is 11th June - on 19th June IAG posted its formal legally binding offer document. As the Tribunal has heard, that is conditional on, among other things, Ryanair agreeing to sell its stake pursuant to the Irish Takeover Rules. That offer expires, I think we are all agreed about this, on 16th July, but IAG has an option to extend the deadline until 18th August.

Sir, at the hearing last week, you posed the question as to the proper interpretation of the word "material" in "material change in circumstance".

THE CHAIRMAN: Yes, that is one of the things I needed help on.

LORD PANNICK: Can I turn to that, if I may. Before I refer to my submissions, can I say that although there is disagreement between us on one side and the CMA and Aer Lingus on the other side as to the meaning of "material", we think there is considerable force in what Aer Lingus say in their skeleton argument as to the relevance of this point. Can I invite your attention, sir, and members of the Tribunal, to what Aer Lingus say in their statement of intervention/skeleton argument that was dated earlier this week. I do not think it is in a bundle.

THE CHAIRMAN: I have it.

LORD PANNICK: It is in something called the Aer Lingus hearing bundle. The relevant bit is at para.14, where they say, at the bottom of p.5 of their submission. They say it does not matter, the point that the CC made in the passage was that it does not matter whether the materiality threshold is set at a high or low level so long as, in the ultimate analysis, the CMA imposes the same remedies that it identifies in the Final Report, save to the extent that changed circumstances or other special reasons justify deciding differently. I see considerable force in that. We, for our part, are very doubtful that this case is going to be decided by reference to who is right on the meaning of "material".

There is a dispute about the meaning of s.41(3) in relation to "material". I will briefly address it. Far more significant, in my submission, is the question of interpretation as to the proportionality of remedies. That is crucial to our second point, and I will come to that in due course, but it is not a dispute about the meaning of "material".

On the meaning of "material", we say the proper approach is this: whether a change of circumstances is material for the purposes of s.41(3) - it may be that one wants to go back to 41(3), which is in tab 1 of the authorities bundle, that tells us:

> "The decision of the CMA … shall be consistent with its decisions as included in its [earlier] report … unless there has been a material change of circumstances since the preparation of the report …"

or there is a special reason.

We say that whether a change of circumstances is material is simply a condition precedent to the power of the CMA to depart from the Final Report. If there is a material change of circumstances, it does not require the CMA to depart from what it said before, it merely requires the CMA to consider doing so.

So it would be very strange, in my submission, if "material" is defined to mean those cases in which the CMA concludes that a departure from the Final Report is appropriate. That is wrong because, in my submission, it conflates the two stages.

THE CHAIRMAN: You are saying if they decide it is material, then they have to decide what the consequences are of that.

LORD PANNICK: What they are going to do about it. There are two stages. My friends, with great respect, are conflating those stages. They are limiting that which is material to cases in which the CMA decide to depart from the report.

THE CHAIRMAN: You say it should be where it is open to the CMA to depart from the report?

LORD PANNICK: Yes.

THE CHAIRMAN: That is how I understood it last time.

LORD PANNICK: That is my submission.

THE CHAIRMAN: We have not got any further on that.

LORD PANNICK: That is my submission, but what I am not saying to you, sir, is that if I am right on that we win because plainly here the reasoning of the CMA is that they have concluded that it is not appropriate, for the reasons they give, to depart from what was said in the CC report. I have got to do that more than that. I have got to undermine the substance of their reasoning either on the first point or the remedies point.

That is my submission as to the proper approach. It is unfortunate that they did not adopt the right approach, but I cannot submit to the Tribunal that that is the end of it in our favour.

THE CHAIRMAN: It all goes back to you showing that it is clear that there has been a change of circumstances, circumstances always change, the things that have happened, the resolution of the pension issue, the IAG bid, but the key issue is whether or not that change of circumstances is material.

LORD PANNICK: Yes, I mean it is more than any old change of circumstances, this is material because the change of circumstances goes to one of the core elements of the CC report. Their report proceeds on the basis that Ryanair's shareholding is a major impediment to serious bidders coming forward and seeing their bids through. It is not the only thing they say, but it is a very important part of their report that while Ryanair has 29 per cent, Aer Lingus is simply not going to attract the interest from potential combiners until that 29 per cent shareholding is removed, and therefore the fact that IAG has come forward, and is prepared to make a bid – and this will be my submission – and is prepared to enter into discussions with Ryanair to acquire the 29 per cent is not just any old change of circumstances, it is plainly material.

Then, the question arises: are there reasons for saying that, yes, there has been a very important change, but in the view of the CMA it does not affect the way forward. That is the real question.

There are two elements of the reasoning of the CMA, as the Tribunal has seen in the MCC decision, two elements that I am criticising. The first element is the major conclusion that it is only because of the CC report and the divestment remedy, only because of that that IAG is now coming forward. Secondly, it is the complete failure to address the proportionality of the divestment remedy in the light of the IAG bid. Can I take those in turn?

First, the CMA conclusion, and I took the Tribunal to it.

THE CHAIRMAN: Yes, we have seen that.

LORD PANNICK: It was in the decision, tab 40 in the second volume – I will not read it out again – para.56 is the guts of it.

THE CHAIRMAN: I have that in mind, yes.

LORD PANNICK: We say that what is undoubtedly true is IAG will only proceed with the bid if they can acquire all the Ryanair shares; there is no doubt about that. The chronology is simply inconsistent with any suggestion that IAG were only prepared to consider acquiring Aer Lingus, and will only make the bid that they have made because of the CC report and, in particular, the divestment remedy.

The relevant first date, of course, is August 2014, because that is the date when IAG say they first seriously considered making the bid for Aer Lingus, that is what they say in their evidence, their response to the CMA, and that is what the CMA focus on in para. 40 of the CMA decision.

THE CHAIRMAN: Lord Pannick, what is your position on that? Shall we just look at the IAG letter for a moment?

LORD PANNICK: Yes, of course. The IAG letter is tab 24. They say they first seriously contemplated their acquisition of Aer Lingus in 2014, bearing in mind the prospect of Ryanair being required to divest its stake in Aer Lingus, down to no more than five per cent and the pensions issues.

THE CHAIRMAN: What I am trying to understand is are you saying that it was irrational, wrong or whatever, of the CMA to accept at face value proposition A?

LORD PANNICK: That is not my submission, I cannot say that. My submission is that what the CMA have failed to do is to identify whether the divestment remedy, which is contained in the report, was crucial to the willingness of IAG to come forward with the bid that we now see, and to pursue the bid. In my submission, any analysis of the circumstances necessarily leads to the conclusion that the divestment remedy is not crucial to the IAG bid for this reason, that neither in August 2014, when they say that they first became seriously interested in acquiring Aer Lingus, nor in January 2015 when they make the bid, can they possibly have known or, indeed, expected, that the divestment remedy would be implemented in time to apply to their bid. Indeed, we now know that they pursued the bid, and the bid that they have made expires later this month, and can be extended only until the middle of August, and they have no expectation whatsoever that there is going to be a divestment remedy. Unless they believe, unless they know that there is going to be a divestment remedy, then it cannot be the case that the prospect of a divestment remedy is crucial to their bid.

THE CHAIRMAN: Just remind me, what is the date of the bid?

LORD PANNICK: The date of the final bid----

THE CHAIRMAN: That is the one that starts the clock, is it not?

LORD PANNICK: --was 19th June. That expires on 16th July and it can go on until 18th August. So, when they made their bid, and of course the MCC decision is not actually focusing on that, what the MCC decision is focusing on, because it came eight days earlier than that, is what they did last August, and I suppose the offer that was made in January, which led to

acceptance by the Aer Lingus Board. Last August, when they became interested, the position was that Ryanair's appeal to the Court of Appeal was still pending.

THE CHAIRMAN: And everyone would have known it was fixed for November or whenever?

LORD PANNICK: Indeed. So the appeal was still pending in August, with leave to appeal on three grounds, two allowed, sir, by your Tribunal, and one by the Court of Appeal.

By January, there had been a hearing in the Court of Appeal, when the bid was made and accepted by the Aer Lingus Board, there had been a hearing in the Court of Appeal, with judgment reserved. People may or may not have had expectations as to how the appeal would go, but the judgment was reserved. There would then be the potential of a further application to appeal to the Supreme Court. There would then be questions of MCCs, so I say it cannot sensibly be said to be the case that IAG were presenting the bid in the knowledge or belief that the shares owned by Ryanair were going to be divested in time to apply to their bid.

If one goes forward to the date of the final bid after the MCC decision that remains the case. IAG have formally made their bid, with its time limits applicable, at a time when they simply do not know – none of us knows – whether or not the Supreme Court are going to grant permission to appeal, nor do they know what the result of this application is going to be, or the result of any further appeal to the Court of Appeal in relation to this application.

Indeed, that analysis that IAG's bid does not depend upon the divestment remedy which the CC adopted in 2013 is confirmed by the final paragraph of the IAG letter, the one that indicates that what they are planning to do is to negotiate with Ryanair. They are not even asking for a divestment remedy. On the contrary, they are expressly saying to the CMA: "Please do not appoint a divestment trustee", and I say that is the strongest possible indication from the IAG point of view that it is not central to their bid that the CC imposed a divestment remedy. Their position undoubtedly is that the CC report has provoked their interest, I do not dispute that, because that is what they say. But what I do submit is that the CMA are plainly wrong in the MCC decision to proceed on the basis that what would otherwise be a material change of circumstances is not so because it is only by reason of the divestment remedy, as part of the report, that IAG are coming forward with this bid.

That is my case.

THE CHAIRMAN: Lord Pannick, how long do you think you are going to be? I am only saying this because I do want to have the break for 12 o'clock, for reasons which I am sure you know.

LORD PANNICK: I hope to finish by 12 o'clock, perhaps before 12 o'clock.

THE CHAIRMAN: Well, everyone will have their own thoughts at 12, and be on their own, so even if you have not finished, we will take a break at five to 12.

LORD PANNICK: Indeed, yes. So, that is my case. I say that either the CMA have reached a perverse conclusion in deciding at paras. 40 through to 42 read with para. 56 of the MCC decision, which I am happy to go back to but I have read it already, that it was the fact of the divestment remedy that explains why IAG are coming forward. I say either it is perverse, or they simply have not focused on all of the relevant factors. They are not focusing at all on the final paragraph of the letter from IAG, they just ignore that completely, and it is of crucial significance in attempting to understand IAG's position. Nor do they focus at all on the points I am making about the unreality of concluding that IAG expect that the divestment remedy is going to be applicable, it is going to have practical effect in time to deal with their bid. And that, no doubt, helps to explain what I would invite the Tribunal to infer; why the final paragraph asks the CMA not to appoint a divestiture trustee.

THE CHAIRMAN: Let me just go back. Are you saying that this last paragraph has just been ignored completely by the CMA?

LORD PANNICK: Well it is not mentioned. Unless I have missed something it is not mentioned at all in the MCC decision. It is very surprising, it is very striking, because it goes to this first point. The first point being, I say, there can be no doubt whatsoever, that the fact IAG has come forward is a significant material change of circumstances which needs to be addressed. The CMA's main answer – see para. 56 – their main answer to the point is that IAG have come forward, but they have come forward in the light of a CC report which includes a divestment remedy, to which our response is that that proposed remedy cannot explain, does not explain, the interest of IAG for chronological reasons, but also because they themselves make it absolutely clear (see the final paragraph) that, far from relying on the divestment remedy, they are asking the CMA not to exercise it. Their position is that they intend to negotiate with Ryanair. That is the first part of the first point.

There is a supplementary part of the first criticism, because I mentioned that the CMA in their MCC decision (tab 40 in the second volume) had what I understand to be a second point which they raised in para. 65. I read it all out, it is the point that, even if one says that the IAG offer in (b) is a material change of circumstances, we, the CMA, (the CC) are also concerned about deterring other people coming forward, to which our answer is that if, as we submit, it is now plain from the IAG bid, that they are prepared to come forward, it undermines a very substantial part of the reasoning in the CC report and they really need,

the CMA, to rethink the conclusions that other potential bidders are being deterred by the Ryanair shareholding.

In any event, of course, Aer Lingus only needs one partner, and the rational proportionate way to proceed for the CMA, if they are concerned that the IAG bid might have broken down, or might still break down, is to wait and see, and if it does fall through then they can consider more intrusive remedies.

So that is my answer to the second subsidiary point, as I understand it, that is being made by the CMA.

That is our first ground of challenge. We say the CMA decision is irrational, it fails properly to consider all the relevant material because the IAG bid is plainly an important change of circumstances, and there is simply no basis, on the contrary, for the CMA to proceed on the basis that IAG are only proceeding because of the divestment remedy that the CC adopted. That is the first point.

The second point is on proportionality of remedies. Our second ground of challenge is that the CMA has erred in law because it has failed to consider whether the remedy of divestment is proportionate in the circumstances of the new bid by IAG and, indeed, by failing to conclude that a divestment remedy is disproportionate.

Again, there is a dispute; this time it is a relevant dispute, a dispute between the parties on how s.41(3) applies. If I could take you to the CMA's defence/skeleton argument they deal with the matter in three paragraphs on p.18 of their skeleton argument. At para. 66 they say:

> "There is obvious sense in this framework. The CMA will, of necessity, already have concluded that any remedy adopted in its report is both effective and proportionate and thus consistent with the duty in section 41(4). Unless therefore there has been an MCC (or some other special reason) since the publication of the report, there is no reason why the proportionality of the remedy should be re-opened when taking action under section 41(2). Such a course would only create additional obstacles to timely and effective regulatory enforcement action where an anticompetitive outcome has already been identified and requires remedying.
>
> 67. Indeed, Ryanair is ultimately driven to accept this argument, because it complains. . . that the CMA has failed to consider '*whether the remedies in the Final Report are proportionate in light of the <u>materially changed</u> circumstances that exist today*'. However, the CMA rejected the premise of this argument – namely, that there *has* been any MCC in the present case – and therefore was not

required to reassess the proportionality of the divestiture remedy even on Ryanair's own argument."

Para.68 I do not think I need to read. Para.69:

"Contrary to Ryanair's case under Ground 1, therefore, the CMA asked the correct legal question in considering whether '*there have been any changes in circumstance that materially affect the analysis and conclusions in the Report*' and which would entitle the CMA to '*depart from its conclusions on remedies set out in the Report*'… Unless these questions were answered 'yes', then there was no basis for a further re-assessment of the proportionality of the remedy identified in the report."

We say that is wrong in law for this reason: we say the remedy of divestment proposed in the report is now disproportionate by reason of the changed circumstances, either because those are material changes of circumstance on my interpretation or, in any event, because there are changes of circumstances which make the remedy disproportionate. The error of law by the CMA, in my submission, is in their assertion that there is no basis for reconsideration of remedies unless there is a material change of circumstance. The error is that it is the disproportionality of the remedy in the light of all the developments that informs whether there is a material change of circumstance, even if my friend's interpretation of "material" is right. On our interpretation of material, there is plainly a material change of circumstance, and the remedy is a disproportionate one.

But however one looks at the matter, what the CMA cannot avoid is the need to consider whether, in the new circumstances the remedy remains a proportionate one.

I say it would be a striking conclusion that the CMA is obliged to impose a remedy that is now a disproportionate one; that cannot be right in my submission. The real question is whether the remedy of divestment is now disproportionate in the new circumstances – we say material change, they say change of circumstances but not material. I say that in the light of the IAG bid the remedy is now a disproportionate one, and that is for these reasons.

First, the CC's report noted that Ryanair had offered undertakings. If the Tribunal, please, would go back to the report (tab 3 main bundle), it is dealt with at p.75 of the internal numbering of the report, para. 8.22. This is under the heading just above para.8.19: "Ryanair's proposed remedies". Para.8.22:

"Ryanair initially proposed the following remedies:

(a) an undertaking (or order) preventing it from voting against an acquisition of Aer Lingus by another EU airline. . ."

So that was the first proposed undertaking. The second one, para. 8.24:

> "Subsequently, and in response to the CC's Remedies Working Paper, Ryanair said that given its proposed binding undertakings above, the CC's only remaining concerns seemed to relate to highly specific ways in which a theoretical acquirer of Aer Lingus might wish to structure a transaction (ie a takeover offer rather than a scheme of arrangement), and. . ."

- this is the crucial point:

> ". . . concerns that such an acquirer might then have about perceived difficulties in obtaining 100 per cent of the company (if it could not squeeze out Ryanair). Ryanair proposed the following additional remedies in order to remove this perceived concern:
>
> (a) an undertaking (or order) to accept an offer for its shares if another EU airline achieved acceptances representing more than 50 per cent of Aer Lingus's shares."

THE CHAIRMAN: But, Lord Pannick, if hypothetically – I know we should not really look at hypotheticals, but I would like to know the answer anyway – the CMA final order was that you must accept an offer for the shares. If another airline achieved acceptances representing more than 50 per cent of Aer Lingus's shares, you would still be challenging it, would you not?

LORD PANNICK: In the light of the history of this case we may well have done. Indeed, we would have challenged the substance of the report, there is absolutely no doubt about that, because we said there was no basis for an SLC finding, but on this second point I am not concerned with that. I am concerned to show the Tribunal in relation to the proportionality of a divestment remedy, which has, from Ryanair's point of view, a particular mischief because it takes out of the hands of Ryanair the disposal of the shares, it means they are no longer able themselves to negotiate and to get what they would consider to be----

THE CHAIRMAN: You are saying that the current stage, i.e. the 2015 stage, they did not explore with you whether or not you would be prepared to give that undertaking in those circumstances?

LORD PANNICK: They ignored all of this – and I have made the point before but it is relevant to this second point as well as the first – notwithstanding the fact that IAG, who made it a condition of their bid that they had to acquire all of Ryanair's shares, say in terms to the CMA at the time of the MCC decision, 'please do not appoint a divestiture trustee'; this is simply ignored in the MCC decision. So the undertakings were given in 2013, they were not accepted by the CC for a particular reason, and the particular reason can be seen if we

turn on to para.8.46, which is on p.80. It is under the heading "Conclusion on the effectiveness of Ryanair's proposed remedies". They say at para.8.46:

> "In a dynamic and uncertain sector such as the airline industry, it is inherently difficult to predict the specific forms of combinations or other matters of strategic importance that might come before the Aer Lingus shareholders in AGMs or EGMs in the future."

Then, at para.8.47, they explain:

> ". . .Ryanair's continued presence on the share register . . . would be likely to deter potential partners proceeding due to their reluctance to accept Ryanair as a significant minority shareholder. . ." etc.

Para.8.48 – maybe there could be amendment to the proposed remedies, and at 8.49 they say:

> ". . . the remedies proposed by Ryanair would not be effective . . ."

So they are concerned that it is more complicated, and that there are a variety of different possible ways in which others might wish to acquire Aer Lingus.

THE CHAIRMAN: The thing is they may well be right that it is more complicated than the offer made by Ryanair as at 2013.

LORD PANNICK: Yes.

THE CHAIRMAN: But you are saying that by the time we get to 2015 you have the express position of IAG, who is the only horse in town at the moment.

LORD PANNICK: That is precisely my submission, that what is put forward by IAG is not complicated at all, it is a standard bid to acquire all of Aer Lingus conditional on acquiring all of the Ryanair shares and, indeed, the shares of the Irish Government. It is a simple proposal, and it is, in my submission, quite impossible to understand why the undertakings that Ryanair was prepared to offer in 2013, i.e. the undertakings at paras.8.22(a) and 8.24(a), would not suffice. It is particularly difficult in my submission to understand why the CMA are determined to proceed with divestment in the circumstances of IAG as the bidder, specifically, clearly saying to the CMA: "Please do not appoint a divestiture trustee". The only possible reason for that is that they, IAG, are confident that they are perfectly able, by negotiation with Ryanair, to resolve matters in that way. There is no other evidence from IAG. All that the Tribunal has is in that tab, tab 24, there is no other representation at any time from IAG.

To put my case at its absolute lowest, I say that there is a fundamental error by the CMA in that they have given no consideration whatsoever in the MCC decision to this question. Is

divestment still a proportionate remedy in the light of the new circumstances? They have to consider that. I am not asking on this first basis. I am not asking this Tribunal to form a view of its own, I am simply saying this cries out for analysis. Ryanair challenged the proportionality of the remedy in the light of the new circumstances. The CMA are obliged, I say, as a matter of law, to consider now the proportionality of the remedy in light of the changed circumstances, and they had a specific submission from IAG asking them not to go ahead with the appointment of a divestiture trustee. Why did they not consider this?

I also make a second point. I say in the light of what is before the Tribunal the insistence of the CMA in imposing, as they want to do, a divestiture trustee is perverse. It is perverse in the light of the undertakings that were offered in 2013. It is perverse, at the very least, not to ask Ryanair: "Are you still prepared to give them?" and it is perverse in the light of the attitude of IAG. That is our second point.

Those are the two points that I focus on, there are a lot more as the Tribunal will have seen in the skeleton argument.

THE CHAIRMAN: I know, but presumably you are still pursuing the pension point?

LORD PANNICK: I am not resiling from any of that, but I hope realistically I recognise that if I cannot persuade the Tribunal on these two points, I am not going to persuade the Tribunal on the others. I am not abandoning those points, but, if I may respectfully say so, I am not, in any reply, going to criticise my friends because they have not said more than they say in their skeleton arguments. In relation to the other points I do see, I hope realistically, the force of the points they make on the other points, but I do not have instructions formally to withdraw those other matters. I hope that is a proper way of proceeding, because I do not want to waste the Tribunal's time.

THE CHAIRMAN: Yes, that is fine. We may have a discussion at the end of today about where we are on the application for interim relief, as to whether you are still holding that out as a prospect at some stage, but we can deal with that at the end.

LORD PANNICK: It is quarter to 12, I am happy to say now why we have not made any application and that is because the CMA, in the light of your helpful indication last week, are not taking any steps that we would regard as irreparable. They have not appointed a divestiture trustee, and therefore it did not seem to us that there was any interim relief that we could usefully or properly apply for.

THE CHAIRMAN: You may say it is a barren debate, but when I looked at the correspondence yesterday, I could still see there is a difference between you two, because what they are saying is: "Malek has said he would appreciate it if they did not appoint a divestiture trustee

at this stage", and they say: "Pending the Supreme Court, and pending the decision of this Tribunal in this case, they are not going to do that, and they have left their position open as to what may happen if there is an appeal from us.

LORD PANNICK: Yes.

THE CHAIRMAN: You have come back and said: "Thanks very much for that, that is what we asked for, but we reserve our position if you take any steps under the final order", and there are these preliminary steps that could be taken at this stage and you are still in dispute over that.

LORD PANNICK: As I understand, we have not been notified that any other steps have been taken. I, I hope properly, reserve the position of Ryanair as to what application we would make if there were other steps taken, but it seemed to us a waste of everyone's time to proceed on a hypothetical basis. What we will need to do – I mean I hope I can persuade the Tribunal, but obviously we think ahead – if our application today fails then we will have to consider, and the other side will have to consider, the questions of what happens until the Court of Appeal – I am assuming that Ryanair would wish to take this matter further – then there would be that question, but that is a different matter.

THE CHAIRMAN: Yes, I can see that.

LORD PANNICK: But I am not instructed to make any application because Ryanair are not aware that there are any steps being taken which we could say caused us irreparable harm.

THE CHAIRMAN: Yes, well, we will have to hear what Mr. Beard says about that----

LORD PANNICK: Of course.

THE CHAIRMAN: --at the end of the day.

LORD PANNICK: Sir, you asked me the question and that is my immediate response.

THE CHAIRMAN: Yes, that is fine. Thank you very much.

LORD PANNICK: Those are my submissions. Unless there are questions I can seek to answer, that is what I want to say on behalf of Ryanair.

THE CHAIRMAN: I am sure there are other questions, but we will come to those later on in the day. Just a point for Mr. Flynn, could you take me through, when you make your submissions, the Irish takeover rules – the relevant ones – they are in the bundle, but I have not looked at them, but I would like to be shown the relevant rules.

MR. FLYNN: I will show you the relevant rules.

THE CHAIRMAN: I am asking you because I cannot expect Mr. Beard to do that, because he is on his feet now.

MR. FLYNN: It is already something to ask me to advise you on Irish law, but I will do what I can.

THE CHAIRMAN: That is very kind. We will come back again at five past 12, and that will be Mr. Beard. Thank you very much.

(Short break)

THE CHAIRMAN: Yes, Mr. Beard?

MR. BEARD: Chairman, members of the Tribunal, I was going to make an introduction and give a summary of the case, but rather than mess around with that, perhaps we can just plunge straight into the legal framework again. I will do a little bit of work on the statutory framework, look at the original final report, then the MCC decision and then sweep up the relevant points in relation to Ryanair's arguments, if I may.

THE CHAIRMAN: That is the logical way of doing it.

MR. BEARD: Yes. So if we could go back to the statutory materials in authorities tab 1. Just start right at the beginning of this section. We have s.22, which is obviously what is now referred to as the first phase test. The only reason I emphasise the fact that you have a first phase test that used to be the OFT's consideration of whether or not there was a relevant merger situation is just because I am going to come on to emphasise that what has to be done by the CC, in phase 2 the CMA, is taking a final decision both in relation to substance and in relation to remedies, whereas, of course, here, what you have at the first phase is a situation where a reference shall be made if it is or may be the case that – so a degree of belief is involved, and that is a matter that is discussed in the *IBA Health* case later in the bundle. We have the relevant merger situations provision here. Again, nothing particularly material, only to note that the whole merger regime is geared to deal with serious matters either where there is substantial turnover being acquired or where there is a substantial market share that is at issue. I do not think we need anything from s.26.

Lord Pannick took you to s.35, obviously we are dealing here with where there is a relevant merger situation, consideration by the CMA on a reference, it must decide the following questions: "whether there is a relevant merger situation and whether there is a substantial lessening of competition", so this is the decision making on the substance. Then, in (3):

> ". . . if [the CMA] has decided on a reference that there is an anti-competitive outcome . . ."

So that is the creation of a relevant merger situation which results or may be expected to result in a substantial lessening of competition, then the CMA shall decide the following matters, and you have been directed to (a) and (c), it shall decide whether action should be

taken and decide if action should be taken what action should be taken. Of course, subsection (4) highlights the need that any decision under subsection (3) "shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects."

THE CHAIRMAN: We considered that in some detail last time.

MR. BEARD: Exactly. But when it comes to just the final points in relation to remedies, the comprehensiveness of the solution is, of course, material here because we are not just dealing with remedies in relation to, say, the IAG bid. So I think it is worth just having that in mind, and it is for that reason I touch on it now, no more than that.

THE CHAIRMAN: What you are saying is that life tells you in the history of M&A that bids come and go, they may or may not be accepted, but you, as the CMA need to look at the picture as a whole in the long term.

MR. BEARD: More than that, we made a decision in relation to that after a long inquiry, and so we make a decision and as we will come on to see in relation to s.41, we are being asked, in relation to the material change of circumstances test, should we be departing from that decision, and it is an important context to bear in mind.

Obviously, s.38 is the requirement to publish the report, setting out the decisions on the various matters which are required to be answered under s.35 and although we do not have s.39 in here, we know that that is a six month period, limited to potential extensions, but it is an extensive inquiry that is carried out to analyse the substance, and to analyse what remedy is required and to take decisions in relation to both.

Then, once you have that body of decisions that is published in the report, you then have what might loosely be called 'the implementation' of those decisions, and that is really what is being dealt with under s.41. So, s.41(1) applies where a report of the CMA has been prepared and published under s.38 within the relevant period under s.39, and contains the decision that there is an anti-competitive outcome.

Then (2):

> "The [CMA] shall take such action under section 82 or 84 as it considers to be reasonable and practicable:
>
> (a) to remedy, mitigate or prevent the substantial lessening of competition concerned. . ."

So it is bound to take action under 82 and 84 insofar as it is reasonable and practical to do so. To deal with the substantial lessening of competition that has been the subject of a decision.

Then we come on to (3):

> "The decision of the [CMA] under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 35(3) or (as the case may be) 36(2) unless there has been a material change of circumstances since the preparation of the report or the [CMA] otherwise has a special reason for deciding differently."

I will try and deal with s.41(3) effectively in two parts. If we look at the first part of s.41(3), what it is telling us is that the decision under s.41(2) to take action, the decision to accept undertakings or to make an order imposing remedies, that shall be consistent with the decisions under s.35(3), that is subject to an exception that comes in the second half, and the practical effect of this prohibition is that unless the conditions of the final part are met, you must implement the remedy identified in the final report and, of course, the reason for that is clear, when the CMA spent six months plus working out what the problems are caused by a merger and how to address them, it had to take decisions, and those decisions are not being revisited.

THE CHAIRMAN: And, in this case in particular, you know one of the grounds of appeal last time was the proportionality of the appointment of the divestment trustee, and we came to a view on that. So really it all does turn on this wording of whether or not there has been a material change of circumstances from your case, so that is the beginning and the end of it.

MR. BEARD: Yes, it is, and I do not want to labour the point, but it is obviously core to the legal analysis. I suppose there is one thing to pick up, I say this is to do with implementing the decisions that have already been made, but it talks about consistency with the decisions, because in the decision itself, where you are saying action must be taken, you have not necessarily set out all the details of what might be in an order for example, and so you are not merely implementing the decision in simply carrying it across, you are taking action consistent with that. But if you have made a remedies decision you have to implement it, and you have to do so consistently with that decision.

At times in some of its submissions Ryanair almost characterises the decision under s.41(2) as some sort of fresh decision which involves a fresh proportionality assessment, certainly it drifts in that direction when we come to Ground 2. We say that is plainly not right, and I will come on to it, but, of course, what we are dealing with here is remedies decisions, not substance, so it is only in relation to the implementation of the remedies decisions that you have the MCC and special reason provision.

THE CHAIRMAN: So what you are saying, as I understand it, is there is no fresh proportionality assessment in the absence of a material change of circumstances?

MR. BEARD: Yes, that is what we say, because otherwise there is not a gateway into that, because you are being told, under s.41 you have to do the implementation with consistent action being taken, you have to do that, subject to the exceptions – material change of circumstances. But, that does not leave you in a position where, if that decision has been taken, you have some kind of free running constant reconsideration open to you. Indeed, that would be problematic because as, sir, you mentioned in passing, circumstances are constantly changing. One can see that you would get a constant flow of: "Well, it is not very significant but you should take this into account and we should be thinking about it in the round" argument that would roll ever onwards. Actually, Parliament has set down a threshold here in relation to these matters.

We say, of course, in relation to the contentions of lack of proportionality here, we say they do not amount to anything anyway because you do not have any material change, so the balance on proportionality does not change in any event, so it would all come out in the wash. But for the purpose of properly understanding the statutory scheme I think it is right to parse it accurately.

What we are talking about is material change of circumstance in relation to actions being taken pertaining to the remedies decision. So to go back to the question that I understood was posed at the CMC about what "material" means here, it is material to the remedies decision because we are at the stage where the CMA is implementing those remedial decisions and it is effectively a cross-reference back specifically to the questions that are posed in s.35(3), those remedial questions, and the practical question is, is there a good reason why we should not implement the decision we have taken after much deliberation. I am obviously using different language, but that is essentially what we are talking about.

We have tried to spell out the position in our defence in para. 50, and it is somewhat mis-characterised by Ryanair in its skeleton – I will come back to that. But a material change of circumstance is one which affects the basis upon which the Competition Commission, and now the CMA, has decided in its report that a particular remedial action should be taken to remedy prevent or mitigate the substantial lessening of competition identified. So it is a change of circumstance which the CMA, because it is the CMA that carries out this analysis obviously subject to its public law duties, it is what the CMA considers means that the operative reasons for its remedies decision cannot stand. In other words, the CMA considers that at least one of those operative reasons, because there may be several, is not

sound any more, and that is just the natural meaning of "material" in this context. In fact, at one point Lord Pannick did refer to 'undermining the basis' for that decision, and to some extent if that is the characterisation, then there would end up being nothing between us. But, elsewhere in submissions there are references by Ryanair, for instance, to 'it could undermine the basis'. There are all sorts of things that could potentially or arguably undermine the basis, but that does not make them material changes of circumstances for these purposes.

THE CHAIRMAN: Then for our purposes, what latitude do you have in relation to us on the ultimate decision as to whether it is material? Can you just address me on that?

MR. BEARD: I certainly can. I am going to----

THE CHAIRMAN: If you are going to come to it later----

MR. BEARD: No, I am perfectly happy to deal with it now, I think it is probably easiest and, perhaps, on my part laziest, to just turn up *BAA* at tab 12.

THE CHAIRMAN: Yes, I have seen how they have done it, so you just rely on that, do you?

MR. BEARD: Yes, we do, and without wanting to sound like I am praying in aid some protective mantra for regulators, it is at para. 20(6).

THE CHAIRMAN: Yes, we do not need to turn it up, if that is what you rely on.

MR. BEARD: I do not think there is any particular issue, but it is a broad margin of appreciation. That is necessarily going to be the case because, of course, the CMA is carrying out an exercise of judgment obviously in relation to whether or not there is a relevant merger situation, but more particularly the nature and extent of the lessening of competition which results from the merger. Then there is a further judgment that is obviously involved in deciding what is an appropriate remedy in those circumstances. So, there is a whole series of judgments but, of course, as is required under para. 38, the CMA cannot just do this on a whim, it has to set out its reasons for doing it.

So if someone is able to come along and say that you have made a decision, that actually these new circumstances do not undermine your reasons for the outcome that you are maintaining, then of course this court can properly scrutinise that. In deciding whether or not the new circumstances really do undermine an operative reason, then obviously, in consideration of those issues, there must be a margin of discretion for the regulator.

THE CHAIRMAN: Yes.

MR. BEARD: I do not know if that satisfies as a relevant reference for those purposes.

THE CHAIRMAN: I was just trying to see whether you were going any further or different from what is in----

MR. BEARD: No, I am not being quite so imaginative.

THE CHAIRMAN: That is fine, thank you.

MR. BEARD: As I say, the Tribunal will have seen the way we approach these matters. Although Lord Pannick suggested that somehow in the MCC decision the approach adopted to s.41(3) was wrong, we do not quite understand why that is the case. I am going to come to the MCC decision, but it is at para.15 and in particular 51. There is just no good basis for suggesting that we have got it wrong. The CMA's approach to the review was to ask whether there had been any changes in circumstance that materially affected the analysis and conclusions in the report so that the CMA should depart from the conclusions on remedy set out in the report. We do not see in what way those statements, as we will see in paras.15 and 51, represent a misapplication of the law at all.

One thing that is worth picking up, of course, is just the final wording in s.41(3) to reinforce that natural meaning of the words "material change of circumstances" in the context of this statutory scheme. It talks about the exception to consistent action being taken unless there has been a material change of circumstances or the CMA otherwise has a special reason for deciding differently, and "deciding" is obviously deciding on the remedial conclusion. That just reinforces why it is that we put it as we do.

Just to pick up, Ryanair characterises our position in its skeleton at para.35 somewhat inaccurately. It suggests that we are saying that a material change of circumstances is only one that would lead to a different remedies decision. We do not say that at all. We say that generally a material change of circumstances would lead to a different remedies decision, but we do not say that it must do. We do recognise that, even if you have a situation where one of the reasons, or the reason, for your particular remedial decision is undermined by a particular change of circumstance, so it is a material change of circumstance, there can be other changes going on, or indeed other reasons why you maintain a particular remedial decision.

THE CHAIRMAN: All it does, if there is a material change of circumstances, it is the key that unlocks the door, and whether or not you come to a different decision depends on your assessment.

MR. BEARD: Absolutely. We have seen this sort of thing happen in other cases. We are not saying it is a single stage process. That is not the approach, but we do say that there have been attempts by Ryanair to say that there is not a lot of disagreement about the law, and somehow this material change of circumstances threshold is rather, "and if we have got a

few queries here you should go away and scrutinise them all", but that is the wrong approach.

THE CHAIRMAN: What happened in this case was that you did not dismiss the suggestion of an MCC out of hand, you did an investigation. Lord Pannick is saying they are not challenging, let us say, the thoroughness of your investigation.

MR. BEARD: No, I hear that.

THE CHAIRMAN: Clearly they are unhappy about the outcome. But you have done the inquiry.

MR. BEARD: Yes. We are not saying in relation to MCC you carry out some sort of binary decision, and if it is merely fanciful you throw it out, and if it is not fanciful then it becomes a material change of circumstance. We say you carry out this sort of exercise and then the CMA makes an assessment as to whether or not the change of circumstances that has been put forward undermines an operative part of the reasoning in the decision. If it does then it will be a material change of circumstance. Normally that will lead you to a different sort of decision, but it does not always have to, and you have a discretion that you have to exercise at that point.

THE CHAIRMAN: Yes.

MR. BEARD: That is how we approach the statutory test. I am not sure whether or not there are other particular questions that arise in relation to the legal issues pertaining to s.41. I am not sure that ss.82 and 84 necessarily take us much further, nor does schedule 8. Clearly we have a range of powers that we have to exercise. Parliament has put in place fairly significant powers in these circumstances, because it considers these are serious matters and when those decisions have been taken that there is a substantial lessening of competition, it wants the regulator to do something about it, and do something comprehensive about it.

With that I was going to move on to the Final Report decision, which, Mr. Chairman, you are more than familiar with. There are various bits in it that I do want to go to, in part because reading Ryanair's submissions and listening to Lord Pannick, who put it most elegantly, you would think that deterrent effects were the central finding that had been made in relation to the minority shareholding, and it was just a deterrent effect that gave rise to a substantial lessening of competition. That is just not right, and it is important, therefore, just to turn up the relevant passages in the Final Report.

Sir, you have it at tab 3 in the bundle. It may be useful - no doubt Professor Mayer and Ms. Potter have read this - just to look at the summary which we then see the reasons for later on. The summary, p.79 in the external page numbering, para.13:

"However, in order to reach an overall view, we looked, in particular, at whether Ryanair's shareholding might:

(a) affect Aer Lingus's ability to participate in a combination with another airline;

(b) hamper Aer Lingus's ability to issue shares to raise capital;

(c) influence Aer Lingus's ability to manage effectively its portfolio of slots at London Heathrow;

(d) influence Aer Lingus's commercial policy and strategy by giving Ryanair the deciding vote in an ordinary resolution; and

(e) allow Ryanair to raise Aer Lingus's management costs or impede its management from concentrating on Aer Lingus's commercial policy and strategy."

I refer to that because, of course, the focus entirely in this application is only in relation to aspects of (a), but of course there is a lot more consideration of a whole range of mechanisms by which the minority shareholding might affect Aer Lingus that are considered in this report.

THE CHAIRMAN: I think the predominant one is para.13(a).

MR. BEARD: Yes, I am sorry, I was just going to go on to para.14. I am not backing away from that at all:

"We formed the view that one mechanism of one particular significance that would affect Aer Lingus's commercial policy and strategy was the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, or entering into a joint venture."

That is, in relation to para.13(a), of particular importance, but it is "impede or prevent", it is not simply a matter of deterrence. We see that as we read on:

"We identified a number of ways in which the minority shareholding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines considering combining with Aer Lingus, or by allowing Ryanair to block a special resolution, restricting Aer Lingus's ability to issue shares …"

So one of the mechanisms within "what is a mechanism of particular significance by which the minority shareholding may affect Aer Lingus" is deterrence. But it is important that the concern about the shareholding being retained is the ability of Ryanair, and, as we will come on to see, the incentive of Ryanair to impede and prevent these forms of combination.

Sir, I just do that out of context. Obviously this is a report that has introductory chapters dealing with the relevant entities and the markets, but clearly the key chapter for these purposes is chapter 7, which begins on p.109, "Assessment of competitive effects of the acquisition", and we will just pick it up, if we may, at para.7.12 under the heading, "Effects of the acquisition on Aer Lingus's commercial policy and strategy":

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

So the range of things it could do.

> "We first considered Ryanair's incentives to use its influence to weaken Aer Lingus's effectiveness as a competitor. We then looked at various mechanisms through which Ryanair's shareholding might influence the commercial policies and strategies available to its rival …"

Of course, what we are talking about are rival airlines -

> "… considered the likelihood that such effects might arise and assessed the scale of the potential impact on Aer Lingus."

So we have got the incentives consideration, considerations of the strategies available, likelihood of the effects, and the scale of potential impact. That is the broad structure we are dealing with here.

We see that picked up from para.7.16 on the "Incentives for Ryanair", and you will see that there was a clear finding that there are incentives for Ryanair to adversely affect the effectiveness of Aer Lingus as a competitor, incentives that would not exist for other airlines that are not shareholders.

Then it moves on to consider the mechanisms. This is the second stage of the analysis. So Ryanair has the incentives to damage the way in which Aer Lingus may be able to operate competitively with, *inter alia*, Ryanair.

Then you have got the mechanisms by which the shareholding could affect Aer Lingus's commercial policy and strategy. We come to (a), the first of these mechanisms, which you will see under para.7.23(a) to (e) - they are reflective of the summary I took you to at para.13, "(a) Aer Lingus's ability to participate in a combination with another airline":

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

> influence Aer Lingus's ability to combine with another airline. We then consider evidence related to the likelihood of Aer Lingus being involved in a combination absent Ryanair's minority shareholding …"

so without it, likelihood without it -

> "[We discussed] the general trend in consolidation …"

so considering it in a broader context -

> "… the views of airlines, internal documents of Aer Lingus and discussions between Aer Lingus and other airlines since 2006."

We will come on to it, but just picking up that final point, there is no sense in this report that people have not been talking to Aer Lingus prior to the time of the report, and subsequent to Ryanair actually acquiring the shareholding. They talked to them, yes; what they did not ever do is finally be able to consummate any combination with them.

Then it is recognised of course that these are matters of judgment:

> "Combinations between airlines are inherently unpredictable and opportunistic, and so it is inevitable that our assessment will require an element of judgement.

which is precisely what it then exercises. Then we have just below para.7.25, "The role of Ryanair's minority shareholding", and just picking up para.7.27:

> "We identified a spectrum of ways in which Aer Lingus and another airline could combine."

What is being said here is that you do not focus just on one airline buying another - that can be in two directions. It could be the IAG situation of someone buying Aer Lingus, but it could be Aer Lingus wanting to go out and buy somebody else. It is also talking about a range of other sorts of combination that might arise - less than full merger in either direction, and considering the impact of the minority shareholding on that.

Then para.7.29:

> "Ryanair told us that it would be open to offers for its shareholding on their merits, and had repeatedly said so in public."

Then para.7.30, just in passing, this is where there is reference to information coming from third parties, and in particular, I just pick up:

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

So it would not even contemplate that normally. We see that picked up later as their stance reiterated in their later letter.

THE CHAIRMAN: That still seems to be their position.

MR. BEARD: Yes, it is still their position. They would not usually contemplate it, and it goes to reinforce why it is that there is a particular relevant circumstance here when IAG comes to bid which is, of course, that, as a matter of law, Ryanair is required to divest its shareholding because it has been told it has to. It has not had any interim relief suspending that requirement since the time of the relevant Final Report.

Then para.7.31:

> "We found that Ryanair's minority shareholding would give it the ability to impede possible acquisitions of Aer Lingus by another airline."

I am not going to go through this whole report saying what has changed and what has not changed, but what you see here is that these key parts just are not in any way affected by the fact of IAG's bid at all.

THE CHAIRMAN: You rely on para.7.31, do you not, to give context?

MR. BEARD: Yes.

THE CHAIRMAN: The way Lord Pannick categorised this is simply to just focus on certain paragraphs in the report would suggest that what you are concentrating on is the impeding people having discussions with a view to making a possible bid, whereas if you look at para.7.31, you are focusing on actually preventing a 100 per cent takeover, which is what is actually in contemplation at the moment.

MR. BEARD: Exactly, and that is what we are concerned about, because that is what limits the freedom.

Yes, we do recognise that there is a deterrent effect, albeit there is nothing in this report that says a deterrent effect is total. It has never been suggested that a deterrent effect is total in this report.

THE CHAIRMAN: You could not suggest that anyway.

MR. BEARD: We could not possibly suggest that. What is said is that it is unlikely that bids will come forward from certain people.

PROFESSOR MAYER: Could I just ask: would you regard it as a material change if a bidder did come along and say, "We are willing to negotiate with Ryanair over their shareholding"?

MR. BEARD: On the basis of the MCC, I do not see why, in the context of a requirement that they are going to have to sell down to 5 per cent, there can be any basis to say in those circumstances there was a material change of circumstance, because the bidder is obviously coming forward in the full knowledge that the target is, in so far as it has a minority shareholding held by a rival airline, going to have to have that shareholding freed up at

some point, and the airline that holds the minority shareholding knows that. That is something we will come on to, but no, one does not assume that at all in these circumstances.

THE CHAIRMAN: I think one of the problems you have is that, from the CMA's point of view, you have to have an order that is sufficiently wide and flexible that deals with a number of possibilities as to the final outcome?

MR. BEARD: Yes.

THE CHAIRMAN: And if you fashion the order or the remedy solely on the basis of one bid you may fall short if, at the end of the day, that bid does not proceed?

MR. BEARD: Exactly. You cannot fashion a remedy, or change a remedy, to focus on the particular circumstances of a particular bid coming forward.

THE CHAIRMAN: You may need to take that into account, but have the flexibility----

MR. BEARD: You may need to take the particular circumstances into account in ensuring that you have flexibility within the order. As I will come on to show you, these issues to do with the Divestiture Trustee, for example, that Lord Pannick highlighted in the final paragraph of the IAG letter, they are actually referred to in the MCC decision. So he is not right on that. They were also issues that were considered in some detail, but they were considered in the context of the mechanisms and flexibilities that existed within the order, because the order enabled deferral of requirements to appoint Divestiture Trustees, and issues such as that. Actually, when you read the last paragraph of the IAG letter, the IAG letter is saying, "Yes, we jolly well do want that final order, but we do not want you appointing a Divestiture Trustee at this moment", and it is transparently obvious why IAG does not want that. If it thinks that it could enter into bilateral negotiations before a Divestiture Trustee is involved it means that the scope for other people coming along and putting in competing bids with Ryanair is effectively less open. Nothing in that paragraph is suggesting that it does not want the order. Indeed, it makes very clear that if it cannot reach an irrevocable undertaking agreement with Ryanair, it does want the Divestiture Trustee there.

If that is the case, it would be bizarre to read that paragraph as suggesting that IAG does not want a final order, as Lord Pannick suggests, but we will come on to that. I am going to go back to the report, if I may.

Sir, I was just at para.7.31, and I think the Tribunal has the point here:

> "Significantly, Ryanair could prevent a bidder from acquiring 100 per cent of Aer Lingus by choosing to retain its shares."

This is nothing to do with the bidder coming forward. It is assuming a bidder has come forward, because it is talking about what it could do in the face of a bid.

> "If Ryanair decided not to sell, an acquirer would need to accept Ryanair remaining as a significant minority shareholder, with different incentives to its own, and with, for example, the ability to block special resolutions and the entitlement to the proportionate share of the dividends and profits of Aer Lingus. In such circumstances, the acquirer's ability to integrate the businesses would be significantly restricted."

Of course, we are seeing that concern made manifest in the way that IAG has actually approached these matters. Because of course IAG has said, "There is no way we are going to be able to close out this bid unless we get an irrevocable commitment from Ryanair, because we cannot operate the squeeze out arrangements, and, frankly, this does not work if we have still got Ryanair sitting there". That is the corollary of their requirements for the irrevocable undertaking. So actually everything that IAG is doing in relation to its bid sits squarely with what the CMA has found here - or the CC at the time.

For your notes, Mr. Williams points out that footnote 75 deals with the squeeze out provisions.

THE CHAIRMAN: Yes, I have seen that.

MR. BEARD: Then we have got para.7.32:

> "We also found that the shareholding would affect Aer Lingus's ability to merge with, enter into a joint venture with, or acquire another airline, by forcing Aer Lingus to seek Ryanair's approval …"

I am not going to go through all the details of this, but para.7.33:

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

That is undoubtedly right.

So we have got these provisions. Para.7.31 is really concerned with the role that Ryanair can have in preventing a bidder; para.7.32 is looking at Ryanair's adverse impact on a whole range of different sorts of joint ventures, the consideration of the likelihood that potential combinations could have gone ahead absent the minority shareholding, and would in future do so if the minority shareholding cannot be retained by Ryanair.

Then we come to 7.34, which is the very essence of Lord Pannick's case. This is the bit he focused on and it starts, "In addition":

"In addition to these direct effects, we considered that the minority shareholding would be likely to affect Aer Lingus's ability to be acquired, merge with, enter into a joint venture with or acquire another airline even without Ryanair needing to take any particular action for the following reasons …"

The first reason:

"(a) Ryanair's influence, combined with its incentives as a competitor to Aer Lingus, would create significant execution risk for airlines considering Aer Lingus as a potential partner, and would therefore be likely to deter some airlines from entering into, pursuing, or concluding discussions with Aer Lingus."

That is what Lord Pannick rests his whole case on. That was the only bit of this that Lord Pannick took you to. It is, with respect, distorting the focus of the essential concerns that are set out in this report. Of course, it goes on beyond this particular indirect effect:

"(b) potential partners might be deterred from entering into, pursuing, or concluding discussions with Aer Lingus if that combination would result in Ryanair appearing on their own share register …

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

that, of course, being something it has something of a track record for.

As I say, the deterrent indirect effect issues that are raised are in addition. We are not suggesting that they are wholly unimportant. They are part of the report, they are part of the reasoning. But when it comes to consideration of what the IAG bid means, there are two points: one is that the IAG bid is not actually undermining any of the central findings that have been made here, the fact of it; and the second point is, to the extent it is possible to say, IAG were not deterred, this is not a finding that there will never be anyone that will come forward as a bidder.

Of course the third thing that I will come back to is that IAG puts its bid forward knowing that it is not lawful for Ryanair to retain its 30 per cent shareholding.

Then if we move briefly through the remainder of chapter 7, just above para.7.36, we have got the consideration of "Consolidation in the airline industry". The assessment that is being made of the substantial lessening of competition is against the background of thinking about the trends in the industry and the extent to which it is likely that Aer Lingus would be part of that trend. So there is consideration of the trend, and then at para.7.40 onwards we have got the views of the airlines of the likelihood of combination involving Aer Lingus as

part of this trend. At para.7.41 we have got Aer Lingus saying that it remained interested in attracting investment, and its management had identified a need for growth.

Then we come down to para.7.43:

> "Ryanair told us that Aer Lingus had no future as an independent airline because of its small scale, its peripheral location and its repeated failure to expand outside of Ireland …
>
> 7.44 Ryanair said that the only long-term future for Aer Lingus was as part of a bigger, stronger Irish airline together with Ryanair."

So Ryanair's case was, notwithstanding the consolidation trend in the industry, notwithstanding the desire of Aer Lingus to actually want to enter into a combination, Ryanair was saying, "There will be no one interested in Aer Lingus except us, there is a beautiful unity between us". I will not get into any classical references about these matters. "There is a beautiful unity between us, and only we can offer real partnership for Aer Lingus".

If there is anything that has changed in this report it is that Ryanair's contention has been shown to be fundamentally wrong. As it is, of course, the CMA did not accept that. They did not buy the idea of this beautiful unity being the only way in which Aer Lingus could consummate a relationship.

At para.7.46 it notes:

> "Several parties, including Aer Lingus, told us that, in the short to medium term, a transaction involving Aer Lingus and one of the three large European carriers was relatively unlikely, as they were occupied with recent acquisitions."

I am sorry, I have skipped on slightly too fast, but what is said is, "We do consider that there is scope for potential combinations, but in particular in relation to the large European carriers…, that is not where we expect them to come from.

That expectation has not turned out to be correct. "It was relatively unlikely" is actually a perfectly good finding. It transpires, however, that one of the large three European carriers would want to become involved in a transaction with Aer Lingus.

In other words, the CMA rejected Ryanair's approach that no one was interested for very good reason, and actually understated the position in para.7.46. It understated the risk of the impact of the minority shareholding, because it considered it relatively unlikely that one of the major European carriers would seek to acquire Aer Lingus.

Then we get on to evidence of potential combinations involving Aer Lingus in the period since 2006, so this is just picking up the point that I adverted to earlier, that there had, in

fact, been a whole series of discussions since Aer Lingus acquired the minority shareholding, but none of them got through to the stage of a final bid, or indeed to an actual acquisition or combination. So that was being factored in.

Other factors, if we turn over the page to, external page numbering, 120, affecting the likelihood of Aer Lingus being involved in combinations. That is the Irish Government, and I am not sure that we need to deal with that now, given Lord Pannick's position.

The impact on Aer Lingus's effectiveness as a competitor: here there is a consideration of how synergies might be generated through mergers, which of course would make Aer Lingus a potentially attractive merger partner.

Then if we go over the page to 124, where we have got the conclusion of the impact of Ryanair's minority shareholding on Aer Lingus's ability to combine with another airline.

> "7.80 We found that as a consequence of its minority shareholding Ryanair would be able to impede another airline from acquiring full control of Aer Lingus …"

That is still true absent the order being in place, and the conclusions in place.

> "… and that its shareholding would be likely to be a significant impediment to Aer Lingus's ability to merge with, enter into a joint venture with or acquire another airline."

So that is the key finding.

> "This would be likely to act as a deterrent to other airlines considering combining with Aer Lingus."

Whilst it stays in place, that is still true. The fact that IAG has come forward----

THE CHAIRMAN: Your position is that that second sentence is just merely an example of the first sentence, and the first sentence is the overriding point that you want to make?

MR. BEARD: Exactly.

THE CHAIRMAN: In the light of para.7.31.

MR. BEARD: That is the essence of it, but also the fact that you can still have a deterrent - a deterrent can still exist even if some people overcome that deterrent. They overcome that deterrent in certain circumstances, very particular circumstances, i.e. circumstances where Ryanair, by law, is being required to divest itself of the minority shareholding, but the holding of the minority shareholding still operates as a deterrent. There is actually nothing here that is undermining the reasoning and analysis that goes to why it is that allowing Ryanair to have this minority shareholding leads to a substantial lessening of competition, which is, in turn, what leads to the conclusion that you need the divestment remedy.

So nothing in the IAG bid has remotely changed any of that analysis.

I have picked up the points that are then summarised in the remainder of this section already, and you have the main point.

I will not, for the reason, sir, that you have already adverted to, that the focus of this challenge is on mechanism (a), deal with the remainder of the mechanisms. It is important to remember that those mechanisms are relevant both to the CMA's overall finding and to the nature of the remedy that needs to be put in place, because that remedy does need to be comprehensive and it does need to deal with all of those mechanisms. It is after all part of what was the challenge previously, that the approach to remedies was unduly onerous in respect of Ryanair, and that is a challenge that has been rejected.

Whilst I skip over these sections, they are not irrelevant for the purpose of what remedy is put in place, and the logic of it, and the proportionality of it of course.

Just for completeness, the other paragraph Lord Pannick emphasised was para.7.127, so could we just go to that p.134 in the analysis. First of all, it is right to read para.7.126, although Lord Pannick started at para.7.127, which relates to the impact on its overall effectiveness as a competitor, albeit without day to day influence because it is a minority shareholding. Then in para.7.127, we see words that we have seen before and I will not reiterate the point. We have the primary finding in the first sentence, and then identification of the number of ways in which the minority shareholding might impede or prevent, including acting as a deterrent. I will not repeat the remainder of the words. They are words that one has seen before, but I hope, by showing you the earlier sections, I have put them in some degree of context.

The other section that Lord Pannick took you to is at p.142 (external numbering). It is the conclusions on the SLC test. Again, what we see here is really just a reiteration of the points that we have already seen and similar wording, so I am not sure that it is necessary to make further submissions in relation to that. The same points obtain.

There is one other paragraph that I would refer you to, para.7.183 on p.144, and this goes to the point I was making about the range of mechanisms and the range of combinations even within mechanism (a) that we were talking about:

> "Overall, we recognized that we could not predict with certainty the specific mechanism by which a harmful competitive effect would manifest itself (or may have done in the period since 2006). However, on the basis of our consideration of the above points in the round, we conclude that Ryanair's minority shareholding would have led or would be expected to lead to a reduction in Aer Lingus's effectiveness as a competitor."

The only reason I emphasise that is because when we come on to remedies, which are considered in chapter 8, what is being put in place is a set of remedies that deal comprehensively with the mechanisms, not merely dealing with combinations, not merely dealing with one type of combination, and certainly not dealing with one bid in relation to one particular type of combination. Indeed, that would not be the CMA properly discharging its remedial function in the light of the terms of s.35 and s.41 of ensuring comprehensive remedies. I will come back then to the particular points raised by Lord Pannick in relation to undertakings at paras.8.24 and 8.46. They do not take him any further in relation to Ground 2, because those undertakings that he is proffering really only are targeted at one type of bid, and in fact one bid in these circumstances. He has no account of how his proposed undertakings deal more broadly with the range of issues. More generally, that chapter on remedies is carrying out the assessment of the proportionality of the remedy package as a whole in the light of all of those mechanisms. If you do not have a material change of circumstance that causes you to revisit more generally your analysis of the substantial lessening of competition, there cannot be any good basis for revisiting the remedial consequences either.

I am conscious of the time. I was going to move on now to the MCC itself.

THE CHAIRMAN: Let us deal with that at two o'clock. How are we doing on timing?

MR. BEARD: I think I will be probably about an hour, I hope.

THE CHAIRMAN: That takes us to three o'clock. Mr. Flynn, how long do you think you are going to be? I do not want Lord Pannick to be squeezed at the end of the day?

MR. FLYNN: I do not think he will be squeezed, sir. I am not intending to be very long at all.

THE CHAIRMAN: We will sit as long as need be.

MR. BEARD: I do not think Mr. Flynn or I want to be squeezing Lord Pannick at the end of the day!

LORD PANNICK: I am prepared to be squeezed as to 5 per cent, but no more than that!

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Beard?

MR. BEARD: I was going to move on to the MCC Decision itself, which is in the second bundle at tab 40. I am obviously conscious that the Tribunal will have read this. I will try and take it relatively briefly. It is perhaps important to dwell on this, since it is obviously the Decision under challenge. What we have at the start after the introduction and outline of structure at p.843 are the key factors underlying the SLC decision in the report. Here the CMA sets out in summary a number of the points that we have already seen from, in

particular, chapter 7. I will not go through that. I do not think there is any issue that it reasonably summarises those matter. We then have the MCCs put forward by Ryanair, and it is in relation to the first of those that we are concerned. We have the views of the parties and you were read the section on IAG, which I think fairly faithfully repeats the material that is set out in IAG's letter. You have also got comments from the Irish Department for Transport, Tourism and Trade, who made submissions that they did not consider that there was an MCC.

There was a provisional decision that was then responded to, but if we go through to the assessment----

THE CHAIRMAN: Those are all the representations you got, are they?

MR. BEARD: Yes, those are summaries of all the representations, so Aer Lingus----

THE CHAIRMAN: You did not get any representations from anyone else apart from the…

MR. BEARD: I believe not, no. Normally, even if they are brief, they get footnoted in this sort of document. That is it. So Aer Lingus, IAG, Irish Government and one or two from Ryanair.

Then we get to the assessment at para.51. It is specifically referring to the MCC test, and you will see just over the page the duties on the CMA to act to remedy any SLC, any adverse effects which have resulted, unless there has been an MCC or special reason:

"In our assessment we have considered whether there have been any changes in circumstances that materially affect the analysis and conclusions in the Report."

I quoted that to you earlier but did not take you to it.

Then the analysis really starts at para.53. Paras.53 and 54 outline IAG's announcement of its intention to make an offer, highlighting the fact that at the time IAG had made its announcement the Tribunal had dismissed Ryanair's challenges to the prior decision requiring divestiture, the Court of Appeal judgment was pending, but ultimately dismissed Ryanair's appeal. Then para.54 is really summarising the account that IAG is reported to have given earlier in the document:

"IAG told that it first seriously contemplated the proposed acquisition of Aer Lingus in August 2014 …"

so that is after the Decision -

"… bearing in mind the prospect of Ryanair being required to divest its stake in Aer Lingus…as well as the resolution of certain pension issues …"

which, on the basis of today, are no longer at issue.

"IAG's proposal was also made on the premise that it would be able to secure Ryanair's shareholding."

Then para.55 is a further articulation of what IAG had said, and I will come back to that and the letter in a moment.

Paragraph 56 was the paragraph that Lord Pannick very heavily emphasised:

"In our view, Ryanair's argument that the IAG bid constitutes an MCC fails to recognise the relationship between the occurrence of the bid and the CC's Report, including its decision as to what would constitute an appropriate remedy."

It is just worth bearing in mind that the relationship between the occurrence of the bid and the CC's report is that which is being described in paras.54 and 55. So it is not trying to go further than that.

"A bid that was made in the context of and having regard to the CC's Report, including the remedy, is not itself evidence that there has been an MCC. Rather, the bid has proceeded on the basis of a set of circumstances in which the majority of Ryanair's shareholding is required to be sold. The existence of such a bid in these circumstances does not cast any new light as to what would have happened if Ryanair had been permitted to maintain its shareholding, given that the CC's finding of an SLC was predicated on Ryanair maintaining its shareholding in Aer Lingus."

In very simple terms it is saying, "You cannot tell what would happen without the remedy being in place, you cannot say that there would have been a bid if the remedy had not been in place", or more exactly that the report had not been made, the decisions taken as to the finding of an SLC and the decisions taken as to remedy, that, at least before this Tribunal, had been upheld by the time the bid had come.

That is understandable, because although Lord Pannick talks about the situation that the bid is being made at a time when divestment may not be required by the time the bid period lapses, what you have is a very different situation for a bidder where they essentially know that Ryanair has to see the writing on the wall that it will have to divest itself of the relevant shareholding. That, to a potential bidder like IAG, must present an opportunity. It changes the situation which it faces in terms of making a bid for Aer Lingus, and materially does so, and that is what IAG is talking about when it says, "Well, we would not usually contemplate buying a controlling interest in an airline with a significantly ongoing minority shareholding, but we are going to make a bid here in circumstances where we are dealing with a difference situation where there has been regulatory intervention.

More particularly, the Competition Commission, the CMA now, is saying, "We cannot read into this that IAG was not, in fact, deterred, but, more generally, that IAG and others would not face impediments or preventions to their bidding if you have a situation where Ryanair is entitled to retain its shareholding".

This is then developed. This is the part of the Decision that Lord Pannick did not take you to. Here in this part of the Decision the CMA works its way through the key considerations that we have seen in the Final Report, and asks itself whether or not IAG's proposal is consistent or at odds with the analysis that it had conducted previously.

"57. Given the above, we took the view that the circumstances relating to the IAG bid were consistent with the CC's decision in the Report."

They do that on the basis of the following analysis:

"58. The Report noted that there was a move towards consolidation in the airline industry …In the Report the CC found that, absent Ryanair's shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable future, in the trend of consultation observed across the airline industry. IAG's proposal is consistent with the CC's finding in this regard, as is the statement by the board of Aer Lingus …"

Then we go on to 59:

"The CC found that even without Ryanair needing to take any particular action, Ryanair's shareholding would be likely to affect Aer Lingus' ability to be acquired, merge with, enter into a joint venture with or acquire another airline by deterring airlines from entering into, pursuing or concluding discussions with Aer Lingus and by forcing Aer Lingus to seek Ryanair's approval for certain types of transaction. In particular, Ryanair's influence, combined with its incentives as a competitor as to Aer Lingus, would create a significant execution risk for airlines considering Aer Lingus as a potential partner, airlines might be deterred from a combination if it meant that Ryanair would appear on their own share register …"

and so on.

"The CC concluded that the more significant the transaction being contemplated, the more likely Ryanair's shareholding would be to impede … the combination from taking place, as a larger transaction would be more likely to require a shareholder vote.

60. As noted in paragraph 56 above we do not accept Ryanair's submission that IAG's announcement of its intention to make a bid for Aer Lingus is inconsistent with this finding. IAG's Rule 2.5 announcement shows that it intends to bid for Aer Lingus via a conventional

open offer rather than, say, a scheme of arrangement. But IAG has stated that it wishes to acquire the entirety of Aer Lingus's share capital. If Ryanair decides not to sell its shares, the proposed offer will fail, as it will not be possible for IAG to initiate squeeze-out procedures with less than 90% of Aer Lingus's shares…Absent intervention, Ryanair therefore has the ability to prevent the combination from taking place if it so chooses."

So effectively, those key findings in the report are being considered, and the proposal put forward, the bid from IAG, is being considered, and it is being asked: is what is being put forward by IAG inconsistent with those fundamental findings? And, perfectly rationally, and I emphasise "rationally" because that is the relevant test here, the CMA is saying it is entirely consistent. None of this is overturning or undermining the reasoning that went to the SLC finding and the consequential remedial matters in the report.

I should say that although that sentence at the end of para.60 refers to the ability to prevent the combination from taking place if it so chooses, of course, as we go on to see, the same is true in relation to all other potential combinations.

Then para.61:

"As an Aer Lingus owned by IAG would potentially be a stronger competitor to Ryanair, Ryanair also has an incentive to block the combination."

As I showed you back in the report, part of the analysis was that Ryanair had incentives and ability to impede competition. What is being said here is that the incentives are unchanged. It is developed in para.61:

"The CC found that Ryanair's incentives as a competitor would generally outweigh its incentives as a shareholder (where these two roles came into conflict) because of the uncertainty and indirectness by which Aer Lingus's profit would flow back to Ryanair and the fact that Ryanair would only bear a share of the cost of any profits forgone Aer Lingus, in proportion to the value of its shareholding. The announcement by IAG of its intention to make of its intention to make an offer and Ryanair's submissions on this point do not change that fundamental assessment of the balance of Ryanair's incentives, which is consistent with recent public statements by Ryanair's Chief Executive that Ryanair wishes to see details of IAG's plans for Aer Lingus, including possible remedies to competition concerns, before it decides whether to accept the stake. Given the above considerations, we took the view …"

again an assessment -

"… that Ryanair has an incentive to block the combination, if the terms on offer from IAG are unattractive to Ryanair from its overall strategic perspective, including its role as a significant competitor to Aer Lingus."

It goes on at para.62:

"The assessment above indicates that the presence of Ryanair as a significant minority shareholder of Aer Lingus remains a material consideration in relation to the success of IAG's proposed offer for Aer Lingus, as Ryanair retains both the incentive and the ability to impede the transaction."

So it is not a question of the deterrence of the transaction here, because obviously IAG has come forward. It is the ability and incentive to impede.

"The fact that IAG chose to make this bid at this time, after the CC's findings were upheld by the Tribunal, does not undermine or impact on the CC's finding that Ryanair's presence on the Aer Lingus share register gives it the ability to impede combinations with other airlines and that this is likely to act as a deterrent to other airlines considering entering into, pursuing or concluding combinations with Aer Lingus."

Then para.63 relates to Ryanair's suggestions about the Irish Government. I think we can leave those for today. Then para.65 is bringing it back to the general considerations in the report and not just focused on IAG:

"While we have focused above on the circumstances of the proposed offer by IAG, the CC's findings did not relate to the impact of Ryanair's shareholding on possible combinations with specific airlines. Rather, in addition to the finding that Ryanair's shareholding would affect Aer Lingus's ability to combine with another airline by requiring Ryanair's approval for certain types of transaction …"

so the combination issue.

"… the CC found that Ryanair's influence over Aer Lingus combined with its incentives as a competitor, would create significant execution risk for airlines considering Aer Lingus as a potential partner, and would therefore be likely to deter some airlines from entering into, pursuing, or concluding discussions with Aer Lingus. This remains true."

Ryanair does not like that. It does not like that assessment at all. It is not an irrational assessment. It is a perfectly sensible assessment. The fact that one particular bidder has announced its intention to make an offer for Aer Lingus, despite the heightened execution risk, and we know that IAG has made it a condition of any bid that it receives acceptances in respect of Ryanair's shares, it does not undermine the findings in the report that some airlines might be deterred from contemplating a combination with Aer Lingus. For

example, the report cited evidence that another airline had broken off negotiations with Aer Lingus in 2013 when Ryanair launched its third bid for Aer Lingus.

"Should the proposed offer by IAG not succeed, for any reason, then the adverse impact of Ryanair's shareholding on the prospect of other possible combinations would remain while Ryanair remains a significant minority shareholder in Aer Lingus."

I am sorry to go through that paragraph again because Lord Pannick took you through it, but I think it is very important to have that in mind, that what was being done here, albeit in a single paragraph, is that it is going back to the entirety of the analysis in the previous report and saying that it still obtains, and that was a rational conclusion to reach.

"68. We recognise that there may be a range of factors which influence potential bidders. We do not consider, however, that any of the factors raised by Ryanair in support of an MCC demonstrate that Ryanair's shareholding in Aer Lingus was anything other than a significant impediment to Aer Lingus's ability to compete, through a sale to or combination with another airline."

It is not about deterrents here, certainly not deterrents alone, this is about impeding and preventing.

Then there are references to the Irish Government and certain pension issues. Then just at the bottom of para.66:

"We also saw no reason to disbelieve, as Ryanair had suggested we should …"

so Ryanair suggested that IAG was making stuff up -

"… IAG's statement that one of the factors bearing on its decision to bid for Aer Lingus was that Ryanair was to be required to divest its stake. As we have noted, IAG's position was consistent with its previous representations to the CC, and its wish to squeeze out any remaining shareholders."

I do not know whether it is useful then just to divert back to the letter. It is just worth bearing in mind what was actually being said by IAG. Obviously it is repeated in this report and it has been properly considered. It is at tab 24 in the first bundle. These are points that have been traversed in the MCC Decision that I have already referred to. If you look at the first substantive paragraph:

"IAG first seriously contemplated its proposed acquisition of Aer Lingus in August 2014, bearing in mind the prospect of (a) Ryanair being required to divest its stake in Aer Lingus …"

In other words, that the Final Report had been made, and in addition the prospect of certain pension issues being resolved. Following two rejected proposals, IAG made a third bid in January, with a higher value:

"IAG's proposal is conditional on, among other things, the receipt of irrevocable commitments from Ryanair…and the Minister for Finance of Ireland…to accept the offer."

So it will not go ahead without those. Ryanair's consent is a necessary condition. Ryanair's provision of its shareholding is a necessary condition.

"The Aer Lingus board announced that it would be willing to recommend the offer on these terms …"

Then we have got the further paragraph, which is that IAG explained some two years ago to the Competition Commission that it would not usually contemplate buying a controlling interest in an airline with a significant minority shareholding:

"Furthermore, in the absence of support from Aer Lingus' largest two shareholders, IAG will not be able to meet the 90% acceptance condition to be able to 'squeeze out' any remaining shareholders and take full ownership of Aer Lingus. An irrevocable commitment from Ryanair to sell to IAG the entirety of its shareholding in Aer Lingus is therefore a prerequisite for IAG being willing to proceed with its current proposal …"

So essentially, in that paragraph it is reiterating what it said previously. It goes to reinforce why it is there is no material change here.

Could you just keep that open for a moment and go back to the MCC report, 67? I just draw to a conclusion the findings on the substance:

"Given the above assessment, we decided that the announcement by IAG of its intention to make an offer, and the Irish Government's consideration of it in accordance with the criteria noted during the inquiry, do not materially affect the CC's findings in the Report …"

an entirely rational conclusion -

"… and therefore do not amount to a change in circumstances that would cause the CMA to reconsider implementing the remedies set out in the Report."

So they are applying quite properly the material change of circumstances test in relation to this assessment and concluding it is not met here. There is no MCC by reference to the IAG bid.

THE CHAIRMAN: You rely on this in relation to the last paragraph.

MR. BEARD: I am going to come on to the last paragraph now:

"68. Finally, we do not consider that the comments made by IAG, Aer Lingus and Ryanair on the execution of the remedies identified in the Report demonstrate an MCC."

The reason I refer to this is, Lord Pannick said there was not any consideration of these matters. It is just wrong:

"We did not consider that the comments showed an inconsistency between the CC's decision, including in relation to remedial action, and the IAG bid or how it might take effect. Rather, we consider that these comments are made with specific regard to the practicalities around the timing and structure of the proposed IAG offer and how it could be accommodated within the Divestiture Trustee's mandate. Therefore we consider that these factors do not constitute an MCC."

These are the matters upon which Lord Pannick placed great reliance: we had not considered the third paragraph in the IAG letter, and we had not considered these matters relating to Divestiture Trustees. We had. We say that, because of the nature of these matters, we, therefore, considered that these factors do not constitute an MCC.

"We assessed these comments in the context of the proposed changes to the proposed Final Order consulted on in November 2013. We published a working paper on our website on 17 April 2015 that looked at these comments in further detail together with an amended proposed Final Order upon which we invited comments."

Let us go back to the IAG letter, because the principal submission is that somehow IAG is suggesting here that it does not want a final order, and therefore this is a factor we have missed. If IAG does not want a final order, that is surely some sort of material change of circumstance that should have been considered by the Competition Commission, if the very bidder does not want this order. If we look on p.569:

"As regards the proposed appointment of a Divestiture Trustee to effect the sale of (the majority) of Ryanair's shareholding, we encourage the CMA to refrain from taking this step for the time being and instead to grant its written consent to Ryanair granting an irrevocable commitment to accept IAG's proposed offer in respect of the entirety of Ryanair's shareholding."

Just dwelling on that sentence, this is pre-supposing that the CMA has the power to take these steps, which is part of the remedial order - in other words, putting in place a Divestiture Trustee. What IAG is saying is not, "We do not like the order, just please do not put in place the Divestiture Trustee for the moment". Then it is going on and saying, "Please grant your written consent to proceeding without a Divestiture Trustee so long as Ryanair gives an irrevocable commitment to us that it will sell the shares to us". That is perfectly understandable from IAG's point of view. The only basis upon which the CMA could relevantly be granting consent or doing anything is when it has an order in place

pursuant to the remedy structure that it has decided is necessary because of the SLC. So the predicate of IAG's analysis is, "You have got your remedy structure in place, but please can you use the flexibility within it to postpone the Divestiture Trustee so that we can get Ryanair on side with us with an irrevocable commitment", not, "We do not want a final order" at all.

We see that further on:

"Only if the CMA subsequently ascertains, after having granted such consent, that Ryanair has failed to give such an irrevocable commitment, should the CMA proceed to appoint a Divestiture Trustee."

In other words, "if Ryanair do not play nice, we want to go back to the same scheme we have got under the final order", not, "We do not want the final order".

"We therefore urge the CMA to proceed to grant such consent, so that Ryanair may provide an irrevocable commitment to IAG."

So the fundamental point about this final paragraph is (a) it was considered, (b) it does not do anything like what Lord Pannick is suggesting it does.

If we then go back to tab 33 in the second bundle, what we find is the working paper that is referred to in para.68. The working paper comments on the draft final order. So not only did we consider it in the MCC and decide how we were to deal with these matters, we dealt with these matters in some detail in the working paper. You can see that, in particular, if you turn on to p.761 in the external numbering. If you just read para.28 you will see that that rather closely reflects the final paragraph of the IAG letter I have just been looking at.

So that is the view of IAG. Obviously this is in the context of the impact on the IAG possible offer that is being considered here in relation to the final order. So it is part of the CMA's consideration.

I am not going to go through this in great detail, but if one turns on to p.763 you have a sub-heading at the bottom, "Our assessment of issues raised in relation to the execution of the divestiture order".

I am going slightly too fast, at the top of p.762 you should note that in consideration of the matters concerning the final order, the impact on other possible offers that is being considered. Then we go to the assessment of issues raised in relation to the execution of the divestiture order, and there was consideration of IAG. If you go para.42 there is consideration of various comments about lack of flexibility in the final order.

"We re-examined the draft Final Order and in particular the terms of the Divestiture Trustee Mandate and have highlighted below that flexibility has been built into a number of the key clauses…"

If I can just go down to (e):

"Fifth, in terms of timing, if the CMA considers it appropriate and necessary, in the light of circumstances at the time, to defer the appointment of the Divestiture Trustee, the Divestiture Trustee would not need to be appointed immediately upon commencement of the Final Order. Further, the definition of the divestment period allows for its possible extension by the CMA. For example, should Ryanair seek the CMA's consent to enter into an irrevocable commitment to sell its shareholding in the context of a public bid for Aer Lingus, the CMA could consider whether there was a valid reason to defer the appointment of the Divestiture Trustee for a short period of time."

So these matters were closely considered by the CMA. They were not considered to amount to an MCC for very clear reasons, but they were taken into account in the consideration of how the final order should be drafted.

I think that probably deals with the MCC decision itself, because the following passages relate to the passing of time. Then you have got "Final conclusion", which simply wraps things up at paras.72 and 73.

In those circumstances, all of the relevant factors that have been raised by Ryanair have been carefully scrutinised by the CMA. They have been subject to consultation through a provisional decision and they have been found not to amount to changes of circumstance which go to undermine the reasons for the findings made in the Final Report that go to justify the remedy that is put in place.

I should pick up in relation to the remedy itself the issues that Lord Pannick raised, in particular in relation to his Ground 2. In relation to Ground 2, before I get to it, it is probably just best if I summarise our position in relation to Ground 1 and then move very briefly on to Ground 2. You have seen from what we have said in relation to the MCC that we do not have a bid here which has been made in circumstances where Ryanair is permitted to maintain its shareholding. Not only that, IAG told the CMA that it first seriously considered making a bid bearing in mind the remedy. That is not simply a coincidence. It is taking into account the legal obligation to engage in that divestment. We do not simply have to draw that as an inference because that is what IAG told the CMA. We have seen from reading on that the proposal from IAG was conditional on irrevocable commitments and is otherwise entirely consistent with the previous position that was

adopted by IAG. Ryanair says that, as things have happened, IAG has to negotiate with Ryanair, and that it has not been deterred from bidding. We recognise in the circumstances it has not been deterred from bidding, but the question is, if Ryanair were entitled to maintain its shareholding, would it or others be deterred from bidding, and we say there is no good evidence to suggest that the conclusions we have reached in that regard, and of course in relation to impeding and prevention of bids has been changed.

I should just pick up one point in Ryanair's skeleton. There is a suggestion at para.58 that the CMA has claimed that IAG would not have made the bid without CMA intervention. That is not the position. We have made our position clear in our defence at para.81. The point we make is rather the other way round. It is that Ryanair's challenge assumes that the same bid would have been absent intervention, and we say that assumption is just unsupported on the evidence.

So, overall, we say Ryanair's argument does not undermine the primary findings in the Final Report, particularly in relation to Ryanair being able to block - to impede or prevent - a combination, and it does not say anything about any of the other mechanisms.

Secondly, the CMA's reasoning as to why a bid made after and in the light of its findings does not undermine the findings in this report is coherent and logical and entirely rational, as set out in the MCC decision. Thirdly, the CMA's conclusions are in any event supported by the evidence provided by IAG as to what its reasons were for making the bid when it did so.

So, with those matters in mind, I just move briefly to Ground 2, which is the argument that you have a situation where, even if there is not an MCC, because I think we have to proceed on that basis, you can carry out, or you are obliged to carry out, some sort of proportionality assessment in relation to the remedies.

The first and most obvious problem with that is, if you have got no MCC, you have got no relevant change. In fact, the CMA does not have any basis for varying its decisions in relation to SLC and remedies, because that is the statutory structure that we are dealing with here. Of course, the MCC test under s.41 is only concerned with remedies. It is not concerned with the substance of the report at all. Parliament has set down a threshold that applies when you are considering remedial issues, not anything to do with substantial issues at all. As I said earlier, what you do not have here is some sort of eternal obligation to carry out an ever-running proportionality assessment. That is precisely what is not permitted under the scheme of the Act.

In any event, there is simply no basis for departing from the reasons as to why it is that the remedies that were put forward were flawed. There is no reason to accept what are, frankly, inadequate undertakings that have not been proffered afresh, but were considered in some detail in the report itself.

It is just useful then to turn back to tab 3 in the first bundle to look at those remedies. It is p.145 in the external numbering. So here we have the remedies section. I will try and take it relatively briefly. The analytical framework for the assessment of remedies is set out, and obviously there were arguments about this in previous proceedings. If you turn on to p.148 there is consideration of remedy options regarding the then CC's remedies notice, talking about full divestiture, partial divestiture and behavioural remedies.

Ryanair's proposed remedies are at paras.8.19 through to 8.22. Those were the initial proposals:

"8.24 Subsequently, and in response to the CC's Remedies Working Paper, Ryanair said that given its proposed binding undertakings above, the CC's only remaining concerns seemed to relate to highly specific ways in which a theoretical acquirer of Aer Lingus might wish to structure a transaction (ie a takeover offer rather than a scheme of arrangement), and concerns that such an acquirer might then have about perceived difficulties in obtaining 100 per cent of the company (if it could not squeeze out Ryanair). Ryanair proposed the following additional remedies in order to remove this perceived concern …"

Here we come to para.8.24(a), which is that upon which Lord Pannick placed emphasis:

"an undertaking (or order) to accept an offer for its shares if another EU airline achieved acceptances representing more than 50 per cent of Aer Lingus's shares."

It is just worth noting that Ryanair's approach is, "All you have got left after we have given these other undertakings, is some very highly technical specific mechanisms that you are concerned about, and so we will provide this very, very narrow particular sort of undertaking to deal with these matters".

What the CC did was, it considered this, it considered all of the undertakings together, including this specific undertaking, and decided they were not a sufficient basis to proceed.

You see that in the discussion of the effectiveness of Ryanair's proposed remedies, which is just over the page. It is a section that runs for a little while, but if you start at para.8.29:

"We considered whether any or all of Ryanair's proposals would be effective in remedying the SLC that we have found.

8.30 In Section 7 we concluded that one of the mechanisms of particular significance to our SLC finding was the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a venture with, or acquiring another airline. We have assessed, in the first instance, whether Ryanair's proposals would be effective in addressing these concerns."

So it is focusing just on the combination of stuff at first.

"8.31 We noted that Ryanair's proposed remedies contained both behavioural and structural elements. As set out in paragraphs…"

and in particular I just note para.8.24(a), so it is being specifically considered -

"various elements of Ryanair's proposal are intended to commit it to supporting, or not opposing, certain types of combinations involving Aer Lingus under certain circumstances.

8.32 We noted that Ryanair's proposed remedies were limited to certain forms of combination effected through a scheme of arrangement or a general offer and were limited to combinations with other EU airlines (until such time as non-EU airlines are permitted to acquire a majority stake in EU airlines).

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

Then it gives some examples, and then at para.8.34, I just invite you to read this:

"We do not consider it to be either feasible or necessary to catalogue all potential future transactions that might involve Aer Lingus and another airline. However, we believe there to be a number of different ways in which a transaction between Aer Lingus and a potential partner might be structured. In reaching our SLC finding, our concerns were not confined to combinations with EU airlines …"

Then it gives some examples and it considered various remedies, and it talks about Aer Lingus's submissions.

Then at p.154 we get to the conclusions in relation to these matters. At para.8.46:

"In a dynamic and uncertain sector such as the airline industry, it is inherently difficult to predict the specific forms of combinations or other matters of strategic importance that might come before the Aer Lingus shareholders in AGMs or EGMs in the future. In Section 7 we found that Ryanair's shareholding constrained Aer Lingus's ability to implement its own commercial policy and strategy in a variety of ways. This makes it inherently difficult to design behavioural remedies that would cater for all eventualities. Looking specifically at the issue of combinations, whilst Ryanair's proposed remedies seek

to address some of our concerns regarding certain forms of combinations by way of a scheme of arrangement or general offer, they do not address other forms of combination available to Aer Lingus and its potential partner's choice of combination."

Then para.8.47:

"We also conclude that Ryanair's continued presence on the share register under certain forms of combinations would be likely to deter potential partners proceeding …"

and so on. Then para.8.48:

"We considered whether these concerns could be addressed by means of amendments to Ryanair's proposed remedies (such as reducing the applicable acceptance level) or imposing a wider prohibition on voting… We took the view that any such amendments could not address all our concerns …

8.49 In the light of the above assessment, we conclude that the remedies proposed by Ryanair would not be effective in addressing the SLC."

It is striking that in relation to these matters and the supposed challenged to the proportionality of remedy, when it is specifically emphasised in the MCC that the concerns that the CMA has are not just in relation to combinations, they are not just in relation to particular types of combinations. They are not just in relation to the combination potentially with IAG. They are in relation to all sorts of relationships with all sorts of people specifically dealt with in para.65. So far as we understood it in oral submissions, Lord Pannick's account of how you deal with it simply 'wait and see'. There is no good basis for the challenge on proportionality to the remedies. There is none as a matter of law, given that there is no MCC; there is no good basis for a roving proportionality consideration, but as it is a proportionality consideration was very fully carried out by the Competition Commission in its Final Report and it specifically considered the undertakings to which Lord Pannick has referred and relied upon today. There is nothing in Ground 2, just as there is nothing in Ground 1 of Ryanair's challenge today.

THE CHAIRMAN: We dealt with the undertakings last time?

MR. BEARD: Yes.

THE CHAIRMAN: Nothing really has changed materially from that?

MR. BEARD: Nothing has changed. I am sorry, I have not gone to the previous decision.

Obviously in the Tribunal's previous decision there was a whole consideration of the----

THE CHAIRMAN: Yes, we dealt with that last time.

MR. BEARD: Yes, so I had rather left that for today, but I am happy to deal with it. Unless I can assist the Tribunal on any matters----

THE CHAIRMAN: Let me just have a look at my notes. (After a pause) No, we have got no further questions.

MR. BEARD: I think there may be one or two issues on interim relief, but they perhaps can wait until the end.

THE CHAIRMAN: Yes, I think we will deal with interim relief at the end.

MR. BEARD: I am grateful.

MR. FLYNN: Sir, members of the Tribunal, we are here because the pretext is the IAG bid, and that bid is made on the terms of the Irish Takeover Rules which you asked me to have a look at with you. That is in the last tab of the authorities bundle, tab 17.

THE CHAIRMAN: They say what one would assume they say.

MR. FLYNN: I say two things, sir: firstly, I am told that they are substantively identical to the UK Rules, which you will be familiar with; secondly, I am accompanied and instructed by Mr. Donal Moriarty, who is executive counsel of Aer Lingus, so if there are particularly questions we can----

THE CHAIRMAN: Yes, we can get the answer from him.

MR. FLYNN: We have someone to ask, and he is intimately involved in the current bid.

The points on which I thought you might be interested are the timetable, the merger regulation condition and the possibility of rebidding.

On timetable, if you turn to, the pagination is slightly odd, the page that has 9.3 in the top left hand corner, it is rule 31 (unfortunately the document is not itself paginated). Rule 31.1 is the first closing date. This runs from when the offer document is despatched (or is posted, I think we say). An offer is required to be open for acceptance until essentially at least the 21st day from posting.

THE CHAIRMAN: Just give me your dates then as we go through. The recommended cash offer is 19th June, is it not?

MR. FLYNN: Yes.

THE CHAIRMAN: It is open for acceptance not earlier than----

MR. FLYNN: It is required to be open for acceptances until at least day 21. In fact, it provides in the document that it is open until 16th July, which is the date that Lord Pannick gave you earlier, and quite correctly.

Under rule 31.2, the offeror can extend that date and state the next closing date for acceptance. So it is open to the offeror to extend the offer beyond the date specified in the offer. There is a lot of wording there, but it is probably not directly relevant for your purposes.

I then invite you to turn on to p.9.6, and rule 31.6, final closing date, satisfaction of acceptance condition, and so forth. That says:

"(i) Except with the consent of the Panel, an offer (whether revised or not) shall lapse unless it has become unconditional as to acceptances by 5.00 p.m. on the final closing date."

The final closing date is, I am instructed and we do not have the definitions, day 60, so the 60th day from posting, which is the August 18th date which Lord Pannick also gave you earlier. Although it says, "Except with the consent of the Panel", that essentially does not happen, because the Panel in Ireland, as does the Panel here, takes the view that offers should be open for a particular time and you cannot have an open-ended offer.

THE CHAIRMAN: Where is the provision that says that the final closing date cannot be later than day 60?

MR. FLYNN: That is the provision that says it cannot be later than the final closing date. What I regret is apparently not here is the definition that says the final closing date is day 60.

THE CHAIRMAN: That is the one I was looking for.

MR. FLYNN: I have the wording. I think what we can probably do is provide an additional page.

THE CHAIRMAN: If you can provide the additional page, that is fine.

MR. FLYNN: That is probably easier, but anyway I have the wording here, and "final closing date" is defined as the 60th day from despatch, or day 60.

Those are the outlines on timing.

In relation to merger control, if you turn back within the document to p.4.12 (quite a way back), rule 12. You will see there a rule headed "The Competition Act and the European Commission". That is obviously the Irish Competition Act. If you look towards the bottom of the next page, 4.13, you will see a little (b):

"If an offer would give rise to a concentration with a Community dimension within the scope of the European Merger Regulation, it shall be a term of the offer …"

You will be again familiar with this. It is essentially if the European Commission initiates what are called Phase 2 proceedings, then the offer is required to lapse. So that is operation of law.

For your information, sir, the current position in Brussels under the Merger Regulation is that IAG has offered certain remedies, as they are called, and those are being market tested at the moment, which leads to a timetable for the Commission's decision under Article 6, which is whether or not to initiate a Phase 2 procedure on 15th July, so the day before the first closing date.

THE CHAIRMAN: We would know by the 16th where we stand on that?

MR. FLYNN: We should know quite a bit by 16th July, one hopes, yes. The Commission must decide by the 15th. IAG will have a decision to take at that point.

THE CHAIRMAN: So that just is another potential wheel that can fall off. The Supreme Court, this application and the European Commission's merger review.

MR. FLYNN: That is right. We do not seem to have had any news on that. This is indeed a wheel that could fall off, precisely, in that bids come and go. There is no indication that that wheel will fall off, and everyone is hoping that it will not, at least those behind me are. Others may be hoping that the car will have fewer wheels than are necessary for driving.

Then, finally, rule 35, which is at p.10.3, so towards the end of these extracts, "Restrictions following offer", delay of 12 months, and again this will be familiar to you, sir. This is essentially if an offer has lapsed, and it may lapse either because of referral to phase 2 or simply because not enough people take up the offer. There is basically a 12 month purdah before there can be a re-bid by the offeror or persons associated with the offeror.

I do not know if there are other provisions that I can help you with?

THE CHAIRMAN: No, that is fine, thank you very much.

MR. FLYNN: I should also say, of course, that in our hearing bundle you have the extracts from the IAG offer document, and you can see how those conditions are reflected in that document. That bid having been launched the question for the Tribunal today in essence is what is the effect of that bid on the substance or the proportionality of the remedies in the final Report?

As to the material change in circumstances issue, Lord Pannick was gracious enough to recognise some force in the way we put it in para. 14 of our skeleton, indeed, I think he came close to adopting it. It does not matter whether you set the materiality threshold high or low, so long as in the ultimate analysis the CMA imposes the same remedies that it identifies in the final report, save to the extent to which changed circumstances or other special reasons justify deciding differently.

If that is the right way to approach this I think it collapses down into the rationality challenge and, in my submission, to assess the rationality challenge we have to be very clear as to what SLC the remedy is directed at. I know you have looked at it several times, and you, sir, probably have it engraved in your memory, but could I just draw the Tribunal's particular attention to para. 7.31 on p.40 of the final Report in tab 3. There are lots of SLCs found in this report, but this paragraph deals with the particular circumstance of possible acquisitions of Aer Lingus by another airline.

"We found that Ryanair's minority shareholding would give it the ability to impede possible acquisitions of Aer Lingus by another airline. Significantly, Ryanair could prevent a bidder from acquiring 100 per cent of Aer Lingus by choosing to retain its shares. If Ryanair decided not to sell, an acquirer would need to accept Ryanair remaining as a significant minority shareholder, with different incentives to its own and with, for example, the ability to block special resolutions and the entitlement to the proportionate share of dividends. . ." and that would significantly restrict the acquirer's ability to integrate. That is the particular form of SLC the Competition Commission was concerned with. The mischief they found is Ryanair's ability essentially to decide whether or not to accept an offer of that nature, and they found - as Mr. Beard has stressed - that Ryanair would have incentives as a competitor largely outweighing its incentives as a shareholder. Nothing at all has changed in that regard. In our submission there is no material impact proceeding from the IAG bid. The CC was never saying that all the bids would definitely be supressed; it is not a surprise to see a bid, still less was it saying that there would be no discussions. The Report is full of examples of discussions as Ms. Potter pointed out, they just have not come to anything.

THE CHAIRMAN: At the time of the 2013 report, it was perceived by your client that it was unlikely to be one of the main European carriers.

MR. FLYNN: It was.

THE CHAIRMAN: But then you say that was a correct assessment at the time, it was unlikely but unlikely things can happen.

MR. FLYNN: Unlikely things can happen, things change, after all this has been going on for a while; we may have underestimated their appetite. Things change. The point is whenever a bid comes for Aer Lingus, and from whomever it comes, Ryanair has the choice whether or not to sell; that is the mischief.

In my submission there is no basis for saying that the original remedies were disproportionate. As you know, the statutory test is they have to be comprehensive. They have to address all the forms of SLC which the Competition Commission found, and that includes depriving Ryanair of the ability to decide whether or not to decide that sort of offer, whether or not to sell, that is the mischief, the fact that they can decide whether or not to do it. That is why we say, in relation to this bid, they are the kingmaker because it has today, or at least it claims to have, that ability. It is certainly acting as if it has that ability. Of course, as Mr. Beard has already pointed out, that is despite the fact that there is a legal order requiring it to divest. It has chosen not to comply. There are letters on the file, which you have seen, saying: 'we consider the order to be unlawful and we will not comply with

it'. That is their position. It makes life difficult for the CMA, it makes life difficult for Aer Lingus and it makes life difficult, as it happens, for IAG.

My submission is that this is really just a manifestation of this SLC that the Competition Commission found, and that the CMA is seeking to remedy. In fact, it is happening in real time, it is happening today, it is happening in this room. This is the SLC. Ryanair is deciding whether or not to sell and, of course, at the moment not showing very much indication of willingness to do so. That is precisely the problem that the CMA identified; it is precisely the problem it sought to remedy and you see how Ryanair's incentives are playing out. I am going to disappoint Lord Pannick by not taking you to press releases that say how long they think they can do this for. I would not think of mentioning the period.

THE CHAIRMAN: You have mentioned it in your skeleton though! (Laughter)

MR. FLYNN: I have mentioned it in my skeleton, I am just going to disappoint him by not mentioning it now! It is all there, and Lord Pannick likes to say that they are jury points, but they are the reality points. That is what is happening, that is what they are doing, and you can see it.

Really, unless I can help further, sir, we have our skeleton, we have heard extensive argument from the CMA, with which we agree, and I do not think there is much that I can usefully add.

THE CHAIRMAN: You are realistic enough to know that I am not going to be swayed by jury points anyway.

MR. FLYNN: No.

THE CHAIRMAN: You have been very precise and very helpful, so let us hear what Lord Pannick has to add.

MR. FLYNN: Thank you.

LORD PANNICK: Mr. Beard began by emphasising that the CMA takes a final decision when the report is published, in this case when the CC report was published. Yes, but that is all subject to s.41(3) at the stage of imposing a remedy.

Mr. Beard, secondly, emphasised that the CMA enjoys a broad margin of appreciation. Yes, but the CMA must consider all relevant facts. It must do so rationally, and we say it must do so proportionately.

As to the meaning of material common ground seems to have broken out. There appears to be agreement that a material change of circumstances is not confined to a change of circumstances which, in the view of the CMA, would lead to a change in the conclusions or remedies.

THE CHAIRMAN: That must be right.

LORD PANNICK: It may do so, but then again it may not.

THE CHAIRMAN: There is a lot of jockeying around on that point, but I think you have all come to the same position.

LORD PANNICK: I think we have, yes. I understood Mr. Beard to support that position. I understand Mr. Flynn to do so. That is certainly our position. In opening the concept of material change of circumstances, as I submitted this morning, it is the condition precedent. Mr. Beard then moved on to more controversial topics. He took the Tribunal through a number of passages of the report with the objective of persuading you that the Competition Commission decided more than that Ryanair's shareholding would, or could, deter a bid from other airlines. Plainly, the Competition Commission did decide a number of other matters. There is no dispute about that. However, we say the parts of the report which conclude that Ryanair's shareholding would, or could, deter other airlines from even considering a bid, and would deter them from bidding, are important parts of the report. It is precisely for that reason that when last time round we complained about a breach of procedural fairness this Tribunal and the Court of Appeal considered the merits of the complaint that there was a breach of procedural fairness in the specific context of that part of the CC report, which addressed the question of whether Ryanair's shareholding would, or could, deter other airlines from bidding for the shares in Aer Lingus, because that was our complaint. The CC in that part of the report said 'We have spoken to particular airlines. They have told us this and that'. We said: 'Who are they?'

Neither this Tribunal nor the Court of Appeal said: 'That does not really matter because it is only a little part of the report.' This Tribunal and the Court of Appeal accepted that it was a sufficiently significant part of the report that we were entitled to procedural fairness in that respect. We lost because it was held that we had been told the gist of the material in that respect.

I emphasise I am not suggesting that this was the only part of the finding. I am not even suggesting it was the most important part of the finding, I do not need to go that far. I am saying it was a significant part of the reasoning of the CC and, therefore, if there is a material change of circumstances in relation to that part of the report consequences follow.

THE CHAIRMAN: Can we just test that by looking at the report again?

LORD PANNICK: Of course.

THE CHAIRMAN: Tab 3. When we look at para.7.34 you say that is all in terms of deterring, or "likely to deter some airlines from entering into, pursuing, or concluding discussions with Aer Lingus"?

LORD PANNICK: Yes.

THE CHAIRMAN: And it comes up later as well, does it not?

LORD PANNICK: It comes up at para.7.127, that is where the phrase "particular significance" is. So the CC regarded it of particular significance that Ryanair can impede or prevent Aer Lingus being acquired by others, or merging with others. Then they say there are a number of ways in which that may occur and they specifically refer to the deterrent effect. That is what we complained about, as I say, in relation to procedural fairness last time, the deterrent to other airlines. There is other similar language at----

THE CHAIRMAN: What I am trying to analyse is that if you look at para.7.31, which we have looked at, they found that: "Ryanair's minority shareholding would give it an ability to impede possible acquisitions", etc. Then we go to para.7.127, they form a view that: "the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired. . ." and they say one way of doing it is they just do not sell their shareholding, they remain on the register.

Then they go on to look at this example: "We identified a number of ways" and they talk in terms of deterring other airlines from making a bid effectively, or discussing bids. You say that that bit, looking at experience since the final Report, has actually been proven not to be accurate because look what has happened, you have actually got a bid by someone and they had entered into discussions before that with Aer Lingus, and in particular one of the major European airlines which, in this report, was premised on the basis that that was very unlikely in the foreseeable future.

LORD PANNICK: Yes.

THE CHAIRMAN: But then you recognise that is only one limb - you may say we can debate how important that limb is - it is one limb of a more broad conclusion which is at the beginning of para.7.127:

"In reaching our conclusion, we formed the view that the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired. . .was of particular significance."

What they are saying is 'you can prevent an acquisition either by just being there and deterring anyone from having discussions or concluding discussions and making a bid', that is one, and looking at this report that is quite an important one. But you can also prevent it

by, at the end of the day, having a bid, for example, that is conditional upon you being taken out.

LORD PANNICK: I entirely accept that. The reality is that the IAG bid is not just relevant, it is not just a material change of circumstance, in relation to no deterrence that they have come forward, they, IAG, plainly would not be doing this unless they thought they had a realistic prospect of achieving their objective, which is to complete the combination, and I say that they are doing that, they come forward in August with the change of mind. They come forward in January with the bid. In May the bid becomes irrevocable, I will come to the reason I say that in a moment, all at a time when they, IAG, have no guarantee whatsoever that the CC report is going to be implemented. They do not know in January, they do not know now, but they are still coming forward, they are still hoping and expecting, otherwise they are wasting their time, that this is going to be a successful bid and - I will come back to it - they are also saying that they are sufficiently confident that they can reach agreement with Ryanair that they specifically ask the CMA not to appoint a divestment trustee.

Now, all of that, I say, is highly material, not just to the bit about deterring people from coming forward, it is highly material to the general point that is being made in that paragraph by the CC. That is the way I put it.

PROFESSOR MAYER: Can I just clarify? You are not saying that you do not think that there is any prospect of it succeeding, but you are saying that they cannot be absolutely sure, but that does not seem to me to rule out the prospect of them making a bid on the possibility - a reasonable possibility - that it will succeed?

LORD PANNICK: No, I entirely accept that, but what is striking is that they are not saying to the CMA in their letter (the final paragraph) 'It is absolutely crucial that you, the CMA, proceed as quickly as possible to implement a divestment trustee mechanism because without it Ryanair are standing in our way.' That is not the position. There is no other material before this Tribunal. The only material from IAG, who have chosen not to intervene, is that letter.

THE CHAIRMAN: I think we have got enough people in court!

LORD PANNICK: I am not encouraging more people, but my point is that that is the only material from IAG and I say that on the basis of that material there is a very strong case that the premise upon which this report is based, whether it is para.7.127, or 7.178, whichever of the paragraphs - which are very similar - that one looks at, there has been a material change of circumstance. To say: 'There is no relevant change here' is not something that needs carefully to be looked at, as in my submission it is unsustainable. The fact that IAG have come forward is highly material.

Professor Mayer this morning asked the question: would Mr. Beard accept that there is a material change of circumstances if IAG had said to the CMA that they are prepared to negotiate with Ryanair. I hope I correctly understood the question. That was the question. My friend, with great respect, gave a very unclear answer.

In my submission, the answer to the question is plainly: 'yes, that would be a very significant new and relevant factor', and on the basis of the only information we have from IAG, that is their letter, the final paragraph, in my submission, amounts to precisely that, that IAG for their part, as at the date of that letter, and nothing has changed since, there is no further information, are prepared to negotiate with Ryanair in relation----

PROFESSOR MAYER: Could I just follow up on that?

LORD PANNICK: Of course.

PROFESSOR MAYER: Presumably it is rather different negotiating in circumstances where there is potentially a divestiture order that is going to be imposed than one where there is not.

LORD PANNICK: Only if you are confident that the divestiture order is going to be implemented during the period of your bid. When they were writing that letter the letter was being written before they, IAG, could have that confidence. It is a letter, tab 24----

THE CHAIRMAN: It is 11th March.

LORD PANNICK: It is a letter written on 11th March and, at that stage, they could have no confidence whatsoever. They do not know what attitude the CMA is going to take on the MCC, indeed, the letter is a contribution to that process. The process is far from complete at that time in relation to the appeal to the Supreme Court, the application. Indeed, IAG committed themselves to the bid not, as I wrongly suggested this morning, after the MCC decision, they committed themselves to the bid before the MCC decision. I say that because the committal to the bid was on 26th May (vol.2 tab 37). I will not read it out but that is the document dated 26th May, it is the offer.

Under the Irish Rules, which Mr. Flynn helpfully took the Tribunal through, there are other provisions. We go back to authorities tab 17 for the Rules, and if we look in that at Rule 2.5, the numbering at the top of the page is 1.7: "The Announcement of a Firm Intention to Make an Offer", that was on 26th May. You can announce a firm intention to make an offer, and if you turn over, please, to p.1.9, at para. 2.7 the "Consequences of a Firm Announcement":

"Except with the consent of the Panel, when there has been an announcement of a firm intention to make an offer, the offeror shall proceed with the offer unless . . ."

and there are the exceptions. So, they, IAG, committed themselves on 26th May, which was before the decision of the CMA.

So, sir, my answer to your question is, "yes" in theory, but in practice what is being done by IAG here is to make an offer to be prepared to negotiate with Ryanair at a time when there is a long way to go in legal terms in relation to whether the CC report and the divestment order are actually going to be implemented in time to have any effect on that particular offer. That is my answer.

I say that the approach taken in this case by the CMA is either unsustainable or it fails to have regard to all relevant factors because they are ignoring the fact, or at least they are irrationally failing to act on it, that IAG are prepared to bid notwithstanding Ryanair's 29 per cent, and even though they, IAG, cannot be confident that the divestment order will take effect during the period of the bid. My friend, Mr. Beard, says that Ryanair retains power and incentive to block or impede the bid, and that was Mr. Flynn's plea at the end of his submissions. But the strength of that plea, I say, is totally undermined by the willingness of IAG to pursue this bid, to do it at a time when they have no basis for confidence whatsoever that a divestment order will be made, and when IAG are content to see their letter that there should be no immediate appointment of a divestiture trustee.

The proof of the pudding, I say, is in the eating, it is in what IAG are doing in this case.

The only other point on this first part of the case is that it is then said by Mr. Beard: "Other airlines, potential partners, they may be deterred", but the CMA really ought to be asking themselves if IAG are prepared to come forward and they are prepared to pursue a bid and they are prepared to negotiate with Ryanair without the immediate appointment of a trustee, why should the position of any other potential partner - and we are in the realms of hypothesis, not reality - why should the position of any other airline seriously contemplating a combination with Aer Lingus be any different? It makes no sense. That is the first part of the case.

We invite the Tribunal to focus on the reality of what is happening here and on that part of the report which addresses Ryanair's power as described by the CC.

The second part of the case on which I wish to respond is the proportionality of the remedy, and here the position of the CMA is stark indeed because they say in their skeleton argument, which is entirely consistent with the MCC decision, that there can be no further consideration of proportionality unless there is a material change of circumstances.

Our case is that the material change of circumstances by reason of the bid, the IAG bid is highly relevant to the proposed remedy. It is highly relevant because we have here a bid

from IAG, which is a bid that is not being presented by IAG on the basis that they need an immediate appointment of a divestiture trustee.

I say it is stark that if one goes to the decision of the CMA (vol.2 tab 40) the summary of IAG's representations is in paras. 40 through to 42, under the heading: "IAG", and there is in that part of the report no mention of the final paragraph of the IAG letter. It is true, as Mr. Beard submitted, that there are various comments made by the CMA at para.68 on the execution of remedies, but what is again stark is that para. 68 does not address at all the proportionality of a divestiture remedy.

Mr. Beard's submission this afternoon was that the final paragraph of the letter from IAG is concerned only with the timing of the appointment of a divestiture trustee. But even that is important to the proportionality of making this final order at this time because this final order does require the appointment of a divestiture trustee.

The final order is at tab 42 of vol.2. Can I take the Tribunal to that? The order itself begins at p.866. If we turn to p.866 we see the CMA makes this order, and the relevant part of the order is at p.872, and at para. 5.1 the divestiture trustee appointment procedure is set out. I will not read it all out, but there is a timetable there set requiring the appointment of a divestiture trustee.

All of this, I say, is very surprising in circumstances where IAG are asking for flexibility. That is what their letter says. Their letter says in the clearest possible terms: 'Please do not appoint a divestiture trustee', and yet that is exactly what the CMA are proposing to do. It is not merely - although it is enough - that what the CMA are proposing to do is irrational in the context of the late stage of this bid, there is no assessment whatsoever in any of the documents before the Tribunal that the CMA have given any consideration, far less given any explanation, of why they think that it is appropriate or necessary to appoint a divestiture trustee in circumstances where the very person making the bid has asked them not to do so.

What Mr. Beard then says is that the CMA are making a general order. They are not making an order that is confined to the circumstances of the IAG bid. That itself, I say, is an irrational approach. It is irrational because in the most unusual circumstances of this case, contrary to what was anticipated by the CC when it made its report, there is now a very serious bid, a bid which has been accepted by the Aer Lingus Board. It has been accepted by the Irish Government on 25th May, it is a serious bid by a very powerful airline group. If that bid succeeds, that is the end of the problem.

More than that, in relation to that bid IAG are prepared to – see the final paragraph of their letter – to negotiate with Ryanair and are not requiring the immediate appointment of a

divestment trustee, and therefore we respectfully submit that for the CMA to proceed by reference to the general requirements of the 'Aer Lingus/Ryanair situation', if I may call it that, blissfully distinct from the practical realities of what is going on is totally irrational. To say we need this divestiture trustee, even though it is not required - to the contrary - by the bidder is an irrational approach and an attitude by the CMA that involves no coherent explanation that they have even considered these circumstances in this case, that they have considered the proportionality of the circumstances as they now find them, which are very different indeed to the circumstances at the time of the CC report.

That is what I wanted to say on proportionality. Unless there is anything else, or unless there are aspects that you, sir, or your colleagues wish me to seek to deal with, that is what I wanted to say by way of reply.

THE CHAIRMAN: Thank you very much, Lord Pannick. Lord Pannick, there are three uncertainties when I am looking at it from my point of view. The first is the Supreme Court position on your petition to appeal, and if it goes one way then we know what is going to happen.

The second is what happens with the European Commission on, at the latest, 15th July.

The third matter that is uncertain to me is what steps the CMA are going to take under the final order between now and whenever we come to a decision on this matter. As I understand it you are not abandoning your application for interim relief, what you are saying is: 'we are not pursuing it at this stage' but you may renew it if there is a need to. I think the need that you are focusing on at the moment is that third element, is that right?

LORD PANNICK: It is. I have not been told by Mr. Beard - I am not complaining about this, I just want to say it publicly - I and my clients have not been told by the CMA that they are envisaging any change in their position between today and the time when you hand down your judgment on this issue. I entirely accept that when you hand down your judgment if you reject the application then they may take a view as to what further steps they may or may not wish to take pending a Court of Appeal application, if any. We would obviously need to look at the judgment and form a view, but unless Mr. Beard is indicating that between today and the date when this Tribunal gives judgment something of significance is going to change, then I see no basis for changing our position that we are not applying for interim relief. Indeed, I would be very surprised if anything did change in the CMA position because we still do not know the view of the Supreme Court.

THE CHAIRMAN: Clearly, all the parties have given us food for thought, and we are going to have to take some time to deliberate, but what I am minded to do is to say now that we are

likely to give judgment on 16th July, just looking at the diaries and the dates I am free, etc. 16th July at 2.30. It may be that it is not going to be ready then, but that is what I am going to aim for, but I would expect counsel, or at least one counsel from each team to be there, because if there is going to be an application for permission to appeal I want it to be made orally on that day, and I will deal with that and any other consequentials one way or another, and that will include any question of interim relief if that is appropriate.

LORD PANNICK: That is Thursday, 16th July, did you say 2.30?

THE CHAIRMAN: Yes, 2.30. Obviously, if one of the team or the leaders cannot be there I would hope at least a Junior or another Silk----

LORD PANNICK: Someone will be there from our side.

THE CHAIRMAN: Mr. Beard?

MR. BEARD: Its really just to respond to what Lord Pannick has raised. The position of the CMA in relation to matters concerning interim relief has not changed, but I do not want to leave the Tribunal with the sense that that means nothing could happen between now and 16th July, because at the moment Ryanair are in current breach of the step to nominate a divestiture trustee. This is not the appointment of the divestiture trustee, it is just the simple fact of nomination. As we have made clear in correspondence----

THE CHAIRMAN: Let us look at that in the terms of the order. You have the order open at tab 42. Article .5.1?

MR. BEARD: We say they are in breach of art.5.1, so it is nomination and setting out the terms and conditions.

THE CHAIRMAN: The commencement date is when?

MR. BEARD: The commencement date was some time ago, it was 11th June, in fact. So, theoretically, it was five days after that that this should have been complied with, but I think it is right to highlight that, in fact, there was correspondence from the CMA on 25th June, following on from the CMC, saying: 'Please could you provide your client's proposed candidates for divestiture trustee on the following day'.

THE CHAIRMAN: In effect that is an extension?

MR. BEARD: Yes, that is what I am saying. Technically there is a breach after five days from June 11th that it is right to draw the Tribunal's attention----

THE CHAIRMAN: So you have directed what date?

MR. BEARD: That was 26th June, and just for your note it is in the supplemental bundle to hearing, so that is behind Lord Pannick's skeleton at tab 4. I should also direct you to tab 5,

which is the warm and giving response from Ryanair's solicitors in that regard, which was "no", hence the situation amounting to a breach.

The CMA has indicated that it does not see any reason at all why Ryanair should not nominate a divestiture trustee and comply with art.5.1 in circumstances where it is not then going to be an appointment pending the outcome of the Supreme Court.

THE CHAIRMAN: I presume what you are saying is, in the absence of a relief from the Tribunal, they should be following that procedure, albeit subject to your concession that you are not going to appoint a divestiture trustee until after the ruling----

MR. BEARD: Yes, I have taken specific instructions because actually the order itself, under arts.5.4/5.5, gives the CMA the power to start doing its own process.

THE CHAIRMAN: You can do your own approach, yes.

MR. BEARD: That is not what the CMA want to do, but if Ryanair continue to breach art.5.1, and the instructions I have are that if they continue to breach 5.1 beyond Wednesday of next week then the CMA will consider whether or not to trigger the art.5.4/5.5 process, and arts.5.8 and 5.9 to nominate someone else instead. I did not want the Tribunal left with any other apprehension about this, given the indications you have made about interim relief. So it is not that interim relief is necessary. If Ryanair come along and comply with the requirements of art.5.1 by next Wednesday, then no issue arises, the CMA does not have to take steps. But, it is right given what is being said and the indication the Tribunal has given, that the CMA does consider, in relation to these very limited matters, that we want to ensure that we can be as ready as possible to deal with these matters quickly, depending on the outcome of this Tribunal's proceeding and, of course, the Supreme Court, and that----

THE CHAIRMAN: And the European Commission.

MR. BEARD: Yes, potentially the European Commission, albeit that that is a slightly different situation. The European Commission scrutiny is in relation to----

THE CHAIRMAN: That the bid might lapse and there might not be such a rush.

MR. BEARD: In those circumstances, if the bid lapses there may be a whole range of concerns because, of course, one of the things the divestiture trustee, if then appointed, would be doing is looking at how these matters are to proceed in the light of a bid lapsing. I do not want to treat the European Commission proceedings, which concern the IAG bid, in quite the same way as these proceedings and the Supreme Court proceedings, which are between the CMA and Ryanair.

THE CHAIRMAN: But so far as you are concerned, the Ryanair process of actually identifying nominees has not got very far?

MR. BEARD: I have no idea how many people they may or may not have been talking to, and what work may have been going on behind the scenes, but so far as the correspondence is concerned we are receiving nothing. We are getting a very clear steer that they will not engage in any way in this process and that they will not nominate anyone and it will not comply with art.5.1. As I say, that is the position and it is right that I make clear my instructions in relation to these matters. I do not know whether or not that causes Lord Pannick to make further applications or take further steps at this stage but, as I say, my instructions are that effectively the CMA is willing to provide an extension to next Wednesday in relation to art.5.1.

THE CHAIRMAN: I am just thinking about the timing, the need for everyone to try and work with each other, because if, for example, you go down this other route after Wednesday then on what Lord Pannick is saying he reserves the right at that stage to renew his application, and then we have all the practicalities of dealing with that.

MR. BEARD: I understand that is the case, but in circumstances where there is an extant order, and it is not being complied with, sir, you can understand why the CMA says: 'We do not understand this position, we are not putting you in any position that jeopardises your position before this Tribunal or the Supreme Court, we are merely trying to put in place sensible arrangements so matters can be ready, depending on the outcome of these proceedings'. We do not understand the position. It seems to be a degree of recalcitrance which is unnecessary in these circumstances. As I have already indicated there have been extensions in relation to these matters. There has effectively been a *de facto* extension to today. The CMA are willing to provide a further extension because they are not trying to be heavy-handed about these matters.

THE CHAIRMAN: Lord Pannick, I presume you have nothing further to add at this stage?

LORD PANNICK: Only this: I understand my friend to be saying that if we do not identify nominees by next Wednesday, then the CMA will or, at least, may trigger the process in the order. Those behind me have heard that. They will have to consider what steps to take. I very much hope it will not be necessary to make any application, but I cannot give any undertakings or assurances, we will have to consider the position in the light of what my friend says today, and what happens after next Wednesday.

I would have thought that in the unhappy event - and I hope it does not come to pass - that we feel the need to make any application, it may be, sir, that you will be prepared to consider that on the basis of a written application without any need to try to arrange a hearing, but this is all hypothetical.

THE CHAIRMAN: It is hypothetical. If I could just help you as to where we are. I am sitting on something else next week, so I will not be around to look at this. The earliest date you can have an oral hearing, if you need an oral hearing, would be a week on Monday. Now, it is up to the CMA as to whether they listen to me, and whether they are willing to extend that Wednesday date to a slightly later date. If they do impose a deadline of next Wednesday the consequences are fairly obvious. If they impose it until a week on Monday then it is going to be a lot more practical to deal with it if we do have that type of situation.

LORD PANNICK: Maybe they would be prepared to extend the period not until next Wednesday, but to next Friday, or at least Thursday night, so that on Friday we can consider our position and if it is necessary to make an application we can give some notice, let everybody know that there will be an application either in writing or orally, for you, sir, to consider on Monday 10th.

THE CHAIRMAN: Yes, maybe Thursday 4.30 would be a much more sensible time. (To Mr. Beard) At the moment you are saying: "We are going to give them until Wednesday"?

MR. BEARD: Yes, I will obviously take instructions in relation to deadlines, but I think if the deadline is not complied with then the CMA will indicate what it is going to do, so I think in practice I am not sure that Lord Pannick's variation on timing is going to matter that much unless I get different instructions from those behind me. We hear what Lord Pannick says, we obviously hear what you say, Mr. Chairman, about timing of dealing with such matters if they arise. I think the sensible thing in these matters is not necessarily to try and hammer out anything further now----

THE CHAIRMAN: No.

MR. BEARD: --but we can communicate in due course.

MR. FLYNN: May I just make a couple of observations?

THE CHAIRMAN: Of course.

MR. FLYNN: The first, really, is on timing. We appreciate the great pressure that the Tribunal is under in dealing with this, and I hear your commitments, but a judgment at 2.30 on the 16th would more or less coincide with the Aer Lingus EGM under the bid timetable and would cause complete chaos. I do not know if it is at all possible to bring it forward, even by a day, since in my submission the consideration of the----

THE CHAIRMAN: When is your EGM?

MR. FLYNN: The 16th itself in the morning.

THE CHAIRMAN: I do not think it is practical to bring it forward a day, I am afraid.

MR. FLYNN: In my submission the timing of the European Commission's decision should not play a part in this. As Mr. Beard says, what we are concerned with is issues between Ryanair and the CMA.

THE CHAIRMAN: I am looking at my diary, the first day I am free to do anything is the 16th, and I want to give it at 2.30 on that day, if I can - if it is ready by then.

MR. FLYNN: I hear that, and I do recognise that----

THE CHAIRMAN: I fully understand your position. Whatever the timetable is, it is not going to be satisfactory to everyone, but I think the main priority is to get it out as soon as practicable in a form that is coherent, and I cannot issue it quickly, I need time to think about the issues, because whatever you may say about Lord Pannick's submissions they are significant points that bear consideration and I have to come to a view on them with the other members of the Tribunal.

MR. FLYNN: I fully recognise all that takes time and has to be spelled out. I merely point out that in the timetable that is a critical and possibly desperate juncture. I can only say that if it is at all possible to reach a view before, and certainly not to delay anything on account of the decision from Brussels----

THE CHAIRMAN: But you will have the draft decision before that day.

MR. FLYNN: There will be the question of what we can do with a draft decision, particularly in a public bid situation.

THE CHAIRMAN: I agree, we need to think that one through.

MR. FLYNN: Yes. Sir, maybe I can just leave the point with you, that a judgment at 2.30 after the EGM is likely to---

THE CHAIRMAN: You would rather have it the day before?

MR. FLYNN: The day before.

THE CHAIRMAN: What about the day after?

MR. FLYNN: Then I could not begin to predict the consequences if it is on the 17th; 16th is the closing date.

THE CHAIRMAN: (After a pause) Mr. Flynn, let us see what everyone else says. If we make it Wednesday afternoon, if we can do it by then, does that create any other difficulties for anyone else?

LORD PANNICK: We are talking about the afternoon, are we? 2.30?

THE CHAIRMAN: Yes, or maybe later; whatever is convenient.

LORD PANNICK: Not before 2.30 would certainly suit me. Mr. Kennelly cannot be there, and so I would want to be there.

THE CHAIRMAN: Yes, of course you would, yes.

LORD PANNICK: If it is on the 15th at 2.30 that would be fine. The alternative, I do not know whether it is possible to give the decision early on the morning of the 16th, or is it, sir, that you are not available on the morning of the 16th?

THE CHAIRMAN: That is going to be difficult.

MR. FLYNN: The EGM is at 10 am.

LORD PANNICK: If it is possible to give it at 9 am then maybe that would solve the problem.

MR. FLYNN: Well, it would certainly be a lot easier if it were at all possible to be on the 15th.

THE CHAIRMAN: What we will do is put it for, let us say, 3.30 on the Wednesday.

MR. FLYNN: Thank you.

THE CHAIRMAN: Counsel will have the draft judgment, so we would want any corrections before that. I am not sure how much notice you will get. I would have thought that you probably would want to be able to take instructions from someone given that I expect any applications for permission to be dealt with on the same day.

MR. FLYNN: That is also helpful, sir. I should say I have now procured text on the definition of the final closing date which I will give to the Registrar.

THE CHAIRMAN: Yes, give that, and we will add that to the bundle.

MR. FLYNN: I should just point out also that the condition of the IAG offer in relation to the Ryanair shares is specified in the offer document, which I think you have seen.

THE CHAIRMAN: I have seen that, yes.

MR. FLYNN: And it was identified in a footnote to our submissions for the previous hearing. That is how IAG have chosen to deal with the issue of whether or not a divestiture trustee will be appointed in time.

THE CHAIRMAN: So the position is if we can get the judgment done we will have the hearing at 3.30 on the Wednesday. If there is a delay for any reason we will notify you probably on the Monday morning. Thank you very much.

MR. FLYNN: I am grateful.