Neutral citation [2012] CAT 3

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1185/6/8/11

Victoria House
Bloomsbury Place
London WC1A 2EB

1 February 2012

Before:

THE HONOURABLE MR. JUSTICE SALES
(Chairman)
WILLIAM ALLAN
JOANNE STUART

Sitting as a Tribunal in England and Wales

BETWEEN:

BAA LIMITED

Applicant

-v-

COMPETITION COMMISSION

Respondent

and

RYANAIR LIMITED

Intervener

Heard at Victoria House on 5-7 December 2011

JUDGMENT

APPEARANCES

Mr. Nicholas Green QC and Mr. Martin Chamberlain (instructed by Herbert Smith LLP) appeared on behalf of the Applicant.

Mr. Daniel Beard QC and Mr. Alan Bates (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Paul Harris QC and Miss Sarah Love (instructed by Nabarro LLP) appeared on behalf of the Intervener.

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I. INTRODUCTION

1. This is an application to the Tribunal sitting to exercise its judicial review jurisdiction under section 179 of the Enterprise Act 2002 ("the Act"). The Applicant ("BAA") makes various challenges to the lawfulness of a report containing a decision by the Competition Commission ("the CC") dated 19 July 2011 requiring BAA to divest itself of Stansted airport ("the 2011 report").

2. The background to the 2011 report is as follows. On 29 March 2007 the Office of Fair Trading made a reference to the CC under the Act requiring the CC to investigate the market for airport services in the United Kingdom. The investigation was required to focus on features of the market in connection with the supply of airport services by BAA, which owns several airports in the United Kingdom. Of particular relevance for present purposes is the fact that in the south east around London at the time of the reference and original investigation by the CC BAA owned all of Heathrow, Gatwick and Stansted airports.

3. Under the statutory scheme, the CC was required to publish a report deciding whether any feature or combination of features of any relevant market prevented, restricted or distorted competition, i.e. created an "adverse effect on competition" ("AEC") (sections 134 and 137 of the Act). Where the CC decides that there is a feature or combination of features found in an investigation to amount to an AEC, it is obliged to decide whether any action should be taken and then to take such action (sections 134(4) and 138 of the Act).

4. On 19 March 2009 the CC published its market investigation report on the supply of airport services by BAA in the United Kingdom ("the 2009 report"). In the 2009 report the CC found that a number of features of the market each gave rise to an AEC. In particular, the CC identified the common ownership by BAA of Edinburgh and Glasgow airports as giving rise to an AEC and the common ownership by BAA of Heathrow, Gatwick and Stansted as giving rise to a further AEC.

5. In order to remedy the effect of these AECs the CC decided that BAA should be required to sell one of its Scottish airports (either Glasgow or Edinburgh) and should be required to sell both Gatwick and Stansted airports. The object in the south east was that the three main London airports should be in separate ownership so as to create a three way competitive dynamic between them.

6. By the time of publication of the 2009 report BAA could see the writing on the wall and had already started the process of selling Gatwick. The remedies in the 2009 report specified that Stansted should be sold next, with the sale of one of the Scottish airports to follow that.

7. However, these latter steps were not taken because in May 2009 BAA brought a judicial review challenge to the 2009 report in this Tribunal. In those proceedings, BAA challenged the 2009 report on two grounds, namely (i) that one of the members of the CC responsible for the report had a relevant connection with an interested party so that the CC failed to give the requisite appearance of impartiality and (ii) that in assessing the proportionality of the divestiture remedies, and in particular in determining the timetable for sale of the three airports, the CC failed to take account of material considerations relating to the impact of divestiture on BAA. In its judgment of 21 December 2009, [2009] CAT 35, this Tribunal dismissed the claim under ground (ii) and no appeal was brought by BAA in respect of that claim. However, the Tribunal allowed the claim based on ground (i), and so quashed the report and remitted the matter back to the CC for reconsideration. The CC's appeal against the Tribunal's judgment on ground (i) was allowed by the Court of Appeal in its judgment dated 13 October 2010, [2010] EWCA Civ 1097, and on 15 February 2011 the Supreme Court refused an application by BAA for permission to appeal to that court. The 2009 report, therefore, has survived BAA's challenge to it and has been upheld as a lawful and valid report.

8. By the time of the ruling by the Court of Appeal a considerable period had elapsed since the publication of the 2009 report, so the CC decided to consult on the question whether there had been any "material change of circumstances" ("MCC") that, pursuant to section 138(2) of the Act, was such as to justify a departure from the remedies decided on in the 2009 report. After a first round of consultation, with

responses from interested parties, the CC published a provisional report setting out the findings and decisions it was minded to make ("the provisional 2011 report") and conducted a second round of consultation on that provisional report. Further representations were received from interested parties, which the CC considered. The CC then finalised and published the 2011 report. To a considerable degree it followed the provisional findings and decisions set out in the provisional 2011 report.

9. Gatwick airport was sold by BAA in April 2010, while the CC's appeal against the Tribunal's judgment of 21 December 2009 was pending. This is of significance in the present proceedings for two reasons. First, it meant that by the time of the finalisation of the 2011 report there had been a period of over a year of competition between Gatwick (under its new owners, Global Infrastructure Partners – "GIP") and Heathrow and Stansted (still owned by BAA). CC therefore had more concrete information about how the competitive effects between the three London airports would develop in practice. As Mr Beard QC for the CC put it, this provided the CC with a natural experiment to test the development of the competitive effects which it had said in the 2009 report it would expect to see if the three airports were not all in the common ownership of BAA. Secondly, BAA submitted to the CC and then to this Tribunal in these proceedings that no further remedial action, in the form of the sale of Stansted, was now required to address the AEC identified in the 2009 report arising from the common ownership by BAA of the three London airports together.

10. The outcome in the 2011 report was that the CC confirmed its decisions that BAA should sell one of its Scottish airports and that it should sell Stansted too. The order in which they were directed to be sold was, again, that Stansted should be sold first within a set time and the Scottish airport second. As a result of delay in the sale of Stansted because of BAA's challenge to the 2011 report in these review proceedings, the CC eventually reversed the order of sale. Accordingly, since BAA does not challenge the 2011 report in so far as it relates to decisions about the Scottish airports, BAA is now getting on with the sale process in relation to the sale of one of the Scottish airports. It is unnecessary to make further reference to the position in relation to Scotland. Meanwhile, any sale of Stansted has been put on hold pending the outcome of this review.

11. In the course of the consultation leading up to the 2011 report BAA made representations to the effect that four matters had arisen since the 2009 report which constituted MCCs relevant to the south east which required the CC to revisit its findings and decisions in the 2009 report (with the trade union Unite also making representations about a fifth possible MCC): see paras. 5-6 of the 2011 report. Of these, it is only necessary to refer to two:

    (i) BAA submitted that there had been an important change in government policy in relation to the possibility of new runway capacity being built in the south east, which amounted to an MCC. A new Coalition Government was formed after the General Election in May 2010. The policies agreed by the coalition parties included a decision not to allow the construction of new airport runways in the south east. This reversed the policy of the previous government, in place at the time of the 2009 report, to encourage the development of new runway capacity in the south east. In particular, at the time of the 2009 report there were serious proposals for the development of new runways at Stansted and Heathrow. For reasons examined below, the CC concluded in the 2011 report that this change in government policy was an MCC which meant that, pursuant to section 138 of the Act, it should re-examine its decisions as to remedy in the 2009 report; and

    (ii) BAA submitted that there had been a significant fall in the level of Stansted's profitability, which also amounted to an MCC. The CC concluded in the 2011 report that, although there had been a fall in Stansted's profitability, this did not constitute an MCC.

12. In the consultation after the proceedings in respect of the 2009 report, BAA also made submissions to the CC that with the change in government policy and with the reduction in Stansted's profitability (whether that constituted an MCC or not) and in the light of its disposal of Gatwick a new set of circumstances had arisen which meant that it would be disproportionate to require BAA to sell Stansted, or at any rate that (if that submission was not accepted) the timetable for disposal of Stansted now being proposed by the CC was too fast and involved a disproportionate risk of

prejudice to BAA's interests. The CC did not accept these submissions when it decided to confirm its decisions on these matters in the 2011 report. (In this judgment we do not refer to the specific time periods for disposal stipulated by the CC at various times, since these are agreed to be confidential for commercial reasons).

13. In these proceedings BAA challenges the lawfulness of the 2011 report on four grounds, as follows:

(1) The CC failed in its duty to gather and assess the information necessary to decide whether in the new circumstances existing at the time of the 2011 report the benefits of the requirement that BAA sell Stansted outweighed the costs and it acted without regard to relevant considerations, with improper regard to irrelevant considerations and/or irrationally, in concluding that the imposition of the divestment requirement in respect of Stansted remained justified by the limited and unquantified competitive benefits identified in the 2009 report as capable of arising if there were no increase in runway capacity in the south east and no prospect of any such increase;

(2) The CC's assessment of the existence, reasons for and relevance of extra spare capacity in the circumstances of 2011 was flawed, because it failed to investigate the cause of decline in traffic at Stansted and the nature of spare capacity there and, despite its assertion to the contrary, took such capacity into account in reaching its decision;

(3) The CC's assessment of the profitability of Stansted by reference to the profitability of comparator airports in Europe was flawed and irrational, in that (a) the data used for Stansted related to a narrower category of business than the data in respect of the comparators; (b) the earnings before interest and tax ("EBIT") figures used for Stansted included exceptional, one-off credits and debits whereas those used for the comparators did not; and (c) the CC could not rationally derive a

conclusion as to Stansted's current profitability from the data referred to; and

(4) In assessing whether the remedy of divestiture of Stansted remained proportionate in the circumstances of 2011, the CC took into account the monetary cost to BAA of selling Stansted (i.e. the transaction costs likely to be associated with a sale process aimed at realising the fair market value for Stansted for the benefit of BAA), but failed to take into account a relevant consideration, namely the substantial impairment to shareholder value for BAA flowing from the requirement to divest Stansted within a short specified period in very depressed market conditions. In relation to this ground of challenge, BAA made an application in the course of the hearing to adduce new evidence which the Tribunal dismissed for reasons set out below.

14. In the course of his submissions, Mr Green QC for BAA applied to amend BAA's Grounds of Claim to add a fifth Ground. The CC did not object to this amendment, which was made with the Tribunal's permission. The new Ground is to this effect:

(5) In the course of writing the 2011 report and in taking the decisions set out in it, the CC failed to understand written representations made by the Civil Aviation Authority ("the CAA") dated September 2008 ("the CAA representations") in a material respect. The CC took the CAA to be making representations about the scope for competition between the London airports owned by BAA even if there were no new additional runway capacity and no expectation of additional runway capacity in the south east, and relied on that interpretation of the CAA representations in reaching their conclusions in the 2011 report, whereas according to BAA on a proper reading of the CAA representations the relevant points made by the CAA were predicated on there being an expectation that new runway capacity could be built in the south east.

15. After Mr Green had opened the case for BAA for two days and finished his submissions, it emerged in the course of the submissions of Mr Beard for the CC in

response that, contrary to the impression Mr Green had given the Tribunal and Mr Beard (by reason of the fact that he had not developed the point in BAA's skeleton argument, did not mention it at all in his opening oral submissions or his long speaking note produced for the hearing and had not taken the Tribunal to all the relevant passages in the 2009 report bearing on the point), Mr Green wished to maintain a case to the effect that by the time of the 2011 report the CC could not properly continue to maintain the view arrived at in the 2009 report that an AEC existed by reason of the common ownership of Heathrow and Stansted airports. It was unfortunate that such a potentially important point was only explained so late in the hearing. It meant that the Tribunal was deprived of the opportunity to test the suggestion by asking questions about it during Mr Green's submissions and it risked creating a position which was materially unfair to the CC and Mr Beard, who – entirely reasonably – had not up to the point part way through Mr Beard's submissions when Mr Green clarified his case understood that this was an argument to which they needed to respond. In an effort to simplify his position, Mr Green then said that he did not rely on this argument in relation to Grounds (1), (3) and (4), but only in relation to Ground (2). We found the logic of this difficult to follow, since if it was a good point in relation to Ground (2) it is hard to see why it should not equally be a good point in relation to the other Grounds. However that may be, we were persuaded by Mr Beard's submissions that it is not a good point at all, as we explain below.

II. THE LEGAL FRAMEWORK

16. Section 134 of the Act provides in relevant part as follows:

> "**134 Questions to be decided on market investigation references**
>
> (1) The Commission shall, on a market investigation reference, decide whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.
>
> (2) For the purposes of this Part, in relation to a market investigation reference, there is an adverse effect on competition if any feature, or combination of features, of a relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or part of the United Kingdom.

…

(4) The Commission shall, if it has decided on a market investigation reference that there is an adverse effect on competition, decide the following additional questions –

(a) whether action should be taken by it under section 138 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;

(b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and

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

(5) For the purposes of this Part, in relation to a market investigation reference, there is a detrimental effect on customers if there is a detrimental effect on customers or future customers in the form of –

(a) higher prices, lower quality or less choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or

(b) less innovation in relation to such goods or services.

(6) In deciding the questions mentioned in subsection (4), the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition and any detrimental effects on customers so far as resulting from the adverse effect on competition.

(7) In deciding the questions mentioned in subsection (4), the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned.

(8) For the purposes of this Part a benefit is a relevant customer benefit of a feature or features of a market if –

(a) it is a benefit to customers or future customers in the form of –

(i) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or

(ii) greater innovation in relation to such goods or services; and

(b) the Commission, the Secretary of State or (as the case may be) the OFT believes that –

(i) the benefit has accrued as a result (whether wholly or partly) of the feature or features concerned or may be expected to accrue within a reasonable period as a result (whether wholly or partly) of that feature or those features; and

(ii) the benefit was, or is, unlikely to accrue without the feature or features concerned."

17. Section 138 of the Act provides as follows:

"138 Duty to remedy adverse effects

(1) Subsection (2) applies where a report of the Commission has been prepared and published under section 136 within the period permitted by section 137 and contains the decision that there is one or more than one adverse effect on competition.

(2) The Commission shall, in relation to each adverse effect on competition, take such action under section 159 or 161 as it considers to be reasonable and practicable –

(a) to remedy, mitigate or prevent the adverse effect on competition concerned; or

(b) to remedy, mitigate or prevent any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition.

(3) The decisions of the Commission under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 134(4) unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently.

(4) In making a decision under subsection (2), the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition.

(5) In making a decision under subsection (2), the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned.

(6) The Commission shall take no action under subsection (2) to remedy, mitigate or prevent any detrimental effect on customers so far as it may be expected to result from the adverse effect on competition concerned if –

(a) no detrimental effect on customers has resulted from the adverse effect on competition; and

(b) the adverse effect on competition is not being remedied, mitigated or prevented."

18. Under section 159 of the Act the CC has power to accept binding undertakings from persons to take action to remedy an AEC. Under section 161 the CC has power to make orders requiring action to be taken to remedy an AEC. These powers extend to the power to require a person to sell an asset or business owned by it: paragraph 13 of Schedule 8 to the Act.

19. By virtue of section 6(1) of the Human Rights Act 1998 ("the HRA"), the CC is obliged to carry out its functions in a way that is compatible with Convention rights. In this case BAA complained that the remedy that it divest itself of Stansted airport imposed on it by the CC in the 2011 report involved a disproportionate interference with its Convention right as set out in Article 1 of Protocol 1 to the European Convention on Human Rights ("Article 1P1"). Article 1P1 provides as follows:

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

20. Section 179(4) of the Act provides that on an application to it for review of a decision of the CC the Tribunal "shall apply the same principles as would be applied by a court on an application for judicial review." There were no major differences between the parties as regards the approach that these principles require on the part of the Tribunal, but there were potentially significant differences of emphasis. In our judgment, the principles to be applied are as follows:

    (1) Sections 134(4) and (6) and 138(2) and (4) of the Act (set out above), read together, require that any remedies that the CC recommends or adopts must be reasonable, practicable and – subject to those parameters – comprehensive;

(2) In light of the relevance of the Convention right in Article 1P1 in this context, section 3(1) of the HRA requires that sections 134 and 138 should be read and given effect in a way compatible with that Convention right, which means that any such remedies must satisfy proportionality principles. Also, the CC accepts in its published guidance that any such remedies must satisfy proportionality principles (paragraph 4.9 of the Competition Commission Guidelines on Market Investigation References, June 2003). There was common ground as to the formulation of the proportionality test to be applied by the CC in taking measures under the Act (and by the Tribunal in reviewing its actions):

> "… the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued" (*Tesco plc v Competition Commission* [2009] CAT 6 at [137], drawing on the formulation by the Court of Justice in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food, ex p. Fedesa* [1990] ECR I-4023, para. 13)

In addressing proportionality, the following observation of the Tribunal at para. [135] of its judgment in *Tesco* should particularly be borne in mind:

> "[C]onsideration of the proportionality of a remedy cannot be divorced from the statutory context and framework under which that remedy is being imposed. The governing legislation must be the starting point. Thus the Commission will consider the proportionality of a particular remedy as part and parcel of answering the statutory questions of whether to recommend (or itself take) a measure to remedy, mitigate or prevent the AEC and its detrimental effects on customers, and if so what measure, having regard to the need to achieve as comprehensive a solution to the AEC and its effects as is reasonable and practicable."

(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it (in this case, most prominently, whether it remained proportionate to require BAA to divest itself of Stansted airport notwithstanding the MCC the CC had identified, consisting in the

change in government policy which was likely to preclude the construction of additional runway capacity in the south east in the foreseeable future): see e.g. *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B per Lord Diplock; *Barclays Bank plc v Competition Commission* [2009] CAT 27 at [24]. The CC "must do what is necessary to put itself into a position properly to decide the statutory questions": *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in *Khatun*:

> "The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made."

(4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health*

Ltd [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45];

(5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised its discretion "reasonably, carefully and in good faith", but will include examination "whether the reasons adduced by the national authorities to justify [the interference] are 'relevant and sufficient'" (see, e.g., *Vogt v Germany* (1996) 21 EHRR 205 at para. 52(iii); also *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paras. 135-138). However, exactly what standard of evidence is required so that the reasons adduced qualify as "relevant and sufficient" depends on the particular context: compare *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [26]-[28] per Lord Steyn. Where social and economic judgments regarding "the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken" are called for, a wide margin of appreciation will apply, and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is "manifestly without reasonable foundation": *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation" standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to

see that an act taken by such a body "is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion": Case C-120/97 *Upjohn Ltd v Licensing Authority* [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under Article 1P1 and section 6(1) of the HRA is essentially equivalent to that given by the ordinary domestic standard of rationality. However, we also accept Mr Beard's submission that even if the standards required of the CC by application of Article 1P1 regarding its investigations and the evidential basis for its decisions were more stringent than under the usual test of rationality, the CC would plainly have met those more stringent standards as well;

(6) It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see *IBA Health v Office of Fair Trading* [2004] EWCA Civ. 142 per Carnwarth LJ at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]. (No doubt, the degree of restraint will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context, in line with the proportionality approach set out by the ECJ in Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987 at para. 39, but that is not something which is materially at issue in this case). This is of particular significance in the present case where the CC had to assess the extent and impact of the AEC constituted by BAA's common ownership of Heathrow, Gatwick and Stansted (and latterly, in its judgment, Heathrow and Stansted) and the benefits likely to accrue to the public from requiring BAA to end that common ownership. The

absence of a clearly operating and effective competitive market for airport services around London so long as those situations of common ownership persisted meant that the CC had to base its judgments to a considerable degree on its expertise in economic theory and its practical experience of airport services markets and other markets and derived from other contexts;

(7) In applying both the ordinary domestic rationality test and the relevant proportionality test under Article 1P1, where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset like Stansted airport, the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor (cf *R v Ministry of Defence, ex p. Smith* [1996] QB 517, 537-538), as does the proportionality test (see *Tesco plc v Competition Commission* at [139]). But the adjustment required is not as far-reaching as suggested by Mr Green at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt;

(8) Where the CC gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in *South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953 (a case concerned with planning decisions) at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal

> important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

In applying these standards, it is not the function of the Tribunal to trawl through the long and detailed reports of the CC with a fine-tooth comb to identify arguable errors. Such reports are to be read in a generous, not a restrictive way: see *R v Monopolies and Mergers Commission, ex p. National House Building Council* [1993] ECC 388; (1994) 6 Admin LR 161 at [23]. Something seriously awry with the expression of the reasoning set out by the CC must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it.

21. It is also necessary to say something about the effect of section 138 of the Act. Under section 138(2), the CC is under a duty to take such action as it considers to be reasonable and practicable to remedy the AEC it identified in the 2009 report arising from common ownership by BAA of Heathrow and Stansted. The CC's decisions in the 2009 report included decisions that divestment of both Gatwick and Stansted by BAA was required as the only effective way to remedy the AEC, so that each of the three airports would be separately owned, and that the costs to BAA of complying with the requirement to divest itself of Stansted as well as Gatwick were justifiable, having regard to the anticipated benefits for the public which would arise from competition between the three airports. Under section 138(3), the CC remains obliged to take action consistent with those decisions unless there has been an MCC (or some "special reason" applies). The question whether there has

been an MCC and, if there has been, the question of how far it affects the decisions arrived at in a previous report are again matters calling for evaluative assessments to be made by the CC, as to which a wide margin of appreciation or evaluative discretion applies in accordance with the principles set out above.

III. THE 2009 REPORT

22. In the 2009 report the CC found that there was support in Government policy for the construction of additional runway capacity in the south east and, as a result, a reasonable expectation that such additional capacity would be created in the foreseeable future, probably at Heathrow and/or Stansted. The CC placed considerable weight upon this factor in the report for its analysis of the likely competition effects and the benefit for the public flowing therefrom if BAA was required to divest itself of Gatwick and Stansted, to be separately owned, while retaining Heathrow. In the CC's view, if additional runway capacity were constructed that would mean that there would be considerably increased scope for competition between the three airports, including on prices charged to airlines and hence (indirectly) to airline customers ("the actual expansion benefits"). Furthermore, in the CC's view, in the period before any new runway was built, the very expectation that there would be an expansion of runway capacity would lead to jockeying for position by the three competing airports which would itself be likely to involve substantial competitive effects in relation to pricing, quality of service to customers and so forth ("the expectation benefits"). It was because of the weight which it attached to the actual expansion benefits and the expectation benefits in its analysis in the 2009 report that the CC regarded the major change in government policy so as to oppose expansion of runway capacity in the south east as an MCC for the purposes of section 138(3) of the Act, requiring it to give fresh consideration to the question whether BAA should be required to divest itself of Stansted.

23. However, the CC's analysis in the 2009 report of the likely benefits from competition if the three airports were separately owned was not confined to the actual expansion benefits and the expectation benefits. The CC also considered that there would be distinct benefits from competition between the three airports even if there were no expansion or expectation of expansion in runway capacity in the

south east ("the constrained capacity benefits"). In the CC's view as set out in the 2009 report, although they would be less pronounced and strong than the actual expansion benefits and the expectation benefits, the constrained capacity benefits would still be very significant. The CC did not need to base its conclusions and remedies in the 2009 report on the constrained capacity benefits alone, because at that stage its assessment was that the still greater actual expansion benefits and expectation benefits would be likely to result from the divestment of Gatwick and Stansted and would soon increase beyond the constrained capacity benefits. Therefore, the CC did not need to focus intensively on the constrained capacity benefits in that report.

24. That position changed with the change in government policy, the MCC identified by the CC. Because of that change, it became very important for the CC to re-examine the conclusions and remedies set out in the 2009 report to see if they were sustainable and should be assessed to be appropriate by reference to the constrained capacity benefits alone. That is an exercise which the CC embarked upon by the process of consultation described above, culminating in the 2011 report reviewed below. Before turning to the 2011 report, it is necessary to emphasise a number of points in relation to the 2009 report, since that report provided the indispensable and substantially unchallenged platform for the analysis in the 2011 report.

25. First, the CC's findings and criticisms in the 2009 report in respect of the existing market structure in the south east were very strong. We refer in particular to paras. 9.1–9.3 and 9.5 of the report, where the CC said:

> "9.1 BAA's ownership of the four south-east airports prevents any competition between them. … The competitive constraints imposed on those airports by other airport operators have been limited at best. In the London area there is an almost complete absence of competition and almost total market failure. … Airlines and passengers at BAA's airports have either been entirely deprived, or substantially deprived, of the innovation, enterprise and concern for their interests that competition brings. These shortcomings, which are extensive, have been felt by airlines and passengers alike in price and/or quality of service.
>
> 9.2 The consequences of common ownership are far reaching. In the South-East in particular there is no competitive market for airport services that allows us to predict how competition will develop. The scope for competition between airports and the ways in which competition can develop are illustrated by evidence from our case studies of competition between airports in other parts of the UK.

> 9.3 Instead, in south-east England, we have plentiful evidence of monopolistic behaviour. The consequences of common ownership and the absence of competition are the most obvious in aspects of BAA's performance – its lack of engagement with its airline customers, insufficient strategic management of the airports, inefficient investment at airports in the South-East in particular, and an unsatisfactory passenger experience at many BAA airports. Inefficient investment has not only had detrimental effects on customers in the past but can hamper the development of competition in the future.
>
> …
>
> 9.5 The markets in which BAA's airports carry on business are highly significant, including their role in national and local economies, as shown by the concerns of airlines, businesses and public sector bodies about the wider economic impact of BAA's performance in both the South-East and Scotland."

No challenge has been made by BAA to these findings either in the proceedings brought in respect of the 2009 report or in these proceedings. It is in the context of the public need to remedy those very serious failures in the relevant market structure that BAA's challenges to the proportionality of the divestment remedy have to be assessed.

26. Secondly, we emphasise that it is indeed clear that the CC did, in the 2009 report, distinctly analyse a series of benefits which it considered would be likely to result from separate ownership of the three airports even if there were no expectation of an increase in runway capacity in the south east – i.e. the CC did identify a distinct set of constrained capacity benefits. We make this point because at certain points in his submissions, particularly the various iterations of his written submissions, Mr Green appeared to suggest that the benefits from competition between the three airports identified in the 2009 report were all predicated upon an expectation that additional runway capacity would be built. However, on a fair reading of the 2009 report this is not correct, as Mr Green was constrained to accept in his oral submissions. In particular, paras. 5.12 to 5.14 of the 2009 report made it clear that the CC's assessment in Appendix 5.1 to the 2009 report was of "the potential for competition between BAA airports within existing constraints", that is to say, was an assessment of the constrained capacity benefits. Paragraph 10.110 of the 2009 report also gave illustrations drawn from the CC's recent review of airport charges at Stansted of potential savings resulting from improved capital efficiency and better control of staff costs which were a type of efficiency saving which the CC

considered "would be delivered more quickly and to a much fuller extent in a competitive environment and that airports under separate ownership would have stronger incentives to deliver differentiated facilities to meet the needs of their customers and to manage their project costs more efficiently". The illustrations included potential savings of 10 to 16 per cent, equivalent to £25 million to £40 million, on BAA's existing Stansted capital expenditure programme over five years (i.e. savings on a programme which was not predicated on the expectation that new runway capacity would be built in the foreseeable future) and significant savings in relation to staff costs which had been identified (again, savings which were not predicated on the expectation that new runway capacity would be built in the foreseeable future).

27. Appendix 5.1 to the 2009 report identified a range of constrained capacity benefits which the CC assessed would be likely to arise as a result of competition between the three airports, if they were under separate ownership. The CC agreed with points made by the CAA in the CAA representations that "competition to invest and innovate, even in the short term, could be intense" (para. 4 of Appendix 5.1) and as set out in para. 3 of Appendix 5.1:

> "The CAA … told us that the combination of capacity constraints and regulation would not necessarily or materially limit the scope for additional competition between BAA's London airports. In particular, it submitted that there could be competition in terms of:
>
> (a) the price terms of access (including the duration of the contract, the charging structure, the allocation of risks of volume downturns etc);
>
> (b) the nature of the airport and/or commercial services (which may be redefined, bundled or unbundled in different ways to suit different airline or passenger requirements);
>
> (c) the quality of service, whether in terms of ambience or efficiency of operation (eg minimizing delays);
>
> (d) investment in facilities, including ways to improve or increase terminal, or other, capacity, which may have relatively short lead times; and
>
> (e) other innovations, which neither the CAA—nor any other regulatory or competition authority—could reasonably be expected to predict".

28. This is a passage drawn directly from para. 5.8 of the CAA representations, and in the course of the hearing became the focus of BAA's new Ground (5): the

allegation that the CAA representations were themselves predicated on the expectation that there would be new runway capacity in the future and that, in relying on the CAA representations in this way in Appendix 5.1, the CC had misunderstood the point being made by the CAA. We consider and reject the complaint in Ground (5) at paras. 64 to 70 below. In our view, the CC correctly understood the CAA representations on this point as being directed to the capacity constrained benefits. It should be noted that the reference to "terminal, or other, capacity" in sub-paragraph (d) is not a reference to runway capacity, but to the various other forms of capacity which affect the scope for airports to compete with each other (the different types of "capacity" in issue were analysed by the CC in Appendix 4.1 to the 2009 report).

29. At para. 4 of Appendix 5.1 the CC noted that the scope for competition on price would be likely to be modest because of the constraints on runway capacity - though not non-existent, and the CC identified that there had already been some price competition effects between Heathrow and Stansted despite their common ownership and those constraints: see e.g. paras. 3.123(a), 3.129, 5.17(c) and 10.47 - but that "There may also be scope for separate ownership to stimulate improvements in the overall quality of service offered …". As will be seen below, by the time of the 2011 report practical experience in the period after Gatwick was sold powerfully supported this assessment.

30. In the rest of Appendix 5.1 the CC identified significant capacity constrained benefits likely to flow from having the three airports in separate ownership in terms of off-peak competition between Gatwick and Stansted (paras. 6(a) and 7-11); competition to increase passenger numbers at Heathrow and Gatwick, including effects on Stansted (paras. 6(b) and 12-18); competition for users by improving service quality (paras. 6(c) and 19); and competition via different commercial strategies, such as to attract higher-value users (paras. 6(d) and 20-21). The CC concluded (para. 24):

> "Taken together, we consider that even in the presence of capacity constraints and price cap regulation, there is scope for service quality competition and modest price competition between BAA's London airports".

31. The identification by the CC of distinct constrained capacity benefits in the 2009 report is an important feature of that report to be borne in mind when analysing the cogency of the CC's reasoning in the 2011 report. The weight to be attached to the constrained capacity benefits in the 2011 report is primarily a matter for the CC.

32. In relation to the CC's assessment that there would be scope for competition between the airports on service quality, it is relevant to set out para. 19 of Appendix 5.1 to deal with points made on it by Mr Green. It states as follows:

> "There may also be scope for separate ownership to stimulate improvements in the overall quality of service offered. As we have noted, airlines operating from different BAA London airports compete with each other and we would expect separately-owned airports to be more responsive to airline views than BAA, as a common owner, has been. We consider that good service quality is often a matter of good management and organization rather than the result of spending large amounts of money (this is relevant as even separately-owned price-capped airports do not necessarily have the incentives to spend on improving service quality, except to achieve SQR [Service Quality Requirements] targets). Rivalry in the provision of service quality would supplement the effect of SQR targets, which are inevitably imperfect substitutes for competition. However, this rivalry would not replace SQRs, at least not in the short term."
>
> (Also see para. 26 of Appendix 10.1 to the 2009 report, which included similar language).

33. Mr Green submitted that para. 19 of Appendix 5.1 indicated that the CC recognised that regulation to impose customer service standards (the regulatory SQR targets at an airport which, if not met, would result in financial penalties being imposed) was an adequate and effective way to raise customer service standards without having to go to the lengths of requiring BAA to divest itself of Stansted to achieve an acceptable raising of standards. This was an aspect of his wider submission that the requirement that BAA sell Stansted was disproportionate to any benefits likely to result, because similar benefits could be achieved to a sufficiently high standard by means of regulation of Heathrow and Stansted while both of them remained owned by BAA.

34. In our view, Mr Green sought to place far more weight on this paragraph in Appendix 5.1 in support of his submissions than it could possibly bear. His submissions regarding the effectiveness of regulation also left out of account a number of points in the paragraph and in the wider report. When those points are

taken into account, as they should be, his general submission about the effectiveness and adequacy of regulation at Heathrow and Stansted can be seen to be wholly unsustainable.

35. As to para. 19 of Appendix 5.1, although there is perhaps some awkwardness in its drafting, we think that its basic meaning is clear. Airports which are in competition with each other will have incentives to compete for customers on the basis of service quality. They will have incentives to do this both in terms of good management and organisation and also, potentially at least (this is the force to be given to the words "do not *necessarily*" in the phrase in parenthesis), by way of investing more money. Effective competition on service quality would be more effective to achieve improvements in that area than reliance on SQR targets, "which are inevitably imperfect substitutes for competition". Even if competition is constrained, such competition as is possible can be expected to reinforce the effect of SQR targets. These seem to us to be powerful and entirely conventional points to make in this area. Indeed, in argument Mr Green accepted that it is entirely defensible for the CC to take the general view that active competition is likely to be more effective than regulation in driving down prices and driving up standards of service for the benefit of consumers. (In due course, as discussed at para. 44 below, the post-divestment experience at Gatwick provided concrete evidence which bore out the validity of these points).

36. The superiority of effective competition over regulation for driving up standards was emphasised in the 2009 report at many points: see in particular Section 6, "The regulatory system", which included a detailed review of the operation of regulation in relation to the three airports and the serious criticisms to be made of it as a method of securing good standards of service (e.g. at para. 6.20, in which it was observed that "the incentives [provided by the regulatory system] are relatively weak" and noted "the SQR system can only address the more important aspects of service" - and see also, for example, paras. 7.87-7.103 reviewing service standards at BAA airports subject to SQR targets, and the continued failings which were experienced there), paras. 7.137-7.138 and paras. 59-64 of Appendix 10.1 to the report. It was also, of course, a point noted in para. 19 of Appendix 5.1. In due course, in the 2011 report, the CC was fully entitled to take the view that the

requirement that BAA should divest itself of Stansted was necessary in order to realise significant benefits for customers arising from increased effective competition and that regulation would not be a satisfactory alternative (see e.g. paras. 63-72 of Appendix A to the 2011 report).

37. In Section 6 of the 2009 report, the CC found that there were a range of further significant benefits in terms of improved regulation which would be likely to result from separate ownership of the three London airports (which did not depend on actual or potential competition which might arise between those airports). The CAA, as regulator, would be able to see three sets of accounts produced by separate operators, allowing it to benchmark their performance more effectively against each other (para. 6.64), which would have "the potential to reduce the costs of regulation significantly" (para. 6.65) and would allow for better, more accurate and effective regulatory standards to be imposed, with the result that "improvements in service quality as a result of comparative competition could be significant" (paras. 6.66ff, esp. 6.72, 6.80-6.81 and 6.83). In that regard, the CC noted that independently owned and managed comparators are highly valued in other regulated sectors (paras. 6.73-6.75). The CC also considered that separate ownership "would have the further benefit of allowing actual and potential investors to compare company management and operating performance" (para. 6.84).

38. A central part of the 2009 report (in particular, section 3) was taken up with detailed review and analysis by the CC of the extent to which each of Heathrow, Gatwick and Stansted could be regarded as substitutes for the others as providers of airport services. The CC found that in each case the other two airports were its strongest demand substitutes and that the degree of substitutability was pronounced. The CC acknowledged that the extent to which competition would actually manifest itself among substitutable airports could be affected by external factors such as capacity constraints and regulation. Accordingly, in sections 4 and 5 of the report the CC considered the extent to which competition might be expected to occur both under current conditions and under future conditions. At the end of this careful and thorough assessment, the CC concluded that even under current capacity constrained conditions competition between the London airports to invest and innovate could be intense, though price competition would likely be modest: see

para. 4 of Appendix 5.1. That conclusion was supported by the evidence of the expert industry regulator, the CAA (see paras. 27 to 28 above and 64 ff below).

39. At a number of points in the 2009 report the CC observed that it was impossible to assess the likely impact of competition between the three airports with precision, in large part because they had up to then been operating without competition between them by reason of BAA's ownership of them all: see e.g. paras. 3.26, 9.1-9.3, 10.67 and 10.107-10.109. However, in view of the market conditions analysed at length in the report – and even allowing for the unusually strong position of Heathrow as a hub airport – ordinary economic analysis and practical experience in relation to other competing airports and in other contexts led to the conclusion that a significant competitive dynamic would be likely to build up between the three London airports under separate ownership: see e.g. paras. 5.19, 10.53 ("a clear expectation that competition will develop"), 10.64 and 10.104-10.112, Appendix 5.1, Appendix 10.1 to the 2009 report (esp. paras. 14 and 26) and paras. 3.127-3.133 and 3.151-5.156 for specific review of the exposure of Heathrow to competitive pressures and paras. 3.160-3.163 for specific review of Stansted. This was an assessment which the CC was well placed and well entitled to make. It is an assessment drawing on the CC's expertise and practical experience to which the approach referred to in para. 20(6) above applies.

40. This and other features of the 2009 report also bear out Mr Beard's submission to us that, on a fair reading of the report, the structure of the CC's reasoning is that (a) the three airports are strong substitutes for each other, such that, subject to other factors constraining the market, a significant degree of competition could be expected between them if they were in separate ownership; (b) such competition could be expected to be particularly pronounced if there were additional runway capacity in place or expected to be put in place; but (c) even without new runway capacity or the expectation of such new capacity, there would still be likely to be significant benefits arising from the competitive dynamic that would develop between the three airports under separate ownership. This pattern of reasoning is made very clear, for example, in paras. 9.1-9.13, esp. at 9.10-9.13, and paras. 10.64-10.66.

41. Finally, it should be emphasised that in the 2009 report the CC made the assessment that there would be likely to be significant competition benefits which would arise from the three-way competitive dynamic between Heathrow, Gatwick and Stansted if they were all in separate ownership. In his submissions, Mr Green sought to down-play this feature of the 2009 report in order to suggest that now that BAA has sold Gatwick there is no significant incremental competition advantage to be expected from requiring BAA to sell Stansted as well. This is an untenable reading of the 2009 report. In that report, the CC was careful to assess the need for divestment of Stansted as well as Gatwick, and concluded that in view of the strong substitutability of Stansted for both of Heathrow and Gatwick and the consequent competitive pressure it could be expected to exert on them and each of them on it there was a need for divestment of Stansted as well as Gatwick. Appendix 10.1 to the 2009 report addressed this directly, as did paras. 10.40-10.54 and 10.60-10.73. There were also many points in the body of the 2009 report where the CC identified scope for a trilateral competitive dynamic between the three airports and a bilateral competitive dynamic specifically between Heathrow and Stansted: see e.g. paras. 3.123, 3.129, 5.11, 5.17 and 10.47. These were points to which the CC returned in the 2011 report.

42. In the 2009 report the principal AEC identified in relation to the south east was the common ownership by BAA of Heathrow, Stansted and Gatwick, which meant that there was "an almost complete absence of competition and almost total market failure": see e.g. paras. 9.1-9.3, set out above. The CC concluded that the effects of this were so serious as to require remedial action to be taken: para. 9.15. Section 10 of the 2009 report set out a lengthy and detailed analysis of the remedial options, leading to the conclusion that requiring BAA to sell Gatwick and Stansted was the necessary and appropriate remedy for the relevant AECs which had been identified. At paras. 10.88ff the CC set out a lengthy review of the proportionality of divestiture remedies, weighing the benefits to be expected from divestiture against the cost to BAA of imposing such a remedy. The CC concluded that, taking account of the actual expansion benefits, the expectation benefits and the constrained capacity benefits, the net incremental benefits of competition were likely to be substantial and to exceed considerably the detriment to BAA (including in

particular the relevant net costs for BAA of divestiture): see esp. paras. 10.111-10.112.

IV. THE 2011 REPORT

43. In the material parts of the 2011 report, the CC decided that (a) the change in government policy regarding construction of additional runway capacity in the south east constituted an MCC; (b) the fall in the level of Stansted's profitability did not constitute an MCC; and (c) the proportionate remedy for the AEC constituted by BAA's ownership of Heathrow and Stansted together remained a requirement that BAA sell Stansted. In reaching the decision at (c), the CC reviewed the position leaving out of account the actual expansion benefits and the expectation benefits which had featured in the 2009 report, and focused solely on the constrained capacity benefits. In these proceedings, BAA challenges the decisions at (b) and (c).

44. In its thorough consultation leading up to the 2011 report and in the report itself the CC reviewed the constrained capacity benefits with particular care, since (unlike in the 2009 report) they were now the sole possible basis for an order requiring divestment of Stansted. In doing this, the CC took into account, in particular, new information which had become available from the natural experiment constituted by the period of independent ownership of Gatwick, which supported the CC's previous view that improvements in service quality and other benefits would be likely to arise from separate ownership of the London airports. GIP, the new owner, provided the CC with a list of changes it had made since acquiring Gatwick: paras. 53-57. GIP's evidence was that there was active competition between airports in the south east (para. 56). In a section entitled "Developments since the 2009 report – the experience of the divestment of Gatwick", at paras. 100-105, the CC reviewed this new information. The CC concluded that there were "tangible signs already of non-price competition for airlines and their customers by Gatwick" and that it would "expect benefits from service quality improvements to continue at Gatwick and to intensify with further competitive rivalry and also to arise at Stansted once it is independently owned" (para. 102 of the 2011 report and paras. 53-57 of Appendix A). This new information strongly supported the CC's previous findings in the 2009 report regarding the AEC constituted by BAA's common ownership of

Heathrow and Stansted and the significant nature of the constrained capacity benefits likely to arise if there were separate ownership of those airports and Gatwick. In that regard, we do not accept Mr Green's submission that these changes represented nothing more than plans and expectations as distinct from concrete evidence in support of the CC's views. The CC was entitled to consider that the evidence of actual changes in the approach at Gatwick in the limited time that had elapsed since divestment by BAA was significant supporting material to reinforce its view that there was scope for competition between the airports which could be expected to be consolidated and developed over time.

45. The CC also noted that spare runway capacity had emerged at Stansted because of a decline in passenger numbers and air traffic movements there since the 2009 report: para. 111 of the 2011 report. This indicated that there would now be scope for a significantly greater level of competition for customers and airlines between Heathrow and Stansted if under separate ownership than had been expected at the time of the 2009 report. However, the CC explained in para. 111:

> "… we do not factor competition based upon this extra capacity into our decision on whether divestment of Stansted is proportionate; as noted in paragraph 285, we simply note that this is an extra benefit which might be expected to arise."

At para. 112, the CC concluded that the detailed assessment of the constrained capacity benefits in the 2009 report (in particular in Appendix 5.1) remained "the appropriate analysis of the scope for competition in the absence of new runway capacity" and that it was not necessary to undertake a completely new assessment of the scope for competition between Heathrow and Stansted.

46. Paras. 284-285 of the 2011 report confirm the approach adopted by the CC. At paras. 280-288 the CC considered whether the remedy of divestment of Stansted would produce adverse effects which would be disproportionate to the aim pursued, and concluded that it would not. At para. 282 the CC stated: "As in the 2009 report, we consider that benefits from competition are likely to accrue across all of Stansted, Gatwick and Heathrow as a result of intensifying rivalry following divestiture of Stansted", and at paras. 282-283 referred to the analysis of those benefits in Appendix A. At para. 284 it concluded on the basis of that analysis that

even in the absence of new runway capacity or the expectation of such capacity, "the requirement that BAA divest itself of Stansted would still be justified". At para. 285 the CC stated: "This conclusion is based on an assessment of the benefits that may be expected to accrue starting in the near future and continuing over 30 years. *In addition*, we note that Stansted has a significantly greater level of spare runway capacity than it did at the time of the 2009 report …" (our emphasis), which suggested that there would be increased scope for constrained capacity benefits to arise than at the time of the 2009 report. In other words, as stated in para. 111, the CC concluded that divestment of Stansted would be a proportionate remedy without relying on the spare runway capacity that had opened up there since the 2009 report, simply noting that this new feature of the environment would tend to increase the scope for effective competition and so did not undermine its critical proportionality analysis.

47. In his submissions on Ground (2), Mr Green focused on what he contended was a conflict between what was said in para. 111 of the 2011 report and para. 114 in that report. Para. 114 appeared in a section entitled "Conclusions on the benefits and scope for competition absent new runway capacity" (paras. 113-115). In para. 113 the CC referred to its conclusion in the 2009 report "that competition to invest and innovate", even absent spare runway capacity, could be intense, and noted that practical experience from Gatwick under separate management reinforced that conclusion. In para. 114 the CC referred to its conclusion in the 2009 report that, even absent spare runway capacity, there was "scope for modest price competition", and went on to say:

> "*Moreover*, we have found that the reduction in passengers and [air transport movements] at Stansted since 2009 means that there is now significantly more spare runway capacity at Stansted. As a result, even without new runways being built, under separate ownership there is now significantly greater scope for competition for airlines and their customers between Heathrow and Stansted." (Our emphasis)

At para. 115, the CC said:

> "We find therefore that there are significant benefits that may be expected to accrue from the divestment of Stansted in the absence of new runway capacity."

48. We do not accept Mr Green's submission that there is a significant conflict between paras. 111 and 114 of the report. In our view, the relevant passages in the 2011 report (the section discussing the increase in spare capacity at paras. 106-112, in particular at paras. 111-112; the conclusions on the constrained capacity benefits in paras. 113-115, in particular at para. 114; and the section discussing whether the remedy would produce adverse effects disproportionate to the aim pursued at paras. 280-286, in particular at paras. 284-285) can all be read sensibly together, and should be so read, as making two points: first, that the analysis of the constrained capacity benefits of separating the ownership of Stansted from Heathrow and Gatwick contained in the 2009 report continued to be valid in 2011 and continued to justify in 2011 the requirement that BAA divest itself of Stansted; and, second, that it was to be noted in addition that since 2009 spare capacity had opened up at Stansted, which would tend to reinforce the scope for competition and hence the constrained capacity benefits, but the CC did not positively rely on that factor (on its analysis, it did not need to) in order to conclude that a requirement that BAA divest itself of Stansted would be proportionate. The word "Moreover" in para. 115 which we have emphasised above corresponds with and echoes the words "In addition" we have emphasised in para. 285 and the express statement "… we do not factor [etc]" in para. 111 which we have quoted above. This reading of the 2011 report on this point is in our view the most natural reading, quite apart from applying the principle of generous construction referred to in para. 20(8) above. It is, of course, a reading which is powerfully reinforced when one also takes that principle into account.

49. At paras. 73-81 of the 2011 report, under the heading "Expected benefits", the CC endorsed its previous analysis of the constrained capacity benefits and the need for divestment of Stansted at Appendix 5.1 and Appendix 10.1 to the 2009 report.

50. At para. 12 of the 2011 report the CC stated its view that "the benefits of the divestiture remedy [in relation to Stansted] are still likely substantially to outweigh the relevant one off costs of divestment and the impact on BAA's business"; and in forming that view the CC said it had had regard to, amongst other things, "the fact that, while the costs of divestment will be incurred only once, the benefits [of divestment] are likely to be sustained and developed for at least 30 years". Mr

Green said that this finding as to the time over which benefits would accrue (and hence as to the scale of the benefits to be expected) was unsupported by adequate reasoning in the report (especially because the assessment of the capacity constrained benefits in the 2009 report, to which the CC referred in the 2011 report, had been limited to the period prior to 2017). We do not agree. In particular, at para. 43 of Appendix A to the report the CC specifically addressed the period over which benefits could be expected to accrue. In relation to the capacity constrained benefits it observed, "There is no reason why the remaining benefits of competition [i.e. after eliminating the expectation benefits] will dry up after just five or ten years. We consider that the stream of benefits from competition will continue to accrue and develop throughout the separation period [i.e. the period after Stansted and Heathrow become separately owned]" (see also para. 76 of Appendix A). Having regard to the nature of the competitive effects it identified in the 2011 report, this was clearly a conclusion which the CC was entitled to reach. We do not consider that the limited duration of the assessment in the 2009 report precludes that conclusion. It was reasonable in 2009 to limit that assessment to the period prior to the point at which the larger benefits associated with the expansion of runway capacity might be expected to arise; when the prospect of such expansion fell away, it was legitimate for the CC to consider the capacity constrained benefits over a more extended period, as it did.

51. Section 4 of the 2011 report is entitled "The fall in Stansted's profitability". In this section (paras. 240-249) the CC considered BAA's contentions that Stansted had experienced a fall in passenger traffic and hence in its profitability since the 2009 report, which constituted a further MCC and was relevant to the proportionality of the divestment remedy, and that the CC should have conducted a proper analysis of Stansted's profitability to support its conclusion (as provisionally indicated in the provisional 2011 report) that divestment of Stansted was a proportionate remedy.

52. At para. 245, the CC said it had considered the strength of Stansted's financial position and noted that, despite a decline in profits, it remained profitable. The CC said: "We would expect profitability to vary over the economic cycle so we did not think that this in itself was strong evidence of a MCC". It also referred to a table it had prepared ("the profitability table") comparing the profitability of Stansted with

that of several European airports (including Heathrow, Edinburgh and Glasgow), and from the comparisons made there noted that Stansted's profitability appeared to compare favourably with several of them by reference to its higher EBIT and earnings before interest, tax, depreciation and amortisation ("EBITDA"). The CC said that this indicated that despite seeing a decline in passenger numbers Stansted was still producing healthy financial results when compared with other airports. It went on:

> "Moreover, in our judgement, a new owner would be free to make independent commercial decisions that may be different from those made by BAA, which also owns Heathrow, and Stansted's future operational and financial performance, including its growth (taking advantage of its new incentive to compete with Heathrow), would not necessarily be in line with BAA's projections."

53. The CC noted that (although BAA had seen the profitability table as part of the provisional 2011 report and was aware from that report of the points the CC drew from it) BAA did not provide it with any analysis of Stansted's performance relative to other airports, but simply said that the margin analysis that the CC had used as the basis of comparison was not sufficient for its purposes (para. 246). At para. 247 the CC noted that the purpose of its assessment was not to determine a regulatory assessment or to establish levels of profitability compared with the cost of capital, but to "consider the impact of Stansted's profitability on the marketability of the airport", and that margin analysis and EBITDA performance was relevant to that task.

54. At para. 248 the CC said:

> "In our judgement, we do not need to conduct a detailed assessment of Stansted's current profitability, of the type suggested by BAA, in order to reach a view on whether there should be a delay in its divestment. Having noted that BAA said Stansted's profitability had reduced, but that it was still profitable (despite having been through the low point of a recession and having had an ongoing disagreement over airport charges with its major airline for over three years), we conducted a simple comparison of publicly-available information. This showed that Stansted's EBIT and EBITDA margins were healthy compared with other airports, despite its recent decline in passenger numbers. We note that there is inevitably a limit to the amount of profitability analysis we can conduct on different airports based on publicly available information, and believe we have struck an appropriate balance to be able to conclude that Stansted's financial position should not be a barrier to its sale for a price which values its long-term prospects."

55. From para. 265 on, in a section entitled "Assessment of proportionality", the CC gave careful consideration to whether the requirement of divestment of Stansted remained a proportionate remedy. At paras. 267-270 the CC affirmed the continuing validity of its analysis in the 2009 report by reference to the constrained capacity benefits and said that divestment of Stansted "offers a clear, easily implemented and timely way of addressing the AEC of common ownership of Stansted and Heathrow airports" (para. 269) which would be effective to achieve the legitimate aim in question. At paras. 271-273 the CC affirmed the relevant parts of its analysis in the 2009 report to the effect that the remedy would be no more onerous than would be required to achieve that aim, allowing for a sequential sale by BAA of Stansted (first) then one of the Scottish airports, and at paras. 287-331 the CC gave detailed consideration to the timetable for divestment, noting at paras. 291 and 327 that the market conditions for divestment had improved since that remedy was ordered in the 2009 report (as events have transpired, the sale of Stansted has been postponed until after the sale of the Scottish airport). At paras. 274-279 the CC considered and dismissed other suggested ways in which the relevant AECs might be remedied, as being less effective than a requirement of divestment.

56. At paras. 280-286, the CC considered whether the remedy would produce adverse effects disproportionate to the aim pursued and concluded they would not. It assessed the costs to BAA of selling Stansted to be about £36.1 million (para. 281 and Appendix A – in the CC's assessment, the relevant cost to BAA would be the transaction costs involved in arranging the sale). For the benefits accruing from a remedy of divestment it referred to the 2009 report, and, as in that report, stated that it considered "that benefits from competition are likely to accrue across all of Stansted, Gatwick and Heathrow as a result of intensifying rivalry following divestiture of Stansted" (i.e. from the trilateral competitive dynamic the CC assessed would arise). The detail of the CC's assessment of the likely benefits of divestment was set out in Appendix A to the 2011 report. The CC concluded that the benefits of divestment - i.e. the capacity constrained benefits attributable to divestment of Stansted – would be "likely substantially to outweigh the costs of divestiture even if those costs were as high as BAA's maximum suggested divestiture costs of £42.5 million …" (para. 283 and Appendix A, para. 78). Therefore, in the CC's view, the divestiture remedy was still justified in 2011 by a

comfortable margin (paras. 283-284). At para. 285 the CC simply noted the additional competition benefits which might also result from the emergence of spare capacity at Stansted (see paras. 45 to 48 above) and at para. 286 noted that further additional benefits might also result from any future change in government policy regarding construction of runway capacity in the south east.

57. In Appendix A to the 2011 report, in a section entitled "Likely areas of benefit beginning in the near future" (paras. 51ff), the CC considered with care and in detail the constrained capacity benefits which would be likely to result from divestment of Stansted, drawing on its analysis of those benefits in the 2009 report and on practical experience in relation to Gatwick under its new owners. It concluded that there would be (i) service quality improvements (as had already begun to manifest themselves at Gatwick): paras. 52-57; (ii) capital expenditure efficiency savings (as had already been noted as possible benefits by reference to illustrations drawn from practical experience in engaging with BAA through the imposition of regulatory controls: see para. 10.110(c) of the 2009 report, para. 26 above): paras. 58-67 of Appendix A to the 2011 report (and in that regard noted that practical experience at Gatwick under new ownership supported that conclusion: paras. 65-66); (iii) operating cost efficiency savings (again as already suggested by practical experience noted in para. 10.110(d) of the 2009 report, para. 26 above): paras. 68-72 (and on that point the CC noted that its view in the 2009 report was now supported by practical experience deriving from the CAA's regulation of Stansted since that time and from the operation of Gatwick under new owners: paras. 69-72); (iv) improvements in economic regulation by the CAA, as noted in the 2009 report, para. 37 above, since the CAA would have the benefit of being able to compare experience at three independently owned airports serving the relevant market in the south east, which could "reduce the costs of regulation significantly" and could give rise to "significant improvements in service quality": para. 73; and (v) price competition, which was assessed in the 2009 report as likely to be a "modest" constrained capacity benefit (i.e. still a real benefit) and would need to have only a small effect in practice (worth 19 pence per passenger) in order to exceed over the 30 year period which the CC judged to be relevant BAA's costs of divestiture: paras. 74-75. Contrary to Mr Green's submission that the CC was somehow bound to treat Appendix 5.1 to the 2009 report as an exhaustive statement

of the relevant capacity constrained benefits, we consider that the CC was plainly entitled to adopt this wider and more extended and detailed assessment of those benefits in the 2011 report.

58. On the basis of this analysis the CC concluded at para. 76 of Appendix A (entitled "Summary of likely areas of benefit beginning in the near future"):

> "In summary, we consider that there are many sources of long-term benefit likely to begin in the near future from the divestiture of Stansted even in the absence of any new runway development. Service quality improvements, capital cost efficiency savings, operating cost efficiency savings and price competition are likely to be significant sources of benefits and these benefits are likely to be developed and sustained for at least 30 years."

59. At paras. 79-84 of Appendix A the CC explained that its analysis of the benefits of divestiture was qualitative rather than quantitative in nature, and that in its view no more extensive investigation of the extent of those benefits was required in order for it to reach a clear conclusion as to the proportionality of the divestiture remedy (see in particular paras. 80 and 84). It stated its view that "it is clear that the benefits of divestment significantly outweigh the costs" (para. 80); its qualitative analysis enabled it "to reach a clear and decisive conclusion on proportionality" (para. 84).

V. LEGAL ANALYSIS: GROUND (1) (IMPROPER ASSESSMENT) AND GROUND (5) (MISUNDERSTANDING THE CAA REPRESENTATIONS)

60. Although referred to by Mr Green very late in the day at the hearing, the logical starting point in relation to Ground (1) (though disavowed by him for the purposes of this Ground, but maintained by him in relation to Ground (2)) is his contention that circumstances had changed so much by the time of the 2011 report that the AEC identified by the CC in the 2009 report constituted by the common ownership by BAA of the three London airports had ceased to exist in any significant way. If there was no AEC arising from common ownership of Heathrow and Stansted in the circumstances of 2011, it is difficult to see how the requirement of divestiture of Stansted could be regarded as a proportionate remedy.

61. We reject Mr Green's submission. It ignored the implications of the CC's unchallenged findings in the 2009 report that in the London area there had been "an

almost complete absence of competition and almost total market failure" (para. 9.1) with "plentiful evidence of monopolistic behaviour" on the part of BAA (para. 9.3). It failed to give proper weight to the robust findings of the CC in the 2009 report and carried into the 2011 report regarding the strong substitutability of Heathrow and Stansted (when looking at the scope for bilateral competition between them) and the strong substitutability of Heathrow, Gatwick and Stansted (when looking at the scope for development of a trilateral competitive dynamic between them all). It also failed to take into account the CC's assessment in the 2009 report and the 2011 report, in large part flowing from these findings, that substantial constrained capacity benefits could be expected to arise specifically from the divestment by BAA of Stansted (in addition to Gatwick). In our view the CC was obviously entitled to conclude, on the basis of the analysis in the 2009 report and the 2011 report, that an AEC with very substantial impact arose from the common ownership by BAA of Heathrow, Gatwick and Stansted (as at 2009) and from the common ownership by BAA of Heathrow and Stansted (as at 2011).

62. This provides a convenient basis for analysis of the other points made by Mr Green under Ground (1). In our view, they were all without merit. The CC was clearly entitled to form the view that each of the constrained capacity benefits it identified in the 2011 report (in particular in Appendix A to that report) as likely to result from the sale of Stansted to independent owners was real and significant. The CC was clearly entitled to form the view that those benefits substantially outweighed the costs to BAA involved in such sale. In those circumstances, the CC was clearly entitled to make the assessment it did in 2011 that a requirement of divestiture of Stansted would be a proportionate remedy for the AEC and market and regulatory failures it had identified. This view is strongly reinforced by reference to the principles set out at para. 20 above, which emphasise the width of the margin of appreciation or evaluative discretion to be accorded to the CC in making judgments of this character.

63. There was no failure of proper investigation by the CC in respect of any of these matters. It was primarily for the judgment of the CC how far it needed to undertake investigations to furnish itself with information to equip it to answer the statutory questions which it understood very well: para. 20(3) and (5) above. It did in fact

carry out elaborate and thorough further investigation of the relevant points in the course of its extensive consultation leading up to the 2011 report. In our view, the CC was plainly entitled to take the view by the time of that report that it had investigated to a level sufficient to allow it to form its very clear view on the material available that divestiture of Stansted remained an appropriate and proportionate remedy for the AEC and market and regulatory failures which continued at that time. It was appropriate for the CC to proceed to a new decision regarding the measures necessary to address those problems as promptly as it could, once it felt confident (as it did) that it had information sufficient for the purpose at hand available to it to do so.

64. We also reject the submissions by BAA (advanced on this point by Mr Chamberlain) in support of Ground (5) (alleged failure by the CC to understand the CAA representations). The suggestion was that the CC erred in relying on the CAA representations for its analysis in Appendix 5.1 to the 2009 report of the constrained capacity benefits - and that error then infected the 2011 report, where Appendix 5.1 was relied on - because on proper reading of the CAA representations they were all predicated on an expectation that new runway capacity would be built in the south east and so ought properly to have been analysed as expectation benefits. In our view, this is an unsustainable contention.

65. It is fair to say that the summary of the CAA representations at the start of the document is (as is always a danger with summaries of complex and detailed documents) perhaps poorly drafted and certainly rather opaque, especially at paras. 9-11. The use of the word "Accordingly" at the start of para. 11, where the various aspects of scope for competition proposed by the CAA are set out in a list which corresponds to the list set out in para. 3 of Appendix 5.1 to the 2009 report, could be taken to indicate that those points are predicated on the expectation of new runway capacity (as Mr Chamberlain argued). However, when one goes to section 5 in the body of the CAA representations from which the summary is drawn, the position is clear, and BAA's submission under Ground (5) falls away.

66. Section 5 of the CAA representations is entitled "Scope for competition given current capacity constraints", and it is in this section that the relevant list of points

is set out at para. 5.8. In this section, the CAA set out submissions that the CC had up to that point correctly identified scope for competition between the three London airports if separately owned, but had underestimated that competitive effect. In paras. 5.3-5.8 the CAA addressed the issue of "Competition in the short term", picking up on the CC's provisional assessment at that stage "that competition between BAA's SE airports would bring benefits despite the existence of continuing capacity constraints and the current system of [Regulated Asset Base]-based price control regulation" (para. 5.4). The CAA submitted that the CC had significantly understated the scope for competition in the short term for two reasons: (a) it had "accepted too readily BAA's argument that capacity constraints substantially reduce the potential for competition" (para. 5.5) and (b) it had wrongly accepted BAA's argument "that continued regulation would necessarily limit the scope for competition between airports" (para. 5.7).

67. As to (a), the CAA said that there was no reason to believe that runway capacity would be artificially constrained post-divestment (para. 5.5), but went on in para. 5.6 to make the further and clearly distinct point (as marked by the word "However" at the start of para. 5.6) that "even if it could be demonstrated that runway capacity has been artificially constrained" "airports could still be expected to compete to a significant degree post divestment", giving as examples the changing mix of airlines and passengers even at "full" airports and referring to the incentives there would be to compete on service and price even at "full" airports. As to (b), the CAA pointed out in para. 5.7 that there would be scope for regulation to be rolled back as and when it appeared that effective competition occurred.

68. This is the textual context for para. 5.8, which begins with the word "Accordingly" which the drafter of the summary at the start of the CAA representations simply transposed into para. 11 of that summary. Para. 5.8 contains the same list of points of competition as are relied on by the CC in para. 3 of Appendix 5.1 to the 2009 report. Para. 5.8 introduces that list as follows:

> "Accordingly, the combination of capacity constraints and regulation would not necessarily or materially limit the scope for additional competition between BAA's SE airports. It follows that there could be significant scope for competition between airports in the short term on [and the list of points is then set out]".

The "capacity constraints" referred to involve reference back to para. 5.6 and "regulation" involves reference back to para. 5.7.

69. On a proper reading of para. 5.8, therefore, it is a submission made by the CAA by reference to a scenario in which one is dealing with airports which are "full", with no spare or expected additional runway capacity. The summary at the beginning of the CAA representations does not fully capture this, but the meaning of para. 5.8 itself is clear. It is also clear from the text at the beginning of para. 3 of Appendix 5.1 (which mirrors the text at the beginning of para. 5.8 of the CAA representations, and not the text in para. 10 of the summary) that the CC has referred directly to para. 5.8 when drawing up Appendix 5.1 to analyse the constrained capacity benefits. It was entitled to read the CAA representations as referring in para. 5.8 to constrained capacity benefits and to accept those representations and rely on them in the way it did.

70. Therefore, Ground (5) also falls to be dismissed.

VI. GROUND (4) (IMPROPER ASSESSMENT OF COSTS OF DIVESTMENT)

71. We address Ground (4) next because it is related to Ground (1). Mr Green submits that the CC failed properly to take into account a significant cost to BAA when carrying out the proportionality analysis leading to the conclusion that divestment of Stansted should be required. Mr Green accepted that the CC devised a timetable for disposal which would give BAA a full and fair opportunity to market Stansted in an effective way so as to be able to obtain a fair market price for it. However, he submits that the CC failed to make any allowance, as it should have done, for the facts that BAA is to be subjected to a loss of freedom of choice about whether or when to sell and that economic prospects are poor at the moment, so that BAA will suffer by having to sell Stansted in poor market conditions rather than being able to wait until conditions improve, in the hope of getting a better price.

72. It was in support of the first of these points, in particular, that Mr Green sought permission at the hearing to adduce in evidence a substantial expert report seeking to explain a possible basis of valuation of the loss of shareholder value associated

with loss of freedom of choice regarding when to sell Stansted. Against the possibility that that expert report might be admitted, the CC obtained its own expert report to dispute the analysis in BAA's expert's report. We refused permission for BAA to adduce expert evidence (see paras. 79 to 82 below), so the CC did not seek permission to adduce expert evidence of its own. We therefore address Ground (4) on the basis of the 2009 report and the 2011 report and the legal submissions addressed to us.

73. In our judgment, Ground (4) must also be dismissed. That is for two reasons.

74. First, in the course of the consultation leading up to the 2009 report and the consultation leading up to the 2011 report, BAA never suggested that there would be a form of loss to it of the character (based on loss of freedom of choice) now sought to be introduced into the analysis by Mr Green. In the consultation leading up to the 2011 report, BAA made specific representations about the losses it said it would suffer if required to sell Stansted, being (a) alleged loss of economies of scale, (b) loss of unquantified benefits of common ownership and (c) separation costs (i.e. transaction costs): see para. 5 of Appendix A to the 2011 report, which accurately lists these. In Appendix A the CC carefully analysed each of BAA's submissions regarding the losses it would suffer, concluding - as it was entitled to do on the material before it – that no value should be given to (a) and (b), and that (c) should be assessed at £36.1 million. That was the loss to BAA which the CC found in the 2011 report was substantially outweighed by the benefits for the public interest of requiring BAA to sell Stansted. Indeed, moving from the 2009 report to the 2011 report, the CC found that market conditions had in fact improved. So it appeared to the CC on the material before it that it could conclude that a requirement that BAA divest itself of Stansted was justified.

75. In our view, it is not now open to BAA on this review to seek to introduce a wholly new submission and new expert evidence regarding a new head of alleged loss arising from a requirement to divest itself of Stansted and on a timetable less relaxed that it would like or choose. The new head of loss now proposed was not clear or obvious, nor was it to the mind of the CC on the basis of its own consideration when it reached the decisions in the 2011 report. Therefore, there was

no call for the CC to consider this allegation of loss when reaching its decisions in the 2011 report and no legal obligation upon it to do so of its own motion. On the contrary, BAA was best placed to make representations about its own likely losses and the CC was entitled to look to it to explain what losses it contended it would suffer and to support its contentions with relevant evidence. Having failed to present the CC with any contentions or evidence regarding this alleged head of loss at the relevant time, it is not now open to it to complain that the CC acted unlawfully by failing to address it.

76. Secondly, and more fundamentally, where after a market investigation the CC concludes, in accordance with the principles set out in *Tesco plc* (see para. 20(2) above), that a company must divest itself of a business in order to remedy an AEC and ensures that the company has an appropriate opportunity to realise a fair market price for that business (as the CC did in this case), there is no further complaint that can properly be made that the action of the CC is disproportionate. In such circumstances the CC has found that remedial action must be taken in the form of divestment in order to address the harm to the public interest arising from the AEC and absence of proper competition in the relevant market; the divestment requirement imposed by it to address that harm will necessarily involve depriving the company of its ordinary freedom of action regarding disposal of that business (that is the very nature of a divestment *order* or *requirement*); and provided the company is given an appropriate opportunity to obtain the fair market value for its asset, its interests will have been sufficiently taken into account and protected. Since, in the scenario under analysis, the public interest requires that the company should not continue to own the business and the company is enabled to obtain the fair market value of that business, that requirement satisfies the proportionality test set out in *Tesco plc* and there is no further ground for complaint that the action taken is in any way disproportionate. In our view, therefore, Mr Green's submission is wrong in principle.

77. The orthodox view is that the best objective indication of the value of a business is to be given by the market, on condition that (a) the relevant market does not suffer from significant market failures and (b) there is a fair opportunity to test the market to get the most competitive offers for the business in question. In such a case, the

market can be expected fairly to factor into the present value of a business general predictions about how that business and the market in which it operates will perform in the future. Mr Green submitted that the approach of the CC, focusing on the transaction costs for BAA to realise the fair market value of Stansted, did not involve a sufficient assessment of the costs of divestment; rather, it was also necessary to consider (i) the market price that BAA might get in the future if it sold Stansted at a time of its own choosing and (ii) the revenues that BAA might obtain in the future if it chose not to sell Stansted at all (whichever was the more favourable to BAA). We do not accept that submission. It is not possible to contend that these aspects of impact on BAA escaped the attention of the CC, since they were intrinsic to the remedy which it decided was necessary. Nor is it possible to say that the CC adopted an unlawful approach in relation to them. Reference to future revenues for BAA would presuppose continuation of the common ownership of airports giving rise to the AEC that the CC has identified and is required to remedy. Reference to a market price that might be obtained in a future, optimally timed and voluntary sale also disregards the fact that an involuntary sale is necessary effectively to remedy that AEC. In performing a proportionality analysis in relation to the remedy for the AEC identified by the CC, we consider that it is appropriate that the fair value of Stansted should be assessed by the value the market will give it after there has been a proper opportunity to market it. This value will take account of its likely future performance to an appropriate extent, i.e. in circumstances undistorted by the AEC of common ownership and as assessed by the market, and BAA will receive the appropriate compensating payment (the market price) for giving up an asset with the potential for such future performance. The CC cannot be expected to be more perspicacious than the market in predicting and assessing the impact of future developments. Since the public interest requires that BAA should not keep Stansted in its hands, and since it will receive the fair value in money terms for that asset, it is not unlawful or disproportionate for the CC to require BAA to sell Stansted in accordance with a fair timetable, as it has done.

78. In relation to Ground (4), Mr Green sought to suggest that the Competition Appeal Tribunal in its judgment on the previous review of the 2009 report ([2009] CAT 35) had given reasons at paras. [248]-[260] which supported BAA's case in this regard. We do not think it did. There is nothing in the judgment to suggest that the Tribunal

took itself to be addressing the specific argument now presented by BAA. The Tribunal was addressing a situation in which BAA was subject to a requirement set out in the 2009 report to sell both Gatwick and Stansted according to a timetable similar to that applicable in relation to Stansted under the 2011 report, and in worse market conditions, so any such argument would have been stronger in that case than it is now, yet there is no analysis of any such contention by the Tribunal. At paras. [249]-[250] the Tribunal identified the risk of loss which might flow from an unduly short period being allowed for divestment in difficult market conditions as a relevant factor to be taken into account, but in the following paragraphs went on to reject the submission that the CC had in 2009 failed properly to take that factor into account. In the context of that judgment, the Tribunal's repeated references to "risk of loss of value" are references to the risk that BAA would not realise the fair market value for its assets. The position of the CC is stronger in relation to the 2011 report, since in that report (see in particular para. 12) it found in terms that the benefits of the divestiture remedy would be likely substantially to outweigh both the costs of divestment "and the impact on BAA's business." This was an assessment it was entitled to make.

79. Finally under this heading, we briefly explain why we dismissed BAA's application to adduce the new expert evidence. In doing so, we simply applied the conventional approach in judicial review proceedings as laid down in *R v Secretary of State for the Environment, ex p. Powis* [1981] 1 WLR 584, 595-597. The new evidence did not fall into any of the categories identified there of material which will be admitted as evidence on a judicial review: it was not evidence to show what material was before the CC, nor was it relevant to any jurisdictional question affecting the CC, nor was it relevant to any allegation that the actions of the CC were tainted by misconduct. Mr Green submitted that it was evidence which should be admitted to enable the Tribunal to carry out its review function properly, relying on the modest adjustment to the Powis categories which Collins J was prepared to accept in *R (Lynch) v General Dental Council* [2004] 1 All ER 1159, at [23]-[25]. Unlike in *Lynch*, we were not at all persuaded that we needed to see the expert reports in order to understand the submissions made by Mr Green under Ground (4).

80. We also make this general point. In our view, attempts to introduce detailed technical expert evidence in reviews under section 179 of the Act should be strongly discouraged and disallowed other than in very clear cases. Otherwise, there is an obvious danger that costs will be wastefully multiplied with no significant benefit for the speedy and efficient dispute resolution procedure which is supposed to be provided for by a section 179 review, as with judicial review generally. That is what happened here. Because BAA obtained the (no doubt expensive) report of its expert and sought to adduce it, the CC felt obliged to go to the expense and trouble of instructing an expert of its own to produce a report to be adduced in answer. In the event, neither report was admitted into evidence. On the other hand, were expert evidence to be admitted on the hearing of a review under section 179, there would be a real danger that time and effort would be expended in argument upon it which does not on proper analysis advance the legal arguments in the case, but operates rather as a distraction from them (and argument about expert reports is likely to be inconclusive as well, in the absence of the contending experts being called to give oral evidence and be cross-examined, which is not in the ordinary course a procedure appropriate in proceedings which are intended to be determined by reference to judicial review principles).

81. The Competition Appeal Tribunal Rules 2003 can be read as suggesting that expert reports may be expected to be adduced in evidence: see Rule 8(6)(b) (which provides that there shall "as far as practicable" be annexed to the notice of appeal "a copy of every document on which the appellant relies including the written statements of all witnesses of fact, or expert witnesses, if any") and Rule 25 (which provides that, inter alia, Part II of the Rules, which includes Rule 8, applies to proceedings under section 179). But this is because the main body of the Rules, and Part II in particular, is concerned with the Tribunal's appellate jurisdiction, in relation to which expert and other evidence will not infrequently be admissible and relied upon, and provisions which make sense in that context are then simply applied across to reviews under section 179 by cross-reference in Rule 25.

82. Where a person making an application under section 179 for review of a decision wishes to contend that expert evidence should be admitted on the application the proper course, subject to any exceptional circumstances, will be for him either to

annex to the application notice the expert evidence on which he wishes to rely (pursuant to Rule 8(6)(b), as applied by Rule 25) and include in the body of the application notice an application for the Tribunal to grant permission to the parties under Rule 19(1) and (2)(e) and/or (l) to adduce expert evidence with a request that that application be determined at the earliest opportunity by the Tribunal or – if he wishes to have a direction from the Tribunal to admit expert evidence before going to the expense of having an expert report prepared - to include in the body of the application notice an application to the Tribunal for such a direction under Rule 19(1) and (2)(e) and/or (l), again with a request that that application be determined by the Tribunal at the earliest opportunity. Of course, where the proceedings need to be dealt with urgently, as for example with certain merger cases, there may be no time for the second option and the evidence sought to be adduced may have to be lodged with the application. In either case, it is important that if an application for permission to adduce and rely on expert evidence is to be made it should be made at the earliest possible stage in the proceedings and, if at all possible, before the respondent is put in a position where it must expend time and expense to respond to the evidence. The matter should not be left hanging in the air, leaving everyone in a state of uncertainty until the hearing itself.

VII. GROUND (2) (FAILURE TO EXAMINE THE REASONS FOR THE INCREASE IN STANSTED'S SPARE CAPACITY IN 2011)

83. Under this heading Mr Green made the submissions that the CC in the 2011 report had relied on the increase in spare capacity at Stansted for the purposes of its proportionality analysis, but without any proper examination of the reasons for that, or had failed to write a report which properly explained its reasons. For both submissions, he relied on what the CC said in para. 114 of the 2011 report and contrasted it with para. 111 of that report. Either the CC had taken this factor into account in reaching its conclusion on divestment, as it said in para. 114, in which case the report should be quashed because the CC had not carried out a proper investigation into that factor; or the CC had not taken it into account, in which case it had not given proper reasons when expressing itself in para. 114 in particular.

84. In our judgment, there is nothing in either submission. They both proceed on the basis of a misreading of the report. On a proper reading of the report, there is no inconsistency between paras. 111 and 114 of the 2011 report. The increase in capacity at Stansted since 2009 was an additional point noted by the CC, but it did not rely upon it when making its assessment that the constrained capacity benefits outweighed the costs to BAA. See paras. 45 to 48 above.

85. We therefore reject Ground (2).

VIII. GROUND (3) (DEFECTIVE COMPARISON OF AIRPORT PROFITABILITY)

86. Ground (3) relates to section 4 of the 2011 report (paras. 51 ff above). BAA complains that there are significant differences between the way the accounts of the various airports compared by the CC were drawn up (with exceptional items being taken into account in some cases, but not others) and between the bases for the income streams of the different airports (with income derived in some cases from businesses or activities which were not comparable in every respect with those of Stansted).

87. In our view, this Ground falls to be dismissed as well.

88. The CC was fully entitled to conclude that the fall in profitability at Stansted did not constitute an MCC. Beyond that, BAA's complaint here puts far too great a weight on the comparative exercise which the CC undertook in relation to comparing airport profitability and seeks to impose on it standards of strict rigour of analysis which the CC did not consider should be adopted. The CC's assessment in that regard fell well within its margin of appreciation or evaluative discretion, as referred to in paras. 20(3) and (5) above.

89. The CC did not consider that it needed to compile a detailed and fully accurate assessment comparing airport profitability and margins on a rigorous like-for-like basis, nor did it consider that it would be possible to do so by reference to the publicly available material to which it was able to refer. It reviewed the accounts

and profitability of other airport operating companies simply to consider the impact of Stansted's profitability on the marketability of the airport (para. 247 of the 2011 report, para 53 above). It had regard to the accounts of those companies bearing well in mind that there was "inevitably a limit to the amount of profitability analysis" it could conduct on different airports "based on publicly available information" (para. 248 of the 2011 report, para. 54 above).

90. In our judgment, there is no unlawfulness in the approach of CC on this issue. It was relevant to have regard to the accounts of other airport operating companies as a simple and inevitably rather crude check (see para. 248 of the 2011 report) that the decline in Stansted's profitability was not indicative of some underlying catastrophic change in its position, or an MCC, which could call in question the CC's general assessment that BAA would be able to obtain a fair market value for Stansted if required to sell it. The CC was entitled to make reference to the accounts to give comfort on that score, and was entitled to assess that the rather superficial comparison which was possible and was undertaken was as far as its investigations needed to go to give it the necessary degree of comfort in relation to an assessment already supported by other parts of its reasoning.

91. Our view in this regard is further supported by the fact that BAA did not make any of the detailed criticisms it now makes about the profitability table comparing airports and the points made on it by the CC when consulted on the same table and assessment, which were set out in the provisional 2011 report. This reinforces our conclusion that the CC could entirely rationally and properly consider that it had probed the profitability of Stansted, including by comparison with other airports, to a sufficient degree for the purposes of its analysis in the 2011 report.

IX. CONCLUSION

92. For the reasons given above, BAA's claim for review of the 2011 report is unanimously dismissed.

The Honourable Mr. Justice Sales | William Allan | Joanne Stuart

Charles Dhanowa
Registrar

Date: 1 February 2012