IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1196/4/8/12

Victoria House
Bloomsbury Place
London WC1A.2EB

Friday, 27th July 2012

Before:

MARCUS SMITH QC
(Chairman)
DERMOT GLYNN
DR CLIVE ELPHICK

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC Applicant

- and -

COMPETITION COMMISSION Respondent

Supported by

AER LINGUS Intervener

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HEARING

APPEARANCES

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

Mr. Daniel Beard QC and Miss Alison Berridge appeared on behalf of the Respondent.

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

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LORD PANNICK: Good morning, gentlemen. I appear with Tristan Jones for Ryanair. The Competition Commission is represented by Daniel Beard and Alison Berridge; and Aer Lingus are represented by James Flynn and Daniel Piccinin.

The Tribunal will have seen that the issue on this review is whether, as we contend, the Competition Commission, the CC, has erred in law in deciding to continue its investigation into Ryanair's acquisition of a minority stake in Aer Lingus, notwithstanding the fact that the European Commission is conducting an investigation into Ryanair's notification of its public bid for the entirety of the share capital of Aer Lingus.

The case for Ryanair is that for the CC to continue its investigation is unlawful for two reasons: first, because the European Commission has exclusive jurisdiction under Article 21 of the Merger Regulation; and secondly, because of the duty of sincere co-operation under Article 4(3) of the European Treaty. Both of those are points of law and I will make submissions on them.

I hope the Tribunal has had the opportunity to see the letter from the Competition Commission which rejected those submissions. I hope you have a bundle of documents, which starts at 1. Behind tab 3 it has A to O.

THE CHAIRMAN: Yes, we have those.

LORD PANNICK: I am grateful. If the tribunal has letter L of that bundle, you will find there a letter from the Competition Commission sent to Ryanair and to Aer Lingus dated 10th July.

THE CHAIRMAN: We have got it.

LORD PANNICK: We see by the lower hole punch what the CC has decided. It does not:

> "… consider it should suspend the reference as a result of either the announcement of an intention to make a bid, the making of such a bid, or notification to the EC, because:
>
> (a) the General Court …"

that is the General Court of the Communities -

> "… has previously confirmed that Ryanair's 29 per cent shareholding did not confer control within the meaning of the Merger Regulation, indicating this acquisition in itself did not amount to a concentration of the Community dimension.
>
> (b) The CC has been in contact with the European Commission who have informed us that they would not at this stage anticipate that examination of the concentration resulting from any new bid would extend to consideration of the

existing minority stake that Ryanair hold in Aer Lingus, which is the subject of the reference to the Competition Commission."

There was a new letter, I do not know whether it reached the tribunal, last night, which I will come to in a moment if I may, from the European Commission.

Then over the page there is the statutory duty to proceed with the investigation. Paragraph 5:

> "The CC recognises its obligations under Article 4(3) … that it must not undermine the ability of the European Commission to complete any inquiries into or take and implement any decisions that fall to the exclusive competence of the European Commission under Article 21(3). The CC does not believe that these obligations currently prevent it pursuing the Reference. It believes it should continue with its inquiries where this is practicable. Equally, it does not prevent the European Commission from pursuing its own inquiries or implementing any resulting decisions.
>
> 6. The CC recognises the desirability of seeking reasonably to minimise the burden that overlapping inquiries might place on parties and third parties. They, the CC, believe however that with co-operation it should be possible to avoid these parallel inquiries becoming oppressive or mutually destructive."

It is going to work with DG Comp to see how the two authorities may best co-operate. I do not think the rest matters for our purposes.

So that is the decision that we are seeking to challenge.

As a consequence of that decision, the Tribunal will be aware - the Chairman will recall - that the CC issued to us, Ryanair, on 10th July a notice under s.109 requiring the provision of information and the production of documents. There was then a case management hearing here on 16th July, where we were applying for an interim order, but that application did not need to be pursued for two reasons: first, because this Tribunal very helpfully arranged for this substantive hearing to take place; and secondly, because the CC very helpfully stated that it would fine Ryanair for failing to comply with the s.109 notice until seven days after this Tribunal pronounces on this substantive appeal. So there is no difficulty, and we are very grateful to everybody for ensuring that we can be heard so speedily. So thank you for that.

As I mentioned, there is a letter from the European Commission which was sent yesterday and which we received yesterday evening. I hope the tribunal has it, 26th July. I do not

think I need to read all of this out. The first page sets out the background. On the second page I think what matters are the last three paragraphs, where they say:

> "Consequently, we can confirm …"

"we" being Competition DG -

> "… the minority shareholding is not part of the concentration notified on 24 July that the European Commission will examine under the Merger Regulation."

I should make it absolutely clear, as I hope it was made clear in our written documents, that that is not in dispute. We do not dispute that the minority shareholding is not part of the concentration which the European Commission are examining. The issue before this tribunal essentially is whether that makes all the difference. As is submitted, there are a number of points, and as I understand it the thrust of the case against us, both in relation to Article 21 and in relation to the duty of sincere co-operation, founds on the fact, which is not in dispute, that the 29 per cent is not part of the concentration that the European Commission are now examining. My argument will be directed to the implications of that rather than to disputing that question of fact.

The next paragraph then states:

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

So the approach being suggested as their view by the author of this letter and those in his department is that the question must be addressed at the stage of decision making. As I shall show the Tribunal, that essentially is what Ryanair were submitting last time round to the Court of Appeal, but unsuccessfully submitting. The Court of Appeal rejected that approach. There it is, that is what the European Commission say.

The final paragraph makes it clear that this is, in fact, not the view of the Commission itself. This letter reflects the opinion of the services in charge of merger control in the Directorate General for Competition and cannot bind the Commission itself.

We make four points on this letter. Point number one is the point made in the final paragraph. This is not the view of the Commission. It is not a formal decision of the Commission, it is the view of the services in charge of merger control. That is point number one.

Point number two is that this letter gives no reasoning as to why the conclusion is reached in the penultimate paragraph. One assumes that the reasoning is that given in the pre-penultimate paragraph, that is that the minority shareholding is not part of the concentration, but there is no analysis of why the conclusion follows from the premise. So this, in my submission, is not going to help this Tribunal to understand the legal rights and wrongs.

The third point is that even if this were a reasoned view of the Commission itself, and it is not, but even if it were it would not bind this Tribunal. The reason why I say that with confidence is because that is what the European Commission itself said in 2007 in this case. If the Tribunal would kindly go to tab A of this documents bundle, you will see the decision of the 11th October 2007, the Commission decision, and there is a paragraph right at the end, p.6 (at the top), para.22, where they are dealing with a request by Aer Lingus that the Commission should adopt a legally binding interpretation of a provision of Community law addressed to Member States. Third line:

> "The Commission manifestly lacks the power to adopt such an act."

Then this sentence in the middle of para.22:

> "Any interpretation of Article 21(3) … that the Commission would give in response to Aer Lingus's request would not be binding upon the authorities of the Member States."

That is the point, and that must be true in our case, just as it was true there. It is a matter for this Tribunal to arrive at its view of what the legal rights and wrongs are.

The fourth and final point is this: the European Commission letter, or rather the letter from those in charge of merger control, does not have the advantage – I hope it is an advantage – of hearing the arguments presented today, not just be me of course, but by all of us. They have not had that benefit.

There is a famous example in about 1967 where Mr. Justice Megarry was asked to decide a case by reference to something that he had said in a textbook he had written, and he rejected the submission. He found that what he had written was wrong, and he said famously that "argued law is tough law", and I hope that this Tribunal may gain some benefit from hearing the competing arguments which plainly the European Commission has not.

That is all I wanted to say on the letter.

Sir, I am in your hands. I was not proposing to take up the time of this Tribunal going through the background of this matter, because I am assuming, I hope accurately, that all members of this Tribunal will be familiar with the history of this. I was proposing to go straight to the legal arguments as to why we say, with great respect to the CC, that they have

erred in law on either or both of Article 21(3) and the duty of sincere co-operation. Obviously some of the history will be relevant as we go through the legal arguments, but I was not planning to have a long knock-up before I get to what matters. I hope that is acceptable.

THE CHAIRMAN: No, we would not encourage you to go through that.

LORD PANNICK: I am grateful. That is all I needed to hear.

Sir, the first point is Article 21(3), and the Tribunal will be very familiar with it, but if you are using the handbook the Merger Regulation begins at 4.502 at the top of the page. In the Merger Regulation the Tribunal will wish to be aware of recital number 8, and that appears on the first page of the Regulation at the top of p.4.502, recital 8:

> "The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentration should, as a general rule, be reviewed exclusively at Community level, in application of a 'one-stop shop' system, and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States."

That is the objective, one-stop shop, that explains the exclusive jurisdiction of the European Commission. The substantive provision with which we are concerned is Article 21, application of the Regulation and jurisdiction. Article 21(1) tells us which concentrations we are concerned with:

> "This Regulation alone shall apply to the concentrations defined in Article 3 …"

and in various Regulations –

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

The Commission's decision in this case correctly proceeded on the assumption that the public bid by Ryanair does give rise to a concentration with a Community dimension within the meaning of Article 1 of the Regulation. There is no dispute about that by reference to turnover size of the relevant matters. As I understand it, the CC does not dispute that if,

which is not the case, the minority stake, the 29 per cent, were to be treated as a part of the same concentration as the current public bid then the European Commission would have exclusive jurisdiction over the entire matter, and the CC's jurisdiction would be excluded by Article 21(3). That is my understanding. In due course Mr. Beard will say if I have misunderstood. My understanding is that the CC's argument is that Article 21(3) does not apply in this case – does not apply – because the minority stake, the 29 per cent, is not part of the same single concentration as that proposed in the public bid and which is under consideration by the European Commission.

THE CHAIRMAN: Lord Pannick, that is a distinction between the first round, *Ryanair* 1, where the public bid that was then made and the acquisition of the minority stake were so intertwined that it was regarded as a ----

LORD PANNICK: Sir, you are completely correct. There are two matters which, from our side, are not in dispute. One is that the 29 per cent, as I have already said, is not part of the single concentration being considered by the European Commission – not in dispute; and the second matter not in dispute is that which, sir, you have put to me accurately, that this is different to the position in 2007 when the 29 per cent – I think it was a lower percentage at that time, it increased from time to time, but whatever it was, the minority stake of less than 30 per cent was treated by the European Commission as part of a single concentration that also included the Ryanair wish to take over the whole of Aer Lingus. Again, that is not in dispute.

Essentially the first question for the tribunal, and it is a short question - there are two short questions - is whether that makes all the difference for the purposes of Article 21(3), and whether it enables the CC and Aer Lingus to distinguish this case from the judgment of the Court of Appeal last time round on duty of sincere co-operation. That, as I understand it, is essentially the issue upon which this tribunal will wish, I submit, to focus. Our case is that Article 21(3) prevents the CC from examining the minority stake, even though the minority stake is not formally part of the same concentration as the public bid.

Why do we so submit? Essentially, we so submit for these reasons. These are the reasons why we say that Article 21(3) confers exclusive jurisdiction on the European Commission in relation to the minority stake in the circumstances of this case. This is our argument.

First, looking to the language of 21(3), and I have argument about purpose as well, but if one looks, first, at the language of 21(3) the question is whether, contrary to 21(3), the CC is applying its national legislation on competition to any concentration that has a Community dimension? We invite the tribunal the answer that question by reference to this

analysis: the concentration that the Commission are considering is the expansion, or the planned expansion, from a 29 per cent holding to a 100 per cent holding. That is what the European Commission are considering.

We say that if, as is the case, the CC themselves consider whether to remove that 29 per cent, which is essentially what they are asking themselves, whether Ryanair should have to give up that 20 per cent. What they, the CC, are essentially considering is whether to remove the base, the foundation, upon which the public bid for the remaining 71 per cent is based. That is what they are assessing. They are considering whether to undermine on competition grounds - it is not a criticism of them - the very foundation of the concentration which the European Commission is considering. The European Commission is considering the question on the basis that there is a 29 per cent holding, should it be allowed to expand to 100 per cent? We say, with great respect, it is simply unrealistic to regard the 29 per cent as not material in a relevant sense to the assessment that the European Commission are undertaking. That is our first point.

Our second point is that for the CC to consider this matter - that is to consider the 29 per cent - would undermine the objective of the Merger Regulation which is, as the Tribunal has seen, to facilitate the one-stop shop principle. The one-stop shop principle will be seriously undermined, in our submission, if the National Regulator conducts an examination which overlaps, substantially overlaps, the assessment by the European Commission.

There are two aspects of this case which involve a very substantial overlap of jurisdictions. The first of them is this: the EU Commission has jurisdiction to find - and it may find, we must proceed on that basis for the purposes of today - it may find that Ryanair may lawfully in competition terms acquire 100 per cent of Aer Lingus. Any such result would directly conflict with a finding by the CC that Ryanair should not be allowed to retain 29 per cent of Aer Lingus. The two conclusions would be fundamentally inconsistent. To have the two bodies, European and national, considering competition issues that have at their heart - because these are not incidental questions, these are the substance of the issues being addressed by the national authority and the European authority - so fundamental an inconsistency, in our submission would breach the objective of the one-stop shop principle, which Article 21(3) to secure.

So we focus attention secondly on the fundamental conflict of these two results.

The third point we make is that, of course, the exercise of the CC's jurisdiction in this case, if any, will also substantially overlap with the exercise of jurisdiction by the European Commission because each of the two Regulators are going to be looking at substantially the

same factors. This is not an incidental overlap, it is a fundamental overlap. They are each going to be looking - in the one case for the purposes of analysing the 29 per cent, in the other case for analysing the leap from 29 per cent to 100 per cent - at the same things. They are going to be looking at the scope of the relevant product markets, the scope of the geographic markets, the competitive constraints, barriers to entry, customer demand, market trends. The same issues, whatever they are, are inevitably going to be the same in the two cases.

We say that there is a very strong case indeed for here regarding Article 21(3) as applicable, notwithstanding the fact, which we accept, that the European Commission in the assessment that it is conducting is not formally looking at a concentration which includes on this occasion the 29 per cent.

We seek to bolster that argument, still on Article 21 - I am coming on to duty of sincere co-operation - there is passage in the judgment of the Court of Appeal last time round that provides assistance.

I hope you have two bundles of authorities. There should be authorities 1 of 2 and 2 of 2, and I am looking at 2 of 2. Behind tab 17 of volume 2 I hope the tribunal will find the judgment of the Court of Appeal last time round, dated 22nd May, the Chancellor (Sir Andrew Morritt), Lord Justice Hughes and Lord Justice McFarlane. I will come to other passages of this in due course, because I say it is of central relevant to the duty of sincere co-operation, but at the moment, just for the purposes of Article 21, can I please invite the Tribunal's consideration to para.40, which is on the penultimate page of the judgment of the Chancellor for the Court of Appeal. Paragraph 40 begins, as regrettably so many of these paragraphs being, "I prefer the submissions of counsel for the OFT and Aer Lingus", but there we are, that is a pleasure of being at the Bar. It goes on:

> "If the appeals of either or both Ryanair or Aer Lingus had succeeded there would have been an immediate clash of jurisdictions. The success of the Ryanair appeal would, on any view, have confirmed the application of Article 21 so that all steps taken by the OFT and Competition Commission under the reference assumed to have been made by OFT in the period the appeal was pending would have infringed Article 21(3)."

What the Chancellor is there dealing with, as the Tribunal will recall, was that between 2007 and 2010 there was an appeal by Ryanair in relation to the decision of the European Commission that we could not acquire 100 per cent of Aer Lingus. The Chancellor is expressing the view as part of the reasoning of his judgment that if Ryanair had succeeded

in that appeal then Article 21 would have applied, and would have applied in relation to any steps to be taken by the OFT. So his reasoning on Article 21 was that Ryanair had succeeded in relation to the 100 per cent it necessarily followed - that is what the third sentence is saying, it necessarily followed that the OFT and the CC, because he refers to both of them, could not consider the 29 per cent, because of course the OFT were only interested in the 29 per cent and not the 100 per cent. So the Chancellor is finding that the 100 per cent was inextricably linked to the 29 per cent for the purposes of Article 21. I say that his reasoning there is not based, it does not say it is based, on the single concentration point. That is not what he is saying. I say that the Chancellor's statement in the third statement of para.40 is based on the practical reality that I have sought to base my argument on. That is that once someone is considering, and the General Court were considering, whether Ryanair can acquire 100 per cent, then it is plain and obvious that you cannot have at the same time the national authorities whether or not it is permissible for Ryanair to acquire 29 per cent, because the former analysis may, depending on the result, entirely prejudge the answer to the second analysis. So I rely upon that passage as assisting our case on Article 21.

We say that the fact that there is not a single concentration, and there is not, does not provide an answer to the Article 21(3) issue for the reasons that I have identified. That essentially is our case on Article 21(3).

THE CHAIRMAN: Lord Pannick, just one point, you have obviously put the case that there will be a conflict were the EU Commission to hold that Ryanair could acquire 100 per cent of Aer Lingus. I see the force of that. Obviously we do not know what the Commission will decide in the future.

LORD PANNICK: No, we do not.

THE CHAIRMAN: Were it to decide differently, that the acquisition could not go ahead, then one would have a situation where there would be a delay were the CC to hold up its investigation which might, to put it no higher than that, be undesirable. Does that not rather suggest that it is a more nuanced question, not a black and white one of saying wait until the Commission has decided, for the CC to decide whether, in all the circumstances, it is right to go ahead or not?

LORD PANNICK: My answer to that, sir, is that exactly the same approach - that is we do not know what the European authorities - could have been adopted the first time round. The Chancellor could have said in that passage, "We simply do not know, we did not know, the OFT did not know in 2007 leading up to 2010, whether the General Court would have

allowed either the Ryanair appeal in relation to the 100 per cent or indeed the Aer Lingus appeal in relation to the 29 per cent". Delay is undesirable, very undesirable, and because there is no certainty here the better way to proceed is let the OFT carry on, and let them carry on until they reach a stage where they have actually got to take a decision and step back at that stage. As a matter of policy, one can see that that may or may not have attractions. My submission, however, is that that, with great respect, is not the law. The law proceeds on the basis that we are concerned to avoid overlapping jurisdictions, potentially conflicting jurisdictions, and it is enough for my purposes, not on some incidental issue, some marginal question, but on a fundamental question there is, at the very least, a real risk of a fundamental inconsistency between the two processes for the reason, sir, that you put to me. You put to me for the purposes of argument that our case at its highest is based upon the real risk, which we must assume, that the European Commission will say 100 per cent is fine and the Competition Commission are considering whether 29 per cent is fine in competition terms.

My answer to your question that the decision might be different, the European Commission might say, "Certainly not, you cannot be allowed to have 100 per cent", is neither here nor there. If that were the approach then the approach taken on Article 21 by the Chancellor would be very different indeed, and the whole jurisprudence in this area would be very different. The court does not proceed on the basis, and we will see this most significantly in relation to duty of sincere co-operation, that we cannot know what decisions will be reached and therefore it is more desirable to avoid delay. That is not the approach.

I email, I am not putting my case on some discretionary basis, I am not seeking to persuade this tribunal that it is preferable for the CC to stay their process. I am not seeking to persuade you that it is better that they delay rather than not delay because the balance of advantage is one way or the other. This is a question of law.

THE CHAIRMAN: You are saying they cannot do it.

LORD PANNICK: They cannot do it. I am either right or I am wrong. I understand the question, sir, you put to me. My answer to it, and I have given a rather long answer, and I apologise, is that is the wrong legal approach, with respect. That is my answer.

THE CHAIRMAN: I quite understand the force you place on the decision of the Chancellor in the Court of Appeal in *Ryanair* 1. Was not the question before the Court of Appeal rather different to the question before this Tribunal now. Let me unpack that a little bit. The question before the Court of Appeal was whether an earlier decision by the OFT to draw stumps and to suspend its investigation, whether that decision was sufficient to trigger the

limitation provisions, if I can call them that, in s.122(4). So was not the question before the Court of Appeal, and indeed the Tribunal before that, the OFT having decided to exercise its self-denying ordinance in this particular case, which decision was not under review, it was a decision that had been made with water under the bridge, that decision having been made, does it have the effect of extending time? That was the question then, whereas the question now is whether the CC's decision in the present factual context to continue with the investigation is justifiable?

LORD PANNICK: In my submission, sir, you are correct, of course, that the way in which the issue arose last time round was in the context of s.122(4).

The issue is the same issue for this reason: the dispute last time round, and the question upon which the Chancellor focused, was whether, as a matter of EU law, not domestic law, the Office of Fair Trading were obliged by EU law not to proceed with their consideration of matters while the processes continued in Brussels and in Luxembourg. Our argument for Ryanair was that, as a matter of EU law, they could have continued. The argument for the OFT and for Aer Lingus was, no, they could not, because of EU law. The argument was whether Article 21 and the duty of sincere co-operation prevented, as a matter of law, the OFT from conducting their investigations while the European procedures were continuing. The Chancellor pronounced on that. He pronounced on how Article 21 applied and how the duty of sincere co-operation applied.

The Chancellor's judgment does not depend upon any question of discretion for the OFT, and it does not depend upon any analysis of domestic law. The domestic law follows from the obligation that the OFT had. It was the because the OFT were obliged by Community law not to carry on that English law had to accommodate that.

We say the position is the same now. We say that the question now is whether, as a matter of Community law, by reference to Article 21 and the duty of sincere co-operation, there is the same or a similar duty under Community law on the CC, that they must not continue with their analysis while the procedures continue in Brussels.

The main point taken against me – my friends will say if there are other points – is that this is different, not because of the content of domestic law, not because this is some form of decision by the Regulator that it will proceed, whereas last time the decision was it would not proceed, what is said against me is that Article 21, as a matter of Community law, does not apply and the duty of since co-operation does not apply because there is not a single concentration this time. If I am right in my legal submissions on the meaning and application of Article 21 or on the duty of since co-operation, it cannot save the CC to say,

"We have taken a judgment, we have made a judgment, and this time round, unlike the OFT, we have decided that we will proceed", whereas last time they decided they would not. That is because unless Community law prevented the OFT, unless, as a matter of hard law, Community law prevented the OFT from continuing, they were out of time. They were out of time to refer the matter to the CC.

I say it is the same question. It is a question of hard Community law that needs to be determined.

THE CHAIRMAN: I suppose the point I am exploring with you is, could it be that the reason that discretion does not feature very much before the Court of Appeal is simply because the OFT's decision not to proceed had already been taken? That was, as it were, a given. As you rightly say, what the Court of Appeal was considering was whether the duty of sincere co-operation meant that, as a consequence of having taken that decision, time did not run. It was not debating the rights and wrongs of the original decision because one way or the other either time did not run or time did. So it is a similar question. The context is remarkably different.

LORD PANNICK: I entirely accept the context is different, but I say - and I am either right or wrong in this, the Tribunal will pronounce in due course – as a matter of law Article 21 means what it means and the duty of since co-operation means what it means and this is not a discretionary question. The Court of Appeal could have said last time round that it is true that the OFT made a decision, but there is an element of discretion in this, that the court will give them a latitude in relation to this question, but they did. That is not the approach. The Court of Appeal take a view as to whether Article 21 applied or it did not apply, and whether the duty of sincere co-operation applied or it did not. There is no suggestion that they, the Court of Appeal, are dealing with this as a matter for the judgment of the Regulator.

I can see that if I were putting my case in a different way, if I were saying to this Tribunal that it is going to be very difficult for us to comply and these are factors that the CC has not properly taken into account, one could then see that the Tribunal would recognise, properly so, a discretionary judgment with which this Tribunal would be reluctant, on traditional concepts, to interfere. Of course, there is some of that in the arguments that we have previously put. That is not how I am putting my case today, as the Tribunal understands.

THE CHAIRMAN: No, you are not saying that it is an irrational or disproportionate decision, you are saying it is wrong as a matter of law.

LORD PANNICK: And I am not saying to the Tribunal it is going to be jolly difficult for us to meet the demands of two task masters on the facts of this particular case. I say there is a right legal answer to be identified by reference to the factors that I have drawn attention to and the factors I am coming to. That is my answer as to the factual circumstances.

THE CHAIRMAN: Thank you, that is very helpful.

LORD PANNICK: May I turn to the duty of sincere co-operation. We will see how the Court of Appeal have dealt with this. The duty comes from Article 4(3) of the Treaty, and that can be found in the other volume of authorities, volume 1 of the authorities, at tab 1. I think the only part that is relevant is 4(3), although of course I will read any other part that I am asked to, which says:

> "Pursuant to the principle of sincere co-operation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."

Of course, flesh needs to be given to those words as to what they mean in particular legal circumstances.

Fortunately, we say, this Tribunal has guidance from the Court of Appeal on facts that are not exactly the same as those we are now considering, but very close indeed because it is the *Ryanair* case, and it is a very recent decision given two months ago. The irony of the situation will not be lost on this Tribunal, and it is very ironic indeed. The position is this: last time round, Ryanair was arguing for a narrow scope of the duty of sincere co-operation. We were saying, there is no secret about this, to the Court of Appeal, "This concept of the duty of sincere co-operation has a narrow scope. It only applies at the stage when you are arriving, you, the National Regulatory Authority, are arriving at a decision". Until then you can continue to investigate, consider and that is what you are required to do. The duty of sincere co-operation does not justify holding things up. Therefore, we said, the OFT should have been doing that from 2007 to 2010, it did not, and therefore it is out of time.

The opposite argument was being put by my friends, far more persuasively than I put my argument, because the Court of Appeal accepted what they said. They said that is not right, the duty of sincere co-operation is much broader than that.

Although it is highly ironic that we are changing sides, none of that matters. What matters, I submit, is what the Court of Appeal actually decided, because all of us at the Bar, and with great respect this Tribunal, are all of course bound to try to identify what the Court of Appeal decided and why and then apply it. That is the position.

What was it that the Court of Appeal were considering in relation to this duty of sincere co-operation? They were considering whether the time limit for the OFT to refer the Ryanair acquisition of the minority stake was suspended while the European Commission and the European Courts were considering the two appeals. There were two appeals, as the Tribunal will recall. Ryanair were appealing in relation to the refusal to allow us to bid for 100 per cent and Aer Lingus were appealing in relation to the Commission's approval of Ryanair acquiring 29 per cent.

What the Court of Appeal held, and indeed what this Tribunal held, was that while the European authorities were considering these two appeals, it would have been a breach of the duty of sincere co-operation for the OFT to investigate the minority stake and therefore the time limits were suspended, therefore the OFT was in time. To get to that result the Court of Appeal rejected the Ryanair submission. The Ryanair submission was very clear, I hope, it was certainly very simple. It was that the duty of sincere co-operation only required the national authorities to avoid taking a final decision which risked conflicting with the decision of the EU institutions.

We can see this if we go back, please, to the judgment of the Court of Appeal, which was volume 2 of the authorities, tab 17. The relevant passage that sets out our submission is para.36, if I could ask the Tribunal, please, to look at that.. What precedes that is a recitation of the authorities in this area. Starting at para.32 there is a reference to the *MTV* case, at para.33 as well, the *Masterfoods* case at para.34, *National Grid*, which was another decision of the Chancellor, but at first instance, in the Chancery Division, para.35, and then at para.36:

> "In the light of those authorities counsel for Ryanair submitted that it is for the national court to determine what is required to satisfy the duty of sincere co-operation and that it did not necessitate OFT refraining from making any reference at all."

That is a reference to the CC.

> "He [counsel] submitted that a reference could be made and pursued so long as the Competition Commission abstained from reaching any conclusion before the Court of Justice had reached its conclusion and ensured that any conclusion arrived at thereafter was consistent with the decision of the Court of Justice."

So that is the submission.

As I have already indicated to this Tribunal, this Tribunal may find a certain harmony between what Ryanair was there submitting and what the European Commission are now

saying in their letter yesterday, which essentially comes to the same thing. That is, "You, the CC, we are quite happy for you to continue, but be careful when you are coming to the stage of a decision to make sure that it does not conflict with anything that we, the Commission might decide". That was the decision, and it was based, we submitted, on previous authorities. What matters is that it was not successful. That is what matters today. Then 37:

> "These submissions are challenged [by my friends]. They contend that the duty of sincere co-operation must extend to avoiding any risk of a clash of jurisdictions, not only inconsistent final conclusions."

So they were arguing for a much broader approach to the duty of sincere co-operation:

> "They contend that the submissions for Ryanair take too limited a view of what the duty of sincere co-operation requires. They support the reasoning and conclusions of the CAT."

which of course were that the duty did not prevent the OFT from referring it to the CC, and the CC from considering the matter.

Then we come to the crucial part. The Chancellor says at para.38:

> "It is, in my view, clear that both ECMR and the Enterprise Act confer extensive powers of investigation on, respectively, the Commission and the OFT and the Competition Commission both before and after a notification or reference is made. Although not looking for quite the same thing, those respective bodies would be investigating the same events. The definition of a 'concentration having a community dimension' contained in ECMR, for which the Commission would be looking, is not the same as a 'merger situation' as defined in the Enterprise Act which would concern the OFT. Accordingly, there could be no question of the conclusions of one being adopted without further inquiry by the other. There is, however, considerable overlap in the exercise of the two jurisdictions."

So it is not the same question, he says, but he, the Chancellor, focuses on what he regards as the considerable overlap. Then he goes on to deal with the practicalities.

> `"The processes of an OFT investigation with a view to possible referral to the Competition Commission , and of any inquiry by that Commission before its decision are, in both cases, intensive."

Then he gives the detail, extensive gathering of information, working papers, detailed examination, proposals as to remedies, orals, he refers to the Issues Paper, he refers to how they look at matters such as shareholding voting patterns, capitalisation, articles of

association, restrictions on airport slot disposal, catchment areas, route comparisons, competition and efficiency incentives, and the level of present or anticipated co-ordination:

> "All this is under intensive investigation, and preliminary views are being expressed, before there is even a reference to the Competition Commission, let alone an inquiry by it. It is, to my mind, self-evident that concurrent investigations in the UK and in Europe would be both oppressive and mutually destructive. I accept, therefore, that the duty of sincere co-operation does go beyond avoiding inconsistent decisions and extends to overlapping jurisdictions."

We say that that is the crucial paragraph. It is an express rejection of the arguments set out at para.36. It is a statement that even though the assessment by the European Commission as the assessment by the National Regulator, nevertheless there is an overlapping jurisdiction, and that, in the view of the chancellor for the Court of Appeal, is sufficient to bring into play the duty of sincere co-operation which prevented, as a matter of law, the OFT from at the same time conducting a parallel overlapping assessment – not the same assessment, but sufficiently overlapping. That is what the Chancellor says, in other words, an OFT investigation into a 29 per cent holding would overlap, and was therefore unacceptable, with a European Commission.

THE CHAIRMAN: I quite see the force of your submissions on para.38, but is not the crucial question when parsing this paragraph to distinguish those holdings of law that the Chancellor is making as opposed to those findings of fact?

LORD PANNICK: Yes.

THE CHAIRMAN: Clearly the last sentence in para.38 looks like holding a matter of law where the Chancellor is saying that the duty of sincere co-operation extends beyond avoiding inconsistent decisions and extends to, as it were, overlapping jurisdictions.

LORD PANNICK: Yes.

THE CHAIRMAN: The question, I suppose, that we will have to grapple with is how much further, as a matter of a legal finding does the Chancellor go? Is he simply saying, yes, the duty of sincere co-operation is engaged prior to the decision making stage and one must then evaluate as a matter of fact whether the duty requires the prevention or discontinuance of the investigation, or is he saying that because there is this overlap, as a matter of law the duty of sincere co-operation requires the OFT to stop?

LORD PANNICK: My submission – you have my submission already, sir – is that there is a clear finding of law at the very least is that the duty of sincere co-operation – it is the last sentence, as you put me to me, sir. The last sentence is plainly a finding of law. The duty

of sincere co-operation is not confined to avoiding inconsistent decisions, it extends to overlapping jurisdictions. What that means, as a matter of law, is that if there is an overlapping jurisdiction it is not open to the National Regulatory Authority, without breaching the European duty, to investigate. That is a finding of law, and it is a finding of law because he has rejecting the submission at para.36, he is making a finding at the end of 38, and also the finding at the end of 38 is consistent with what we see at the beginning of 38 which he, the Chancellor, is focusing, if one picks it up in the eighth line, there is the sentence:

> "Accordingly, there could be no question of the conclusions of one being adopted without further inquiry by the other. There is, however, considerable overlap in the exercise of the two jurisdictions."

So he, the Chancellor, thinks that that is enough to bring into play the duty of sincere co-operation. I say that his reasoning is not dependent upon any more detailed factual analysis. He is stating a principle of law, and the principle of law is informed, of course, by what one finds in the second half of para.38, that you really do not want to have two different bodies essentially looking at the factual issues. The finding of law is that the duty of sincere co-operation prevents – it precludes – what he describes as "overlapping jurisdictions". If that is right, the question for this Tribunal is whether here there would be overlapping jurisdictions.

I have made my submissions already in relation to Article 21, and if I am wrong on Article 21 I make the same points under this head, that there would manifestly be overlapping jurisdictions in the way that they are understood by the Chancellor, in that both the European Commission and the CC would be looking at substantially the same material, the same questions, not exactly the same, but that is not needed says the Chancellor, and there overlapping jurisdictions in the fundamental sense that I have already identified, that the European Commission are going to say yes or no, or possibly with qualifications, but they are going to say can we, Ryanair, own 100 per cent. If we can then that overlaps very, very substantially indeed. Indeed, it precludes any negative answer, I would say if I need to say, as to whether the CC can say whether it is acceptable for us to own 29 per cent. So how else could this be but overlapping in the sense that the Chancellor indicates.

So, yes, I agree, sir, it is important that this Tribunal identifies what is the principle of law, and that is my submission on it in relation to para.38.

THE CHAIRMAN: The difficulty is how far is it a pure question of law and how far is it a question of mixed law and fact? I see exactly what you are saying, that this is a largely a question of law, not fact.

A moment ago you made a very interesting statement. You said the Chancellor found the duty comes into play. That I certainly see in the last sentence. It having been found that the duty of sincere co-operation comes into play, what may be said against you is that it is then a question of fact as to whether that duty actually requires the suspension of the investigation. Looking at the penultimate sentence in para.38, is the Chancellor there, when he is saying it is self-evident that concurrent investigations would be both oppressive and mutually destructive, making a finding of fact in this case or making a statement of law which would bind this Tribunal?

LORD PANNICK: I have two answers to that. First, I would say that it is not a finding of fact, it is an analysis that leads him to the legal conclusion. In my submission, this Tribunal, with great respect, is bound by what he says. Anything in his judgment that is central to the conclusion, central to the reasoning that leads to the conclusion, is binding on this Tribunal unless of course it can be distinguished. That is the first point.

The second point is that if one proceeds on the basis that to have the OFT and the European Court and European Commission looking at these same matters at the same time is unacceptable for the reasons that the Chancellor gives, we, for our part, would submit that it is very difficult to see why the position should be any different in relation to the European Commission and the CC. There would be a real difference if all we are looking at is whether there is a risk of conflicting decisions, because then the CC would be perfectly entitled to say, "Yes, we can consider, we can address, we can investigate, but we will be very careful, not least the European Commission have told us to be very careful, not to arrive at a decision that might prejudge or conflict with the European Commission might say".

That is not the test. Whatever else may be in doubt, the duty of sincere co-operation is not limited as a matter of law to the stage of decision making. That was our submission, and that was undoubtedly rejected – undoubtedly rejected.

If one is trying to see what was it the Chancellor was deciding, we go on. I have already referred to para.40 which refers to the Article 21 point, but it is of interest to note in relation to the duty of sincere co-operation that that is also referred to in para.40. The second sentence of para.40 is referring to these two – then between 2007 and 2010 – concurrent appeals – that is the appeals of Ryanair and Aer Lingus. If the appeals of either or both of

them had succeeded there would have been an immediate clash of jurisdictions. Why is that? Because just looking at the appeal by Ryanair, because he says, "If either or both", but let us focus on Ryanair. If Ryanair had succeeded that would either have meant they can acquire 100 per cent, or they would have a pretty prospect of being able to acquire 100 per cent. Certainly the fundamental bar on them doing so would have been removed, and, says the Chancellor, that would have involved an immediate clash of jurisdictions, a clash of jurisdictions with the OFT considering the 29 per cent. So we rely upon that.

Then there is the sentence about Article 21, which I have already read, and which is not concerned with the duty of sincere co-operation, but I rely on it in the Article 21 context.

Then the next sentence:

> "The duty of sincere co-operation, which had existed at all material times, necessarily …"

"necessarily" –

> "… required the OFT to desist from making any reference during that period."

That is the period when these two appeals were alive. So he, the Chancellor, regards the existence of the Ryanair appeal in relation to the 100 per cent as necessarily – that is his word - necessarily bringing into play the duty of sincere co-operation.

So I do not accept for that reason that the Chancellor's view is based upon carefully calibrated assessment of fact or confers any degree of discretion on the OFT. His position is very simple. He says, because the issue of 100 per cent ownership was on appeal in Europe, that, of itself, because it is either or both of the appeals, while that question remained in alive that necessarily – necessarily – required the OFT not to make a reference on the 29 per cent.

So I invite the Tribunal to look at para.40 as helpful on the scope of this duty of sincere co-operation. I say that that none of that is very surprising. If Europe is considering whether we, Ryanair, can acquire 100 per cent, it really is not very surprising that the duty of sincere co-operation should prevent the national authorities at the same time from considering whether we can acquire 29 per cent. It comes back to the fundamental point that I raised at the beginning.

THE CHAIRMAN: So what it boils down to really is this: unless we can persuaded that the overlapping jurisdictions in Ryanair one and the overlapping jurisdiction here are materially different, then, if they are not materially different, as a matter of law, the duty of sincere co-operation requires the CC to desist and our decision is a remarkably easy one.

LORD PANNICK: That is my submission to this Tribunal, that on duty of sincere co-operation it follows from the views, the binding views, with respect, that were expressed by the Court of Appeal. The point taken against me in relation to the duty of sincere co-operation, as it is taken against me in relation to Article 21, is that the judgment of the Court of Appeal last time round either does not apply or it can be distinguished because the basis of assessment last time round was that there was a single concentration. It is essentially the point taken against me.

I have dealt with that in relation to Article 21(3), but the same distinction is advanced by my friends as the basis for distinguishing, they say, the Court of Appeal judgment on duty of sincere co-operation. They say that Article 21 does not apply, and for the purposes of this argument that is duty of sincere co-operation. One must assume that they are right on that, because if they are wrong we win anyway. So let us assume they are right on that. They say, "Sincere co-operation does not apply because this is not a case where we are within the scope of Article 21". That is the difference between then and now.

We say with great respect that that analysis confuses the two doctrines. There are two distinct doctrines here. There is the Article 21 doctrine, and there is the duty of sincere co-operation. On the approach for which my friends contend, the duty of sincere co-operation adds nothing to the Article 21(3) requirements. The latter – that is duty of sincere co-operation – is not co-extensive with Article 21(3). It is a separate legal route to arrive at the conclusion that the National Regulatory Authorities are prevented from acting. We are concerned in the context of Article 21(3) not with the same jurisdiction, or indeed with one jurisdiction, because Article 21(3) is concerned with exclusive jurisdictions, as the Tribunal appreciates. What the duty of sincere co-operation is concerned with (see the Court of Appeal judgment) is overlapping jurisdictions. Whatever else may be unclear about the Court of Appeal judgment, what is clear, I say beyond doubt, is that the Court of Appeal tell us that the duty of sincere co-operation is concerned with a case where there are overlapping jurisdictions, and where there are then the National Authority may not act.

It, therefore, is not enough, I submit, for my friends to say that the distinction between this case and the previous factual circumstances is that last time round there was a single concentration for the purposes of Article 21(3). They cannot, in my submission, distinguish the previous judgment of the Court of Appeal on that basis. Indeed, that is not the basis upon which the Chancellor decides the case at para.36, where he sets out our submissions, and 38 where he rejects them. He is not rejecting them at 38 on the basis that this is within

Article 21. Indeed, the Chancellor in 38 is focusing, as I say, on overlapping jurisdictions, not on whether you fall within or without Article 21(3).

So, in our submission, if there is any force – and the Tribunal will say in due course whether there is any force – to my analysis of paras.38 and 40 of the Court of Appeal judgment, it is no answer to my points for my friends to say, "Well, there was a single concentration for Article 21 purposes last time round and there is not this time round". With respect, that is nothing to the point, in my submission.

That is what I want to say on the duty of sincere co-operation in this case. I have dealt with the Competition Commission's argument that the facts here are different, and I have made my submission on why they are not relevantly different.

The Competition Commission also make a submission that they enjoy a discretion, and I have made my submission on that. Nothing in the analysis of Article 21 or in the analysis of duty of sincere co-operation recognises a discretion for the National Regulator. These are hard edged questions of law with which they must comply.

Delay, the undesirability of delay, is addressed by the Competition Commission, and it is a matter, sir, that you put to me in the course of argument. Our answer, if I can just formulate a response on delay, is as follows: we say, if we are correct in our legal analysis on either of these limbs, delay is simply irrelevant. It is as irrelevant as it was that there was delay between 2006 and 2010 in the previous case. It is no doubt regrettable that there is ever delay, but it does not affect the legal analysis. Indeed, the delay this time round is likely to be a lot less than the delay last time, but however long it is, it is simply irrelevant. It is irrelevant because the scheme of European law is that however delay is, it is even more undesirable to have two parallel assessments either because the European Commission has exclusive jurisdiction, that is Article 21, or because there are overlapping jurisdictions and therefore the duty of sincere co-operation prevents the two processes continuing at the same time.

May I just say a word or two about the skeleton argument from Aer Lingus. Sir, members of the Tribunal, I do not want to spend a lot of time on this, but I should mention that the Aer Lingus skeleton argument by contrast with that from Competition Commission takes what I hope I may fairly describe as a rather angry tone. What it suggests is that my clients, Ryanair, are proceeding in bad faith. My friends see fit to describe Ryanair's conduct as a "ploy" (para.2). They say in para.3 we are seeking to frustrate the CC's investigation. They allege at para.33 that we have engineered an unmeritorious legal challenge to string out the

delay, and they conclude at para.36 that we "made a mockery" of the UK's merger control regime. Those are the points that they make.

I hope, on reflection, that my friend, Mr. Flynn, whose submissions are never angry in tone, may see fit to withdraw those allegations. They are, of course, entirely irrelevant to the issues before this Tribunal. We are right in law or we are wrong, and I have given the Tribunal the legal arguments that we say lead to the conclusion that we are correct. The Tribunal will pronounce in due course whether we are right or we are wrong.

If it were to matter, I hope I might briefly be allowed to say this: the delays until 2010 were caused by two appeals. It was not just Ryanair's appeal. As the Tribunal appreciates, there was also the appeal by Aer Lingus against he 29 per cent holding, Aer Lingus being aggrieved by the decision of the Commission that there was no reason in competition law terms why we could not hold 29 per cent. So that appeal held up the matter on its own until 2010.

The delays after the OFT started to look at this matter in late 2010/early 2011 were because we took a point of law about whether the OFT were out of time. It is difficult to suggest, if my friend were to suggest, that this was some vexatious point when it was a point of law that the Court of Appeal itself gave leave to appeal on. It regarded it as a sufficiently important difficult point of law that we should be given to appeal on. It was also the Court of Appeal which, rejecting Aer Lingus's submissions, held that the OFT had power to hold up the process until the Court of Appeal pronounced on that substantive issue. The OFT were supportive of our submission that they, the OFT, did have power pending the Court of Appeal's substantive decision, to hold matters up. That judgment is contained, if the Tribunal wants to look at it, at tab 16. At that stage, Mr. Beard for the OFT, and I, for Ryanair, were on the same side. That appeal succeeded.

Finally, can I just say this for the record if it matters, the current bid by Ryanair for the 100 per cent is not being advanced in order to hold up the CC's investigation, as is being suggested by Aer Lingus. The current bid is being presented because Ryanair takes the view – it might be right, it might be wrong – it genuinely takes the view that it has good prospects of persuading the European Commission to let that bid proceed in the light of changed circumstances since 2007. If it matters, our announcement of the bid – I am not going to take time on it, but it is behind tab F in the documents bundle, p.121 – sets out a range of reasons why we say the circumstances have changed and the Commission should allow us to acquire 100 per cent of Aer Lingus. So the Tribunal will understand that there is a degree of bitterness on either side between the main commercial rivals. It may lead to

some statements in skeleton arguments that perhaps, with the benefit of reflection, were not very wise, but none of it is relevant, but I do not want to leave the Tribunal with some lingering belief that this is all a ploy. It is not. We are hopeful – we may be right, we may be wrong – that we can persuade the Commission that we are right on the merits as to 100 per cent in competition law terms. We take the view genuinely that the CC has no legal power to consider the minority stake in the meantime. . I have presented my legal arguments. The Tribunal will pass judgment on their strengths or otherwise in due course. The raising of the temperature by Aer Lingus, in my submission, really will not assist the Tribunal on these matters.

Finally, subject of course to any other matters the Tribunal wants me to deal with, can I just mention the five questions that the Tribunal very helpfully directed to us in your letter, which was the letter of 19th July. The first of them related to the question of precedental value of the previous Court of Appeal decision. I hope I have dealt with that. What binds this Tribunal, I think we all agree, is the findings of law and the essential reasoning of the Court of Appeal last time round. We will have an argument about that. You have heard my side and my friends will put their side. An analysis of the doctrine I do not think is going to take the Tribunal much further forward.

Similarly, the second question on *res judicata*, what is the line between questions of fact and questions of law? I think I have dealt with that as well, and the same answer applies. You will form a view on what the Court of Appeal was deciding and why.

Question number three was the factual matrix of the earlier decisions, and I have made submissions on that. I say that there are factual differences, I accept, but they are not material to the issues of law that the Tribunal has to decide.

Question number four was the margin of appreciation, and I submit, by reference to Article 21, by reference to the earlier Court of Appeal judgment, there are questions of law, hard edged questions of law. It is not a matter of discretion, it is a matter of duty.

Question five was the question of whether the minority shareholding is part of the concentration notified to the EU Commission, to which the answer is, no, it is not, and I have addressed you on the legal implications.

Subject to any further questions, sir, that is what I wanted to say on behalf of Ryanair, and I have kept within my time limit.

MR. GLYNN: Could I just ask you a question on what you have described several times as the risk of a fundamentally inconsistent outcome of the two kinds of decision? Would you agree that there are, from a competition policy point of view, quite different issues involved

in the prospect of a 100 per cent ownership merger which might have considerable benefits – it might or it might not, I do not have any view on that, but it might – and the issues that would be involved in the prospect of a continuing 28 or 29 per cent holding, where you might see more clearly the potential disadvantages and little prospect of advantage. Is it not a mistake to think that there would be a fundamental conflict in addressing the two questions simultaneously by different authorities?

LORD PANNICK: Sir, you are putting to me that there might be circumstances from a competition point of view where it would be acceptable to own 100 per cent, but not acceptable to own only 29 per cent. Is that the question that you are putting to me?

MR. GLYNN: If I could just say it again, a possibly sensible outcome might be that a 100 per cent would be allowed. There is a set of issues involved in that which one could easily see might go that way. Equally, it would be very hard perhaps to see the outcome being that it was sensible to allow a minority stake to continue if it were not a part of the 100 per cent.

LORD PANNICK: I certainly recognise from a competition point of view that one might arrive at the conclusion that 100 per cent is acceptable, but 29 per cent considered on its own is not acceptable. I recognise that there might be such a conclusion. My case is that once you have decided that 100 per cent ownership is acceptable, and reasons have been given for that, that is at the very least going to be of enormous significance if that is what the European Commission decide – of enormous significance in a decision that is then taken by the National Regulatory Authority as to whether 29 per cent considered on its own is acceptable. If I was putting the case, and I think I was, on the basis that one could not ever envisage circumstances from a competition point of view where 100 per cent ownership was acceptable, but 29 per cent was not acceptable, then I am putting it too high, so my answer is yes. It would be of enormous significance in any analysis to look at the conclusion, if it be the conclusion, that 100 per cent is acceptable, and to look at the reasons why it is acceptable.

THE CHAIRMAN: Thank you very much, Lord Pannick. Mr. Beard?

MR. BEARD: Sir, I am conscious that mid-morning often the CAT wants to give the shorthand writers a short break, I do not know whether that is the intention this morning - given that we are ahead of schedule this might be the moment to do so, but obviously I am very happy to proceed.

THE CHAIRMAN: On this occasion press on, Mr. Beard.

MR. BEARD: Certainly. If I may I will take the submissions made by Lord Pannick in two parts, first dealing with the Article 21(3) issues, and then with the duty of sincere co-operation issues.

In dealing with the 21(3) issues I am going to go a little bit back into some of the history here just because it may be instructive for the Tribunal to see one or two of the decisions and passages in some of the decisions that dealt with minority shareholding - this minority shareholding - in the previous cases.

Accompanying our skeleton argument a chronology, I do not know if you have that to hand, it is just the annex?

THE CHAIRMAN: Yes, we have that.

MR. BEARD: You will be pleased to know I am not going to go through it box by box. I was just going to highlight the start of the chronology here because what we had back in September/October 2006 is acquisition of minority shareholding and, within days, a public bid being made and then the notification of the public bid and within a month a pushing up of the relevant minority shareholding to 25 per cent. So there was a whole cluster of actions taken within a short period of time back in 2006.

Then, of course, the investigation of the Commission rolls forward. As you know a European Commission investigation has two phases potentially: there is phase 1 and phase 2; in this case the second phase investigation was opened, it rolled through to a decision which declared the acquisition of sole control of Aer Lingus by Ryanair would be incompatible, and then the litigation feud began in the Luxembourg Courts.

First of all Ryanair was out of the blocks appealing against the entirety of the prohibition decision. Aer Lingus was a little slower, but nonetheless admirably quick in Luxembourg timescales. It pressed the Commission for a particular decision asking whether or not it was going to dispose of the minority shareholding, getting confirmation of that decision. Lord Pannick referred you to that decision and I will take you to that in the context of the Commission letter. But the Commission adopted a formal decision under Article 8(4) of the Merger Regulation, saying it did not have the power to order divestment of the minority shareholding and Aer Lingus promptly appealed that. But it did not just appeal it, it also applied for interim relief. So it went off to the General Court and said: "Please, General Court, the public bid has been blocked and, indeed, it lapsed when Phase 2 of the investigation began, but in the meantime we have Ryanair sitting on our shareholders' register, and it is a major rival of ours, and we are saying that actually the Commission should do something about that." So in the circumstances it was pressing for the minority

shareholding to be subject to interim relief protection in particular, not allowing voting of shareholdings and so on.

If I may, I would just like to take you to the President's Judgment briefly. It is in the first bundle of authorities at tab 9. There is some wonderful EU law Karma in some of the early parts of this decision about what can be dealt with on an interim relief application. But it is clear that what the President did was he considered whether or not this interim relief application by Aer Lingus, pertaining just to this minority shareholding should be granted.

If one turns on to (external page numbering) p.383 you will see a heading half way down saying: "The Merits". "Prima facie case", so this is a standard approach to consideration of interim relief, have you got a prima facie case, and where does the balance lie. I summarise - we are not getting into the technicalities of European interim relief applications but they are broadly similar.

What Aer Lingus were saying was "please can we have action taken in relation to this shareholding. If one turns on to what will be your page 385 you will find the findings of the President. This summarises what was said by Aer Lingus:

> "The applicant submits, in essence, that the Commission wrongly refused to take action under Article 8(4) and (5) of the Regulation against Ryanair's minority shareholding in Aer Lingus. In that respect, Aer Lingus contends that the minority shareholding in question has substantial negative effects on competition and submits that the Commission was wrong to conclude that it does not have the power in this case to take action under Article 8(4) and (5).
>
> With regard to the applicant's first claim, relating to the assertion in paragraph 12 of the Contested Decision that 'negative effects cannot occur since Ryanair has not acquired, and may not acquire, control of Aer Lingus', it is clear from a closer reading of the Contested Decision that such a statement is taken out of context: it did not form the basis for the Commission's decision not to adopt the measures requested by the applicant under Article 8(4) and (5), and is therefore irrelevant for the purposes of the present proceedings. Indeed, the rationale behind the Contested Decision is clearly that, according to the Commission, no concentration has been implemented in the circumstances at hand and that therefore the Commission has no powers to adopt measures under Article 8(4) and (5) in relation to the minority shareholding in question, irrespective of whether such minority shareholding might be deemed to give rise to competition concerns or not."

So what is being said here by the President is that the decision by the Commission not to do anything about that minority shareholding, the same minority shareholding we are dealing with here, is because it is not a concentration with a Community dimension and nothing can happen in relation to it.

Then if one turns on through this decision to what will be your 388, there was consideration of an argument that somehow a lacuna would be left in merger control if the EU did not take interim steps here in relation to minority shareholding whilst Aer Lingus was arguing that it should do, and at para. 100 it says:

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

It goes on to indicate in para. 102 that it would be entirely open to national authorities to take further steps, and it also notes in paras. 103 and 104 that although there may not be European merger control operating in relation to such a minority shareholding, in fact you can have a situation where Articles 101 and 102, the general competition law prohibitions, could apply in relation to the conduct of the shareholder in respect of a rival, but that is speculation in this regard.

So that is the first of the historical Judgments, but it is relevant because what you have is not a situation where you are thinking about some parallel minority shareholding being considered somewhere and drawing on that as general authority. These are decisions of the President, and I will come on to the General court, concerned with *this* minority shareholding, and emphatically making clear how it is to be treated, or not treated, for the purposes of the European Merger Regulation.

The next case I will briefly take the Tribunal to if I may, is the Ryanair appeal itself, which is at tab 10, which is the first in the second bundle of authorities. There is not a great deal, you will be pleased to know that I want to take the Tribunal to in relation to this rather lengthy decision. All I want to do is just to emphasise what was going on here, which was

that you had a situation, as I have indicated in the chronology, where there had been an acquisition of a minority shareholding and there had been a public bid and it had all been considered together by the Commission, albeit at the end they had not ordered a divestment. Ryanair then come along and say that the Commission's decision, which dealt with all of those matters, was wrong, and that is what they are then contesting, and you can see that in particular the arguments put forward are at para.33, which is probably your p.399. That is just a summary, and then what is discussed at great length in the remainder of this Judgment, because what is said is that the substantive analysis of the whole set of arrangements was wrongly made by the European Commission.

I am not disputing what Lord Pannick says in relation the fact that it was the entirety of the transaction that was at issue here, it plainly was. They wanted the entire Commission decision annulled, and that pertained to the consideration of the minority shareholding by the Commission and the public bid, which is of course technically lapsed as it did at phase 2.

The next Judgment I briefly wanted to take the Tribunal to is in the next tab, which is the Aer Lingus appeal. As I say, Aer Lingus had got the Commission to issue a formal decision in relation to Article 8(4) and that is technically what this appeal is about, but in essence it is saying "you should jolly well have done something about that minority shareholding that is sitting on our Register".

One thing I will just point the Tribunal to for reference, at 487, para. 16, we do not actually have the original decision in the bundles, and there is no criticism of anybody in relation to that, it is a long document that is not going to be relevant to these proceedings in any detail, but just at para.16 it is worth reading what is said, the quotation of Recital 12 to the Ryanair Decision.

> "As Ryanair acquired the first 19% of the share capital of Aer Lingus within a period of less than 10 days before launching the public bid, and the further 6% shortly thereafter, and in view of Ryanair’s explanations of the economic purpose it pursued at the time it concluded the transactions, the entire operation comprising the acquisition of shares before and during the public bid period as well as the public bid itself is considered to constitute a single concentration within the meaning of Article 3 of the merger regulation."

So that is just making good the point I was asserting about how those initial steps were all considered together by the Commission in its decision. Then if we turn on, p.493 begins the findings of the court in relation to Aer Lingus' appeal at para.57, and this is not especially

exciting because what it does is it reiterates effectively the very clear findings of the President in relation to the minority shareholding, and that can perhaps most clearly be seen in pars. 61 and 62 through to 64 and 65. Rather than reading those out if the Tribunal would not mind just reading through those - 61 to 65.

THE CHAIRMAN: (After a pause): Yes.

MR. BEARD: The reason I highlight this again is the decision of the full General Court in relation to the treatment of this minority shareholding, and just for your notes if you look down at para. 67 by the time of this Judgment Ryanair's shareholding had moved up to 29 per cent. So we are at the level of the shareholding effectively that we are dealing with now and the court is saying emphatically that shareholding does not fall within the jurisdiction of the EU merger regime.

So when Lord Pannick talks about whether or not these 21(3) issues apply in relation to the minority shareholding, this is not a case where we are speculating about it. We would say the law was pretty clear in any event, but in this case we actually have Judgments from the Luxembourg Court absolutely emphatically.

If I may, I will just go briefly to the Merger Regulation in relation to the relevant provisions. I will deal with it relatively quickly. Lord Pannick has gone to it. You have got points in the skeleton argument. It is in the Purple Book beginning at 4.503. It may be a matter that is so cryingly familiar to the Tribunal Members that it does not warrant further submission, but if I may I will just take the Tribunal through one or two of the key provisions here, just to put in context what those Judgments were about and what we are dealing with here. I am not going to go to the recitals. It is well accepted that the EU Merger Regime does provide a one-stop shop in relation to concentrations with a Community dimension. If they are not concentrations with a Community dimension it does not provide a one stop shop, and it does frequently happen that you have transactions that are multi-jurisdictional and you cannot just go to Brussels and get them cleared there alone. I think Mr. Flynn, for Aer Lingus, may talk a little further about that; he has dealt with such matters in his skeleton argument. I am going to deal with much more basic things: Article 1 of the EUMR.

> "This regulation shall apply to all concentrations with a Community dimension as defined in this Article."

In many ways that is the key point here, that is the extent of the scope of this Regulation; it goes no further. If you have a shareholding which is not a concentration with a Community

dimension, it is not covered by the EUMR. You can read 21(3) until you are blue in the face, it does not extend the scope of the EUMR of which 21(3) is a part.

Article 2, just to give a little bit of background:

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

Obviously it is only concentration that is within the scope of the Regulation. Just for your notes, it is in 2 and 3 that the relevant test is applied:

> "3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

And conversely, if not it shall be declared incompatible. But it is just "significantly impede effective competition" is just slightly different from the substantial lessening of competition test that we see in the domestic legislation.

Article 3: "Definition of concentration":

> "1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:
>
> (a) the merger of two or more previously independent undertakings or parts of undertakings, or
>
> (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

Article 3(2) just for your reference, the reason that you have the possibility of domestic regimes biting on shareholdings lower than those at which the EU Merger Regime will bite is because an Article 3(2):

> " 2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking …"

I am not going to take the Tribunal to the domestic law provisions on merger control but it is no doubt familiar that there are three levels of control that mean that you can have a relevant merger situation under the Enterprise Act in domestic law - material influence, control, or ownership, and the material influence can be at a much lower threshold than decisive influence. The language rather tells its own story there.

Certainly decisive influence is generally seen as over 50 per cent, material influence can be much lower, for instance in ITV Sky it was down at 17.9 per cent as a shareholding that the finding was made.

Then we go on to Article 4:

> " Prior notification of concentrations and pre-notification referral at the request of the notifying parties"

I am not going to go through in detail the practicalities of notification and pre-notification discussions with the Commission, but the important thing to note is, of course, it is mandatory notification regime at a European Level.

> "1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. "

Indeed, you can notify where you have simply publicly announced an intention to make a bid, which I think is the accurate appraisal of where we are now. It probably does not matter for these purposes but it is just worth bearing in mind that the decision taken by the Competition Commission was taken at a time when there was not actually a notification before the European Commission, there were only pre-notification discussions but that may be a matter of formality that is not of significance here.

Article 5: "Calculation of turnover". I did not go through the thresholds as to what constitutes a concentration with Community dimension. Those are set out in Article 1, but in broad terms you need to have a pretty large worldwide turnover in aggregate, whether it is €5 billion or €2.6 billion with a particular allocation of that turnover is perhaps immaterial. But there obviously comes a question as to how you calculate that turnover as to whether or not you are having decisive influence and are crossing those relevant turnover thresholds. Article 5 deals with the calculation of turnover. The only reason I mention this is because there is a provision in Article 5(2) which refers to two or more transactions within the meaning of the subparagraph:

"which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction."

Just to de-mystify that, that provision is only concerned with calculation of turnover, and if it assists at all - I will not take you to it, but I will provide the reference if I may - the Commission's jurisdictional notice which is Regulation 139/2004/EC, which is in the Purple Book at, in particular, 4.630, paras. 36 through to 44 explain precisely why it is you need to have the transactions all very close together and interdependent in order for them to form a single concentration but calculation of turnover can be taken in relation to transactions over a broader period, but they are doing different things. Lord Pannick takes no point in that, but just for clarity it is something that is dealt with in the skeletons, I touch upon it as we pass through.

Article 6: " Examination of the notification and initiation of proceedings" . This essentially spells out the existence of phase 1 and phase 2 for the purposes of the Commission's consideration of a notified merger. If the Commission decides that there is not a concentration with a Community dimension, i.e. you either do not cross the threshold or you do not have decisive influence it will say so, that is a phase 1 decision. Equally, if it does not raise any serious doubts as to the compatibility with the Common Market, in other words the substantive test does not look like it is ever going to be met here, it is causing concern, then you will get a phase 1 clearance decision. Equally a phase 1 decision may be: "We do have concerns, we need to open a phase 2 inquiry", that is then what is done, but just for your reference it is under Article 6 that phase 1 and phase 2 is spelled out. Article 7, just for your reference, is the "Suspension of concentrations", which means that once you have notified then you are under legal obligations not to act in particular ways. What it may mean in relation to public bids is that you can actually complete the acquisition of shares but not vote them, for example, there are very specific provisions; I am not sure that anything turns on them.

The next Article I would just refer you to, because it may become at least noteworthy if not of crucial relevance here, is just the time limits in Article 10. 10(1) is effectively dealing with a phase 1 decision and it is to be taken within 25 working days unless - 10(1) says - the parties come forward with commitments as to how any putative concerns might be dealt with, in which case phase 1 can be a little further extended but you do not have to trigger a full investigation under phase 2.

Article 10(3) effectively deals with time limits under phase 2, and those are primarily 90 working days. They can be extended by 15 days if commitments are offered by the parties but after phase 1 procedure effectively.

Just for completion 10(4) indicates that if the Commission asks for information and you do not respond within the relevant time limits then there can actually be a suspension of time or an extension of the time in relation to those matters.

Article 11 deals with those requests for information. Article 13 is about powers of inspection, and there are various potential penalties, but then I will move on to Article 21: "(1) This Regulation alone shall apply to concentrations as defined in Article 3", so it is giving exclusive jurisdiction to the Commission to deal with anything that is a concentration with a Community dimension. 21(2) some people have said is in fact otiose, but it makes clear that the sole review of the Commission is with the Court of Justice. It is being suggested that you do not really need that given the institutional architecture that exists at a European level. Then (3);

> "No Member State shall apply its national legislation on competition to any concentration that has a Community dimension."

The primary submission that is made is the minority shareholding is not a concentration with a Community dimension, 21(3) does not apply. It is such a straightforward and clear point; there is really nothing more here to see.

A bit of a fuss was made of this because in the July 10th decision to which Lord Pannick has already taken you, which is the subject of challenge today, the Competition Commission referred to the fact that it understood the European Commission understood that 21(3) did not apply, and some fuss was made in the skeleton argument from Ryanair which, to be fair to Lord Pannick, he does not pursue, and I will just give you the reference: para. 52: "The Competition Commission's decision reports the European Commission's preliminary view that the minority stake will not be treated for the purposes of Article 3 of the Merger Regulations as formerly part of the same concentration as that proposed in the public bid."

There is no reference to any statement by the Commission regarding the application of 21(3). It is impossible to ascertain from the very brief reasons supplied what, if anything, the Commission said to the CC regarding 21(3), and there is a footnote saying: "This view from the European Commission is assumed to have been expressed orally, since no document is provided by the Competition Commission."

What the Competition Commission did in the light of that is, on 13th July, it sent an email to the relevant part of the Commission , DG (Competition) dealing with mergers and said: "Look, we have your preliminary view, can you set it out in writing?" These things take longer than one would ever hope, so a chaser email was sent on 25th and finally a letter was forthcoming late yesterday afternoon, and it is that letter which you have already seen.

But just to be clear about this letter, this letter is setting out the Commission's position, the merger sections' position does not bind the entirety of the Commission; we quite understand that. It is not an appealable Commission decision in the same way as the Aer Lingus 8(4) decision was. It has never been suggested otherwise. What simply was being done by the Competition Commission was looking at the Merger Regulation, and the Judgments we already had it was clear that this minority shareholding was not a concentration with a Community dimension, 21(3) did not apply to it. But given that a public bid has been notified or was going to be notified to the European Commission, it was thought sensible to talk to the European Commission about it. All that is being shown here is that the European Commission is not in any way diverging from or demurring in the slightest in relation to the analysis that the Competition Commission itself has carried out in its consideration of the application of Article 21(3). No, it is not the view of the entirety of the Commission; the reasoning, with respect to Lord Pannick, is a little fuller in the letter than he gives credit for, because actually if one turns up the reasoning in the letter itself what you see is in the first two paragraphs: 'Yes, you have been chasing us for this; you have sent us emails'. Then the third paragraph onwards - I will not read it out - goes back through the history of consideration of that minority shareholding by the courts and by the Commission in relation to the time when it was actually acquired, and it spells out very clearly that those decisions and those assessments were right in relation to the application of Article 21(3). So by reference to those other Judgments the reasoning here is actually very clear and much more extensive than Lord Pannick suggests, because the critical paragraph to which he referred: "consequently we can confirm that the minority shareholding is not part of the concentration notified" , consequently, it is consequent on all that previous analysis which the Commission is referring to and adopting.

The points that he made: not the view of the Commission - we accept it is not binding, we accept as a matter of an appealable decision. There is a lack of argument - of course, Ryanair did not put forward specific submissions on that, we understand that it has been talking to the European Commission as is quite proper in relation to a notification. The

argument of Lord Pannick and, indeed, any representative of Ryanair is no doubt interesting, that does not remotely impugn any of the analysis in that letter.

In those circumstances, the first set of submissions, this idea that 21(3) is engaged is simply unfounded; there is nothing there for Lord Pannick and Ryanair.

That then takes me on to the duty of sincere co-operation - unless the Tribunal has any specific questions on 21(3) alone.

In fact the analysis of 21(3) is important to the consideration of the duty of sincere co-operation, and before I come on to the Court of Appeal decision which has been the focus of Lord Pannick's submissions, it is perhaps just important to consider a little more what this duty of sincere co-operation is, because as I will submit in relation to the Court of Appeal decision, there is no sense that the Chancellor was somehow, by a side wind, overturning other previous decisions about the nature of the duty of sincere co-operation and what it meant.

In the letter the Tribunal kindly sent with various questions there was a reference to the *Deutsche Grammophon* case and the broad tenor of the duty of sincere co-operation. I am not going to take the Tribunal to that, it is a very brief reference and we entirely adopt it.

What I would take the Tribunal to, if I may, however, is *Masterfoods*, which is in authorities bundle 1, tab 5.

The *Masterfoods'* litigation was a wonderful and many tentacle thing. It is actually very nicely summarised in the *National Grid* case that I will take you on to in a minute, if I may.

In the *Masterfoods*' case Masterfoods had instituted proceedings in the High Court of Ireland seeking declarations that exclusivity arrangements relied upon by HB Ice Cream to exclude Masterfoods from the ice cream market in the Republic were contrary to what is now 101 and 102. Essentially what was being done was HB were saying: "We will put a freezer in your shop. You will put no one else's freezer in your shop and you will only stock our ice cream in your freezer", therefore foreclosing the market so Masterfoods said.

In parallel with those proceedings being brought directly in the Irish Courts Masterfoods lodged a complaint with the European Commission.

Initially the European Commission did not do anything with that complaint, so the High Court of Ireland adjudicated on the case and it said that it did not think there was anything Masterfoods' case.

Masterfoods then appealed to the Supreme Court of Ireland, but before that appeal came on for hearing the Commission decided that actually the agreements on which HB were relying were, in fact, infringements of Article 101. HB then appealed to the court of first instance

from that Commission decision and, at that point, the Supreme Court of Ireland, which is thinking about the appeal from the Irish Court thinks: "What do we do here?" We have a High Court decision that says there is no problem, we have a Commission decision that says there is a problem, the Commission is off on appeal to what was then the court of first instance and now the General Court in Luxembourg. The High Court decision is before us, what do we do? That is the context in which we see the Judgment at tab 5.

If I may, with that introduction I would take the court on to para. 45 to make sure I am showing you the start of the "Findings of the court", just to give you the context.

> "45. First of all, the principles governing the division of powers between the Commission and the national courts in the application of the Community competition rules should be borne in mind.
>
> 46. The Commission, entrusted by Article 89(1) of the EC Treaty (now, after amendment, Article 85(1) EC) …"

- we are a long way on from that, we have been 81 and we are now 101, it is one of those cruel tricks that those negotiating the Treaties do to punish lawyers so they can never search for cases in due course.

> 46. The Commission, entrusted … with the task of ensuring application of the principles laid down in Articles 85 and 86 of the Treaty, is responsible for defining and implementing the orientation of Community competition policy. It is for the Commission to adopt, subject to review by the Court of First Instance and the Court of Justice …

Then para. 47 - this was at the time when the Commission had exclusive competence in relation to what is now 101(3), in other words the exemption criteria that obviously changed with the advent of the modernisation regulation in 2003.

If I could then take you down to para. 49:

> "49 It is also clear from the case-law of the Court that the Member States' duty under Article 5 of the EC Treaty …."

- again, this is a nasty twist: Article 5, duty of sincere co-operation in the Treaty establishing the European Community became Article 10, subsequently became Article 4 of the Treaty on European Union. So it has actually moved Treaties, but the substance is, in essence, the same.

> "… to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from Community law and to abstain from

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

I just highlight that paragraph because it matters just as much for regulators as it does for courts because some of the other references are to courts but you can read it for both.

"51 The Court has held, in paragraph 47 of *Delimitis*, that in order not to breach the general principle of legal certainty, national courts must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of Articles 101 and 102 and Article 101(3) of the Treaty.

52. It is even more important that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance."

So this is saying effectively that if you have a clash between Commission decision and the original High Court decision you cannot just uphold the High Court decision whilst that Commission finding in relation to these agreements because, of course, it was the same agreements being dealt with by the High Court and by the European Commission, and it was telling the Supreme Court it could not do that.

Paragraph 53 I am not sure is crucial here.

"54. Moreover, if a national court has doubts as to the validity or interpretation of an act of a Community institution it may, or must, in accordance with the second and third paragraphs of Article 177 of the Treaty …"

- this is the preliminary reference provisions:

"… refer a question to the Court of Justice for a preliminary ruling."

55. If, as here in the main proceedings, the addressee of a Commission decision has, within the period prescribed in the fifth paragraph of Article 173 of the Treaty, brought an action for annulment of that decision pursuant to that article …"

So this is the appeal to the general court by HB in relation to the Commission decision:

"… it is for the national court to decide whether to stay proceedings until a definitive decision has been given in the action for annulment or in order to refer a question to the Court for a preliminary ruling.

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

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

Then 58, just as a coda:

"58. If a national court stays proceedings, it is incumbent on it to examine whether it is necessary to order interim measures in order to safeguard the interests of the parties pending final judgment."

The only other paragraph I would refer the court to is actually in the Advocate General's opinion, which is under tab A of 5. It is the opinion of Advocate General Cosmas. What Advocate General Cosmas said, with whom the court did not agree, but at p.98 in my bundle, paras 15 and 16 deals with the general question of when a risk of inconsistent decisions arises.

THE CHAIRMAN: Shall we read this, Mr. Beard?

MR. BEARD: Yes, if you would not mind. Could you also read the footnotes to it because he gives a series of interesting and perhaps instructive examples.

THE CHAIRMAN: (After a pause): Yes.

MR. BEARD: The point I draw from that, and it will become clearer as I move on to some of the domestic case law, is simply this that what is being said there is the fact that you end up with parallel analysis in two places does not mean that you are ending up with conflicting decisions. In many circumstances you can see why that is obviously the case - reasonable decision making bodies can reasonably differ about analysis; that does not necessarily mean that there is any particular conflict. I know that Aer Lingus in their skeleton have referred to the *Inntrepreneur v Crehan* case in this regard, I will leave that to Mr. Flynn if it is of

further assistance to the Tribunal, but I just highlight the Advocate General's approach there.

Then I would, if I may, move on to *National Grid*, which is in the second bundle of authorities at tab 13. Just to put *National Grid* in context, if I may. *National Grid* is one of a number of instances, where issues concerning a clash, potential clash or an alleged clash between European institutions and domestic institutions arise. It is a case where the Commission has taken a decision that there has been a cartel. In this case it was in the context of gas insulated switchgear, which is big industrial kit used to build electricity grids, and the people that make it are some of the big engineering companies. National Grid is obviously the grid operator in the UK, and what it was doing in these proceedings was coming along and saying: "The Commission has found there is a cartel, it affected the prices of this gas insulated switchgear we bought. In those circumstances we want to rely on the finding of infringement made by the Commission and then we want to show that there is causation of loss to us and we want damages. Those sorts of claims can be brought both in this Tribunal and in the High court - they are often referred to as "Follow-on" claims. This particular follow-on claim is no different to many others in the sense that the Commission decision that National Grid wanted to rely upon was the subject of appeals going out to the Luxembourg Court. So the defendants, the people who had been found to infringe the large engineering companies, a number of them were appealing the Commission decision out to the general court and then in fact they appealed onwards to the European Court of Justice. What was being said by the engineering companies at this stage in relation to this application was: "The decision you are relying upon, which is the basis - the very basis - for your damages' claim", because if you think of a competition law damages' claim as being a breach of statutory duty requiring infringement, causation and quantum, the infringement foundation for it was subject to appeal. If it fell in the general court proceedings, or the ECJ proceedings then in those circumstances National Grid would not have the basis upon which to bring the damages' claim, so the engineering companies were coming along and saying: "Duty of sincere co-operation here. You cannot proceed with a High Court hearing in circumstances where the very basis of it may be cut away by the proceedings out in Luxembourg, because if you were to reach a conclusion that we owed National Grid damages it might turn out that, in fact, there was no infringement there at all and we would owe them nothing. You would end up, therefore with a conflict of decisions between the High Court potentially making a ruling and finding of damages, and the European Court saying 'no infringement'." They said: "You must stop now" because the

duty of sincere co-operation means if there is a real risk of conflicting outcomes in the final decisions you must stop.

The Chancellor, albeit quite correctly, at First Instance said: "No, that is not right. That is not what the duty of sincere co-operation requires", and that can be seen perhaps best if you start at para. 20: "The parties' submissions and my conclusions"

> "20. It was common ground that the starting point for my consideration of these applications must be the Judgment of the EEC in *Masterfoods*."

Then there is a summary of the *Masterfoods'* litigation which I have essentially 'lifted' in my introduction. Then one turns over the page and sees an extensive quotation from *Masterfoods*, the paragraphs to which I have just taken the Tribunal. Then I just note para. 23: "It is clear from paragraphs 55 to 57 …" which is obviously from *Masterfoods*:

> "… that this court should take all the steps required to ensure that the trial does not come on before all appeals to the CFI and, if brought by any party, to the ECJ have been finally concluded. Accordingly the minimum requirement of this court at this stage is an order to ensure that the action is not fixed for trial against any defendant before, say, three months after the exhaustion of all rights of appeal of that defendant from the Decision. As I have indicated the defendants contend that such a minimum order is not sufficient to protect them."

So this is the Chancellor making clear that in his view the duty of sincere co-operation is a duty that subsists by reason of the Treaty, but what is required by it depends on the context, it is very different from the Bright Line that is shone by Article 21(3), and that is a central issue here. Article 21(3) the Bright Line does not apply, we are in the territory of the duty of sincere co-operation and, to be clear, the Competition Commission quite accepts that the duty of sincere co-operation always applies to it if matters are being dealt with at a European level which my impinge on what it is doing or which its actions may impinge upon.

So we recognise that the duty of sincere co-operation applies, the question now is: what does it require and the Chancellor is emphatically saying that it does not require stopping immediately in the context of a case, and this is worth emphasising as well, where the essence of the conflict related to the very same agreement, and finding of infringement in relation to the agreement. It is different from here where you have a minority shareholding and a public bid, it is absolutely clear that the minority shareholding will not be the subject of consideration and ruling by the European Commission because it has no jurisdiction to do so under the European Merger Regulation; it can only deal with 30 to 100 per cent

transaction. Here, we are talking about the very same infringement decision being subject to proceedings both in Luxembourg and in the High Court and yet the Chancellor says: "No, no, no, you can roll those proceedings forward in the domestic court, you do not stop them immediately, you must avoid conflicting final decisions. So that is the decision that is being articulated in relation to para. 23.

Then there is I will not say a 'digression' but an interesting excursion into s.47A and this Tribunal's own power to deal with these matters, and the joys of *Emerson III* which was a parallel case brought before this Tribunal, albeit that, of course, in this Tribunal the situation is rather different because you actually have to apply for permission to bring a damages' claim when those appeals are pending out in Luxembourg, so the issue in *Emerson III* was slightly different and, as you will see from para.26, the exotic "Italian Torpedo" was of some concern there and was of concern in *National Grid* litigation, i.e. the possibility of proceedings starting in another jurisdiction and precluding proceedings in the UK.

The Chancellor, having considered that, moves on at para. 31 to consider some of the other case law that has dealt with these issues of the application of duty of sincere co-operation in national courts. At para. 31 he refers to *Morgan Stanley Dean Witter Bank Ltd v Visa International Service Association*, and then if I turn over the page to p.33 he cites the case of *MTV Europe v BMG Records (UK) Ltd* [1997] 1 CMLR 867. *MTV Europe* was a case that pre-dated *Masterfoods* but, in many ways, rather anticipated the outcome in *Masterfoods* and, as the Chancellor says in the penultimate sentence of that paragraph:

> " I see nothing in it inconsistent with either the decision of the ECJ in *Masterfoods* or the provisions of the Civil Procedure Rules."

The reason he is referring to the Civil Procedure Rules is because he is referring to the discretion of case management that a court has in relation to its proceedings.

Then he records some key paragraphs of the decision of then Sir Thomas Bingham, Master of the Rolls, in *MTV*. "There is in my judgment …" this is Sir Thomas Bingham dealing with the question of duty of sincere co-operation in relation to a situation where the Commission was seised of a matter and it was coming before the domestic courts:

> "[28] There is, in my judgment, nothing which suggests that in a case where the answer is not clear in favour of the plaintiff or the defendant, the national court *must* at once stay the proceedings pending a decision by the Commission. The Court's concern is to avoid inconsistent decisions. There is no ground for seeking

to prohibit the preparation of an action for trial so long as it does not lead to a decision in advance of a decision by the Commission."

Then there is a reference to the *Gøttrup-Klim* case:

"That reasoning is, as it seems to me, entirely consistent with earlier authority, but I find nothing in it to suggest that the European Court of Justice was intending to forbid national judges, in cases where the outcome was not clear, from allowing the preparation of proceedings to go ahead until a point short of decision. Moreover I can, for my part, see no reason why the Court of Justice should seek to intrude into that area. The Court of Justice has always respected the power of national courts to order their own procedure so long as no Community interest is adversely affected, and I can see no reason why it should wish to step in here."

That is then echoed in the quotation from Lord Justice Millett (as he then was) in relation to the same case. We can provide full copies of *MTV*, but we did not particularly wish to burden the Tribunal with more paper.

Then para. 35:

"It follows that I should consider the applications for a stay in the light of all relevant circumstances, the object to be achieved and the balance indicated by the terms of the overriding objective. Does such consideration lead to a conclusion that the stay should take effect before the latest appropriate point as indicated in paragraph 23 above? This involves a comparison of the position of the parties if a stay is granted with immediate effect and if it is not. That comparison must be made on two alternative hypotheses, namely, that the applications of the defendants to the CFI [*now the General Court*] and subsequently on appeal to the ECJ are or are not successful in whole or in part."

He then goes on to consider the particular facts and the details of the case. I do not want to skate over these matters but they are only of limited relevance perhaps. The key point that I am seeking to make here is that the duty of sincere co-operation is not a Bright Line duty. It is one to be considered on all the facts. It is a matter of the context. I know that Lord Steyn once referred to: "In law context is everything", that may be taking it a little too far, but here in relation to the duty of sincere co-operation context is of great importance, and the point is it is not a Bright Line, it is not an obligation that comes down sharply upon a national court or a national regulatory body in these circumstances.

In paras. 38 and 39 one of the things he actually considers is the costs that would be incurred, albeit I understand from Lord Pannick that the position of Ryanair in relation to

costs and resources has somewhat changed since the skeleton argument and it is not suggested that there is any resources problem with parallel investigations, we will not take that further.

However, what is clear is that in that case at para. 44:

> "In these circumstances the proper balance, in my judgment, requires me to allow this action to proceed at least to the close of pleadings. In addition I consider that it is premature to decide that no disclosure should take place before the conclusion of the applications and appeals to the CFI and the ECJ. In principle, therefore, I accept the submissions of counsel for NGET that the action should proceed to the stage of the close of pleadings …"

In fact we know from subsequent Judgments that not only had pleadings closed but there has been actually very substantial disclosure, there have been contacts with the European Commission about getting other material from them and the litigation continues to roll forward and there is, as yet, no stay. Indeed, the order that applies in that case is slightly attenuated from what is referred to there in that it is now only an order that, insofar as appeals to the ECJ are relevant to the proceedings in relation to damages will there be any need for any stay, so things have moved on.

The point is important because what we see in National Grid is a canvassing of the general case law, a consideration of what is required by the duty of sincere co-operation, a clear conclusion by the Chancellor that it is not a Bright Line, you consider all the facts and circumstances and, in those circumstances he thought notwithstanding that he was dealing with the same decision both in Luxembourg under challenge and being relied upon in the High Court there was no need for an immediate stay and matters should roll forward.

The next important case to turn to is obviously the Court of Appeal at tab 17 upon which Lord Pannick has placed most of the weight of Ryanair's submissions. The first thing to note in relation to this is there is no suggestion in this decision anywhere that the Chancellor, or other members of the court are seeking to, or considering that there is any departure from the previous case law on duty of sincere co-operation. Indeed, if there were to have been one might have expected the Chancellor to be pretty clear about it, since it was the Chancellor that gave the Judgment in National Grid and it is the Chancellor that is giving the operative Judgment in the Court of Appeal. There is no suggestion that any of that case law is overturned, and therefore the law on the duty of sincere co-operation continues to obtain as it did in *Masterfoods*, as it was considered in *MTV*, and as it was considered more particularly in *National Grid*, and to some extent that is the full answer to

this because insofar as you are dealing with the duty of sincere co-operation and it is not a Bright Line then in those circumstances it is right that the Competition Commission considers whether it must stop now. Unless, for some reason, one can read the Court of Appeal Judgment as saying: "No, no, we are not overturning the duty of sincere co-operation case law but in this circumstance you must stop immediately."

I am going to take you to a number of paragraphs to which Lord Pannick has referred the Tribunal, my emphasis will be slightly different. The conclusion is very clear, we are not going through the experience of Groundhog Day today. There was a different case that was being dealt with before the Court of Appeal. Before the Court of Appeal you were dealing with a case where, when the consideration was about what happened before the Commission - and that is the relevant parallel, it is what happened before the Commission - there was no argument but that the OFT (and therefore the CC) could do nothing by reason of Article 21(3) and that was because the European Commission back in 2006/2007 was considering the single concentration that included the minority shareholding and the public bid. No issue at all.

This is not a question of changing position, or changing sides - obviously it is a different party before you today from the party before the Court of Appeal and previously before a differently constituted Tribunal. But none the less, it is not the case that the Competition Commission is somehow wilfully diverging from the position take from the Office of Fair Trading. In this case previously both the OFT and the CC, there was no issue, but they could not do anything whilst the Commission was seised of the matter. The question arose whether once the Commission had said that they were not doing anything with the minority shareholding then the OFT should have been engaging itself with that minority shareholding, which the Commission was saying that it would not touch. That is where the matter became complicated, because what was then at issue was whether those appeals out in Luxembourg, the Ryanair appeal to which I referred the Tribunal earlier, and the Aer Lingus appeal was such as to perpetuate some sort of real risk of conflicting jurisdictions or conflicting outcomes that meant the OFT must stop immediately.

In that context it is also important to bear this in mind, the argument before the Court of Appeal was about a specific domestic provision, s.122(4). It is weirdly worded provision, I think that was the consensus view across the court, everybody struggled with it at all levels. Nonetheless, it was a mechanism that, in colloquial terms, allowed the OFT to hit the brakes when the procedure was being dealt with at a European level. The question was: did that domestic provision bite.

It is worth noting there is no similar provision in relation to the Competition Commission arrangements. Yes, the Competition Commission has a specific statutory timetable, yes, it can extend that statutory timetable within minutes, yes, there are certain investigative management tools that it can use to avoid conflicts, but let us not get away from the fact that the context, the domestic legislative context here is also different from the Court of Appeal. But that is not the central difference, the central difference here is that the appeals going out to Luxembourg were about what should be done with the minority shareholding at a European level. Ryanair was saying it should be dealt with at a European level and it should all be cleared. Aer Lingus was saying that it should be dealt with at a European level and it should be divested. But everyone, was talking about dealing with the minority shareholding as part of a single concentration at a European level and therefore it fell that that side of the Bright Line if either of those appeals succeeded.

So the issue that the Court of Appeal was grappling with was whether the fact there was a real risk that the courts would say it has to be dealt with at a European level meant that the OFT should stop because if the appeal said it must be dealt with at a European level you would have a direct clash of jurisdictions. You would have on the one side the European Commission being required to deal with this minority shareholding under the EUMR in accordance with Article 21. On the other hand, you would have the OFT and potentially the Competition Commission ploughing on and considering that same minority threshold directly in conflict with Article 21(3); the same minority shareholding, clash under 21(3). It was not certain that that clash would arise because, of course, in the end the court on appeal said: "No, no, the Commission was right, you were both wrong, Aer Lingus and Ryanair, it was not a matter for European consideration." So the OFT could not turn up and say: "It's definitely going to be a clash of jurisdictions" it is said there is a real risk of clash of jurisdictions." It then said: "If there is a real risk of clash of jurisdictions then the duty of sincere co-operation means we should not consider this matter and make a reference, because if we do so there is no other way of hitting the brakes and the thing will roll forward and it will be conflicting jurisdictions considering the same shareholding. That is the essence of the difference, because the Court of Appeal says: "That is absolutely right, you should stop because otherwise you were right to have stopped because in those circumstances you would have had the situation of overlapping jurisdictions in relation to the same minority shareholding", and that is what the Chancellor is talking about when he talks about overlapping jurisdictions in para. 38; it is not actually very complicated.

If I just take the Tribunal to the Judgment itself. After setting out a good deal of the relevant provisions it deals at 635 with the decision of the CAT at some length. Then it goes on to "The submissions of counsel and my conclusions" at 638, beginning at para. 26. The only reason I highlight para. 26 is those are the four propositions that are then referred to in various paragraphs by the Chancellor just for you reference, I am not sure anything particularly turns on it.

There is an interesting little passing point to note in para. 29 of the Judgment. Essentially the Chancellor doubted whether both the OFT and Aer Lingus were really being strong enough about Article 21 because at para. 29 it is said that neither OFT nor Aer Lingus accepted that whilst appeals were going on in the European Courts 21(3) actually applied and he said: "I have real doubts, I think that when you were dealing with a single concentration being appealed up, actually 21(3) probably applied all the way through, in other words this could be a Bright Line case", but he did not feel it necessary to reach a conclusion in relation to that because neither OFT nor Aer Lingus pressed that point.

Then you see at para.32 he refers to *MTV*, *Masterfoods* and *National Grid*. So it is not a case where the Chancellor was somehow shutting down left brain and writing Judgment with right brain and therefore not being cognisant of what was going on in previous Judgments that he has written, he was specifically referring to these Judgments and the duty of sincere co-operation. Indeed, again he quotes them at some length in paras. 32, 33, 34 and 35. He did so, in particular, at the invitation and instigation of Lord Pannick for Ryanair, who was saying, as set out in para. 36: "Look, look, look, what those decisions say is you must avoid a final decision that creates a clash."

What OFT and Aer Lingus were saying was that it is not only inconsistent final decisions, it is the clash of jurisdictions that is the problem. That is what is being referred to at para.37. Lord Pannick has been too modest about his submissions. His submissions about inconsistent final conclusions and how the OFT and the Competition Commission might be able to roll on if the only concern was inconsistent final conclusions was not something that was the foundation of the Chancellor's Judgment. What the Chancellor was focused on was that it is not only about those final conclusions, it is also about clashes of jurisdiction and the significance of that is, of course, the clash of jurisdiction arising as soon as you start dealing with the minority shareholding as the domestic authority. You do not have to wait for the final outcome. So that is why it says that Lord Pannick:

> "… submitted that a reference could be made and pursued so long as the Competition Commission abstained from reaching any conclusion before the Court

of Justice had reached its conclusion and ensured that any conclusion arrived at thereafter was consistent with the decision of the Court of Justice.

These submissions are challenged by counsel for OFT and for Aer Lingus. They contend that the duty of sincere cooperation must extend to avoiding any risk of a clash of jurisdictions, not only inconsistent final conclusions. They contend that the submissions for Ryanair take too limited a view of what the duty of sincere cooperation requires. They support the reasoning and conclusions of CAT."

Then we get to para. 38 which is essentially the entire basis of Ryanair's case, and it is being taken out of context again, because what the Chancellor is saying here is: "Look, if you have these two jurisdictions operating directly in conflict, as to which there was a real risk in this case back in 2007 if the OFT had started rolling forward, if you have that real risk of a clash of jurisdictions, and it is just worth highlighting the second sentence:

"Although not looking for quite the same thing, those respective bodies would be investigating the same events."

It is talking about the same minority shareholding.

Now it is right that there was a discussion in the Court of Appeal about whether or not there was a difference between the domestic law merger control tests and the European law merger control tests, and the OFT made clear that the sorts of analysis you carry out in order to assess a substantial lessening of competition are the same sorts of analysis you carry out for the significant impediment to effective competition in the European Merger Regulation. So you would end up looking at, for instance, market definition, routes, barriers to entry, those sorts of things.; there is no doubt about it. There is an overlap in analysis. But it is no part of Ryanair's case that the overlap in analysis is problematic to it, it can put in those materials now. It says that there is a matter of law, as a matter of law you cannot proceed and that is not what the Court of Appeal was saying beyond the situation where you have a real risk of the OFT and the CC considering a matter, the events pertaining to the minority shareholding, that are the same matter that could be being considered by the European Commission depending on which way the appeals turned out.

He talks about the issues paper which was submitted to the Court of Appeal setting out how the OFT went about its analysis and what was done, and it is quite right as the Chancellor recounts, that there are a whole range of things that would be the same sort of matters you would consider under either regime. Therefore, the analysis that he is talking about here there is no dispute about that, but as to the finding of law there is no finding of law here, that somehow the duty of sincere co-operation, contrary to the previous case law, requires a

Bright Line immediate stay in circumstances where you do not have overlapping jurisdictions or a real risk of overlapping jurisdictions. So the Chancellor at the end saying:

> "It is, to my mind, self-evident that concurrent investigations in the UK and in Europe would be both oppressive and mutually destructive."

is quite clear and right, because having two sets of bodies investigating the same minority shareholding "would be both oppressive and mutually destructive" - "mutually" is instructive there; it is talking about the fact that you would be dealing with the same minority shareholding.

> "I accept, therefore, that the duty of sincere cooperation does go beyond avoiding inconsistent decisions …"

So it is not just those final decisions, so he is accepting that the duty of sincere co-operation does cover inconsistent final decisions, which is on a par with *Masterfoods* and *National Grid* and so forth, but it extends to overlapping jurisdictions. So the simple, clear point is overlapping jurisdictions here, it was a real risk of that that triggered the duty of sincere co-operation which mean that s.122(4) then operated as the brakes on the way in which the OFT worked; here you do not have that.

You can see that further, the importance of that in his Judgment. 39 is dealing with this question of how you do reading down and so on. But it is not necessarily that important I do not think at this stage.

Paragraphs 40 and 41 are specifically focusing on the impacts of the appeals and referring to the application of Article 21 in that context. "

> "If the appeals of either or both Ryanair or Aer Lingus had succeeded there would have been an immediate clash of jurisdictions."

- if they had succeeded.

> "The success of the Ryanair appeal would, on any view, have confirmed the application of Article 21 so that all steps taken by the OFT and Competition Commission under the reference assumed to have been made by OFT in the period the appeal was pending would have infringed Article 21(3). The duty of sincere cooperation, which had existed at all material times, necessarily required OFT to desist from making any reference during that period. If there was no such reference then there would be no occasion to read down or disapply any provision of the Enterprise Act. The consequences of the OFT's self-denial would have been dealt with in accordance with s.122(4)."

So effectively it is saying that was the relevant tool in the circumstances.

"So also in the case of the Aer Lingus appeal, if the appeal were allowed it would establish that the Commission, not OFT, had both the power to impose interim measures pending the resolution of the Ryanair appeal and the jurisdiction under Article 8(4) in respect of Ryanair's minority holding in Aer Lingus. In such circumstances any interim measures taken by OFT or the Competition Commission would have been to usurp, to that extent at least, the exclusive jurisdiction of the Commission."

- "the exclusive jurisdiction of the Commission" in relation to the minority shareholding.

"Once again the due performance of the duty of sincere cooperation would have called for a period of abstention on the part of the OFT and Competition Commission and there would be no occasion to read down or disapply any provision of the Enterprise Act.

If, by contrast the appeals were unsuccessful and the time for any further appeal had expired then the risk of conflicting jurisdictions in respect of the proposed takeover of Aer Lingus by Ryanair would disappear."

I leave the Tribunal to read on, but just in para. 43 it is worth just emphasising:

" I turn then to the third submission. Counsel for Ryanair accepted that if either of his first two propositions was rejected then s.122(4) applied. I agree. In the view I have taken a reference of a merger situation in respect of Ryanair's proposed takeover of Aer Lingus could not have been made until both the Ryanair and Aer Lingus appeals had been finally determined. The direct cause of this impediment was the duty of sincere cooperation."

So that is the direct cause.

"The duty arose because of the ECMR, in particular, Article 21."

That is the operative conclusion. I will not go back to the Tribunal's questions directly but that is the key point.

I am conscious of the time, I do not think I will require that much longer to wrap up, but I will be at least another five, ten, possibly fifteen minutes.

THE CHAIRMAN: Very well, we will rise until 2 o'clock.

MR. BEARD: I am most grateful.

THE CHAIRMAN: Thank you very much.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Beard.

MR. BEARD: Sir, I was just wrapping up. I think I had dealt with the last of the authorities, I have dealt with the Court of Appeal, and I have emphasised the discrete jurisdictions.

Lord Pannick talks about there being two doctrine, the 21(3) doctrine and the duty of sincere co-operation. I hope I have made clear that we do accept that there are two doctrines, albeit that in that particular case the risk of infringement of 21(3) fed into the analysis of the duty of sincere co-operation. I hope I have also made clear that the duty of sincere co-operation is a duty that Competition Commission takes seriously and continues to subsist.

In that regard the point that has been made about avoiding a clash of final outturn decisions still continues to apply to the Competition Commission. It does not duck that. What it says is that that does not mean that tools must be downed as a matter of law now.

Of course, part of the analysis and the consideration of the Competition Commission in that regard is that it is not clear whether the Competition Commission will be reaching any conclusions before the EU does at any particular stage, because the relevant dates at which things are done are not entirely clear. Of course there are fixed timetables, both under the EUMR, subject to various limited extensions, and under domestic statutory schemes.

I think, as I highlighted when I was going through, the Commission does have the possibility of an eight week extension within its discretion. If that were something that it needed to exercise in order to obviate risks of clashing final outcomes, then that is something that it could well use, and it would want to ensure that no concrete steps were taken in relation to remedies that compromised – I think that was the word the Commission used in its letter – the outturn that the Commission might make.

Beyond those rather general propositions it becomes rather difficult to identify precisely when conflicts might arise and in what circumstances conflicts might arise. The longer one thinks about it the more possible permutations of dates and times and conclusions one can look at, some of which raise no problems whatsoever, some of which might, on Ryanair's analysis, raise problems. Aer Lingus may have a different account of it, and one would have to think about those further down the line. I am just talking about it in very simple terms and not holding the CC to anything specific in relation to these, but if one thinks about the European Commission going through potentially having concerns with the Ryanair merger, the public bid element that it is considering, and then going on through a phase two and then not clearing the matter, it is difficult to see why any potential conflict really arises with whatever the Competition Commission does. If it cleared the 30 per cent then so be it, that does not conflict, even on Ryanair's case, so far as I can see.

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

Mr. Glynn put the possibility that you could have effectively a putative clearance perhaps at phase two, or indeed at phase one, leaving the possibility of the 30 per cent still being a matter for consideration. I think the simplest way to put this is that if the Commission were to at phase one, or subject to some sort of commitment, clear the 100 per cent, then of course that would be a very significant factor for the Competition Commission to take into account in what it was doing, and whether it needed to do anything more at all. There are no bones made about that.

Indeed, if it were a question of the Competition Commission, under its statutory timetable, or whatever, extensions had been given in whatever place, was reaching an end decision where it was concerned about the retention of the 30 per cent shareholding, but the Commission had not reached a final view and it was a still a matter of some consideration and one would have to look at all the circumstances in the round, then the Commission would want to make sure that no remedies that it was considering implementing or had decided were appropriate should be implemented pending clarity from the Commission in relation to those matters. That, the implementation of remedies, is a matter, I think I referred to it earlier as a sort of investigative management tool, I do not want to try and gloss it unduly but there is a degree of flexibility in relation to how these matters are dealt with.

The problem is that it is very difficult to think about these things at this removed at this time. The principal submission is not now.

I think it is also worth emphasising, as was emphasised in the letter that is under challenge, that in doing all of this the CC as part of its duty of sincere co-operation will be liaising with the Commission, both in relation to, as far as possible, sensibly minimising burdens of investigation under the two schemes, although there is not a resources point taken, we will still conscientiously consider that, but more generally understanding how the Commission is thinking about these and exploring matters in so far as they are analytical matters where we can assist them or they can assist us. Again, none of that precludes a dead stop right now.

With those submissions in mind, I would just finally, unless there are particular questions from the Tribunal, just turn to the questions that were kindly sent in the letter from the Tribunal on 19th July.

The first question was:

> "Clearly, the decision of *Ryanair v. OFT* is, on points of law, highly persuasive authority, and the decision of the Court of Appeal binding on points of law."

Of course we take absolutely no issue with that, as I have made clear.

> "This application for review involves exactly the same parties …"

I think it is clear that that is not quite right.

> "To what extent are any findings of fact contained in those decisions binding on the parties …?"

As a consequence of it not being the same parties, then obviously the findings of fact are not binding. It really only tells part of the story in relation to those matters, because the findings of fact that are being made are (a), they need to be carefully identified, and (b) pertain to a different context as well. So the extent to which those are helpful, whether or not they are to be treated as binding, is a further consideration and you have heard the Competition Commission's submissions in relation to that.

Moving on to the second question:

> "Where is the line between questions of fact and questions of law to be drawn this case? By way of example, to what extent are the passages relied upon by Ryanair in para.65 of its Notice of Application (i) determinations of points of law; (ii) relevant findings of fact; (iii) mixed questions of fact and law; or (iv) subject to some other classification?"

I hope I made very clear where we find the clear findings of law that are important that were the ratio of the Court of Appeal's decision; and, most importantly perhaps, they are not just found in the extract that is quoted in para.65 of the application. One needs to read that in context and read it with paras.40, 41 and 44.

The third question:

> "Are there any relevant differences between the factual matrix of the earlier decisions of the Tribunal and the Court of Appeal and this case?"

I do not want to labour that. I think I have canvassed the salient differences there, not only in relation to the domestic legislative context but more particularly in relation to the European law context, and I took the Tribunal to some of the earlier judgments that are rather important potentially. It may well be that here would be a point of *res judicata* in relation to the minority shareholder in relation to those earlier judgments, but we perhaps do not need to go there.

Then question four:

> "The Court of Justice has held that Article 5 EEC (then Article 10 EC, now Article 4(3) TEU) as laying down 'a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its scheme' [*Deutsche Grammophon*]."

The Competition Commission wholeheartedly adopts that summary of what the duty of sincere co-operation amounts to. It is context specific, you do have to think about all the circumstances. That is precisely why at the moment we say that it does not operate to stop the Competition Commission continuing on its way. It has exercised its discretion sensibly, rationally, lawfully, that at the moment the matter should not be stopped.

That really deals with the second question here:

> "To what extent does the Competition Commission have a 'margin of appreciation' …?"

It does have a margin of appreciation because the duty of sincere co-operation is not a bright line test.

Then finally in question five:

> "Will the minority shareholding of 29.82 per cent form part of the concentration to be notified to the EU Commission on 25 July 2012 and, if so, what legal implications, if any, would this have?"

I will not labour that point further. I think the position is tolerably clear.

Those are the submissions of the Competition Commission, unless I can assist you further.

THE CHAIRMAN: No, thank you very much, Mr. Beard. Mr. Flynn?

MR. FLYNN: Thank you, sir. Members of the Tribunal, I think I can be relatively short. I think the risk of my getting angry is somewhat reduced by the temperature in this room, which may have been deliberately chosen to keep things cool between my learned friend and myself. Essentially, I am adopting the submissions of Mr. Beard and I will just elaborate one or two of the points in my own way, unless in a previous case where we had our own theory of the case which did not ever need to get decided. In this case, I am essentially following the line that he has taken and so I will not trespass too much on anyone's time. The legal background has been pressed upon you well. Obviously the judgments of the Court of First Instance established that the EC Merger Regulation does not apply to Ryanair's holding of a substantial minority stake in Aer Lingus, and the subsequent proceedings in this jurisdiction and in the Court of Appeal established beyond any doubt that the United Kingdom authorities retained jurisdiction over the non-CCD, the relevant merger situation and are exercising that jurisdiction.

Ryanair argues that a supervening offer, a new CCD – we all assume it is a CCD – displaces the authority or jurisdiction of the Commission to carry out an investigation despite disclaiming, and doing so again today expressly, that the minority shareholding forms an part of the notified concentration.

That is the legal background against which the issues raised in the application fall to be debated. We do urge upon the Tribunal to recall that if the concentration were to be prohibited, or if the bid were to fail for whatever reason – say of Irish takeover law – the minority shareholding would, of course, remain in place as it has done now for over half a decade. If the OFT Issues Paper is any pointer, it is something which raises issues which require urgent investigation.

The case that has been put to you in our submission relies on a misconstruction of Article 21(3) of the Regulation and a misreading of the scope of Article 4 of the Treaty, the TEU, that would require Member States to go further than EC law and specifically the Merger Regulation provides, to be what the French call *plus Catholique que le Pape,* more Catholic than the Pope. Neither of those, in our submission, are the correct approach. We say it is not a clash of jurisdiction case, as the Chancellor intended that phrase to be understood, and I will come back to his judgment. So Article 21(3) has no application, largely for the reasons that Mr. Beard has given. Article 4, of itself, cannot affect the Competition Commission's jurisdiction, as such. The Competition Commission's jurisdiction is established.

In relation to Article 21(3) and recital 8 of the Merger Regulation, to which you have been taken, it is important, in our submission, to remember that that strikes a legislative balance. What it makes plain is that the general principle is that concentrations with a Community dimension, CCDs, should be reviewed at the Community by the European Commission, but things which are not CCDs should remain within the jurisdiction of the Member State competition authorities. That is the balance which is struck, and that is in pursuance of the principle of subsidiarity, which, if you read the whole of Article 4, 4(3), and the principle of sincere co-operation, is located within that principle.

That goes to Lord Pannick's textual argument as to what Article 21(3) is meant to achieve. Then he says as a matter of fact, or something that is inescapable, that Ryanair's bid for the, let us call it for convenience, 70 per cent that does not already own, necessarily takes as its starting point the 30 per cent that it already does. What the Commission is looking at is the move from 30 per cent to 100 per cent.

Again, we say that is not the right way of looking at what the European Commission is supposed to be doing. What the European Commission is to do is to decide whether the acquisition by Ryanair of "decisive influence" in Merger Regulation terms over Aer Lingus would give rise to undesirable effects on competition or not. That is the test that they have to apply. They will do that against a counterfactual of that decisive influence not being acquired. No suggestion has been made as to why that decision would be any different if Ryanair already had 29 per cent or no per cent of Aer Lingus or anything in between. That base is not relevant to the case before the Commission.

I think what Lord Pannick is saying is similar to the point that was made in their skeleton, that this in some way interferes with the Commission's assessment, and that we address in our skeleton in para.12, and I will not go back to that.

Then he says that for the Competition Commission to carry on with its investigation would interfere with the one-stop shop principle, and he laid emphasis on the "one-stop shop" phrase from recital 8, which I would urge you to read in full. Again, we have dealt with that in a bit of detail in paras.26 to 28 of our skeleton and I will not, for the sake of it, go over that now, but I do commend that to you. In essence, the one-stop shop is a one-stop shop for CCDs, it is not a one-stop shop for mergers. It is a one-stop shop for CCDs, and indeed parts of CCDs can be parcelled out and sent back to the national authorities, but the principle is that for CCDs you start in Brussels, but for anything that is not you do not, and really there is no encroachment on the one-stop shop principle in the case before you.

Just another point on the merger regulation while we are on that. Lord Pannick said that if Ryanair's appeal before the Court of First Instance, as it then was, had succeeded then the prohibition on it acquiring 100 per cent of Aer Lingus would have been overturned, the bar would have been lifted, or some such phrase. That is not the consequence, or would not have been the consequence of success for Ryanair in the Court of First Instance. The consequence there would have been that Article 10.5 of the Merger Regulation applied. I do not know if you wish to turn that up. It is not perhaps a central point in this case but it is worth just remembering what the system is. It is 4.512 in the Purple Book, and 5 of that Article says:

> "Where the Court of Justice …"

which, for these purposes, includes what is now the General Court –

> "… gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-

examined by the Commission with a view to adopting a decision pursuant to Article 6(1).

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

I pointed this provision out to the Court of Appeal in the course of argument, because of the one of the questions they had was, did the Court of First Instance have the power to substitute its own decision for that of the Commission or was it to be remitted. I explained, and they must be taken to have understood if I was at all doing it properly, that the matter would, by operation of law, be remitted to the Commission for a reconsideration. In other words, on a successful Ryanair appeal, the Commission would immediately have been seized with jurisdiction over the concentration – that is the single concentration which it had prohibited in the decision that was under challenge in those proceedings. So Ryanair would still in those circumstances have needed a clearance following a re-examination in the light of any changed circumstances if it had succeeded.

As Mr. Beard said, the Ryanair case has been made effectively to depend, other than the arguments based on 21(3) itself, entirely on the judgment for the Court of Appeal, and in particular para.38 of that. In my submission, it is indisputable, when one reads the judgment properly - and I am going to go through it as a matter of structure, if not detail - that what he means by a "clash of jurisdictions" is the exercise by the UK competition authorities in that case over something over which the Commission had exclusive jurisdiction pursuant to Article 21(3), and he does not mean anything else. The situation that he has in mind is that if either or both of the Ryanair or Aer Lingus appeals had succeeded, the OFT of the Competition Commission would at that point have turned out to have had no jurisdiction whatsoever, and that is what he means.

Without going over the detail, can I just show you the structure of the Chancellor's judgment so that you will see how I make that submission. It is in tab 17 of the authorities bundle, and Mr. Beard has already taken you to para.26 of that judgment, which is the starting point. This section of the judgment is headed "The submission of counsel and my conclusion", and what he does in para.26 onwards is to summarise four submissions made by my learned friend Lord Pannick on behalf of Ryanair, the first being that once the Commission had taken its decision, and by the "Interim Measures" decision he means the decision that Aer Lingus in the Court of First Instance, once that decision had been taken, which was the later of the two that the Commission had taken, Article 21 ceased to apply. That is the first submission.

The second relates to the duty of sincere co-operation.

The third submission is that s.122(4), the awkwardly worded provision that we were debating in those proceedings did not apply for either or both of reasons one or two.

The last point was that that was a better outcome.

Those are the submissions. As Mr. Beard has pointed out, in considering the first submission the Chancellor somewhat regretted that neither Mr. Beard nor I felt able to say that Article 21 continued to apply. So at what appears to be mistakenly run together paras.30 and 31 the Chancellor accepts the first proposition put forward on Ryanair's behalf. So Article 21 does not apply. The question, however, was that the way the OFT had analysed it, it was not Article 21 that was preventing us from doing anything, it was the principle of sincere co-operation.

We come at para.32 to the second submission, the one dealing with the principle of sincere co-operation. Paragraphs 32 to 36 summarise Ryanair's submissions. Paragraphs 37 to 39 deal with the OFT and Aer Lingus position, and the conclusion starts at para.40:

"I prefer the submissions of counsel for OFT and Aer Lingus."

So his conclusions are set out from 40 to 42. At para.43 he turns to the third submission, and I will come back to that.

Starting at para.32, what is being said by Ryanair in this case is, all right, so Article 21 does not apply, neither did the principle of sincere co-operation, because all that principle requires you to do is avoid a clashing outcome. We go through the cases on stays in competition litigation, and the submission on behalf of Ryanair is that tells you what is the content or what is the obligation on a Member State authority with parallel jurisdiction under the principle of sincere co-operation.

At para.37 onwards, those submissions are challenged by counsel for OFT and Aer Lingus, and the position essentially argued by my learned friend Mr. Beard was, no, that does not tell you everything, the principle of sincere co-operation is not only an obligation to avoid inconsistent outcomes, in this case it went further because there was a risk, a substantial risk, that in that intervene period between the decisions being taken and the Court of First Instance ruling, that the legal position would be that the OFT and the Competition Commission did not have any jurisdiction. That was a matter also embraced by the principle of sincere co-operation.

The principle of sincere co-operation being flexible, fact specific, depending on the legal context, and so forth, had a specific application in the context where it may turn out that the national competition authorities did not have any jurisdiction. That is the position that the

Chancellor accepts in 40 to 42. I will not go through what he actually says about it because I think that has been done, but it is helpful to see how to parse this judgment.

Let me just turn to para.43, where he says, "I turn to the third submission". I think it is important to realise that what is actually happening in this paragraph is that, in effect, the Chancellor is summarising his conclusion under the second submission. The third submission was, if you remember, that if neither Article 21 nor the principle of sincere co-operation deprived the OFT of the ability to act, then there was nothing additional in s.122(4) that prevented it either.

That boiled down though, as para.43 says, to:

> "Counsel for Ryanair accepted that if either of his first two propositions was rejected then s.122(4) applied. I agree. In the view I have taken a reference of a merger situation in respect of Ryanair's proposed takeover of Aer Lingus could not have been made until both the Ryanair and Aer Lingus appeals had been finally determined. The direct cause of this impediment …"

and it is the impediment that causes s.122(4) to activate -

> "… was the duty of sincere cooperation. The duty arose because of the ECMR, in particular, Article 21. Therefore s.122(4) applied."

Article 21 was clearly out of the picture, somewhat to the Chancellor's regret, because he put it to us more than once, did we not think that applied. He finds that the principle of sincere co-operation in this case does extend to avoiding the risk of encroaching on exclusive jurisdiction, and that is the basis for the application of s.122(4).

In my submission, that is how to read the judgment, and that is why it is not right to suggest that the Chancellor was in some way saying something different, that he was trying to overrule or extend the principle, extend the principle of sincere co-operation to cover other situations, such as the *Masterfoods* type of case.

In my submission, it is actually very clear that this case can only at best a potential clash of outcomes case. It is not a clash of jurisdictions case, as that is properly to be understood. The question under clash of outcomes relates to the risk of irreconcilable decisions by the two authorities. I think the phrase used by my learned friend Lord Pannick was "fundamentally inconsistent". You were taken to the opinion of Advocate General Cosmas in the *Masterfoods* case. Mr. Beard asked if you would look at the footnotes. If you look at footnote 7 to para.16 of his opinion you will see he uses the phrase "unmixed conflict". It is that sort of phrase that one is looking for when assessing the scope of the duty under the principle of sincere co-operation.

The first point I would wish to emphasise is that this case is extremely different from the other Article 4 type sincere co-operation cases that have been cited because the matters that are being considered, respectively by the European Commission under the Merger Regulation and the Competition Commission here under the Enterprise Act, are absolutely legally distinct. One is a CCD under the Merger Regulation and the other is a relevant merger situation arising from material influence under the Enterprise Act. As Mr. Glynn has rightly pointed out, they raise very different issues from the competition policy point of view.

This is not a case like *Masterfoods, National Grid* or *MTV*, or those other cases which have been cited today, where the two authorities each of which have jurisdiction and are each looking within their sphere of jurisdiction at precisely the same legal phenomenon, the application of the same Article of the Treaty to the same agreement, or the same practice by a dominant company; it is not that type of case. It is not even a case like *Crehan* which I think Mr. Beard said I might pick up on. I will do, a case I much enjoyed winning - or participating in the win, I should say.

For those who are not familiar with it, *Crehan* was about brewers' leases, brewery ties and the European Commission had taken a series of decisions in relation to certain brewers' networks of leases - this is under the old system of what was then I think probably Article 85 - it had held that competition in the UK for beers was foreclosed against entry by foreign brewers essentially, but that individual exemptions could be given to those brewers' leases. For complicated reasons the defendant in the *Crehan* case, or the original claimant, was a company owing a series of these leases that did not have an individual exemption, so the question was: did it fall within what is now Article 101, and the trial Judge held that the UK market was not foreclosed, and that therefore there was not an infringement of what is now Article 101. So there you had a case where the Commission on the one hand, the court on the other, each had jurisdiction under the same provision of the Treaty in relation to materially identical sets of facts but different parties. The House of Lords authoritatively held that that is not a problem.

It is not even that case that we have here. What we have is extremely different legal provisions and different aspects of Ryanair's involvement in Aer Lingus - to use a neutral phrase - being looked at for very different purposes. In that connection it cannot be relevant that to some extent, and that may be a greater or lesser extent, the European Commission and the Competition Commission will have to ask some of the same questions or seek some of the same information, that cannot be a determinative issue under the principle of sincere

co-operation, and we set out some examples in para.24 of our skeleton that relates to that sort of hypothesis.

Everything that Lord Pannick said could be a problem if the investigations were proceeding at the same time, could be said of a *National Grid* type situation, it is just not a relevant feature. In my submission, given the differences, the undoubted jurisdiction and so forth, the risk of a true legal conflict, one of unmixed conflicts or irreconcilable decisions, given the different legal bases of these investigations is far less than has been considered in those other cases. But what is absolutely clear, and Mr. Beard I think ended really on this note, is even in those situations there is absolutely no legal requirement for the Member State authority to down tools just because of the potential for conflict in one of the many scenarios that could emerge. So on any view this challenge is premature as well as baseless.

In my submission, it is also beyond debate that how to manage, how to cope with the principle of sincere co-operation is a matter for the national authority; it is a Member State matter how that conflict is avoided. Mr. Beard has given some examples of it, but that is clearly how it is dealt with in the High Court stay cases. There was a quotation from Lord Bingham I think in the *MTV* case saying that the European Court would not expect to interfere with the procedures of the National Court in those things; it is a matter for the relevant Member State authority.

But, in any event, this case is explicitly not put on the basis that the Competition Commission has wrongly exercised discretion as to how to continue, it is put on the simple legal point.

I am obviously not going to speculate on the likely outcomes of either of these proceedings, the theoretical range is from the 100 per cent approval by both authorities to 100 per cent disapproval by both authorities and any point in between is also possible. We set out in our skeleton why we do not think there is any relevant change in the European Commission practice that led to the prohibition in the first Ryanair bid; we have set out a recent decision that says there is still the question of route overlaps and they have more intense not less intense in the intervening period. What we do say, obviously, is that the relevant merger situation is one that should be investigated as speedily as may be, and I will say it in case nobody else does, of course, we would be very grateful if the Tribunal were able to produce a Judgment as soon as may be, and it is a very unseasonable as well as impolite request that I have just made.

Unless I can help further, sir, those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Flynn. Lord Pannick?

LORD PANNICK: Sir, the 29 per cent shareholding is not part of the single concentration being considered by the Commission; there is no dispute about that, as I accepted this morning. Our case is that the 29 per cent is so closely, so inextricably linked to what the European Commission is considering that either Article 21 properly understood, or the duty of sincere co-operation applies. Our case is that it is not just, as Mr. Flynn suggested now, that the European Commission and the Competition Commission will be looking at the same evidence, and essentially the same issues, although they will be it is much more than that. Our case is this: if the European Commission were to approve the bid, then the basis for assessment by the Competition Commission of the 29 per cent would be likely to disappear. Why is that? Because we would then own either 100 per cent or at least a decisive influence, even if it was not 100 per cent, we would own a very substantial proportion of Aer Lingus, and lawfully so.

We would simply not own 29 per cent, we would not wish to own 29 per cent. Whether we could own 29 per cent would be academic. Indeed, if the European Commission allow us to proceed with a bid for 100 per cent we say it would conflict with that conclusion for us to be required to divest ourselves of 29 per cent, and not re-acquire the 29 per cent. There is a fundamental clash here; a fundamental conflict and the fact - and it is a fact - that the 29 per cent is not itself a concentration for Article 21 purposes, does not provide an answer in my submission to the inextricable link between the assessment by the Commission and what is to happen to the 29 per cent. That is how we put it, the two are so closely linked and not just because it is the same issues of fact in competition that are being assessed.

Turning then to Article 21 on that basis, my friend Mr. Beard says if you look at Article 21(3), if you read it, he said - and these were his words - "You can read it until you are blue in the face but it only applies to the extent that there is a concentration that has a Community dimension". That is his case, look at the words.

This is, with respect, to ignore a fundamental principle of EU law that the words of a Community instrument must be read, having regard to their purpose. The purpose of Article 21(3) is not a matter of doubt, the purpose is set out in recital 8, the one stop shop principle. Our case is that where, on the facts of this case, the undisputed facts of this case, the concentration with a Community dimension, that is the bid, is so closely linked with the matter being addressed by the national authority, as it is here for the reasons I give, it would frustrate the one stop shop principle to have two jurisdictions looking at these issues so closely interlinked at the same time. That is how we put it on Article 21. It really is not

good enough to say look at the words of 21(3), one has to interpret and apply those words by reference to their purpose.

If we are wrong on that, then one moves to the duty of sincere co-operation. What is clear, we say, from the Court of Appeal Judgment are two principles of law. The first of them is that the duty of sincere co-operation is not confined to the risk of conflicting decisions, conflicting decisions at national level and at European level. The duty does apply to that, that is certainly something that the duty does apply to but it is not confined to that. I say the duty does apply to that at least because that is the view set out in much of the case law that my friend, Mr. Beard, referred to, and it is the view of the Directorate in the letter of yesterday, in the penultimate paragraph. They accept national competition authorities should not on the basis of their national law take decisions that would compromise decisions, or possible decisions, by the European Commission under the regulation. That is very important; very important for the purposes of this case that one notes that that is so because even if, contrary to our submissions, the Competition Commission is able to continue with its investigation there is a limit to what it can do.

The first point that is established by the Court of Appeal is the duty of sincere co-operation is not confined to the risk of conflicting decisions, at least in some cases.

The second point of principle established by the Court of Appeal is that the duty of sincere co-operation is concerned to avoid overlapping jurisdictions, that is what the Chancellor says expressly.

The question that then arises is: what does he mean by overlapping jurisdictions. The case against me is that when he talks of overlapping jurisdictions he is essentially referring to Article 21 in the context of this case, that is what he means. That poses two difficulties for my friends, in my submission. The first difficulty is that if Article 21 applies, and one is in the realm of an exclusive jurisdiction you do not need the duty of sincere co-operation because Article 21 applies.

The duty of sincere co-operation, if it is to have any force, must connote something supplementary to that which is already established as a matter of binding Community law, under Article 21. That is the first point that I make in reply in response to my friends.

The second point that I make in reply to my friends is that it is very clear indeed from the Judgment of the Chancellor, it is a passage to which my friend, Mr. Flynn, referred a few moments ago, that the Chancellor regarded the case before him as not involving, or at least he was proceeding on the basis that the case before him did not involve a breach of Article 21.

If we go back, please, to the Judgment of the Court of Appeal, it is vol.2 tab 17 of the authorities bundles. At para. 26 the submissions on behalf of Ryanair were set out, and 26(1) is the first submission, namely:

> (1) The jurisdiction of the Commission in relation to Ryanair's proposed takeover of Aer Lingus under ECMR terminated on its Interim Measures Decision made on 11th October 2007 with the consequence that thenceforth Article 21 ceased to apply."

So that is the argument, that Article 21 simply did not apply as from October 2007. As my friends indicated para.29 begins with the statement that neither the OFT nor the Aer Lingus were challenging that first submission, so neither of them were asserting that Article 21 did continue to apply as from October 2007. The rest of para. 29 contains the Chancellor's explanation as to why he doubted that their reluctance to dispute my proposition was well founded, but nevertheless at 30 and 31 he makes it very clear at the end of those linked paragraphs that he, the Chancellor, accepted for the purposes of this appeal but do not decide the correctness of the first of the four propositions. So he is expressly proceeding on the basis - expressly proceeding on the basis - that Article 21 did not apply or, rather, ceased to apply because that is how it is put at 26(1) "ceased to apply" from 11th October 2007. It therefore, in my submission, cannot be the case - cannot be the case - that the Chancellor's analysis of the scope of the duty of sincere co-operation is based upon the scope of Article 21, because that would be to contradict that which he has accepted for the purposes of the Judgment at paras. 30 and 31. In other words he, the Chancellor, is necessarily addressing the scope of the duty of sincere co-operation on the basis that it is supplementary, it adds something, to that which is established by Article 21, it adds something more. My friends' argument, with all due respect to them, fails to address that logical necessity, that is that from the Chancellor's point of view, in the circumstances of the case before him, I entirely accept, he is defining the scope of the duty of sincere co-operation as something that applies even though Article 21 does not.

THE CHAIRMAN: I see that, Lord Pannick, but is he not also saying in para.40 that if the OFT and Aer Lingus appeals go one way or the other the Article 21(3) exclusive jurisdiction will, as it were, revive?

LORD PANNICK: Undoubtedly, he is undoubtedly saying that but he is not proceeding on the basis that the scope of the duty of sincere co-operation is confined to that which is established in the circumstances of the case before him by Article 21, it is a supplement to Article 21, and not confined to that which is established by Article 21. Indeed, as I say, the

duty would add nothing unless it was supplementary in some respects. So I entirely accept that the case is linked to Article 21, which is what, sir, you are putting to me and rightly so. But equally the present case is linked to Article 21, it is linked to Article 21 in that there is a current holding of the 29 per cent which is being considered by the domestic authorities in the circumstances of a bid for 100 per cent which, if it goes one way, and that was the premise in para. 40 - if a decision goes one way - will inevitably have a very substantial effect on the other part of the equation, that is in that case what the OFT was looking at, in the present case what the Competition Commission is looking at.

So the question for the Chancellor is the duty of sincere co-operation requires consideration of a link with Article 21, it does not require the establishment of a current existing exclusive jurisdiction under Article 21.

THE CHAIRMAN: No, you say "link", let me put this phrase to you, it is a phrase neither the Chancellor nor, indeed, Mr. Beard used, it is too inelegant for them, but did the Chancellor not proceed on the basis that Article 21 was contingently applicable. If the appeals went one way or the other then it would apply and to that extent it was contingent. You have used the work "link", but would this be a case where Article 21(3) could contingently apply if events went one way rather than another, or can you not go that far?

LORD PANNICK: Well I can go that far in this sense, that if the Competition Commission contingently were to decide that a holding of 29 per cent is impermissible for competition law terms, and if they were to decide, as theoretically they may do, that we should be required to divest ourselves of that 29 per cent, it is very difficult indeed to see how that could be consistent with at least a contingent ruling by the European Commission that we are entitled in Community law terms to own 100 per cent of Aer Lingus. So there is, on the contingent basis that you, sir, are putting to me, understandably, was the thinking of the Chancellor in the earlier case a similar, very close contingent link with the exclusive jurisdiction of the Commission; that is how we put it. One cannot dissociate, in the way that my friends seek to do, the contingencies that founded the analysis of the Chancellor in relation to the duty of sincere co-operation in the first case from the contingencies that would apply on a particular finding, a central finding, that is possible by the European Commission in the circumstances of our case.

My friend, Mr. Beard, relied on the earlier authorities which do not take him further forward because the Chancellor, in his analysis, expressly considered those very same authorities. We have seen at paras. 32, 33, 34 and 35 that the same authorities on which my friend relied were analysed by the Chancellor and led up to the conclusions that he reached. Indeed, if

one looks at the earlier Tribunal decision in this case, which is at tab 15, and we look at para. 67, which I have at 585. It follows on from an analysis that begins at para. 55 under the heading "Case law", and the case law that this Tribunal were looking at included *Masterfoods* and *National Grid* and various other cases, and *MTV*. At para.67 this Tribunal said that these cases confirm the generality and importance of the duty in Article 10 - that is another manifestation of the sincere co-operation duty.

> "However, it is also pertinent to note that each of them concerned the risk of conflicting decisions in an area of competition law where the domestic courts and the European Commission have *concurrent* jurisdiction, namely in relation to Articles 101 and/or 102. The present case is distinct in that, rather than concurrent jurisdictions, the legal framework provides for a 'one stop shop' principle, and for (largely) mutually exclusive jurisdictions of the domestic authorities on the one hand and of the Commission on the other. Therefore in none of the cases above was there an occasion to consider a situation such as the present where, in addition to possibly inconsistent outcomes, there exists the potential for a conflict of jurisdiction. It is also of significance that in the present case we are dealing with national authorities rather than courts."

So this Tribunal did not find the earlier authorities particularly helpful in resolving the issue before it, and plainly the Chancellor did not either, and in my submission the situation has not changed as we have arrived at the present appeal. Indeed, the earlier authorities focus, as the Chancellor identified, on the question of conflicting decisions, and our submissions were rejected on the basis that that did not exhaust the scope of the duty of mutual co-operation.

So my submission is that the duty of sincere co-operation recognises that one can move outside the exclusive jurisdiction of Article 21. Paragraph 43 of the Court of Appeal Judgment, the Judgment of the Chancellor, was also referred to, particularly the sentence at the bottom of the penultimate page:

> " The direct cause of this impediment was the duty of sincere cooperation. The duty arose because of the ECMR, in particular, Article 21."

But I have no difficulty with that because it is equally my case that the duty of sincere co-operation arises because of Article 21, it arises because of the exclusive jurisdiction of the European Commission and the need to ensure that the exercise being conducted at national level does not involve any assessment that may lead at the end of the process to something that may trespass upon the exclusive jurisdiction. The question remains: how close a

connection, a link is required with Article 21? We know from the Court of Appeal Judgment that it is the right approach to focus on a contingency, that is what may be decided by the European Commission, and you have my submission that if the European Commission decide, as they may, that 100 per cent ownership by my clients is consistent with Community that would fatally undermine in practice and in substance consideration at domestic level of whether or not my clients can continue to own 29 per cent. So we say there is the closest of links with the exclusive jurisdiction of the European Commission and the test is not whether the matter being considered by the domestic authority is itself a concentration with a Community dimension.

Those are the points I wanted to make in response; anything else would be repetition.

THE CHAIRMAN: Lord Pannick, thank you very much, that is very helpful. We obviously will not be handing down a Judgment now. I take on board what Mr. Flynn said about speed being important; we will do our very best to hand down a Judgment as soon as possible.

MR. BEARD: To echo that, I did not make any point during the principal submissions but, first of all, the Commission is very grateful for the Tribunal getting this hearing on within a fortnight of the application being lodged, but unfortunately would ask that as soon as was possible a decision if it were necessary for there to be a decision followed by reasons that is not ideal for anybody I know, but urgency is upon us in relation to this because clearly what we want is to be in a position to understand what needs to be done. Ryanair needs to understand what it needs to do in order that a work plan can properly be agreed as soon as possible if this matter is to go forward. If it is not then we need to know that as soon as possible and, indeed, indicate as much to the European Commission, so I am most grateful.

LORD PANNICK: (No microphone) I would not wish any silence on my part to indicate a statement as to the right to know as soon as reasonably possible what the answer to this is.

THE CHAIRMAN: Well on that, at least, you are all agreed! (Laughter)

LORD PANNICK: And we have not used any Olympic analogies all day, which I think is a triumph.

THE CHAIRMAN: Thank you all very much, we will let you know when our Judgment is ready for handing down.

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