Neutral Citation Number: [2012] EWCA Civ 1632

Case No: C3/2012/2210

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM COMPETITION APPEAL TRIBUNAL
Marcus Smith QC, Dr Clive Elphick, Dermot Glynn
[2012] CAT 29

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2012

Before :

LORD JUSTICE PILL
LORD JUSTICE ETHERTON
and
LORD JUSTICE LEWISON

- -

Between :

RYANAIR HOLDINGS PLC ("Ryanair")	**Appellant**
- and -	
COMPETITION COMMISSION ("CC")	**1st Respondent**
-and-	
AER LINGUS GROUP PLC ("Aer Lingus")	**2nd Respondents**

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Lord Pannick QC and Brian Kennelly (instructed by **Cleary Gottlieb Steen and Hamilton LLP**) for the **Appellants**
Daniel Beard QC and Alison Berridge (instructed by **Treasury Solicitors**) for the **1st Respondents**
James Flynn QC and Daniel Piccinin (instructed by Cadwalader, Wickersham & Taft LLP) for the **2nd Respondents**

Hearing date : 16th November 2012

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Judgment

Lord Justice Etherton :

1. The appellant, Ryanair Holdings plc ("Ryanair"), and the second respondent, Aer Lingus Group plc ("Aer Lingus"), operate well known airlines. Following a reference by the Office of Fair Trading ("the OFT"), pursuant to section 22 of the Enterprise Act 2002 ("the EA"), the Competition Commission is currently conducting an investigation under Chapter 1 of Part 3 of the EA (mergers) into Ryanair's 29.82% shareholding in Aer Lingus. The European Commission ("the EC") is concurrently exercising its jurisdiction under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("the Merger Regulation") to consider Ryanair's current public bid for the entirety of Aer Lingus' share capital.

2. The Competition Commission has rejected Ryanair's claim that, by virtue of the EC's exclusive jurisdiction under Article 21(3) of the Merger Regulation ("Article 21(3)") and the duty of Member States under Article 4(3) of the Treaty on European Union ("TEU") to assist the European Union ("the EU") to carry out its tasks ("the duty of sincere co-operation"), the Competition Commission has no jurisdiction to continue its investigation or ought not to exercise any such jurisdiction pending completion of the EC's review under the Merger Regulation.

3. This is Ryanair's appeal from the decision of the Competition Appeal Tribunal ("the CAT") dated 8 August 2012 by which, broadly speaking, it dismissed Ryanair's application for an order pursuant to EA s.120 that the Competition Commission's decision to continue with its investigation, including the Competition Commission's notice under EA s. 109 requiring Ryanair to produce certain information and documents, be quashed or stayed.

The legal framework

The duty of sincere co-operation

4. Article 4(3) TEU provides:

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

5. There are important observations on the principle of sincere co-operation in *MTV Europe v BMG Records (UK) Ltd* [1997] 1 CMLR 867 ("*MTV Europe*"); *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369 ("*Masterfood*s") and *National Grid Electricity Transmission plc v ABB Ltd* [2009] EWHC 1326 ("*National Grid*"). It is

sufficient for the purpose of this appeal to refer to the reasoning and decision of the Chancellor in *National Grid*, with which I agree. That case concerned "follow-on" actions for damages which relied, for the establishment of liability, on the decision of the EC that there had been serious antitrust infringements of competition law by way of cartel arrangements. The question was whether there should be a stay of the English proceedings pending the conclusion of appeals by the defendants to the Court of First Instance ("the CFI") (now the General Court) and any subsequent appeals to the European Court of Justice ("the ECJ") (now the Court of Justice of the European Union). The Chancellor refused a stay but ordered that the action be not fixed for hearing against any defendant until after the period of three months had elapsed from the exhaustion by that defendant of its rights of application for annulment to the CFI or of subsequent appeal to the ECJ. The Chancellor said the following at paragraph [24] of his judgment:

> "24. At one stage counsel for Areva submitted that the terms of paragraph 58 of the ECJ's judgment in *Masterfoods* required the national court to abstain from any further proceedings in the action save any which could properly be described as "interim measures to safeguard the interests of the parties pending final judgment". He submitted that any requirement for service of defences, disclosure of documents or other normal interlocutory steps in preparation for a trial were outside the scope of what the ECJ considered to be permissible. I reject that submission. First, the terms of paragraphs 55 and 57 show that it is for the national courts to decide when to stay its proceedings. The object is to avoid any decision running counter to that of the Commission or the community courts. Paragraph 58 deals only with the position when the national court has stayed the proceedings. It says nothing about the obligations of the national courts before that stay has become effective. Indeed it would be contrary to the very division of functions to which the ECJ referred in paragraphs 47 to 49 to conclude that it had the jurisdiction to interfere with the procedures of the national courts in areas where there was no risk of conflicting decisions. Given that objective it is for the national court to consider, in accordance with its own procedures, how best to achieve it. "

6. In reaching his conclusion the Chancellor relied upon the following passages in the judgment of Sir Thomas Bingham MR in *MTV Europe* about the consequences of the duty of sincere co-operation where the EC is exercising its concurrent jurisdiction in respect of a matter which is also the subject of pending antitrust proceedings in the UK:

> "[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."
>
> "[29] … I find nothing in [Case C-250/92 *Gøttrup-Klim Grovvareforening v. Dansk Landbrugs Grovvareselskab AmbA*] 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."

The Merger Regulation

7. Article 1 of the Merger Regulation defines the transactions falling within its scope and grants to the EC exclusive jurisdiction within the EU to scrutinise those transactions on competition grounds. Article 1 provides that the Merger Regulation "shall apply to all concentrations with a Community dimension". It goes on to define "Community dimension" by reference to the turnover of the undertakings concerned in the concentration.

8. Article 3(1) provides:

> "A concentration shall be deemed to arise where a change of control on a lasting basis results from:
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> (a) the merger of two or more previously independent undertakings or parts of undertakings, or
>
> (b) the acquisition … 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".

9. Article 3(2) provides:

> "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..."

10. Article 2 sets out the substantive test against which mergers falling within the jurisdiction of the EC are assessed, focusing on the concept of a "significant impediment to effective competition". It provides:

> "(2) A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or

> strengthening of a dominant position, shall be declared compatible with the common market.
>
> (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."

11. Article 4 contains provisions for notifying the EC of concentrations with a Community dimension prior to their implementation and following, among other things, the announcement of a public bid.

12. Article 6 contains provisions for a two stage consideration of the concentration by the EC. In the first, shorter, phase the EC decides whether the concentration falls within the Regulation at all and, if it does, whether there are serious doubts as to its compatibility with the common market. If the EC entertains serious doubts (and remedies are not accepted), there is a second, longer, phase when it initiates proceedings for an in-depth investigation and a final decision as to whether the concentration is or is not compatible with the common market.

13. Article 10 imposes time limits for taking the first phase decisions in Article 6 and for concluding the second phase proceedings mentioned there.

14. Article 21 imposes the general rule (subject to limited exceptions which are not relevant to this appeal) that the EC has exclusive jurisdiction to consider concentrations with a Community dimension. This is described in recital (8) of the Merger Regulation as the application of a "one-stop shop" system. The converse situation, also mentioned in recital (8) is that concentrations not covered by the Merger Regulation come, in principle, within the jurisdiction of the Member States. Article 21(3) of the Merger Regulation ("Article 21(3)"), which looms large in this appeal, provides:

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

Domestic law: the EA

15. The EA is the primary statute governing UK merger control. It defines the transactions over which the relevant UK authorities (the OFT and the Competition Commission) have jurisdiction and lays down procedures and a timetable for the review of those transactions. In broad outline, Chapter 1 of Part 3 of the EA lays down a regime for controlling the anti-competitive consequences of a merger situation, under which the OFT carries out an initial scrutiny of any merger situation which falls within the jurisdiction of domestic merger control. If the OFT has concerns about the actual or potential impact on competition of a merger, it refers the matter to the Competition Commission for a more substantial investigation.

16. EA s.22(1) provides:

> "(1) The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that—
>
> (a) a relevant merger situation has been created; and
>
> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

17. The substantive tests for anti-competitive mergers are, therefore, different under the Merger Regulation and the EA. Under Article 2 of the Merger Regulation the question is whether the concentration would significantly impede competition in the common market or in a substantial part of it. Under the EA the question is whether the merger has resulted or may result in a substantial lessening of competition within any market or markets in the UK for goods or services. That is called "an anti-competitive outcome" in EA s.35.

18. EA s.24 imposes time limits for the OFT to make a reference to the Competition Commission under EA s.22.

19. EA s.26 specifies when enterprises cease to be distinct enterprises. It provides:

> "(1) For the purposes of this Part any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control...
>
> (3) A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise may, for the purpose of subsections (1) and (2), be treated as having control of it."

20. Accordingly, in deciding whether a transaction qualifies for review, the UK regime applies a test of "material influence". This contrasts with the European regime which is only triggered under Article 3(2) of the Merger Regulation by an acquisition of "decisive influence". The test under the EA is more expansive, and in practice applies at lower levels of shareholding, than the EU test.

21. Under EA s.35 the Competition Commission must decide whether the merger situation has resulted or may be expected to result in an anti-competitive outcome, and, if so, what remedial action should be taken.

22. EA s.38(1) provides that the Competition Commission shall prepare and publish its report on a reference under section 2 within the period permitted by section 39. Section 39 provides:

> "(1) The [Competition] Commission shall prepare and publish its report under section 38 within the period of 24 weeks beginning with the date of the reference concerned...

> (3) The [Competition] Commission may extend, by no more than 8 weeks, the period within which a report under section 38 is to be prepared and published if it considers that there are special reasons why the report cannot be prepared and published within that period.
>
> (4) The [Competition] Commission may extend the period within which a report under section 38 is to be prepared and published if it considers that a relevant person has failed (whether with or without a reasonable excuse) to comply with any requirement of a notice under section 109..."

23. Accordingly, under the domestic statutory scheme, the Competition Commission is required to carry out its investigation and produce a detailed final report within a strictly defined time limit. Parliament has not provided any statutory mechanism to slow or stop the Competition Commission process save in the circumstances specified in s.39.

24. EA s.41 provides:

> "(1) Subsection (2) applies where a report of the [Competition] Commission has been prepared and published under section 38 within the period permitted by section 39 and contains the decision that there is an anti-competitive outcome.
>
> (2) The [Competition] Commission shall take such action under section 82 or 84 as it considers to be reasonable and practicable—
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> (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and
>
> (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition.
>
> (3) The decision of the [Competition] Commission under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 35(3) or (as the case may be) 36(2) unless there has been a material change of circumstances since the preparation of the report or the [Competition] Commission otherwise has a special reason for deciding differently."

25. There is, therefore, a duty to take action where the Competition Commission has decided that the merger situation has resulted, or may be expected to result, in a substantial lessening of competition in UK markets. The remedial action is not subject to a statutory time limit and there is scope to take into account significant events that have taken place since the publication of the Competition Commission's report.

26. EA s.120 provides for review of decisions of the Competition Commission made in connection with merger investigations as follows:

> "(1) Any person aggrieved by a decision of... the [Competition] Commmission ... in connection with a reference... in relation to a relevant merger situation ... may apply to the Competition Appeal Tribunal for a review of that decision.
>
> …
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> (4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
>
> …
>
> (6) An appeal lies on any point of law arising from a decision of the Competition Appeal Tribunal under this section to the [Court of Appeal]..."

27. EU and domestic legislative provisions are more comprehensively set out in the Appendix to this judgment.

The factual background (Stage 1)

28. All three parties to this appeal rely heavily on the judgment of the Chancellor, Sir Andrew Morritt, in *Ryanair Holdings plc v the Office of Fair Trading and Aer Lingus plc* [2012] EWCA Civ 643 ("the Ryanair/OFT proceedings"). That judgment, with which the other members of the court agreed, was handed down on 22 May 2012. In order to place that judgment ("the Chancellor's judgment") in its proper context it is necessary to explain its factual background in some detail.

29. The shares of Ryanair and Aer Lingus are quoted on the Dublin and the London Stock Exchanges. Between 27 September and 5 October 2006 Ryanair acquired 19.2% of the issued share capital of Aer Lingus. On the latter date Ryanair publicly announced its intention to bid for the outstanding 80.8%. That bid was made by Ryanair on 23 October 2006. Its terms included the usual term that the bid would lapse if there was a reference to a merger authority in either the UK or the European Union. On 30 October 2006 Ryanair lodged with the EC a notification under Article 4 of the Merger Regulation of its proposed concentration by acquiring the issued share capital of Aer Lingus. By 28 November 2006 Ryanair had increased its holding in Aer Lingus to 25.2%.

30. By its decision made on 20 December 2006 the EC concluded that the activities of Ryanair had given rise to a single concentration for the purposes of Article 3 of the Merger Regulation and initiated second phase proceedings pursuant to Article 6. One consequence of that conclusion was that Ryanair's bid for the remaining share capital in Aer Lingus lapsed. By a further decision made by the EC on 27 June 2007 ("the Prohibition Decision") it was declared, pursuant to Article 8(3) of the Merger

Regulation, that such concentration was incompatible with the common market and was therefore prohibited. By an application made to the CFI on 10 September 2007 Ryanair sought the annulment of the Prohibition Decision.

31. In the meantime on 25 January and 7 June 2007 Aer Lingus asked the EC to require Ryanair to divest itself of the shares in Aer Lingus it had already acquired and to take interim measures under the Merger Regulation to ensure that it did. On the same day as the Prohibition Decision was made, namely 27 June 2007, the EC indicated to Aer Lingus that now that the proposed merger of Ryanair with Aer Lingus was prohibited the EC had no power to order Ryanair to divest itself of the shares in Aer Lingus it had already acquired, but suggested that the relevant body in the UK might. In a letter dated 3 August 2007 the OFT indicated its belief that Article 21(3) precluded it from doing so. On 17 August 2007 Aer Lingus invited the EC (1) to open proceedings against Ryanair under Article 8(4) of the Merger Regulation, (2) to adopt interim measures under Article 8(5) to prevent Ryanair from exercising the voting rights of the shares it had acquired and, alternatively, (3) to state formally that it did not have the power to adopt such measures. On 11 October 2007 the EC formally determined ("the Interim Measures Decision") that it did not have power to open proceedings against Ryanair or to order Ryanair to dispose of its holding in Aer Lingus, and it also formally determined that it did not have the power to interpret Article 21 in the manner Aer Lingus sought.

32. Aer Lingus appealed the Interim Measures Decision. In addition it applied for interim measures to be imposed by the CFI so as to prevent Ryanair exercising the voting and other rights conferred by its holding in Aer Lingus. Its application for interim measures was rejected by the President of the CFI on 18 March 2008. He did so on the basis that Aer Lingus had established neither a prima facie case nor the necessary degree of urgency.

33. On 6 July 2010 the General Court (as the CFI had by then become) dismissed both the application of Ryanair to annul the Prohibition Decision and the appeal of Aer Lingus from the Interim Measures Decision. There was no further appeal against either decision. Accordingly proceedings in the EU courts came to an end but Ryanair still had its minority stake in Aer Lingus, by then increased to 29.8%.

34. On 30 September 2010 the OFT gave notice to Ryanair under EA s.31 seeking information from Ryanair to enable it to determine whether a merger situation had arisen such as it was required to refer to the Competition Commission. Ryanair objected on the ground that the four month time limit for such a reference by the OFT under EA s.24, as extended by EA s. 122, had expired on 28 October 2007. The OFT disagreed, and on 7 January 2011 Ryanair commenced the Ryanair/OFT proceedings in the CAT for a declaration that the time within which OFT might refer any merger situation arising from the acquisition, actual or proposed, by Ryanair of shares in Aer Lingus had expired.

35. On 28 July 2011 the CAT dismissed the application. Ryanair appealed to the Court of Appeal. In his judgment the Chancellor summarised as follows (at [26]) the four propositions on which counsel for Ryanair relied:

> "(1) The jurisdiction of the EC in relation to Ryanair's proposed takeover of Aer Lingus under the Merger Regulation

terminated on its Interim Measures Decision made on 11 October 2007 with the consequence that thenceforth Article 21 ceased to apply.

(2) Although the duty of sincere cooperation continued, because of the rights of appeal available to both Ryanair and Aer Lingus, and was the only European law constraint on OFT, it did not preclude OFT from making a reference under EA s.22 of Ryanair's proposed takeover of Aer Lingus to the Competition Commission as the risk of conflict did not arise at that stage.

(3) Section 122(4) does not apply because for either or both the preceding reasons there was nothing to preclude OFT making the necessary reference within the four month period.

(4) The submissions for Ryanair are to be preferred because the consequence will be that OFT will have power to take any necessary interim steps; by contrast neither national authorities nor the Commission will enjoy such powers if the contrary submission is accepted."

36. The Court of Appeal dismissed Ryanair's appeal. The only reasoned judgment was the Chancellor's judgment.

The Chancellor's judgment

37. The Chancellor considered the basis and nature of the obligation of sincere co-operation and, in that connection, referred to and cited passages in *MTV Europe*, *Masterfoods* and his own judgment in *National Grid*. He then said as follows:

"37. … [C]ounsel for OFT and for Aer Lingus … 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.

38. It is, in my view, clear that both ECMR [viz. the Merger Regulation] and the Enterprise Act confer extensive powers of investigation on, respectively, the Commission and the OFT and 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 OFT. Accordingly, there could be no question of the conclusions of one being adopted without further enquiry by the other. There is, however, considerable overlap in the exercise of the two jurisdictions. The processes of an OFT investigation with a view to possible referral to the Competition Commission, and of any enquiry by that Commission before its decision are, in both cases, intensive. They are likely to involve extensive gathering of information from third parties as well as from the

companies directly concerned, working papers submitted for comment, oral hearings, and detailed examination of the internal workings of the companies. They may involve proposals as to remedies and oral hearings directed to enquiring into them. The 'Issues Paper' which has now been provided by OFT to Ryanair in the present case is an example. There is no occasion here to publish its detailed contents, but it runs to 224 paragraphs and traverses such matters as shareholder voting patterns, capitalisation, the Articles of Association and restrictions on airport slot disposal, the catchment areas of airports, 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 enquiry 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 cooperation does go beyond avoiding inconsistent decisions and extends to overlapping jurisdictions.

39. Counsel for OFT and Aer Lingus also rely on the provisions of the Enterprise Act to which I have referred. They point out that they lay down a strict timetable from initial reference to final conclusion without any power comparable to that of a court to stay proceedings at any stage if it thinks fit. There is no point short of a decision by the Competition Commission at which the process could be halted in the manner suggested by Ryanair. Moreover by then the exercise of UK jurisdiction over matters which will also be directly relevant in Europe, if jurisdiction there be established, has in any event been extensive. For this reason, if no others, the three cases relied on by counsel for Ryanair are distinguishable. The response of the latter is to suggest that the provisions of the Enterprise Act imposing a timetable should be 'read down' under s.2(1) European Communities Act 1972 as "subject to the requirements of EU law" and if that is not sufficient disapplied altogether under *Factortame*. The riposte of counsel for OFT and Aer Lingus is to point out that s.122(4) is the mechanism provided by Parliament for resolving potential clashes of jurisdiction or inconsistent decision. In those circumstances, so they contend, there is no occasion to read down or disapply any provision of the Enterprise Act.

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

41. 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. 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.

42. 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. In those circumstances the OFT's duty of sincere cooperation would cease to apply leaving it free to make such investigations or references it wished. Accordingly, I conclude that so long as the appeals of Ryanair and Aer Lingus were pending and, after their conclusion, the time for any further appeal still running the duty of sincere cooperation applied. Its due observance required OFT to desist from making any reference or, subject to the possibility referred to in paragraph 43 below, taking any other action under the domestic legislation. Thus, while I accept the first part of the second proposition advanced by counsel for Ryanair I reject the suggested consequence that "it did not preclude OFT from making a reference under s.22 Enterprise Act 2002 of Ryanair's proposed takeover of Aer Lingus to the Competition Commission as the risk of conflict did not arise at that stage". A risk did arise and the duty of sincere cooperation required OFT to avoid it by refraining from making any reference until all appeals had been dismissed.

43. 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. The duty arose because of the ECMR, in particular, Article 21. Therefore s.122(4) applied."

The factual background (Stage 2)

38. On 15 June 2012 the OFT referred to the Competition Commission Ryanair's 29.82% shareholding in Aer Lingus ("Ryanair's minority shareholding") pursuant to EA s. 22. The Competition Commission then began its investigation. On 19 June 2012 Ryanair announced its intention to make a public bid for the entirety of Aer Lingus' share capital (the "public bid"). On 20 June 2012 Ryanair informed the Competition Commission of the public bid, and invited the Competition Commission, at the very least, to stay the investigation, given the public bid. On 5 July 2012 Ryanair formally notified the EC, whose consideration of the public bid is continuing. On 10 July 2012 the Competition Commission informed Ryanair and Aer Lingus that it had decided to continue its investigation. On the same day it issued to Ryanair a notice under EA s. 109 requiring the provision of information and production of documents (the "section 109 notice"). Ryanair was also asked to respond to a merger inquiry market questionnaire, which asked 31 questions, requiring responses by (depending on the question) 18 July, 25 July or 1 August 2012.

39. By an application dated 13 July 2012 Ryanair applied to the CAT for: (1) an order pursuant to EA s.120 that the Competition Commission's decision to continue its investigation be quashed or stayed and that the decision to issue the section 109 notice similarly be quashed or stayed; and (2) interim relief pursuant to Rule 61 of the Competition Appeal Tribunal Rules 2003, S.I. No 1372 of 2003 suspending the investigation, including the section 109 notice, pending determination of the application under section 120.

The CAT's decision

40. As I have said, on 8 August 2012 the CAT (Marcus Smith QC, Dr Clive Elphick and Dermot Glynn) dismissed Ryanair's application. The CAT rejected both grounds of Ryanair's application, namely that the EC has exclusive jurisdiction under Article 21(3), and that the OFT and the Competition Commission are subject to the duty of sincere co-operation under Article 4(3) TEU to assist the EC in the carrying out of its task under the Merger Regulation. The CAT said the following about the duty of sincere co-operation:

> "41. Essentially, when and how a stay pursuant to the duty of sincere cooperation ought to be imposed involves – at least in the United Kingdom – something of a balancing exercise (see paragraph [35] of *National Grid*). This exercise may require a more or less complex assessment of numerous interlocking factors and intrinsically involves an element of appreciation and the exercise of judgment.
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> 42. Our conclusion, viewing the matter apart from the [Court of Appeal's decision in the [Ryanair/OFT proceedings], is that the question of what needs to be done in order to comply with the duty of sincere cooperation is a nuanced one, which is very dependent on the facts of the given case. Ordinarily – and without, for the moment, considering the *ratio* of the [Court of Appeal's decision the Ryanair/OFT proceedings] – we would very much doubt whether a decision by a NCA such as the [Competition Commission] to continue or not continue with proceedings before it could, without more, be considered to

amount to an error of law. (We say nothing about other possible heads of review. It may be that a decision by the OFT or the [Competition Commission] to proceed with an investigation could be criticized as irrational or disproportionate. But no such contentions were advanced by Ryanair before us in this case.)"

41. The CAT then undertook an extensive review of the Chancellor's judgment and its factual background. The CAT concluded (in [79] to [81]) that his judgment on the application of the duty of sincere co-operation was directed to a case of "overlapping jurisdictions" where, because of on-going proceedings before the EC and the EU courts, Article 21 was contingently applicable depending on the outcome of proceedings before the EU courts: in such a case, any investigation by the OFT or the Competition Commission would run the risk (depending on how the final European court decisions went) of interfering with a jurisdiction belonging exclusively to the EC. The CAT decided that the present case is not one of "overlapping jurisdictions" and so the Chancellor's judgment is not applicable. The CAT concluded as follows:

> "82. This is not a case of "overlapping jurisdictions" as that term is used by the Chancellor in the [Ryanair/OFT proceedings]. In this case, there is no prospect – even contingently – of the exclusive jurisdiction conferred on the European Commission by Article 21 of the EC Merger Regulation extending to the Minority Holding. As is common ground, whilst the shares which are the subject of the Public Bid amount to a concentration with a Community dimension, and so fall within the EC Merger Regulation, the Minority Holding does not. This fact distinguishes the present case from that before the Court of Appeal in the [Ryanair/OFT proceedings] Decision: there Ryanair's minority shareholding in Aer Lingus was part of the same concentration with a Community dimension as Ryanair's first public bid, with the result that the entire concentration – including the minority holding – was subject or potentially subject to the EC Merger Regulation.
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> 83. This is a case where there are parallel or concurrent jurisdictions:
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> (1) In the case of the Public Bid, the European Commission has exclusive jurisdiction.
>
> (2) In the case of the Minority Holding, the European Commission has no jurisdiction, and the matter falls within the purview of the OFT and the [Competition Commission]. There is no prospect, as regards the Minority Holding, of Article 21 applying, let alone reviving.
>
> 84. Accordingly, we reject Ryanair's contention that, as a matter of law, the duty of sincere cooperation precludes the [Competition Commission] from taking any further steps in the Investigation. Of course, as Mr Beard Q.C., for the

> [Competition Commission], accepted, the [Competition Commission] remains subject to the duty of sincere cooperation and must avoid taking any final decision in respect of the Minority Holding which would, or could, conflict with the European Commission's ultimate conclusion on the compatibility of the Public Bid with the common market. That does not mean that the [Competition Commission] is precluded, as a matter of law, from taking any further steps in the Investigation."

The appeal

42. In his oral submissions Lord Pannick QC, for Ryanair, identified, as the ratio of the CAT's decision, its conclusion that the Competition Commission must avoid taking any final decision in respect of Ryanair's minority shareholding which would, or could, conflict with the EC's ultimate conclusion on the compatibility of the public bid with the common market, but that does not mean that the Competition Commission is precluded, as a matter of law, from taking any further steps in its investigation. Lord Pannick observed that the CAT's conclusion reflected a concession made before the CAT by Mr Daniel Beard QC, for the Competition Commission, amounting to an acknowledgement that the EC's decision on the public bid would or might be of relevance to the reasoning and decision of the Competition Commission in its investigation. Lord Pannick submitted that was a correct, but insufficient, recognition of the Chancellor's reasoning and decision in the Ryanair/OFT proceedings. He submitted that the ratio of the Chancellor's judgment precludes the Competition Commission taking any action which overlaps the investigation by the EC of the public bid.

43. Lord Pannick emphasised the obligations of the Competition Commission under EA s.35 (1) and (3) to decide whether a relevant merger situation has been created; and, if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition, and what action, if any, should be taken to remedy, mitigate or prevent that lessening of competition or its adverse effect. It was against that statutory background that Lord Pannick subjected the judgment of the Chancellor in the Ryanair/OFT proceedings to a close and detailed analysis.

44. Lord Pannick accepted that, in the light of the General Court's dismissal of Aer Lingus' appeal against the Interim Measures Decision, the EC has no jurisdiction in respect of Ryanair's minority shareholding and the UK has exclusive jurisdiction in respect of the competition issues concerning that minority shareholding. He acknowledged that the situation under consideration in the present case is, therefore, different from the factual situation in the Ryanair/OFT proceedings, in which, until the Prohibition Decision on 27 June 2007, the EC had exclusive jurisdiction in respect of Ryanair's minority shareholding as well as its public bid, and, until the General Court's dismissal of Ryanair's appeal against that Prohibition Decision and Aer Lingus' appeal against the Interim Measures Decision, there was a continuing possibility (in the event of either of those appeals succeeding) that the EC would continue to have exclusive jurisdiction under Article 21(3). Lord Pannick's submission, however, was that the reasoning of the Chancellor, particularly in

paragraph [38] of his judgment in the Ryanair/OFT proceedings, is of general application to overlapping investigations by the Competition Commission and the EC and forms part of the ratio of the Court of Appeal's decision in that case.

45. Lord Pannick began his analysis of the Chancellor's judgment by observing that the contention of the OFT and Aer Lingus, accepted by the Chancellor, was that the duty of sincere co-operation must extend to avoiding "any risk of a clash of jurisdictions, not only inconsistent final conclusions". Lord Pannick observed that the Chancellor's reference to "a clash of jurisdictions" must, therefore, be something other than final conclusions, contrary to the decision of the CAT in paragraph [84] of its decision in the present case.

46. The primary focus of Lord Pannick's analysis was on paragraph [38] of the Chancellor's judgment. He submitted that it clearly follows from what the Chancellor said there that (1) the duty of sincere co-operation is not confined to cases where the national authority and the EC are considering precisely the same legal and factual questions; (2) the concern of the Chancellor was about an overlap in respect of evidence and issues; and (3) the Chancellor made it clear that the duty of sincere co-operation is a duty to avoid conflict both in the final decision that is reached and in preliminary or prior decisions along the way.

47. Lord Pannick reinforced that analysis by referring to paragraph [100] of the decision of the CAT's decision in [2011] CAT 23, from which the appeal was made to the Court of Appeal in the Ryanair/OFT proceedings. That paragraph was as follows:

> "Thus, although the competition assessment required by each of the two merger regimes is formulated in slightly different language, it is clear that the Competition Commission would be considering precisely the same issues as those which the European Commission had considered and Ryanair had raised for determination by the General Court, namely the existence and nature of competitive constraints on the merging parties, an assessment of barriers to entry, a route-by-route analysis, and an assessment of alleged efficiency gains. Moreover, if in the course of a Competition Commission investigation Ryanair had proposed any remedies, then similar issues might well have arisen as arose in relation to the commitments which were the subject of the EU proceedings. It would compromise legal certainty and undermine the objectives of the Merger Regulation for there to be inconsistent assessments and findings on such issues. "

48. Lord Pannick said that it appears from that passage that the CAT's then concern was twofold, namely that the same issues were applicable in the two different investigations and that there might be inconsistent assessments and findings in the two investigations.

49. Lord Pannick submitted that his analysis of paragraph [38] of the Chancellor's judgment, and his contention that it formed a distinct part of the ratio of the Ryanair/OFT proceedings, is apparent from the final two sentences of the paragraph:

> "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 cooperation does go beyond avoiding inconsistent decisions and extends to overlapping jurisdictions." [Lord Pannick's emphasis].

50. Lord Pannick rejected the analysis of the CAT and the argument on this appeal of Mr Beard, for the Competition Commission, and Mr James Flynn QC, for Aer Lingus, that the ratio of the Court of Appeal's decision in the Ryanair/OFT proceedings is to be found in paragraphs [40] to [43] of the Chancellor's judgment, which focused on the application or potential application of Article 21 (3). He submitted that those paragraphs were merely applications of the wide reasoning of the Chancellor in paragraphs [38]. He submitted that paragraph [40] was, in particular, dealing with the particular arguments set out in paragraph [39] of the Chancellor's judgment. He said that the Chancellor recognised in paragraph [38] that the issues of law may not be the same in the investigation of the EC and the overlapping investigation of the national authority. He contended that the Chancellor's analysis was directed to similarity of issues and of evidence and of the oppressive consequences of such overlapping investigations. He further observed that there is nothing in paragraph [38] which indicates that the reasoning there is in any way related to the actual or contingent application of Article 21. Indeed, he said, paragraph [38] would be entirely redundant if the ratio of the Court of Appeal's decision in Ryanair/OFT was solely related to the Article 21 point.

51. Lord Pannick supported his argument that paragraph [38] of the Chancellor's judgment was part of the ratio of the Court of Appeal's decision by pointing out that the Chancellor, having considered the leading authorities on the duty of sincere cooperation, including *Masterfoods* and *National Grid*, and having had the benefit of full argument, emphasised that it is plain that there will be common and overlapping issues and evidence in the investigation by the Competition Commission and the EC. Lord Pannick, relating that to the facts of the present case, said that the information which Ryanair would have to provide to the Competition Commission and the EC would overlap substantially and the EC's considerations concerning the competition aspects of the public bid for all the remaining shares in Ryanair would plainly be relevant to an assessment of the competition aspects of Ryanair's minority shareholding. He submitted that, if the EC was to give clearance to Ryanair in respect of the public bid for all the remaining shares in Aer Lingus, it would be highly unlikely in practice that the Competition Commission would object to Ryanair owning its minority shareholding. He said that it was precisely because the reasoning and decision of the EC would be relevant to the reasoning and decision of the Competition Commission that the CAT held in paragraph [84] of its decision that the Competition Commission must avoid taking any final decision which would or could conflict with the EC's ultimate conclusion on the public bid.

52. Lord Pannick submitted that it is no answer, as the Competition Commission currently argue, that the remedies for any anti-competitive outcome could be delayed until the conclusion of the EC's investigation, unlike the report of the Competition Commission which would have to be delivered within the statutory timetable in EA s.39. He pointed out that EA s.38 requires the Competition Commission's report to

include the Commission's decisions as to what action, if any, should be taken by Ryanair or others to remedy, mitigate or prevent any anti-competitive outcome of Ryanair's minority shareholding.

53. He further observed that the Chancellor in *National Grid* said at paragraph [23] that the Court should take all steps required to ensure that the trial in that case did not come on before all appeals to the CFI and the ECJ were finally concluded. It followed, he said, from the analogy of that case and the general reasoning of the Chancellor in paragraph [38] of the Ryanair/OFT proceedings that the OFT should not have made any reference to the Competition Commission until the EC completes its own investigation into the public bid. This was not, he said, a matter of discretion for the OFT or the Competition Commission: it is a matter of law.

54. Lord Pannick rejected any counter-argument based on the delay in remedying any anti-competitive effect of Ryanair's minority shareholding if the Competition Commission cannot continue its investigation until the conclusion of the EC's investigation into the public bid. He submitted that any such delay would simply be the consequence of lawful adherence to the principle of sincere co-operation, just as was the delay between 2006 and 2010 when the EC was actually or contingently entitled to exclusive jurisdiction pursuant to Article 21 (3).

Discussion

55. A Member State's duty of sincere co-operation under Article 4(3) TEU subsists at all times. Whether and when it requires the Member State to take or to desist from taking any particular action, and precisely what is required to fulfil it, are highly fact sensitive. There may be a choice of several different ways, with different timing, to satisfy the duty. Provided that the duty is fulfilled, it is for the Member State to choose the most appropriate course of action to take.

56. Caution must, therefore, be exercised in transferring the reasoning in one judicial decision about the requirements of the duty in that particular case to another case in which the court is considering a quite different factual situation.

57. Important statements about the principle are to be found in *Masterfoods* and *National Grid*. As Mr Flynn pointed out, however, the context of those cases was (what are now) Articles 101 and 102 of the Treaty on the Functioning of the European Union where there are truly concurrent jurisdictions in respect of antitrust prohibitions on anti-competitive agreements and abuse of dominant positions.

58. The context of the present case has been described in the written and oral submissions of the parties as "overlapping" jurisdictions on anti-competitive concentrations under the Merger Regulation, on the one hand, and Member States' domestic merger legislation, on the other hand. The description "overlapping" is, however, strictly inaccurate since, as between the EC, on the one hand, and Member States on the other hand, the jurisdictions are mutually exclusive. If the jurisdiction of the EC is engaged, it has exclusive jurisdiction. If it is not engaged, then, as between the EC and the Member State, the jurisdiction of the Member State is necessarily exclusive.

59. The issue in the present appeal is, at the end of the day, a very short one. If it is approached as a matter of first principles, and without regard to the decision of the

Court of Appeal in the Ryanair/OFT proceedings and the analysis of the Chancellor in that case, there can be no doubt that a stay of the Competition Commission's investigation at the present time is neither necessary nor appropriate pending the conclusion of the EC's consideration of the public bid. The reasons are clear.

60. First, it is common ground in this court (although it was not before the CAT) that the EC's jurisdiction does not extend to Ryanair's minority shareholding. Whatever the EC decides, or any court on appeal from the EC's decision holds, the UK has exclusive jurisdiction to consider the competition implications of Ryanair's minority shareholding. Article 21(3) has no application. Secondly, even if there is a theoretical possibility that the analysis and decision of the Competition Commission on Ryanair's minority shareholding could be relevant to, and even inconsistent with, those of EC on its investigation of the public bid, and vice versa, all parties before us appear to be in agreement that (subject to some exceptional and unforeseen circumstances) the EC's decision will in fact be delivered first. That is due to extension of the Competition Commission's timetable for carrying out its investigation caused by Ryanair's non-compliance with the section 109 notice. Thirdly, in any event, even if the Competition Commission's investigation were to be completed and its report published first due to the Competition Commission's statutory duty to complete its investigation within the time specified in EA ss.38 and 39, and it found that there was an anti-competitive outcome and proposed remedial action, the Competition Commission would not be bound to implement the remedial action immediately. The Competition Commission would have power under EA s.41(3), if it saw fit in the circumstances then prevailing and taking into account its duty of sincere co-operation, to defer such remedial action until the publication of the results of the EC's investigation and to re-consider remedial action in the light of the reasoning and decision of the EC.

61. The issue on this appeal is whether that analysis is deficient because the decision of the Court of Appeal in the Ryanair/OFT proceedings, and in particular the reasoning of the Chancellor in that case, are binding authority that, due to the EC's current investigation of the public bid, the duty of sincere co-operation requires an immediate suspension of the Competition Commission's investigation of Ryanair's minority shareholding. Despite everything that Lord Pannick has so ably submitted, I cannot see that they do. Again, I can express my reasons quite briefly.

62. Firstly, and critically, the factual situation in the Ryanair/OFT proceedings was materially different from the present case. In the Ryanair/OFT proceedings the EC, reflecting the principle in the last sentence of recital (20) of the Merger Regulation, treated Ryanair's entire shareholding as a single concentration due to the timing of the acquisition of the shares. This meant that, until the EC issued its Prohibition Decision on 27 June 2007, the entire shareholding was within the exclusive jurisdiction of the EC pursuant to Article 21(3). If the EC had cleared the single concentration of anti-competitive effect, the UK would have had no residual jurisdiction under the EA in respect of the minority shareholding that had actually been acquired by Ryanair at that time. So, even after the EC's Prohibition Decision on 27 June 2007, Ryanair was still invoking the EC's exclusive jurisdiction over the entire single concentration, including the minority shareholding actually acquired by that date, by appealing to the CFI against the Prohibition Decision. Aer Lingus too, by appealing to the CFI against the EC's Interim Measures Decision of 11 October 2007, was similarly maintaining

the stance that the EC continued to have jurisdiction (and, therefore, necessarily exclusive jurisdiction) over the entire single concentration. Those are the reasons why, even after 27 June 2007, there was a possible contingent infringement of Article 21(3) until 17 September 2010. That was the date when the time expired for appealing the General Court's dismissal on 6 July 2010 of the appeals of both Ryanair and Aer Lingus.

63. Secondly, I consider that, as submitted by Mr Flynn, the ratio of the Court of Appeal's decision in the Ryanair/OFT proceedings is to be found succinctly expressed by the Chancellor in paragraph [43], as follows:

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

64. Paragraphs [40], [41] and [42] of the Chancellor's judgment explained equally succinctly why the duty of co-operation arose because of Article 21, as follows:

> "40. … 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). The duty of sincere cooperation, which had existed at all material times, necessarily required OFT to desist from making any reference during that period. …"

> "41. 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. 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 …"

> "42. 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. In those circumstances the OFT's

duty of sincere cooperation would cease to apply leaving it free to make such investigations or references it wished. …"

65. Thirdly, what is clear from those passages is that the Chancellor's references to "clash of jurisdictions" in paragraphs [37] and [40] and "conflicting jurisdictions" in paragraph [42] are references to a situation in which the Competition Commission will have assumed a jurisdiction under domestic legislation which would legally have been the exclusive jurisdiction of the EC under the Merger Regulation. As I have said, that is not, properly speaking, a case of conflicting or clashing jurisdictions at all, but rather of the wrongful assumption of jurisdiction by the Competition Commission where it had no legal jurisdiction at all.

66. Fourthly, that also explains the concluding sentence of paragraph [38] of the Chancellor's judgment, in which he said that he accepted that "the duty of sincere co-operation does go beyond avoiding inconsistent decisions and extends to overlapping jurisdictions". He was clearly addressing there, as in each of paragraphs [39] to [43], the hypothetical situation where the Competition Commission has taken steps to progress its investigation pursuant to a reference under EA s. 22, but there are pending court proceedings or the possibility of future court proceedings the outcome of which may subsequently establish that those steps were a nullity because they were taken pursuant to a purported jurisdiction which never existed in law since the EC had exclusive jurisdiction. It is in that specific context that he expressed the view in paragraph [38] that it is "self-evident that concurrent investigations in the UK and in Europe would be both oppressive and mutually destructive". They would have been oppressive because, contingently on one possible outcome of appeals to the General Court and the ECJ, the Competition Commission's investigation would have been entirely unnecessary and unlawful. They would have been mutually destructive in the sense that, on that possible outcome, the Competition Commission's investigation would have been inconsistent with the exclusivity of jurisdiction residing in only the EC. In short, the Chancellor was saying that it is self-evident that concurrent investigations in the UK and in Europe, when only one of them has jurisdiction, would be both oppressive and mutually destructive. I entirely agree, but that has nothing whatever to do with the present case where only the UK has jurisdiction in respect of Ryanair's minority shareholding.

67. It is impossible, in the circumstance, to say that the Competition Commission's decision to continue its current investigation into Ryanair's minority shareholding was a breach of the UK's duty of sincere co-operation and accordingly subject to challenge on judicial review grounds pursuant to EA s.120.

Conclusion

68. For those reasons I would dismiss this appeal.

APPENDIX

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

Whereas:

…

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

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

…

(5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

…

(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 concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a ‘one-stop shop’ system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.

…

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

(14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close

cooperation, using efficient arrangements for information- sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

…

20. It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

Article 1

Scope

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

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

…

Article 2

Appraisal of Concentrations

1. …

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

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.

…

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 …

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, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

…

Article 4

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

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.

…

Article 6

Examination of the notification and initiation of Proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market. A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

…

Article 10

Time limits for initiating proceedings and for decisions

1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information.

   That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with Article 9(2)or where, the undertakings concerned offer commitments pursuant to Article 6(2) with a view to
   rendering the concentration compatible with the common market.

…

5. Where the Court of Justice gives a judgment which annuls the whole or part of 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 Artice 6(1).

…

Article 21

Application of the Regulation and jurisdiction

1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003 (1), (EEC) No 1017/68 (2), (EEC) No 4056/86 (3) and (EEC) No 3975/87 (4) 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 coordination 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.

…

Enterprise Act 2002

22 **Duty to make references in relation to completed mergers**

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

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

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

…

23 Relevant merger situations

(1) For the purposes of this Part, a relevant merger situation has been created if—

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

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

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

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

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

…

35 Questions to be decided in relation to completed mergers

(1) Subject to subsections (6) and (7) and section 127(3), the Commission shall, on a reference under section 22, decide the following questions—

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

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

(2) For the purposes of this Part there is an anti-competitive outcome if—

(a) a relevant merger situation has been created and the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; or

(b) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation and the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.

(3) The Commission shall, if it has decided on a reference under section 22 that there is an anti-competitive outcome (within the meaning given by subsection (2)(a)), decide the following additional questions—

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

(b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and

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

…

38 Investigations and reports on references under section 22 or 33

(1) The Commission shall prepare and publish a report on a reference under section 22 or 33 within the period permitted by section 39.

(2) The report shall, in particular, contain—

(a) the decisions of the Commission on the questions which it is required to answer by virtue of section 35 or (as the case may be) 36;
(b) its reasons for its decisions; and
(c) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions.

(3) The Commission shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section.

(4)The Commission shall, at the same time as a report prepared under this section is published, give it to the OFT.

39 Time-limits for investigations and reports

(1) The Commission shall prepare and publish its report under section 38 within the period of 24 weeks beginning with the date of the reference concerned.

(2) [Where article 9(6) of the European Merger Regulations applies in relation to the reference under section 22 or 33, the Commission shall prepare and publish its report under section 38—

(a) within the period of 24 weeks beginning with the date of the reference; or
(b) if it is a shorter period, within such period as is necessary to ensure compliance with that article.]

(3) The Commission may extend, by no more than 8 weeks, the period within which a report under section 38 is to be prepared and published if it considers that there are special reasons why the report cannot be prepared and published within that period.

(4) The Commission may extend the period within which a report under section 38 is to be prepared and published if it considers that a relevant person has failed (whether with or without a reasonable excuse) to comply with any requirement of a notice under section 109.

…

41 Duty to remedy effects of completed or anticipated mergers

(1) Subsection (2) applies where a report of the Commission has been prepared and published under section 38 within the period permitted by section 39 and contains the decision that there is an anti-competitive outcome.

(2) The Commission shall take such action under section 82 or 84 as it considers to be reasonable and practicable—

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

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

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

…

The Treaty on European Union

Article 4

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

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

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Lord Justice Lewison:

69. I agree.

Lord Justice Pill :

70. I also agree.