Neutral citation [2011] CAT 23

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1174/4/1/11

Victoria House
Bloomsbury Place
London WC1A 2EB

28 July 2011

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
MICHAEL BLAIR QC
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC

Applicant

- v -

OFFICE OF FAIR TRADING

Respondent

- supported by -

AER LINGUS GROUP PLC

Intervener

Heard at Victoria House on 10 and 11 March 2011

JUDGMENT

APPEARANCES

John Swift QC, Alistair Lindsay and Josh Holmes (instructed by Covington and Burling LLP) appeared for the Applicant, Ryanair Holdings plc.

Daniel Beard and Julian Gregory (instructed by General Counsel, Office of Fair Trading) appeared for the Respondent, the Office of Fair Trading.

James Flynn QC and Kelyn Bacon (instructed by Linklaters LLP) appeared for the Intervener, Aer Lingus Group plc.

I. INTRODUCTION

1. This application for review ("the Application") brought by Ryanair Holdings plc ("Ryanair") pursuant to subsection 120(1) of the Enterprise Act 2002 ("the Act") raises an important point, namely whether the Office of Fair Trading ("OFT") has become time-barred from referring to the Competition Commission under section 22 of the Act Ryanair's acquisition of a minority shareholding in one of its competitors, Aer Lingus Group plc ("Aer Lingus"). The answer to this issue depends upon the proper construction of domestic and EU legislation and the application of that legislation to events which occurred between 2006 and 2010, as summarised below. In particular the Application concerns the relationship between the UK merger regime and the EU measures which provide for the European Commission to have exclusive jurisdiction over mergers with an EU dimension. This so-called "one stop shop" principle is enshrined in article 21 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) ("the Merger Regulation"). Article 21 is set out at paragraph 48 below.

II. THE FACTUAL BACKGROUND

2. First we will describe the salient events which have given rise to this issue. The primary facts are not in dispute.

3. Between 27 September and 5 October 2006 Ryanair acquired a 19.2 per cent shareholding in Aer Lingus. On 5 October 2006 Ryanair announced its intention to launch a public bid for the entire share capital of Aer Lingus. The public bid was made on 23 October 2006. At the end of October Ryanair notified its concentration to the European Commission in accordance with article 4(1) of the Merger Regulation.

4. By 28 November 2006 Ryanair had acquired up to 25.2 per cent of the equity in Aer Lingus. However, on 20 December 2006 the European Commission decided to initiate 'Phase II' proceedings under the Merger Regulation in order to investigate

the compatibility of the notified concentration with the common market. Accordingly Ryanair's public bid lapsed.

5. On 25 January 2007 Aer Lingus made the first of several requests to the European Commission to require Ryanair to divest its minority shareholding and to take the necessary interim measures under articles 8(4) and 8(5) of the Merger Regulation. Aer Lingus made a further request in the same terms on 7 June 2007.

6. On 27 June 2007 the European Commission issued decision C(2007) 3104 declaring that the concentration whereby Ryanair would acquire sole control of Aer Lingus was incompatible with the common market and was therefore prohibited (Case COMP/M.4439 – *Ryanair/Aer Lingus*) ("the Prohibition Decision"). The same day the Deputy Director General of the European Commission's Directorate-General for Competition wrote to Aer Lingus stating that the European Commission did not have the power under article 8(4) of the Merger Regulation to order Ryanair to divest the minority shareholding or to adopt interim measures under article 8(5). The last two paragraphs of that letter read as follows:

> "Please note that this position is without prejudice to the powers that Member States may have after the adoption of [the Prohibition Decision] to apply their national legislation on competition to the acquisition of Ryanair's minority shareholding in Aer Lingus.
>
> This letter does not constitute a decision of the Commission. It reflects the opinion of the services in charge of Merger Control in the Directorate-General for Competition, which cannot bind the Commission itself."

7. On 12 July 2007 Aer Lingus sent a memorandum to the European Commission, the Irish Competition Authority, the OFT and the German Bundeskartellamt ("BKartA") (one or more of whom it apparently considered to have jurisdiction), inviting those authorities to reach a common position as to the authority competent to act in relation to the minority shareholding. Part of this submission referred to the points made by the Deputy Director General in her letter of 12 July 2007 and stated that:

> "Aer Lingus maintains that it was and is open to the Commission to act under Art 8(4) [of the Merger Regulation] and regrets that it has not done so. Aer Lingus reserves the possibility to challenge this interpretation before the CFI [now General Court]."

8. The memorandum then referred to the passage in the Deputy Director General's letter quoted above and continued:

> "…by this statement the Commission explicitly opens the way for the Member States to apply their national laws on competition to the minority shareholding. In particular the Commission's letter makes it apparent that the minority shareholding is not at this point, following the blocking of the public offer, to be considered to form part of a concentration over which the Commission has exclusive jurisdiction."

9. The memorandum then referred to the application of national systems of merger control, and in particular those in the Federal Republic of Germany and the United Kingdom, and with reference to the latter stated as follows:

> "It would follow from the Commission's letter of 27 June that the four month period within which reference may be made to the Competition Commission began to run following adoption of the prohibition decision and the expiry of the European Commission's exclusive jurisdiction under the [Merger Regulation]: see s. 122(3) and (4) of the Act. Until that moment the reference could not have been made, since the European Commission was seized of exclusive jurisdiction under the [Merger Regulation] in relation to the combined stake-and-offer."

10. On 3 August 2007 the European Commission's services reiterated the conclusion that it did not have power to order Ryanair to divest its shareholding. This conclusion was stated to have taken into account the scheme and provisions of the Merger Regulation as well as the presumption of validity of the Prohibition Decision. The conclusion was also stated to be without prejudice to the question whether competent competition authorities of Member States would be entitled to exercise discretion not to open or pursue national proceedings during a pending court case, for example for reasons of "procedural economy".

11. Also on 3 August 2007 the OFT wrote to the solicitors for Aer Lingus setting out its view that it was prevented by article 21(3) of the Merger Regulation (below, at paragraph 48) from taking action in relation to the minority shareholding. The OFT's letter stated:

> "The OFT considers that it is prevented by Article 21(3) [of the Merger Regulation] from applying national legislation on competition to the 25.22 per cent minority stake held by Ryanair in Aer Lingus. In our view, Article 21(3) [of the Merger Regulation] precludes the OFT's merger jurisdiction in circumstances where (1) the Commission expressly defined the relevant shareholding as part of the concentration with a Community dimension in its Article 6(1)(c) and 8(3) decisions; and (2) the Commission reviewed the concentration in its entirety,

> including the minority stake. This conclusion is underlined by the likelihood that Ryanair will challenge the [Prohibition Decision] before the CFI [now General Court] – and/or, as you indicate in your submission, that Aer Lingus will itself seek relief before the CFI [now General Court] – creating a risk of inconsistent outcomes if the OFT were to have parallel jurisdiction at this time."

12. This letter was not copied to Ryanair.

13. On 6 August 2007 the BKartA wrote to the solicitors for Aer Lingus stating that it would not take any action in relation to Ryanair's minority shareholding. The BKartA considered that the question of whether article 21(3) of the Merger Regulation excluded national law ultimately remained "unclarified". The BKartA saw no reason to institute its own proceedings as long as the Prohibition Decision was still pending before European courts. The BKartA specifically pointed out that this approach would avoid the "risk of mutually contradictory decisions being [adopted] under national and EU merger control law".

14. The same month Ryanair acquired further shares in Aer Lingus, taking its overall shareholding to 29.4 per cent.

15. On 17 August 2007 Aer Lingus again asked the European Commission to act under articles 8(4) and 8(5) of the Merger Regulation in respect of Ryanair's minority shareholding or to state formally that it did not have the power to do so. At the same time Aer Lingus asked the European Commission to take a formal position on the effect of article 21(3) of the Merger Regulation as regards that shareholding.

16. On 10 September 2007 Ryanair began proceedings in the Court of First Instance (now General Court) for annulment of the Prohibition Decision (Case T-342/07). Ryanair submitted that the European Commission had committed manifest errors of assessment in relation to five matters: the competitive relationship between Ryanair and Aer Lingus; the barriers to entry to the affected markets; the route-by-route competitive analysis; the efficiencies which would flow from the concentration; and the remedies proposed by Ryanair. We shall refer to this challenge as the "Ryanair Appeal".

17. On 11 October 2007, in relation to the request by Aer Lingus that the European Commission act under Article 8(4), the Commission adopted decision C(2007)4600, holding that it did not have the power under that provision to order divestment of the minority shareholding ("the Article 8(4) Decision"). The European Commission stated:

> "12. … The Commission's competence is limited to situations in which the acquirer has control over the target. … In the present case … Ryanair has not acquired, and may not acquire, control of Aer Lingus by way of the proposed concentration."

18. In relation to Aer Lingus's request for the European Commission to take a position on the interpretation of article 21(3) of the Merger Regulation, the European Commission observed that this is a provision of EU law that imposes an obligation on the Member States, and does not confer any specific duties or powers on the European Commission. The European Commission stated that it lacked the power to adopt a legally binding interpretation of a provision of EU law addressed to Member States. It continued:

> "23. Should Aer Lingus be of the opinion that a national competition authority is obliged to act with respect to Ryanair's minority shareholding pursuant to its national legislation on competition, Aer Lingus has the opportunity to pursue this matter before that authority and/or the competent national court. If a national court considers that an interpretation of Article 21(3) of the EC Merger Regulation is necessary to enable it to give judgment, it may request the Court of Justice to give a preliminary ruling pursuant to Article 234 of the EC Treaty in order to clarify the interpretation of that provision …"

19. On 19 November 2007 Aer Lingus appealed against the Article 8(4) Decision (Case T-411/07), submitting that the European Commission has both misconstrued and misapplied articles 8(4) and 8(5) of the Merger Regulation, and arguing that the Commission had acted in breach of article 21(3) of the Merger Regulation by failing to assert its exclusive jurisdiction and instead leaving open the possibility of intervention by Member States. We shall refer to these proceedings as the "Aer Lingus Appeal".

20. On the same day Aer Lingus also applied to the Court of First Instance for interim measures and for the suspension of the operation of the Article 8(4) Decision on the

basis of Articles 242 and 243 EC (now Articles 278 and 279 of the Treaty on the Functioning of the European Union ("TFEU")).

21. On 18 March 2008 the President of the Court of First Instance (now General Court) made a reasoned Order rejecting Aer Lingus's application for interim relief including suspension of the Article 8(4) Decision: Case T-411/07 R *Aer Lingus Group plc v Commission* [2008] ECR II-411. The President stated:

> "As far as the operation of Article 21 is concerned, it should be pointed out, first, that Article 21(3) must be read in conjunction with Article 21(1). Article 21(1) provides that the Regulation alone is to apply to concentrations having a Community dimension as defined in Article 3 of the Regulation. In this light, in circumstances such as those in the present case, where a concentration has been notified, declared incompatible with the common market by the Commission and on this basis the public bid was abandoned, no concentration with a Community dimension as defined in Article 3 is in existence. Nor can a concentration with a Community dimension be contemplated by the parties in these circumstances, since any such concentration would be in violation of an existing Commission decision. On this basis, as the Commission sets out in its written observations, Article 21(3) cannot be said, prima facie, to apply since there is no concentration in existence, or contemplated, to which the Regulation alone must apply. The remaining minority shareholding is, prima facie, no longer linked to an acquisition of control, ceases to be part of a 'concentration' and lies outside the scope of the Regulation. Accordingly, Article 21, which under recital 8 to the Regulation is aimed at ensuring that concentrations generating significant structural changes are reviewed exclusively by the Commission in application of the 'one-stop shop principle', does not in principle, under these circumstances, prevent the application by national competition authorities and national courts of national legislation on competition.
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> In this respect, the fact that the Commission's decision finding the concentration incompatible with the common market is being challenged before the Court of First Instance makes no material difference, since, on the basis of Article 242 EC, actions before the Court of Justice do not have suspensory effect. In addition, if the relevant national competition authorities were deterred from taking definitive measures by considerations relating to procedural economy, it would be open to such authorities to adopt interim measures to address any concern which they might identify pending judgment by this Court." (Paragraphs 101-102)

22. Ryanair made a further acquisition of shares in Aer Lingus on 2 July 2008, taking its stake to 29.8 per cent. This was followed, on 8 January 2009, by a further proposal by Ryanair to acquire control of Aer Lingus which was notified to the European Commission, but subsequently withdrawn 15 days later.

23. On 6 July 2010 the General Court dismissed, in separate judgments, the Ryanair Appeal (Case T-342/07 *Ryanair Holdings plc v Commission* [2011] 4 CMLR 245)

and the Aer Lingus Appeal (Case T-411/07 *Aer Lingus Group plc v Commission* [2011] 4 CMLR 358). In summary the Court's conclusions were as follows:

(a) *Ryanair Appeal*. The General Court dismissed all of Ryanair's challenges to the European Commission's assessment of the closeness of the competition between Ryanair and Aer Lingus in relation to a number of routes between Dublin and other airports in the EU (including several in the UK), and the way in which the concentration would adversely affect that competition. The Court also affirmed the European Commission's assessment of barriers to entry, its point-to-point route analysis, and its consideration of claimed efficiencies; it held that the European Commission had been entitled to reject the remedies offered by Ryanair.

(b) *Aer Lingus Appeal*. The General Court endorsed the European Commission's view that the minority shareholding did not give Ryanair control of Aer Lingus. In the absence of control, there had been no implementation of a concentration for the purposes of the Merger Regulation. It followed that the European Commission had been correct to decide that it had no powers under article 8(4) or 8(5) thereof to require Ryanair to divest its minority shareholding. In its judgment the Court observed:

> "64. ... the acquisition of a shareholding which does not, as such, confer control as defined in Article 3 of the merger regulation does not constitute a concentration which is deemed to have arisen for the purposes of that regulation. On that point, European Union law differs from the law of some of the Member States, in which the national authorities are authorised under provisions of national law on the control of concentrations to take action in connection with minority shareholdings in the broader sense
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> …
>
> 91. Where there is no concentration with a Community dimension, the Member States remain free to apply their national competition law to Ryanair's shareholding in Aer Lingus in accordance with the rules in place to that effect."

24. The period for appealing against either judgment on a point of law to the Court of Justice expired on 17 September 2010. Neither judgment was appealed.

III. THE CHALLENGED DECISION AND THE APPLICATION

25. On 30 September 2010 the OFT sent a notice under section 31 of the Act to Ryanair requiring it to produce specified information which the OFT considered to be relevant to a preliminary merger investigation. In that letter the OFT stated that the statutory time period for making a reference to the Competition Commission under section 22:

> "has effectively been suspended since the [European] Commission began its investigation in 2006 by dint of the operations of sections 122(3) and 122(4) of the Act. This is because a reference to the Competition Commission … could not have been made and has become possible only now that the appeals to the General Court … have ended."

26. On 21 October 2010 Ryanair wrote to the OFT arguing, among other things, that the OFT's investigation was out of time. Ryanair stated that this issue raised a narrow and discrete question of statutory construction, and invited the OFT to make a formal decision on it separately from, and in advance of, its consideration of any other issues to which the OFT's proposed investigation gave rise. Ryanair indicated that if the OFT were to rule that the investigation was not out of time Ryanair would wish to have the point tested by an appeal to the Tribunal.

27. By letter dated 4 January 2011 the OFT acceded to Ryanair's request, and notified the company of its reasoned conclusion that, should it decide to do so, it was not out of time to refer Ryanair's 2006 acquisition of a minority stake in Aer Lingus to the Competition Commission under section 22 of the Act ("the Decision").

28. Ryanair, by its Notice of Application dated 7 January 2011, contends that the Decision is wrong in law, and seeks a declaration that the OFT's investigation is time-barred, together with other consequential relief.

29. The OFT resists Ryanair's challenge, and is supported in this regard by Aer Lingus who was permitted to intervene in these proceedings by an order of the Tribunal dated 14 January 2011.

30. Ryanair's Notice of Application also contains a challenge to another decision of the OFT, which was notified to Ryanair in a second letter of 4 January 2011 ("Stopping

the Clock decision"). That challenge related to whether (assuming that the OFT was not already time barred) any reference to the Competition Commission which the OFT might decide to make would have to be made by 17 January 2011 (ie within 4 months of the expiry of time for appeals to be brought against the General Court's judgments of 6 July 2010), or whether by virtue of subsection 25(2) of the Act the clock had been stopped as a result of Ryanair's failure to answer the OFT's section 31 request for information sent to Ryanair on 30 September 2010. Prior to the hearing the parties reached an understanding on this issue, relieving the Tribunal of the need to hear argument on it. That challenge is now stayed until further order.

31. In its skeleton argument Ryanair referred to arguments which purported to amount to a challenge to the Decision on a ground which is separate from the time-bar issue, and which does not appear in Ryanair's Notice of Application. This ground, which alleges that the OFT acted unfairly and in breach of the principle of legal certainty, would have required a close consideration of the factual matrix. It was not purely a point of law. The OFT objected to the attempt to introduce this new ground, which would have required additional argument and evidence to be adduced in order to meet it. The Tribunal indicated that it would have to be the subject of an application to amend the Notice of Application. In the event Ryanair did not apply to amend, and the matter was not pursued.

32. Therefore the time bar issue enshrined in the Decision is the sole issue which the Tribunal is required to resolve.

IV. LEGAL FRAMEWORK

33. Before examining the parties' respective contentions, it is appropriate to describe the legislative framework, both domestic and EU, relevant to the dispute, as well as some of the case-law to which we were referred.

The domestic provisions

34. So far as the domestic law is concerned, the relevant provisions are contained in Chapter 1 of Part 3 of the Act. Section 22 which is headed "Duty to make references in relation to completed mergers" provides *inter alia* as follows:

> "(1) The OFT shall ….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….."

35. The duty to make a reference to the Competition Commission is subject to certain qualifications, one of which is that a reference can be made only within specified time limits. Those time limits are applied to section 22 by way of the definition of a "relevant merger situation" in section 23 of the Act. So far as material, section 23 provides:

> "(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
>
> …"

36. Section 24 is headed "Time limits and prior notice". So far as relevant, subsection (1) of section 24 provides:

> "(1) For the purposes of section 23 two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within this section if -
>
> (a) the two or more enterprises ceased to be distinct enterprises before the day on which the reference relating to them is made and did so not more than four months before that day
>
> …"

37. Section 25 allows for the extension of the four-month period in which a possible completed merger can be referred in certain circumstances:

> "(1) The OFT and the persons carrying on the enterprises which have or may have ceased to be distinct enterprises may agree to extend by no more than 20 days the four month period mentioned in section 24(1)(a) or (2)(b).
>
> (2) The OFT may by notice to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period mentioned in section 24(1)(a) or (2)(b) if it considers that any of those persons has failed to provide, within the period stated in a notice under section 31 and in the manner authorised or required, information requested of him in that notice.
>
> …"

38. Subsection 25(2) of the Act refers to section 31, which gives the OFT the power to obtain information from the parties about a possible completed merger.

39. In addition, subsections 25(4) and 25(6) respectively also allow the OFT to extend the 4 month period where undertakings in lieu of a reference to the Competition Commission are being sought or where the OFT has made a request to the European Commission under article 22(3) of the Merger Regulation.

40. Once a merger reference to the Competition Commission has been made by the OFT, sections 38 and 39 of the Act require the Commission to prepare and publish its report on the reference within a maximum period of 24 weeks from the date of reference. Subsection 38(2) together with subsections 35(1) to (3) require the Competition Commission's report to contain *inter alia* its reasoned decisions on (a) whether a relevant merger situation has been created, and (b) if so, whether the merger 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, and if so (c) what if any action should be taken or (in the absence of power to take the requisite measures) recommended by the Commission to remedy, mitigate or prevent that substantial lessening of competition and/or any adverse effects flowing from it.

41. Subsection 39(3) permits the Commission to extend the 24 week period for one further period of no more than 8 weeks where it is satisfied that there are special reasons why the report cannot be prepared and published within that period. The Act does not define the expression "special reasons", but the Explanatory Notes to the Act state that they would "include matters such as the illness or incapacity of members of the Commission that has seriously impeded its work, and an unexpected event such as a merger of competitors". In addition, subsection 39(4) gives the Competition Commission a discretion to extend the time period within which it has to report:

> "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."

42. Relevant person is defined in subsection 39(5) as, broadly speaking, the merging parties, but not third parties.

43. Mention should also be made of section 41, which so far as relevant states:

> "(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."

44. Under the heading "Primacy of Community law" section 122 of the Act provides:

> "(1) Advice and information published by virtue of section 106(1) or (3) shall include such advice and information about the effect of Community law, and anything done under or in accordance with it, on the provisions of this Part as the OFT or (as the case may be) the Commission considers appropriate.
>
> (2) Advice and information published by the OFT by virtue of section 106(1) shall, in particular, include advice and information about the circumstances in which the duties of the OFT under sections 22 and 33 do not apply as a result of the [EC Merger Regulation] or anything done under or in accordance with them.
>
> (3) The duty or power to make a reference under section 22 or 45(2) or (3), and the power to give an intervention notice under section 42, shall apply in a case in which the relevant enterprises ceased to be distinct enterprises at a time or in circumstances not falling within section 24 if the condition mentioned in subsection (4) is satisfied.
>
> (4) The condition mentioned in this subsection is that, because of the [EC Merger Regulation] or anything done under or in accordance with them, the reference, or (as the case may be) the reference under section 22 to which the intervention notice relates, could not have been made earlier than 4 months before the date on which it is to be made.
>
> …"

(as amended by the EC Merger Control (Consequential Amendments) Regulations 2004 (SI 2004/1079)).

45. It is common ground that the OFT has not published "advice and information" about the effect on the provisions of Part 3 of the Act of Community law (now EU law) and the Merger Regulation, and anything done under or in accordance with them.

The EU provisions

46. The relevant EU legal framework comprises the Merger Regulation and certain provisions of the EC Treaty. This judgment refers interchangeably to the European Community (EC) or the European Union (EU), whether in citations from judgments or otherwise, notwithstanding that the European Community was subsumed into the European Union by the Treaty of Lisbon with effect from 1 December 2009.

47. "Concentrations with a Community dimension" as defined in the Merger Regulation fall within the scope of that Regulation. They must be notified to the European Commission, are subject to a prohibition on implementation pending notification and clearance, and are appraised exclusively by the European Commission with a view to establishing whether or not they are compatible with the common market (see articles 1 to 7 of the Merger Regulation). The Merger Regulation provides that the European Commission's appraisal should be carried out in two stages: if at the first stage the Commission considers that no serious doubts are raised as to the concentration's compatibility with the common market, a clearance decision will be made at that stage; if however serious doubts are raised (in the absence of the merging parties offering suitable phase I remedies) the appraisal will proceed to phase II which entails a more detailed investigation (see articles 6 and 8). A "concentration" is defined for the purposes of the Merger Regulation; in very general terms what is required in order for a concentration to exist is "a change of control on a lasting basis" as a result of a merger between two or more previously independent undertakings or the acquisition, by one or more persons who already control an undertaking, of control of another undertaking (see article 3).

48. Of particular importance for present purposes is article 21 of the Merger Regulation. It delineates jurisdiction between Member States' relevant authorities and the European Commission, so as to create the so-called "one stop shop". Article 21 provides (so far as material):

> "1. This Regulation alone shall apply to concentrations as defined in Article 3 …
>
> 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."

49. The 8th recital to the preamble to the Merger Regulation explains this division of powers between the competent competition authorities of the Member States and those of the EU:

> "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 the 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."

50. We should also refer to Article 10 of the EC Treaty, which provides:

> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from actions taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

51. As a consequence of the Lisbon Treaty, Article 10 was replaced by what is now Article 4 of the Treaty on European Union. Article 4 TEU, so far as relevant, 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."

52. Although the wording of Article 10 EC and Article 4 TEU are not identical, it was common ground that the nature and extent of the duty on Member States was not materially affected by the Lisbon Treaty. However the parties differed as to the scope of the duty, and as to its application and effect, if any, in the present case. We shall need to refer to the case-law in relation to this provision in due course.

53. Finally, Article 242 of the EC Treaty (now Article 278 TFEU) provides:

> "Actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended."

54. It is common ground that, under Article 242 EC, acts of the EU institutions are presumed to be lawful. This means that they produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality.

Case-law

55. The parties referred us to a number of authorities touching on the nature of the duty of sincere cooperation under Article 10 EC.

56. The judgment of the Court of Justice in Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935, concerned the compatibility of a particular beer supply agreement with what is now Article 101 TFEU, in circumstances where both the national court and the Commission were seised of the issue. This reference for a preliminary ruling was decided at a time when the national courts and the European Commission each had competence to apply Article 101(1) TFEU (as now), but the Commission still had exclusive jurisdiction to grant an individual exemption under Article 101(3). In that context the Court observed at paragraph 47:

> "It now falls to examine the consequences of that division of competence as regards the specific application of the Community competition rules by national courts. Account should here be taken of the risk of national courts taking decisions which conflict with those taken or envisaged by the Commission in the

> implementation of Articles [101(1) and 102], and also of Article [101(3)]. Such conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission."

57. Perhaps surprisingly, the Court does not expressly pray in aid the duty of sincere cooperation (other than in relation to the Commission's duty to provide assistance to the national court – see paragraph 53 of the judgment), but refers to the principle of legal certainty. In the operative part of the judgment (*dispositif*) the Court states that the national court could only proceed to declare the agreement void under Article 101(2):

> "if it is certain that the agreement could not be the subject of an exemption decision [by the Commission] under Article [101(3)]".

58. The *Masterfoods* decision (Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369) was a preliminary ruling given by the Court of Justice after *Delimitis* and in the context of the same division of jurisdiction between the European Commission and national courts. There the Irish courts and the Commission were simultaneously considering the compatibility of Van Den Bergh Food Limited's ("VDB") ice cream distribution system with what are now Articles 101 and 102 TFEU. The Irish Supreme Court was being asked by Masterfoods to declare certain clauses in VDB's distribution agreements unlawful and void as offending those Articles. In parallel the Commission had been considering a complaint by Masterfoods raising the same issues. In the meantime a modified agreement had been notified to the Commission and an application for exemption had been made. Eventually the Commission adopted a decision finding that the agreement as modified, together with certain associated practices, infringed the Articles in question. VDB appealed to what is now the General Court, and the Irish Supreme Court stayed its proceedings and referred certain questions to the ECJ.

59. This time the Court of Justice did make express reference to the duty of sincere cooperation in its judgment, holding that the duty bound all the authorities of Member States including, for matters within their jurisdiction, the courts (see paragraph 49 of the judgment). Having referred to its decision in *Delimitis* the ECJ then stated:

> "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 [263] of the Treaty, brought an action for annulment of that decision pursuant to that article, 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.
>
> …
>
> 60. The answer to Question 1 must therefore be that, where a national court is ruling on an agreement or practice the compatibility of which with Articles [101(1) and 102] of the Treaty is already the subject of a Commission decision, it cannot take a decision 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. If the addressee of the Commission decision has, within the period prescribed in the fifth paragraph of Article [263] of the Treaty, brought an action for annulment of that decision, it is for the national court to decide whether to stay proceedings pending final judgment in that action for annulment or in order to refer a question to the Court for a preliminary ruling."

60. In his Opinion in *Masterfoods* Advocate General Cosmas sought to identify when there was an impermissible conflict or risk of conflict between a decision of the Commission applying the competition rules and a decision of a national court on the same question. In a passage which was heavily relied upon by Mr Swift QC, who appeared for Ryanair, the learned Advocate General said:

> "16. In order to establish such a form of conflict, a connection between the legal problem which arises before the national courts and that being examined by the Commission is not in itself sufficient.[4] Nor is the similarity of the legal problem where the legal and factual context of the case being examined by the Commission is not completely identical to that before the national courts.[5] The Commission's decision may provide important indications as to the appropriate way to interpret Articles [101(1)] and [102], but in this case there is no risk, from a purely legal point of view, of the adoption of conflicting decisions. Such a risk only arises when the binding authority which the decision of the national court has or will have conflicts with the grounds and operative part of the Commission's decision.[7]

> 4 – Such as, for instance, when national courts are examining the legality of an exclusivity clause in respect of the use of ice cream freezer cabinets and the Commission is assessing an exclusivity agreement on the use of a newspaper distribution network.
>
> 5 – Such as, for instance, the case in which the national courts are examining the legality of an exclusivity agreement on the use of ice cream freezers between a particular company and retailers 1, 2 and 3 in Ireland, whilst the Commission is monitoring a similar agreement for the same products in the same market between another company and retailers 4, 5 and 6.
>
> 7 – I do not deny that, in cases where the similarity of the subject-matter of the Commission's decision and that of the judgment of the national court is more obvious, the adoption of conflicting solutions by those two bodies does not further the uniform application of Community law. They are not, however, cases of unmixed conflict between the Community and the national decision. Any other interpretation to the effect that the above risk of giving contradictory decisions was limited more generally would result in the national court being overly bound."
>
> ([2000] ECR I-11369, at 11376; footnote 6 omitted)

61. The Court of Justice's judgment in *Masterfoods* was applied by the Chancellor of the High Court in *National Grid Electricity Transmission Plc v ABB Ltd & Ors* [2009] EWHC 1326. There the court was dealing with an action for damages brought by National Grid against 21 companies involved in the supply of gas insulated switchgear. The action was based on a European Commission decision finding an infringement of Article 101. The validity of that decision was under challenge before the Court of First Instance (now General Court). The Chancellor stated at paragraph 23:

> "It is clear from paragraphs 55 and 57 [of *Masterfoods*] that this court should take all the steps required to ensure that the trial does not come on before all appeals to the [General Court] and, if brought by any party, to the [Court of Justice] have been finally concluded ... The object is to avoid any decision running counter to that of the Commission or the community courts."

62. We were taken to a number of other domestic authorities dealing with the Article 10 duty, including *Iberian UK v BPB Industries Plc* [1996] 2 CMLR 601, *MTV Europe v BMG Record (UK) Ltd* [1997] 1 CMLR 867, and *Inntrepreneur Pub Company v Crehan* [2007] 1 AC 333.

63. In *Iberian UK Ltd v BPB Industries plc* [1996] 2 CMLR 601 the High Court considered, as a preliminary issue, the question whether the findings of the Commission, the Court of First Instance and the ECJ to the effect that BPB had

abused its dominant position were either admissible in, or binding on the parties to, the domestic proceedings. Having referred to the judgment of the Court of Justice in *Delimitis* and the judgment of the Court of Appeal in *MTV Europe* (among other authorities) Laddie J concluded at paragraph 69:

> "In my view these cases reinforce and support the following propositions:
>
> 1. The courts here should take all reasonable steps to avoid or reduce the risk of arriving at a conclusion which is at variance with a decision of, or on appeal from, the Commission in relation to competition law.
>
> 2. Except in the clearest cases of breach or non-breach, it will be a proper exercise of discretion to stay proceedings here to await the outcome of the European proceedings."

64. In the following paragraph of his judgment Laddie J made clear that this principle also applied to the judgments of the Court of First Instance (now General Court) and ECJ on appeal from the Commission's decision.

65. In *MTV Europe*, which concerned an action by MTV claiming damages against several record companies and collecting societies for infringements of Articles 101(1) and 102, Millett LJ (as he then was) said at paragraph 32:

> "… It is incumbent on a national court to avoid the risk of reaching a decision which conflicts with a ruling, or future ruling, of a Community institution. To that end it may grant an immediate stay of proceedings before it, or take whatever other measures are open to it under the national rules of procedure."

66. It was common ground before the House of Lords in *Inntrepreneur Pub Company v Crehan* that the duty of sincere cooperation was not engaged in that case as had it been in *Delimitis* and *Masterfoods*, there being no possibility of a legal conflict between the relevant decision of the European Commission and that of the national court, because the national court was dealing with different parties and a different agreement (see paragraph 56, per Lord Hoffmann). Nevertheless, both Lord Bingham and Lord Hoffmann had occasion to discuss the ambit of the duty as revealed in those cases. (See per Lord Bingham at paragraph 5 and per Lord Hoffmann at paragraphs 49 to 52.) Lord Bingham stated:

> "The Court of Justice has invoked these duties on many occasions: in *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Grossmärkte GmbH & Co KG* (Case 78/70) [1971] ECR 487, para 5, it recognised the provision 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 general scheme."

67. These cases confirm the generality and importance of the duty in Article 10. 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* jurisdictions, namely in relation to the enforcement of 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 (see paragraphs 114 and 115 below).

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68. It is common ground that article 21(3) of the Merger Regulation prohibited the OFT from applying UK domestic merger provisions during the period when the European Commission was considering the compatibility with the common market of the proposed concentration, up until the Prohibition Decision on 27 June 2007, and that as a result subsections 122(3) and (4) of the Act prevented the OFT becoming time barred from making a reference under section 22 at that stage. However, from this point onwards the parties' views diverge.

69. The OFT and Aer Lingus contend that the application of national merger rules remained prohibited until 17 September 2010 when the time allowed for appealing against the General Court's judgments expired. Only at that point did the 4 month period in subsection 122(4) begin to run, with the result that during that period the OFT was in a position to investigate and, if appropriate, refer Ryanair's minority shareholding to the Competition Commission under section 22. (The question whether the running of the 4 months period was thereafter suspended as a result of a

failure to supply requested information is the subject of the OFT's separate Stopping the Clock decision: see paragraph 30 above.)

70. Ryanair, on the other hand, submits that, as soon as the European Commission's Prohibition Decision was adopted on 27 June 2007, article 21(3) ceased to be a legal obstacle to a reference, and the applicability of national rules was therefore revived. Accordingly at that point the start of the four month period referred to in subsection 122(4) was triggered, with the result that by the time the OFT sent to Ryanair its request for information in September 2010 the authority was long out of time for making a reference to the Competition Commission. Naturally enough, Mr Swift relied upon the views expressed by the European Commission and its officials, as well as upon the *dicta* of the President of the General Court in the interim application brought by Aer Lingus. As we have noted, neither the Commission nor the President saw any objection in principle to the application of national competition law to Ryanair's minority shareholding once the Prohibition Decision had been adopted by the Commission (see paragraphs 18 and 21 above).

71. The OFT summarised the reasoning underlying the Decision in its letter of 4 January 2011 to which we have referred:

> "(a) The EU merger control regime was introduced to provide a 'one stop shop' for the consideration of concentrations with a Community dimension. That principle is embodied in particular in Article 21 of the EC Merger Regulation (ECMR).
>
> (b) The OFT is subject to a 'duty of sincere cooperation' under EU law which requires it to avoid the risk of inconsistent outcomes between UK and EU decisions.
>
> (c) There was a real risk of inconsistent outcomes as a result of the appeals brought by Ryanair and Aer Lingus to the General Court against the decisions of the European Commission relating to Ryanair's public bid for Aer Lingus.
>
> (d) Uncertainty as to the outcome of those appeals ended only with the expiry of the period of appeal against the General Court judgments.
>
> (e) Section 122(4) operated to postpone the running of the four month period in which a reference might be made. The OFT could not have made a reference earlier than 20 September consistently with the application of EU law in circumstances where the statutory scheme for consideration of a merger by the OFT and (if referred) by the Competition Commission is governed by a fixed timetable which (subject to minor extensions of time under specific

provisions) cannot be suspended or stopped by the OFT or the Competition Commission.

(f) Further or alternatively, in all the circumstances, section 122(4) EA02 must be read as operating to suspend the running of a period within which a reference can be made where there is a real risk of inconsistent outcome with an EU decision."

Is there a risk of impermissible conflict?

72. According to the OFT the risks of conflict with EU decisions arise in relation to each of the appeals to the General Court, and the principal risks are said to relate to decisions and actions that might have been taken by the Competition Commission after a reference to it by the OFT. It is not disputed that, had such a reference been made within the 4 month period following the Prohibition Decision on 27 June 2007, the Competition Commission would almost certainly have reached conclusions on the statutory questions and would have issued its report under subsection 38(1) of the Act long before the appeals to the General Court were determined.

73. In these circumstances the OFT identifies the following risks of conflict in relation to the Ryanair Appeal. Assuming the Competition Commission had concluded that the minority shareholding constituted a "relevant merger situation", then it would have been obliged to reach conclusions on the other questions specified in paragraph 40 above. Had the Competition Commission concluded that there was a substantial lessening of competition in a relevant market as a result of the acquisition of the minority shareholding, then it might have decided to impose a divestment remedy requiring Ryanair to sell down all or part of that holding. If the General Court had later overturned the European Commission's Prohibition Decision on the ground that the decision to prevent Ryanair acquiring 100% of the shares in Aer Lingus was vitiated by errors of assessment in relation to competition issues, then an inconsistency of reasoning and determination would have arisen where the same issues had already been considered and determined by the Competition Commission, and had led the latter to conclude that not even the minority shareholding could be retained. Further, while Ryanair had been required by the national authority to divest its minority holding, the General Court would

have opened the way for Ryanair to make a fresh public bid for *all* Aer Lingus' shares.

74. As to the Aer Lingus Appeal, it will be remembered that Aer Lingus was arguing that, by refusing to act under article 8(3) and (4) of the Merger Regulation so as to require divestment of Ryanair's minority shareholding, the European Commission was failing to assert its exclusive jurisdiction and thereby infringing article 21(3) of that Regulation. The OFT points to two potential conflicts which it submits would materialise if (1) the UK merger regime had been applied to Ryanair's minority shareholding while this appeal was ongoing and (2) the General Court ultimately accepted Aer Lingus's argument in the appeal, to the effect that the minority shareholding fell within the European Commission's exclusive jurisdiction.

75. On this premise the OFT first argues that any investigation into the minority shareholding by the UK authorities would have been inconsistent with the 'one stop shop' objective and would have resulted in a conflict with article 21(3) of the Merger Regulation, regardless of the outcome of the national investigation. Second, it submits that the ultimate outcome at the European level might have been pre-empted by a remedy imposed in the domestic proceedings. For example, the Competition Commission might have required Ryanair to sell all its minority shareholding. Then, later, after the (assumed) successful appeal by Aer Lingus and consequential annulment of the Article 8(4) Decision, the European Commission, on reconsidering the matter, might have concluded that European law required none or only part of the minority stake to be sold. However, that outcome would by then have been prevented by the divestiture required by the earlier (conflicting) application of the UK merger regime.

76. The OFT formulated three strands of argument based on these perceived conflicts.

77. The first was based on the duty of sincere cooperation. As we have seen, for part of the relevant period this duty was enshrined in Article 10 EC, and from December 2009 found its home in Article 4(3) TEU. Nothing turns on the change of wording, and we shall refer hereafter only to Article 10. Mr Beard, who appeared for the OFT, submitted that this duty required the national authority to avoid the risk of

conflicts with EU decision-makers. Given the potential conflicts detected by the OFT if a merger reference were to be made to the Competition Commission while the Ryanair Appeal and the Aer Lingus Appeal were still pending, such a reference "could not have been made" within the meaning of subsection 122(4) of the Act. The result was that time did not run against the OFT. He submitted that this interpretation did no violence to the language of the subsection.

78. The second strand of argument is subtly different: if, contrary to the first strand, the duty of sincere cooperation did not directly preclude a reference to the Competition Commission, nevertheless the duty has the same effect *indirectly* by requiring the language of subsection 122(4) to be "read down" in order to reach the same result.

79. The third argument is put forward by the OFT on the assumption that the first two strands both fail and that the duty in Article 10 EC has no application. As we understand it, the argument proceeds as follows: although the prohibition in article 21(3) of the Merger Regulation on its face appears to apply only once it has been established that there is a concentration with a Community dimension, it also applies where there is a *real risk* of a finding of a concentration with a Community dimension. The OFT notes that, although a transaction notified to the European Commission may at the phase I investigation be found not to be a concentration with a Community dimension (see article 6(1)(a) of the Merger Regulation), nevertheless no one suggests that national authorities are free to apply national competition rules to that transaction during the period when the Commission is carrying out that investigation. This is because article 21(3), properly understood, also applies where there is a real risk of a finding of a concentration with a Community dimension and such a risk exists when the Commission is considering a notified transaction at phase I. On that basis the OFT submits that such a risk also exists pending any appeals to the General Court (or the ECJ) which could result in a corresponding finding; it follows that national authorities are not free to apply national competition legislation to a transaction pending such an appeal.

80. In the OFT's letter of 4 January 2011 embodying the Decision this third argument was put in a slightly different way. There the need to comply with article 21(3) was linked to the duty of sincere cooperation. Thus, the letter states:

> "… in the context of EU merger control, the duty of sincere cooperation includes, in practical terms, that Member States … should avoid taking decisions that may prove to be inconsistent with the exclusivity for merger control provided to the European Commission by Article 21(3) …"

81. Then in footnote 8, after referring to the presumed application of article 21(3) during the Phase I of the European Commission's merger procedure, the following appears:

> "In order to achieve a "one stop shop" outcome, it may be necessary either to read some language into Article 21(3)……or for [Article 10 EC] to operate here in addition to where European Commission decisions are appealed."

82. However, in his oral submissions Mr Beard was reluctant to link compliance with article 21(3) of the Merger Regulation to the duty of sincere cooperation. He submitted that the third argument only ran if the Tribunal decided that Article 10 had no application. The reason, he said, was because if Article 10 was engaged then the third argument was unnecessary. We find this approach puzzling since, at first sight, the two provisions seem to offer the OFT's case more in combination than individually. We note that in the Defence, as in the Decision, the two are clearly linked in the context of the OFT's first argument, in that the Article 10 duty is said to require that Member States' institutions "should not act in a way that could jeopardise the attainment of Treaty objectives, which would include the "one stop shop" objective…" (see paragraph 27 of the Defence). In our view that interpretation of what the duty requires in the present context is right in principle. It would be artificial if, in considering the scope of the duty, the Tribunal (or indeed the OFT when making the Decision) could look only at potential inconsistencies of outcome and not at the risk of a conflict of jurisdiction.

83. Ryanair disputes the OFT's submissions at a number of levels. Fundamentally, Ryanair contends that if a reference to the Competition Commission had been made by the OFT neither the Ryanair Appeal nor the Aer Lingus Appeal gave rise to a risk of conflict or inconsistent outcome capable of engaging Article 10 EC, as between the result of those appeals and the findings of the Competition Commission. In the alternative Ryanair contends that if any such risk was capable of arising, it could and should have been managed by a suspension of the OFT/Competition Commission investigation at some point.

84. Ryanair's skeleton argument contains detailed submissions that the potential conflicts put forward by the OFT are not in reality conflicts, or at least are not such as to engage the Article 10 duty. We propose to consider those submissions through the prism of Mr Swift's admirably succinct oral exposition of them.

85. Mr Swift referred to the test for identifying a risk of relevant conflict. He submitted that this required one to ask whether the outcome of the national proceedings depended upon the validity of the relevant decision of the European Commission. In his submission a risk of conflict only arises when the binding authority of the decision of the national authority may conflict with the grounds and operative part of the European Commission's decision. In support of this he cited paragraph 57 of the ECJ's judgment in *Masterfoods*, and also emphasised the examples given by Advocate General Cosmas in the same case (see paragraphs 59 and 60 above). Mr Swift pointed to the fact that the latter were referred to with apparent approval by Lord Hoffmann in his comments in *Crehan*. He submitted that the outcome of a reference to the Competition Commission of Ryanair's minority shareholding did not depend on the validity of either the Prohibition Decision or the Article 8(4) Decision or on the outcome of the appeals against those decisions. The issues of law and fact before the European Commission (and the General Court on appeal) were quite different from those that would have confronted the OFT and, in the event of a reference, the Competition Commission. By way of example Mr Swift contrasted the concept of "concentration" in article 3 of the Merger Regulation with that of a "relevant merger situation" under section 23 of the Act: the situations encompassed by the latter included acquisition of "material influence", which fell outside the Merger Regulation. It followed, in his submission, that Article 10 EC was not engaged in this case.

86. In relation to the test for application of Article 10, we note that the validity of the European Commission's Prohibition Decision and of its Article 8(4) Decision were clearly in issue in the appeals to the General Court relied upon by the OFT, and that it is the uncertain outcome of those appeals which are said by the OFT to have given rise to the impermissible risk of conflict with the (almost certainly earlier) outcome of any reference to the Competition Commission. Had the General Court annulled one or both of those decisions, then the situation which the OFT interprets

as an impermissible conflict could have arisen. To that extent it could be argued that the *Masterfoods* approach is reflected here.

87. But in any event we consider that Mr Swift places too much reliance on the details of that approach. Advocate General Cosmas's analysis of relevant conflicts in *Masterfoods* was clearly tailored to the circumstances of that case, and to the issues which arose there. Those issues involved the possibility of conflicting decisions occurring when different authorities were exercising concurrent jurisdictions to apply identical legislative measures in respect of the same persons and the same behaviour. We do not believe that the Advocate General's suggested test was intended to, or reasonably could, be transposed precisely to every situation where a risk of conflicting outcomes is alleged to engage the duty of sincere cooperation. It is important to consider the specific legal and factual context of each case where the duty is invoked, as the ECJ itself emphasised in a passage quoted by Lord Bingham (see paragraph 66 above). As already noted, we are here confronted not with concurrent jurisdictions to apply Articles 101 and 102, but with a "one-stop shop" system achieved by means of the European Commission's exclusive jurisdiction over concentrations that have a Community dimension. In those circumstances we do not consider that the learned Advocate General's analysis, although obviously providing helpful guidance, is capable of direct application to a potential conflict in the context of the two merger regimes. The question we are faced with is whether the potential conflicts identified by the OFT could, if they materialised, jeopardise the attainment of the EU's objectives in relation to, in particular, the Merger Regulation, and thereby engage the duty enshrined in Article 10.

88. One of those objectives is, of course, the "one-stop shop" principle, together with the related exclusivity of the Commission's jurisdiction over certain mergers. In relation to the Aer Lingus Appeal, Ryanair's argument that there was no impediment to the application of the domestic merger control regime while that appeal was unresolved fails to address the following problem. Precisely the same minority shareholding would have been under consideration by both the General Court and the OFT/Competition Commission in parallel. By the time the General Court gave judgment the Competition Commission would in all probability have reached their conclusions on the statutory issues, and imposed whatever remedies

they considered appropriate. Had the General Court's judgment been in line with Aer Lingus's contention that the European Commission were wrong to conclude that they did not have jurisdiction to consider the minority shareholding under the Merger Regulation, then a jurisdictional conflict would exist. There would in that event have been an infringement of article 21(3) because *ex hypothesi* the OFT/Competition Commission would have applied domestic competition rules to part of a concentration which was subject to exclusive Community jurisdiction.

89. Moreover, that conflict and infringement would presumably have existed from the moment the OFT embarked on its investigation. For the General Court's judgment would normally take effect *ex tunc*. In other words it would be declaratory of what the position in law had been at all material times. The fact that the General Court would be scrutinising the shareholding from the perspective of the Merger Regulation and the OFT/Competition Commission would have done so pursuant to the provisions of UK merger regime has no bearing on the existence of a conflict of this kind: article 21(3) is there specifically to deal with the fact that different merger regimes exist.

90. Accordingly, had the domestic merger rules been applied before the Aer Lingus Appeal was finally resolved, this would have given rise to a *risk* that the OFT/Competition Commission would be infringing article 21(3) of the Merger Regulation. That risk would continue at least until the Aer Lingus Appeal (and any subsequent appeal to the ECJ) had been determined. It seems to us that once the jurisdiction of the Commission (and, as a corollary, that of the national authority to apply domestic competition rules) has been put in issue, and remains *sub judice* before the General Court, it may well be unreasonable as a matter of purely domestic public law for an authority of a Member State to take a step which would give rise to the risk that the authority was thereby infringing a binding prohibition of EU law, if it was within its power to avoid the risk. Be that as it may, we are of the view that the risk here was of such a nature as to trigger the duty of sincere cooperation under Article 10 EC, with the result that the OFT/Competition Commission were under an obligation to avoid the risk. It is in this respect that Mr Beard's analysis, which seeks to keep the Article 10 duty and article 21(3) in watertight compartments, seems to us to break down. For the Article 10 duty

combined with an avoidable *risk* of infringement of article 21(3) is in our view sufficient for this purpose, without there being any need to extend the wording of article 21(3) in order to find an *actual* infringement, which seems to be the thrust of the OFT's third argument.

91. Mr Swift sought to rely upon Article 242 EC and the so-called presumption of validity enshrined in it, to argue that, absent an order for interim measures by the General Court, everyone including the OFT was entitled to act upon the understanding that the Prohibition Decision was valid, and that therefore as from the date of that decision, 27 June 2007, the national authorities were free to apply the domestic competition regime untrammelled by Article 10 and the duty of sincere cooperation. However in our view this reliance upon Article 242 is misconceived. If it had the effect for which Ryanair contends then the issue whether national proceedings should be stayed pursuant to the duty of sincere cooperation would not have required any real debate in cases such as *Masterfoods* or *National Grid*. The presumption of validity would simply have determined the matter. Yet Article 242 played no part in those decisions. In truth it has no bearing on the issues before us. Its effect is merely to make clear that a measure which is the subject of an action for annulment is not suspended pending the outcome of the appeal, so that for example any mandatory provisions of the challenged measure must be complied with, subject to the grant of interim relief. The duty of sincere cooperation is engaged by virtue of the *uncertainty of ultimate outcome* which an appeal to the General Court may generate. This uncertainty is not affected by Article 242, which does not relate to the outcome of an appeal.

92. Nor does it assist Mr Swift to pray in aid the fact that the General Court ultimately found against Aer Lingus in its appeal, leaving the Article 8(4) Decision intact. The effect of that judgment was to remove the uncertainty of outcome which had engaged the duty of sincere cooperation. The fact that such judgments are declaratory and have effect *ex tunc* does not mean that prior to the judgment the uncertainty did not exist, or must somehow be deemed not to have existed. The issues which arose in *Delimitis* and *Masterfoods* did so because of the uncertainty of outcome which existed prior to a definitive ruling by the appropriate authority or court. Where a national court has stayed its own proceedings on the ground that it

has a duty to avoid a potential conflict with an impending determination of an EU institution, it would be absurd retrospectively to characterise the stay as incorrect simply because, when the ultimate outcome in EU came to be known, the potential conflict the risk of which was removed by the stay, would not in fact have arisen. We do not therefore consider that the case of *Biggs v Somerset CC* [1996] 2 CMLR 292, cited to us, has any bearing on the issue.

93. The other potential conflicts relied upon by the OFT comprise the alleged risk of inconsistent findings and/or substantive outcomes rather than risks of jurisdictional conflict. The main examples based on the Ryanair Appeal are referred to at paragraph 73 above. In relation to that, had Ryanair's minority shareholding been referred by the OFT to the Competition Commission, it is certainly possible that the Competition Commission would have found a "substantial lessening of competition" in a relevant market as a result of the shareholding, and imposed a divestment remedy on Ryanair requiring it to sell down all or part of that holding. Nor can the possibility be excluded that when (at a later date, we assume) the General Court came to determine the Ryanair Appeal, the Court could have acceded to Ryanair's submissions that the decision to prevent Ryanair acquiring all the shares in Aer Lingus was vitiated by material errors of substantive assessment, with the result that the Prohibition Decision would have been annulled, thereby opening the way for Ryanair to make a fresh public bid for *all* of Aer Lingus's shares. Further, by that time Ryanair might have actually divested its original minority shareholding as required by the Competition Commission.

94. In the context of the Aer Lingus Appeal the OFT identified a second potential conflict, which is very similar to the one just mentioned. It, too, postulates that the Competition Commission could have imposed a remedy requiring Ryanair to sell its entire minority shareholding. It then goes on to assume that, the Article 8(4) Decision disclaiming jurisdiction over the minority shareholding having been *ex hypothesi* annulled by the General Court, the European Commission reconsidered the matter and concluded that none or only part of the minority stake need be divested to satisfy the requirements of EU principles.

95. Mr Swift submitted that in considering whether the Ryanair Appeal gave rise to a risk of conflict we should set the matters which the General Court would be determining alongside the issues which would be before the Competition Commission in a reference under section 22 of the Act. He argued that no inconsistency of reasoning or determination which could engage Article 10 would have arisen, because the issues of law and fact under consideration when the European Commission and General Court are appraising Ryanair's public bid are quite different from those which would confront the UK merger control authorities when applying Part 3 of the Act to Ryanair's minority shareholding. The latter would be dealing with the question of acquisition of material influence, which simply does not arise under the Merger Regulation, where the test for a "concentration" depends essentially on the higher test of "control". Therefore, unlike the domestic authorities, the European Commission and the General Court were concerned with a predictive analysis of the consequences of Ryanair acquiring "control" of Aer Lingus, in the sense of article 3 of the Merger Regulation. (It appears that Ryanair places no weight on the different wording of the "competition" tests applied in the two regimes, with the Merger Regulation asking whether there would be a "significant impediment to effective competition" and the Competition Commission investigating whether or not the minority shareholding gave rise to a "substantial lessening of competition" (assuming the "material influence" threshold had been satisfied).)

96. Mr Swift argued that the factual and legal matrices of the two situations were, therefore, quite different and that to suggest, as the OFT and Aer Lingus do, that there could be inconsistent assessments and outcomes as between what he termed the two separate legal orders was erroneous. He also submitted that if one confused the EU and domestic merger control regimes and treated one as subordinate to the other, then there would be seriously adverse consequences for the interests of the UK public interest and in particular consumers. If the latter were to be properly protected the domestic authority should be in a position to apply the national regime in circumstances such as these, without having to await the outcome, perhaps several years later, of unmeritorious appeals to the Courts of the EU.

97. Despite the skill and force with which these submissions were made, we do not accept them. The differences between the two merger control regimes upon which Mr Swift relies do of course exist, but that does not mean that unacceptable conflicts of assessment or outcome are incapable of arising. As the ECJ pointed out in *Delimitis* (see paragraph 56 above), the need for legal certainty is central to the need to avoid such inconsistencies. This applies every bit as much in the area of merger control as in other areas of competition law. It is therefore necessary to look carefully at the specific circumstances in order to assess whether an impermissible conflict could arise.

98. We are of the view that the potential inconsistencies of outcome to which the Ryanair Appeal could give rise are ones which have to be avoided in compliance with the duty of sincere cooperation under Article 10. It would be objectionable, not least in terms of legal certainty, for Ryanair to be subject first to a finding that its minority shareholding represents a substantial lessening of competition whose adverse effects are such that divestment is required, and later to a judgment of the General Court opening the way to Ryanair's acquisition of *all* the shares in the target company. Quite apart from the waste of time and expense on all sides, Ryanair, Aer Lingus, their investors and competitors, and all other interested parties would be receiving conflicting messages which would undermine legal certainty. Worse still, by the time the General Court had delivered its judgment Ryanair might already have been obliged to carry out the divestment at the domestic level and therefore have irretrievably altered its position. The "one-stop shop" principle would have been compromised. At one point in the course of argument Mr Swift appeared to acknowledge that in circumstances such as those postulated above, the domestic authority's decision to require divestment of the minority shareholding could not live with an EU outcome to the effect that 100% control was acceptable under the Merger Regulation.

99. Nor would the potential inconsistencies be restricted to ultimate outcome. The Ryanair Appeal involved the General Court in a thorough appraisal of the competitive relationship between Ryanair and Aer Lingus by reference to Ryanair's grounds of challenge. This relationship, and the associated question whether the proposed merger would significantly impede effective competition in the market,

was the subject of the first ground of the application for annulment. The second ground required an assessment of Ryanair's argument that barriers to entry were low in the market in question, that there was plenty of potential competition to be regarded as a sufficient competitive constraint on the parties to the concentration, that the concentration would not create any significant impediment to effective competition, and that the Commission was wrong to find otherwise. The third ground involved a route-by-route competitive analysis. Many of the routes under scrutiny in this regard involved airports in the UK. The fourth ground concerned a challenge to the Commission's assessment of Ryanair's claims as to the efficiency gains which its proposed takeover of Aer Lingus would bring for the benefit of consumers. The final ground comprised Ryanair's complaints in connection with the Commission's rejection of certain commitments which Ryanair had offered with a view to rendering the notified transaction compatible with the common market. All the detailed arguments under these heads of appeal were considered by the General Court in a long and careful judgment. There is no indication that Ryanair brought the appeal out of academic interest. It is reasonable to assume that it did so because it was seeking to overturn the findings made by the Commission, and to affect any subsequent findings the Commission would make if it were to revisit these matters, for example in the event of a revived public bid.

100. 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.

101. We add that it is indeed possible that the Ryanair Appeal too (as well as the Aer Lingus Appeal) generated a risk of conflict with article 21(3) of the Merger Regulation, in that Ryanair was asking the General Court to hold that the European Commission had erred in its assessment of the effects of the concentration on competition, not just in relation to that part of the proposed shareholding represented by the public bid, but in relation to the *whole* of the single concentration identified by the Commission in its examination under the Merger Regulation, including Ryanair's minority shareholding. However the matter was not put to us on that basis, and it is not necessary for our decision to reach a final view.

102. Therefore, in our view the fact that the two merger regimes differ in the respects relied upon by Mr Swift would not exclude the risk of infringement of article 21(3) of the Merger Regulation or the risk of inconsistent assessments and/or outcomes sufficient to engage the Article 10 EC duty, in the event that domestic merger rules were applied before the Ryanair Appeal and the Aer Lingus Appeal had been finally determined.

103. Ryanair does not submit that where a national court or authority perceives a risk of conflict it should attempt to form a view as to what will be the outcome of the issue pending before the EU Commission or EU courts. There is no support for any such assessment in the case-law. We note that in *Delimitis* the ECJ stated that the national court could only proceed to a decision if there was "scarcely any risk" or if the national court was "certain" that no conflict would arise (see paragraph 50 of the judgment and paragraph 5 of the *dispositif*). Obviously the alleged risk must be real and not fanciful, but there is no suggestion by the General Court in its full and careful judgments in the Ryanair Appeal and the Aer Lingus Appeal that the issues raised by the applicants in those appeals were not properly arguable.

104. Understandably Mr Swift placed reliance on the views expressed by the President of what is now the General Court in his Order refusing Aer Lingus interim relief in respect of the Article 8(4) Decision. We have cited the passage relied upon at paragraph 21 above. In short the President considered that given that there remained only a minority shareholding which was *prima facie* no longer linked to control, "in principle" Article 21(3) did not preclude the application of domestic competition

rules. He went on to say that the fact that the Prohibition Decision was being challenged on appeal made no difference in view of the presumption of validity; moreover if for reasons of procedural economy the national authorities did not want to take a definitive decision before the outcome of the appeal, they could adopt interim measures.

105. Those comments, made in the context of an application for interim relief, expressed a view "in principle" on a matter which could not be conclusively decided until the substantive appeal, namely whether on a correct interpretation of the provisions in question the Commission had exclusive jurisdiction in respect of the minority shareholding. The President's Order was not therefore capable of removing the uncertainty upon which the OFT relies. If it were capable of having that effect there would have been no point in the General Court hearing and determining the Aer Lingus Appeal. Although he was alive to a possible issue of procedural economy that might confront the national authorities, it is clear that the President was not considering the possible application of Article 10 EC to any potential conflict. There is nothing to suggest that this formed any part of the argument put to him. Still less would the President have had in mind the circumscribed nature of the UK merger control system, where the authorities are not afforded a general power to suspend their proceedings on grounds of procedural economy. In these circumstances neither the President's Order nor the views expressed by the European Commission should deflect us from the conclusion we consider appropriate having heard full argument on these issues.

106. In summary, we conclude that the Ryanair Appeal and the Aer Lingus Appeal each gave rise to potential conflicts with a decision taken pursuant to (or with the outcome of) a reference under section 22 of the Act, and that those potential conflicts were such that the duty of sincere cooperation under Article 10 EC required the UK merger control authorities to avoid them. In the case of the Aer Lingus Appeal, the potential conflicts also included a risk of infringement of article 21(3) of the Merger Regulation.

How should a risk of conflict be avoided by the OFT/Competition Commission?

107. Given that conclusion, the Member State (in the form of the OFT and, if a reference under section 22 of the Act were to be made, the Competition Commission) is in a similar position to the national court in *Delimitis*, *Masterfoods* and *National Grid*. We therefore need to consider how those potential conflicts and the duty to avoid them interact with the domestic legislation, particularly subsection 122(4) of the Act. This is pertinent to Mr Swift's alternative submission, that even if there was a risk of such a conflict, this did not prevent the OFT from making a reference to the Competition Commission under section 22 of the Act, as any risk could and should have been managed differently. For example, any risk could have been managed by the OFT/Competition Commission suspending their investigation at some stage otherwise than by reference to subsection 122(4). Mr Swift submits that if (as he contends) there was no legal impediment to an earlier reference, the condition in subsection 122(4) was not satisfied and the period allowed under section 24 of the Act for making a reference expired four months after the European Commission's Prohibition Decision in June 2007.

108. Therefore the essential question is whether, in the light of our finding as to potential conflicts, the OFT and Aer Lingus are right in their submission that "because of the [EC Merger Regulation] or anything done under or in accordance with them ….the reference under section 22 ... *could not have been made earlier* …" i.e. earlier than 17 September 2010 when the time for appealing against the General Court's judgments expired.

109. Mr Swift argues that the fact that the Ryanair Appeal and the Aer Lingus Appeal were ongoing did not prevent the OFT from making a reference or the Competition Commission from embarking on the investigation. He submits that subsection 122(4) refers to the Merger Regulation and not to an appeal to the General Court as the source of the necessary impediment. In his submission the proceedings under the Merger Regulation had come to an end with the adoption of the Prohibition Decision on 27 June 2007. Had Parliament wished to extend time in circumstances where the same issues arise simultaneously in proceedings before the UK competition authorities and before the EU courts, it could have included the kind of

provision made in relation to section 47A of the Competition Act 1998, which deals with follow-on monetary claims based on infringements of EU and UK competition law. The combined effect of subsections 47A(7) and (8) and rule 31 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003/1372) is that the time for bringing such a claim does not begin to run until any appeal against the relevant infringement decision has been finally resolved.

110. Mr Swift also relied upon the fact that subsection 122(1) refers to "Community law and anything done under or in accordance with it", whereas subsections 122(2) and 122(4) refers only to "the EC Merger Regulation or anything done under or in accordance with" it. In this connection he drew our attention to the definition of "Community law" in subsection 129(1) of the Act:

> "Community law" means—
>
> (a) all the rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties; and
>
> (b) all the remedies and procedures from time to time provided for by or under the Community Treaties"

111. His argument in this regard was that Article 10 EC would fall under subparagraph 129(1)(a) and an appeal to the General Court under subparagraph 129(1)(b), but neither Article 10 nor an appeal to the General Court could be covered by the description "the EC Merger Regulation or anything done under or in accordance with" it. Therefore he submitted that subsection 122(4) of the Act did not apply to any impediment which was created by Article 10 or by the two appeals to the General Court.

112. Mr Swift also submitted that if subsection 122(4) was not the appropriate or permissible means of managing the risk of conflict between the outcome of the appeals to the General Court and of any investigation by the UK authorities, any such risk would be managed in some other way. He stated that the risk would not crystallise when the matter was before the OFT. All the OFT would have to decide was whether to refer a possible merger to the Competition Commission for a detailed investigation. The Competition Commission was a surrogate of the Member State in much the same way as the High Court in *National Grid*, where the

court had indicated that the litigation could continue as long as the risk of conflict which engaged the Article 10 duty did not crystallise. The Competition Commission, being broadly in the same position as the court, should therefore be allowed to decide if or when a conflict has arisen and then take the appropriate decision to ensure that the United Kingdom complies with its obligations under EU law. He submitted that, for this purpose, the Competition Commission had an *inherent* power to stay or suspend its investigation where it was necessary to do so in order to give effect to the primacy of EU law, in much the same way as the High Court does.

113. In our view it would be surprising if Parliament had provided a mechanism enabling the OFT to avoid the risk of conflict with decisions of the European Commission (as Mr Swift accepts it has) but not with those of the General Court or Court of Justice. We have come to the conclusion that Mr Swift's contentions as to the meaning and effect of subsection 122(4) are incorrect, and that in a case such as the present that subsection is the means provided by Parliament for managing the separate merger jurisdictions and affording primacy to EU law, while preserving the possibility of exercising the domestic jurisdiction.

114. Mr Swift's analogy with the position of a national court can only go so far. In this context there are at least two significant differences between the courts and the OFT/Competition Commission. One such distinction is that neither the OFT nor the Competition Commission is a "court or tribunal of a Member State" within the meaning of Article 234 EC (now Article 267 TFEU). This means that neither authority has the option of making a reference to the ECJ for a preliminary ruling on the interpretation of the EU provisions in order to remove the uncertainty which has led to a perceived risk of conflict (see, for example, paragraphs 57 and 60 of the judgment of the ECJ in *Masterfoods* above).

115. More importantly, unlike most courts, the OFT and the Competition Commission, in fulfilling their respective roles under the UK merger regime, are subject to a closely circumscribed statutory framework which specifies with precision the decisions which are to be taken by each authority and the timetable within which this is to be done. The authorities are not afforded the autonomy and flexibility

which a national court normally enjoys to control its own proceedings and to determine its procedures and timetable. For example, the OFT is not given a discretion whether to refer a completed merger to the Competition Commission: subject to certain exceptions enumerated in subsection 22(2) of the Act, it is under a duty to do so where the relevant conditions are satisfied, and it has a limited time in which to act. Further, if subsection 122(4) is left out of account, it is common ground that there is no express provision in the relevant domestic legislative framework which would entitle either the OFT or the Competition Commission to stay or suspend their respective proceedings or to extend the strict statutory timeframe in order to discharge the obligation of sincere cooperation under Article 10. As the extracts from the Act set out earlier in this judgment demonstrate, wherever there is provision for an extension to the statutory timetable, the criteria for its application are closely defined and, with one exception not relevant to this point, any extension is only for a fixed period. None of these provisions covers a case such as the present, and therefore once the OFT has set the statutory procedure in motion by making a reference under section 22, the Competition Commission must continue to the end of the process (unless it is satisfied that the merger has been abandoned within the meaning of section 37 of the Act).

116. It is true that there is a further stage in the Competition Commission's procedure after it has produced its report (under section 38) containing decisions on the questions specified in section 35 of the Act, including whether a substantial lessening of competition will result from the merger and if so what are the appropriate remedies. This stage is dealt with by section 41 of the Act (see above), which requires the Competition Commission to put into effect the remedies identified in the statutory report. There is a provision enabling the Competition Commission to vary the action determined in the report where there has been a material change of circumstances since the report or there is a "special reason for deciding differently." Mr Swift did not specifically rely upon this provision, and in our view it does not assist his argument. By the time this stage is reached the risk of conflict would have crystallised and the damage would have been done, as a result of the definitive findings on jurisdiction and substance in the statutory report.

117. Therefore, unless subsection 122(4) of the Act applies, if the OFT or Competition Commission wished to suspend or stay their statutory proceedings in order to avoid a conflict, unlike a court they would be confronted with the need to override express statutory obligations relating to the decisions which must be taken within specified time limits. It was accepted by Mr Beard and Mr Flynn QC, who appeared on behalf of Aer Lingus, that in certain circumstances this might be necessary and legitimate pursuant to the EU law principles applied in, for example, *R v Secretary of State ex parte Factortame Limited and others (No. 2)* [1991] 1 AC 603. However they contended that this was a last resort, and that in the present circumstances Parliament had in subsection 122(4) provided a mechanism which enabled the United Kingdom to comply with its EU obligations without recourse to the drastic step of disapplying national measures.

118. We agree with that analysis. One clearly does not disapply national legislation unless there are no other means of ensuring that the primacy of EU law is respected. In the ordinary course one would first need to satisfy oneself that domestic provisions do not provide the required means. Moreover, even if extra-statutory suspension of the merger investigation is justified, there could be no guarantee that it would be able to preserve the possibility of exercising the domestic merger jurisdiction once the uncertainty had been removed, in the way that subsection 122(4) would. If the suspension took place at the OFT stage, i.e. before a reference had been made, the power to refer would arguably lapse on the expiry of the four month period. If the suspension were put into effect by the Competition Commission, the failure to comply with the statutory timetable might render the authority *functus officio*.

119. Although subsection 122(4) does not implement or give effect to the Merger Regulation, it clearly acknowledges and, at least in some respects, manages the interface between that Regulation and the Act. The subsection recognises that, "because" not only of the Merger Regulation but also of "*anything done under or in accordance*" with it, the OFT's duties under the Act may have to be suspended. Unlike an extra-statutory suspension derived from the Member State's obligation to comply with EU law, the subsection also enables the duties of the OFT to be reactivated and the possibility of applying UK merger control to be preserved if and

when the impediment is removed. So much appears to be common ground. Mr Swift accepts that in the present case the subsection suspended and preserved the OFT's duties in this way until 27 June 2007.

120. Moreover the subsection is the only provision which fulfils this role. Nothing equivalent exists once the OFT has set matters in motion by making a reference under section 22: thereafter, as we have seen, the statutory procedure must be followed to its conclusion in the Competition Commission's report produced pursuant to subsection 38(1) of the Act. We therefore consider that, contrary to the thrust of Mr Swift's argument, it is at the stage when the matter is still before the OFT and before any reference has yet been made, that questions of potential conflict are, if possible, intended to be confronted.

121. There is no attempt in the Act to define the impediments to a section 22 reference which are envisaged by subsection 122(4). However, the generic description could hardly be phrased more broadly. In our view it is apt to encompass, where relevant, an appeal to the General Court against a Commission decision under the Merger Regulation. If, as we have held here, an appeal generates uncertainty of such a nature as to engage the Article 10 duty and to require the risk of conflict to be avoided, then in our view it is consistent with the very broad language in question to describe the Merger Regulation as the ultimate source of that requirement (the reference could not have been made earlier "*because of* the EC Merger Regulation"). It is also consistent with the language of the subsection to describe the two appeals as having been brought "in accordance with" the Merger Regulation for this purpose. Given its breadth and generality we have not found it necessary to "read down" or strain the language of the subsection in order to construe it in this way.

122. Nor is this conclusion affected in any way by the fact that those appeals, like all appeals to the Court of Justice (which includes the General Court for this purpose), are brought under a procedure for annulment in what is now Article 263 TFEU. The fact that an appeal is brought pursuant to a procedure laid down in Community law in the form of the TFEU does not preclude it from being brought "in accordance with" the Merger Regulation. It clearly is. The right of appeal to the General Court

from a decision of the European Commission taken under the Merger Regulation is an integral feature of the EU merger control regime. Such an appeal is by its nature capable of affecting the ultimate outcome in a specific case, and the two cannot sensibly be divorced in the present context. Without the Merger Regulation there can be no Commission decisions taken thereunder, nor any appeals from such decisions. In this regard we note that it makes specific reference to such appeals: indeed article 21(2) provides:

> "*Subject to review by the Court of Justice*, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation." (Emphasis added.)

Review by the EU courts is also envisaged by articles 9(9), 10(5), 11(3), 13(4), 13(8), and 16 of the Merger Regulation and recitals 17 and 43 to the Regulation's preamble.

123. Nor do we accept that the reference in subsection 122(4) to "the EC Merger Regulation" instead of "Community law" used in subsection 122(1), means that because Article 10 is in the EC Treaty it is excluded from any role in determining whether there is an impediment under subsection 122(4), as Mr Swift contends. On its own Article 10 has no effect: it is entirely general and must be linked to some EU provision to be found in the Treaties or secondary legislation. The source of the impediment here is the Merger Regulation together with the two appeals to the General Court. In any event, as already discussed, "Community law" and "the Merger Regulation" are not mutually exclusive. The latter is part of, and subject to, the former and something done "in accordance with the Merger Regulation" can also be done by virtue of Community law. In our view Mr Swift is attributing unwarranted significance to the use of one phrase rather than the other in different parts of section 122.

124. At various points in his submissions Mr Swift stressed that the OFT's and Aer Lingus's interpretation of subsection 122(4), and in particular their argument that an appeal to the General Court is capable of being an impediment to a reference, would have the effect of delaying for several years a domestic merger investigation in respect of which Parliament had intentionally laid down a structured procedure consisting of short time limits. However, it is difficult to see where this submission

takes one. The source of the delay in a case such as the present is exogenous in relation to the domestic regime: it is the result of the one stop shop enshrined in EU rules. Some delay as a result of the existence of, and procedures taken under, the Merger Regulation is admittedly within the contemplation of subsection 122(4). Further, Mr Swift's alternative approach to management of a potential conflict, namely the suspension or stay by the Competition Commission of its investigation at some later stage, would in practice be likely to result in an equivalent delay in arriving at a final outcome of the merger reference.

125. It follows that in our view subsection 122(4) is the means provided by Parliament for enabling the OFT to comply with the duty of sincere cooperation and avoid the risk of impermissible conflicts with article 21(3) of the Merger Regulation and/or between decisions taken (or to be taken) under the EU merger control system (including, where relevant, judgments of the EU courts) and decisions of the UK competition authorities. Where subsection 122(4) applies it also has the effect of preserving the possibility of a reference under section 22 pending the final resolution of the EU process.

Timing of the Aer Lingus Appeal

126. Ryanair contended that even if the Aer Lingus Appeal gave rise to the risk of conflict asserted by the OFT, and even if such risk could in principle result in an impediment to a section 22 reference for the purposes of subsection 122(4), the appeal was initiated after the expiry of the relevant four month period; the result was that the Aer Lingus Appeal could not provide a basis on which the OFT could claim that its right to refer had been preserved.

127. In view of the Tribunal's findings in respect of the Ryanair Appeal set out in paragraphs 98-102 above, this point does not affect the outcome of the Application. However we will express our views briefly.

128. The relevant events are as set out at paragraphs 6 to 19 above. In summary, the Prohibition Decision was adopted on 27 June 2007. The same day a Commission official wrote to Aer Lingus indicating what was stated to be the Commission services' non-binding view that the Commission did not have the power under

article 8(4) of the Merger Regulation to order Ryanair to divest its minority shareholding. It appears that this was a step which Aer Lingus had been urging the Commission to take in the course of the administrative proceedings leading up to the Prohibition Decision. A few days later Aer Lingus's legal advisers sent a memorandum to a number of competition authorities, including the European Commission and the OFT, in which the company expressly reserved the possibility of challenging that interpretation before the General Court. On 3 August 2007 the European Commission's services reiterated its conclusion. On the same day the OFT wrote to the solicitors for Aer Lingus expressing the conclusion that it was prevented by article 21(3) of the Merger Regulation from taking action in relation to the minority shareholding, and stating that its view was underlined by the likelihood of appeals in the General Court by both Ryanair *and Aer Lingus*, and consequent risk of inconsistent outcomes. On 17 August 2007 Aer Lingus asked the European Commission either to act with a view to divesting Ryanair's minority shareholding or to state formally that it did not have the power to do so. On 11 October 2007 the Commission adopted the Article 8(4) Decision holding that it did not have the power to order divestment of the minority shareholding.

129. In the light of the above the OFT had reasonably (and accurately) concluded by August 2007 that in all probability Aer Lingus would mount a challenge in the General Court to the Commission's interpretation of its powers in respect of Ryanair's minority shareholding. Their belief would have been fortified by the Article 8(4) Decision on 11 October 2007, since the only reason that decision had been requested by Aer Lingus and adopted by the Commission was in order to provide a decision which the company could challenge. Does it matter that the predictable and predicted appeal was brought by Aer Lingus on 19 November 2007, which is admittedly more than four months after the date of the Prohibition Decision on 27 June 2007? With some hesitation we have reached the conclusion that on the unusual facts of this case it does not.

130. In many, indeed in most, cases uncertainty sufficient to engage the duty of sincere cooperation would probably not arise unless and until a relevant decision at the EU level was actually pending, in the sense that the appropriate procedure at the end of which a conflict might arise, had been set in train. However, we remind ourselves

that the triggering of the duty is dependent on the specific facts. The circumstances here are such that the OFT had very good reason to believe, and did believe, that a relevant appeal to the General Court was highly likely to be commenced. Indeed the OFT informed Aer Lingus of that belief (see letter quoted at paragraph 11 above). If a competent authority of a Member State reasonably believes that the particular circumstances are such that if it applies domestic merger rules a risk of impermissible conflict would be likely to arise, it is difficult to avoid the conclusion that, in the light of the duty of sincere cooperation, it ought not to apply those rules until it knows the expected event (*in casu* a challenge by Aer Lingus to a decision of the Commission) is not in fact going to occur. If we are right in this regard the impediment to a section 22 reference arose sometime in July/August 2007 or at the latest on 11 October 2007. In those circumstances the relevant uncertainty (and the impediment under subsection 122(4) of the Act) persisted until 17 September 2010, when the time for appealing against the General Court's judgment expired.

Preliminary ruling of the ECJ

131. In the course of his reply Mr Swift suggested that if we were minded to find that Article 10 was engaged in the present circumstances we should request the ECJ for a preliminary ruling on that issue under what is now Article 267 TFEU, given the consequences our finding could have for the public interest in terms of delay in addressing prospective mergers and the undermining of the United Kingdom merger control system. Neither Mr Beard nor Mr Flynn made any comment on the issue.

132. Article 267 TFEU gives the Tribunal a discretion to refer questions to the ECJ for a preliminary ruling on (among other matters) the interpretation of EU law where a decision on the question referred is necessary to enable the Tribunal to give judgment. It seems to us that in relation to Article 10 EC we are more concerned with the *application* of reasonably well established principles of EU law rather than with the nature of those principles. Nevertheless the scope and effect of Article 10 EC in conjunction with article 21(3) of the Merger Regulation has not, so far as we are aware, hitherto been explored by the ECJ. As such the case could be said to raise questions of EU law which are not *acte clair*. On that basis we have a discretion whether or not to make a reference, which should be exercised in the

light of the well-known considerations set out in cases such as *Trinity Mirror plc v Customs & Excise* [2001] EWCA Civ 65, at paragraphs 48 to 53, and *Professional Contractors' Group v Commissioners of Inland Revenue* [2001] EWCA Civ. 1945, at paragraph 91.

133. These factors include the need for national courts (other than courts of last resort, to whom different considerations apply) to exercise an appropriate measure of self-restraint before sending questions to an already over-burdened ECJ. The particular concatenation of events which has led to the Application is somewhat unusual, and it is questionable how often similar problems would be repeated in this jurisdiction. So far as any application to other EU Member States is concerned, the time bar problem with which we are faced is bound up with legislation specific to the United Kingdom, and very unlikely to arise in this form elsewhere in the EU. In addition, any reference which we made could be rendered otiose if our conclusion, that subsection 122(4) is capable of encompassing an action in the General Court seeking annulment of a relevant Commission decision, were to be reversed on appeal. One must also take into account the inevitable delay that would be involved if we were to make a reference. In all the circumstances, including the above, we do not consider it appropriate to exercise our discretion in favour of a reference here.

VI. CONCLUSION

134. For the reasons given above, the Tribunal unanimously concludes that:

(a) the Ryanair Appeal and the Aer Lingus Appeal each gave rise to potential conflicts with a decision taken pursuant to (or with the outcome of) a reference to the Competition Commission under section 22 of the Act, and those potential conflicts were such that the duty of sincere cooperation under Article 10 EC required the UK merger control authorities to avoid them. In the case of the Aer Lingus Appeal, the potential conflicts also included a risk of infringement of article 21(3) of the Merger Regulation.

(b) Subsection 122(4) of the Act is the means provided by Parliament for enabling the OFT to comply with the duty of sincere cooperation and avoid

the risk of impermissible conflicts with article 21(3) of the Merger Regulation and/or between decisions taken (or to be taken) under the EU merger control system (including, where relevant, judgments of the EU courts) and decisions of the UK competition authorities, whilst preserving the possibility of a reference under section 22 pending the final resolution of the EU process.

(c) For the purposes of subsection 122(4), a reference under section 22 could not have been made earlier than 17 September 2010, and Ryanair is not entitled to any of the relief sought in paragraph 38 of the Notice of Application.

The President Michael Blair Graham Mather

Charles Dhanowa
Registrar Date: 28 July 2011