Neutral citation [2015] CAT 14

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1239/4/12/15

15 July 2015

Before:

HODGE MALEK QC
(Chairman)
PROFESSOR COLIN MAYER
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

AER LINGUS GROUP PLC

Intervener

Heard at Victoria House on 3 July 2015

JUDGMENT

APPEARANCES

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

Mr Daniel Beard QC, Mr Rob Williams and Miss Alison Berridge (instructed by CMA Legal) appeared for the Respondent.

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

1. Ryanair Holdings Plc ("Ryanair") holds a 29.82% minority stake in Aer Lingus Group plc ("Aer Lingus"). In its final report dated 28 August 2013 ("the Final Report") the Competition and Markets Authority's ("the CMA") predecessor, the Competition Commission ("the CC"), concluded that this stake gave Ryanair material influence over Aer Lingus and resulted in a substantial lessening of competition ("SLC"). To remedy this SLC, the CC decided to require Ryanair to reduce its stake to no more than 5% of Aer Lingus' issued ordinary shares.

2. Ryanair's challenge to the Final Report was dismissed by the Tribunal in its judgment of 7 March 2014 ([2014] CAT 3) ("the 2014 Judgment"). The 2014 Judgment was upheld by the Court of Appeal in its judgment of 12 February 2015 ([2015] EWCA Civ 83). Ryanair's application for permission to appeal the Court of Appeal's judgment to the Supreme Court was refused on 13 July 2015.

3. On 12 February 2015, Ryanair made an application to the CMA for it to conduct a formal assessment of whether there had been a material change of circumstances since the Final Report and, further, whether the proposed divestment remedy remained appropriate in light of what Ryanair said were materially changed circumstances.

4. On 11 June 2015, the CMA issued a decision finding that there had been no material change of circumstances since the Final Report ("the MCC Decision"). In particular, the CMA concluded that the public takeover bid for Aer Lingus by International Consolidated Airlines Group, S.A. ("IAG") was not a material change of circumstances that required it to consider remedial action different from that set out in the Final Report. On the same day, the CMA also made a remedies order requiring the appointment of a Divestiture Trustee to manage the partial disposal of Ryanair's stake in Aer Lingus ("the Final Order").

5. By its Notice of Application of 18 June 2015, Ryanair seeks to challenge the lawfulness of the MCC Decision and Final Report on the following three grounds:

(1) The MCC Decision and the decision to impose a Final Order are unlawful (Ground 1). In reaching those decisions, the CMA misconstrued and misapplied the legal test under section 41(2) of the Enterprise Act 2002 ("the Act"). In particular, section 41(2) requires the CMA to take a fresh decision on remedies having regard to the considerations set out in section 41(4), including an assessment of proportionality. The CMA failed to do so.

(2) The MCC Decision is irrational (Ground 2). It is inconceivable that any reasonable competition authority could fail to conclude that there had been a material change of circumstances when the very thing it predicted would not happen (a bid for Aer Lingus), and which was critical to its original assessment, has in fact taken place.

(3) The CMA's decision to impose a Final Order is unreasonable, disproportionate and in breach of Ryanair's legitimate expectation that no order would be imposed while its appeal of the Final Report remains unresolved (an application for permission to appeal was pending before the Supreme Court at the time of the hearing, but has now been refused); alternatively it is in breach of Ryanair's legitimate expectation that the CMA would consult Ryanair and would conscientiously consider its representations before imposing the Final Order while Ryanair's appeal was unresolved (Ground 3).

6. Prior to the hearing in these proceedings, Ryanair withdrew its third ground of challenge leaving only Grounds 1 and 2 for the Tribunal's determination.

7. Ryanair seeks an order that the MCC Decision and the Final Order be quashed by the Tribunal exercising its judicial review function under section 120 of the Act. In its Notice of Application, Ryanair also sought interim relief pursuant to rule 61 of the Competition Appeal Tribunal Rules 2003 (S.I. 1372 / 2003) to suspend the Final Order pending determination of this Application. The request for interim relief was, however, not pursued at the hearing and we therefore do not consider it further in this judgment.

8. The structure of this judgment is to set out the background to this matter (Part 1), the legislative provisions and framework applicable (Part 2), the Final Report (Part 3) and the developments since the Final Report including the MCC Decision (Part 4) before dealing with each ground of challenge (Part 5).

PART 1: THE BACKGROUND

9. The background to these proceedings is set out in some detail at paras. 3 – 30 of the 2014 Judgment. By way of summary, Ryanair's acquisition of a stake in Aer Lingus dates back to 2006, when Aer Lingus was the subject of an IPO and Ryanair started to acquire shares in Aer Lingus.

10. On 5 October 2006, Ryanair announced its intention to launch a public bid for Aer Lingus; this first bid was notified to the European Commission on 30 October 2006 in accordance with Article 4 of Council Regulation 139/2004 (the EU Merger Regulation or "EUMR"). On 20 December 2006, the European Commission initiated phase II proceedings under Article 6(1)(c) EUMR, triggering a standard term in the bid that the bid would lapse if it was referred to phase II. Hence, Ryanair's first bid lapsed. In any event, the European Commission issued a decision on 27 June 2007 prohibiting the acquisition pursuant to Article 8(3) EUMR. This decision, as well as a related decision in which the European Commission decided it did not have the power to order Ryanair to divest its minority stake, were the subject of unsuccessful appeals to the General Court by Ryanair and Aer Lingus respectively. Those appeals did not conclude until 6 July 2010.

11. On 1 December 2008, Ryanair announced a second bid for the entire issued share capital of Aer Lingus, which it subsequently abandoned on 23 January 2009.

12. In light of the proceedings at the EU level, which are further explained in the 2014 Judgment, Ryanair's acquisition was not subject to merger scrutiny in the UK until 2010. The acquisition was eventually referred to the CC by the Office of Fair Trading ("the OFT") on 15 June 2012, by which time there had already

been an appeal to the Tribunal and to the Court of Appeal in relation to the statutory time limit for making such a reference.

13. On 19 June 2012, Ryanair announced a third bid for the entire issued share capital of Aer Lingus. Despite a request from Ryanair, the CC decided not to stay its investigation. Ryanair notified the European Commission of a proposed concentration on 24 July 2012. The European Commission subsequently confirmed to the CC, by letter of 26 July 2012, that it would be examining the proposed concentration under the EUMR. On 29 August 2012, the European Commission initiated phase II proceedings under Article 6(1)(c) EUMR, again triggering the standard term requiring the bid to lapse.

14. In the meantime, Ryanair continued to pursue appeals against the CC's decision to continue its investigation into the stake acquired in Aer Lingus between 2006 and 2008. The Court of Appeal dismissed Ryanair's appeal on the issue of quashing or staying the CC's decision to proceed with its investigation on 13 December 2012 ([2012] EWCA Civ 1632) (the Tribunal having dismissed Ryanair's application for review on 8 August 2012 ([2012] CAT 21)). The Supreme Court refused permission to appeal the Court of Appeal's judgment on 24 April 2013.

15. On 27 February 2013, the European Commission issued a decision prohibiting the acquisition proposed by Ryanair's third bid pursuant to Article 8(3) EUMR. On 8 May 2013, Ryanair lodged an appeal with the General Court against this decision, which remains pending (Case T-260/13).

16. The CC continued its investigation, issuing its Final Report on 28 August 2013. As noted above, the CC found that Ryanair's acquisition of 29.82% of the shares in Aer Lingus had created a relevant merger situation which had led or might be expected to lead to an SLC for air passenger services between Great Britain and Ireland.

17. By an application for judicial review dated 23 September 2013, Ryanair challenged the CC's findings on six grounds. The Tribunal dismissed all of those grounds in its 2014 Judgment. Ryanair's appeal to the Court of Appeal was dismissed on 12 February 2015 ([2015] EWCA Civ 83). Ryanair's

application for permission to appeal to the Supreme Court was refused on 13 July 2015.

18. On the same day as the Court of Appeal handed down its judgment, Ryanair made a written application to the CMA requesting that it investigate an alleged material change of circumstances since the publication of the Final Report. The principal basis for that application was that, between the Tribunal's ruling and the Court of Appeal's judgment, IAG had made a number of approaches to Aer Lingus, the third of which, dated 26 January 2015, had been recommended by the board of Aer Lingus to its shareholders.

19. By its MCC Decision of 11 June 2015, the CMA concluded that IAG's bid was not a material change of circumstances requiring it to reach a different conclusion on remedies. The CMA decided to make the Final Order on the same date. The MCC Decision and the Final Order are considered in further detail in Part 4 below.

20. Ryanair's challenge to the MCC Decision and Final Report was submitted by way of its Notice of Application dated 18 June 2015. At the case management conference on 24 June 2015, the Tribunal gave directions as to pleadings and evidence. Aer Lingus was given permission to intervene. The Tribunal also directed that the hearing of the application be expedited and, accordingly, skeleton arguments were ordered to stand in place of the defence and the statement of intervention. The hearing took place on 3 July 2015.

PART 2: THE LEGISLATIVE FRAMEWORK

21. At the relevant time, section 22 of the Act required the OFT to refer a completed merger to the CC if it:

> "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."

22. Where the OFT made a reference under section 22 of the Act, the CC was required by section 35(1) to decide the following questions:

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

23. Section 35(2) of the Act provides that there is "an anticompetitive outcome" if a relevant merger situation has been created and the creation of that situation has resulted, or may be expected to result, in an SLC within any market or markets in the UK.

24. If the CC decided that there was an "anti-competitive outcome", it was obliged by section 35(3) of the Act to decide the following additional questions:

> "(a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
>
> (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and
>
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented."

In deciding those questions, the CC was directed to have regard to "*the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it*" (section 35(4)) and may have regard to "*the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned*" (section 35(5)).

25. Section 38 of the Act required the CC to publish a report on a reference within the period specified in section 39. At the relevant time, section 38(2) provided:

> "The report shall, in particular, contain –
>
> (a) the decisions of the [CC] on the questions which it is required to answer by virtue of section 35…;

(b) its reasons for its decisions; and

(c) such information as the [CC] considers appropriate for facilitating a proper understanding of those question and of its reasons for its decisions."

26. Section 41 of the Act provided for remedial action where the CC had decided that there was an anti-competitive outcome:

> "(1) Subsection (2) applies where a report of the [CC] has been prepared and published under section 38…and contains the decision that there is an anti-competitive outcome.
>
> (2) The [CC] 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 [CC] under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 35(3) or (as the case may be) 36(2) unless there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently.
>
> (4) In making a decision under subsection (2), the [CC] shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
>
> (5) In making a decision under subsection (2), the [CC] may, in particular, have regard to the effect of any relevant customer benefits in relation to the creation of the relevant merger situation concerned."

27. Sections 82 to 84 of the Act identify the final powers of the CC, in accordance with section 41. Section 82 allows the CC to accept, from such persons as it considers appropriate, undertakings to take action specified or described in the undertakings. Section 84 allows the CC to make a final order, which may contain anything permitted by Schedule 8 of the Act, and any supplementary, consequential or incidental provision as the CC considers appropriate.

28. In April 2014, the relevant functions of the OFT and CC were transferred to the CMA by virtue of the Enterprise and Regulatory Reform Act 2013, which amended the Act in a number of ways. None of those changes is material to the

present proceedings, except that references to the OFT and CC in the Act have been replaced with references to the CMA.

Review in the Tribunal

29. Section 120 of the Act allows a person aggrieved by a decision of the CMA to apply to the Tribunal for a review of the decision. In determining such an application, the Tribunal is to apply "the same principles as would be applied by a court on an application for judicial review" (section 120(4)).

30. It appeared to be accepted before us that the Tribunal's judgment in *BAA Ltd v Competition Commission* [2012] CAT 3 ("*BAA*"), which related to an application under section 179 of the Act, identified the relevant principles that apply in the context of a review under section 120 of the Act. At para. 20 of that judgment, the Tribunal stated as follows:

> "20. Section 179(4) of the Act provides that on an application to it for review of a decision of the CC the Tribunal "shall apply the same principles as would be applied by a court on an application for judicial review." There were no major differences between the parties as regards the approach that these principles require on the part of the Tribunal, but there were potentially significant differences of emphasis. In our judgment, the principles to be applied are as follows:
>
> (1) Sections 134(4) and (6) and 138(2) and (4) of the Act (set out above), read together, require that any remedies that the CC recommends or adopts must be reasonable, practicable and – subject to those parameters – comprehensive;
>
> (2) In light of the relevance of the Convention right in Article 1P1 in this context, section 3(1) of the HRA requires that sections 134 and 138 should be read and given effect in a way compatible with that Convention right, which means that any such remedies must satisfy proportionality principles. Also, the CC accepts in its published guidance that any such remedies must satisfy proportionality principles (paragraph 4.9 of the Competition Commission Guidelines on Market Investigation References, June 2003). There was common ground as to the formulation of the proportionality test to be applied by the CC in taking measures under the Act (and by the Tribunal in reviewing its actions):
>
> > "… the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are

> disproportionate to the aim pursued" (*Tesco plc v Competition Commission* [2009] CAT 6 at [137], drawing on the formulation by the Court of Justice in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food, ex p. Fedesa* [1990] ECR I-4023, para. 13)

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

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

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

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

(4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45];

(5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised its discretion "reasonably, carefully and in good faith", but will include examination "whether the reasons adduced by the national authorities to justify [the interference] are 'relevant and sufficient'" (see, e.g., *Vogt v Germany* (1996) 21 EHRR 205 at para. 52(iii); also *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paras. 135-138). However, exactly what standard of evidence is required so that the reasons adduced qualify as "relevant and sufficient" depends on the particular context: compare *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [26]-[28] per Lord Steyn. Where social and economic judgments regarding "the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken" are called for, a wide margin of appreciation will apply, and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is "manifestly without reasonable foundation": *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation" standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken by such a body "is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion": Case C-120/97 *Upjohn Ltd v Licensing Authority* [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under Article 1P1 and section 6(1) of the HRA is essentially equivalent to that given by the ordinary domestic standard of rationality. However, we also accept Mr Beard's submission that even if the standards required of the CC by application of Article 1P1 regarding its investigations and the evidential basis for its decisions

were more stringent than under the usual test of rationality, the CC would plainly have met those more stringent standards as well;

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

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

(8) Where the CC gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in *South Buckinghamshire District Council v Porter (No. 2)* [2004]

UKHL 33; [2004] 1 WLR 1953 (a case concerned with planning decisions) at [36]:

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

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

31. In *BAA*, the Tribunal gave specific guidance as to how the Tribunal is to approach appeals against decisions on material change of circumstances at para. 21:

> "Under section 138(3) [which is the equivalent of section 41(3) in the market investigation context], the CC remains obliged to take action consistent with those decisions [on the appropriate remedy] unless there has been an MCC (or some "special reason" applies). The question whether there has been an MCC and, if there has been, the question of how far it affects the decisions arrived at in a previous report are again matters calling for evaluative assessments to be made by the CC, as to which a wide margin of appreciation or evaluative discretion applies in accordance with the principles set out above."

The Irish Takeover Rules

32. IAG's bid for Aer Lingus is subject to the Irish Takeover Rules. The following provisions of those Rules are relevant to these proceedings:

    (1) *EU Merger Regulation (Rule 12(b)(i))* – an offer will lapse if it is referred to Phase II assessment by the European Commission, or is referred back to a Member State's national competition authority:

    > "If an offer would give rise to a concentration with a Community dimension within the scope of the [EUMR], it shall be a term of the offer that it will lapse if the European Commission either initiates proceedings in respect of the concentration under Article 6(1)(c) of that Regulation or refers the concentration to a competent authority of a Member State under Article 9(1) of that Regulation before the first closing date of the offer or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later."

    (2) *Timeframe of the offer (Rule 31)* - in summary, the offer must initially remain open for acceptance for 21 days, but in general that offer period can be extended until up to 60 days after the offer document was despatched.

    (3) *Restrictions on new offers (Rule 35.1)* - in summary, if a bid has failed (for example, because it has not been accepted) the bidder cannot make another offer for 12 months without the consent of the Irish Takeover Panel.

33. These provisions are significant for the IAG bid because they dictate when the offer will close, and – absent the consent of the Irish Takeover Panel – IAG will be unable to re-bid for 12 months if the acceptance conditions are not met in time. Thus, there is a particular time pressure on these proceedings.

PART 3: THE CC'S FINAL REPORT

34. The Final Report is summarised in some detail at paras. 48 – 88 of the 2014 Judgment. The key parts of the Final Report for the purposes of this judgment are sections 7 and 8, in which the CC assessed the competitive effects of Ryanair's acquisition of a minority shareholding in Aer Lingus and the

appropriate remedy respectively. We summarise those parts below, so far as they are relevant to the instant proceedings.

35. Paragraph references in this Part are to the Final Report unless otherwise indicated.

Assessment of the competitive effects of the acquisition

36. The CC's assessment of the competitive effects of Ryanair's acquisition of a minority shareholding in Aer Lingus included an analysis of:

    (1) the relevance of the European Commission's findings on Ryanair's third bid for Aer Lingus (paras. 7.3 – 7.11);

    (2) the effect of the acquisition on Aer Lingus's commercial policy and strategy (paras. 7.12 – 7.130);

    (3) other ways in which Ryanair's minority shareholding might affect competition in the market (paras. 7.131 – 7.159); and

    (4) whether entry or expansion by another airline would be likely to offset any adverse effect of the transaction (paras. 7.160 – 7.175).

    For the purposes of this judgment, we are concerned primarily with (2), the CC's analysis of the effects of the acquisition on Aer Lingus's commercial policy and strategy.

37. The CC considered, at paras. 7.16 - 7.22, Ryanair's incentives with respect to its shareholding in Aer Lingus, forming the view (at para. 7.17) that Ryanair would have an incentive to take actions that ultimately had the effect of reducing Aer Lingus's effectiveness when deciding how to exercise the influence afforded to it by its shareholding. More generally, the CC stated that it would expect Ryanair's incentives as a competitor to outweigh its incentives as a shareholder (para. 7.19), and that – in light of its stated strategy of acquiring the whole of Aer Lingus – Ryanair would have an additional incentive to use its influence to weaken Aer Lingus's effectiveness as a competitor if this would make it easier to acquire the company (para. 7.20).

38. The CC then examined the mechanisms by which Ryanair's shareholding could affect Aer Lingus's commercial policy and strategy. In particular, the CC considered whether Ryanair could:

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

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

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

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

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

39. In light of Ryanair's submission that IAG's bid for Aer Lingus's shares amounted to a material change of circumstances, the CC's analysis of how Ryanair's minority shareholding could affect Aer Lingus's ability to participate in a combination with another airline is of particular relevance to these proceedings. The CC considered whether Ryanair's shareholding might weaken the effectiveness of Aer Lingus as a competitor by restricting Aer Lingus's ability to manage its costs at a competitive level and/or expand or improve its offering via a combination with another airline. In this analysis, the CC considered various factors such as:

(1) how Ryanair's minority shareholding might affect Aer Lingus's ability to combine with another airline (paras. 7.26 – 7.35);

(2) the trend of consolidation in the airline industry (paras. 7.36 – 7.39);

(3) views of Aer Lingus, Ryanair and other airlines on the likelihood of Aer Lingus being involved in a combination absent Ryanair's minority shareholding (paras. 7.40 – 7.46);

(4) evidence of potential combinations involving Aer Lingus in the period since 2006 (paras. 7.47 – 7.55);

(5) other factors affecting the likelihood of Aer Lingus being involved in combinations (paras. 7.56 – 7.58); and

(6) how Ryanair's minority shareholding might have in the period since 2006 affected, or would in future be expected to affect, Aer Lingus's effectiveness as a competitor to Ryanair on routes between Great Britain and Ireland (paras. 7.59 – 7.79).

40. The parties emphasised in their pleadings, and at the hearing, the CC's analysis of the role of Ryanair's minority shareholding. This section is set out in full below:

> "7.26 We considered how Ryanair's minority shareholding might affect Aer Lingus's ability to combine with another airline.
>
> 7.27 We identified a spectrum of ways in which Aer Lingus and another airline could combine. These ranged from a full merger involving the integration of business activities and assets (including an acquisition of Aer Lingus by another airline, an acquisition by Aer Lingus of another airline, and other combinations based on the relative contribution of Aer Lingus and its merger partner to the enlarged business), through a joint venture (with close cooperation but less extensive business integration than a full merger), acquisition of a strategic investment in Aer Lingus via a minority shareholding by another airline, to franchises, codeshares and bilateral alliances with no integration. We set out different possible forms of combination in more detail in Table 1 in Appendix F.
>
> 7.28 Aer Lingus said that Ryanair's shareholding allowed it to control the destiny of Aer Lingus, making it 'kingmaker'. It told us that because of the minority shareholding, Aer Lingus was known as a target for a Ryanair takeover rather than a successful and profitable airline, and that this was an impediment to partnership negotiations. It said that Ryanair's presence on its share register was considered by potential investors to be a 'poison pill'.
>
> 7.29 Ryanair told us that it would be open to offers for its shareholding on their merits, and had repeatedly said so in public. Ryanair also said that it would not oppose a proposed acquisition if it were in the interests of Aer Lingus's shareholders, and would support Aer Lingus if it sought to raise capital by taking up its quota of shares in any rights issue. Ryanair said that its shareholding could not prevent Aer Lingus from acquiring another airline, as it could use its cash reserves or debt to finance an acquisition.
>
> 7.30 Third parties told us that any acquirer of Aer Lingus would be likely to be concerned by Ryanair's minority shareholding. IAG told us that it would not usually contemplate buying a controlling interest in an airline with a

significant ongoing minority shareholder. Air France said that Ryanair's presence as an existing shareholder in Aer Lingus was not considered a deterrent to another airline acquiring an interest in the airline. However, there would be concerns over the illiquid share block between the shares held by the Irish Government, Ryanair and employees. Overall, Air France said that it would be difficult, but not impossible, for another airline to take a stake in Aer Lingus given its current share register. Lufthansa said that having a competitor like Ryanair as a shareholder made Aer Lingus's shareholder structure rather challenging and made the airline rather less attractive. Aer Arann told us that a potential suitor would have concerns about acquiring an airline in which the largest shareholder was also a competitor.

7.31 We found that Ryanair's minority shareholding would give it the ability to impede possible acquisitions of Aer Lingus by another airline. Significantly, Ryanair could prevent a bidder from acquiring 100 per cent of Aer Lingus by choosing to retain its shares. If Ryanair decided not to sell, an acquirer would need to accept Ryanair remaining as a significant minority shareholder, with different incentives to its own, and with, for example, the ability to block special resolutions and the entitlement to the proportionate share of the dividends and profits of Aer Lingus. In such circumstances, the acquirer's ability to integrate the businesses would be significantly restricted.

7.32 We also found that the shareholding would affect Aer Lingus's ability to merge with, enter into a joint venture with, or acquire another airline, by forcing Aer Lingus to seek Ryanair's approval for certain types of transaction. First, as set out in paragraphs 4.20 and 4.21, Ryanair's ability to block a special resolution means that it could prevent a merger between Aer Lingus and another airline via a scheme of arrangement or under the Cross Border Merger Regulations. Ryanair could also prevent Aer Lingus from issuing new shares to a potential partner via a private placement and could prevent other forms of corporate restructuring or reorganization (for example, a repurchase of the company's shares, a reduction of share capital, the cancelling of shares or changes to the Articles of Association) which would be required in certain types of transaction. Second, Ryanair could hamper Aer Lingus's ability to issue shares for cash in order to raise the capital needed to acquire or merge with another airline, by defeating the special resolution required to disapply pre-emption rights. This is discussed in more detail in paragraphs to 7.92. Third, if Ryanair were able to command a majority in an Aer Lingus general meeting (see paragraphs 7.108 to 7.114) it would be able to block a class 1 transaction (see Appendix C). This would be relevant in a joint venture (for example, a new company is created in which Aer Lingus and a partner own shares) or merger or acquisition discussions where the value of the assets to be acquired by Aer Lingus exceeded the relevant thresholds.

7.33 We considered there to be a significant likelihood that potential combinations that, absent the minority shareholding, Aer Lingus might have been or would in the future be involved in would trigger one or more of these mechanisms. We noted that in the context of the discussions between Aer Lingus and each of [✂] (see paragraph 7.51) and [✂] (see paragraph 7.53) the transactions being proposed would have been likely to involve significant restructing (sic) of Aer Lingus's share capital and/or corporate structure, which would have required the approval of Ryanair. In general terms, the more significant the transaction being contemplated (all other things being equal), the more likely Ryanair's shareholding would be to impede—or give

> Ryanair the ability to prevent—the combination from taking place, as a larger transaction would be more likely to require a shareholder vote (for example, if it was classified as a class 1 transaction, or required a restructuring of Aer Lingus's share capital or the issuing of shares on a non-preemptive basis).
>
> 7.34 In addition to these direct effects, we considered that the minority shareholding would be likely to affect Aer Lingus's ability to be acquired, merge with, enter into a joint venture with or acquire another airline even without Ryanair needing to take any particular action for the following reasons:
>
> (a) Ryanair's influence, combined with its incentives as a competitor to Aer Lingus, would create significant execution risk for airlines considering Aer Lingus as a potential partner, and would therefore be likely to deter some airlines from entering into, pursuing, or concluding discussions with Aer Lingus;
>
> (b) potential partners might be deterred from entering into, pursuing, or concluding discussions with Aer Lingus if that combination would result in Ryanair appearing on their own share register, given Ryanair's position as an activist shareholder and a competitor. This scenario might arise, for example, if an airline merged with Aer Lingus and shares in the respective airlines were exchanged, via a scheme of arrangement (or via the EU Cross-Border Merger Regulation), for shares in a new holding company, or if an acquisition of Aer Lingus was made wholly or partially on a share-for-share basis rather than 100 per cent for cash;
>
> (c) potential partners might be deterred from entering into, pursuing, or concluding discussions with Aer Lingus by the fear that Ryanair would use its existing shareholding as a platform from which to launch further bids for the whole of Aer Lingus (see paragraph or 7.124). Ryanair has stated that it still intends to acquire Aer Lingus (see paragraph 3.11) and has appealed the February 2013 prohibition decision of the European Commission. We note that [✂] decided not to continue its discussions with Aer Lingus upon hearing that Ryanair was launching its third bid.
>
> 7.35 We thought that Ryanair's shareholding would not directly impede Aer Lingus's ability to enter into less significant forms of cooperation such as codeshares, franchise agreements and alliances. We note that Aer Lingus has been able to enter into a number of such agreements in the period since the transaction took place (see paragraph 2.15)." (footnotes omitted)

41. As regards the views that had been expressed by Ryanair, Aer Lingus and other airlines on the likelihood of a combination involving Aer Lingus, the CC noted that:

> "7.45 Third parties identified a number of features which could make Aer Lingus an attractive partner for a combination, including its strong financial position, its brand, its attractive slot portfolio and its position in the Irish market. Like Ryanair, however, third parties also identified a number of factors that could limit Aer Lingus's attractiveness, including the pension deficit, the relatively limited scale of Aer Lingus's long-haul operations and

> the size of the Irish market (in addition to the company's shareholder structure, see paragraph 4.29).
>
> 7.46 Several parties, including Aer Lingus, told us that, in the short to medium term, a transaction involving Aer Lingus and one of the three large European carriers (IAG, Air France/KLM and Lufthansa) was relatively unlikely, as they were occupied with recent acquisitions."

42. In considering the evidence of potential combinations involving Aer Lingus in the period since 2006, the CC concluded as follows:

> "7.55 We concluded that there was significant evidence from the period since 2006 that Aer Lingus has wanted to pursue inorganic growth as part of its commercial policy and strategy. The internal documents of Aer Lingus suggested that in 2011 Aer Lingus reached the conclusion that an acquisition by one of the large European network carriers was unlikely to take place. As set out in paragraphs 7.10 and 7.47, we are unable to observe what discussions regarding potential combinations would have taken place since 2006 in the absence of Ryanair's minority shareholding. However, the discussions that have taken place while Ryanair has had its minority shareholding, although not ultimately pursued, suggest that possible combinations arise and other airlines have considered Aer Lingus to be a credible partner. Furthermore, the evidence from Aer Lingus's discussions with [✂] and [✂] about the terms of these possible combinations indicated that Ryanair would be likely to be able to exert influence over the execution of significant transactions in which Aer Lingus might be involved."

43. In considering whether there were any other factors which might affect the likelihood of Aer Lingus being involved in combinations absent Ryanair's minority shareholding, the CMA assessed the significance of the Irish Government's 25.1% stake in Aer Lingus:

> "7.57 The Irish Government has announced its intention to sell its shares in Aer Lingus, although it said that the disposal of its shares would only take place at the right time, under the right conditions and at the right price (see Appendix C). We considered that the sale of the Irish Government's shareholding would increase the likelihood of Aer Lingus being involved in a combination with another airline absent Ryanair's minority shareholding, given the possibility that the shareholding could be acquired by another airline."

44. Further detail regarding the Irish Government's position is set out in Appendix C to the Final Report, notably that it expected to take into account the following considerations when deciding whether to sell its shares:

> "(a) ensuring competition is maintained to provide travellers with a choice of airlines for travel to and from Ireland;

(b) maintaining good connectivity for Ireland through strong links with Heathrow for onward connections and, separately, the continuance of direct transatlantic services; and

(c) obtaining a good price for the shareholding to provide value for the taxpayer."

45. The CC's key conclusions on this issue are set out in paras. 7.80 to 7.84:

"*Conclusion on the impact of Ryanair's minority shareholding on Aer Lingus's ability to combine with another airline*

7.80 We found that as a consequence of its minority shareholding Ryanair would be able to impede another airline from acquiring full control of Aer Lingus, and that its shareholding would be likely to be a significant impediment to Aer Lingus's ability to merge with, enter into a joint venture with or acquire another airline. This would be likely to act as a deterrent to other airlines considering combining with Aer Lingus. The more significant the transaction being contemplated (all other things being equal), the more likely Ryanair's shareholding would be to impede—or give Ryanair the ability to prevent—the combination from taking place. As discussed in paragraphs 7.16 to 7.22, we considered that Ryanair would have the incentive to use its influence to oppose any combination which it expected to strengthen Aer Lingus's effectiveness as a competitor, or make it harder to acquire the company itself.

7.81 Furthermore, we found that, in the absence of Ryanair's minority shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable future, in a significant acquisition, merger or joint venture. In reaching this view, we took into account the general trend of consolidation in the airline industry and the need to exploit economies of scale and maintain or reduce costs per passenger, which suggested that a combination involving an airline of Aer Lingus's size was likely. We also took into account Ryanair's view that Aer Lingus would be unlikely to have an independent long-term future, and Aer Lingus's view of the importance of scale to its future competitiveness. The Irish Government's stated intention to sell its shares in Aer Lingus at the right time and at the right price also made it more likely that Aer Lingus would be involved in a combination absent Ryanair's minority stake, given the change in ownership this implied.

7.82 The views expressed to us by other airlines did not support Ryanair's assertion that Aer Lingus was an inherently unattractive partner, and we considered that while the characteristics of its network might limit its attractiveness to certain airlines, these factors might impact upon the consideration involved in any transaction that took place rather than act as an absolute deterrent. We also considered that the airline's strong financial position and access to Heathrow would be attractive to potential partners.

7.83 The extent to which we can draw inferences from evidence of discussions between Aer Lingus and other airlines in the period since 2006 is limited because of the presence of Ryanair's minority shareholding throughout this period. Nevertheless the discussions between Aer Lingus and other airlines which had taken place in the period since 2006 suggested to us that possible combinations arise and other airlines considered Aer Lingus to be a credible partner for a combination. While the evidence that we received suggested that it was relatively

unlikely that a large European airline would seek to acquire Aer Lingus in the immediate future (and so going forward a merger or acquisition by Aer Lingus was the most likely form of combination), we considered that an acquisition remained a possibility in the longer term, and might have taken place in the period since 2006 absent Ryanair's minority shareholding.

7.84 The scale of any efficiencies—in particular economies of scale—arising from a combination would necessarily depend on the identity of the acquirer and the specific nature of the transaction being contemplated. Nevertheless, in our view Aer Lingus was likely to be at a competitive disadvantage because of its relatively small size, and inorganic growth would be required in order for it to remain competitive. A consequence of Ryanair's shareholding impeding or preventing Aer Lingus from combining with other airlines would be to limit Aer Lingus's ability to increase the scale of its operations and reduce its unit costs. This would have the potential to weaken significantly the effectiveness of the competitive constraint Aer Lingus will impose on Ryanair relative to the counterfactual. Certain synergies would be likely to arise from a substantial combination between Aer Lingus and another airline that would not be achievable via looser forms of cooperation." (footnotes omitted)

46. Having considered Ryanair's incentives, and each of the five mechanisms set out at para. 38 above, the CC set out its overall conclusions on the effects of the acquisition of Ryanair's minority shareholding on Aer Lingus's commercial policy and strategy at paras. 7.126 to 7.130:

"*Conclusions on the effects of the acquisition on Aer Lingus's commercial policy and strategy*

7.126 We found that Ryanair's minority shareholding would have affected or would affect Aer Lingus's commercial policy and strategy and inhibit its overall effectiveness as a competitor, albeit without giving Ryanair direct influence over the company's competitive offering on a day-to-day basis. Given the closeness of competition between Ryanair and Aer Lingus and its stated aim of acquiring the entirety of Aer Lingus, we found that Ryanair had an incentive to use its influence to weaken Aer Lingus's effectiveness that would not exist for a shareholder which was not in competition with Aer Lingus.

7.127 In reaching our conclusion, we formed the view that the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a joint venture with or acquiring another airline was of particular significance. We identified a number of ways in which the minority share-holding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines considering combining with Aer Lingus, or by allowing Ryanair to block a special resolution, restricting Aer Lingus's ability to issue shares. We found that absent Ryanair's shareholding, it was likely that Aer Lingus would have been involved in the period since 2006 or would be involved in the foreseeable future in the trend of consolidation observed across the airline industry through an acquisition, merger or joint venture. By impeding or preventing Aer Lingus from combining with other airlines, Aer Lingus's ability to increase the scale of its operations and reduce its unit costs would be limited. This would be likely to have reduced or to reduce the effectiveness of the competitive constraint Aer

Lingus could impose on Ryanair on routes between Great Britain and Ireland relative to the counterfactual.

7.128 In addition, we found that Ryanair's minority shareholding could limit the commercial policies and strategies available to Aer Lingus by limiting its ability to manage effectively its portfolio of Heathrow slots. We also took account of the possibility, albeit relatively unlikely, that Ryanair would, in certain circumstances, be able to pass or defeat an ordinary resolution at an Aer Lingus general meeting (if other share-holders voted in the same way as Ryanair, the Irish Government were to abstain on a vote, or the Irish Government's shareholding was dispersed). Given Aer Lingus's existing balance sheet strength and forecast financial performance, we found it unlikely that Aer Lingus would need to raise equity in the medium to long term other than in relation to a corporate transaction or to optimize its corporate structure. However, we note that unforeseen events might arise which would require Aer Lingus to raise equity and noted that Ryanair would be able to impede it doing so by blocking a special resolution. The minority shareholding would also increase the likelihood of Ryanair mounting further bids for Aer Lingus relative to the counter-factual.

7.129 We found that the extent of the impact of Ryanair's minority shareholding on Aer Lingus's effectiveness as a competitor was likely to be significant. The importance of scale to airlines was clear from our discussions, with Ryanair itself highlighting Aer Lingus's small scale as an impediment to its long-term survival. We identified a number of significant synergies that would be likely to arise from a combination between Aer Lingus and another airline, over and above those that might arise via looser forms of cooperation. Given wider trends in the airline industry, we would expect the pressure on Aer Lingus's cost base—and the need for additional scale to remain competitive—to become stronger over time. In addition, given the strategic importance of Aer Lingus's Heathrow slots and the importance of its Heathrow services to its UK operations, there could be a significant impact on Aer Lingus arising from its reduced ability to manage its slot portfolio in the context of optimizing the network or timetable of its UK routes. Additional bids by Ryanair for the out-standing shares in Aer Lingus could significantly disrupt Aer Lingus's commercial policy and strategy. Although relatively unlikely, if Ryanair were to achieve a majority at a general meeting, the implications for Aer Lingus's competitive capability could be very significant because of the importance of company decisions put to a shareholder vote by ordinary resolution.

7.130 Overall, while we could not predict with certainty the specific mechanism by which a harmful competitive effect would manifest itself (or would have done in the period since 2006), we formed the expectation, based on the evidence that we had gathered and the various mechanisms that we had assessed, that either in the period since 2006 or in the foreseeable future, Aer Lingus's commercial policy and strategy would have been impeded or would be impeded by Ryanair's minority shareholding. We concluded that the constraints on Aer Lingus's ability to implement its own commercial policy and strategy were likely to make Aer Lingus a less effective competitor than it would otherwise be across its network generally, and specifically as a rival to Ryanair on routes between Great Britain and Ireland." (footnotes omitted)

47. In its conclusions on the SLC test, at paras. 7.176 to 7.188, the CC summarised its earlier findings in section 7, noting in particular the potential for Ryanair's

minority shareholding to impede or prevent Aer Lingus entering into a combination with another airline:

> "7.178 We formed the view that one mechanism of particular significance that would affect Aer Lingus's commercial policy and strategy was the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a joint venture with or acquiring another airline. We identified a number of ways in which the minority shareholding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines considering combining with Aer Lingus, or by allowing Ryanair to block a special resolution, restricting Aer Lingus's ability to issue shares (which might be required for a corporate transaction or to optimize its capital structure). We found that absent Ryanair's shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable future, in the trend of consolidation observed across the airline industry. Such consolidation has the potential to provide significant benefits to Aer Lingus by increasing its scale and reducing its unit costs, thus enabling it to become a stronger and more effective competitor with Ryanair in the relevant market relative to the counterfactual."

48. The CC's overall conclusion is set out at 7.188:

> "We conclude that Ryanair's acquisition of a 29.82 per cent shareholding in Aer Lingus has led or may be expected to lead to an SLC in the markets for air passenger services between Great Britain and Ireland."

Remedies

49. Having outlined the CC's analytical framework for the assessment of remedies and the duty of sincere cooperation with the institutions of the EU pursuant to Article 4(3) of the Treaty on the European Union ("TEU"), the CC proceeded to consider three remedy options on which it had consulted in its notice of possible remedies, published on 30 May 2013, namely full divestiture, partial divestiture or partial divestiture accompanied by behavioural remedies.

50. At paras. 8.19 to 8.49, the CC specifically considered certain remedies proposed by Ryanair. The CC's summary of the remedies offered by Ryanair is set out below:

> "8.22 Ryanair initially proposed the following remedies:
>
> (a) an undertaking (or order) preventing it from voting against an acquisition of Aer Lingus by another EU airline, including by means of a scheme of arrangement or a transaction under the Cross-Border Mergers Directive. Ryanair said that this could remove any concern that it could prevent Aer Lingus from being acquired by another airline and was a major concession as

it could expose it to the risk of being squeezed out under a scheme of arrangement;

(b) an undertaking (or order) preventing it from voting against an acquisition by Aer Lingus, including by public offer or a scheme of arrangement, involving another EU airline (if put to a vote), as proposed by the Aer Lingus board.

(c) an undertaking (or order) preventing it from voting against a disapplication of pre-emption rights outside the EU. Ryanair said that this could remove any concern arising from its ability to prevent Aer Lingus from issuing new shares other than on a pre-emptive basis; Ryanair said that this could remove any concern that it could prevent Aer Lingus from acquiring another airline;

(d) an undertaking (or order) preventing it from voting against Aer Lingus's board on the disposal of Aer Lingus's slots at London Heathrow. Ryanair said that this could remove any concern that it may have the ability to block the disposal of these slots in the future.

8.23 In Ryanair's view, undertakings of this type would raise no specification, circumvention, or enforcement risks, and as the minority shareholding involved no integration or cooperation of the two businesses, there was no risk of behavioural undertakings distorting market outcomes.

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

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

(b) an undertaking (or order) to support a scheme of arrangement involving another EU airline if shares representing more than 50 per cent of Aer Lingus's issued share capital were voted in favour at the shareholders' meeting.

8.25 Finally, Ryanair offered two further additional remedies:

(a) an undertaking (or order) to extend the remedies set out in paragraphs 8.22 and 8.24 to non-EU airlines, should it at any point in future become legally permitted for a non-EU airline to hold more than 50 per cent of Aer Lingus's shares;

(b) an undertaking (or order) not to oppose the disapplication of pre-emption rights in the context of a combination between Aer Lingus and another airline."

51. Ryanair emphasised in these proceedings that its proposed remedies included an undertaking that would have prevented it from voting against an acquisition of Aer Lingus by another EU airline, such as IAG.

52. However, the CC concluded that Ryanair's proposed remedies would not be effective in addressing the SLC, notably because they were limited to certain forms of combination and did not address a number of other potential forms:

> "8.46 In a dynamic and uncertain sector such as the airline industry, it is inherently difficult to predict the specific forms of combinations or other matters of strategic importance that might come before the Aer Lingus shareholders in AGMs or EGMs in the future. In Section 7 we found that Ryanair's shareholding constrained Aer Lingus's ability to implement its own commercial policy and strategy in a variety of ways. This makes it inherently difficult to design behavioural remedies that would cater for all eventualities. Looking specifically at the issue of combinations, whilst Ryanair's proposed remedies seek to address some of our concerns regarding certain forms of combinations by way of a scheme of arrangement or general offer, they do not address other forms of combination available to Aer Lingus and potential partners and would, in effect, restrict Aer Lingus's and its potential partner's choice of combination.
>
> 8.47 We also conclude that Ryanair's continued presence on the share register under certain forms of combinations would be likely to deter potential partners proceeding due to their reluctance to accept Ryanair as a significant minority shareholder, the residual uncertainty and execution risk associated with the measures, and/or their perceived risk of Ryanair using its shareholding to mount a further bid for control of Aer Lingus. We note that Ryanair has said that it still wants to acquire Aer Lingus (see paragraph 3.11).
>
> 8.48 We considered whether these concerns could be addressed by means of amendments to Ryanair's proposed remedies (such as reducing the applicable acceptance level) or imposing a wider prohibition on voting or application of Ryanair's rights as a shareholder. We took the view that any such amendments could not address all our concerns regarding the range of potential future scenarios and the uncertainty of application of these measures. We considered that a wider prohibition (where, for example, Ryanair was precluded from voting or its shareholding was placed with a hold separate manager or in a voting trust) would be likely to result in a significant distortion to Aer Lingus's corporate governance as a result of having a large non-participative shareholder. Our view is that such a distortion would compromise Aer Lingus's effectiveness as a company and competitor to Ryanair.
>
> 8.49 In light of the above assessment, we conclude that the remedies proposed by Ryanair would not be effective in addressing the SLC." (footnotes omitted)

53. For each of its own remedy options, the CC proceeded to consider the question of whether such remedies were effective in addressing the SLC and the resulting

adverse effects. Having done so, it concluded that only full or partial divestiture would be effective remedies. It then went on to consider the proportionality of the effective remedies that it had identified, concluding that a partial divestiture to reduce Ryanair's stake in Aer Lingus to 5% would be an effective and proportionate remedy.

54. The CC considered how its chosen remedy should be implemented at paras. 8.122 to 8.125 and Appendix K of the Final Report. Having considered the divestiture package and the risks associated with its disposal, the nature of the divestiture process (and the identity of the party conducting that process), issues relating to purchaser suitability, and the timescale that should be allowed for any disposal to take place, the CC decided as follows (at para. 8.123):

> "(a) A Divestiture Trustee should be appointed from the outset to sell the divestiture package to suitable purchasers.
>
> (b) The divestiture may be implemented via an upfront buyer process to a single purchaser or via a stock market placement of the shares, or by another process identified by the Divestiture Trustee and approved by the CC.
>
> (c) The Divestiture Trustee will review whether a purchaser satisfies the CC's suitability criteria (see Appendix K), and will consult with the CC as appropriate.
>
> (d) Ryanair may nominate parties to act as Divestiture Trustee for approval by the CC. The CC may appoint its own choice of Divestiture Trustee if Ryanair is unable to identify appropriate candidates within specified timescales. Ryanair is responsible for remuneration of the Divestiture Trustee.
>
> (e) The divestiture period is [✂] months from Final Determination."

PART 4: DEVELOPMENTS SINCE THE FINAL REPORT

Ryanair's challenge to the Final Report

55. On 23 September 2013, Ryanair filed its Notice of Application seeking review of the Final Report pursuant to section 120 of the Act. The Tribunal dismissed all six of Ryanair's grounds of challenge in the 2014 Judgment, which is summarised briefly below:

    (1) Ryanair submitted that the CC's decision to require divestiture was contrary to the EU law duty of sincere cooperation because of the ongoing proceedings at EU level, as it would undermine any subsequent ruling by

the European Commission that Ryanair is entitled to acquire the whole of Aer Lingus. For the reasons set out in the 2014 Judgment, the Tribunal concluded that the CC's decision to impose a divestiture order did not breach the duty of sincere cooperation (see paras. 89 – 114). In particular, the Tribunal rejected Ryanair's submission that it is an EU objective that an acquisition, once cleared by the European Commission under the EUMR, does in fact take place.

(2) Ryanair submitted that it was procedurally unfair to keep secret from Ryanair material allegations and evidence which the CC relied upon in reaching its decision, in particular the identity of certain airlines that had provided evidence to the CC during its investigation. The Tribunal concluded that, both globally and in relation to the specific matters relied on by Ryanair, Ryanair was informed of the gist of the case which it was required to answer, and was in a position to make worthwhile representations in answer to the case it had to meet (see paras. 115 – 144).

(3) Ryanair submitted that the CC had erred in law by failing to appreciate the need for a causal connection between Ryanair's acquisition of material influence over Aer Lingus and the alleged SLC. Ryanair submitted that the CC had wrongly relied on various ways in which Ryanair's minority stake may result in an SLC but which have nothing to do with its alleged material influence. The Tribunal concluded that the CC had applied the correct approach, by seeking to compare the situation where the relevant merger situation prevailed with one where it did not (see paras. 145 – 154). This exercise did not require the CC to limit itself to the examination of competitive effects which are causally connected to the mechanism by which two or more enterprises cease to be distinct, in this case Ryanair's ability to exercise material influence over the policy of Aer Lingus.

(4) Ryanair submitted that the CC's SLC finding was irrational, as it was based on highly speculative theories of harm, and was unsupported by the evidence. Having considered the elements of the CC's SLC finding, the Tribunal found that the CC's conclusion that there was an SLC was one it

was entitled to reach, and the Tribunal found no basis for overturning this conclusion on the grounds put forward by Ryanair (see paras. 155 – 175).

(5) Ryanair submitted that the CC's divestiture remedy and the immediate appointment of a Divestiture Trustee were disproportionate, given Ryanair's willingness to offer undertakings which were equally (or more) effective but less intrusive, and less destructive of Ryanair's interests. The Tribunal rejected Ryanair's submissions, finding that the CC acted in a reasonable and proportionate manner in rejecting Ryanair's remedies proposals, and was entitled to impose a remedy which would result in no realistic prospect of an SLC materialising (see paras. 175 – 221).

(6) Ryanair submitted that the CC did not have jurisdiction to impose requirements on Ryanair, an Irish company which does not carry on business in the UK. The Tribunal concluded that the CC did not err in its assessment of its jurisdiction to impose a remedy on Ryanair on the basis of the material before it (see paras. 222 – 239).

56. Accordingly, the Tribunal unanimously dismissed Ryanair's application for review. On 3 April 2014, Ryanair sought permission to appeal the 2014 Judgment on three grounds. The Tribunal having granted permission in its ruling of 23 April 2014 ([2014] CAT 6) in respect of the first and third grounds of appeal, which concerned procedural fairness and the duty of sincere cooperation under Article 4(3) TEU respectively, Ryanair renewed its application in respect of its second ground before the Court of Appeal. On 17 July 2014, the Court of Appeal granted permission to appeal in relation to the second ground, which concerned the need for a causal connection between Ryanair's acquisition of material influence and the alleged SLC. The appeal was heard over two days from 26 to 27 November 2014.

57. On 12 February 2015, the Court of Appeal dismissed all three grounds of Ryanair's appeal, upholding the Tribunal's 2014 Judgment. While the Court of Appeal refused Ryanair permission to appeal to the Supreme Court, Ryanair renewed the permission application on 12 March 2015. The Supreme Court refused Ryanair's application on 13 July 2015.

58. In light of the ongoing appeals, Ryanair continues to hold its minority stake in Aer Lingus although its partial divestiture remains a very real prospect.

The Aer Lingus pension dispute

59. The Final Report records, at para. 11 of Appendix B, that Aer Lingus's pension deficit was estimated to be €779 million as at 31 December 2012 on a minimum funding standard basis. Ryanair considered that this was a major deterrent to any potential bidder for Aer Lingus, as is noted at para. 7.44 of the Final Report.

60. Aer Lingus's pension deficit issues appear to have been resolved in the second half of 2014. Indeed, IAG specifically refers to the resolution of certain pension issues at Aer Lingus as having influenced its decision to make the offer (see, further, para. 72 below).

IAG's bid for Aer Lingus

61. IAG's bid is central to these proceedings as it is that bid which Ryanair says constitutes a material change of circumstances pursuant to section 41(3) of the Act. Therefore, we summarise below the offers made by IAG for Aer Lingus and the relevant terms of the formal offer.

62. On 14 December 2014 (i.e. after the 2014 Judgment of the Tribunal upholding the Final Report, but before the Court of Appeal judgment on Ryanair's further appeal), IAG announced publicly a possible offer for Aer Lingus. IAG made a revised approach on 9 January 2015. However, both offers were rejected by the Aer Lingus board.

63. On 26 January 2015, IAG announced that it had made a further proposed offer for Aer Lingus. The offer was conditional on, amongst other things, confirmatory due diligence, the recommendation of the board of Aer Lingus and the receipt of irrevocable commitments from Ryanair and the Minister for Finance of Ireland to accept the offer. The Aer Lingus board recommended the offer the following day.

64. Between February and 26 May 2015, IAG negotiated with the Irish Government "legally binding commitments on direct air services" on the London Heathrow/Ireland routes, called "Connectivity Commitments" and set out in the

IAG Rule 2.5 announcement of an intention to make a recommended cash offer dated 26 May 2015. These commitments imposed greater obligations on the combined Aer Lingus/IAG entity to operate on the London Heathrow /Ireland routes than existed previously. The Irish Government announced that it was willing to sell its shares to IAG, subject to the terms of the offer, on 28 May 2015. Under the Irish Takeover Rules, IAG was obliged to issue an offer for Aer Lingus within 28 days following its Rule 2.5 announcement.

65. On 11 June 2015, the CMA took the MCC Decision and notified the Final Order to Ryanair, both of which are detailed further below.

66. On 19 June 2015, IAG posted its formal, legally binding, offer document. This offer is conditional upon, among other things:

    (1) IAG having received valid acceptances in respect of not less than 90% of the relevant Aer Lingus shares;

    (2) the general principles of the proposed disposal by the Minister for Finance of Ireland, which were approved on 28 May 2015;

    (3) the Minister for Finance of Ireland having validly accepted the offer in respect of all of the relevant Aer Lingus shares held by him; and

    (4) Ryanair's agreement to sell its stake to IAG (if not required to do so).

    This offer expires on 16 July 2015 (although IAG has the option of extending that deadline but not beyond 18 August 2015 pursuant to Rules 31.2 and 31.6 of the Irish Takeover Rules, referred to at para. 24 above).

The MCC Decision

67. As mentioned above, the CMA decided in its MCC Decision of 11 June 2015 that there had been no material change of circumstances since its Final Report requiring it to reach a different conclusion on remedies. In this section, we explain the process which led to the MCC Decision, as well as the CMA's reasoning.

68. On 12 February 2015, Ryanair made an application to the CMA requesting that it consider whether there had been a material change of circumstances since the Final Report. Ryanair's principal ground for contending that there had been a material change of circumstances within the meaning of section 41(3) of the Act was that IAG had made an approach to acquire Aer Lingus. As subsidiary grounds, Ryanair also pointed to Aer Lingus's recommendation of the IAG offer, the Irish Government's position in relation to the IAG offer, trade union opposition to an IAG takeover and the resolution of the pension issues referred to at paras. 59 - 60 above.

69. Ryanair contended that the IAG bid amounted to a material change of circumstances which undermined the principal theory of harm in the Final Report, and that the CMA was therefore required to reach a new decision on whether and what remedies were now appropriate. In particular, Ryanair made the following points:

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

70. Ryanair submitted that the appropriate framework for the CMA's review was as follows:

> "Where, following investigation, the CMA concludes there has been a material change of circumstances since the Final Report, the CMA may only impose remedies that are necessary and proportionate in light of those changed circumstances."

71. On 3 March 2015, the CMA issued a notice inviting comments on whether or not there had been a material change of circumstances since the preparation of the Final Report, or any other special reason, such that the CMA should take remedial action other than as proposed in the Final Report. The CMA received

responses from Aer Lingus, Ryanair, the Department of Transport, Tourism and Sport of Ireland, and IAG. All respondents, except Ryanair, argued that there had been no material change of circumstances.

72. In its response of 11 March 2015, IAG explained that it first seriously contemplated its proposed acquisition of Aer Lingus in August 2014, bearing in mind the prospect of (a) Ryanair being required to divest its stake in Aer Lingus (down to no more than 5%) and (b) the resolution of certain pension issues at Aer Lingus. IAG also noted that its bid was conditional on, among other things, the receipt of irrevocable commitments from Ryanair (29.82% shareholding) and the Minister for Finance of Ireland (25.11% shareholding) to accept the offer. IAG then set out its reasons for considering that there had been no material change of circumstances:

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

73. IAG also made certain requests in relation to the appointment of a Divestiture Trustee:

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

Ryanair sought to rely on IAG's request that the CMA refrain from appointing a Divestiture Trustee to sell down Ryanair's stake in its challenge to the Final Order, which is considered in the next section.

74. The Department of Transport, Tourism and Sport of Ireland did not consider that there had been any material change of circumstances. In its response of 16 March 2015, it also explained that the Irish Government's position had not changed since the Final Report:

> "In its submissions and evidence to the [CC], the Department set out the Irish Government's position on its shareholding in Aer Lingus and, in particular, the main considerations that would be taken into account in making any decision on a sale of its shareholding. These were summarised by the CC in paragraph 36 of Appendix C to its Report as:
>
> *(a) "Ensuring competition is maintained to provide travellers with a choice of airlines for travel to and from Ireland;*
>
> *(b) Maintaining good connectivity for Ireland through strong links with Heathrow for onwards connections and, separately, the continuance of direct transatlantic services; and*
>
> *(c) obtaining a good price for the shareholder to provide value for the taxpayer".*
>
> I confirm that this remains the Government's position and that the Government remains committed to a "two-airline" policy in Ireland. The considerations set out above are the criteria against which the Government is currently considering the IAG proposal.
>
> I also confirm that it remains the position of the Government that it is unlikely to sell its shareholding in Aer Lingus while Ryanair continues to be a significant minority shareholder as set out in paragraph 37 of Appendix C and paragraph 4.25 of the Report."

75. Ryanair filed, on 1 April 2015, observations on the responses to the CMA's consultation on a material change of circumstances. Ryanair opened its submission with the following summary of why it disagrees with the other respondents to the consultation:

> "IAG, Aer Lingus, and the Department of Transport, Tourism and Sport wrongly contend, in the face of compelling evidence to the contrary, that there has been no material change of circumstances since the [CC]'s Final Report … Yet, the very thing that the [CC] said was unlikely to happen so long as Ryanair retained its minority shareholding has in fact happened: another airline has announced its intention to acquire Aer Lingus. It is impossible to assert that these events could be anything other than material to the conclusions reached in the Final Report."

76. The CMA published its Provisional Decision of Possible Material Change of Circumstances on 17 April 2015. The CMA provisionally concluded that there were no material changes of circumstance that materially affected the CC's

findings such that it was required to consider remedial action that is different from that set out in the Final Report. Therefore, the CMA set out its intention to implement the remedial action identified in the Final Report in accordance with its duty under section 41 of the Act.

77. The CMA also consulted on its Provisional Decision, and received responses from Aer Lingus and Ryanair.

78. The CMA's approach to the review was to ask whether "*there have been any changes in circumstance that materially affect the analysis and conclusions in the* [Final] *Report*" such that the CMA should "*depart from its conclusions on remedies set out in the* [Final] *Report*" (paras. 15 and 51, MCC Decision).

79. The CMA recorded Ryanair's view that IAG's bid undermines the basis for a forced divestiture and that the passing of time constitutes a material change of circumstances (paras. 26 – 32, MCC Decision). The CMA also recorded the position of Aer Lingus, IAG and the Irish Government (paras. 33 – 46), before setting out Ryanair's response to those third parties' views (paras. 47 – 48) and summarising the responses to its Provisional Decision (paras. 49 – 50).

80. The CMA then set out its assessment of Ryanair's arguments (paras. 53 – 73, MCC Decision). Emphasising IAG's evidence that it had made its bid bearing in mind the CMA's divestiture remedy and on the condition that it would be able to acquire Ryanair's shareholding, the CMA found as follows:

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

81. The CMA went on to consider the CC's various findings in the Final Report and found that they were consistent with IAG's decision to make a bid, in particular that:

(1) a combination between Aer Lingus and another airline was likely (para. 58, MCC Decision); and

(2) Ryanair would have both the ability and the incentive to impede such a combination (paras. 59 – 61, MCC Decision).

82. The CMA also considered whether the "real" obstacles to a bid for Aer Lingus had been the position of the Irish Government and/or other issues such as Aer Lingus' pension fund. Given that the Irish Government had considered the bid with reference to the same criteria as it had highlighted previously, and did not intend to sell whilst Ryanair remained a substantial shareholder (a sale by Ryanair being a condition of the IAG bid), the CMA found that there had been no material change of circumstances in that regard (paras. 63 – 64, MCC Decision). Indeed, by the time the MCC Decision was published, the Irish Government had decided to accept IAG's offer (para. 14 of the MCC Decision). The CMA also made the following more general observations:

> "66. We recognise that there may be a range of factors which influence potential bidders. We do not consider, however, that any of the factors raised by Ryanair in support of an MCC demonstrate that Ryanair's shareholding in Aer Lingus was anything other than a significant impediment to Aer Lingus's ability to compete, through a sale to or combination with another airline. Even if the need to secure agreement from the Irish government, along with other matters such as the resolution of certain pension issues at Aer Lingus, were relevant considerations for some third parties considering a combination with Aer Lingus, this does not undermine the CC's finding that Ryanair's shareholding was likely to impede or prevent Aer Lingus combining with other airlines and so limit its ability to pursue its independent commercial policy and strategy.
>
> 67. Given the above assessment, we decided that the announcement by IAG of its intention to make an offer, and the Irish government's consideration of it in accordance with the criteria noted during the inquiry, do not materially affect the CC's findings in the Report and therefore do not amount to a change in circumstances that would cause the CMA to reconsider implementing the remedies set out in the Report."

83. The CMA concluded that the IAG bid had not demonstrated that the CMA's chosen remedy was unworkable; only that there were additional practical points which would be dealt with in drafting the Final Order:

> "68. Finally, we do not consider that the comments made by IAG, Aer Lingus and Ryanair on the execution of the remedies identified in the Report demonstrate an MCC. We did not consider that the comments showed an inconsistency between the CC's decision, including in relation to remedial action, and the IAG bid or how it might take effect. Rather, we consider that these comments are made with specific regard to the practicalities around the timing and structure of the proposed IAG offer and how it could be accommodated within the Divestiture Trustee's mandate. Therefore we consider that these factors do not constitute an MCC. We assessed these comments in the context of proposed changes to the proposed Final Order consulted on in November 2013. We published a working paper on our website on 17 April 2015 that looked at these comments in further detail together with an amended proposed Final Order upon which we invited comments."

84. The CMA also concluded, at paras. 69 – 71 of the MCC Decision, that other developments in the market highlighted by Ryanair did not amount to a material change of circumstances either.

The Final Order

85. Having rejected Ryanair's various arguments that there had been a material change of circumstances, the CMA decided to make the Final Order on the same date that the MCC Decision was published.

86. Prior to the Final Order being made, the CC had consulted on its terms both informally and formally with the formal consultation running for 30 days from 5 November 2013. Following the 2014 Judgment, the CC specifically invited comments on the draft Final Order from Ryanair on 18 March 2014. In its response, Ryanair asked the CC not to make a final order while the proceedings arising from the Final Report remain ongoing, including the appeal to the Court of Appeal. The CMA then notified Ryanair, on 21 May 2014, that it had decided it would be "*inappropriate to proceed to the implementation of a Final Order until such time as the Court of Appeal has ruled on Ryanair's application*". The CMA further noted that it intended to re-visit this decision following the conclusion of matters in the Court of Appeal.

87. Following the Court of Appeal's judgment rejecting Ryanair's appeal on 12 February 2015, Ryanair wrote to the CMA requesting that it not seek to impose a Final Order while: (a) it considers whether there has been a material change of circumstances; and (b) the litigation in this matter is unresolved. The CMA responded on 17 February 2015 inviting Ryanair to comment on the draft Final Order at this stage. However, by letter dated 20 February 2015, Ryanair declined to comment and stated that it would be inappropriate for the CMA "*to seek to finalise the terms of an Order, or to consult on such terms, when it is in the process of reconsidering its divestment decision as a whole in light of the material change of circumstances*" for which Ryanair contends.

88. On 17 April 2015, the CMA published a Working Paper in relation to comments received on the draft Final Order. The Working Paper focusses on Ryanair's arguments that the CMA's order could not be implemented in the form envisaged by the Final Report. It also recorded the views of other parties on issues such as the impact of the draft Final Order on the possible IAG offer. At para. 28 of the Working Paper, the CMA noted IAG's preference (referred to at para. 73 above) that the CMA refrain from appointing a Divestiture Trustee at this stage to effect the sale of the majority of Ryanair's shareholding.

89. The CMA considered that many of Ryanair's comments arose from a perceived lack of flexibility in the draft Final Order and, thus, the CMA re-examined in particular the terms of the Divestiture Trustee Mandate and emphasised, at para. 42 of the Working Paper, the flexibility that had been built into a number of the key clauses:

> "(a) First, the Divestiture Trustee would be directed by the CMA in the first instance to consider the most appropriate divestiture process by conducting all reasonable enquiries, including holding one meeting with Ryanair and one with Aer Lingus.
>
> (b) Second, the Divestiture Trustee shall consult with the CMA on the most appropriate divestiture process and shall not take any action without the written approval of the CMA.
>
> (c) Third, where the Divestiture Trustee recommends disposal by means of an upfront buyer process, the CMA shall be consulted and approve such purchasers in advance.

> (d) Fourth, the Divestiture Trustee shall comply with any written directions or instructions issued to it by the CMA and can seek written directions or instructions from the CMA in order to assist it in the fulfilment of the Divestiture Trustee Obligation.
>
> (e) Fifth, in terms of timing, if the CMA considers it appropriate and necessary, in the light of circumstances at the time, to defer the appointment of the Divestiture Trustee, the Divestiture Trustee would not need to be appointed immediately upon commencement of the Final Order. Further, the definition of the divestment period allows for its possible extension by the CMA. For example, should Ryanair seek the CMA's consent to enter into an irrevocable commitment to sell its shareholding in the context of a public bid for Aer Lingus, the CMA could consider whether there was a valid reason to defer the appointment of the Divestiture Trustee for a short period of time." (footnotes omitted)

90. In summary, the Final Order requires Ryanair to divest the ordinary shares it holds in Aer Lingus down to no more than 5% as per the Final Report (Article 3.1). Ryanair is also required to appoint a Divestiture Trustee in accordance with a procedure set out in Article 5 of the Final Order (Article 3.6). In particular, Ryanair was required to provide the CMA with a list of two or more potential Divestiture Trustees within 5 working days of the date of the Final Order. This date has since been extended to 8 July 2015. The role of the Divestiture Trustee is, in essence, to manage the sale of the shares; its specific functions are detailed in Article 6 and Annex 1 to the Final Order.

91. Following imposition of the Final Order, Ryanair wrote to the CMA on 15 June 2015 seeking a withdrawal of the Final Order in light of the Supreme Court application for permission to appeal the Court of Appeal's judgment and the present proceedings. Ryanair also informed the CMA of Ryanair's intention to seek interim relief if the Final Order was not withdrawn. The CMA responded by letter on 17 June 2015. While the CMA recognised in general terms the principle that it should not take irreversible steps while the Supreme Court application remained undecided, it stated that it intended to proceed with the process of appointing a Divestiture Trustee (with a mandate to sell Ryanair's shares) unless the Supreme Court granted permission to appeal in the interim. The Supreme Court refused permission to appeal on 13 July 2015.

PART 5: RYANAIR'S GROUNDS OF CHALLENGE

92. In this Part, we summarise Ryanair's grounds of challenge and set out our assessment and conclusions. As explained at para. 5 above, Ryanair's Notice of Application challenged the MCC Decision and Final Order on three grounds. However, prior to the hearing Ryanair informed the Tribunal that, in view of the CMA's decision not to require Ryanair to appoint a Divestiture Trustee while these proceedings were pending (and its application to the Supreme Court remained unresolved), it was unnecessary to pursue its application to the Tribunal for interim relief or Ground 3 "*at this stage*". We therefore deal only with Grounds 1 and 2.

93. Ground 1 asserts that section 41(2) of the Act requires the CMA to conduct a fresh assessment of the proportionality of the remedy proposed in its final report in light of the circumstances that pertain at the point when the remedies are imposed. Ground 2 challenges the CMA's assessment of the facts as not giving rise to a material change of circumstances. There is an overlap between Ground 1 and 2 in that it is argued that certain new circumstances, namely IAG's bid and its position on the appointment of a Divestiture Trustee, must be considered by the CMA either: (i) in the context of a fresh proportionality assessment under section 41(2); or (ii) as amounting to a material change of circumstances that would justify a departure from the remedy as out in the Final Report in its own right.

Ground 1: the proper legal test for considering a "material change of circumstances"

Ryanair's submissions

94. Ryanair developed this ground in the following way. The CMA, when reaching a decision under section 41(2) of the Act is required, pursuant to section 41(4), to impose remedies that are "reasonable and practicable". Since the divestiture remedy in question engages Ryanair's fundamental rights under Article 1 of the First Protocol of the European Convention on Human Rights ("A1P1"), the principle of proportionality must be respected (see: *Tesco v Competition Commission* [2009] CAT 6 at [137], which is set out within the *BAA* excerpt at para. 20 above). The Act envisages that circumstances may change between a

final report and the time at which remedies are imposed (section 41(3)). Therefore, according to Ryanair, when reaching a decision under section 41(2), the CMA has to consider what action (if any) would be proportionate in the circumstances that exist at the point in time when the remedies are imposed. Where the remedy would be disproportionate in light of the developments, it is that disproportionality which establishes the material change of circumstances.

95. The CMA erred in law by not adopting this approach, but considering instead whether there were changes in circumstances or other special reasons for the CMA to depart from its conclusions on remedies set out in the Final Report and whether there had been any changes in circumstances that materially affected the analysis and conclusions in the Final Report. In doing so, the CMA fettered its discretion by considering itself bound by the decision on remedies in the Final Report unless those findings had been contradicted by more recent events.

96. Further, Ryanair contends that the expression 'material change of circumstances' in section 41(3) should be given its ordinary meaning, informed by the context of the Act. A material change is a change that is relevant to the assessment of remedies and which could properly lead to a different remedies decision. Whether it in fact requires a different decision on remedies is a matter of judgment for the CMA. The CMA is therefore wrong in law when it construes a material change of circumstances as one which would lead to a different remedies decision. A material change of circumstances is not a change which necessarily requires one remedy or another, it simply obliges the CMA to investigate the matter. At the hearing, Ryanair clarified that it was no part of its challenge that the CMA had not conducted a full and proper investigation.

97. At the hearing, Lord Pannick summarised Ryanair's submissions on Ground 1 as follows:

> "… we say the remedy of divestment proposed in the report is now disproportionate by reason of the changed circumstances, either because those are material changes of circumstance on my interpretation or, in any event, because there are changes of circumstances which make the remedy disproportionate. The error of law by the CMA, in my submission, is in their assertion that there is no basis for reconsideration of remedies unless there is a material change of circumstances. The error is that it is the disproportionality of the remedy in the light of all the developments that

> informs whether there is a material change of circumstances, even if my friend's interpretation of 'material' is right. On our interpretation of material, there is plainly a material change of circumstance, and the remedy is disproportionate one. But however one looks at the matter, what the CMA cannot avoid is the need to consider whether, in the new circumstances the remedy remains a proportionate one." (Transcript page 24, lines 11-22)

98. Ryanair argues that the developments since the Final Report required the CMA to conduct a separate proportionality assessment. Where, on analysis, the remedy is no longer proportionate in light of the new circumstances, that is a material change of circumstances in its own right.

99. Ryanair draws particular support for this point from the submission by IAG in a letter to the CMA encouraging it to refrain from appointing a Divestiture Trustee (as envisaged in the Final Report) "*for the time being and instead to grant its written consent to Ryanair granting an irrevocable commitment to accept IAG's proposed offer in respect of the entirety of Ryanair's shareholding*" (see para. 73 above). This, Ryanair contends, suggests that a less onerous remedy than forced divestiture and the appointment of a Divestiture Trustee may suffice to address the SLC. To illustrate a less intrusive remedy, Ryanair points to those it proposed during the investigation whereby it undertook, among other things, to accept an offer for its shares in the event that more than 50% of shareholders in Aer Lingus accepted the offer (see paras. 50 - 52 above). It says this undertaking would have addressed the bid by IAG that was in fact made. Further, Ryanair says IAG's submission was not considered by the CMA as part of its MCC Decision.

The CMA's submissions

100. The CMA rejects Ryanair's contention that it erred in law. In its opinion, this ground is premised on a misreading of the statutory scheme (see Part 2 above), under which the CMA must take action consistent with its final report unless there is a material change of circumstances. Since the CMA had rejected Ryanair's argument that there had been a material change of circumstances or there was otherwise a special reason for deciding differently (the latter not being in dispute between the parties), it is required to implement the remedy identified in the Final Report, and in those circumstances there is no basis for any further re-assessment of the proportionality of the remedy outlined in that Report.

101. While a decision under section 41(2) is in one sense a separate legal decision in that it is made at a subsequent time under a different provision of the Act, it is wrong to characterise it as a fresh remedies decision which requires a fresh proportionality assessment. Ryanair's criticism that the CMA fettered its discretion by defaulting to its earlier decision on remedies fails to recognise the CMA's duty under the statutory scheme for consistency with the final report. Sections 41(2) and (4) do not trigger a fresh proportionality assessment unless the CMA identifies that there has been a material change of circumstances and on that basis decides to impose a different remedy from that identified in the report. In that scenario, the revised remedy must be both effective and proportionate in those materially changed circumstances, and it may well be that a fresh remedies decision involving a new proportionality assessment is required.

102. The CMA's view is that a "material" change of circumstances will (generally) be one which the CMA considers would lead to a different remedies decision. In its view, this is the natural meaning of the word "material" as being something which makes a difference to the decision in question; this interpretation is consistent with the final words of section 41(3) which relate to the category of special reasons for "otherwise … deciding differently".

Aer Lingus's submissions

103. Aer Lingus supports the CMA's interpretation of the statutory scheme. The Final Report encapsulates several months of detailed investigation of the effects of a merger and consideration of appropriate remedies. If nothing changes between the date of the final report and the final order, then there is no reason to revisit the remedies identified in that report. If circumstances do change in such a way that affects the CMA's analysis in the final report, the CMA should only depart from the remedies identified in the final report if and to the extent that the change in circumstances justifies a change in remedy. It would otherwise be perverse to discard analysis and conclusions which are the product of several months of investigation and – as is the case here – have been tested and upheld on appeal in the 2014 Judgment, and subsequently by the Court of Appeal.

104. Aer Lingus also notes that the use of the word "otherwise" in section 41(3) makes clear that the term material change of circumstances does not exist in the abstract but is a species of special reason for deciding differently. Aer Lingus pointed out that the CC's decision in July 2011 in BAA (BAA Market Investigation Consideration of possible material changes of circumstances) illustrates that it is possible to define the materiality threshold in section 41(3) in a variety of ways without making any difference to the substance of the analysis that the CMA is required to carry out:

> "31. We do not see that where a change of circumstance is 'material', a direct obligation to reach conclusions inconsistent with the report arises. Instead, we consider that if a change of circumstances is 'material', the CC has a discretion which it exercises using its best judgement (and subject to ordinary public law requirements).
>
> 32. We would note that even if a 'material' change of circumstance were, by definition a change of circumstance which led the CC to reach conclusions… which were inconsistent with the report, the effect of the test would not be any different. That interpretation would simply set a higher threshold of 'materiality'…"

The Tribunal's analysis and conclusions

105. According to Ryanair, the CMA erred in law in taking the approach that there is no basis for the reconsideration of the remedy unless there is a material change of circumstances. Instead, in its view, section 41(2) requires the CMA to conduct a fresh assessment of the proportionality of the remedy set out in its final report in light of the circumstances that pertain at the point when the remedies are imposed.

106. In the Final Report, the CC gave detailed consideration to what was an appropriate remedy in respect of the SLC it had found. The CC had regard to the need to achieve as comprehensive a solution as is reasonable and practical to the SLC and any adverse effects resulting from it, pursuant to section 35(4) of the Act (para. 8.1, Final Report). Ultimately, it decided that this required Ryanair to reduce its shareholding in Aer Lingus to no more than 5% and that the sale should be by way of a disposal conducted by a Divestiture Trustee. At that stage the CC carried out a proportionality assessment (paras. 8.113 – 8.121, Final Report). Ryanair challenged that assessment before the Tribunal in Ground 5 of its application in respect of the Final Report. The dismissal of this ground by the

Tribunal in the 2014 Judgment was not appealed by Ryanair to the Court of Appeal.

107. In the MCC Decision, the CMA did not undertake a fresh proportionality assessment in the light of its finding that there had been no material change of circumstances. We do not consider that the statutory scheme requires the CMA to conduct a fresh proportionality assessment when considering the implementation of the remedies it had already found to be proportionate in its final report. Section 41(3) requires that the action to be taken by the CMA shall be consistent with its decisions as included it its report, unless there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently. No special reason has been suggested in the present application. To require the CMA to undertake a fresh assessment in the absence of a material change of circumstances would go beyond the clear statutory provision and has the potential to lead to repeated challenges to the CMA when it comes to the stage when it takes action in accordance with the final report. In the present case, there has already been a challenge to the proportionality of the remedy identified in the Final Report, which has been dismissed.

108. The express requirement to take account of a material change of circumstances is a sufficient protection against the situation where a remedy may have been proportionate at the time of the final report, but circumstances have changed in such a way that that the remedy is no longer proportionate. We consider that, where the CMA has found a material change of circumstances, it is incumbent upon the CMA to assess the impact of such a change. It will not always follow, however, that a proportionality assessment is necessary. For example, the CMA may find that, as a result of the change of circumstances, there is no longer a relevant merger situation resulting in a SLC, thus a remedy should no longer be imposed and a proportionality assessment would be redundant. Where there is a material change of circumstances and the CMA is minded to impose a remedy, it would ordinarily be appropriate to conduct a fresh consideration of whether the remedy proposed is proportionate, particularly where the rights of others may be engaged.

109. In the context of the discussion of the correct interpretation of the word 'material' in 'material change of circumstances' within the meaning of section 41(3), at the hearing Ryanair and the CMA appeared to be broadly in agreement that a material change of circumstances is a change that could lead to a different remedies decision, albeit that in the CMA's view, a material change of circumstances generally would lead to a different remedies decision (Transcript page 34, lines 18-26). James Flynn QC, for Aer Lingus, put it in these terms: "*It does not matter whether you set the materiality threshold high or low, so long as in the ultimate analysis the CMA imposes the same remedies that it identifies in the final report, save to the extent to which changed circumstances or other special reasons justify deciding differently*" (Transcript page 63, lines 24-27).

110. As regards the meaning of a material change of circumstances, we consider that a change can be material even if it would not necessarily lead to a change in the remedy. The first step is to consider whether a change is material in the sense that it *may* result in a different decision on remedy. A change which affects a significant aspect of the reasoning in the Final Report may also be considered to be material. However, a change which does not have any impact on the reasoning or appropriateness of the remedy would not in the ordinary course of events be likely to be considered material. The second stage is to consider what the decision on remedy ought to be in the light of that material change in circumstances. To conduct this analysis the other way around, as at times Ryanair appeared to suggest, would be circular – the proportionality assessment is conducted after the material change of circumstances has been identified, and does not of itself satisfy the materiality criterion.

111. Against that background, the CMA's approach to the MCC Decision was irreproachable. The CMA considered whether changes in circumstances justified departing from the CC's conclusions on remedies in the Final Report and "*whether there have been any changes in circumstances that materially affect the analysis and conclusions in the Report*" (para. 51, MCC Decision). Having found no such changes in circumstances, the CMA rightly decided to

implement the remedies that it considered to be comprehensive and proportionate.

112. In light of our conclusion on this ground that the CMA is not required to reconsider the proportionality of the remedy in circumstances where it has concluded that there has been no material change of circumstances within the meaning of section 41(3), we consider whether IAG's proposed bid and offer (including its stated position on the appointment of the Divestiture Trustee) amounts to a material change of circumstances as part of Ground 2.

Ground 2: the rationality of the MCC Decision

Ryanair's submissions

113. By its second ground Ryanair contends, firstly, that it was irrational for the CMA to decide that IAG's bid to acquire Aer Lingus did not constitute a material change of circumstances since the Final Report. In the Final Report, the CC found that Aer Lingus wanted to merge with another airline, but that no merger was expected or even in contemplation. It concluded that potential merger partners were being deterred by Ryanair's minority shareholding, that they would continue to be deterred in future, and that a divestment remedy was therefore needed. These predictions have turned out to be wrong. Aer Lingus has since the Final Report been subject to a takeover offer by IAG which has been recommended by the Aer Lingus Board and the Irish Government. Ryanair contends that the very thing that the CC said would not happen (and could not happen for so long as Ryanair continued to own a minority shareholding in Aer Lingus) is in fact now happening.

114. Secondly, Ryanair contends that the CMA wrongly placed more emphasis on IAG's submissions than they can bear. The MCC Decision found that no material change in circumstance has taken place because IAG's "*bid has proceeded on the basis of a set of circumstances in which the majority of Ryanair's shareholding is required to be sold*" (para. 56). Ryanair emphasises that IAG said the deal depended on Ryanair *committing* to sell its minority stake to IAG, not to Ryanair being *ordered* to do so. Indeed, IAG chose to make its

legally binding offer in the knowledge that Ryanair might not be ordered to sell its stake.

115. Ryanair argued that the chronology of events is inconsistent with any suggestion that IAG was only prepared to consider acquiring Aer Lingus, and only made the bid they did make, because of the Final Report and the divestiture remedy. The CMA failed to identify whether the remedy was crucial to the willingness of IAG to come forward with the bid and to pursue it. An analysis of the circumstances reveals that at key stages (August 2014, when IAG said that it first became interested in acquiring Aer Lingus and December 2014, when Aer Lingus announced a possible offer), IAG cannot have known or expected that the divestment remedy would be implemented in time to apply to its bid. In August 2014, Ryanair's appeal to the Court of Appeal was still pending. By January 2015, there had been a hearing in the Court of Appeal with judgment reserved. There would then be the potential of a further appeal to the Supreme Court and questions of material changes of circumstances would need to be considered. Therefore, in Ryanair's view, it cannot be said that IAG expressed its bid in the knowledge or belief that the shares owned by Ryanair were going to be divested in time to apply to their bid. The same applies to the final bid. That bid expires on 16 July 2015 (but can be extended to 18 August 2015), and there is no expectation that the divestment remedy will be in place then.

116. Thirdly, Ryanair contends that the CMA failed to consider in the MCC Decision, or reached irrational conclusions on:

    (1) evidence showing that the position of the Irish Government had changed since the Final Report and that it was the Irish Government, not Ryanair, that obstructed IAG's bid; and

    (2) the significance of new evidence (not available at the time of the CC's investigation) that the Aer Lingus pension dispute was a likely deterrent to IAG.

117. In Ryanair's view, there is a wealth of evidence that the Irish Government created impediments to IAG's bid proceeding and that protracted negotiations took place to overcome these, culminating in significant commercial

concessions by IAG. The MCC Decision does not reach a view on whether the position of the Irish Government acted as a deterrent to airlines considering merging with Aer Lingus. It also concludes that the position of the Irish Government was unchanged since the Final Report (see para. 82 above). Both of these findings are incorrect.

118. At the hearing Lord Pannick clarified that, while he did not resile from these aspects of Ground 2, if he was unsuccessful on his other points he was unlikely to be successful on these. Therefore, Lord Pannick did not devote time to these points during his oral submissions.

119. Finally, Ryanair contends that the Final Order is disproportionate in any event. There is considerable overlap with this aspect of Ground 2 and Ground 1, where Ryanair argued that the CMA was required to conduct a proportionality assessment. In this ground, Ryanair relies on the same argument but further says that the CMA failed to take into account several relevant factors which underpinned the Final Order. At the hearing, Ryanair placed much emphasis on the letter IAG sent to the CMA encouraging it to refrain from appointing a Divestiture Trustee for the time being. Ryanair says that this also provides evidence that IAG did not consider the existence of the divestment remedy to be central to its bid (Transcript page 21, lines 22-29). Further, Ryanair says that the undertakings it offered in the investigation leading to the Final Report would have addressed the bid by IAG that was in fact made:

(1) Ryanair offered to undertake to vote its shares in such a way as not to obstruct a recommended bid for the entirety of Aer Lingus by *inter alia* a major European airline group such as IAG (see paras. 8.22(a) and 8.24(a) of the Final Report, set out at para. 50 above).

(2) The CMA did not dispute that Ryanair's proposed undertakings would be effective in that regard. The CMA rejected Ryanair's proposed undertakings in the Final Report because they could not address every possible type of combination that might arise (paras. 8.46-8.50, Final Report).

(3) In the event, the type of combination that was in fact proposed was not that envisaged by the Final Report, but a combination that would have been addressed by Ryanair's undertakings.

120. The history and circumstances of IAG's bid are set out above at paras. 61 - 66. The CC's assessment in the Final Report of the impact of Ryanair's minority shareholding on Aer Lingus's prospect of combining with another airline is summarised at paras. 39 - 45 above. While some time was devoted to this at the hearing, it does not appear to be seriously in dispute that the latter was a core finding of the Final Report and a crucial part of the SLC reasoning. That accords with the Tribunal's view of the matter.

121. Ryanair's challenge, however, focuses on a particular limb of this core finding, namely that "*no other airline would want to consider acquiring Aer Lingus while we, Ryanair, retain our 29 per cent stake*" (Transcript page 1, line 16-17; emphasis added) and that another airline group would be "*deterred even from coming forward*" (Transcript page 7, line 2-3). At the hearing, we were referred to a number of paragraphs in the Final Report which, in Ryanair's view, indicate that the CC's concern was not that a bid could not be completed, but that Ryanair's shares would deter anyone from even coming forward (see, for example, paras. 7.127, 7.178, 7.34 and 7.80 of the Final Report). Therefore Ryanair contends there has been a radical change of circumstances in respect of a key finding in the Final Report, namely that contrary to everything that was expected by the CC, there is now a major airline group which has come forward and which is eager to acquire Aer Lingus.

122. Ryanair also contests as manifestly unsustainable the CMA's finding that, notwithstanding IAG's bid, other airlines might remain deterred by the minority stake. If a substantial bid like IAG's is not deterred by Ryanair's shareholding, the CMA ought to rethink whether it is really true that other potential bidders would be so deterred. Moreover, the CMA could and should have waited to see if the IAG bid did fall through before imposing remedies.

The CMA's assessment of the IAG takeover bid

123. The first point that the CMA takes in answer is that its concern in the context of this finding was not simply related to deterring potentially interested parties from coming forward. Para. 13(a) of the Final Report states that the CC looked in particular at whether Ryanair's shareholding might "*affect Aer Lingus's ability to participate in a combination with another airline*". At para. 14, the CC's conclusion in this regard is stated as follows:

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

124. Reference was also made to Section 7 of the Final Report (Assessment of competitive effects of the acquisition) which refers at para. 7.31 to "*prevent[ing] a bidder from acquiring 100 per cent of Aer Lingus*" and at para. 7.80 to "*acquiring full control of Aer Lingus*" (see paras. 39 - 45 above). Moreover, the CMA points to references in the Final Report to airlines holding discussions with Aer Lingus prior to the date of the Final Report and subsequent to Ryanair acquiring the shareholding, which in its view indicates that this cannot have been its sole concern at the time.

125. Secondly, the CMA points out that the MCC Decision contains a response to Ryanair's Ground 2, namely that the SLC finding in the Final Report was predicated on Ryanair continuing to maintain its shareholding in Aer Lingus (absent regulatory intervention) and that the IAG bid proceeded in the light of the CC's findings, including its decision that Ryanair would be required to divest all but 5% of its shareholding; IAG's bid is therefore conditional on its ability to acquire Ryanair's shareholding. Indeed, the MCC Decision makes clear the CMA's view that IAG's bid was made in the context of the Final Report and proposed remedy; it did not cast any new light on what would have happened if Ryanair had been allowed to maintain its stake in Aer Lingus (see para. 80 above).

126. The questions posed by Ryanair in its Notice of Application – namely, whether the IAG bid would have affected the CMA's findings if it had been in play at the time of the Final Report, and/or whether Aer Lingus would have been able to merge with IAG without a forced divestiture, proceed on the false assumption

that the same bid would have been made without the CC's intervention. That assumption is considered by the CMA to be contrary to the evidence before it. Far from undermining the CC's findings in the Final Report, the IAG bid is consistent with it and reinforces those findings (see paras. 58-61 of the MCC Decision).

127. Mr Flynn put the argument succinctly at the hearing: "*The point is whenever a bid comes for Aer Lingus, and from whoever it comes, Ryanair has the choice whether or not to sell; that is the mischief*" (Transcript page 64, lines 22-24).

128. The CMA argued that, to a potential bidder like IAG, it is significant that Ryanair is subject to regulatory intervention by way of a divestment order: this presents it with an opportunity to make a bid for Aer Lingus. Further, IAG's previous statements that it would not usually contemplate buying a controlling interest in an airline with a significant ongoing minority shareholding were reiterated in the context of the MCC inquiry (see para. 72 above).

129. In response to Ryanair's objection to the CMA's finding that other airlines were being deterred by Ryanair's stake, the CMA pointed to para. 65 of its MCC Decision:

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

The CMA's assessment of the immediate appointment of a Divestiture Trustee

130. The CMA states that the remedies set out in its Final Report are intended to deal comprehensively with a variety of mechanisms whereby the harmful competitive effect of Ryanair's minority shareholding in Aer Lingus could manifest itself. This is in line with the CMA's duty to discharge its remedial function in light of the terms of sections 35 and 41 of the Act, in particular the requirement to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it (section 41(4)). For that reason, the CMA rejected Ryanair's contention that it is now disproportionate to require the appointment of a Divestiture Trustee. Further, the CMA emphasises that the undertakings offered by Ryanair are only targeted at one type of bid and IAG's stated position is only relevant to its own bid.

131. Daniel Beard QC submitted on behalf of the CMA that IAG's views were taken into account by the CMA and reflected at para. 68 of its MCC Decision, which is set out at para. 83 above. Mr Beard also took us to the relevant paragraphs of the Working Paper described in para. 88 above and noted that IAG is not saying that it considers that a Divestiture Trustee should not be appointed at all. IAG's position is in fact that if Ryanair does not provide an irrevocable commitment to IAG, the Divestiture Trustee should be appointed. The Working Paper addresses these points at para. 42(e), where the CMA notes that it can defer the appointment of the Divestiture Trustee if it considers it appropriate and necessary, such as where Ryanair seeks the CMA's consent to enter into an irrevocable commitment to sell its shareholding in the context of a public bid for Aer Lingus.

The CMA's assessment of role of the Irish Government

132. The CMA argues that the protection sought by the Irish Government is consistent with what it said it would seek at the time of the Final Report and that in any event (despite any concessions by IAG), an Aer Lingus owned by IAG would be a stronger competitor to Ryanair (para. 61, MCC Decision), which is a conclusion that Ryanair has not challenged. Moreover, IAG made clear to the CMA that it did not make a bid for Aer Lingus until the CC had required

Ryanair to divest most of its shareholding and did not suggest that the real deterrent had been or continued to be the position of the Irish Government. Given this evidence, the CMA considers that the irrationality challenge is bound to fail.

The CMA's assessment of the Aer Lingus pension fund

133. Finally, the CMA says it did not fail to analyse the Aer Lingus pension fund or dismiss it as insignificant. The CMA accepted that it had been a relevant issue for IAG but considered that this did not undermine its assessment of the impact of Ryanair's shareholding (para. 66 of the MCC Decision, extracted at para. 82 above).

The Tribunal's analysis and conclusions

134. Ground 2 requires the Tribunal to consider, in essence, whether the CMA's conclusion that there was no material change in circumstances was irrational with regard to the following factors: (i) IAG's proposed bid and formal offer; (ii) IAG's request that the CMA not immediately appoint a Divestiture Trustee; (iii) the alleged change in the attitude of the Irish government; and (iv) the resolution of Aer Lingus's pension dispute.

(i) IAG's proposed bid and formal offer

135. We consider that the conclusion by the CMA that the IAG proposed bid and formal offer did not constitute a material change of circumstances was one in its discretion it was entitled to reach. The question of whether there has been a material change of circumstances is a matter which to a large extent requires an evaluative assessment by the CMA. The Final Report concluded that Ryanair's holding in Aer Lingus was and had been an impediment to other airlines combining with Aer Lingus. Ryanair could prevent a takeover occurring by not agreeing to sell its shareholding and some bidders may not be prepared to take a majority holding in Aer Lingus whilst Ryanair remained a shareholder. Whilst in the Final Report it was considered that a transaction with one of the three large European carriers was relatively unlikely in the short to medium term, this was not excluded as a possibility. IAG had told the CC as reflected in the Final

Report that it would not usually contemplate buying a controlling interest in an airline with a significant ongoing minority shareholder.

136. In determining that there had been no material change of circumstances arising from IAG's bid, the CMA was entitled to take account of the fact that the proposed bids in January 2015 came against the background that Ryanair had been required to divest itself of all but 5 % of its shareholding in Aer Lingus and that IAG had itself confirmed to the CMA that this along with the resolution of the pension dispute had led it to first seriously contemplate its proposed acquisition of Aer Lingus in August 2014. Whilst this was before the Court of Appeal decision dismissing Ryanair's appeal against this Tribunal's decision rejecting Ryanair's challenge to the Final Report's divestiture remedy, IAG did not make its Rule 2.5 announcement of an intention to make a recommended cash offer until 26 May 2015, by which time the CMA has already issued its Provisional Decision on Possible Material Change of Circumstances, indicating its view at that time that there had been no material change of circumstances.

137. Further the proposal put to the Aer Lingus board, which the Aer Lingus board recommended to its shareholders on 27 January 2015, the Rule 2.5 announcement of 26 May 2015 and Recommended Cash Offer dated 19 June 2015, all made it clear that the offer was conditional upon Ryanair accepting the offer in respect of all the shares it holds in Aer Lingus. We do not consider that it was unreasonable for the CMA to conclude that such an offer did not undermine its assessment that Ryanair's shareholding could impede a combination or takeover of Aer Lingus. The critical point in the Final Report was that one way or another Ryanair's holding may deter combinations. The fact that IAG was prepared to consider and discuss a takeover with Aer Lingus at a time that Ryanair was still a shareholder did not undermine that central finding. The Final Report did not state in terms that no other airline would consider a combination or discuss one whilst Ryanair was still a shareholder. Indeed it gave examples of such discussions in the past. The IAG discussions with Aer Lingus were against the backdrop as already described (including a requirement to divest) and the proposals were in terms of being conditional upon Ryanair agreeing to sell its shareholding.

138. In conclusion on this issue, we consider that the CMA was entitled to take the view that the Ryanair shareholding acted as a deterrent to combinations and this assessment still holds good in the light of the IAG bid. Even if IAG has not been deterred from entering discussions and making a bid, that does not mean other airlines would not also continue to be deterred. Further, the IAG offer is conditional upon it being accepted by Ryanair.

(ii) IAG's request that the CMA not immediately appoint a Divestiture Trustee

139. In IAG's letter of 11 March 2015, which is set out at paras. 72 - 73 above, it requested that the CMA not immediately proceed to the appointment of a Divestiture Trustee, but rather that the CMA "*grant its written consent to Ryanair granting an irrevocable commitment to accept IAG's proposed offer in respect of the entirety of Ryanair's shareholding*".

140. Contrary to the submissions on behalf of Ryanair, the CMA did not fail to consider this suggestion by IAG. The suggestion is specifically set out at para. 28 of the CMA's Working Paper issued on 17 April 2015 (see paras. 88 - 89 above). To deal with this, the CMA made clear that the draft Final Order was sufficiently flexible to accommodate the concerns of IAG and it would be open to the CMA if it considered it appropriate to defer the appointment of a Divestiture Trustee upon an indication by Ryanair that it would sell its shareholding pursuant to the offer.

141. We also consider that the CMA was entitled to take the view that it was appropriate to issue the Final Order in the terms that it did, bearing in mind that it is looking for a comprehensive solution to the SLC it had found. To base a remedy merely on one offer would not necessarily be prudent given that offers are not necessarily proceeded with and there was no guarantee that IAG's offer would in fact be accepted either by Ryanair or a sufficient proportion of shareholders for the takeover to take place.

(iii) The alleged change in the attitude of the Irish Government

142. Ryanair has sought to show that the Irish Government changed its position and that it was the real deterrent to combinations with Aer Lingus. Ryanair says that,

contrary to the factual position at the time of the Final Report (see para. 4.25), there was no longer an expectation at the time of the material change of circumstances analysis that the Irish Government was required to sell its shareholding in Aer Lingus under commitments made to the Troika of the International Monetary Fund, the European Stability Fund and the European Central Bank.

143. The CMA clearly considered, as part of its investigation into the potential material change of circumstances, what the Irish Government's position was and what protections it sought. Having considered the Irish Government's submission that its position had not changed since the Final Report (see para. 71 above), the CMA was entitled to find that there had been no material change of circumstances.

144. We also do not accept Ryanair's argument that the Irish Government was the main impediment to a combination, and that this undermines the Final Report's findings as to the effect of Ryanair's shareholding. It is clear from the Final Report that the Irish Government would only agree to sell its stake under the right conditions (see paras. 43 – 44 above). The only specific concessions said to have been obtained by the Irish Government are the connectivity commitments (see para. 64 above). As these were one of the three considerations identified at the time of the Final Report (para. 36(b), Appendix C, Final Report) we fail to see how the CMA's conclusion that there was no material change of circumstances and that Ryanair remained the primary impediment to an Aer Lingus combination can be irrational. Thus, this part of Ground 2 fails.

(iv) The resolution of Aer Lingus's pension dispute.

145. The Final Report noted the views of both Ryanair and certain third party airlines that Aer Lingus's pension deficit was one factor which could limit its attractiveness as a target. In line with this, IAG cites the resolution of the pension deficit issue as having influenced its decision to make an offer. However, far from having failed to take this into account, as Ryanair contends, the CMA makes clear at para. 66 of the MCC Decision that it had considered

the pension issue but reached the view that it did not undermine the CC's finding that Ryanair's shareholding was likely to impede or prevent Aer Lingus combining with other airlines. The CMA has a margin of discretion in determining what constitutes a material change of circumstances and we are satisfied that its decision on the pension issue was one it was entitled to make. The fact that the unresolved pension issue could act as a deterrent to a combination does not mean that it was a deterrent to all airlines or all forms of combination, nor would it necessarily rule out any question of a takeover of Aer Lingus. The CC in the Final Report and the CMA in the MCC Decision concluded that Ryanair's shareholding remained a significant impediment to a combination involving Aer Lingus, even after taking the pension issue into consideration.

146. Accordingly, Ground 2 also fails.

CONCLUSION

147. For the reasons set out above, we unanimously dismiss Ryanair's application for review.

Hodge Malek QC Clare Potter Professor Colin Mayer

Charles Dhanowa OBE, QC
(*Hon*)
Registrar

Date: 15 July 2015