<u>IN THE FIRST-TIER TRIBUNAL</u> **<u>Case No.</u>** <u>EA/2012/0088</u>
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

<u>ON APPEAL FROM:</u>

The Information Commissioner's Decision Notice No:	**FS50391208**
Dated:	**19 MARCH 2012**
Appellant:	**RYANAIR LIMITED**
First Respondent:	**INFORMATION COMMISIONER**
Second Respondent:	**OFFICE OF FAIR TRADING**
Heard at:	**FIELD HOUSE, LONDON**
Dates of hearing:	**29 AND 30 NOVEMBER 2012**
Further consideration on the papers:	**20 DECEMBER 2012**
Date of decision:	**28 JANUARY 2013**

Before

ROBIN CALLENDER SMITH
Judge

and

MARION SAUNDERS
Tribunal Member

Attendances:

For the Appellant: Mr Gerry Facenna, Counsel
For the First Respondent: Mr Robin Hopkins, Counsel
For the Second Respondent: Mr Alan Bates, Counsel

Subject matter:

FOIA 2000

Absolute Exemptions

- Personal data s.40
- Prohibitions on disclosure s.44

Qualified Exemptions

- International relations s.27
- Law enforcement s.31
- Inhibition of free and frank provision of advice s.36(2) (b)
- Prejudice to effective conduct of public affairs s.36(2) (c)
- Legal professional privilege s.42

Cases:

Wilden Pump Engineering Co v Fusfeld [1985] FSR 159; *Hellenic Mutual War Risks Association (Bermuda) Ltd v Harrison (The Sagheera)* [1997] 1 Lloyds Rep 160; *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302; *In re L (a Minor) (Police Investigation: Privilege)* [1997] AC 16; *Porter v Magill* [2002] 2 AC 357; *Durant v FSA* [2003] EWCA Civ 1746; *Three Rivers District Council v Governor of the Bank of England (No. 6)* [2004] UKHL 48; *CAAT v IC and MoJ* (EA/2007/0040); *Student Loans v IC* (EA/2008/0092); *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47; *Corporate Officer of the House of Commons v IC* [2008] EWHC 1084 (Admin); *Dumfries and Galloway Council v Scottish Information Commissioner* [2008] CSIH 12; *Secretary of State for the Home Department v British Union for the Abolition of Vivisection* [2008] EWCA Civ 870; *Roberts v IC and DBIS* (EA/2009/0035); *Chief Constable of the Surry Police v IC* (EA/2009/0081); *DBERR v IC and O'Brien* [2009] EWHC 164 (QB); *Financial Services Authority v IC* [2009] EWHC 1548 (Admin); *APPGER v IC and MoD* [2011] UKUT153 (AAC); *Jackson v IC and Electoral Commission* (EA/2011/0136); *Morrissey v IC and Ofcom* (GIA/605/2010); *Sittampalam v IC and MoJ* (EA/2011/0277); *Hogan v IC and Oxford City Council* [2011] 1 Info LR 588; *APPGER v IC and FCO* (EA/2011/0049 – 0051); *Kikugawa v IC and MoJ* (EA/2011/0267); *Ryanair Holdings Plc v OFT* [2012] EWCA Civ 643; *Sutton v IC and Nottingham City Council* (EA/2012/0044); *William Thackeray v IC* (EA/2011/0069); *Department of Health v IC* (EA/2011/0286 – 0287); *C – 506/08 Sweden, Mytravel Group plc v European Commission* [2011] 5 CMLR 18; *R (Prudential) v Income Tax Special Commissioner* [2011] QB 669 at 718 and *Ryanair Holdings v Competition Commission* [2012] CAT 21.

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2012/0088
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DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 19 March 2012 and dismisses the appeal.

REASONS FOR DECISION

Background

1. The requests for information in this case were made against a background of regulatory action by the OFT in relation to Ryanair's acquisition – in 2006/2007 – of a minority shareholding in Aer Lingus. To give this decision the context that is necessary for it to be understood, externally and generally, that background is set out in some detail below.

2. Although matters have moved on since this appeal was heard[1] – in terms of matters before the Competition Commission – the most convenient précis of the facts and the regulatory framework is set out in the recent judgment of the Competition Appeal Tribunal in *Ryanair Holdings v Competition Commission* [2012] CAT 21 at [44] – [73]. In summary:

    (a) Aer Lingus was floated on the Dublin and London Stock Exchanges on 2 October 2006, having previously been owned by the Irish Government. Following the flotation, Ryanair acquired approximately 25% of the shares and announced its intention to launch a public bid for the entire share capital of the airline. Ryanair now owns approximately 29.8% of Aer Lingus. The other largest shareholder is the Irish Government, with approximately 25.1% of the shares. The Irish Government opposed the acquisition by Ryanair of the Minority Holding and its proposed takeover of Aer Lingus.

[1] On 13 December 2012 the Court of Appeal delivered its judgment in *Ryanair Holdings PLC v Competition Commission and Aer Lingus Group PLC* [2012] EWCA Civ 1632, a copy of which was provided to the Tribunal after the date of the Information Rights appeal hearing and before the Tribunal finally met to determine its decision on 20 December 2012.

(b) The European Commission was notified of Ryanair’s 2006 takeover bid in accordance with Regulation (EC) No 139/2004 and, in a decision dated 27 June 2007, the Commission blocked the takeover as a “concentration” incompatible with the common market. However, in a letter of the same date the Commission stated that it did not have the power to order Ryanair to sell its minority stake, as Aer Lingus had requested. In the letter to Aer Lingus the Commission Deputy Director-General indicated that that decision was: “without prejudice to the powers that Member States may have, after the adoption of today’s decision, to apply their national legislation on competition to the acquisition of Ryanair’s minority shareholding in Aer Lingus.”

(c) The EC Merger Regulation is based on a “one stop shop” principle, i.e. it seeks to avoid duplicative and possibly inconsistent reviews of the same mergers by the European Commission and national authorities, by providing that the European Commission alone has jurisdiction to examine and assess “concentrations” that meet the jurisdictional tests under the Merger Regulation. Article 21(3) of the Merger Regulation therefore provides, inter alia, that “No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.”

(d) On 12 July 2007, Aer Lingus sent a memorandum to the European Commission, the Irish Competition Authority, the OFT and the German Competition Authority inviting those authorities to reach a common position as to the authority competent to act in relation to the Minority Shareholding.

(e) In response, on 3 August 2007 the European Commission reiterated its view that it did not have power to order Ryanair to divest its shareholding but that this was without prejudice to any power that Member States may have.

(f) On the same day the OFT also wrote to Aer Lingus setting out its view that it was prevented by Article 21(3) of the EC Merger Regulation from taking action in relation to the minority shareholding. The OFT’s letter stated:

> The OFT considers that it is prevented by Article 21(3) [of the EC Merger Regulation] from applying national legislation on competition to the 25.22 per cent minority stake held by Ryanair in Aer Lingus. In our view, Article 21(3) [of the EC Merger Regulation] precludes the OFT’s merger jurisdiction in circumstances where (1) the Commission expressly defined the relevant shareholding as part of the concentration with a Community dimension in its Article 6(1)(c) and 8(3) decisions; and (2) the Commission reviewed the concentration in its entirety, including the minority stake. This conclusion is underlined by the likelihood that Ryanair will challenge the [Prohibition Decision] before the CFI [now the General Court] – and/or, as you indicate in your

submission, that Aer Lingus will itself seek relief before the CFI [now General Court] – creating a risk of inconsistent outcomes if the OFT were to have parallel jurisdiction at this time.

(g) On 17 August 2007, Aer Lingus made a request to the European Commission to act under Articles 8(4) and 8(5) of the EC Merger Regulation in respect of Ryanair's minority shareholding or to state formally that it did not have the power to do so. Aer Lingus also asked the European Commission to take a formal position on the effect of Article 21(3) of the EC Merger Regulation as regards the minority shareholding. On 11 October 2007, the European Commission adopted a formal decision holding that it did not have the power under Article 8(4) to order divestment of the minority shareholding. The European Commission declined to adopt a position on the interpretation of Article 21 of the EC Merger Regulation since Article 21(3) binds Member States and does not confer powers on the European Commission.

(h) Thus there was, at that time, inconsistency between the views of the OFT and the European Commission as to whether the OFT was precluded from applying UK competition law to the Minority Holding, having regard to the terms of the EC Merger Regulation and the European Commission's June 2007 decision.

(i) Ryanair appealed to the Court of First Instance (CFI) (now the General Court of the EU) against the European Commission's 27 June 2007 decision. Aer Lingus appealed to the CFI against the European Commission's 11 October 2007 decision. The Court dismissed both appeals on July 2010.

(j) On 30 September 2010, after the time period for appealing against the two judgments of the CFI had expired, the OFT commenced an investigation into the Minority Holding under section 22 of the EC Merger Regulation 2002 (EA 2002). The purpose of such an investigation is to determine whether a "relevant merger situation" has been created which may have adverse competition consequences; if specified criteria are satisfied under the EA 2002, the OFT may refer the matter for investigation by the Competition Commission.

(k) Ryanair considered that it was not open to the OFT to commence an investigation in September 2010 because it had jurisdiction to do so following the Commission's decision in 2007 and the time for doing so under the EA 2002 had therefore expired by September 2010. On 4 January 2011, the OFT issued a decision confirming its view that its investigation was not "time-barred". Ryanair challenged that decision by way of an appeal to the Competition Appeal Tribunal.

(l) At that point, in February 2011, Ryanair made the information requests that are the subject of this appeal. The requests were made in the course of an exchange of correspondence in which Ryanair raised a number of questions about the OFT's decision-making process and the extent to which the decision to open an investigation may have been influenced by the Irish Government.

(m) The question of whether the OFT had jurisdiction to commence an investigation in September 2010 was ultimately determined in the OFT's favour by the Court of Appeal on 22 May 2012 ([2012] EWCA Civ 643). The OFT referred the matter to the Competition Commission on 15 June 2012, and the Competition Commission's investigation is on-going.

3. The OFT's decision to make a reference to the Competition Commission – and the outcomes that could flow from that decision – had significance for Ryanair and Aer Lingus. The Competition Commission had wide powers and could require Ryanair to divest itself of some or all of its shares in Aer Lingus.

4. Ryanair's position – in making the information requests – was that it wished to understand how and why the OFT had decided to exercise its powers under the EA 2002 in September 2010, when (in August 2007) it considered it had no jurisdiction to do so.

5. Ryanair was concerned about the possibility that the OFT's actions may have been influenced by representations made by Aer Lingus and/or by the Irish government.

6. The OFT Chief Executive, Mr John Fingleton, had been employed by the Irish Government as the full-time Chair of the Irish Competition Authority – and also sat on Ireland's National Competitive Council – prior to his appointment as Chief Executive of the OFT.

7. Ryanair's concern was – as expressed by its Counsel, Mr Facenna – *not* to suggest that Mr Fingleton had acted improperly but rather to understand how the decision had been taken and to be satisfied that the OFT complied with expected standards of governance, including the need to

ensure impartiality, in its regulatory actions relating to Ryanair and Aer Lingus.

8. The OFT had not been willing to release any of the information requested by Ryanair (see below) even in a redacted form.

9. The Tribunal has, however, seen all of the withheld matters as closed and confidential evidence and material. For reasons which follow, it has not felt the need to deal with any of the matters disclosed by way of a closed and confidential annexe to this decision.

10. The final matter of note – at this introductory stage – is to record that the Tribunal sat as a panel of two (rather than three) with the agreement of all the parties. This was after it became apparent that the third member assigned to the Tribunal would not, for unavoidable reasons, be able to sit over the two-day period that had been allocated.

The request for information

11. On 4 February 2011, Ryanair wrote to the OFT asking 12 questions which the OFT treated as requests under FOIA. Broadly speaking, Ryanair wished to know (i) the views in 2007 of the OFT's Chief Executive and Director of Mergers on whether the OFT should commence an investigation at that stage, in parallel to the action being taken by the European Commission; (ii) which person from Aer Lingus had spoken to the OFT's Chief Executive about the Ryanair issue, when and where those conversations took place and what was said, and (iii) what communications, if any, passed between Aer Lingus and the OFT/the OFT's Chief Executive and between the Irish Government and the OFT/the OFT's Chief Executive in the period between the Court of First Instance's handing down of its judgment and the OFT's commencement of its investigation.

12. The OFT treated that letter, in part, as a request for information under section 1 FOIA. In its FOIA response, the OFT identified twelve categories of information under four headings, as follows:

Views exchanged by Mr Pritchard and Mr Fingleton

1. Views exchanged by Mr Simon Pritchard and Mr John Fingleton in 2007 on whether the OFT ought to commence investigations into minority shareholdings alongside EU processes.

Approach to Mr Fingleton

2. The identity of an adviser to Aer Lingus who approached Mr Fingleton on two occasions at external conferences.

3. Details of when (and where) exactly those approaches took place.

4. What, if anything, the adviser said to Mr Fingleton.

Communications from Aer Lingus to the OFT/Mr Fingleton

5. Any communications from Aer Lingus to the OFT between 6 July 2010 and 30 September 2010 in relation to this case.

6. Any response by the OFT to any such communications.

7. Any communications from Aer Lingus to Mr Fingleton between 6 July 2010 and 30 September 2010 in relation to this case.

8. Any response by Mr Fingleton to any such communications.

Communications from the Irish Government to the OFT/Mr Fingleton

9. Any communications from the Irish Government to the OFT between 6 July 2010 and 30 September 2010 in relation to this case.

10. Any response by the OFT to any such communications.

11. Any communications from the Irish Government to Mr Fingleton between 6 July 2010 and 30 September 2010 in relation to this case.

12. Any response by Mr Fingleton to any such communications.

13. The OFT refused to disclose any of the information requested for the following (summarised) reasons:

a) in relation to request (1), i.e. views exchanged in 2007 between Mr Fingleton and Mr Pritchard, then OFT Director of Mergers, on the possibility of the OFT commencing regulatory action alongside action by the European Commission, the OFT confirmed that it holds such information but that it is withheld in reliance on: section 42 FOIA (legal professional privilege); section 27 FOIA (international relations); section 41 FOIA (information provided in confidence) and section 31(1)(g) read with 31(2)(c) FOIA (prejudice to the exercise of the OFT's functions for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise). In relation

to sections 27 and 41 FOIA the OFT relied on section 17(4) FOIA and so did not give reasons for claiming those exemptions;

(b) in relation to requests (2)-(4), concerning approaches made to Mr Fingleton by an adviser to Aer Lingus, the OFT confirmed that it holds information relating to the identity of the adviser and information "similar" to the details of when the approaches took place, and what was said. However it has withheld the information on the basis of section 42 FOIA, section 40 FOIA (personal data) and section 44 FOIA (statutory prohibition on disclosure);

(c) in relation to requests (5) to (8), communications between the OFT and Aer Lingus, the OFT relied on section 44(1) FOIA to neither confirm nor deny whether it holds any relevant information, on the basis that such a confirmation or denial would itself fall within section 44(1) and the prohibition on disclosure of "specified information" within the meaning of sections 237 and 238 of the EA 2002. It also mentioned the possibility of exemption under sections 31, 41 and 43 FOIA, but did not explicitly rely on them;

(d) in relation to requests (9) to (12), communications between the OFT and the Irish Government, the OFT again relied on section 44(1) FOIA to neither confirm nor deny whether it holds any relevant information. It also mentioned the possibility of exemption under sections 27, 31 and 41 FOIA, but did not explicitly rely on them.

14. The OFT conducted an internal review and confirmed its decision in a letter dated 30 March 2011. On 11 May 2011 Ryanair took the matter to the Information Commissioner (IC).

15. The IC's decision was dated 19 March 2012. He:

(a) upheld the OFT's reliance on sections 27 and 42 FOIA in relation to request (1) (and also section 21 FOIA, which was raised by the OFT during the IC's investigation in relation to a newspaper article);

(b) upheld the OFT's reliance on section 40 so far as the identity of the Aer Lingus adviser is concerned in request (2), and section 42 FOIA in relation to information recording the content of the representations in request (4); and

(c) in relation to requests (5) to (8) and (9) to (12), upheld the OFT's refusal to confirm or deny whether it holds information, on the basis of section 44 FOIA and section 237 of the EA 2002.

16. In reaching his decision the IC placed significant weight on detailed submissions made by the OFT regarding its use of FOIA exemptions. The IC informed Ryanair in a letter dated 21 November 2011 that he had received these closed and confidential submissions. The IC's Decision was also accompanied by further reasoning in a confidential annex to the Decision.

17. As a result, much of the argument and reasoning underlying the refusal to provide access to the information - or to confirm whether information is held - is contained in documents which Ryanair has not seen, or has seen only in redacted form.

18. The Tribunal has, however, seen all the material in reaching this decision. It is conscious that it has been used within this appeal process – and makes no complaint about this – as a rigorous judicial filter in respect of the closed and confidential material and how the public interest balancing test in respect of the exemptions should operate and apply within this appeal.

19. It has applied the most anxious scrutiny to the material in considering how the exemptions have been claimed and should be applied.

<u>The questions for the Tribunal</u>

20. In respect of **Request 1** (the Fingleton/Pritchard exchanges) whether and why any or all of the following exemptions applied: s.27 (1) (b), s.27 (2), s.36 (2) (b) and (c), s. 42. (1) and s. 44.

21. In respect of **Request 2** (the identity of the Aer Lingus Advisor): s.40 (2) and s. 42 (1).

22. In respect of **Request 4** (representations by the Aer Lingus Advisor): s.42 (1).

23. In respect of **Requests 5 – 12** (communications with Aer Lingus or the Irish Government): s.27 (1) and (2), s. 31 (1) (g) and (2) (c).

Conclusion and remedy

24. The Tribunal's decisions attempts to follow the format of the questions above.

25. In terms of **Request 1**, The Tribunal finds that the exemptions claimed in respect of s.27 (1) (b) and s.27 (1) (c) together with s.42 (1) prevail in respect of the information requested with the effect that the Appellant's appeal fails on these exemptions.

26. We find that the EC – as an institution and through its officials – has and will have a reasonable expectation that conversations and communications between Commission officials and officials of the national competition authority such as the OFT would be kept confidential. That reasonable expectation arises on the basis of Article 17 of the EU Merger Regulation which provides that:

    (i) information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing; and

    (ii) the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information that they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

27. This is reinforced by Article 19 (2) of the EU Merger Regulation. This imposes an obligation on the EC to carry out the procedure set out in the Regulation in close and constant liaison with the competent authorities of the Member States. The "competent" authority in this case is the United Kingdom's OFT.

28. The EC and the competition authorities of the EU Member States have a mutual interest in communicating with each other privately, at a number of levels within their organisational hierarchies, including in relation to policy

development and regulatory decision-making in the competition field. It is clearly necessary that such communications can take place in confidence so that there is a shared understanding of difficult legal and practical issues of mutual interest and concern and also so that the EC and the national authorities can use their respective resources most effectively to help prevent unnecessary jurisdictional or other conflicts arising between themselves. This creates a clear and significant public interest.

29. The ability of Commission officials to have free and frank exchanges of views with – and to provide information to – officials in national competition authorities in private (so that the information is not made public) enables the EC and national competition authorities to work together constructively at all levels within their respective organisational hierarchies within a climate that permits the discussion and airing of issues of common concern and which contributes to the various internal policy development processes while avoiding unnecessary conflicts with one another in relation to jurisdictional or other matters.

30. The effect of requiring the OFT to breach the EC's expectation of confidentiality in respect of the information requested would be to reduce and potentially undermine the willingness of the EC and its officials to provide such information and might cause them to be less candid or forthright in their communications with the OFT.

31. To require the OFT to disclose such information would be likely to have a genuinely "chilling effect" on the open, candid and free discussion of issues of legitimate mutual concern. The Tribunal considers it is in the public interest for the OFT (and its officials) to be able to have such frank exchanges with a view – where possible – to developing consistent approaches.

32. The Tribunal believes that it would be likely to prejudice relations between the EC and the UK if the OFT disclosed information in circumstances which meant that there was a breach of the UK's international obligations by virtue of Article 17 of the EU Merger Regulation.

33. Only the most exceptional public interest factors favouring such disclosure could be sufficient to outweigh the very strong public interest in the UK abiding by its international treaty obligations and – considering all the material it has had before it – the Tribunal does not consider that the high threshold required for this to occur has come anywhere close to being achieved.

34. Also, if the OFT was required to confirm or deny whether it held specific information it would put at risk the situation where Member States might wish to provide information to the OFT without the fact that they had done so becoming public knowledge. The OFT would not be able to maintain that confidentiality if it was required to confirm or deny such specific enquiries because, in situations where it did not deny that it held such information, the existence of such information could be inferred.

35. The Tribunal finds that the small amount of additional information within the scope of this request that was withheld on the basis of the qualified exception at s. 42 (1) – the exemption relating to legal professional privilege – was correctly withheld.

36. The issue arose because of Ryanair's contention that legal professional privilege cannot arise in this instance because the requested information was not within communications between a lawyer acting in his professional capacity and his client. Ryanair's view was that the information was about senior OFT employees who happened to be legally qualified discussing matters of strategy.

37. The reality is that legal qualifications – in and of themselves – do not suffice to make such communications privileged. The Tribunal finds that, in the light of their particular contents, the relevant portions of information here were the subject of legal professional privilege. Following the House of Lords decision in *Three Rivers District Council v Governor of the Bank of England (No. 6)* [2004] UKHL 48 the Tribunal is satisfied that this exemption was correctly applied because the communications were

confidential and because legal skills were being applied "in the relevant legal context" (per Lord Scott at [48]).

38. Confidentiality clearly existed in this case and the disputed information involved the application of legal skills in the relevant legal context. That context comes from the fact that the issue being discussed was a decision by the OFT about whether or not to commence an investigation and, in doing so, exercise its powers and duties under the EA 2002. The disputed information records the application of legal skill by the internal lawyers in helping the OFT formulate its position on whether or not to investigate Ryanair at the time.

39. Given that litigation between Ryanair and the OFT was live at the time of the request, the importance of preserving legal professional privilege remains very strong and the Tribunal finds no reason to disturb that position.

40. In a supplementary response dated 14 September 2012 the OFT sought to rely on the additional exemptions contained within subsections 36 (2) (b) (i), 36 (2) (b) (ii) and 36 (2) (c). Prior to the appeal hearing itself the Tribunal made a preliminary ruling in respect of this late-claimed exemption which, if it had stood, could have been the subject of an appeal by the OFT. In the event the Tribunal's preliminary ruling was reconsidered and withdrawn at the request of Ryanair – under the Tribunal's general case management powers - and the issues within the exemption were argued within the appeal.

41. In respect of the section 36 issues the Tribunal notes that a qualified person's opinion for the purposes of section 36 (2) must be both reasonable in substance and reasonably arrived at. An example is within the Tribunal's jurisprudence in the case of *William Thackeray v IC* (EA/2011/0069) at [20].

42. This Tribunal notes the manner and timing of obtaining the relevant opinion in this case and has not changed its view that – given the timing of the opinion (post review) – there is a strong objective perception that such

an opinion is an *ex post facto* conclusion and, as such, that goes to the heart of eroding the concept of reasonableness.

43. Ryanair's submission - that the opinion relied on in connection with section 36 was neither reasonable in substance nor had it been reasonably arrived at - has great strength. The substance of the opinion itself is heavily dependent on the claimed "chilling effect" that would arise in the event of disclosure under FOIA.

44. Although these comments do not alter the position in respect of the appeal, and do not cause the disputed information to which they relate to be disclosed, this Tribunal repeats and records observations it has already made.

45. In respect of the exemptions claimed in respect of **Request 2** (the identity of the Aer Lingus advisor) these relate to sections 40 (2) and 42 (1). The Tribunal finds that the exemptions were correctly applied.

46. In terms of the individual's identity (section 40 (2)) – on the facts – the Tribunal has no difficulty finding that it is "personal data" and that it would be unfair for the disclosure to occur. The individual in question was a private individual from a private company and not a public official. That individual was not responsible for public decisions or public funds. There is nothing to suggest that the individual could reasonably have expected the sort of public disclosure requested by Ryanair in this case. As has been observed by the IC, the individual might reasonably have expected the fact of the approaches to be made public….and that has already happened.

47. The Tribunal can find no basis for thinking, on these facts, that the individual could reasonably have expected that any identity would be made public. There is no "pressing social need" that would bring the proportionality exercise into play and the Tribunal finds that the exemption was correctly applied.

48. In relation to Request 3 the OFT confirmed that it did not hold any information falling within scope. Mr Fingleton had attended a considerable

number of external conferences and professional seminars. The Request did not provide any information that could assist in establishing the date of the external conferencing in question or its location. The OFT did what it could to search for this information and concluded – as has the Tribunal having seen all the documentation in relation to the searches – that it did not hold the information in question.

49. In relation to this exemption and **Request 4**, the only document that the OFT had been able to identify containing any information falling within the scope of the request was a handwritten document consisting of various notes made by an OFT lawyer for the purposes of recording, obtaining and/or giving legal advice in relation to contemplated litigation.

50. The Tribunal finds that the document is clearly the subject of both legal advice and litigation privilege – which has not been waived – and there is no information falling within scope in respect of which the exemption is not engaged.

51. In terms of the public interest factors favouring the maintenance of the exemption, the document in question is covered by legal advice and litigation privilege, is the legal adviser's own work product and it was in relation to recent legal advice and contemplated litigation relating to matters that had been – and to some extent still are – active. Disclosure of such information would undermine the confidence that lawyers advising their clients – including "in-house" clients – could have in the protection of their own work product.

52. Great importance is properly given to protecting and facilitating free and frank communication between lawyers and their clients. Communications of this sort could be impeded to a significant extent if lawyers and clients considered that the lawyers' notes of such communications could, within a short period of time, be made accessible to the public particularly – as in this case – a contemplated litigation opponent engaged in litigation against the client.

53. In relation to the exemptions claimed for **Requests 5 – 12** the Tribunal finds that all of them were properly claimed and should be maintained.

54. In terms of s.27 (1) (a) and (2) the reasoning for the Tribunal's finding mirrors the reasoning already expressed above. The risk of prejudicing good relations and the breaching of another State's reasonable expectation of confidence would arise not only from disclosure of the information but also if the OFT was required to confirm or deny whether it held such information.

55. There is a public interest balance favouring the maintenance of the exemptions because competition issues operate across – as well as within – national boundaries and companies' activities may be spread across the world. The merger of two companies either or both of which are active in markets outside the United Kingdom may give rise to concerns or investigations across a number of jurisdictions. The OFT needs to maintain good relations with other States' reasonable expectations of confidential treatment of information provided to the OFT and for any less to happen could damage the OFT's effectiveness as a national body which could not be in the public interest.

56. In terms of the exemptions in sections 31 (1) (g) and (2) (c) – a qualified exemption, the disclosure of which would, or would be likely to, prejudice "the exercise by any public authority of its functions for any of the purposes specified in subsection (2)" – the OFT had statutory functions in terms of "ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise" together with certain functions in relation to mergers, the statutory source of which is Part 3 of EA 2002.

57. The Tribunal is satisfied that to require the OFT to disclose information in connection with investigations that have not yet produced any formal outcome (in the sense that the outcome has been published and is, as a consequence, in the public domain) would prejudice the OFT's exercise of its functions.

58. Such information is inevitably of a commercially or otherwise sensitive nature. Disclosure of such information would be likely to cause harm to the legitimate business of undertakings, businesses that were, or which might be, placed under investigation could use FOIA to obtain information that would enable them to assess whether they were under investigation and a steer on the direction that the investigation was taking. It would also mean that the OFT's officials could be hampered in relation to the information they received and their ability to conduct investigations free from interference from premature disclosures and the potentially significant media publicity, stock market reactions and other effects that such premature disclosures could produce.

59. The Tribunal finds there is a strong public interest in the OFT being able to carry out its functions in an effective manner so that businesses under investigation are not able to obtain premature disclosure which could ultimately impede the investigations or cause those investigations to be subject to inappropriate interference or outside pressures. It is also noted that once an investigation has concluded – and an OFT decision been issued – there is a significantly high level of public transparency by the publication of the ultimate results.

60. In relation to section 44 (2) the Tribunal agrees with the OFT's submission on this point (at [32 – 36] of the open submissions). The fact that the OFT has (or has not) received information from a particular third-party in connection with the exercise of its functions in a particular case is in itself information that "comes" to the OFT in connection with the exercise of its functions: it is not information that the OFT has generated itself.

61. That information is therefore "specified information". That information "comes" to the OFT's knowledge as a result of the actions of a third party in either submitting, or in not submitting, information. Parliament's choice of the word "comes" appears to have been deliberate and is intended to have a very broad scope. Parliament could easily have referred instead to information "given to" the OFT or "provided to" the OFT but chose to do otherwise.

62. For instance, if a “whistle-blower” provided highly sensitive information to the OFT about a merger situation involving his employer that would not otherwise have come to the OFT’s attention then, without this construction, the legislative policy behind section 237 of the EA 2002 would be negated. The fact that a whistle-blower had provided such information would plainly be information that had “come” to the OFT in connection with its functions under Part 3 EA 2002. That fact would be “specified information”.

63. The mischief, on any other kind of construction, is that it could be discovered by the employer making a FOIA request to the OFT asking for “any information provided to the OFT by one of our employees”, requiring the OFT to confirm or deny whether it held such information.

64. The Tribunal notes that Mr Fingleton was the OFT’s chief executive throughout the relevant period. Any communication made to him by the Irish government or by Aer Lingus in connection with the Ryanair/Aer Lingus merger situation would have been made to him in that public capacity. There is no evidence of any requests being received by him “in a private capacity” and at all times he appears to have acted carrying out public functions on the OFT’s behalf.

65. For all these reasons the Tribunal upholds the exemptions claimed variously in this appeal – with the reservations it has expressed in relation to the late-claimed exemptions in section 36 which do not alter the outcome of this appeal – and as a result the Appellant’s appeal fails.

66. Our decision is unanimous.

67. There has been no application for – and there is no order as to – costs.

Robin Callender Smith

Judge

28 January 2013