



BY E-MAIL

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Dear Joint Administrators,

1. Decision 01/2021 by the Civil Aviation Authority (CAA) in relation to the Consumer & Markets Group (CMG)'s proposal to revoke the Operating and Route Licences of Flybe Limited (Flybe)

1. We refer to the CMG notice dated 19 January 2021 (**CMG Proposal**) containing its proposal to revoke Flybe's operating licence (**OL**) OL/A/16 and route licences (**RLs**) C/27 and S/27.
2. The hearing in relation to Flybe's request for a review took place on 26 February 2021. The hearing was not able to be held in person because of the COVID-19 pandemic and, therefore, took place using remote video-conferencing software. The hearing lasted from 11.00am until around 3.30pm and both Flybe and CMG had the opportunity to make submissions and present evidence.
3. The CAA Panel is comprised of Mr Graham Ward CBE (Chair) and Ms Katherine Corich, both appointed by the Secretary of State for Transport as Non-Executive Members of the Board of the CAA.

1.1 The questions to be decided by the Panel

4. The principal questions to be decided by the Panel are, in the light of the evidence and the relevant law:

- a. Whether the Panel should suspend or revoke Flybe's OL pursuant to the provisions of Regulation 9(1) of EC Regulation 1008/2008 (**Retained Regulation**)¹ and, if so, which.
- b. Whether the Panel has the discretion, under Regulation 9(1a) not to revoke or suspend Flybe's OL, and, if so, whether to exercise that discretion.
- c. Whether any of the complaints of procedural unfairness made by Flybe are well founded and, if so, what should follow from that.

1.2 The evidence

5. In reaching its decision, the CAA Panel has carefully considered the following evidence and submissions:
 - a. Documents submitted by Flybe and CMG in preparation for the hearing and contained in the bundles before the Panel, namely (i) submissions (ii) accompanying documents and exhibits and (iii) legal authorities, regulations and other legislative material.
 - b. Oral submissions presented at the hearing by Flybe and CMG, which are set out in the agreed transcript of the hearing and summarised below.
6. Prior to the hearing the Panel also received written submissions from Loganair. The Panel decided (and Loganair agreed) that Loganair was not entitled to address the Panel on the matter of Flybe's OL. Loganair, however, claimed to be entitled to address the Panel in relation to Flybe's RL, pursuant to Article 20 of the Civil Aviation Authority Regulations 1991. As is apparent from the transcript of the hearing, the Panel did not consider argument on whether Flybe met the test for, or should be able to retain, its RLs. Rather the parties agreed that the RLs would be revoked if and when Flybe's OL were revoked. As there was no substantive legal or factual argument relating to the RL, the Panel did not consider that the material in the submissions was relevant to the issues it had to decide and, therefore, did not take it into account.

1.3 The relevant legal framework and CAA Guidance

7. The relevant legal framework is set out in the Retained Regulation and Regulation 7 of the Operation of Air Services in the Community Regulations 2009 (UK Regulations), as set out below.
8. As to the relevant provisions of the Retained Regulation:

¹ Retained in domestic law by virtue of the European Union (Withdrawal) Act 2018 and the operation of Air Services (Amendment etc) (EU Exit) Regulations 2018/1392.

- a. Under Article 3(2) the competent licensing authority [i.e. the CAA] shall not grant OLs or maintain them in force where any of the requirements of Chapter II of the Regulation (i.e. Articles 3-14) are not complied with.
- b. Article 4 sets out the conditions for granting an OL, including that the undertaking holds a valid Air Operator Certificate (**AOC**) (sub para (b)), and that the undertaking meets the financial conditions specified in Article 5 (sub para (g)).
- c. Article 5(1) provides that the competent licensing authority shall closely assess (among other things) whether an undertaking applying for an OL for the first time can demonstrate that it can meet at any time its actual and potential obligations for a period of 24 months from the start of operations.
- d. Article 8(1) provides that an OL shall be valid as long as the air carrier complies with the requirements of Chapter II. Article 8(2) requires the CAA closely to monitor compliance with the requirements of Chapter II of the Regulation and, in any case, to review compliance with these requirements “*when a potential problem has been suspected*”.
- e. Under Article 9(1), the competent licensing authority [i.e. the CAA] may at any time assess the financial performance of a UK air carrier which it has licensed [such as Flybe]. Based upon its assessment, the authority shall suspend or revoke the OL if it is no longer satisfied that the UK air carrier can meet its actual and potential obligations for a 12-month period.
- f. Article 9(1) also provides that the competent licensing authority may grant a temporary licence, not exceeding 12 months, pending financial reorganisation of the UK air carrier provided that safety is not at risk, that this temporary licence reflects, when appropriate, any changes to the AOC and that there is a realistic prospect of a satisfactory financial reconstruction within that time period.
- g. Article 9(1a) was originally introduced in May 2020² specifically as a response to the COVID-19 pandemic. It currently provides,³ as retained in domestic legislation, as follows:

Based on the assessments referred to in paragraph 1 carried out from 1 March 2020 to 31 December 2021, the competent licensing authority may decide before the end of that period not to suspend or revoke the operating licence of the UK air carrier provided that safety is not at risk, and that there is a realistic prospect of a satisfactory financial reconstruction within the following 12 months. It shall review the performance of this UK air carrier at the end of the 12-month period and decide whether the operating licence shall be suspended or revoked and a temporary licence shall be granted on the basis of paragraph 1.

² By EC Regulation 2020/696

³ Pursuant to EC Regulation 2020/2115.

- h. Article 9(2) provides that whenever there are clear indications that financial problems exist or when insolvency or similar proceedings are opened against a UK air carrier licensed by it the competent licensing authority [i.e. the CAA] shall without delay make an in-depth assessment of the financial situation and on the basis of its findings review the status of the OL in compliance with this Article within a time period of three months.
 - i. Article 9(5) provides that in case a UK air carrier's AOC is suspended or withdrawn, the competent licensing authority [i.e. the CAA] shall immediately suspend or revoke that air carrier's OL.
 - j. Article 14 provides that the licensing authority, when adopting a decision to suspend or revoke an OL, shall ensure that the carrier is given the opportunity to be heard.
- 9. The UK Regulations make provision for the implementation of the Retained Regulation. In particular:
 - a. Regulation 5 designates the CAA the competent licensing authority for the purposes of (amongst other things) Articles 3-11 of the Retained Regulation.
 - b. Pursuant to Regulation 7, the CAA may revoke or suspend an OL that it has granted. It may exercise these powers only after notifying the licence holder of its intention to do so and after due consideration of the case and any representations made by the licence holder.
 - c. By Regulation 8(2) and paragraph 3 of Schedule 2, a decision to revoke or suspend does not take effect until 14 days after the licence holder has been notified of the CAA's decision.
- 10. The applicable procedure is set out in the CAA's document CAP 1591 "*Guidance on the procedure for a decision by a CAA Board Member pursuant to Part 1 (Regulation 7) of the Operation of Air Services in the Community Regulations 2009 and Chapter II of Regulation (EC) No 1008/2008*" (September 2017).
- 11. As regards route licences, section 69A(5) of the Civil Aviation Act 1982 states that, where a person holds an OL and an RL and the OL is suspended or revoked, the RL shall, from the date when the revocation or suspension takes effect, cease to be in force (or, in the case of suspension, not be effective during the period of suspension of the OL). No other grounds for retention of an RL were considered at the hearing or in the submission made by the parties prior to the hearing and, as set out above, the parties proceeded on the basis that if the OL were revoked, the RLs would follow.

1.4 Background

- 12. Flybe is the holder of the following licences granted by the CAA:
 - a. Operating Licence (OL) (Type A) OL/A/16;

- b. Route Licence, C/27 (charter route licence); and
 - c. Route Licence, S/27 (scheduled route licence).
13. Flybe entered administration on 5 March 2020. CMG made a proposal to revoke Flybe's OL and RL on the same date, based on an assessment which had started in January 2020. This resulted in the CAA's decision 01/2020 dated 16 April 2020 to revoke the OL and RLs (the **April 2020 Decision**). Flybe appealed against that decision to the Secretary of State for Transport, pending which its OLs and RLs remained in place.
 14. The April 2020 decision, however, was subsequently withdrawn by the CAA because of the introduction of the amendments to Article 9(1) (paragraph 8(g) above). These amendments had retrospective effect in that they referred to assessments carried out from March 2020, which was, therefore, relevant to Flybe's situation. The withdrawal of the April 2020 Decision was communicated in a letter to Flybe dated 2 July 2020 (although the status and meaning of that letter is in dispute (see below)).
 15. The Administrators of Flybe made a progress report to creditors dated 2 October 2020 in respect of the period 5 March to 4 September 2020 (**Administrators' Report**). That report indicated that, since the appointment of the joint administrators, a sale of Flybe's business and assets had been actively pursued and that the joint administrators "*consider that a sale of the business and certain specified assets of the Company may be possible, although it is unlikely to include the sale of the Company as a legal entity*".
 16. On 19 October 2020 the joint administrators signed an asset purchase agreement with a company called "Thyme OpCo". That agreement was not before the Panel but the evidence was that Thyme OpCo is to acquire "the bulk" of Flybe's business, including IP rights, spare parts, tooling, manuals, IT systems, software and the rights to take off and landing slots at airports. The Panel was told that the completion of the purchase was dependent on successful transfer of the slots and also upon Thyme OpCo itself obtaining an OL, for which it had applied and an AOC⁴ and holding such licence and certificate simultaneously with Flybe for some months. The intention is that, if and when the transaction completes, Thyme OpCo will rebrand itself as "Flybe".
 17. There was further correspondence between CMG and the administrators between 23 November 2020 and 23 December 2020, which is referred to below.
 18. On 19 January 2021, CMG wrote to the joint administrators with its proposal (**CMG Proposal**) to suspend or revoke Flybe's OL and RLs on the basis that:
 - a. CMG was no longer satisfied that Flybe could meet its actual and potential obligations for a 12-month period under Article 9(1) of the Retained Regulation; and that

- b. CMG was not satisfied that Flybe had a realistic prospect of a satisfactory financial reconstruction within the following 12 months for the purposes of Article 9(1) and 9(1a) of the Retained Regulation.
19. Flybe's AOC had been provisionally suspended under Article 254 of the Air Navigation Order 2016 and was subject to a proposal to revoke the AOC from the CAA's Safety and Airspace Regulation Group (**SARG**) dating back to March 2020, albeit that the proposal process was not progressed further as a consequence of the withdrawal of the April 2020 decision referred to in paragraph 14 above. CMG, therefore, also relied on Article 9(5) of the Retained Regulation in support of its proposal.

The Panel's approach

20. As was made clear at the hearing, the CMG Proposal made in January 2021 was a different proposal from that which had led to the April 2020 Decision. It was also taken in the context of amended legislation and within a different factual framework. The Panel, which was in part differently constituted from the panel which took the April 2020 Decision,⁵ considered this proposal afresh. No comment or objection was made by the parties in this regard.

1.5 Summary of CMG's submissions

(a) Application of Article 9(1)

21. CMG's position is that the CAA can no longer be satisfied that Flybe can meet its actual and potential obligations for a 12-month period.
22. The fundamental disagreement between the parties relates to the ambit of the financial assessment required under the Article 9(1) and 9(1a) tests. CMG argue that the assessment of Flybe's financial position should be directed at Flybe itself, i.e. the legal entity which currently holds the OL and RL. CMG submit that the Panel should not take the course suggested by Flybe of considering both Flybe Limited and the proposed successor business in its financial assessment. Such an approach would be wrong in law.
23. In this regard, CMG rely on the following:
 - a. The recitals to the Retained Legislation,⁶ including Recital 4 which states that the same member state should be responsible for the oversight of both the AOC and the OL, Recital 5 which refers to the obligation on licensing authorities to carry out regular assessments of the air carrier's financial situation and Recital 6 which provides that: "*to reduce risk to passengers, Community air carriers failing to fulfil*

⁵ The panel which took the April 2020 Decision consisted of: Mr Graham Ward CBE, Ms Anne Lambert and Mr David King. The Panel taking the present decision consists of Mr Graham Ward CBE and Ms Katherine Corich.

⁶ These are intended still to be available for interpretation of retained legislation: see section 6(3) of the EU Withdrawal Act 2018 and the Government's Guidance to the Act at paragraph 63: https://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf

their requirements or maintaining a valid operating licence should not be allowed to continue operations in such cases and the competent licensing authority should revoke or suspend the operating licence". CMG submitted that these provisions indicate that both the AOC and the OL are authorisations conferred on a specific air carrier to permit that carrier to provide air passenger services where it demonstrates that it is a fit and proper person to hold such authorisation.

- a. Pursuant to Article 2 of the Retained Regulation, an OL is "*an authorisation granted by the competent licensing authority to an undertaking permitting it to provide air services as stated in the operating licence*". An "*undertaking*" is defined as "*any natural or legal person whether profit-making or not*".
- b. Article 3(1) states that no undertaking shall be permitted to carry passengers mail or cargo by air unless it has been granted an appropriate OL. Under Article 3(2) the competent licensing authority shall not grant operating licences or maintain them in force where any of the requirements of this Chapter are not complied with.
- c. Article 4 sets out the requirements which must be satisfied by the undertaking that applies for an OL and, for example, Article 4(g) requires that undertaking to comply with the financial requirements of Article 5. CMG emphasised that the only person who could comply with this requirement was the original legal person who applied for the OL and it was not open to a third party acquiror of the assets to seek to do so. Similarly, Article 4(b) provided that the granting and validity of the OL was dependent on the possession of a valid AOC, demonstrating the AOC and the OL inhere in the same legal person and cannot be split.
- d. As to Article 9 itself, CMG argued that it was clear from the Retained Regulation that the financial tests are applied to the particular legal person to whom the OL and the AOC had been granted and, therefore, it was not open to Flybe to point to the financial position of the 'combined' entities of Flybe and Thyme OpCo to demonstrate financial viability.
- e. It was plain that Flybe itself could not meet the financial viability test – the Administrators' report stated that Flybe's non-preferential creditors were owed in the region of £450-500 million although the figure could be materially higher.

24. CMG also rejected Flybe's submissions to the effect that the transaction could be structured differently such that Flybe was restructured rather than selling its assets to a third party and that the CAA should have guided Flybe down this route, including because:

- a. The CAA is a regulator and it is not for the CAA to advise Flybe as to the relative merits of an asset sale rather than a restructure.

- b. The legal position is clear in that it is only the holder of the OL and AOC which can and must meet the financial tests.
- c. In any event CMG made it clear since the middle of 2020 that the OL was not transferable and that CMG did not accept that the financial test could be met by an entity other than Flybe itself. This point was repeated in CMG's letter of 23 November 2020.
- d. Flybe had the benefit of sophisticated legal advice and could itself have pursued the restructure alternative had it wished.

(b) Application of Article 9(1a)

- 25. CMG argued that the first sentence of Article 9(1a) granted a discretion to the regulator not to revoke or suspend an OL even if the tests in Article 9(1) were not met by the carrier.
- 26. As a matter of public law, before exercising its discretion the CAA was under a duty to make sufficient enquiry to put itself in a position where it could make an informed and lawful decision.
- 27. The CAA had not previously made a decision under Article 9(1a) – following withdrawal of the April 2020 decision on 2 July 2020, the CAA afforded a substantial period of time to the joint administrators to demonstrate that they could meet the test under Article 9(1a) and to carry out the necessary inquiries. On withdrawal of the April 2020 decision and pending those further inquiries, the previous financial assessments which had led to that decision remained in place.
- 28. By October 2020 it was clear, from the Administrators' Report, that there was little prospect of Flybe being financially reconstructed; and on 17 October 2020 the asset purchase deal was concluded.
- 29. There was, therefore, no real prospect of Flybe meeting the financial viability test under Article 9(1a) given that that test must be applied to Flybe itself. There was no realistic evidence that the purchaser of Flybe would be prepared to pursue a restructure whereby Flybe would itself continue as an air carrier. The CAA, therefore, could not exercise the discretion in Article 9(1a).
- 30. As to the choice between suspension or revocation under Article 9(1), CMG endorsed the approach taken in paragraph 39 of the decision 1/2019 in relation to Thomas Cook Airlines Limited (**TCAL**). There, the CAA Panel had said that suspension rather than revocation was appropriate where there was a realistic prospect that within a reasonable time the non-compliance could be remedied and the suspension lifted.
- 31. In this case there was no basis merely to suspend the OL, since there was no proposal to restart Flybe as an operating air carrier and, indeed, Flybe intended voluntarily to relinquish its OL if the transaction completed. The test for suspending, as potentially the more appropriate decision to take rather than revoking, was not met.

(c) Procedural unfairness/legitimate expectations

32. As to Flybe's argument of procedural unfairness and breach of natural justice:

- a. The Proposal and the hearing had followed the CAA's procedure laid down in CAP 1591. It was not said that the policy had been incorrectly applied. The complaint, therefore, appeared to relate to the policy itself, which was not a permissible challenge in an OL hearing.
- b. The basis for the Proposal was clear, namely that Flybe did not meet the tests in Article 9.
- c. The administrators had been notified and accorded at least the minimum time to make representations.
- d. The decision was not taken by CMG but by the Panel. Any defects in CMG's reasoning or the ability of the administrators to address CMG's points (none of which were admitted by CMG) were cured by the time of the holding of the hearing.

33. The argument that the CAA's actions were premature flowed from an incorrect interpretation of Article 9(1a) since:

- a. There had been no exercise of the discretion afforded by Article 9(1a) in July 2020 and no determination or decision by the CAA about Flybe's financial position at that point.
- b. Even if there had been, it must be open to the regulator to reconsider its assessment before the expiry of the 12 month period referred to in Article 9(1a). Article 9(1) remained in place and this expressly permitted the regulator to assess the financial position of an OL holder at any time.
- c. Following withdrawal of the April 2020 Decision, CMG had afforded the administrators time to demonstrate that Flybe could meet the test in Article 9(1a) but by October 2020 what had crystallised was an asset sale which meant that Flybe could not meet the test. CMG followed up on these points in the correspondence in November and December and only took its decision to propose revocation in the CMG Proposal (dated 19 January 2021).

34. The legitimate expectation argument was without merit, since there had been no sufficiently clear or unequivocal representation by the CAA (for example that the administrators could freely proceed by way of an asset sale). In any event, such an expectation could only be vindicated by way of judicial review.

35. Finally, an additional reason for suspending or revoking the OL was provided by Article 9(5), since Flybe's OL had been provisionally suspended under Article 254 ANO.

Summary of Flybe's submissions

(a) Application of Article 9(1)

36. Flybe submitted that the Panel should consider the financial position of the Flybe “undertaking” in a broad sense and carry out a financial assessment of Flybe and Thyme OpCo together. Completion of the asset sale transaction was expected to happen and the “Flybe” business would restart under the ownership of Thyme OpCo, having separated the business from its legacy liabilities and with significant financial resources available to it. That Thyme OpCo and its backers should be contemplating such a transaction itself demonstrated that Flybe was a viable undertaking which met the Article 9 tests.
37. The wide interpretation of the Flybe “undertaking” was supported by the Retained Regulation itself, which in paragraph 4(e) referred to the “company structure” as a separate matter from the “undertaking”, thereby demonstrating that these are two different things. It was also said to be supported by other retained EU law, which provides that a combination of assets can itself amount to an undertaking even where this is not co-extensive with an individual legal entity. In particular:
- a. In case M.8672 the European Commission recognised that the acquisition by easyJet of certain of Air Berlin’s assets and rights relating to its operations at Berlin’s Tegel airport (including Air Berlin’s slots at that airport) amounted to acquisition of an “undertaking”.
 - b. More recently, the Commission had, in August 2020, granted Flybe grandfathering rights to some of the slots operated by Flybe out of Heathrow. It was only able to do so on the basis that it considered that “Flybe” the wider entity (i.e. Flybe and Thyme OpCo its successor) would remain a competitive force on the relevant routes.
38. Flybe also argued that relevant policy considerations favoured a conclusion which permitted Flybe to retain its OL until the Thyme OpCo transaction completed. In particular:
- a. The Panel should be prepared to allow Flybe to retain its OL so as to facilitate the grant of slots for the winter season. This would only be possible, according to the relevant rules of the international regime of slot allocation, if Flybe were in possession of a valid OL when the slots were allocated.
 - b. The relevant rules about airline licensing had to be interpreted in the context of the airline industry internationally, which included the rules for allocating slots. It was permissible to interpret Article 9 within this business context so as to allow Flybe to benefit from a “bridging arrangement” whereby it and Thyme OpCo together held two OLs for a short period of time to enable the slots to be allocated, transferred and for the transaction to complete.

- c. Allowing such a bridging arrangement was consistent with a broader policy of facilitating the rescue of airlines from insolvency. Other European regulators had permitted airlines to retain OLs for a short period to facilitate a total or partial takeover. Flybe appeared to be the first UK airline with a prospect of being rescued from insolvency. This was particularly remarkable given the difficult circumstances in which the global aviation industry found itself as a result of the COVID-19 pandemic. If Flybe were rescued this would create jobs and would increase choice for consumers. Removing Flybe's OL would jeopardise the sale of Flybe to Thyme OpCo and, with it, the potential benefits for the UK economy. In the meantime, there was no concern about consumer protection since the administrators had given assurances that the Flybe business would only resume operations when the entire business has been transferred to Thyme OpCo.
39. Flybe also argued that, if the relevant test were focused on Flybe Limited then there was a real possibility that the Administrators could do the proposed transaction by way of a restructuring plan, with Flybe's liabilities having been "cleansed" under the procedure set out in section 26A of the Companies Act 2006. One way or another (whether through an asset sale or a restructuring plan) Flybe could meet the financial viability test.
40. Flybe submitted that, in any event, even if the focus of financial viability was on Flybe Limited, it was compliant with the tests in Article 9(1) since it was meeting the obligations which fell due for payment during the administration. These sums were funded by asset sales, recoupment of monies from third parties and, since August 2020, injections of funding from its pending buyer, Thyme OpCo.

(b) Application of Article 9(1a)

41. Flybe argued that:

- a. The CAA had already made a determination about Flybe's financial position under Article 9(1a) when it withdrew the April 2020 Decision but did not revoke Flybe's OL. This assessment under Article 9(1a) must have taken place in July 2020. The only other legal basis for a decision in July 2020 was that the test under Article 9(1) was met, but that is not what the correspondence says. The CAA must have made a decision under one or the other Article in July 2020 since the CAA has previously stated that it must act expeditiously in relation to licensing decisions. Alternatively, at the very least, the CAA must, in July 2020, have started an assessment under Article 9(2) which would have to have been concluded within 3 months.
- b. On its proper interpretation, Article 9(1a) does not permit a further assessment before the expiry of 12 months, since the purpose of the amendments to the Retained Regulation was to permit breathing space for financial reconstruction. In making a proposal in January 2021 CMG, therefore, acted prematurely.

42. In any event, the fact that there was a credible bona fide offer for the Flybe business meant that Flybe met the Article 9(1a) conditions and the Panel should not therefore revoke or suspend the OL.

(c) Procedural unfairness/legitimate expectations

43. Flybe's case was that the CMG Proposal was contrary to the requirements of natural justice:

- a. The CMG Proposal was insufficiently reasoned. It referred to the Administrators' Report, which had been superseded by the time of the proposal because of the entry into the Thyme OpCo deal.
- b. It was not enough for Flybe to know that the decision would be taken. It needed to have enough information about the basis of the decision to make effective representations. The CMG Proposal did not even refer to the Thyme OpCo deal and so did not explain why CMG regarded this as insufficient to allow Flybe to comply with the tests in Article 9.
- c. Effectively, the proper order of submissions was reversed because Flybe were being asked (in a letter dated 23 November 2020) to justify why they should keep the OL.

44. Flybe also submitted that the CMG Proposal was premature and that the CAA had acted unnecessarily quickly in relation to the OL:

- a. Legally, for the reasons set out above, the CAA was obliged to wait 12 months before making another assessment under Article 9(1a) and, therefore, the earliest another proposal could be made was July 2021.
- b. The proposal was also factually premature in the light of the extraordinary circumstances of the COVID-19 pandemic and its effect on the transport industry. It was also true to say that Flybe's situation was still evolving as the Thyme OpCo transaction developed and the administrators engaged in legal action with BA relating to slots. These factors would materially impact Flybe's situation and it was therefore appropriate for the CAA to wait before reaching a decision about Flybe's OL.

45. Finally, Flybe contended that the administrators had a legitimate expectation that the asset sale structure would be acceptable to the CAA in the sense that this would enable Flybe to meet the tests in Article 9 to retain its OL. That is because the CAA was supportive of the transaction and did not raise any concerns about the structure of the proposed transfer to Thyme OpCo. Indeed, if the CAA had requested a restructuring plan the administrators could have carried this out. Such a structure would still be possible but it would cause detriment to Flybe, its creditors and to Thyme OpCo.

46. Flybe also submitted that if the Panel were to decide that the Article 9(1) or Article 9(1a) conditions were not met then it should suspend rather than revoke the licence. It did not disagree that the TCAL decision set out the appropriate test in this regard. It stated that if the OL were retained as a bridging arrangement towards a successful relaunch then the suspension would not need to be lifted but rather the OL would be voluntarily revoked at that stage.

Summary of response submissions

47. CMG submitted in response that:

- a. If the Panel concludes that the financial tests under Article 9 cannot be met, it would not be permissible for it to decide that Flybe should in any event retain its OL as a temporary bridging arrangement (i.e. to enable the winter slots to be obtained and transferred to Thyme OpCo). To do so would be to exercise the Panel's powers *ultra vires*, for an improper purpose and taking into consideration irrelevant considerations. Such a decision would also not be without impact on third parties because the Flybe slots would otherwise be released to the slot pool and would be available for re-allocation to other airlines. The submission that the application of the Article 9 test involved taking account of the rules as to slot allocation amounted to the "commercial tail wagging the regulatory dog".
- b. CMG, as the expert body presenting the Proposal to the Panel, did not itself consider that it had made an assessment under Article 9(1a) in July 2020 or at any other time before the Proposal. This was a far more plausible interpretation of the facts than the strained construction put on them by Flybe. That strained construction was the result of a desire to "reverse engineer" a 12 month hiatus which would enable Flybe to retain its OL beyond the date for allocation of the winter slots.
- c. A decision to suspend would be tantamount to no decision at all.

48. Flybe submitted in response that:

- a. The CMG Proposal threatened to jeopardise the transaction, which was close to completion.
- b. There is no better evidence that a business is viable than the willingness of a third party to invest in it.
- c. The only plausible interpretation of the facts was that an Article 9(1a) assessment was made in July 2020 and the whole purpose of Article 9(1a) was to give air carriers flexibility and a respite in the COVID-19 pandemic.
- d. The Proposal was premature because, until completion, it was impossible to say that the company cannot be restructured.

Discussion and determination

(a) Application of Article 9(1)

49. The relevant test for the Panel under Article 9(1) is whether it is satisfied that Flybe can meet its actual and potential obligations for the next 12 months.
50. The Panel's view was that it was concerned, under Article 9, with the financial prospects of Flybe itself as the current holder of the OL. It was not appropriate to consider a wider Flybe "business" consisting of Flybe together with Thyme OpCo, the potential future acquiror of its assets. This was because:
- a. Given the aims and scope of the Retained Regulation, it is important to be clear, for regulatory purposes, which legal entity was authorised to provide air services and subject to oversight and supervision by the CAA. Consistently with this, the provisions of the Retained Regulation relied on by CMG strongly suggest that the obligations imposed by an OL are personal to the OL holder.
 - b. In particular, Article 2 makes it clear that an OL is an authorisation granted personally to a particular "undertaking" as defined. It was not an asset which could be transferred to a third party. "Undertaking" is, importantly, defined by reference to a particular natural or legal person, not a broader concept of a wider "business" such as that argued for by Flybe.
 - c. In any event, Article 9(1) states in terms that the assessment that is to be carried out is of the "*financial performance of a UK air carrier*".
 - d. The Panel also found it instructive to consider the requirements which an air carrier must satisfy in order to obtain an OL in the first place (Article 4 of the Retained Regulation). These include having one or more aircraft at its disposal (Article 4(c)) and that the applicant's main occupation is to operate air services in isolation or combined with any other commercial operation of aircraft or the repair and maintenance of aircraft (Article 4(d)). This reinforces the Panel's view that the financial requirements of both Articles 5 and 9 are directed towards the licence holder's position as an air carrier. Plainly, were Flybe to apply for an OL for the first time now it would not qualify, irrespective of its financial position, because it is not purporting to function as an air carrier even notwithstanding the constraints of the COVID-19 pandemic (for example the Administrators' 2 October 2020 progress report states that all of Flybe's fleet of 65 aircraft had been returned to lessors).
 - e. The Panel was also doubtful whether Flybe's proposal that there should be two OLs held simultaneously (one by Flybe and one by Thyme OpCo) by reference to the same pool of assets was consistent with the Retained Regulation, given the provisions referred to above.

51. It was not seriously disputed by Flybe that Flybe itself could not currently satisfy the test of financial viability in Article 9(1) as an air carrier. Clearly, the sums owed to its non-preferential creditors vastly outweigh its assets. Indeed, Flybe's representatives were open about the fact that the desirability of the proposed transaction from Thyme OpCo's perspective was dependent either on effecting an asset sale, leaving the liabilities in Flybe, or "cleansing" Flybe of its liabilities under a Companies Act restructuring. The administrators have opted for an asset sale which, if it completes, means that Flybe has no prospect of operating as an air carrier again, let alone getting itself into a position to meet the financial viability tests in Article 9(1).
52. Flybe's argument that it was currently meeting its obligations as they fell due was nothing to the point:
- a. The test under Article 9(1) is whether the air carrier can meet its actual and potential obligations for a 12 month period.
 - b. That must mean its actual and potential obligations as an air carrier, consistently with the correct interpretation of the Retained Regulation outlined above.
 - c. Flybe had no aircraft and was not purporting to operate as an air carrier. The fact that it was meeting the modified obligations that fell due in administration did not mean that it satisfied the Article 9(1) test, or that it could do so in the future.
53. The Administrators' Report which was cited in the CMG Proposal clearly stated that the sale of Flybe as a legal entity was unlikely. Consistently with this, the Thyme OpCo transaction which has emerged is an asset sale which, if successful, will result in Flybe transferring its business and ultimately voluntarily relinquishing its OL. The argument that CAA engendered a legitimate expectation in Flybe that the asset sale would be acceptable is dealt with further below. That the transaction *could* be differently structured, so that Flybe continued to hold the OL and to conduct the relevant business, is itself, however, no answer to the CMG proposal:
- a. The CAA is a regulator. CMG's task is to assess the financial viability of the air carrier according to its actual financial position and its proposed near-term plans, as presented to CMG. It is not itself an adviser.
 - b. It was (and remains) open to Flybe's administrators to structure the proposed transaction how they saw fit at any stage in the light of the available information, and in the light of the highly competent and specialised legal and commercial advice which is available to it. It was said that a restructure was still possible.
54. The Panel did not agree that the arguments of policy, or the submissions about decisions of the EC Commission, should cause it to reach a different conclusion under Article 9(1):

- a. The Panel's task is to apply the Retained Regulation. The words of Article 9, construed against the remainder of the Regulation, are clear for the reasons set out above.
- b. The risk to Flybe of losing its allocation of winter slots does not arise from the Retained Regulation but from the operation of different rules governing slot allocation, which are not the Panel's concern.
- c. Equally, if the Article 9 tests are not met it would not be appropriate to use the licensing regime to permit the OL to be retained simply to facilitate a particular commercial transaction.
- d. There was no real evidence of an EU or UK policy in relation to insolvent airlines and the references to the treatment of Air Berlin were not persuasive in the light of the facts that this involved a different factual situation and also that insolvency laws differ across the EU.
- e. The fact that the EC Commission had, in its decision on Flybe's grandfathering rights, apparently taken account of the financial viability of Flybe's successor was not decisive. That decision related to the construction of and compliance with certain commitments entered into by British Airways' parent company.⁷ Similarly, the fact that for competition law purposes Thyme OpCo might be considered as the successor undertaking to Flybe did not trump the clear definition of "undertaking" in the Retained Regulation.

(b) Article 9(1a)

55. The effect of Article 9(1a) is to grant the Panel a discretion, in cases where the Article 9(1) financial viability test is not met, not to suspend or revoke an OL provided the air carrier can comply with the potentially more generous Article 9(1a) test. That test is (and provided safety is not at risk) whether there is a realistic prospect of satisfactory financial reconstruction within the following 12 months.
56. Article 9(1a) was primarily relied on by Flybe to argue that the CAA was precluded from taking any action for 12 months (until July 2021 at the earliest).
57. The Panel did not agree with Flybe that the CAA had already made an assessment under Article 9(1a) either when the April 2020 Decision was withdrawn or at some other unspecified time within 3 months thereafter:
- a. The CAA's letter dated 2 July 2020 withdrawing the April 2020 Decision refers to *"the particular situation which arises in this case as a result of the retrospectively*

⁷ The Commission also appears to have been influenced in its decision by the assertion made by Freshfields Bruckhaus Deringer for the Administrators on 14 July 2020 that Flybe was expecting to be able to keep its OL (see paragraph 57(c)), as appears from paragraphs (42), (70), (87) and (137) of the decision.

applicable COVID amendments". In other words the decision had been withdrawn because the legal basis on which it had been taken had been changed. That is a long way from saying that an assessment had already been made under the newly applicable rules.

- b. In any event the letter stated in terms that the CAA was prepared to accede to a further consideration of the OL and RL. It refers to a proportionate and timely process for this reconsideration, in relation to which Flybe would be permitted to present updated evidence. That was wholly inconsistent with an assessment under Article 9(1a) having already been carried out.
- c. Flybe did not themselves believe that an assessment had already been carried out on (at least) 15 July 2020. On that date its solicitors, Freshfields Bruckhaus Deringer, submitted to the European Commission (in the grandfathering rights dispute referred to above in paragraph 54(e)) that "*Flybe is expecting the fresh assessment by the CAA to conclude that the Article 9 test of the EU Regulation (as amended by the Amending Regulation) is met and that there is no longer a basis to revoke Flybe's operating licence*". It is not clear what the basis for that assertion was but it is, in any event, inconsistent with a belief that an assessment had been carried out around the time of the withdrawal of the April 2020 Decision on 2 July 2020.
- d. In its decision the EC Commission stated that the CAA was expected to conclude its assessment by 'mid-August', although it is unclear on what information that was based.
- e. Flybe were unable to point to any such assessment having been carried out or communicated to it after 15 July 2020 or 4 August 2020 (at which point the European Commission was of the view that an assessment had not yet been carried out).
- f. The evidence was inconsistent with any assessment having previously been carried out and entirely consistent with CMG having afforded the administrators time to develop and present their proposals as to the future of Flybe, against the backdrop of the administrators' undertakings that they would not sell tickets or undertake any aircraft operations in the meantime.

58. In any event, even if, contrary to the above, an assessment had already been carried out, the CAA would not then be precluded from conducting a further assessment for 12 months. Article 9(1a) is not mandatory but gives the licensing authority a discretion to alleviate the consequences of the stricter test in Article 9(1) by looking forward 12 months to a potential reconstruction. To hold that the CAA is not permitted to make another assessment and act on it within the 12 month period would be entirely contrary to the scheme of the Retained

Regulation which is concerned with reducing risk to passengers (Recital 6 – see paragraph 23(a) above). It would also be inconsistent with the general words in Article 9(1) that the licensing authority may assess financial performance “at any time”. In the Panel’s view the requirement to review the carrier’s performance at the end of the 12 month period is to provide a longstop date by which a further assessment must be made if the Article 9(1a) discretion has been exercised, not to give mandatory breathing space for the exclusive benefit of the air carrier.

59. Accordingly, the CAA was not precluded from taking its decision by virtue of Article 9(1a).

60. As to the test in Article 9(1a), for the same reasons as set out above, the correct approach is to consider whether there is a realistic prospect of satisfactory reconstruction of Flybe Limited. It is clear from the evidence presented to the Panel and in particular the transaction that has been put in place, that there is currently no such prospect. Accordingly, there is no basis to exercise the discretion in Article 9(1a). In the light of this, the question of whether safety was not at risk within the meaning of Article 9(1a) did not arise for determination.

(c) Procedural unfairness/legitimate expectations

Insufficient reasoning

61. There was no merit in this complaint. Although the proposal letter was fairly short, the approach being adopted by CMG was clear and straightforward. It must have been clear to the Administrators from, at the latest, the 23 November 2020 letter, that CMG did not consider that Flybe could satisfy the Article 9 tests if it were selling its assets to Thyme OpCo.

62. In any case, the relevant decision in this case is taken by the Panel. The CMG Proposal is just that; a proposed course of action. In considering whether Flybe had had sufficient chance to understand CMG’s position and to put its own case in response, it was relevant to look not just at the CMG Proposal but also at:

- a. The correspondence which preceded it, including the 23 November 2020 letter from CMG, the Administrators’ response of 29 November 2020 and CMG’s further response of 23 December 2020;
- b. The lengthy written submissions submitted by the Administrators in response to the CMG Proposal dated 15 February 2021;
- c. The response documents put in by both CMG and Flybe dated 18 and 23 February 2021; and
- d. The submissions made at the hearing itself.

63. It was clear from that material that Flybe had had ample opportunity to understand CMG’s position and to put its response before the CAA made its decision. Flybe availed itself of

that opportunity with its detailed legal and factual submissions which were considered by the Panel.

64. Flybe's argument that CMG had "inverted the correct procedure" because of a lack of reasoning in the proposal letter is not correct. The procedure is governed by the CAA's CAP 1591 policy document. No complaint was made by Flybe that CMG had failed to comply with its published policy. This policy provides that, where it considers that the CAA should suspend or revoke an OL, CMG will send out a proposal letter and that the proposal letter must include CMG's reasons for the proposal and any documents supporting the proposal and other relevant evidence. That requirement was complied with, as were the provisions of CAP 1591 dealing with the exchange of written representations. There is no requirement for formal exchange of pleadings in a particular order, or for a particular level of detail to be included at a particular stage. Nor was it wrong in principle or procedurally unfair for the CAA to ask, in its letter dated 23 November 2020, for an explanation of how Flybe the legal entity satisfied the tests set out in the Retained Regulation; on the contrary it is for the regulated entity to satisfy the regulator at all times as to how and why it fulfils the relevant criteria.

Prematurity

65. The legal argument as to prematurity based on Article 9(1a) has been addressed above. The remaining complaint was that the CAA had acted too hastily in the light of the situation of the COVID-19 pandemic and also the evolving situation of Flybe itself.
66. This complaint was hard to understand in the light of Flybe having first entered administration over a year ago. Furthermore:
- a. As is apparent from the discussion in paragraphs 14-18 and 33 above, CMG afforded a considerable period of time to the Administrators between the withdrawal of the April 2020 Decision and the presentation of its Proposal in January 2021.
 - b. The CAA's CAP 1591 policy document envisages a swift procedure from the making of CMG's Proposal to the hearing (with the licence holder's written submissions normally following 10 days after the proposal letter and a period of "at least" 21 days from the date of the Proposal to the hearing.) The procedure adopted in this case was entirely consistent with that. Moreover, Flybe was permitted a total of 27 rather than the normal 10 days to send its initial response to CMG's Proposal and was afforded an opportunity to make further submissions 3 days before the hearing itself.
 - c. Furthermore, the Retained Regulation does oblige the CAA not to delay unduly. Under Article 9(1), once the CAA determines that it is no longer satisfied that the air carrier can meet its actual and potential obligations for a 12 month period it must either suspend or revoke the licence and not delay (unless the discretion under

Article 9(1a) is available and the CAA elects to exercise it). Article 3(2) also provides clearly that the competent licensing authority “*shall not*” maintain an OL in force when any of the requirements of Chapter II of the Retained Regulation are not complied with. That also required the CAA to act and not to delay.

67. Although the wider COVID situation is ongoing and developing, the course now adopted by Flybe’s administrators is tolerably clear since, as presented to the Panel, the asset sale deal has been concluded with Thyme OpCo and will complete subject to the conditionality described to the Panel. It is not clear what further information would be revealed if the CAA were to delay taking a decision.
68. The Panel also notes for completeness that Flybe’s written submissions dated 15 February 2021 included a request to delay the hearing “*due to the uncertainty caused by the unfolding situation with regards to the latest COVID-19 pandemic measures*”. That request was rejected on the basis that:
- a. Adjourning the hearing involved not taking a decision at all, which was equivalent to a decision that Flybe should retain its OL and RLs pending the adjourned hearing. The Panel should not take this course without hearing full submissions from both sides.
 - b. Flybe was entitled to address the Panel at the hearing on why it should retain its OL and RLs.
69. In any event, having now heard full submissions on the prematurity argument, the Panel rejects them for the reasons already expressed.

Legitimate expectations

70. As to legitimate expectations, in order to succeed in this claim Flybe would need to show some form of express or implied promise by the CAA about its approach to the OL or Article 9.⁸ Flybe submitted in this regard as follows:
- a. The asset sale deal with Thyme OpCo was pursued with the CAA’s “*apparent blessing*” (written submissions paragraph 5.3).
 - b. The Administrators proceeded with the asset sale but at no point in the process did the CAA raise any concerns with the structure of the sale. On the contrary, the CAA was supportive of the transaction and had been acting on an expedited basis to approve the OL application of Thyme OpCo (written submissions paragraph 6.12).
 - c. The current revocation process sits “*somewhat awkwardly*” with the discussions the administrators had had with the CAA (hearing transcript page 74).

⁸ Ordinarily this would need to be in the form of a clear and unequivocal representation by the CAA: see for example *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 at [61].

71. The Panel could see no basis in these submissions for a clear and defined promise which might give rise to a legitimate expectation on the part of Flybe, not least because it must have been clear to Flybe and its experienced legal team that the CAA would not be venturing to advise Flybe as to how best to structure its proposed transactions. It is also not clear precisely what Flybe allege the promise to be.
72. In the hearing, it was asserted by CMG that, following the withdrawal decision, CMG had repeatedly made it clear that the OL was not transferable and it was Flybe as the current OL holder which had to satisfy the requirements. No written evidence was relied on to support this assertion apart from the correspondence referred to below. Accordingly, although Flybe did not directly deny this allegation, the Panel places no weight on it.
73. But in any event:
- a. As appears from the material in the hearing bundle, the CAA adopted the same position in relation to the interpretation of Article 9(1) in relation to the April 2020 Decision. Indeed, this was one of the grounds of appeal from the April 2020 Decision.⁹ Even though that decision was withdrawn as a result of the retrospective introduction of the Article 9(1a) discretion, the basic approach of the CAA as to which legal entity had to meet the relevant test was unlikely to have changed.
 - b. Consistently with this approach, it was clearly understood by the Administrators that Thyme OpCo would need to apply for its own OL (and it has done so).
 - c. If there were any residual doubt about CMG's likely approach to the test then this was made very clear in CMG's letter of 23 November 2020. This stated in terms that "*any proposal which relates to a different legal entity is not relevant to the CAA's consideration of the tests under Article 9.1 and 9.1(a) with regard to the [OL] currently held by [Flybe].*"
74. Accordingly, the legitimate expectation arguments do not withstand scrutiny.

(d) Remaining matters

75. As to the choice between suspension or revocation, the parties were agreed that the relevant guideline was that set out in the TCAL decision (suspension might be appropriate where there is a realistic prospect that within a reasonable time the non-compliance could be remedied). It follows from the proper application of the test to Flybe Limited that there is no realistic prospect that the non-compliance with the financial tests could be remedied within a reasonable time and that suspension is not appropriate. Indeed, Flybe did not press its case for suspension particularly hard. This was unsurprising since Flybe frankly

⁹ See the Flybe Response Submissions in the hearing bundle dated 28 May 2020 at paragraph 5.1(a), 5.17-5.21 and footnote 36: "*the CAA will only accept that a sale of Flybe where it "continues as an air carrier under the same OL" qualifies as an eligible transaction for the purposes of Article 9(1)*".

acknowledged that, if the OL remained in place and the asset sale to Thyme OpCo completed, its intention would be simply to relinquish the suspended OL rather than to seek a lifting of the suspension.

76. In the light of the above conclusions it was not necessary for the Panel to determine whether the provisional suspension of the AOC provided a separate basis for the revocation or suspension of the OL under Article 9(5). The consideration of SARG's proposal in respect of the AOC has not been progressed to a hearing. It is a matter for SARG to review the circumstances which have developed since summer 2020 and to consider its next steps with regard to the provisionally suspended AOC.

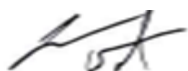
1.6 Decision

77. For the reasons set out above Flybe's OL should be revoked.

78. By Regulation 8 and paragraph 3 of Schedule 2 of the UK Regulations this decision does not take effect until 14 days after the licence holder has been notified of the CAA's decision, i.e. the date of this letter.

79. By section 69A(5) of the Civil Aviation Act 1982, Flybe's RLs will also cease to be in force on the date the revocation of the OL takes effect.

Yours faithfully



Graham Ward CBE
Chair of the Panel



Katherine Corich
Panel Member

cc Paul Smith Esq, Group Director, CMG