Department for Transport

From the Secretary of State
The Rt. Hon. Grant Shapps

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2nd June 2021

Dear Paul

Appeal against CAA Decision 1/2021 Operation and Route Licences of Flybe Limited – Decision to Revoke by CAA.

1. I refer to the Notice of Appeal ('NoA') dated 23 March 2021 against Decision 01/2021 of the Civil Aviation Authority ('CAA') to revoke Flybe Limited's operating licence ('OL') (the 'Decision').[1]

Factual background

2. The factual background to this appeal may be briefly summarised as follows:

    (a) In January 2020 the CAA's Competition and Markets Group ('CMG') commenced an assessment of the finances of Flybe. Flybe entered into administration on 4 March 2020 and, the next day, CMG initiated its procedure to suspend or revoke an OL by making a proposal. A hearing was held on 27 March 2020 and, after some further exchanges of evidence and submissions, on 16 April the CAA Panel published its decision, Decision 1/2020, to revoke Flybe's OL.

    (b) In May 2020 the European Commission (the 'Commission') amended Regulation (EC) 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community[2] in view of the impact of the Covid-19 pandemic on the aviation industry: see Regulation (EU) 2020/696 of 25 May 2020 amending

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[1] In the period since the appellant submitted its notice of appeal, Flybe Limited has become known as "FBE Realisations Limited". In this decision the appellant is referred to as "Flybe".

[2] OJ L 293/3, 31.10.2008.

Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community in view of the COVID-19 pandemic.[3]

(c) Given the apparent retrospective effect of the amendments upon the CAA's financial assessment, Decision 1/2020 was withdrawn on 2 July 2020. The impact and effect of that decision to withdraw the revocation is disputed in the context of this appeal.

(d) On 2 October 2020 the Administrators provided an update to Flybe's creditors about the sale which included the following:

> "As set out in the Proposals, 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 a sale of the Company as a legal entity."

(e) On 19 October 2020 the Administrators entered into an asset purchase agreement to sell the brand and certain other assets of Flybe to a company called 'Thyme OpCo'. (It is stated in §16 of the Decision issue on 9 March 2021 that the evidence before the Panel was that Thyme OpCo is to acquire "*the bulk*" of Flybe's business.)

(f) Following further correspondence between the CAA and Flybe, on 19 January 2021 the CMG wrote to the Administrators with a proposal, re-initiating the process by which an OL can be suspended or revoked.

(g) After a remote hearing on 26 February 2021, the CAA Panel issued the Decision, which is now under appeal.

Statutory background

3. The appeal is brought under regulation 9 of the Operation of Air Services Regulations 2009/41 (the 'UK Regulations')[4] and is governed by the provisions of Schedule 2 to those Regulations.

4. Schedule 2 sets out the process for appealing the revocation, provision for the service of written information, and a process whereby questions necessary to the determination of the appeal may be asked of the parties. Paragraph 7 of Schedule 2 prevents the submission by any person of new evidence that was not before the CAA

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3 OJ L 165/1, 27.5.2020.

4 As amended by the Operation of Air Services (amendment etc.) (EU Exit) Regulations 2018.

when it decided the case. Paragraph 8 sets out that in deciding an appeal I may uphold the decision of the CAA or direct it to reverse or vary its decision.

5. The legal framework for the Decision itself is set out in the retained Regulation 1008/2008 on the operation of air services in the United Kingdom ("the Retained Regulation"), [5] which includes the following material provisions:

   (a) recital (2), which refers to the need to "*ensure a more efficient and consistent application of Community legislation for the internal aviation market*";

   (b) recital (3), which explains that, "*[r]ecognising the potential link between the financial health of an air carrier and safety, more stringent monitoring of the financial situation of air carriers should be established*";

   (c) recital (5), which refers to the need for licensing authorities to "*carry out regular assessments of the air carriers' financial situation*" so as to ensure "*consistent monitoring of the compliance with the requirements of the operating licences of all Community air carriers*";

   (d) recital (6), which states, "*To reduce risks to passengers, Community air carriers failing to fulfil the requirements for maintaining a valid operating licence should not be allowed to continue operations*";

   (e) Article 2, containing the definitions;

   (f) Article 3(2), under which the competent licensing authority (ie, the CAA) shall not grant OLs or maintain them in force where any of the requirements of Chapter II of the Retained Regulation (Articles 3 to 14) are not complied with;

   (g) Article 4, which contains the conditions for the granting of an OL, one of which is meeting the financial conditions specified in Article 5;

   (h) Article 5(1), which requires the competent licensing authority to "*closely assess*" whether a new applicant for an OL can demonstrate that (i) "*it can meet at any time its actual and potential obligations established under realistic assumptions, for a period of 24 months from the start of operations*" and (ii) "*it can meet its fixed and operational costs incurred by operations according to its business plan and*

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5 As amended by the Operation of Air Services (amendment etc.) (EU Exit) Regulations 2018.

established under realistic assumptions, for a period of three months from the start of operations, without taking into account any income from its operations";

(i) Article 8(1), which provides that an OL shall be valid as long as the air carrier complies with the requirements of Chapter II;

(j) Article 8(2), which requires the competent licensing authority to "*closely monitor*" compliance with the requirements of Chapter II and to review compliance "*when a potential problem has been suspected*";

(k) Article 9(1), which provides:

> "The competent licensing authority may at any time assess the financial performance of a UK air carrier which it has licensed. Based upon its assessment, the authority shall suspend or revoke the operating licence if it is no longer satisfied that this UK air carrier can meet its actual and potential obligations for a 12-month period. Nevertheless, the competent licensing authority may grant a temporary licence, not exceeding 12 months pending financial reorganisation of a UK air carrier provided that safety is not at risk, that this temporary licence reflects, when appropriate, any changes to the AOC [air operator certificate], and that there is a realistic prospect of a satisfactory financial reconstruction within that time period";

(l) Article 9(1)(a), which provides:

> "Based on the assessments referred to in paragraph 1 carried out from 1 March 2020 until 31 December 2020, the competent licensing authority may decide before the end of that period not to suspend or revoke the operating licence of the Union 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 Union 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.";

(m) Article 9(2), which reads:

> "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 shall without delay make an in-depth assessment of the financial situation and on the basis of its findings review the status of the operating licence in compliance with this Article within a time period of three months"; and

(n) Article 14, which gives a UK air carrier whose licence is to be suspended or revoked the opportunity of being heard.

Nature of appeal

6. Before turning to the substance of this appeal it is necessary to briefly address the submissions of the parties regarding my proper function in determining an appeal under the UK Regulations.

7. The CAA at §§9 to 14 of its reply submissions of 6 April 2021 (‘Reply’) considers that the function of the Secretary of State is limited to reviewing the Decision. In reviewing the Decision, the Secretary of State must ascertain whether the CAA has made some legal or other clear error which vitiates the Decision. It argues the appeal is not concerned with UK transport policy generally.

8. In its response to the CAA Reply (‘Response’), at §1.11, Flybe argues it is open to the Secretary of State to direct the CAA to reverse or vary its decision “*even if a decision by the CAA is lawful and in compliance with the applicable legislation*”. It argues:

> “[T]he SoS [Secretary of State] is, in Flybe’s submission, permitted to direct the CAA to vary or reverse its decision if the SoS considers that the varied or new decision would be more in line with UK transport policy. In other words, where two or more decisions in relation to the same set of facts are lawful, the fact that the CAA may have decided for one outcome does not preclude the SoS from directing the CAA to reverse or vary that decision if the SoS’ alternative but preferred decision is also lawful. In making such assessment, the SoS is entitled to consider UK transport policy.”

9. Schedule 2 of the UK Regulations does not expressly set out the task of the Secretary of State in determining an appeal under the UK Regulations. Paragraph 2 of Schedule 2 does not prescribe or constrain the grounds on which an appeal can be made, but requires the appellant to state the grounds on which the appeal is based and state the arguments on which the appellant relies. Paragraph 7 of Schedule 2 precludes the submission of any evidence to the Secretary of State that was not before the CAA when it decided the case. Paragraph 8 of Schedule 2 provides that in deciding an appeal I may uphold the decision of the CAA or direct it to reverse or vary its decision.

10. This statutory framework suggests that my role is intended to be one of review rather than reconsideration. In determining an appeal under the UK Regulations, it is necessary to assess whether the decision of the CAA is wrong (or vitiated by procedural error or unfairness), and the burden falls to the appellant to establish that the Decision should be reversed or varied.

11. As will become clear, it is not necessary in the present circumstances to express a view about the proper approach to disposing of an appeal where the CAA decision is flawed in a material respect that means I must direct the CAA to vary or reverse its decision.

Disposal

12. Flybe advances four grounds of appeal:

(a) the CAA failed to apply correctly the test of financial viability in Article 9(1) of the Retained Regulation [*ground 1*];

(b) the CAA failed to consider and apply correctly the test in Article 9(1a) of the Retained Regulation [*ground 2*];

(c) by its Decision, the CAA reneged on a legitimate expectation on Flybe's part to which the CAA's conduct had given rise [*ground 3*]; and

(d) the CAA took the Decision on a different basis to that which was in the proposal by the CAA's Consumer and Markets Group ('CMG') dated 19 January 2021 [*ground 4*].

13. In determining this appeal, I had before me:

(a) the bundle that was before the CAA Panel that took the Decision;

(b) the transcript of the Panel hearing of 26 February 2021 that preceded the Decision;

(c) the Decision itself of 9 March 2021; and

(d) the NoA, the Reply (with accompanying additional authorities) and the Response.

14. Based on those materials and for the reasons set out in §§15 to 58, below, I conclude that each ground of appeal lacks merit and therefore uphold the Decision. In accordance with regulation 8(3) of the UK Regulations, the revocation of Flybe's OL takes effect from the date of this decision. As a consequence, and in accordance with section 69A(5) of the Civil Aviation Act 1982, its route licences cease to be in force.

Reasons

<u>Ground 1</u>

15. Flybe's submissions on this ground of appeal may be summarised as follows:

(a) Although an OL is granted to a legal entity, the assessment of financial viability under Article 9(1) is to be applied to an 'undertaking', which may be different to that legal entity and does not have to have a legal personality.

(b) Those parts of Flybe's business that Thyme OpCo has agreed to purchase comprise an undertaking: they are "*a package of assets that corresponds to the business of Flybe*" or "*Flybe 2.0*" (NoA, §5.6).

(c) The foregoing is consistent with (i) the decision of the Commission in Case M.8672 – *easyJet/Certain Air Berlin Assets* of 12 December 2017 (the '*Air Berlin* Decision') and (ii) the approach taken by the Commission to Flybe in the context of its decision in Case M.6447 – *IAG/BMI, Granting of Grandfathering rights* of 4 August 2020 (the 'Grandfathering Rights Decision').

(d) Accordingly, in assessing financial viability under Article 9(1) the CAA should not have considered the position of Flybe alone but should have considered the position of Flybe together with that of its successor, Thyme OpCo. Had it done so, it would have found the test of financial viability to be satisfied.

(e) The fact that, in view of the CAA having now granted Thyme OpCo an OL, the consequence would be that both Flybe and Thyme OpCo would hold OLs simultaneously in relation to the same underlying assets is not only permissible under the Retained Regulation but consistent with the harmonious functioning of the EU-law system for the regulation of aviation.

16. In my view, for the reasons given by the CAA in its Reply and in the Decision itself, Flybe's submissions are misconceived.

The entity whose financial viability should be assessed

17. I do not consider that analysis of the concept of an 'undertaking' for the purposes of EU law assists greatly in resolving ground 1. As is observed by Flybe (Response, §3.3), and as the CMG accepted before the Panel,[6] an 'undertaking' is any entity that is engaged in economic activity; thus, not all undertakings have legal personality. This is consistent with, and reflected in, the definition of 'undertaking' in Article 2(3) of the Retained Regulation: it is "*any natural or legal person, whether profit-making or not*" or "*any official body whether having its own legal personality or not*". However, it does not follow that under Article 9 of the Retained Regulation, the CAA should not assess the financial performance of the entity with legal personality that holds an OL but should, instead, assess the financial performance of some other entity (or entities).

[6] See §9 of the CMG's response of 18 February 2021 to Flybe's submissions of 15 February 2021 and the CAA Panel's questions of 16 February 2021.

18. An operating licence is defined, in Article 2(1) of the Retained Regulation, as "*an authorisation granted by the competent licensing authority to an undertaking, permitting it to provide air services as stated in the operating licence*". Flybe does not dispute that "*CAA policy is that an OL is granted to a legal entity*" (Reply, §5.4) – in other words, that the 'undertaking' to which an OL is granted under Article 2(1) is an entity with legal personality. In my view, Flybe is correct to accept this: the obligations/conditions under Articles 4 and 5 of the Retained Regulation for the grant of an OL are clearly individual by nature. Thus, if Flybe's interpretation of Article 9(1) were correct, there would be a potential mismatch between the entity that holds an OL (and that had to meet the conditions in Articles 4 and 5 in order to do so) and the entity the financial viability of which the CAA should assess under Article 9 in deciding whether to revoke or suspend that entity's OL.

19. I agree with the CAA that such a potential mismatch would be contrary to the language of Article 9(1), which requires the competent licensing authority to assess the financial performance of the relevant "*UK air carrier*". A "*UK air carrier*" is defined, in Article 2 (11), as "*an air carrier with a valid operating licence granted by the competent licensing authority in accordance with Chapter II*" and is therefore clearly intended to be <u>the same entity</u> as that which holds the OL.

20. In any event, turning to §§15(b) and 15(c) above, the Commission decisions relied on by Flybe do not in fact support the proposition either that certain assets of an air carrier are, by themselves, an 'undertaking' or that it is appropriate to consider Flybe and Thyme OpCo, two unrelated legal persons, to be a single 'undertaking'.

21. In the *Air Berlin* Decision, as the CAA observes (Reply, §32), the Commission stated that easyJet would, as a result of the transaction under consideration, "*acquire sole control over assets and rights of Air Berlin, which constitute <u>parts of an undertaking</u> as defined in paragraph 24 CJN*[7]" (*Air Berlin* Decision, §18; emphasis added). The Commission continued, "*Therefore, the Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.*" Flybe asserts that the fact that the acquisition by easyJet of those assets was a notifiable concentration for the purposes of the Merger Regulation[8] "*presupposes that the assets transferred were sufficient to constitute a business with a market facing presence so the business*

[7] The "*CJN*" being the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95/1, 16.4.2008.

[8] Council Regulation (EC) No 139/2004, OJ L 24/1, 29.1.2004.

transferred was itself an "undertaking"" (Response, §3.6). This is incorrect. Under Article 3(1)(b) of the Merger Regulation,

> "A concentration shall be deemed to arise where a change of control on a lasting basis results from: ...
> (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings." [emphases added]

22. Therefore, the fact that a notifiable concentration has arisen does not mean that there has necessarily been a merger between two (whole) undertakings or an acquisition of a (whole) undertaking.

23. The Grandfathering Rights Decision, as the CAA submits (Reply, §33) concerned whether Flybe was entitled to grandfathering rights to certain slots, which depended on the construction of the commitments that were made by the International Consolidated Airlines Group when it acquired British Midlands Limited and no view is expressed in the Grandfathering Rights Decision as to whether the assets of Flybe that are being purchased by Thyme OpCo could comprise an 'undertaking'. Moreover, insofar as the Commission's analysis in the Grandfathering Rights Decision appears to have been premised on Flybe being sold as a going concern and/or being in a position potentially to resume operations (see, in particular, §70 of that Decision), I agree with the CAA (Reply, §34) that, the premise being inaccurate, the Decision cannot assist.

24. It follows, the entity in relation to which the CAA should have performed the financial viability assessment for the purposes of Article 9(1) of the Retained Regulation was Flybe itself.

25. In view of the above, the question whether it is possible under the Retained Regulation for two separate legal persons to hold OLs simultaneously in respect of the same underlying assets does not need to be decided.

Whether, when applied to the correct entity, the Article 9(1) test is met

26. As to whether Flybe itself 'passes' the test of financial viability in Article 9(1), the CAA notes (Reply, §42) that the grounds of appeal do not include an explicit challenge to the Panel's finding that Flybe did not meet the Article 9(1) test (Decision, §§51-52). However, given that Flybe does assert (NoA, §5.44) that "*the Article 9(1), as amended by Article 9(1)(a), test is met*", for completeness I address the question whether the

conclusion in Decision, §§51-52 was correct, ie, whether Flybe itself meets the Article 9(1) test.

27. The question under Article 9(1) is whether the CAA is "*satisfied that [Flybe] can meet its actual and potential obligations for a 12-month period*". Flybe asserts (NoA, §§5.42-43) that it can do so because, as a result of the administration process that it entered on 5 March 2020, it has remained able to satisfy its obligations as they fall due and will continue to do so through disbursements from the estate (as funded by recoupment of monies owed, partial asset sales and funding by Thyme OpCo).

28. I agree with the CAA that the "*obligations*" to which Article 9(1) refers must the OL holder's obligations <u>as an air carrier</u>. That is consistent with the need to interpret Article 9(1) consistently with Article 5 of the Retained Regulation ('Financial conditions for granting an operating licence'), the requirements in which are clearly directed towards the ability of a prospective OL holder to meet its obligations as an air carrier, and with the aims in recitals (3), (5) and (6) to the Retained Regulation. I also agree with the CAA that (i) Flybe does not meet those obligations and (ii) that it is currently meeting its modified obligations in administration, as they fall due, does not change this fact.

29. The position, therefore, is that (i) the CAA's decision to assess the financial viability of Flybe itself was correct and (ii) so, too, was the CAA's conclusion that Flybe could not satisfy that test.

The asserted policy considerations and their relevance

30. Before turning to ground 2, I must return to submission made by Flybe in §1.11 of its Reply, namely that if I find there to be two lawful decisions, one of which "*would be more in line with UK transport policy*" than the other, it is open to me to (in effect) choose which to prefer.

31. As a matter of principle, this submission is not tenable in view of my role in determining an appeal under the UK regulations: see §§ 9 and 10 above. If the CAA's decision was correct and was not vitiated by procedural error or unfairness, that there may have been some other decision that was equally open to the CAA is not a reason why its actual decision should be reversed or varied. However, for the avoidance of doubt, even if it were open to me to allow the appeal on the basis of wider UK transport policy as set out by Flybe in §1.11 of its Reply, I do not consider that UK transport policy warrants overturning the CAA's decision in this instance.

32. I do not consider that whether Flybe needs to continue to hold an OL to obtain slots, for transfer to Thyme OpCo, is relevant to the interpretation of Article 9 of the Retained Regulation, which is in any event clear: see §§17-25 above.

33. For the reasons set out above, in my view, Flybe's ground 1 should not succeed.

Ground 2

34. Flybe submits that the CAA "*must have assessed [its] position against Article 9(1)(a) of the Retained Regulation around July 2020*" (NoA, §5.17) and exercised its discretion against suspension or revocation and that, accordingly, the CAA had to wait for a 12-month period before conducting a further Article 9(1) assessment. Further or alternatively, Flybe submits that it meets the test for the exercise of discretion against suspension or revocation in Article 9(1a).

35. The first of these submissions can be disposed of briefly: I have seen nothing to suggest that any assessment as to whether the requirements of Article 9(1a) were met, or decision in the light of such assessment to exercise discretion against revocation or suspension, was carried out around July 2020. Far from supporting the proposition that such an assessment and exercise of discretion had taken place, the language of the CAA's letter of 2 July 2020 withdrawing Decision 1/2020 – in particular, the references to "*a new reconsideration [being] necessitated by amendments to the law*" and the CAA having agreed to "*a fresh consideration of the position under the amended EU Regulation*" – points to the contrary conclusion.

36. Nor do I consider that the removal of Decision 1/2020 from the CAA's website on 9 July 2020 is evidence of the position having been considered anew (contrary to NoA, §§5.20-21 and Response, §4.2). The removal was the corollary of the decision by the CAA that Decision 1/2020 should be withdrawn in the light of the amendment to the Retained Regulation.

37. Flybe submits that unless there was an assessment under Article9(1a) by around July 2020, the CAA would have breached Article 9(2) of the Retained Regulation. Given that the CAA did not, in withdrawing Decision 1/2020 to revoke Flybe's OL, also thereby withdraw the financial assessment that had led to this decision, I do not think that there was a need to conduct such a further "*in-depth assessment*" by July 2020. But in any event, even if the effect of the withdrawal of Decision 1/2020 had been to trigger the 3-month time period in Article 9(2), the logical conclusion is that the CAA did not conduct

an assessment within the timescales required by Article 9(2), not that one has to infer that an assessment must have taken place.

38. In the circumstances, there having been no assessment under Article 9(1a) around July 2020, no 12-month period could have been triggered.

39. Turning to the question whether, in fact, Flybe meets the Article 9(1a) test of there being "*a realistic prospect of a satisfactory financial reconstruction within the following 12 months*", for the reasons already discussed above in relation to ground 1, the test has to be applied to Flybe itself, without consideration of the position of Thyme OpCo.

40. Flybe contends that there is such a prospect (i) because, "*should it become necessary to do so*", Flybe could be put through a restructuring plan such that it could be sold as a legal entity (NoA, §5.41(a)) and (ii) in view of the fact that Flybe has, since entering into administration, been able to meet its obligations as they fall due (NoA, §§5.42-43).

41. The latter point is misconceived, as already explained in §28 above. Turning to the former, by the time that the CMG put forward its proposal in January 2021, an asset purchase agreement with Thyme OpCo had already been agreed. The effect of this agreement is to leave Flybe without the majority of its assets. That being the case, the Panel was correct to conclude in the Decision that there was no realistic prospect of a satisfactory financial reconstruction of the company as an air carrier.

42. My view is therefore that Flybe's ground 2 should not succeed.

Ground 3

43. Flybe's argument under this ground may be summarised as follows:

    (a) Flybe kept the CAA apprised of its intention to pursue an asset purchase agreement and the CAA did not indicate any objection to such a transaction.

    (b) Such silence gave rise to a legitimate expectation on Flybe's part that the CAA would not take the step of revoking Flybe's OL in the event that it pursued an asset purchase agreement[9] – or, at least (*per* Response, §5.4), that the CAA would not take any such step before consulting Flybe.

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[9] Flybe characterised its legitimate expectation, in its letter of 23 February 2021 in reply to the Panel's questions of 16 February 2021, as being "*that the CAA will not take any steps that would jeopardise the ([then] imminent) closing of the sale of the Flybe business to Thyme OpCo*" (§2.15).

(c) Had Flybe known that the consequence of pursuing an asset purchase agreement was that it would not be able to retain its OL, it would not have chosen to pursue such a transaction in preference to an alternative form of financial reconstruction.

(d) By choosing in January 2021 to propose revocation, and reaching the Decision in March 2021, the CAA altered its position unfairly, thereby frustrating that legitimate expectation, and did so at a point when Flybe had already entered into its preferred form of transaction.

(e) The effect was that Flybe lost the opportunity to pursue an alternative form of financial reconstruction that might have enabled it to retain its OL.

44. In order for such an argument to succeed, it is necessary for Flybe to show that the CAA's conduct gave rise to a legitimate expectation. I agree with the Panel that the CAA's failure to express any objection to an asset purchase agreement until after such an agreement was effected is insufficient to give rise to such an expectation.

45. It is well-established in law that a legitimate expectation arises only where there is a promise that is clear, unambiguous and devoid of any relevant qualification. While such a promise can be derived from the circumstances of a particular matter (ie, from a practice as opposed to an express representation), the practice must still meet that requirement of being clear, unambiguous and without relevant qualification.

46. Having reviewed the correspondence between the Administrators and the CAA that preceded the Proposal and the Decision, I cannot see any practice that meets this demanding standard. On the contrary:

(a) The way in which the CAA has interpreted Article 9(1) of the Retained Regulation, as requiring an assessment of the financial viability of the specific legal entity that holds the OL, is consistent with the CAA's approach in Decision 1/2020, which followed the CMG's assessment of Flybe's finances in 2020.[10]

(b) Nothing in the CAA's subsequent correspondence with the Administrators after the withdrawal of Decision 1/2020 in July 2020 indicated that it had changed its

[10] I would add that the CAA's interpretation of Article 9(1) also seems to me to be consistent with the approach that it has taken in its previous revocation decisions, Decision 1/2017 (Monarch Airlines Limited) and Decision 1/2019 (Thomas Cook Airlines Limited).

position in this regard. On the contrary, when David Kendrick of the CMG wrote to the Administrators on 14 July 2020, he stated,

> "We have previously indicated to you that whether by way of a new application or by the change in of ownership and control to the existing Operating Licence, the proposed business model will be a significant change to what the CAA has previously licensed and therefore detailed analysis of the financial modelling and other aspects such as ownership and control will be required."

(c) As observed in §73(c) of the Decision, such residual doubts as may have remained about the likely approach of the CMG to the Article 9(1) test were dispelled by Mr Kendrick's letter of 23 November 2020.

47. In the circumstances, I consider ground 3 to be unmeritorious.

<u>Ground 4</u>

48. Flybe alleges in its final ground that there is such a "*fundamental mismatch*" (NoA, §5.49) between the content of the Proposal and the grounds on which the CAA reached the Decision that the CAA should, instead, have required the CMG to issue a new proposal that "*matche[d]*" its position as articulated in the course of the subsequent correspondence and, in particular, in the oral hearing.

49. As is noted by the CAA (Reply, §§75-76), neither the Retained Regulation nor the UK Regulations prescribes such a requirement: the former is silent as to the procedure that the competent licensing authority should follow before deciding whether to revoke or suspend an OL and the latter simply requires that the licence-holder (i) be notified of the CAA's intention and (ii) be able to make representations (regulation 7(2)).

50. The CAA's guidance, CAP 1591, is somewhat more prescriptive in this regard, explaining in §§3.2.1-2 that, *inter alia*,

(a) the CMG must send out written notice to the licence holder in the form of a 'proposal' letter;

(b) the proposal letter must include its reasons for the proposal; and

(c) the CAA's Panel may accept that proposal or make a different decision.

51. However, there is no specific requirement in CAP 1591 as to the extent to which the reasoning in a revocation or suspension decision is required to correspond to that in

the CMG's proposal letter and, in any event, Flybe does not allege that there has been any breach of the procedural requirements in CAP 1591.

52. In my view, therefore, rather than viewing Flybe's ground 4 in terms of whether a requirement (in legislation or guidance) to reissue a proposal in certain circumstances is met, Flybe's complaint is better analysed in terms of procedural fairness. The question is whether the matters in NoA, §§5.49-52 mean that the procedure followed by the CAA, from the issuing of the Proposal to the making of the Decision, was unfair.

53. I do not consider that any such unfairness arose, for three reasons.

54. *First*, there was no "*fundamental mismatch*" between the Proposal and the Decision. As is apparent from §1 of the Proposal,

    (a) the CMG proposed that Flybe's OL be revoked because it considered that the company (i) could not meet its actual and potential obligations for a 12-month period, and so did not meet the financial viability test in Article 9(1) of the Retained Regulation and (ii) had no realistic prospect of a satisfactory financial reconstruction within the following 12 months, so did not satisfy the criteria in Article 9(1a) (nor the criteria for the granting of a temporary OL); and

    (b) the reason why the CMG took this view was, in essence, because Flybe had been in administration since March 2020 and there was no credible proposal to bring it out of administration to resume operations.

55. It is correct that much of the Decision is taken up with the CAA's analysis of, and conclusions on, Flybe's submissions as to the correct interpretation of Articles 9(1) and 9(1a). That is a reflection of the submission that Flybe made in response to the Proposal, in writing and at the oral hearing. But the fact that the CAA addressed those points does not change the nature of the decision that the Panel took (to revoke Flybe's OL) or the fundamental reasons why it took that decision (which were Flybe's inability to meet the requirements of Articles .9(1) and 9(1a)).

56. *Second*, nothing in the bundle that was before the Panel, the transcript of the hearing of 26 February 2021, the NoA or the Response suggests that the Administrators (who had the benefit throughout of experienced legal advice and representation and the opportunity to make detailed written and oral submissions) were not given an adequate opportunity to address the CMG's submissions. Clearly, the Administrators disagreed

with the CMG as to the interpretation of Articles 9(1) and 9(1a) of the Retained Regulation. But there is no basis to conclude that the Administrators had difficulty understanding the CMG's arguments; were unable effectively to prepare their case in response; were taken by surprise; etc.

57. *Third*, as a matter of principle, that the reasoning by a CAA Panel in its Decision may not be identical to that in a proposal letter (or to put it differently, that a proposal letter may not capture the CMG's arguments as they develop subsequently) cannot be a basis concluding that a fresh proposal letter is required. Such a conclusion does not reflect the fact that the Panel is not the same as the CMG and is not required to agree with its proposal. Moreover, it ignores the very reason for having a process in which a licence holder has the opportunity to respond to the CMG's proposal, which is to enable the CMG and the licence holder to develop their submissions in response to each other's cases. It is entirely appropriate that the CAA Panel's reasoning, in its final decision, takes into account that subsequent development of the parties' cases.

58. For the reasons set out above, in my view, Flybe's ground 4 should not succeed. Accordingly, the appeal cannot succeed and I uphold the Decision.

Other matters

59. The appellant, at §§2.1-2.2 of the Response requested that I provide a "minded to" decision in advance of reaching a final decision. I did not consider that, in the context of this appeal, it was necessary or desirable to do so.

60. I note that, in accordance with paragraph 9 of Schedule 2 to the UK Regulations, the CAA must take any necessary steps to cause this decision to be published in its Official Record. At §§1.3 of the NoA Flybe requested that, before publication of any information related to the appeal, any confidential information is redacted. Whilst I do not consider that any material in this decision requires redaction, the appellant will no doubt notify the CAA urgently if it disagrees.

Rt Hon Grant Shapps MP

SECRETARY OF STATE FOR TRANSPORT

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