



- a. Documents submitted by MAL and CMG in preparation for the hearing (the Hearing Bundle);
- b. Oral evidence and submissions presented at the hearing by MAL and CMG, which is set out in the agreed transcript of the hearing;
- c. Documents handed up at the hearing; and
- d. Letter sent by Freshfields Bruckhaus Deringer for MAL after the hearing on 9 November 2017.

### **The relevant legal framework and CAA Guidance**

6. The relevant legal framework is set out in the EU Air Services Regulation and UK Regulations, as summarised below.
7. As to the relevant provisions of the EU Air Services Regulation:
  - a. Under Article 3.2 of the EU Air Services Regulation the competent licensing authority [i.e the CAA] shall not grant operating licences or maintain them in force where any of the requirements of Chapter II of the Regulation are not complied with.
  - b. Article 4 sets out the conditions for granting an operating licence, including that the undertaking has one or more aircraft at its disposal through ownership or dry lease agreement (sub paragraph (b)) and that it meets the financial conditions set out in Article 5 (sub para (g)).
  - c. Article 8(1) provides that an operating licence shall be valid as long as the air carrier complies with the requirements of Chapter II.
  - d. Under Article 9(1) of the EU Air Services Regulation, the competent licensing authority [i.e. the CAA] may at any time assess the financial performance of a Community 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 Community air carrier can meet its actual and potential obligations for a 12-month period.
  - e. Article 9(1) also provides that the competent licensing authority may grant a temporary licence, not exceeding 12 months, pending financial reorganisation of a Community 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.
  - f. Article 9(2) provides that whenever there are clear indications that financial problems exist or when insolvency or similar proceedings are opened against a Community 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.
  - g. Article 9(5) provides that in case a Community air carrier's Air Operator's Certificate (AOC) is suspended or withdrawn, the competent licensing authority

shall immediately suspend or revoke that air carrier's operating licence.

- h. Article 14 provides that the licensing authority, when adopting a decision to suspend or revoke an operating licence, shall ensure that the carrier is given the opportunity to be heard, taking into account the need, in some cases, for an urgency procedure.
8. The UK Regulations make provision for the implementation of the EU Air Services Regulation in the UK. In particular:
  - a. Regulation 5 designates the CAA the competent licensing authority for the purposes of (amongst other things) Articles 3-11 of the Regulation.
  - b. Pursuant to Regulation 5 of the UK Regulations, the CAA may revoke or suspend an operating licence 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 and paragraph 3 of Schedule 2 of the UK Regulations 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.
9. As regards route licences, section 69A(5) of the Civil Aviation Act 1982 states that where a person holds an OL and a route licence and the OL is suspended or revoked, the route licence 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).
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).

### **Agreed Facts**

11. The parties agreed that there were no disputed issues of fact for the Panel to decide, and also agreed on the following specific issues:
  - a. On 4 February 2013, the CAA granted the following licences to MAL:
    - i. Operating Licence, number OL/A/65;
    - ii. Route Licence, number C/031 (charter route licence); and
    - iii. Route Licence, number S/031 (scheduled route licence).
  - b. In the light of financial problems at MAL (and generally within the Monarch Group), the CAA commenced an assessment of the financial situation envisaged by Article 9(2) of the EU Air Services Regulation of MAL on or around 29 August 2017.

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- c. CMG is informed by MAL, and is content to accept, that on or before 1 October 2017 MAL entered into agreements with certain counterparty airlines whereby MAL could give notice to that counterparty to enter into an agreed form slot exchange agreement for some of the slots at UK airports from which MAL operated public air transport services. These exchange agreements would be accompanied by monetary compensation payments from the counterparty. MAL has not yet given notice under these agreements due to ACL's refusal to allocate MAL the relevant summer 18 slots.
- d. On 1 October 2017, the court granted an Administration Order in respect of MAL. MAL went into administration at 4.00 a.m. on 2 October 2017.
- e. The witness statement of Mr Andrew Swaffield presented to the Court by MAL and the joint administrators in support of the administration stated that:

*"87. I am advised that the statutory purposes of administration are, in relation to each of the Administration Companies:*

- (a) the rescue of the Administration Company as a going concern;*
- (b) achieving a better result for the Administration Company's creditors as a whole than would be the case in the liquidation of that Administration Company; or*
- (c) realising the property of that Administration Company for the benefit of one or more of its secured or preferential creditors.*

*88. The purpose of the proposed administration in each case is to achieve a better result for the Administration Companies' respective creditors than would likely be achieved if in each case the Administration Companies were wound-up (without first being in administration). The secondary purpose of the proposed administrations is to realise property in order to make a distribution to some of the Administration Companies' secured creditors."*

- f. The witness statement of Mr Blair Nimmo presented to the Court at the same time by MAL and the joint administrators in support of the administration order stated that:

*"16. As matters currently stand, and based on information provided by the Administration Companies, we do not consider it likely that it will be possible to rescue any of the Administration Companies as a going concern. During the administration none of the Administration Companies will operate or book any further flights or holidays and, due to safety reasons, it will not be appropriate for the Proposed Administrators to continue to operate the MAL airline business. However, I and the other Proposed Administrators are satisfied that the purpose of an administration order for each of the Administration Companies to which they are proposed to be appointed will be achieved in that it will be possible to realise property in order to make a distribution to one or more of the secured creditors. In respect of the Administration Companies we believe for the reasons highlighted*

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*below that it will also be possible to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration)."*

- g. By letter dated 2 October 2017 from the Joint Administrators to the CAA, the relevant companies in administration, including MAL, provided various undertakings. These were that, unless otherwise agreed in writing with the CAA and subject to their ability to provide certain services in the context of repatriation, during the course of the administration of MAL, the Joint Administrators would not:
- i. offer or provide services to consumers other than as necessary or desirable in the ordinary course of the administration, including taking bookings for flights or other travel accommodation;
  - ii. request or accept payments of any kind from consumers in respect of balances for existing bookings (unless the travel or holiday which was booked has already been completed) or new bookings; and
  - iii. provide flight accommodation (as defined in the Civil Aviation (Air Travel Organisers' Licensing) Regulations 2012) to any person.
- h. On 2 October 2017, approximately 1,900 Monarch employees were made redundant. Approximately 200 employees were retained to support the administration.
- i. All the aircraft operated by MAL on the day prior to its entry into administration are in the process of being repossessed by lessors.

### **MAL's AOC**

12. MAL's AOC has been provisionally suspended and the CAA's Safety and Airspace Regulation Group has made a formal proposal dated 2 October 2017 that it be revoked. In correspondence before the hearing there was some discussion about whether this separate proposal in relation to the AOC should be heard together with the OL proposal at a single one-day hearing but this did not ultimately take place. The AOC issue will be the subject of a hearing on 28 November 2017.
13. MAL's understanding was that the two proposals are being determined at a single combined hearing taking place over two days (8 and 28 November), while CMG argued that the two hearings were separate and stand-alone. Neither party however took the position that the Panel should await the outcome of the decision regarding the AOC proposal before making a decision about the OLs. Other than to note that it is not making any determination about MAL's AOC in this decision letter, the Panel does not here comment further on the issue of whether the hearings are combined or separate.

### **Submissions of CMG**

14. CMG make three main arguments which are summarised below.
15. First, CMG say that the CAA is obliged to revoke or suspend the OL pursuant to Article 3(2) of the EU Air Services Regulation in the event that an air carrier is unable to

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comply with the conditions set out in Article 4. MAL is unable to comply with Articles 4(c) and 4(d), because it does not have one or more aircraft at its disposal (see paragraph 11i above) and its main occupation is no longer to operate air services (paragraph 11g above). It therefore follows that the OL must be suspended or revoked.

**(Article 3 Argument)**

16. Second, CMG argue that the CAA is obliged pursuant to Article 9(1) to suspend or revoke the OL because it can no longer be satisfied that MAL can meet its actual and potential obligations for a 12-month period:
  - a. In this regard, CMG relies on the evidence presented to the court in support of MAL's application to enter administration on 1 October 2017 in which the purpose of the administration was stated to be that contained in paragraphs 3(1)(b) and (c) of Schedule B1 of the Insolvency Act 1986, namely (i) achieving a better result for the company's creditors as a whole than would be likely if MAL were wound up without first going into administration and, secondarily, (ii) realising property in order to make a distribution to one or more secured or preferential creditors (see paragraph 11e above). CMG point to the fact that the rescue of the company as a going concern pursuant to paragraph 3(a) of Schedule B1 was not one of the stated purposes of the administration.
  - b. CMG also argue that the reference in Article 9(2) to 'three months' is specifying a maximum period, rather than any minimum period and there is no requirement to carry out a further Article 9(2) assessment upon MAL entering administration.

**(Article 9 Argument)**

17. Third, if the Article 3 and/or Article 9 Argument mean that the CAA should act, then CMG say that the appropriate course is to revoke rather than suspend the OL because:
  - a. a suspension is only appropriate if there is a real prospect that the reason why the OL must be revoked/suspended can be remedied in a short time period;
  - b. there is no evidential basis to consider that MAL will be in a position to remedy its breaches of the relevant requirements in the foreseeable future or at all; and
  - c. it is not relevant to consider whether the revocation of the OL would impact upon the return to the creditors of MAL.

**(Revocation Argument)**

18. In short, CMG argue that there is no basis in law for the taking of no decision, which is effectively what MAL seek. The circumstances clearly oblige the CAA either to suspend or revoke the OL, the only question being which. In circumstances where MAL appear to have no prospect of ever operating again as an airline CMG say that the appropriate course is plainly to revoke rather than suspend the OL.

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## Submissions of MAL

19. As to the **Article 3 Argument**, MAL's position, in summary, is that:
- a. Non-compliance with the conditions of Article 4 should not *per se* lead to revocation or suspension of the OL because (i) Article 4 only applies to new applicants for an OL; and (ii) non-compliance with Article 4 at a given point, or 'snapshot' in time should not immediately lead to revocation or suspension of the OL.
  - b. In this regard MAL referred to a number of hypothetical scenarios in which an airline might be in short-term breach of the requirements of Article 4 (such as where all of its aircraft were temporarily grounded for a technical fault which was thereafter remedied or where an airline PLC breached the rules on majority EU ownership in Article 4(f) and thereafter took steps to correct the position). MAL argued that the correct reading of Article 4, in combination with the right to be heard in Article 14, is that a carrier in breach of the Article 4 conditions is entitled to a 'period of grace' rather than an immediate suspension or revocation of its OL. MAL also sought to draw support in this regard from the three month assessment period referred to by Article 9(2) (an argument referred to in more detail below).
  - c. There is nothing in the EU Air Services Regulation which requires the CAA to take immediate action to revoke or suspend the OL without first taking time to assess the progress of the administration.
  - d. There is no need for the CAA to take any immediate action because there can be no safety or consumer protection concerns in circumstances where MAL's AOC has been suspended and it has undertaken not to operate any flights.
  - e. Although all of MAL's aircraft are being repossessed, this does not definitely exclude it having one or more at its disposal in the future.
20. As to the **Article 9 Argument**, MAL say that:
- a. There is no obligation to immediately revoke or suspend and, pursuant to Article 9(2), no such steps should be taken for three months after MAL's entry into administration.
  - b. Further, even though it was accepted that an assessment of MAL's financial position for the purposes of Article 9(2) had begun on 29 August 2017 (paragraph 11b above), MAL argue that a further three month period should be triggered on MAL's entry into administration. This was because the entry into administration provided various new possibilities for financial restructuring, such as a company voluntary arrangement.
  - c. The fact that at the moment MAL cannot meet its actual and potential obligations does not definitely preclude that it might be able to at some point during the administration. In this regard MAL point out that the administrators are not due to present their statement of proposals for achieving the purpose of the administration until 8 weeks after the entry into administration, on 27 November

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2017.

- d. The reliance by MAL, on entering into administration, on the statutory purposes in paragraphs 3(b) and 3(c) of Schedule B1 of the Insolvency Act 1986 does not as a matter of law preclude the administrators from considering other purposes for the administration. In particular, if, during the course of the administration, it appeared that there was a possibility of selling the company as a going concern (i.e. the purpose contained in paragraph 3(a) of Schedule B1) then the administrators could pursue this. In this regard MAL relied on the decision in *Key2Law (Surrey) LLP v De'Antiquis* [2011] EWCA Civ 1567; [2012] BCC 375.
- e. The OL should be maintained in accordance with an alleged EU policy to facilitate restructuring of airlines in financial difficulties.
- f. The EU Air Services Regulation should be applied in such a way as to achieve a broadly consistent regime for air carriers across the EU with regard to the revocation or suspension of OLs, notwithstanding accepted differences in local insolvency laws. In particular, MAL points to the situation of Air Berlin which apparently retained its operating licence and carried on flying after entering into administration notwithstanding that a stated purpose of the administration was to achieve the best possible outcome for creditors. The German insolvency regime in question was akin to Chapter 11 proceedings in the US and permitted the company in administration proceedings to continue to trade. The end result was a sale of parts of the company, which was only possible because the German licensing authority maintained Air Berlin's OLs in place.
- g. The OL should be maintained so as to allow the Joint Administrators (JAs) to realise assets such as slots and promote the sale of the business. In this regard, MAL accepted that the only transaction currently in contemplation was the exchange of some of MAL's take-off and landing slots for valuable consideration, but that the materialisation of other potential transactions as the administration progressed was "not impossible", and was dependent on the maintenance of the OL in force.

21. As to the **Revocation Argument**, MAL's position is that:

- a. If the CAA is obliged to take any action, it should suspend rather than revoke because revocation has irreversible consequences and reduces the chances of a restructuring to zero. Suspension would 'complicate' this possibility but not destroy it.
- b. Article 9(1) says nothing about the circumstances in which suspension rather than revocation would be appropriate but at least makes it clear that suspension is an available option in circumstances where a company is not able to meet its actual and potential obligations for a 12 month period.
- c. When considering whether to revoke or suspend, it is relevant for the CAA to take into consideration whether suspension would achieve a better return for the airline's creditors than revocation, including because such a course would tend to encourage lending to airlines in the UK.

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22. MAL noted that the facts were agreed and (subject to a few points) the applicable law was not in dispute but said that its argument was essentially one of policy. MAL's case in summary was that in circumstances where the law allowed flexibility on timing, and Article 9(2) allows a three month assessment period, the Panel should delay making a decision to allow time to see if any financial restructuring possibilities emerged or to maximise value for creditors by leaving the OL in place.

## Discussion and Determination

### Article 3 Argument

23. The Panel considered that that the wording of Article 3(2) ("**shall not** grant operating licences or maintain them in force where any of the requirements in Chapter II are not met") was clear in *prima facie* requiring a carrier's licence to be either suspended or revoked in circumstances where any of the Article 4 requirements were not met.
24. The agreed facts made it clear that (at least) the requirements in Article 4(c) (aircraft at the carrier's disposal) and in Article 4(d) (main occupation to operate air services) were not met, and the Panel did not understand this to be disputed.
25. These facts also of themselves distinguished MAL's situation from that of the case of Air Berlin, which had apparently continued to have aircraft at its disposal and to operate air services while still in administration.
26. The Panel was unpersuaded by MAL's argument that the conditions in Article 4 only applied to new applicants for an OL. Article 3 is explicit in requiring the CAA not to maintain licences in force where any of the requirements in Chapter II are not complied with. Furthermore there is no support in the Regulation for the Chapter II conditions to be categorised as applying on the one hand only to new applicants or on the other hand only to those who already hold an OL. Article 8(1) (which provides that an operating licence shall be valid as long as the air carrier complies with the requirements of Chapter II) also clearly supports the conclusion that no such distinction is intended to be drawn.
27. The Panel did not necessarily disagree with MAL's submission that a temporary non-compliance with Article 4 would not always require an immediate suspension or revocation under Article 3(2), particularly in light of the right for the carrier to be heard under Article 14.
28. The illustrations given by MAL however were purely hypothetical ones in which, as MAL put it, there should be a "*period of grace while the process is ongoing in order to remedy [the problem].*" The examples given were ones in which the problem was a short term one which appeared capable of remedy within a reasonable time. The facts here are not at all analogous, because, as MAL accept, they are unable to point to a single fact or matter giving rise to any expectation that the problem in question is capable of remedy. MAL has no aircraft at its disposal, it has no intention to acquire any aircraft, and it has no plans to operate any air services in the future. The mere fact that such a possibility cannot be definitively ruled out is plainly insufficient to support MAL's case in this regard.
29. Nor was the Panel persuaded, for the reasons set out in the next section, that MAL could draw support from Article 9(2), or from the EU situation, in support of its

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argument for a 'grace period' under Article 3(2).

30. The Panel accepts that there are no immediate safety or consumer protection issues relating to MAL, not least because it has no aircraft at its disposal and is not selling any flights. There would be no question of a grace period if there were. This is not itself however a positive reason supporting the grant of a grace period. The Panel was unpersuaded by the argument that, unless there were safety concerns, no action should be taken; the clear wording of Article 3 suggests otherwise (see paragraph 23 above).
31. The Panel therefore agrees with CMG's submission that the CAA is obliged to suspend or revoke MAL's OL pursuant to Article 3(2).

#### Article 9 Argument

32. It is accepted by MAL that it cannot currently meet its actual and potential obligations as they fall due and, as set out above, no substantive evidence has been presented to suggest that this position will change over the next 12 months. Accordingly, in the Panel's view, the clear words of Article 9(1) oblige it to take action to suspend or revoke MAL's licence.
33. The Panel does not accept that Article 9(2) requires a period of three months (or some lesser time) to be allowed to MAL before any decision is taken to revoke or suspend the OL. Article 9(2) obliges the licensing authority to make an in-depth assessment of a carrier's financial position as soon as problems present themselves and then to complete that assessment within three months. It is intended to require licensing authorities to be pro-active and prompt in investigating carriers in difficulty. It is not a provision which is intended to advantage carriers by granting them a "grace period" while any assessment takes place. If a carrier happens to benefit from a delay in decision pending an assessment then this is incidental.
34. In this case, in any event, it is agreed that the article 9(2) process was commenced on 29 August 2017 (paragraph 11b above). CMG's position is that the relevant assessment was completed by 2 October 2017 when the CMG Notice was sent. Even if MAL were correct that it has an entitlement to benefit from Article 9(2), that process has already been completed. Article 9(2) has therefore ceased to be of relevance and Article 9(1) governs.
35. Furthermore the Panel sees no merit in the argument that, in this case, the entry into administration should entitle MAL to a fresh three month period of assessment under Article 9(2). While it is no doubt possible that a carrier's circumstances might change during the period of assessment, in the present case there is no evidence at all that MAL's entry into administration will help its position under Article 9(1). In short, there is nothing further for CMG to make an "in-depth assessment" of. MAL cannot identify any aspect in which its financial prospects have changed for the better as a result of entering into administration. The contrary is true.
36. Furthermore, as CMG submitted, MAL already made efforts to sell or refinance its business prior to entry into administration but its evidence on entry into administration made it clear that those had all come to nothing. MAL's argument that the formal process of administration might encourage potential 'rescue transactions' which have not previously emerged was nothing more than speculation and lacked any substance.

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In this regard, it is significant that MAL did not dispute that it could not satisfy the requirements in article 9(1) for a temporary licence because there was no “*realistic prospect of a satisfactory financial reconstruction*” within 12 months.

37. As to the insolvency law issues, by the end of the hearing it was common ground that MAL’s previous reliance on sub paragraphs 3(b) and 3(c) of Schedule 1B of the Insolvency Act 1986 would not, as a matter of law, preclude it from pursuing a ‘sale as a going concern’ option should the possibility arise. As CMG correctly pointed out however, the question for the Panel is whether it is under a duty to suspend or revoke the licence pursuant to the EU Air Services Regulation. This in turn requires consideration of the particular facts of this case. As set out above, there was no evidence at all before the Panel to suggest that sale as a going concern was likely or even remotely in prospect. In those circumstances, the fact that the administrators could hypothetically pursue such a prospect if it were to arise did not appear to the Panel to take the argument any further.
38. As to MAL’s arguments about EU policy:
  - a. The Panel is not persuaded from the examples given that there is an EU ‘policy’ of facilitating the restructuring of airlines in difficulties.
  - b. It was common ground that insolvency laws differed across the EU and that, in particular, Air Berlin had benefited from a German insolvency procedure allowing trading in administration which is not available in the UK. Importantly, while Air Berlin was in administration it had continued to operate as an air carrier. The situation regarding its OL is therefore not analogous to MAL’s, whether in law or in fact.
  - c. MAL’s arguments do not persuade the Panel that there is any developed EU law position regarding OLs which should influence its decision pursuant to the EU Air Services Regulation.
  - d. Furthermore, if the Panel is otherwise persuaded that the EU Air Services Regulation requires it to suspend or revoke MAL’s OL it should not decline to do so merely in order to compensate for differences in insolvency laws across the EU.
39. Accordingly the Panel agrees with CMG’s submission that the CAA is obliged to suspend or revoke MAL’s OL pursuant to Article 9(1).

#### Revocation Argument

40. The Panel notes that no explicit guidance is given in either the EU Air Services Regulation or the UK Regulations as to the circumstances in which revocation rather than suspension should apply, or vice versa.
41. The fact that two different options are provided does suggest that particular circumstances might require one course rather than another. Given that the purpose of the EU Air Services Regulation is to regulate the operations of air carriers it must be relevant, when choosing between suspension and revocation, to consider whether a carrier has any prospect of carrying out air operations again in the near future. In particular, it appears to the Panel that it might be appropriate to suspend a licence

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rather than revoke it where there is a prospect of the carrier remedying the problem which has led to the suspension within a foreseeable and reasonable period of time.

42. As set out above, all the evidence suggests that, in MAL's case, there is no such prospect. As CMG submitted, there is no detectable prospect of MAL being in a position within any foreseeable period of time to need an OL in order to operate as an air carrier. Accordingly, there is no reason relating to MAL's position as an air operator to keep the licence in existence; in short MAL does not need an OL because there is simply no discernible prospect of it operating as an air carrier again. In the Panel's view it therefore follows that the appropriate course is to revoke the licence rather than suspend it.
43. In the absence of any evidence to support a potential sale as a going concern and/or a recommencement of operations, MAL seeks to rely on the possible financial benefit to MAL's creditors in suspending rather than revoking the licence (for example to enable them to benefit from the sale of take-off and landing slots). Even if this could be said to be relevant to the decision, this factor did not appear to the Panel to outweigh the above arguments in favour of revocation.

#### Article 9(5)

44. For completeness, we note that in the CMG Notice CMG also relied on Article 9(5) to argue that, since MAL's AOC had been provisionally suspended, the CAA was obliged immediately to take steps to suspend or revoke MAL's AOC. By the time of the hearing however, the parties were agreed that this issue should not be determined, if at all, until after the outcome of the 28 November 2017 hearing dealing with MAL's AOC was known. We accordingly heard no substantive argument on the point. In the event, given the decision we have reached on the basis of Articles 3 and/or 9, the issue now falls away.

#### **Decision**

45. For the reasons set out above, the Panel's decision is that MAL's OL should be revoked.
46. 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.
47. By section 69A(5) of the Civil Aviation Act 1982, MAL's Route Licences will also cease to be in force on the date the revocation of the OL takes effect.

Yours faithfully



**David Gray**  
**Chair of the Panel**

cc Reiner Krammer, Head of Aviation and Travel Finance, CMG

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