Redacted version of decision dated 16 April 2020 released by the Panel for publication in order to protect a limited amount of commercially sensitive information

CAA Non- Executive Board Members: **Mr Graham Ward CBE**
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BY E-MAIL

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16 April 2020

Dear Madam,

Decision 01/2020 by the Civil Aviation Authority (CAA) in relation to the Consumer & Markets Group (CMG)'s proposal to revoke or suspend the Operating and Route Licences of Flybe Limited (Flybe)

1. I refer to the CMG notice dated 5 March 2020 (**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 27 March 2020. The hearing was not able to be held in person because of the UK Government's directions in relation to the COVID-19 pandemic and, therefore, took place by telephone. In those circumstances it was not possible to permit attendance at the hearing by members of the public. The taking place of the hearing, however, was advertised on the CAA website and copies of the transcript were made available on application. The transcript was redacted to remove a small amount of sensitive commercial information in relation to Flybe and negotiations with potential buyers. The hearing lasted from 12.30pm until around 5.30pm 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), Ms Anne Lambert and Mr David King, all appointed by the Secretary of State for Transport as Non-Executive Members of the Board of the CAA.

The questions to be decided by the Panel

4. The 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 and, if so, which.

b. In the event that Flybe's licence is suspended or revoked, whether the Panel considers that the conditions for granting a Temporary Operating Licence (**TOL**) are met.

c. Whether the Panel should defer its final decision in relation to Flybe's OL beyond the normal period of ten working days of the date of the hearing.

The evidence

5. In reaching its decision, the CAA Panel has carefully considered the evidence and submissions set out below:
    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. Documents provided by the parties during the hearing, including a letter from Flybe's solicitors Freshfields Bruckhaus Deringer to British Airways plc (**BA**) dated 20 March 2020 and a response dated 26 March 2020; and
    c. Oral submissions presented at the hearing by Flybe and CMG, which are set out in the agreed transcript of the hearing and summarised below.
    d. The Panel also considered further written submissions received from Flybe after the hearing, delivered on 3 April and 8 April 2020, and CMG's response dated 10 April 2020, in the special circumstances described in paragraphs 50-51 below.
6. The Panel also received communications from third parties as follows:
    a. Letters dated 26 March and 2 April 2020 from the solicitors acting for Virgin Atlantic Airways (**VAA**). The Panel did not hear full submissions on whether VAA, a non-party, should be entitled to make representations. Without prejudice to that issue, the material in the letters did not in any event assist the Panel on the issues to be decided since it either repeated arguments already made on behalf of Flybe or set out the reasons why it was in VAA's commercial interests for Flybe's OL not to be revoked, which is not a relevant consideration.
    b. Letter dated 30 March 2020 from the Monitoring Trustee to the European Commission to supervise and monitor the correct implementation of the commitments in case COMP/M.6447 IAG/bmi, which set out some details about the "Grandfathering" rights to aircraft take off and landing slots pursuant to those commitments. Again, the Panel did not consider the matters in the letter to be of relevance to the issues to be decided.

The relevant legal framework and CAA Guidance

7. The relevant legal framework is set out in the EC Regulation No 1008/2008 (**EU 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 EU Regulation:
    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*". Article 8(3) adds that the OL shall be resubmitted for approval when a Community air carrier has not started operations within six months of the granting of an OL (sub para (a)) or has ceased its operations for more than six months (sub para (b)). Article 8(5)(c) requires the air carrier to notify the CAA within 14 days of any change in ownership of a single shareholding of 10% or more in its total shareholding, or that of a parent.

e. Under Article 9(1), 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 [such as Flybe]. Based upon its assessment, the authority shall suspend or revoke the OL if it is no longer satisfied that the Community 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 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.

g. 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 [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.

h. Article 9(5) provides that in case a Community 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.

i. 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 EU 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 EU 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. 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).
11. 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).

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. The CAA was made aware of financial problems at Flybe and, starting on around 11 January 2020, the CAA commenced an assessment of its financial situation.
14. On 11 January 2020, one of the shareholders of Flybe indicated that it was not prepared to provide further funding. Discussions with the UK government thereafter did not result in any direct assistance. Flybe also experienced booking declines as a result of the COVID-19 coronavirus threat.
15. As at 4 March 2020 Flybe had cash of approximately £5.7m available to it with payments to creditors in excess of £10 million due on or before 6 March 2020. In the light of this, Flybe's board of directors met on 4 March 2020 and concluded that there was no reasonable prospect that Flybe could avoid an insolvent administration or liquidation. Accordingly, also on 4 March 2020, Flybe made an application under para 12(1)(b) of Schedule B1 to the Insolvency Act 1986 for the making of an administration order in relation to Flybe and for the appointment of joint administrators over the company.
16. The administration order was made on 5 March 2020 by Nugee J. Alan Hudson, Simon Edel, Joanne Robinson and Lucy Winterborne of Ernst & Young LLP (**EY)** were appointed joint administrators of Flybe.
17. Also on 5 March 2020, CMG wrote to the joint administrators with its proposal to suspend or revoke Flybe's OL and RLs on the basis that 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 EU Regulation.
18. Also on 5 March 2020, Mr Colin Russell, Flybe's Director of Safety and Security, informed the CAA that he had taken the decision to suspend all flying, training, continued airworthiness and maintenance operations, and was voluntarily suspending Flybe's AOC (among other approvals).
19. On the same date, the CAA's Safety and Airspace Regulation Group (**SARG**) wrote to the joint administrators, providing formal notice of its proposal to revoke Flybe's Air Operators Certificate (**AOC**) and Part M - Continuing Airworthiness Management Organisation Approval (**CAMO**) (the **SARG Proposal**). The SARG Proposal also stated that the AOC had been provisionally suspended under Article 254 of the Air Navigation Order 2016.

20. Since that date, Flybe's Part M (maintenance) approval has been reactivated and Flybe has made proposals to address SARG's findings relating to the AOC which are being considered by SARG, albeit the provisional suspension of the AOC remains in place.

Submissions of CMG

(a) Should Flybe's Operating Licence be suspended or revoked and, if so, which?

21. CMG's position is that the CAA is obliged, pursuant to Article 9(1) of the EU Regulation, to act now to revoke or suspend the OL because it can no longer be satisfied that Flybe can meet its actual and potential obligations for a 12-month period.
22. CMG first addressed the question of whether it was permissible for the Panel to proceed to decide about suspension or revocation at all at this stage, or whether its proposal should be withdrawn.
23. In this regard, CMG rejected the argument made by Flybe pursuant to Article 9(2) that (i) on the entering of insolvency proceedings it was obliged to start a fresh "in depth assessment" of Flybe's financial position or that (ii) the present circumstances caused by the COVID-19 pandemic should lead it to take a "wait and see" approach in relation to Flybe's financial position. In particular:
    a. Article 9(1) states that the competent licensing authority "may at any time assess the financial performance" of an air carrier, giving the widest possible discretion as to when the assessment was to start.
    b. CMG had been carrying out an in-depth assessment as to the financial position of Flybe since January 2020, which had included regular meetings between CMG and Flybe and discussions about Flybe's OL.
    c. It was not correct to say that Article 9(2) required the assessment to be re-started when the air carrier entered insolvency. Nor was there any basis for suggesting that an assessment should be postposed pending the out-turn of any economic or social conditions which might be having an impact on the operator.
    d. There was also no suggestion that Flybe was not already in serious financial trouble before the COVID-19 pandemic.
24. On the contrary, once the CAA had determined that it was no longer satisfied that the air carrier could meet its actual and potential obligations for a 12-month period it must either suspend or revoke the licence and not delay.
25. As regards the financial position of Flybe, CMG relied principally on the fact that the directors of Flybe had determined that there were no reasonable prospects for avoiding insolvency and the Company had entered into Administration.
26. CMG pointed in particular to the following:
    a. The evidence of Mr Hudson of EY in support of the application for an administration order which stated that the administrators did not (at that stage) consider it likely that it will be possible to rescue Flybe as a going concern.
    b. The evidence of Mr Anderson of Flybe in support of the application for an administration order said that, other than a shareholder facility arrangement, which was fully drawn, Flybe did not have any working capital facilities, term loans or other sources of cash. As at 4 March 2020 the company had insufficient cash available to pay creditors the sums due

on or before 6 March 2020 and Flybe was unable to pay its debts as they fell due.

c. An analysis of the daily cashflow figures following the entry into administration showed the cash position deteriorating. The short-term cash flow forecast was similarly poor.
d. The staffing of Flybe had been drastically scaled down since entering administration.
e. There was no convincing evidence of any current interest in the purchase of Flybe as a going concern and it was highly unlikely that any would emerge now. The only party with any interest in purchasing Flybe as a going concern (CP1) had recently withdrawn its interest. There were expressions of interest in purchasing parts of the Flybe business (such as aircraft or airport slots) but these were irrelevant to the question of the long-term financial prospects of Flybe as an air operator.
f. Although the COVID-19 pandemic had made it more difficult to gauge the true level of interest in rescuing Flybe, unfortunately the likely effect of the crisis was to make purchase as a going concern significantly less likely in the weeks since Flybe had entered administration.

27. CMG also relied on the provisional suspension of the AOC to submit that the CAA was obliged pursuant to Article 9(5) of the EU Regulation also immediately to take steps to suspend or revoke the OLs and RLs. It stated that one of the purposes of the EU Regulation was to ensure that the financial health of an airline did not adversely affect safety. Since SARG had identified serious breaches of safety regulations which led it to make a provisional suspension of the AOC, it followed that the OL and RLs should also be suspended or revoked. There was no prospect of Flybe remedying the safety concerns which had been identified since it lacked the manpower, cash and necessary resources to do so.
28. Once the CAA had determined that it was not satisfied that the carrier could meet its actual or potential obligations over a 12-month period, it was under a mandatory obligation to suspend or revoke the OL. The CAA had a discretion as to which of these options to select but that discretion had to be exercised reasonably and rationally.
29. As to the exercise of that discretion, CMG endorsed the approach taken in paragraph 39 of the decision 1/2019 in relation to Thomas Cook Airlines Limited (**TCAL**).[1] 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.

[1] That is - "The Panel did not agree that its discretion to choose between suspension or revocation was unfettered. Ultimately its power to suspend or revoke derived from the EU Regulation (and the implementing UK Regulations) and had to be exercised consistently with the provisions and purposes of that legislation including, in particular, Article 3(2). Revocation and suspension have different impacts: revocation is terminal because an air carrier who wished in the future to continue operating would need to apply afresh for a new OL but suspension leaves open the possibility that the carrier may in future be able to trade on the original OL. Although there is no explicit guidance in the Regulation about when a suspension would be the appropriate course as opposed to revocation, it is inherent in the notion of suspension that it is a response to temporary non-compliance with the relevant rules. This suggests that suspension rather than revocation might be appropriate in circumstances where there was a realistic prospect that within a reasonable time the non-compliance would be remedied, and the suspension lifted."

30. In this regard CMG submitted that none of the evidence about expressions of interest in the business and assets of Flybe suggested that there was any reasonable prospect of a sale of Flybe as a going concern within a reasonable time and there was no realistic prospect that the company would have the cash to discharge its obligations over the next 12 months. It would, therefore, not be appropriate for the CAA to exercise its discretion merely to suspend the OL and the OL should be revoked.

(b) Whether the Panel considers that the conditions for granting a TOL are met

31. CMG argued that there were three problems with any application for a TOL:
    a. In its current state, for the reasons already explained, Flybe was incapable of meeting the requirements in Article 9(1) of the EU Regulation to show (i) that safety was not at risk and (ii) that there was a prospect of a satisfactory financial reconstruction within the period of any temporary licence (not exceeding 12 months).
    b. An application for a TOL required the applicant to file a change management document which sets out the basis on which it would operate under a TOL, detailing which personnel will be working, which aircraft would be operated and generally how the carrier would propose to operate. Flybe had not done this and therefore the Panel could not grant a TOL.
    c. Finally, the resourcing of Flybe in administration came nowhere close to establishing that the company could operate as an air carrier, even on a much reduced basis. It was not the purpose of a TOL to bridge an airline to a point where there was a possibility that a buyer might be found.

(c) Whether the Panel should defer its final decision in relation to Flybe's OL beyond the normal period of ten working days of the date of the hearing.

32. CMG submitted that there should be no such delay because:
    a. CAP 1591 indicates that the CAA's policy is ordinarily to produce a decision within 10 working days of the hearing. To delay would be contrary to the CAA's own policy and also contrary to the principles of good administration.
    b. The Panel should make its decision while the evidence is fresh in its members' minds.
    c. The only reason to delay would be to enable further evidence or submissions to be filed, which would render the process incoherent and indeterminate.

Submissions of Flybe

Evidence

33. The Panel heard evidence and argument from representatives of Flybe and the administrators.
34. The CEO of Flybe, Mr Mark Anderson gave evidence as follows:
    a. The business plan to turn Flybe around following its acquisition in January 2019 had been working but the level of further funding required by December 2019 and early January 2020 was so great that one of the main investors decided that it could not continue to fund the business.
    b. After 11 January 2020, when this became clear, Flybe had explored with the UK government whether any assistance could be offered to save the business, including (i) a commercial loan (ii) a reduction in domestic Air

Passenger Duty and (iii) increasing the use of public service obligation routes. At this stage, some shareholders were prepared to offer some further funding.

c. Until 4 March 2020 the management team genuinely believed that they would be in a position to secure further shareholder funding even without government assistance (which was not, in the event, forthcoming). Flybe, however, suffered a sharp drop in bookings partly because of doubts about its future but principally because of the COVID-19 pandemic.
d. By 4 March 2020, in the absence of further support from shareholders, the management had no choice but to put the company into administration.
e. Since the administration it has become clear that due to the COVID-19 crisis the UK Government will need to provide assistance to airlines but Flybe did not know that when it put the company into administration. In the light of that, the rush by the CAA to remove the OL seemed premature.
f. Without support to continue the process being undertaken by the administrators and to see if any of the expressions of interest come to fruition, removal of the OL would "put the nail in the coffin" of UK regional aviation. This would have an impact not just on Flybe but on many airports around the UK.

35. Ms Joanne Robinson, one of the joint administrators, gave evidence as follows:
    a. The appointment of the administrators was made with very little notice, with personnel being deployed to Flybe's offices only around 6 hours before the administrators' appointment.
    b. Shortly after the administration order was made, the administrators had to carry out a large number of urgent initial tasks such as deploying staff to airports, communicating with employees and implementing a communications strategy. The administrators also negotiated acceptable pricing for the continuation of the maintenance part of the business, which meant that there was some incoming cashflow.
    c. Although the evidence in support of the administration application had stated that there was little prospect of sale as a going concern, that statement was made at a very early stage, without the benefit of having tested the market. The administrators' current strategy, given the level of interest received, was to dispose of the business and assets of Flybe as a going concern. The belief was that there was a realistic prospect of this but the administrators needed time to achieve it and to obtain the best possible outcome for creditors.
36. Mr Mike Parr, a transaction partner at EY involved in assisting the joint administrators, gave the following evidence:
    a. Shortly after their appointment the administrators contacted over 140 potential investors and also received seven inbound unsolicited expressions of interest. Non-disclosure agreements had been concluded with 20 parties, all of whom had received an information memorandum, access to a data room and details of the process to be followed by the joint administrators. This was a higher level of interest than the administrators had anticipated at the outset of the process.
    b. There were entities who had expressed interest in acquiring parts of the business but which were unable to devote sufficient management time to a potential acquisition because of the COVID-19 pandemic.

c. One potential counterparty ("CP1") had been interested in purchasing the whole airline. This party was well capitalised and attracted to investing in the UK regional aviation market. They had been actively carrying out due diligence but unfortunately now needed to focus on COVID-19 and had very recently withdrawn their interest.
d. Another party ("CP7") was interested in acquiring all 21 owned aircraft, crew, slots and a flight simulator. This was not a purchase of the whole airline but was still a "going concern" transaction for which an OL would be necessary.
e. A third potential counterparty ("CP2") also wished to acquire some of the business operations of Flybe, including 5 aircraft and routes. As a result of the current circumstances they would be unlikely to be in a position to make a non-binding offer in the next two weeks but remained confident of their own survival. CP2 had expressed an interest in acquiring Flybe's AOC as part of any deal. It was too early, however, to draw meaningful conclusions about the legal structure of any deal and whether it would involve CP2 retaining Flybe's existing OL or AOC.
f. There were a number of other counterparties who were interested in the Heathrow slots, which were an important asset of Flybe. One complicating factor in relation to these was that BA claimed entitlement to the return of certain of Flybe's Heathrow slots. These slots had been provided to Flybe pursuant to commitments given to the European Commission when BA's parent company International Airlines Group acquired the BMI airline. Flybe provided the Panel with copies of a letter from their solicitors to BA and BA's response asserting its entitlement to appropriate the slots and informed the Panel that the issue would proceed to a fast track arbitration. The administrators have also made an application to the European Commission for grandfathering rights in respect of some of the Heathrow slots. If successful, that would vest ownership of the slots irrevocably with Flybe. These factors all indicated that more time was needed before the OL was removed.
g. There is also a question mark over whether it would be compatible with the commitments to the European Commission for Flybe to transfer the slots to third parties. That problem would be overcome if a third party were to purchase Flybe as a legal entity (and this, therefore, might make sale as a going concern more likely).
h. All parties' work had been slowed down as a result of the need for remote working caused by the COVID-19 pandemic.
i. To sum up, there was substantial interest in the business and assets of Flybe and the ability to retain an OL was critical to facilitating those proposed transactions.

37. Mr Colin Russell, Flybe's Director for safety, gave evidence as follows:
a. It was clear that the safety of neither the aircraft, the employees nor the passengers was compromised as a result of the financial situation of Flybe at any point from January 2020 onwards.
b. Although Flybe had voluntarily suspended its approvals, within 7 days of going into administration it had reactivated its Part M and Part 145 approvals (namely those relating to maintenance and airworthiness management). This helped to ensure the safety and preservation of the owned and leased assets. All key personnel had been retained across the

operations and safety functions, even though the scale and scope of the operations had been reduced because Flybe was not flying.

c. The SARG findings in its oversight report, referred to in the SARG Proposal, were being addressed.

(a) Should Flybe's Operating Licence be suspended or revoked and, if so, which?

38. On the first question for the Panel, Flybe summed up the evidence as showing that the administrators were in serious discussions with counterparties which stood realistic prospects of coming to fruition. Many of those developments had only occurred since CMG made its proposal. There was a credible process ongoing with airlines that could lead to a transaction within a reasonable time. In the case of CP2, it might be flying under the same OL and AOL as Flybe and, even if any acquirer were not flying under the same OL or AOC, it would be legally the successor business for competition law purposes. The important thing was that the OL needed to be retained in order to facilitate such a transaction, whether or not the same OL were ultimately retained and used.
39. Flybe therefore submitted that:
    a. Article 9(1) required the decision to suspend or revoke to be made on the basis of the CAA's assessment. That assessment, however, had to be complete. It was, therefore, necessary for CMG to consider the new evidence about the possible transactions, to put its assessment in writing and for Flybe to have the chance to respond. If the current proposal were to be maintained the process would be flawed and unfair.
    b. In order to determine whether the test in Article 9(1) was satisfied, the CAA should look properly at the various restructuring efforts and consider whether there was a probability that they would lead to a reversal of the current problems. In the TCAL case (which involved liquidation rather than administration) it seems that a number of proposed restructuring efforts were underway over a four and a half month period prior to its entry into liquidation and also there was a longer period in that case between the opening of insolvency proceedings and the hearing of CMG's proposal.
    c. Accordingly, CMG should withdraw its proposal and open a new in-depth investigation (or continue the previous one). The in-depth assessment required by Article 9(2) could take up to three months. Alternatively, the Panel should delay making its decision in order to allow for more time for evidence to be presented and considered.
40. As to whether the OL should be suspended or revoked, without prejudice to Flybe's arguments that neither was appropriate, Flybe (i) agreed that the key test was that set out in the TCAL decision (paragraph 29 above) and (ii) submitted that there was, on the evidence, a reasonable prospect that the non-compliance could be remedied within a reasonable time.

(b) Whether the Panel considers that the conditions for granting a TOL are met

41. Flybe submitted that:
    a. The test in Article 9(1) only required a "realistic prospect of a satisfactory financial reconstruction", not that it was likely or more likely than not. All that the test required was that such a prospect was not unrealistic. The evidence in fact showed that there was a very real prospect of financial reconstruction of Flybe, including by sale as a going concern.

b. CMG should not be permitted to rely on the provisional suspension of the AOC to remove the OL, or to deny a TOL. The power provisionally to suspend an AOC comes not from the EU Regulation but from Article 6.8 of the Civil Aviation Authority Regulations 1991 which provides that "*a provision or suspension constitutes a temporary measure pending inquiry into or consideration of the case for suspension or revocation of the AOC*". In order finally to suspend or revoke the AOC there is a separate process which affords the licence holder the right to make written representations and to make submissions at a hearing. The fact that a provisional suspension has been made summarily and prior to this procedure being followed cannot be relied on to remove an existing OL or to deny a TOL. In the case of TCAL's OL, the parties had agreed that the issues relating to safety and the AOC should be left to the separate AOC procedure and that was also appropriate here. If it were correct that a provisional suspension of the AOC always precluded a TOL then it would never be possible to award a TOL when an airline entered administration, which cannot have been the legislative intent.
c. The lack of submission of change control documentation should not preclude Flybe from obtaining a TOL. The administrators had had insufficient time to submit such documents but were happy to do so after the hearing for the Panel's consideration if that would facilitate granting a TOL.

(c) Whether the Panel should defer its final decision in relation to Flybe's OL beyond the normal period of ten working days of the date of the hearing.

42. Flybe submitted that, even if the Panel were currently minded to suspend or revoke Flybe's OL, it should nevertheless delay publishing its decision beyond the usual period of 10 working days, for the same reasons it relied on support of its arguments that the CMG Proposal should be withdrawn (paragraph 39 above).

Response submissions from CMG

43. CMG rejected the argument that the procedure had been rushed and unfair. CMG had conducted an in-depth assessment, beginning on around 11 January 2020. Flybe had had the opportunity to respond to that assessment and had done so in detailed submissions on 16 March 2020 and in further submissions and evidence submitted on 25 March 2020. CMG had considered the new evidence but it did not change their assessment.
44. CMG reminded the Panel of the provisions of Article 3(2) and Article 4(g) (see paragraphs 8a and 8b above), and also referred to Article 8(5)(b) which required an air carrier to notify the CAA of any intended mergers or acquisitions. No such notification had been received in respect of any of the transactions about which evidence had been given. This was particularly surprising in the case of CP7, which had apparently indicated that it wished to complete any transaction by the end of April 2020.
45. The key issue for the purposes of Article 9(1) was whether any of the proposed transactions would involve the sale of the company as a going concern. Only CP2 and CP7 were realistically in play in this regard but neither of those involved the sale of Flybe as a going concern. Instead, the proposed transactions involved the selling off of parts of Flybe's business and its integration into the business of

the acquirors. The fact that retention of the OL would assist in the recovery of value for creditors was not relevant to the question before the Panel. Nor was the fact that, for competition law purposes, the acquirors might be seen as successor businesses to Flybe; Regulation 9 was focused on the viability of the OL holder and the ability of that carrier to pursue its operations and meet its financial obligations.

46. Many of the assets owned by Flybe were charged and the debts secured by those charges would need to be satisfied. There was no suggestion that there would be sufficient cash or assets available to meet Flybe's Article 5 financial obligations in the future, especially in the light of Flybe's substantial outgoings.
47. In relation to the TOL, Flybe had put the "realistic possibility" test in article 9(1) too low. It should be interpreted in a common-sense way with regard to the clear words used. On that basis the evidence did not show that there was any such realistic possibility. Also, given the lack of a change control document, the Panel could not conclude that there was a valid application for a TOL.
48. Finally, it would be contrary to the CAA's own policy and to the principles of good administration to delay the decision. To do so would likely lead to challenges by third parties who might be impacted by the delay (such as airports or other slot acquirors). Those challenges might well succeed.

Response submissions from Flybe

49. Flybe responded as follows:
    a. If it were the case that only the sale of Flybe with an operating licence was relevant for the purposes of Article 9(1) then the proposed transactions could be structured in this way, possibly through a scheme of arrangement. Flybe should have a further opportunity to consider that possibility and make submissions on it. Currently the administrators' assumption was that at least one of CP2 and CP7 wanted to acquire Flybe's OL.
    b. It was accepted that CMG could not take no action but they were obliged to investigate the circumstances properly. In this case, CMG were obliged to consider the evidence in depth, for Flybe to comment on it and then for there to be a further hearing.
    c. The evidence showing the historic financial position of Flybe was less important than the likelihood of a transaction taking place giving rise to an improved financial position going forward. The fact that the CAA had not heard from any of the potential counterparties was not an indication that the transactions were not possible or likely. They had all signed non-disclosure agreements and in any event it was still very early in the process.
    d. The fact that Flybe was not flying should be no impediment to the issuing of a TOL, since under the EU Regulation a carrier was afforded some time without flying following the initial grant of an OL.
    e. The EU regulation should be applied homogenously across the EU; other airlines in the EU have managed to retain an OL after entry into insolvency.

Further evidence from Flybe after the hearing

50. On 3 April 2020 Flybe sent an e-mail to the Panel seeking to give evidence of developments since the hearing, including brief description of (i) "*credible*"

interest from a party ✂ which was said to be considering an investment together with "*an airline partner yet to be determined"*. This was described by Flybe as giving rise to a possibility that the airline would be sold as a going concern; and (ii) interest from a non-EU resident individual with previous airline ownership experience who had made a non-binding offer for the operations of Flybe.

51. Since these new matters, although lacking in detail, had the potential to impact on the Panel's application of the relevant test, exceptionally the Panel decided to consider further evidence notwithstanding that it was only provided after the hearing. The Panel invited Flybe, by 8 April 2020, to put in any further material on which it wished to rely in relation to these issues, including proper details of the nature of the interest received and of the likely structure of any deal, as well as an explanation of the impact of the proposal on the test to be applied under Article 9(1). CMG had the right to respond by 9 April 2020.
52. Flybe then took the opportunity to put in further written submissions and a long accompanying exhibit. In summary it submitted as follows:
    a. As to the interest from the ✂ investor, it was said that they were considering providing financial support to a European/UK partner making a bid for the operations of Flybe. Discussions were said to be ongoing to identify potential partners although these were not far enough progressed to be able to provide details. Supporting evidence of e-mail communications showed that a third party advisor who represented this investor had been granted access to the relevant data room, had signed an NDA and had been sent a copy of the relevant information memorandum.
    b. As to the interest from the non-EU resident individual, there was also supporting e-mail correspondence showing the signing of an NDA and provision of the information memorandum, together with an e-mail dated 3 April 2020 referring to an offer of ✂ for certain items including the AOC, ✂ aircraft, "*appropriate slots and routes to op ✂ aircraft*", ✂ flight simulator and 3 spare engines. This was described as a non-binding offer expressing interest in a cash deal for Flybe operations based on ✂ aircraft. It was said that the EY M&A team and Flybe management were supporting this party in developing a financial model.
    c. In both cases it was too early to provide any clarity on the likely transaction structure although there were options available for both 'legal entity' and 'asset' deals. In the former scenario Flybe Limited would survive (for example through a scheme of arrangement). An example of the latter scenario would be where a 'NewCo' would acquire the assets and the new owners would seek to transfer Flybe's OL ("copy/paste") to the NewCo.
    d. It might be helpful for the Panel to consider whether it was confident, based on the evidence, that if it revoked or suspended Flybe's OL, there was a less than 50% probability that Flybe would apply for a new one within a 6 month or reasonable period to support one or more of the transactions in contemplation (to which the answer was that the Panel could not be so confident).
    e. Various submissions were also made which went beyond the issues identified by the Panel, including the need to ensure consistent application

of the EU Regulation across all member states and reference to the experience of other EU member states as well as the attitude of other regulators to revocation of OLs.

53. In response, CMG, among other submissions, pointed out that there was no evidence of any substantive offer from the investor or of any interest from a partnering airline. As to the 'non-binding offer' this appeared to be a proposed acquisition of assets, it did not seem that the offer had been repeated or confirmed in subsequent meetings and there was no evidence that the administrators would accept the putative offer. In either case the new owner of Flybe would need to satisfy the ownership and control requirements in Article 4(f) of the EU Regulation (which provides that Member States or nationals of Member States must own more than 50% of the licenced undertaking and effectively control it).

Discussion and determination

(a) Should Flybe's Operating Licence be suspended or revoked and, if so, which?

54. The relevant test is that set out in Article 9(1): is the Panel satisfied that Flybe can meet its actual and potential obligations for the next 12 months? The Panel has carefully considered the evidence and permitted the exceptional submission of post-hearing evidence.
55. Flybe has undoubtedly in the recent past suffered severe financial difficulties which led it to enter into administration. The key question, though, is whether anything is likely to change within a reasonable time so as to satisfy the Panel that Flybe, as the relevant 'air carrier' for the purposes of Article 9(1), would or might meet the test. In practice this would only be possible if Flybe were to be sold as a going concern and the new shareholders injected sufficient new funding so that Flybe were able to continue as an air carrier under the same OL, even if this operation took place on a smaller scale than before. Such a transaction would require notification to the CAA under Article 8(5)(c) of the EU Regulation but was theoretically capable of putting Flybe in a position to comply with the financial tests required to continue to hold an OL.
56. As to this key question:
    a. The evidence at the hearing showed that the only potential transaction of this type was that with CP1. CP1, however, had recently withdrawn their interest.
    b. Of the other counterparties referred to at the hearing, only CP2 and CP7 were at all relevant to the prospect of Flybe continuing as a going concern. Nevertheless, there was no evidence that the transactions proposed by CP2 or CP7 stood any prospect of allowing Flybe to continue as a financially viable air carrier. On the contrary, CP2 and CP7 had expressed interest only in purchasing parts of the business and assets of Flybe, to be integrated into their own operations. In any event, after the hearing the Panel were informed that the interest of CP2 and of CP7 had been deferred.
    c. The fact that, in those circumstances, the acquiror might be considered for competition law purposes as the successor undertaking to Flybe did not assist in the assessment of whether the test in Article 9(1) was met. That test was concerned with the financial health and prospects of the current licence holder.

d. Maximising the return for Flybe's creditors was not a relevant consideration in the application of that test. Ultimately, an OL is granted to an airline in order to permit it to provide air services, not to maximise value for the airline's owners or creditors.

e. Nor did the evidence adduced after the hearing show that Flybe could satisfy the test. There was nothing in all of the material supplied to show that any offer had been or was likely to be made by the investor, or that any such offer would give any prospect of Flybe continuing as a going concern. The evidence simply showed that the investor had signed an NDA and was looking in the data room. As for the 'non-binding cash offer', the evidence did not persuade the Panel that there was a realistic prospect of any transaction which would enable Flybe to meet the test in Article 9(1). Flybe's submission that the Panel should consider whether it was likely that Flybe would, if its OL were revoked, need to apply for a new one in the next 6 months appeared to be an attempt to reverse the burden of proof and was not appropriate. The relevant question was whether Flybe had satisfied the Panel that it could meet its actual or potential obligations for a 12-month period. Flybe's assertion that there were 'options available' with the two new parties identified for the acquisition of Flybe as a legal entity (and thus its continuation as OL holder as a going concern) was not backed up by any evidence that this was even a possibility on the facts and fell far short of meeting the test.

57. The evidence about the dispute over Heathrow slots did not assist on the key question pursuant to Article 9(1). A third party's purchase of Flybe's slots would not on its own put Flybe in a position to meet the relevant financial viability test. The assertion that restrictions on slot disposal caused by the commitments to the EC Commission might make Flybe more attractive as a going concern was nothing more than speculation.
58. The present circumstances of the COVID-19 pandemic were undoubtedly very difficult indeed for air carriers and the evidence did suggest that potential counterparties who would otherwise have been interested in purchasing Flybe or its assets were pre-occupied with such matters. However, (i) Flybe's financial difficulties at least partially pre-dated the pandemic difficulties; and (ii) the Panel still ultimately had to apply the Article 9(1) test in relation to Flybe's financial prospects over the next 12 months. The Panel agreed with CMG that the current circumstances made it less likely that Flybe would be rescued as a going concern. The withdrawal of CP1's interest was an illustration of this.
59. The Panel also gave consideration to (i) the point made by Mr Anderson that there might yet be a government rescue package for airlines and to (ii) Flybe's argument that maintenance of Flybe's OL would be consistent with the public efforts to support the airline industry. The Panel's task, however, was to apply the law as it currently stood (particularly in the EU Regulation). If there were a future rescue effort from the government, it seems likely that airlines would have to apply on a case by case basis; there was no indication that any assistance would be forthcoming to an airline that was already in administration. The Panel was not persuaded by Flybe's references to the attitude of other EU regulators to insolvent airlines and the need for a 'level playing field' across member states, especially in the light of the fact that insolvency laws differ across the EU.
60. The Panel was also not persuaded that the hearing was premature or that CMG should be required to withdraw its proposal and to continue or start afresh with its

assessment of the financial health of Flybe. This question had to be considered by reference to the EU Regulation and the CAA's policy. In this regard:

a. Article 9(1) permitted an assessment at any time by the CAA and required only that any decision to suspend or revoke had to be "based on" that assessment.
b. There was no requirement under Article 9(2) to restart an assessment if a carrier enters insolvency.
c. The procedure followed in the present case was in accordance with the process and time periods set down in CAP 1591.

61. It was not seriously disputed that there had indeed been an assessment by CMG of Flybe's financial position which began in January 2020. The assessment process had not stopped with the CMG proposal on 5 March 2020 since, for present purposes, the relevant assessment under Article 9(1) was that of the Panel. The Panel had reached a view after consideration of all of the evidence placed before it by the parties, together with two rounds of written submissions and oral submissions at the hearing and further evidence after the hearing had closed. It was always possible to say that further evidence might be available in the future but it was reasonable to apply a cut-off point of the present decision date, particularly where the hearing had been held in accordance with the published CAA policy on applicable time limits and the Panel had, exceptionally, permitted post-hearing evidence.
62. Due to its obligations under Article 9(1), once the CAA had determined that it was no longer satisfied that the air carrier could meet its actual and potential obligations for a 12 month period it must either suspend or revoke the licence and not delay. Article 3(1) 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 EU Regulation are not complied with. That also required the CAA to act and not to delay.
63. As to the choice between suspension or revocation, the parties were helpfully 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). Applying that guideline, the evidence clearly fell short of showing such a realistic prospect. The prospect had to be "realistic" i.e. based on concrete proposals or something other than hope or speculation. As already set out above, there was no evidence of any current interest by any counterparty in the purchase of Flybe as an air carrier, or of Flybe remedying its financial problems within 12 months.
64. In the light of the above conclusions it was not necessary for the Panel to determine whether Article 9(5) provided a separate basis for the revocation or suspension of the OL in the light of the provisional suspension of the AOC, particularly in the light of the fact that the SARG proposal and the issues relating to safety would fall to be fully adjudicated upon in due course.

(b) Whether the Panel considers that the conditions for granting a TOL are met

65. The Panel was not persuaded by CMG's arguments about whether there was a proper TOL application before the Panel or whether the Panel was precluded from answering this question in Flybe's favour because Flybe had not submitted change management documentation. The question as formulated merely required the Panel to consider whether the test for a TOL in Article 9(1) (in particular whether there is a realistic prospect of satisfactory financial

reconstruction within a maximum of 12 months) was met, which the Panel was capable of doing on the evidence before it.

66. The Panel accepted Flybe's submission that Flybe only had to show a realistic prospect of financial reconstruction not that it was likely, or more likely than not. The evidence, however, did not even meet this low threshold because there was nothing concrete to suggest that there was any such realistic prospect.

67. The assertion by Flybe that there was no need for an air carrier to be flying in order to have a TOL missed the point. The purpose of both an OL and a TOL was to permit the holder to operate as an air carrier either now or in the near future, not to maintain the status quo merely to maximise the chances of selling assets.

(c) Whether the Panel should defer its final decision in relation to Flybe's OL beyond the normal period of ten working days of the date of the hearing.

68. The Panel was obliged to take action once it considered that the financial test in Article 9(1) was no longer satisfied (paragraph 62 above). Furthermore, delay was not a neutral stance since there were likely to be third parties who had an interest in the outcome of the present adjudication. There would, therefore, need to be a good reason for a delay, supported by evidence which was relevant to the question of whether Flybe could meet any of the relevant tests in the legislation within a reasonable time period. For the reasons set out above, there was no such evidence in the present case and it would, therefore, not be appropriate to delay the issuing of the decision.

Decision

69. For the reasons set out above Flybe's OL should be revoked.
70. 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.
71. By section 69A(5) of the Civil Aviation Act 1982, Flybe's Route Licences 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

cc Paul Smith, Director, CMG, CAA