

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2008 1038 JR**

**COMMERCIAL COURT**

**IN THE MATTER OF COUNCIL REGULATION 2408/92 (EEC) OF 23rd JULY, 1992, ON ACCESS FOR COMMUNITY AIR CARRIERS TO INTRA-COMMUNITY AIR ROUTES**

**BETWEEN**

**RYANAIR LIMITED**

**APPLICANT**

**AND**

**THE MINISTER FOR TRANSPORT**

**AND**

**AER ARANN**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 2nd day of April, 2009**

1. On 9th September, 2008, the High Court (Feeney J.) granted leave to the applicant, Ryanair, to seek an order of *certiorari* of the decision of the Minister for Transport ("the Minister") to award the Public Service Obligation (PSO) contract for the Knock-Dublin route to Aer Arann and related declarations and ancillary reliefs on the grounds set out at paragraph K of the statement of grounds. The proceedings were admitted to the Commercial List. The Minister has delivered a notice of opposition and fully defended the application. Aer Arann has chosen not to participate in the proceedings.

2. The primary challenge of Ryanair is on the basis that the contract was awarded to Aer Arann without any proper tender process in contravention of Council Regulation No. 2408/92 (EEC) and was therefore *ultra vires* the Minister. Ryanair also challenges the decision, even if made pursuant to a tender process, on the basis that the contract awarded contravenes the minimum frequency and seat requirements for the Knock-Dublin route in notice 2005/C 39/06 and/or is in breach of Regulation 2408/92 by providing for the payment of certain potential additional compensation for the month of October 2008, to that specified in the tender of Aer Arann.

3. The Minister objects to the *locus standi* of Ryanair to challenge the decision, submits the decision made was in accordance with Regulation 2408/92, and the tender process and submits that even if the decision was *ultra vires* the Minister that as a matter of discretion, the Court should refuse Ryanair the reliefs sought.

4. Council Regulation No. 2408/92 (EEC) of 23rd July, 1992, on access for Community air carriers to intra-community air routes ("the Regulation"), provides that a member state, having informed the Commission, may impose a public service obligation in respect of scheduled air services to an airport serving a peripheral or development region within its territory, such route being considered vital for the economic development of the region. Where a member state operates a public service obligation, that obligation may include a requirement that any air carrier intending to operate the route gives a guarantee that it will operate the route for a certain period. The member state may limit access to the route to one carrier. The right to operate such services must be offered by public tender. The member state may reimburse an air carrier which carries out the public service obligation, which reimbursement shall take into account the costs and revenue generated by the service. The Regulation sets out the procedures which, at the material time as to these proceedings, were required to be followed by each EU member state when it granted PSO contracts under the Regulation.

5. The tender process is governed by the provisions of the Regulation, the published notices containing the route specifications and the provisions of the invitation to tender. In addition, the parties argue that this tender process is also governed by certain general principles, by analogy with EU public procurement law, such as equal treatment and transparency.

**Regulatory Framework**

6. The Regulation came into force on 1st January, 1993. The Regulation recognised the need to:

"make special provision, under limited circumstances, for public service obligations necessary for the maintenance of adequate air services to national regions".

Article 2 defined "public service obligation" to mean:

"any obligation imposed upon an air carrier to take, in respect of any route which it is licensed to operate by a Member State, all necessary measures to ensure the provision of a service satisfying fixed standards of continuity, regularity, capacity and pricing, which standards the air carrier would not assume if it were solely considering its commercial interest".

7. Article 4 (1)(a) provides a member state may impose a public service obligation:

"in respect of scheduled air services to an airport serving a peripheral or development region in its territory or on a thin route to any regional airport in its territory, any such route being considered vital for the economic development of the region in which the airport is located".

The Commission is required to publish the existence of this Public Service Obligation in the Official Journal of the European Communities ("the Official Journal").

8. Article 4 (1)(d) provides that if no air carrier has commenced or is about to commence scheduled air services on a route in accordance with the Public Service Obligation which has been imposed on that route, then the member state may limit access to that route to only one air carrier for a period of up to three years after which the situation shall be reviewed. The right to operate such services shall be offered by public tender, either singularly or for a group of such routes, to any Community air carrier entitled to operate such air services. The invitation to tender shall be published in the Official Journal.

9. Article 4 (1)(e) and (f) provide:

"(e) The invitation to tender and subsequent contract shall cover, *inter alia*, the following points:

(f) the standards required by the Public Service Obligation;

(ii) rules concerning amendment and termination of the contract, in particular to take account of unforeseeable changes;

(iii) the period of validity of the contract;

(iv) penalties in the event of failure to comply with the contract.

(f) The selection among the submissions shall be made as soon as possible, taking into consideration the adequacy of the service, including the prices and conditions which can be quoted to users, and the cost of the compensation required from the Member State(s) concerned, if any."

10. Article 4 (1) (h) and (i) provide:

"(h) A Member State may reimburse an air carrier, which has been selected under subparagraph (f), for satisfying standards required by a Public Service Obligation imposed under this paragraph; such reimbursement shall take into account the costs and revenue generated by the service.

(i) Member States shall take the measures necessary to ensure that any decision taken under this Article can be reviewed effectively and, in particular, as soon as possible on the grounds that such decisions have infringed Community law or national rules implementing that law."

11. On 16th February, 2005, notices were published in the Official Journal revising PSOs in respect of a number of scheduled air service routes in the State, including the Knock-Dublin route. Notice 2005/C39/06 concerned the Knock-Dublin route and contained the specifications required for that route, including a minimum frequency of one return flight per day, seven days per week, with a minimum of thirty seats each way. Paragraph 2.3 of notice 2005/C39/06 provided that the flight schedules should enable passengers, including passengers on business trips, to make a round trip within the same day. A further notice was published in the Official Journal on 29th January, 2008, notice 2008/C24/05, indicating that Ireland would be revising the PSOs published on 16th February, 2005, including the Knock-Dublin route. This revision contained adjustments to the route specifications, such as the maximum fare, which would take effect from 22nd July, 2008. A further notice, 2008/C25/04, was published in the Official Journal on 30th January, 2008, which related to invitations to tender by Ireland in respect of scheduled air services on a number of routes, including the Knock-Dublin route ("the invitation to tender").

12. The invitation to tender announced that there would be a tender process which would be subject to the provisions of the Regulation. Services would commence on 22nd July, 2008.

13. At paragraph 6, it was stated that the tenders would be evaluated according to which tender most economically advantageous, while was also taking account of the carrier's capacity to secure the operation of the PSO air service for the duration of the contract term. The deadline for the submission of tenders was 3rd March, 2008.

14. Paragraph 2 of the invitation to tender recited that the object of the invitation to tender is the:

"Operation from 22 July 2008 of direct scheduled air services on one or more of the routes listed above in accordance with the public service obligations imposed on the route(s) in question and published in OJ C39 of 16 February 2005, as amended by the notice published in OJ C24 of 29 January 2008."

15. Paragraph 2 further provided that airlines could submit either stand-alone bids for each route or combined bids for a number of route combinations, including a combination of the Derry-Dublin and Knock-Dublin routes. Paragraph 2 provided that:

"combined bids would be welcomed where the compensation level proposed is lower than the sum of the two relevant stand alone bids".

16. Paragraph 4 provided that:

"the present tender process is subject to the provisions of points (d), (e), (f), (g), (h) and (i) of Article 4(1)"

of the Regulation.

17. Paragraph 6 provided that:

"tenders will be evaluated according to which tender is the most economically advantageous, while also taking account of the carrier's capacity to secure the operation of the PSO air services for the duration of the contract term."

Paragraph 6 also provided:

"However, the awarding authority is not obliged to accept any tender. In certain circumstances, the Minister reserves the right to negotiate with bidders on a price related to their bids, but taking account of projected losses based on operating costs, projected yields, *etc.* The awarding authority reserves the right to solicit further information about any applicant's financial and/or technical resources and abilities, and without prejudice to the foregoing, to solicit or seek further information, whether from a third party or from the applicant, regarding the ability of the applicant to undertake and operate the relevant scheduled air services."

18. Furthermore, it was provided that:

"The contract shall be considered as a contract made under Irish law and subject to the exclusive jurisdiction of the Irish courts".

19. In relation to financial compensation, paragraph 7 provided:

"Tenders must explicitly state the amount of financial compensation required for the operation of the public service obligation on the route(s) for each of the 3 years from the scheduled starting date. The compensation should be calculated in accordance with the required minimum standards. The actual amount of the compensation payable by the Department of Transport will be determined annually, on an *ex-post* basis, and will be limited to the actual losses incurred, having regard to actual costs, revenues and if applicable, profit margin, by the successful tenderer in operating the services, subject, as a maximum, to the limit of the amount stated in respect of each year in the tender .... The contract will include provision for the maximum limit of compensation in any year(s) to be increased in certain circumstances, at the sole discretion of the awarding authority, in the event of extraordinary changes in operating conditions, and without prejudice to the provisions governing the termination of the contract. Requests for an increase in the maximum limit of subvention in any year(s) will be considered by the awarding authority only in circumstances where the developments in question were not or could not have been anticipated by the tenderer or are due to factors entirely outside the control of the tenderer."

20. Specific provisions were made for increases in fuel costs.

21. Paragraph 8 provided in relation to amendment and termination of the contract as follows.

"The contract will be awarded by the Minister for Transport. The contract will be valid for a period of 3 years from 22 July 2008. A new invitation to tender will be made, if applicable, before the end of a period of 3 years maximum from 22 July 2008. Any amendment or termination of the contract will be in accordance with the terms of the contract. Variations in the standards required by the public service obligation will be permitted only with the prior agreement of the awarding authority.

Should a situation arise in which a successful tenderer is no longer in a position to provide the contracted service(s), the awarding authority reserves the right to award the contract(s) in question, for the remainder of the contractual period and subject to the same conditions and compensation levels, to the next highest ranking tenderer identified in the original assessment process."

22. Paragraph 9 provided in relation to failure to comply with the contract as follows.

"Where a flight is cancelled for reasons directly attributable to the carrier, the compensation payable will only be in respect of costs, if any, actually incurred by the carriers in handling passengers disrupted by the non-operation of such flights. The awarding authority reserves the right to serve notice of termination of the contract, if having regard to the adequacy of the service provided by the carrier and, in particular, to the number of flights cancelled and/or delayed for reasons directly attributable to the carrier, it is of the opinion that the standards required by the public service obligation have not been or are not being met satisfactorily."

23. The 'note for information of tenderers', which accompanied the invitation to tender, explained at paragraph 5 that the tender process would take a minimum of three months from the date of publication of the invitation to tender to the selection of the successful carriers. It also explained that the tender process would not, therefore, be completed "before 3rd May, 2008" and that the start date for the service would be 22nd July, 2008, therefore, the successful tenderer would have "a maximum period of 11 weeks to make all necessary arrangements to ensure start-up of services" on 22nd July, 2008.

24. Paragraph 13 provided under the heading "form of contract":

"Successful tenderer(s) will be required to enter into a contract for the provision of services on the route(s) in question. Subject to the conditions governing termination, these contracts will be for a three-year period commencing 22 July 2008. Copies of the draft contracts are included in the tender dossiers. Tenderers are advised

to read the terms of these contracts carefully and submission of a tender implies acceptance by the tenderer of those terms”.

25. The draft contract provides at clause 8 in relation to financial compensation:

“Subject to compliance by the Company with the standards specified in this contract, the Minister may compensate the Company for losses incurred in operating the service to be provided by it under this contract. The amount of compensation shall be the lesser of either:

(i) The actual losses incurred by the Company taking account of (a) the actual losses, including direct, indirect and allocated costs attributable to the operation of the service, (b) the revenues generated by the service and, if applicable, (c) a profit margin. Such actual losses shall be established at the end of each year of the contract. Or

(ii) Euro AAA in respect of the first year of this contract ending 21 July, 2009, Euro BBB in respect of the second year of this contract ending 21 July 2010, and Euro CCC in respect of the third year of this contract ending 21 July, 2011.”

Clause 9 contains detailed provisions in relation to time and method of payment which are not relevant.

26. Clause 10 provides:

“(a) The maximum annual limits of compensation referred to at Clause 8 (ii) may, at the sole discretion of the Minister and as an exceptional matter, be increased by means of payment or payments in addition to those for which Clause 9 provides, in the event of unforeseen changes in operating conditions affecting the service. In assessing any proposal from the Company for an increase in the maximum limit of compensation in any year, the Minister will have due regard to developments affecting the operation of the service that were not, or could not have been, anticipated by the Company or are due to factors outside the control of the Company.”

Paragraph (b) relates to increase in fuel costs and is not relevant. Paragraph (c) provides:

“(c) Notwithstanding the provisions of Clause 18, the parties, by mutual agreement, may terminate the contract, subject to three months notice thereon being given by the terminating party, if, following the Minister’s rejection of a proposal from the Company under Clause 10 above for an increase in the maximum limit of compensation in any year, the Company indicates in writing to the Minister that it is not prepared to continue to provide the service within the maximum limits of compensation provided in Clause 8 (ii).”

27. In relation to termination of the contract, clause 13 provides as follows:

“Notwithstanding the provisions of Clause 18, the Minister may terminate the contract, subject to three months notice thereon being given to the Company, if having regard to the adequacy of the service provided by the Company and, in particular, to the number of flights cancelled or delayed for reasons directly attributable to the Company, he is of the opinion that the standards required by the public service obligations as specified in OJ Notice 2005 C/39/04 as amended by OJ Notice 2008 C/24/05 have not or are not being met satisfactorily by the Company”.

28. Clauses 18 and 19 also provide as follows:

**18.** This contract may be terminated before 21 July 2011 either by mutual agreement between the Minister and the Company or by either party giving to the other at least six months written notice of termination, the contract to terminate on the expiry of such notice.

**19.** Notwithstanding Clause 18, this contract may be terminated with immediate effect by the Minister by written notice to the Company in the event of a material breach of performance by the Company of the terms and standards specified in the contract. The contract shall be deemed to have terminated on the date on which the event which gave rise to the termination of the contract occurred notwithstanding the date on which the Minister gave notice of termination”.

29. Clause 21 provides that the contract shall be governed by, construed and interpreted in accordance with Irish law.

### **Factual Background**

30. Ryanair tendered for one of the PSO routes advertised in the invitation to tender of 30th January, 2008, namely, the Dublin-Kerry route. It was successful and was awarded the contract in respect of that route. Ryanair, however, did not tender for the Knock-Dublin route. Aer Arann successfully tendered for the Galway-Dublin, Derry-Dublin, Sligo-Dublin and Donegal-Dublin routes. CityJet and Aer Arann tendered for the Dublin-Knock route. Aer Arann submitted three tenders in relation to the Knock-Dublin route. The first tender was a single bid in respect of the Knock-Dublin route for a compensation sum of €5,902,827. The second and third tenders were both combined bids in respect of both the Knock-Dublin and Derry-Dublin routes for a compensation sum of €12,996,094 and €13,389,255 respectively. CityJet also submitted a combined bid, but as this tender did not comply with the tender specifications required for the Derry-Dublin route it was rejected. CityJet submitted a single tender in respect of the Knock-Dublin route for a compensation sum of €4,865,373.

31. On 12th May, 2008, Aer Arann was informed that it has been unsuccessful in relation to its tender for the Knock-Dublin route. On the same day, the Department wrote to Mr. Patrick Edmond, Head of Commercial at CityJet. The letter stated that the Department was “prepared to offer CityJet” the Knock-Dublin PSO contract. This offer was subject to CityJet, “confirming that it will be in a position to commence operations on 22nd July, 2008, to the standards and specifications required under the Invitation to Tender Notices and as prepared in your tender proposals”. The Department

requested Mr. Edmond to confirm this in writing immediately. The Department also wrote that, "should you accept this offer, we will arrange for execution of contract documents in the coming days". Mr. Edmond replied by email on the same day and wrote, "I am happy to confirm our acceptance of the Knock PSO offer and look forward to finalising the details with you without delay".

32. This was followed up with a further letter from the Department of 23rd May, 2008. The letter read:

"Following your recent acceptance of our offer of the contract for the operation of services on the Dublin/Knock route, I now enclose two copies of the contract documentation.

The contract confirms commencement of operation on 22 July 2008, to the standards and specifications required under the invitation to tender notice and as proposed in your tender submission.

I would be grateful if you could now arrange for execution of both copies of the contract by CityJet and return them to me. I will then arrange for their execution on behalf of the Minister ...."

33. This was followed up with a further letter from the Department to Mr. Edmond of 26th June, 2008, referring to the letter of 23rd May, 2008, and inquiring if Mr. Edmond would be in a position to return the copies of the contract so they could be executed on behalf of the Minister. CityJet did not execute the contracts. On 8th July, 2008, Mr. Edmond wrote to the Department [by email] indicating that CityJet would be unable to take up the contract and provide a service on the Knock-Dublin route.

34. On 14th July, 2008, Ryanair's Chief Operating Officer and Deputy Chief Executive, Mr. Michael Cawley, wrote to the Department indicating he had heard in the press that, "CityJet have decided not to take up the offer" of the contract and that Ryanair would now be prepared to provide a service on the Knock-Dublin route, even though it had not originally tendered for that route. This was followed up with a second letter from Mr. Cawley on 6th August, 2008. Mr. Cawley received a reply on 14th August, 2008, which noted that, "CityJet have not been able to operate the service as originally proposed because of unexpected difficulties in securing an aircraft from within their own fleet", and also informing Ryanair that the Department was not in a position to consider Ryanair's proposal on the Knock-Dublin route as Ryanair did not submit a tender in respect of that route during the tendering process. On the 19th August, 2008, Mr. Cawley replied to that letter indicating that Ryanair was able to provide the service on the Knock-Dublin route and requesting the Department to reconsider its proposal. This was followed up with a further letter from Mr. Cawley on 27th August, 2008.

35. Meanwhile, officials at the Department had been in contact with Aer Arann, as the second preferred tenderer, in relation to the Knock-Dublin route.

36. Mr. Liam Daly, Principal Officer and Mr. Denis Murphy, Assistant Principal Officer in the Department each swore an affidavit on 10th November, 2008, in which each gives evidence of his contacts with Aer Arann in July, August and September 2008 concerning the awarding of the contract.

37. Mr. Murphy avers that on or about 11th July, 2008, following CityJet's withdrawal from the Knock-Dublin route, he telephoned Mr. Fergal Barry, Commercial Director of Aer Arann, to enquire whether Aer Arann would still be in a position to provide a service on the Knock-Dublin route in accordance with the terms of its tender. Mr. Barry replied that in the short term this would not be possible, as the aircraft originally earmarked for the route had been assigned to other operations. The best that could be provided at short notice would be a midday service. It was indicated that Aer Arann would try to provide the full PSO specification by November if required. Mr. Barry also indicated that the cost of providing the service would be higher than the original bid price because Aer Arann might have to forego other remunerative business for existing or new aircraft and take account of increased fuel prices since the bid was formulated. On 13th August, 2008, Mr. Barry telephoned Mr. Murphy and said new aircraft has become available sooner than anticipated and Aer Arann would be in a position to operate the Knock-Dublin route in accordance with the terms of its first single tender, for a compensation sum of €5,902,827, in the near future. Mr. Barry confirmed this position by email on the same date. In his affidavit, Mr. Daly avers that on 27th August, 2008, Mr. Daly contacted Mr. Barry to seek clarification as to whether Aer Arann would be prepared to operate the Knock-Dublin route as per its *combined* bid for both the Knock-Dublin and Derry-Dublin routes. On the following day, Mr. Barry contacted Mr. Daly and said Aer Arann would need a sufficient period of time for forward sales to build up and recommended a minimum lead-in time of six weeks for the commencement of the service from the date the contract would be awarded. Mr. Barry also indicated that if sufficient lead-in time was allowed, Aer Arann would be in a position to operate the Derry-Dublin and Knock-Dublin routes according to its original combined bid for both routes for a compensation sum of €12,996,094.

38. A short meeting was held on the afternoon of 28th August in the Office of the Department. The Department wanted the marketing of the route and the service to commence as soon as possible. Aer Arann indicated that it would be prepared to operate the service one month from formal Departmental approval subject to receiving compensation for loss of target revenue for the month of October. This meant if its target revenue as estimated in its bid fell short, the Department would pay the shortfall for the month of October in arrears. On 1st September, 2008, Mr. Daly emailed Mr. Barry and Mr. Paul Schutz of Aer Arann that the Department would accept Aer Arann's proposal to operate the Knock-Dublin route with effect from 1st October, 2008, in line with the combined Aer Arann bid for the Derry-Dublin and Knock-Dublin routes subject to a *pro-rata* reduction in compensation for the period when the Knock-Dublin service would not operate i.e. from 22nd July to 30th September, 2008. Mr. Daly also confirmed in his email that if target operating revenue fell below €70,995 in October, 2008 the Department would pay the shortfall on that amount for the month of October in arrears.

39. On 2nd September, 2008, the Minister announced that the contract had been offered to Aer Arann for the period beginning on 1st October, 2008, to 21st July, 2011. The text of the press release issued that day read:

"The Minister for Transport, Noel Dempsey, T.D. announced today (Tuesday 2nd September 2008) that following detailed discussions, a new contract to provide scheduled air services on the Knock-Dublin Public Service Obligation (PSO) regional air route has now been offered to Aer Arann ... Under the tendering process carried out earlier this year by the Department of Transport, Aer Arann was the second preferred bidder for the route ... Aer Arann will

operate the service under a combined contract that will also cover the Dublin/Derry PSO service. The contract provides for one daily return service on the Knock route and two daily return services between Dublin and Derry”.

Aer Arann commenced the route on 1st October, 2008. The contract was executed on 24th October, 2008.

#### **Ryanair's grounds**

40. Leave was granted on a number of grounds. Not all of the grounds were pursued at the hearing of the action. The main grounds put forward by the applicant can be summarised as follows.

- (1) That the tender process had come to a conclusion, with the acceptance by CityJet of the award of the tender and the Minister was therefore required to invite new tenders for the contract in question, or, alternatively, offer the exact same contract that had been initially awarded to CityJet to Aer Arann in accordance with paragraph 8 of the invitation to tender.
- (2) Alternatively, if the tender process had not concluded by the time of City Jet's withdrawal, the Minister should have approached the next preferred tenderer (Aer Arann) and offered the contract to that tenderer on the terms of its tender, but was not permitted to negotiate terms with that tenderer outside the scope of the invitation to tender.
- (3) Even if the tender process had not come to conclusion, the contract that was awarded to Aer Arann did not comply with the route specifications in Notice 2005/C39/06 and/or the terms of the invitation to tender by reason of the potential payment of additional compensation for October 2008.

41. The Minister's statement of opposition was filed on 11th November, 2008. The Minister makes a preliminary objection to Ryanair's application on the basis that it lacks *locus standi* to bring the application in circumstances where it did not tender for the contract in question. Ryanair, on the other hand, submits that when CityJet could no longer proceed with the contract that had been initially awarded to it the Minister, should have re-tendered for the award of the PSO contract for the Knock-Dublin route. Ryanair states that if the Minister had re-tendered, Ryanair would have been entitled to tender for the Knock-Dublin route and claims that factors had changed in the intervening period, including rising fuel costs, and the short Knock-Dublin route was attractive to Ryanair. In such circumstances, it submits that it has *locus standi* to challenge the decision to award the contract to Aer Arann.

42. In addition to the issue of *locus standi*, the following matters are raised by the Minister.

43. It is not in dispute that the Minister did not re-tender the contract and that he did not offer the same contract that had been initially awarded to CityJet to Aer Arann in accordance with paragraph 8 of the invitation to tender. It is disputed that the tender process had concluded with the award of the contract to CityJet and its acceptance of the contract by email. According to the Minister, the tender process only concludes on the successful tenderer entering into the contract in writing, as described in the invitation to tender, and this did not occur before CityJet withdrew from the tender process. Therefore, the Minister was entitled to proceed with the tender process and turn to the next preferred tender.

44. The Minister submits that he did not negotiate outside the terms of the invitation to tender and argues that the terms of the route specifications contained in notice 2005/C39/06 have been complied with. In relation to the potential October payment, the Minister argues he was entitled to make minor modifications to the contract in order to take account of unforeseeable changes as signalled in the Regulation, the invitation to tender and the draft contract.

45. Furthermore, the Minister pleads that this Court should exercise its discretion and refuse to grant the reliefs sought by Ryanair in these proceedings in circumstances where Ryanair has sought to submit a bid for the Knock-Dublin route without seeking to comply, in any way, with the conditions of the tender competition. This conduct, it is claimed, demonstrates a lack of *bona fides* in Ryanair's attempt to have the contract set aside due to lack of alleged compliance with the tender conditions.

#### **Issues**

46. Having regard to the grounds pursued, the notice of opposition and submissions of the parties, the issues which have to be determined by the Court are:

- (i) Does Ryanair have *locus standi* to challenge the validity of the Minister's decision to award the contract for the Knock-Dublin PSO route to Aer Arann on the ground pursued?
- (ii) Had the tender process concluded prior to CityJet informing the Minister on 8th July, 2008, that it would not be taking up the award of the Knock-Dublin PSO route, such that the Minister was precluded from awarding the contract for the Knock-Dublin PSO route due to commence on 22nd July, 2008, to the next most economically advantageous tenderer, on the basis of its tender subject to any permitted modifications?
- (iii) If the tender process had not concluded, was the Minister acting *ultra vires* in awarding the contract to Aer Arann by reason of:
  - (a) Negotiating outside the terms of the invitation to tender and/or,
  - (b) by agreeing to pay potential additional compensation for the month of October 2008, which had not been included in the tender of Aer Arann and/or
  - (c) its tender failing to comply with the route specifications contained in Notice 2005/C 39/06.

(iv) Even if the Minister was acting *ultra vires* in making the award to Aer Arann, should the Court, in its discretion, refuse the reliefs sought by reason of Ryanair's conduct in the summer of 2008 in seeking the award to it of the Knock-Dublin PSO route without having submitted a tender in response to the invitation to tender of 30th January, 2008, or any new invitation to tender?

### **Locus standi**

47. The primary objection of the Minister to the *locus standi* of Ryanair to challenge the decision to award the contract to Aer Arann is because Ryanair did not tender for the Knock-Dublin route in response to the invitation to tender of 30th January, 2008. The Minister submits that in those circumstances, Ryanair is not a person who has demonstrated an interest in the contract, the subject matter of the tender process.

48. The parties are not in dispute as to the principles according to which the Court should determine the issue of Ryanair's *locus standi*. Counsel for the Minister submits that the *locus standi* of Ryanair to challenge an award of a PSO contract pursuant to Regulation 2408/92 should be determined in accordance with national law *i.e.* Irish law, subject to the principles of equivalence and effectiveness. These are that the available remedies must be not less efficient than those applying to similar claims based on national law (principle of equivalence) and must not be such as in practice to make it impossible or excessively difficult to obtain judicial protection (principle of effectiveness).

49. It is also common case that notwithstanding that leave was granted to Ryanair, its *locus standi* may be considered at the full hearing. (See *Lowes v. Coillte Teoranta* (Unreported, High Court, Herbert J., 5th March, 2003).

50. The appropriate approach by the Court remains that set out by Walsh J. in the *State (Lynch) v. Cooney* [1982] I.R. 337, where at p. 369, he stated:

"The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case. In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates. In so far as it may be thought that such a matter can be deemed to be a question of practice rather than of substantive law, it is sufficient to point out that the Rules of the Superior Courts make no reference whatever to this subject. However, such rules as do exist, or appear to exist, regarding what is 'sufficient interest' for the purpose of applying for *certiorari* or a declaratory order are judge-made rules and, as such, can be changed and altered by judges. More importantly, they must be flexible so as to be individually applicable to the particular facts of any given case. Such a question cannot be regarded as a preliminary point unless there is an admission of all the facts necessary to determine the issue. In the absence of any admission in any case where the point is raised, it is necessary for the court to enter into a sufficient examination of the facts and, having heard them, to decide whether or not a sufficient interest has been established."

The reference to "sufficient interest" and the Rules of the Superior Courts is, of course, a reference to O. 84, r. 20, which provides:-

"The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

51. In an application for judicial review, the standing or sufficiency of interest in the subject matter of the application must be considered, not just in relation to the relief, but also to the grounds either in respect of which leave is sought, or, as in this instance, upon which leave has been granted. This is of particular importance in a challenge such as this to an award made pursuant to a tender process by a person who has not submitted a tender. If, for example, the grounds advanced only related to an alleged breach of the requirement of equal treatment of tenderers, then it would appear to me that Ryanair, as a person who had not tendered, could not be regarded as having standing to challenge the decision on such a ground. However, in this application, the primary ground of the challenge of Ryanair is that the tender process which commenced with the invitation to tender of 30th January, 2008, had come to an end prior to 8th July, 2008, when CityJet informed the Minister that it would not take up the award of the Knock-Dublin PSO route. Ryanair submits that the Minister then had only two options. He could, pursuant to paragraph 8 of the invitation to tender, award the contract to Aer Arann as the next highest ranking tenderer, but only subject to the same conditions and compensation levels as in the contract awarded to CityJet. If he did not do this, Ryanair submits that he was then obliged to publish a new invitation to tender. Ryanair submits that in its correspondence with the Minister in the summer of 2008, it demonstrated an interest at that time in seeking to obtain the award of a contract for the Knock-Dublin PSO route if a new invitation to tender was published.

52. If Ryanair was successful in its challenge on this ground, and Aer Arann was not prepared to accept a contract with the lesser compensation in the tender of CityJet, the Minister would have been obliged to issue a new invitation to tender in which Ryanair could have then participated. I am satisfied that, as a potential tenderer in the summer of 2008, Ryanair has established a *locus standi* to challenge the Minister's decision on this ground.

53. As I have determined that Ryanair has *locus standi* to challenge the validity of the Minister's decision on the primary ground advanced, and as leave has been granted on the remaining grounds, it appears to me that I should exercise my discretion so as to consider the challenge on the remaining grounds. Whilst I do so, I do not wish to imply that if these were the only grounds, Ryanair, as a person who did not tender, would have had standing to challenge on those grounds.

### **Had the tender process concluded by 8th July, 2008**

54. The primary focus of Ryanair's submission that the tender process was complete prior to 8th July, 2008, is the decision made to offer the PSO contract to CityJet, the communication of that offer to CityJet by letter of 12th May, 2008, and the acceptance by CityJet of that offer by email of the same date. Ryanair submitted that the terms of the draft contract had been specified in the documents made available at the time of the invitation to tender and it relied on paragraph 13 of the note for information of tenderers which stated, *inter alia*,

"Tenderers are advised to read the terms of these contracts carefully and submission of a tender implies acceptance by the tenderer of those terms."

55. It does not appear to me that the issue which the Court has to resolve as to whether the tender process had concluded prior to 8th July, 2008, such that the Minister was precluded from then awarding the Knock-Dublin PSO contract to Aer Arann on the basis of its tender, should be determined by resolving the question as to whether or not a concluded agreement had come in to existence between the Minister and CityJet prior to that date. Rather, it appears to me that what must be considered is whether the tender procedure specified in the Regulation and invitation to tender (when read with the note for information of tenderers) terminates prior to execution by the successful tenderer of the required contract or provides the procedure to be followed if, as happened here, a tenderer to whom the contract had been awarded withdraws prior to executing the contract which has been awarded to it. If it does not, then the further issue arises as to whether there is anything in those documents, or the applicable principles of community law or national law, which precludes the Minister from then awarding the contract to the next preferred tenderer on the basis of its tender in the same tender process.

56. Ryanair submits that the tender process is at an end once the successful tenderer accepts the contract even if it does not execute the contract and that the second indent of paragraph 8 of the invitation to tender covers the situation which occurred here. This provides:

"Should a situation arise in which a successful tenderer is no longer in a position to provide the contracted service(s), the awarding authority reserves the right to award the contract(s) in question, for the remainder of the contractual period and subject to the same conditions and compensation levels, to the next highest ranking tenderer identified in the original assessment process."

57. I have concluded that the above paragraph does not apply to a situation such as arose here where a successful tenderer withdraws prior to entering into the contract which the Minister decided to award to it. First, the Regulation in Article 4, and the invitation to tender, when read in conjunction with the note for information of tenderers, envisages quite clearly that the successful tenderer enter into a written contract with the Minister. This is confirmed by the draft contract made available as part of the tender documents. Article 4(1)(e) of the Regulation refers to the "subsequent contract" and requires it to cover the points specified in sub-paragraphs (i)(2)(iv). In accordance with paragraph 6 of the invitation to tender, "the contract shall be considered as a contract made under Irish law and subject to the exclusive jurisdiction of the Irish courts". Paragraph 13 of the accompanying note for the information of tenderer puts beyond doubt the requirement that a successful tenderer "will be required to enter into a contract for the provision of services on the route(s) in question". The draft contract supplied is just that, "a draft". It contains factual omissions which will require to be completed on the basis of the information in the tender which is successful and terms of award made. The contract to be entered into pursuant to Article 4(1) of the Regulation is a formal contract in the terms of the draft.

58. Accordingly, I have concluded that the procedure envisaged by the invitation to tender, construed in the context of the Regulation, and taking into account the additional information supplied in the note for information of tenderers, provides that following the assessment made by the Minister, or on his behalf, a decision is made as to the tenderer to whom the contract is to be awarded and, if accepted, the tender procedure envisages a further essential step in which the Minister and the successful tenderer enter into the contract referred to in Article 4(1) of the Regulation and the invitation to tender. Until such contract is executed it does not appear to me that the tender process can be regarded as concluded.

59. It does not appear to me that paragraph 8 of the invitation to tender is intended to apply to a factual situation where a successful tenderer withdraws prior to entering into the contract with the Minister. The situation referred to therein is one in which a successful tenderer "is no longer in a position to provide the contracted service(s)" (emphasis added). This appears to pre-suppose that a contract has been entered into to provide the services. I am satisfied that in the invitation to tender where reference is made to "the contract" it is referring to the written contract to be entered into between the Minister and the successful tenderer. Further, paragraph 8 refers to the award of the contract "for the remainder of the contractual period" (emphasis added) which, again, appears to refer to an event occurring after the commencement of the contractual period. Finally, the award may only be made subject to the same conditions, which, presumably, include the same flight schedules which must be detailed at paragraph 2 of the contract, and for the same compensation. The former appears aimed at a continuity of service which has already commenced.

60. I have concluded that neither the Regulation nor the invitation to tender expressly provides the procedure to be followed if, following acceptance of the award, but prior to entering into the contract with the Minister, a successful tenderer withdraws. Neither do they expressly set out the procedure to be followed if a successful tenderer to whom the Minister decides to award the contract withdraws before accepting the award. Could there be any doubt in the latter situation that the Minister is entitled to then award the contract to the next preferred tenderer on the basis of its tender in the same tender process. The Minister must be so entitled. To conclude otherwise would be absurd. It would render the tender process potentially useless as a tenderer is not precluded from withdrawing at this stage.

61. Whilst, similarly, the procedure set out in the invitation to tender does not expressly provide for what is to occur if a successful tenderer who has accepted the award withdraws prior to entering into the requisite contract with the Minister, it appears to me implicit that the Minister is entitled in the same tender process to offer the contract to the next preferred tenderer, provided in doing so he complies with the applicable Community law principles.

62. The next relevant issue to be considered, therefore, appears to be whether the Minister, in awarding the contract to Aer Arann, as the next preferred tenderer, acted in breach of any of the applicable Community law principles.

63. It is common case that the award of the contract falls outside the scope of the EU Public Procurement Directives (Directive 92/50 as replaced by Directive 2004/18). Nevertheless, both parties agree that, in accordance with the case law of the Court of Justice, certain general principles of Community law apply to the tender process for the PSO contract in question: see in particular, the judgment in *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v. Comune di Bari* (C-410/04) [2006] E.C.R. I-3303.

64. The parties are in agreement that the relevant principles are those of equal treatment and non-discrimination on grounds of nationality and a related obligation of transparency which consists "in ensuring, for the benefit of any potential



tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed": see Case C-324/98 *Telaustria* [2000] E.C.R. I-10745 at paragraph 62.

65. In my view, there was no breach of any of the above principles, when considered in accordance with the case law of the Court of Justice, by the Minister when in the summer of 2008, through officials at his Department he held limited discussions with, and then determined to award the contract to, the next preferred tenderer *i.e.* Aer Arann, on the basis of one of its tenders, in circumstances where CityJet had withdrawn after award but prior to entering into the contract to which the tender process related. There was no breach of the principle of equality of tenderers or non-discrimination on grounds of nationality. Ryanair alleges breach of the principle of transparency by the alleged negotiations in relation to the extra potential payment for October, 2008 which, it is contended, went outside the invitation to tender. This is in substance the same objection as one of those made to the *vires* of the contract awarded which included such payment.

66. The Minister submits, correctly, in my view, that in the factual circumstances in which he found himself in the summer of 2008, it was permissible for him to have discussions with Aer Arann, as the next preferred tenderer, and agree to award the contract to it with an additional potential payment for the month of October, 2008, over the maximum compensation claimed in the tender submitted by Aer Arann. In my view, the Minister was so entitled by reason of the provisions of Article 4 (1)(e)(ii) of the Regulation, paragraph 7 of the invitation to tender, and clause 10 of the contract. All of these are fully set out earlier in the judgment. Article 4 (1)(e)(i) expressly provides that the invitation to tender and subsequent contract shall cover, *inter alia*, "rules concerning amendment . . . of the contract, in particular to take account of unforeseeable changes . . .". Paragraph 7 of the invitation to tender then indicates that the contract will include provision for the maximum limit of compensation in any year to be increased in certain circumstances, and clearly signals the contractual provisions included at clause 10 at both the draft contract furnished with the invitation to tender and the contract as awarded. Insofar as relevant, this provides:

"(a) The maximum annual limits of compensation referred to at Clause 8 (ii) may, at the sole discretion of the Minister and as an exceptional matter, be increased by means of payment or payments in addition to those for which Clause 9 provides, in the event of unforeseen changes in operating conditions affecting the service. In assessing any proposal from the Company for an increase in the maximum limit of compensation in any year, the Minister will have due regard to developments affecting the operation of the service that were not, or could not have been, anticipated by the Company or are due to factors outside the control of the Company."

The maximum annual limits of compensation referred to at clause 8 (ii) are those derived from the compensation specified in the tenders.

67. I have concluded that clause 10 of the contract, as signalled by paragraph 7 of the invitation to tender, permitted the Minister, in the factual circumstances which pertained in the summer of 2008, to agree to pay additional compensation for the month of October, 2008, over the amount specified in Aer Arann's tender. The Minister was entitled, as he did, to treat the late withdrawal of CityJet and consequent necessity to fix a new date for the commencement of the service as "unforeseen changes in operating conditions" which were due to factors outside of the control of Aer Arann. The time lag between the award of a contract and commencement of the service was seen as important, as appears from the information given in the note for information of tenderers, referred to earlier at paragraph 23 of this judgment. Tenderers were warned that the successful tenderer would have "a maximum period of 11 weeks to make all necessary arrangements to ensure start-up services on the then envisaged date of 22nd July, 2008". When it became impossible in practice to award a contract with an obligation to commence service on 22nd July, 2008, the Minister was anxious to procure the commencement of the service as early as possible. The contract was only awarded to Aer Arann on 2nd September, 2008, and it was required to commence the service on 1st October, 2008. It was to procure this commencement of service in a significantly shorter time from the award of the contract than had been envisaged in the information for tenderers that the Minister agreed to pay the additional compensation of any shortfall below €70, 995 for the month of October, 2008.

68. Further, in my view, the new term of the contract providing for the additional compensation for the month of October, 2008 does not constitute a material amendment which required a new invitation to tender in accordance with the principles set out by the Court of Justice in Case C-454/06 *Presstext Nachrichten Agentur GmbH v. Austria* (judgment of 19th June, 2008), and, in particular, at paragraphs 34 to 37 where the Court stated:

"34. In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98 *Commission v France* [2000] ECR I-8377, paragraphs 44 and 46).

35. An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.

36. Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in Article 11(3)(e) and (f) of Directive 92/50, which imposes, in respect of contracts concerning, either solely or for the most part, services listed in Annex I A thereto, restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract.

37. An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract."

69. The agreement to pay what, in relative terms, is a small amount for the month of October, 2008, does not make the

amendment material in accordance with any of the criteria set out by the Court of Justice. Accordingly, I have concluded that the award of a contract with this additional potential compensation for the month of October, 2008 was *intra vires* the Minister. Insofar as the invitation to tender and the contract envisages the payment of additional compensation in some limited circumstances, this pre-supposes that the Minister and successful tenderer are entitled to enter into discussions in relation to any such additional compensation. Such discussions would clearly be permissible after a successful tenderer enters into the written contract. It does not appear to me that there is any basis for suggesting, in the circumstances which existed in this case, that the Minister is prohibited from entering into such discussions prior to the award of the contract.

70. The last issue is whether the route specifications in the contract awarded to Aer Arann complied with the route specifications in notice 2005/C-39/06. The service specified by Aer Arann in its tender was for one return flight each day leaving Knock at ----- am and returning from Dublin to Knock at ----- pm. The aircraft to be used has ----- seats.

71. Notice 2005/C-39/06 sets out the revised route specifications for the Knock-Dublin PSO route and at paragraph 2 provides, *inter alia*:

"2.1 Minimum seating frequency and seating capacity

(a) The service must be operated at the rate of at least one return flight per day, seven days a week;

(b) A minimum of thirty seats per day each way to and from Knock/Dublin (*i.e.* a minimum of sixty seats in both directions), must be provided, seven days per week.

The above requirements apply throughout each year . .

2.3 Timetables:

The flight schedules should enable passengers, including passengers on business trips, to make a round trip within the same day. This requirement applies throughout the year."

72. The objection of Ryanair is that only passengers starting from Knock are able to make a round trip within the same day on the Aer Arann service. Ryanair submits that the combined requirements of paragraphs 2.1 and 2.3 above is that there must be a schedule which enables passengers from both Dublin and Knock to make round trips on the same day in both directions. The Minister has accepted the Aer Arann schedule as being consistent with the requirement of paragraphs 2.1 and 2.3.

73. Whilst there may be some lack of clarity with the wording of paragraph 2.3, I am satisfied that when read in conjunction with the express requirements of paragraph 2.1 (a) that there must be at least one return flight per day, that it only requires passengers commencing at either Dublin or Knock to be able to make the round trip within one day. Any other construction would require more than one return flight per day and would not be consistent with the minimum requirement in paragraph 2.1.

74. Accordingly, I am satisfied that Ryanair has failed in each of the grounds upon which it challenges the decision to award the contract to Aer Arann and in those circumstances it is unnecessary for me to consider the final issue in relation to the exercise of the Court's discretion.

75. There will be an order dismissing the application of Ryanair.