Competition and Markets

CAA Competition Working Paper: A discussion of National and European Competition Case Law relevant to the Aviation Sector

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Foreword

1. This is an ad hoc working paper that provides additional information related to the guidance issued by the CAA on its competition powers[1] and on the draft guidance on the application of the market power test contained in the Civil Aviation Act 2012.[2] This document is not guidance.

2. The CAA has concurrent powers with the Competition and Markets Authority (CMA)[3] in relation to the application and enforcement of UK and EU competition law to the provision of airport operation services (AOS)[4] and the supply of air transport services (ATS). This means that the CAA, concurrently with the CMA, has the power to apply and enforce the competition prohibitions – that is Chapters I and II of the Competition Act 1998 (CA98) - which prohibit anti-competitive agreements and an abuse of a dominant position respectively (the UK competition prohibitions) and the equivalent EU law prohibitions in Articles 101 and 102 of the Treaty on the Functioning of the EU (the EU competition prohibitions).

3. The CAA is responsible for assessing the market power of airports by carrying out the market power test in the Civil Aviation Act which contains three elements as follows.

   - **Test A** is that the relevant operator has, or is likely to acquire, substantial market power in a market, either alone or taken with such other persons as the CAA considers appropriate.

1 http://www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Competition-policy/Competition-powers/

2 http://www.caa.co.uk/Our-work/Consultations/Open/Draft-guidance-on-the-application-of-the-Market-Power-Test-under-the-Civil-Aviation-Act/

3 The Competition and Markets Authority (CMA) is responsible for strengthening business competition and preventing and reducing anti-competitive activities. From 1 April 2014, it assumed many of the functions of the previously existing Competition Commission (CC) and Office of Fair Trading (OFT), which were abolished.

4 AOS is defined in Chapter 1.

- **Test B** is that competition law does not provide sufficient protection against the risk that the relevant operator may engage in conduct that amounts to an abuse of that substantial market power.
- **Test C** is that, for users of air transport services, the benefits of regulating the relevant operator by means of a licence are likely to outweigh the adverse effects.

4. This working paper reviews a series of judgments and decisions in the aviation sector available at the time of preparing this paper, relating to assessment of market power and the enforcement of competition law and other sectoral legislation. The CAA will take account of these and any other relevant judgments and decisions in carrying out the above duties.

Chapter 1

Introduction

1.1 This working paper reviews recent academic literature and examines cases that have been determined by both UK and European authorities. The purpose of the paper is to extract the main lessons for the CAA in terms of assessment of market power and the application of competition law.

1.2 Consideration of both UK and European cases is necessary because economic activities of airports in the EU Member States are governed by two systems of competition law – the national and European Union system. The key distinguishing feature is that if an anti-competitive practice affects trade between Member States then EU law as opposed to national law applies.

1.3 The focus of this paper is on competition case law for airport operation services (AOS); it does not consider other aspects of European or national law such as the Slots Regulation or state aid decisions.

1.4 Airport operation services (AOS) are generally those services provided at an airport, other than air traffic services or services provided in shops or other retail businesses. AOS are defined in CAA12[5] as services provided at an airport for the purposes of:

- the landing and taking off of aircraft;
- the manoeuvring, parking or servicing of aircraft;
- the arrival or departure of passengers and their baggage;
- the arrival or departure of cargo;
- the processing of passengers, baggage or cargo between their arrival and departure; and
- the arrival or departure of persons who work at the airport.

1.5 Airport operation services (AOS) also include provision at an airport of:

[5] Section 68 of CAA12.

- groundhandling services described in the Annex to Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports;
- facilities for car parking and allowing access to and/or use of them; and
- facilities for shops and other retail businesses and allowing access to and/or use of them.

1.6 Airport operation services (AOS) do not include:

- air transport services for the carriage of passengers or cargo by air;
- air traffic services; or
- services provided in shops or as part of other retail businesses.

1.7 Likewise, the paper largely concentrates on judgments and decisions that have been made by authorities other than the CAA. In particular it does not review the specific market power analyses that were carried out by the CAA in 2013-14. It does, however, provide a summary of the market power analysis carried out in 2009 by the Competition Commission in its review of British Airports Authority (BAA), and the subsequent judgments of the Competition Appeal Tribunal (CAT) and High Court. The CMA is currently conducting an evaluation of the remedies resulting from the BAA investigation.[6]

1.8 This paper is based on judgments in decisions that were available at the time of preparing the paper.

Structure of working paper

1.9 The next chapter of the paper provides a brief literature review on the application of competition law in the aviation sector.

1.10 The paper then provides a summary of national and European case law based only on the facts of the case and the judgment of the Court or of the relevant competition authority.

[6] The CMA's evaluation of the remedies resulting from the BAA investigation can be found at: https://www.gov.uk/cma-cases/baa-airports-evaluation-of-remedies

1.11 This is followed by a review of the Competition Commission investigation of BAA.

1.12 Finally, we provide our own perspective on the key points from the case law and what these imply for assessing market power at airports.

Chapter 2

General review of the application of competition law in the aviation sector

Introduction

2.1 This chapter provides a general review of the application of competition law in the aviation sector and a review of literature on its application.

Relationship between competition law and economic regulation

2.2 For all sectors which are covered by both economic regulation and competition law, some assessment needs to be made of the relationship between these.

2.3 For example, European Union competition law prohibits the abuse of a dominant position. This can refer to either exclusionary practices (e.g. to prevent entry or exclude competitors) or exploitative practices (e.g. excessive prices) that harm consumer interests.

2.4 At the same time, the EU also has three main pieces of legislation relating to airports which govern:

- airline access to congested facilities at airports (Slot Regulation 1993 as amended)[7];

[7] The original slot regulation is 'Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports', which can be found at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993R0095&from=EN
This was brought into UK law by 'The Airports Slot Allocation Regulations 2006', which can be found at: http://www.legislation.gov.uk/uksi/1993/1067/made and subsequently amended by the 'The Airports Slot Allocation Regulations 2006', which can be found at: http://www.legislation.gov.uk/uksi/2006/2665/made

- charges at EU airports (Airport Charges Directive 2009)[8]; and
- the vertical relationship between airports and groundhandling companies (the Airports (Groundhandling) Directive 1996).[9]

2.5 Similarly, UK law allows for airports to be licensed and subject to economic regulation if they pass the test in the Civil Aviation Act 2012. Heathrow and Gatwick airports are, as a result, subject to economic regulation through a licence. However, both those airports are still subject to the prohibitions of competition law.[10]

2.6 Therefore there is potential for EU and national regulation to overlap with competition law. This issue has never been directly addressed in case law relating to airports, although it was the subject of the dispute between the European Commission (the Commission) and Deutsche Telekom.[11] Specifically, the Commission took the view that in paragraph 54 of the decision that "the competition rules may apply [even] where the sector specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition".

2.7 Likewise, under the Enterprise and Regulatory Reform Act 2013, sector regulators like the CAA are required to consider in individual cases whether using competition law to deal with particular issues is more appropriate than using economic licence enforcement powers.

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8 Airport Charges Directive (ACD) is 'Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges', which can be found at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0012&from=EN

This was brought into UK law by the 'The Airport Charges Regulations 2011' (ACR), which can be found at: http://www.legislation.gov.uk/uksi/2011/2491/made

9 ''Council Directive 96/67/EC of 15 October 1996 (GHD) on access to the groundhandling market at Community airports', which can be found at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0067&from=EN

This was brought into UK law by the GHR is 'the Airports (Groundhandling) Regulations 1997' (GHR or AGR), which can be found at: http://www.legislation.gov.uk/uksi/1997/2389/contents/made

10 In the UK for example "airport operation services" are subject to economic regulation if certain market power and other tests are met. This covers a range of services at the airport including arrival and departure of passengers, groundhandling services, facilities for car parking and facilities for shops and retail businesses.

11 Commission Decision N.2003/707/EC, OJ 2003 L263/9

2.8 Finally it is also worth mentioning an important difference between competition law and sector specific regulation. In particular, the former is usually of an ex-post character whereas the latter is typically ex-ante. With ex-post competition law there is obviously the risk that the abuse can occur for some time before it is discovered and remedied. However well-publicised case law decisions may act as a stronger deterrent to responsible airport operators.

Review of literature

2.9 In investigating the efficacy of European competition law in dealing with an abuse of dominance in the airport sector de Paula e Olivera of ANAC, Brazil (2013)[12] notes that EU competition law stands as a universal mechanism to protect consumers from abuse of a dominant position. However in reviewing the case law, de Paula e Olivera concludes that competition law has been rarely enforced in the airport sector although it can be considered as an antidote to regulators that promote national self interests.

2.10 The reasons given for the lack of competition enforcement in the sector are that airports lack incentives to exploit their dominant position because they risk reducing the revenue from commercial activities, along with the credible threat of airline switching. This would appear to point to a conclusion that many airports are not, in fact dominant.

2.11 Meanwhile Brochado and Marrana (2011)[13] consider the application of European competition rules to airports including the main approaches that have been used to define the relevant market and to assess airport dominance. Brochado and Marrana's paper presents three selected case law examples (discussed later in this working paper) from the period 1995-2000 relating to discrimination between domestic and international flights and non-linear rebate schemes that favour national carriers. Their main conclusion is that the application of EC Competition rules has permitted the Commission to exercise control over essential facility owners to ensure that the facility is

[12] Abuse of dominance in the airport sector, Gustavo de Paula e Oliveira, Journal of Transport Literature, January 2013 http://www.scielo.br/pdf/jtl/v7n1/v7n1a02.pdf

[13] http://wwwa.uportu.pt/siaa/Investigacao/WP_19_2011.pdf

operated on terms which are fair, transparent and non-discriminatory.

2.12 Nowag, Centre for Competition Law, Oxford has prepared an interesting article[14] on the Selex Sistemi v Commission judgments discussed below. Sistemi is the latest in a line of aviation cases that have considered the meaning of an "undertaking". Nowag believes the decision adds fundamentally to the understanding of the definition and by taking a broader view of activities than the General Court (EGC), he argues that the European Court of Justice (ECJ) has provided a further shield for a public authority task from the application of competition law.[15]

2.13 Lastly, in an article[16] reviewing two English High Court cases relating to buses and parking, Richard Eccles considers the conduct of airports that were deemed to be dominant (Luton and Heathrow) in granting access to facilities. Often such matters are assessed by reference to the essential facilities doctrine but as Eccles points out these two cases clarified the application of Article 102 or Chapter II in circumstances where there is a withholding of access to a facility, or refusal to grant equivalent access. According to Eccles the two cases enable a more flexible approach to abuse of dominance cases by reference to the concept of anticompetitive discrimination between competing operators in the downstream market. As a result he argues that it may also be harder for a dominant entity to resist access to facilities where they have not been developed specifically for the purpose of the downstream activity. The two specific cases are discussed in more detail below.

2.14 Notwithstanding the above, there appears to be a general lack of academic research in this field. The next chapter of the working paper considers a range of cases relating to UK and European Competition law in the aviation sector. We do not claim that the list of cases reviewed is a fully exhaustive list but a reasonable effort[17] has been

14 http://ssrn.com/abstract=1891720

15 A discussion of this case can be found in chapter 3, in the section on 'Cases related to separation and economic nature of activities (what is an undertaking)'

16 "Competition law: Access to facilities", Richard Eccles, Bird and Bird, 28 May 2015 (originally published on Competition Law Insight, April 2015 http://cn.lexology.com/library/detail.aspx?g=4533e363-b24f-4ba7-9fc6-d5fed1ea8df6

17 For instance, we have included all relevant cases from Kluwer law International – European

made to find those most relevant to dominance and the application of competition law in the aviation sector at the time of preparing this paper. The reference to each case is provided in the endnote to allow the reader to access the full Court transcript via the internet. The review is thematic, with each section considering both national and European decisions and judgments.

Chapter 3

Review of individual competition cases

Introduction

3.1 This chapter outlines the individual competition cases that were available at the time of preparing this paper, which relate to assessments of market power and the enforcement of competition law and other sectoral legislation.

Different sources of case law

3.2 In the UK an aggrieved party can challenge anti-competitive behaviour in the Courts by bringing a private action case. The judgments we have reviewed show that private enforcement of competition law in the aviation sector has been rather prominent in the UK. In private action cases, there has been no involvement from the CAA or the CMA (Competition and Markets Authority) or its predecessor the OFT (Office of Fair Trading).

3.3 Operating in parallel to private actions, competition law has established a public enforcement regime whereby designated competition authorities can investigate possible breaches. In regulated sectors like airports there is a concurrent regime with both the regulator and the CMA serving as a competition authority. However it should be noted that the powers of the CAA as a competition authority are limited to matters within its jurisdiction and do not extend to all competition matters.

3.4 Where the matter under investigation also affects trade between member states, the European Commission becomes the relevant authority with the possibility of cases going to the ECJ on appeal.

EU Competition Institutions

3.5 The Directorate-General for Competition (COMP) is a Directorate-

General of the European Commission. The DG Competition is responsible for the effective enforcement of competition rules relating to anti-trust and cartels, mergers and state aid. The DG Competition has a dual role in antitrust enforcement: an investigative role and a decision-making role. It conducts economic and legal analysis of competition cases.

3.6 There are two Courts that ensure EU law is interpreted and applied consistently in every EU country; ensuring countries and EU institutions abide by EU law. They are:

- The General Court (EGC, GC) - This was previously called the 'Court of First Instance'. The Court hears and determines actions for annulment brought by individuals, companies and, in some cases, national governments of EU member states, including appeals against competition decisions of the European Commission. Cases before the GC tend to be more fact based and more likely to involve consideration of written and oral evidence than those before the CJEU, whose cases are mostly limited to deciding questions of law.
- The Court of Justice of the European Union (CJEU, CJ, ECJ) - The CJEU can broadly be described as the supreme court of the EU with responsibility for examining the legality of EU acts and ensuring that Union law is interpreted and applied uniformly. It hears and determines appeals against judgments of the General Court which are limited to points of law only.

Categories of cases considered

3.7 The categories of cases considered are as follow:

- Cases related to separation and economic nature of activities (what is an undertaking).
- Cases relating to access to facilities.
    - Cases related to access by car park operators.
    - Cases related to access to facilities by bus operators.
    - Cases related to access to facilities by Groundhandlers.

- Cases related to access to other facilities.
- Cases related to access to terminals by different airlines.

- Cases related to charges at airports.

Cases related to separation and economic nature of activities (what is an undertaking)

Selex Sistemi Integrati SpA v Commission of European Communities, 26 March 2009[i]

3.8 The series of Sistemi cases has redefined the boundaries between what is an 'undertaking' for competition purposes and the exercise of public authority. The Sistemi cases followed some earlier aviation cases on the definition of "undertaking" viz. SAT fluggesellschaft mBH (1994) and Alpha Flight Services v Aeroports de Paris (AdP) (1998). The Alpha Flight Services v AdP case is discussed below in the section on Access to Facilities for Groundhandlers.

3.9 The Italian company SELEX Sistemi Integrati SpA (SELEX), a company engaged in air traffic management, lodged a complaint to the Commission because of an alleged Article 102 TFEU violation by Eurocontrol.[18] The complaint focused on three main areas of activity:

1. technical standardisation;
2. the research and development activity of Eurocontrol and in particular the acquisition of prototypes and its intellectual property rights regime; and
3. assistance to the national administrations on request.

3.10 The complaint stated that the regime of intellectual property rights governing contracts, concluded by Eurocontrol, for the development and acquisition of prototypes of new systems and equipment for applications in the field of air traffic management was liable to create de facto monopolies in the production of systems which are subsequently standardised by that organisation. It claimed that the situation was all the more serious because Eurocontrol had failed to

[18] Eurocontrol is an international organisation that was set up 1963 in order to manage and co-ordinate air traffic in Europe.

observe the principles of transparency, openness and non-discrimination in connection with the acquisition of the prototypes. In addition, the complaint stated that, as a result of assistance provided by Eurocontrol to national administrations, at the latter's' request, undertakings which had supplied prototypes were in a particularly advantageous position as compared with their competitors in tendering procedures organised by national authorities seeking to acquire equipment.

3.11 The Commission rejected the complaint on that basis that, even though competition law would in principle apply to an international organisation like Eurocontrol, the activities of Eurocontrol were non-economic. Thus, Eurocontrol's activities would not be considered as activities of an undertaking for the purpose of EU competition law. Finally, the Commission found that even if these activities would fall within the scope of EU competition law an infringement of Article 102 TFEU could not be found.[19]

3.12 SELEX contested the Commission decision before the EGC and subsequently before the ECJ. Both the EGC and ECJ found a way to exclude Eurocontrol from the application of EU competition law, but along the way made interesting observations that may have some relevance to other situations.

3.13 The EGC rejected the complaint on the grounds that the activities concerned could not be described as economic and so Eurocontrol could not be considered to be an undertaking within the meaning of Article 82 (now Article 102). Moreover the ECG judged that no breach of the competition rules had been established with regard to Eurocontrol's activities connected with the acquisition of prototypes and management of intellectual property rights.

3.14 On appeal, the ECJ did not set aside the judgment even though it found legally flawed reasoning.[20] However with regard to the matter

[19] It seems interesting to note that the Commission explained that the assistance provided on request to the national administrations would not constitute economic activity since it would be provided 'without remuneration'. See Case T-155/04 SELEX Sistemi Integrati v Commission [2006] ECR II-4797 paragraph 15. Even though this would not normally be sufficient to support the fact that activity is non-economic which the GC made again clear in its decision (paragraph 77)

[20] The ECJ did not agree with the EGC that assistance given by Eurocontrol to national

most relevant to private sector activity, the ECJ agreed that the acquisition of prototypes by Eurocontrol was not an economic activity, as the acquisition was not used in a subsequent economic activity but in the exercise of public power.[21] This approach, which is important given the supremacy of the European law[22], runs contrary to previous practice in various member states including the UK, in particular one aspect of the BetterCare decision made by the Competition Appeal Tribunal.[23]

3.15 The ECJ also agreed with EGC that the profit motive (or lack of it) was a relevant but not sufficient factor in determining whether the activity was economic. So even if a service is provided without payment it could still constitute an economic activity and therefore be subject to European competition law. But in considering the nature of activities there appeared to be a difference of view between the EGC and ECJ. The EGC adopted the position that each activity must be considered individually, was generally separable, and examined whether the activity can be provided commercially. So for example, technological development may be an economic activity even when pursued by an organisation which is exercising public interest type functions.

3.16 The position of the ECJ was more nuanced, considering whether statute links the individual activity to a more general public function rather than taking the more invasive or market related approach of the EGC. So while EGC and ECJ both found Eurocontrol's activities to be non-economic they arrived at the result via a different route.

Application of competition law to air traffic services

3.17 Historically, there has been a level of debate within the UK as to the application of competition law to air traffic services. In 2006, the CAA undertook a consultation on the application of its concurrent powers,

administrations would be a separate economic activity and subject to competition rules: instead it found the activity to be non- economic in nature.

21 The EGC relied on the Fenin case, transposing reasoning previously applied to social activities to the procurement process. This reasoning was accepted by the ECJ.

22 See section 60 Competition Act 1998

23 BetterCare Group Ltd v Dir General Fair Trading, [2002] CAT7. In this case, the decision dismissed the argument that 'the simple act of purchasing without resale is not an economic activity' on the basis that the relevant factor was 'whether the undertaking in question was *in a position to* generate the effects which competition rules seek to prevent' (paragraph 264).

and following the consultation produced a policy document in 2006. The document concluded that although it was ultimately for the courts to determine, "...if the [CAA] received a complaint against [a provider of air navigation services at airports] it would expect to consider this under competition law".[24]

3.18 Since the 2006 policy document[25] there has been some change in the European regulations governing the Single European Sky. The latest regulations on Common Requirements[26] appear to clarify that providers of air traffic services are subject to national and EU competition law. The areas considered relevant are:

"Annex I...

8.1. Open and transparent provision of air navigation services

Air navigation service providers shall provide air navigation services in an open and transparent manner. They shall publish the conditions of access to their services and establish a formal consultation process with the users of air navigation services on a regular basis, either individually or collectively, and at least once a year.

Air navigation service providers shall not discriminate on the grounds of the nationality or identity of the user or the class of users in accordance with applicable Union law.

... Annex II...

2. Open and Transparent provision of services

In addition to point 8.1 of Annex I and where a Member State decides to organise the provision of specific air traffic services in a competitive environment, that Member State may take all appropriate measures to ensure that the providers of these specific air traffic services shall neither engage in conduct that would have as its object or effect the prevention, restriction or distortion of competition, nor shall they engage in conduct that amounts to an

[24] CAA (2006), Air Traffic Services and Competition Law: A CAA Policy Document, paragraph 4.11

[25] As explained in CAP 1004 'SES Market Conditions for Terminal Air Navigation Services in the UK', February 2013

[26] Commission implementing regulation (EU) No 1035/2011, of 17 October 2011, laying down common requirement for the provision of air navigation services and amending regulations (EC) No 482/2008 and (EU) No 691/2010 – OJEU L271/23 18.10.2011

abuse of a dominant position in accordance with applicable national and Union law."[27]

3.19 These regulations provide additional comfort to the CAA's position set out in the 2006 policy document. We consider that it is likely that competition law could be applied to the providers of air navigation service at airports. In particular, the intent of regulation appears to be that where a market has been set up in a competitive manner, as we observe for the UK, competition law should be applicable.

Summary of cases on separation and economic nature of activities (what is an undertaking)

3.20 It will be interesting to see how the separation of activities is treated in future case law. The meaning of "undertaking" remains of interest to the CAA, even in the context of privately owned airports, as certain activities at these airports such as immigration or customs control are exercised in the nature of a public function.

Cases relating to access to facilities

3.21 Case law relating to access to facilities has centred on services like security provision, groundhandling and facilities for passenger surface access (such as parking and bus operations at airports). It might initially seem surprising that these services, which more often than not are offered by competing firms, require any kind of regulatory or legal intervention. However the case law indicates that the need by consumers or alternative providers to access the airport can create a situation of localised market power. This can have an adverse impact on the provider of services downstream that needs a contract with the airport operator as the cases illustrate.

3.22 It is also noteworthy that many of the cases discussed in this section are private action cases brought by one party against another in the English Courts. In these cases, the Court did not consider whether the party, against which the action was brought, was dominant as the parties agreed that it was dominant. In contrast, in a competition investigation by an authority such as the CAA or the CMA, the authority would have to show to the requisite legal standard that the

[27] Commission implementing regulation (EU) No 1035/2011, of 17 October 2011, laying down common requirement for the provision of air navigation services and amending regulations (EC) No 482/2008 and (EU) No 691/2010 – OJEU L271/23 18.10.2011

party was a dominant undertaking as part of its assessment of whether competition law has been infringed.

3.23 The two main issues that have given rise to competition case law in the UK are airport parking and bus operation cases. These are both activities that take place within the airport boundary and often rely on facilities provided by the airport operator.

Essential facilities doctrine

3.24 The essential facilities doctrine imposes on owners of essential facilities a duty to deal with competitors. The doctrine was first developed in the United States. A refusal to deal can constitute an abuse of a dominant position. The CJEU first dealt with refusals to deal in the case of Commercial Solvents.[28] It has never, however, explicitly used the term "essential facilities." In 1998, the Court of Justice issued its decision in Bronner.[29]

3.25 Mediaprint was the publisher of two newspapers, which together accounted for 46.8 percent of the Austrian daily newspaper market in terms of circulation and 42 percent in terms of advertising revenues.[30] Mediaprint had established the only nationwide delivery scheme, which made possible the distribution of its newspapers in the early hours of the morning.[31] Oscar Bronner was the publisher of a competing newspaper, which accounted for 3.6 percent of the Austrian daily newspaper market in terms of circulation and 6 percent in terms of revenues.[32] Bronner's newspaper was enjoying spectacular growth in new subscriptions and in advertisement revenues.[33]

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28 Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission, Joined Cases 6/73 & 7/73, 1974 E.C.R. 223, [1974] 1 C.M.L.R. 309.

29 Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Case C-7/97, 1998 E.C.R. I-7791, [1999] 4 C.M.L.R. 112.

30 Bronner, 1998 E.C.R. at I-7791, para. 6.

31 Id. at para. 7.

32 Id. at para. 4.

33 Opinion of Advocate General Jacobs, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co. KG, Case C-7/97, 1998 E.C.R. I-7791, [1999] 4 C.M.L.R. 112, para. 67 (stating that new subscriptions had increased by 15% and advertisement revenues by 30% in comparison with the year before).

3.26 Mediaprint refused to grant Bronner access to its delivery scheme. Bronner filed a complaint in its national Court seeking an order requiring Mediaprint to grant it access in return for reasonable remuneration.[34] The national Court stayed the proceedings and referred preliminary questions to the CJEU. In essence, the national Court asked whether Mediaprint's refusal constituted an abuse of dominant position.[35]

3.27 The Court held that if the national Court concluded the relevant market was nationwide home-delivery schemes, Mediaprint would be deemed to possess a dominant position in that market.[36] The Court further held that there could be an abuse of dominant position if (i) the refusal was likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service; (ii) that such refusal was incapable of being objectively justified; and (iii) that the service in itself was indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for the home-delivery scheme.[37] The Court decided these conditions were not met since other, less advantageous methods of distributing daily newspapers existed,[38] and there were no technical, legal, or economic obstacles to establishing another nationwide delivery scheme.[39]

3.28 The first and second conditions can be found in the Court's earlier case law.[40] The third condition is the most important and raises the standard for assessing whether an undertaking in dominant position has a duty to deal. The Court held that it was not sufficient that the establishment of a second home-delivery scheme was not economically viable because of the small circulation of the daily

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34 Bronner, 1998 E.C.R. at I-7791, para. 8.

35 Id. at para. 11.

36 Id. at para. 35.

37 Id. at para. 41.

38 Id. at para. 43. One can then ask the question whether the relevant market should not have been defined more broadly to include these alternative methods of distribution.

39 Id. at para. 44.

40 Commercial Solvents, 1974 E.C.R. at 223, para. 25; Telemarketing, 1985 E.C.R. at 3261, para.

newspaper to be distributed.[41] Instead, it said that it must be demonstrated that it is not economically feasible to create a second delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by Mediaprint.[42] The AG wrote in his opinion that "it would be necessary to establish that the level of investment required to set up a nationwide home distribution system would be such as to deter an enterprising publisher who was convinced that there was a market for another large daily newspaper from entering the market."[43] Hence, it is an objective test and not a subjective one that the Court put forward, based on the needs of the undertaking requesting access.[44] Logically, one should first ask the question whether the facility is indispensable. If so, one should determine whether the refusal is likely to eliminate all competition and, lastly, whether this refusal is justified.[45]

3.29 Bronner can be distinguished from the earlier case law in two ways. First, it sets a higher standard for the application of the essential facilities doctrine. The fact that the facility's owner has a dominant position is no longer sufficient. Under Bronner, the facility must be indispensable. Second, Bronner entails a forward-looking assessment of the competitive conditions in the downstream market.

Cases related to access by car park operators

Decision on an investigation under Regulation 11 (1) of the Civil Aviation Authority (Economic Regulation of Airports) Regulations 1986[ii]

3.30 Airpark Services Limited (Airparks) operated a long-stay car park close to Birmingham airport. It transported customers between the car park and airport by minibus and originally paid a fixed access fee to Birmingham airport.

41 Id. at para. 46.

42 Id.

43 Opinion of Advocate General Jacobs, Bronner, 1998 E.C.R. at I-7791, para. 68.

44 Id. at para. 67; see also John Temple Lang, The Principle of Essential Facilities in European Community Competition Law- The Position since Bronner, 1 Journal of Network Industries 375, 380 (2000).

45 Barry Doherty, Just What Are Essential Facilities?, 38 Common Mkt. L. Rev. 397, 432 (2001).

3.31 This case arose from an attempt by Birmingham International Airport (BIA) to change the basis of the fee paid by Airparks Ltd from a fixed fee for access, to a fee of 4% of Airparks' turnover. Airparks complained to the CAA under the Airports Act 1986 (now repealed) that the fee was excessive, that it should not be based on turnover and that it was being discriminated against as no other commercial operator had to pay an access fee to the airport. Airparks stated its grounds for objection included the argument that a fee based on turnover would mean the airport receives payment based on the profitability of Airparks' operation rather than the cost to the airport of access. The airport would thus benefit from increased efficiencies in Airparks' operation without having to improve its own level of service.

3.32 The CAA investigated under Section 41(3) of the Airports Act 1986. It found no evidence that the fee was excessive or discriminatory and turnover based fees were common at BIA. The fee was found to not be clearly disproportionate to the economic value of the service provided. Referring to the Bronner case[46] and others, the CAA did not consider that BIA either refused access or refused to negotiate in a meaningful way over access. The CAA concluded BIA was not pursuing a course of conduct specified in Section 41(3) (a) and (b) of the Airports Act.

Purple Parking Ltd and Meteor parking Ltd v Heathrow, 15 April 2011[iii]

3.33 This private action was triggered by Heathrow Airport Limited (HAL)'s attempt to change arrangements for Meet and Greet parking services at Heathrow Terminal 1 and Terminal 3 (T1 and T3). HAL wanted to move Purple and Meteor from the terminal forecourt to short-term parking. HAL itself also provided a similar 'meet and greet' service, i.e. they competed directly in the downstream market and were not required to move. The proposed change would have left HAL as the only meet and greet supplier on the terminal forecourts at T1 and T3.

3.34 The Court assumed that HAL was dominant in the wholesale “Facilities Market” although it did not assess this and HAL did not challenge this assumption. The relevant downstream market was defined as the meet-and-greet market at Heathrow.

[46] Bronner v Mediaprint (case C-9/97, reported at [19980 ECR 1-7791, which is discussed earlier in this chapter in the section on ‘Essential facilities doctrine’.

3.35 HAL wanted the case treated under the more stringent[47] essential facilities test rather than Section 18(2) of the Competition Act 1998 (CA98). Purple and Meteor on the other hand relied on 18(2)(c): i.e. discrimination, applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage. In this case the Court rejected the argument to use the essential facilities test and found that the conduct indeed contravened Section 18(2) of CA98 for which there was no good objective justification. The Court found that the proposed change would have operated to the detriment of the consumer with the likelihood of higher and constrained prices for the forecourt service.

3.36 In rejecting the essential facilities argument, the Court observed that the forecourts at Heathrow were not specifically developed so that HAL could run a meet and greet parking service. Rather, forecourts were provided to service the central purpose of Heathrow which is provision of an airport for passengers and cargo. Therefore HAL was not being forced to share an investment it had specifically made for a meet and greet service and had not shown objective justification for the differential conditions of access to a competitor, such as congestion at the forecourts. In general, the Court concluded that a high degree of "necessity" is required for such a justification to succeed.

Summary of cases related to access by car park operators

3.37 The cases continue to require a high degree of 'necessity' for arguments based on the essential facilities doctrine to succeed.

Cases related to access to facilities by bus operators

3.38 The next three cases (one in England, two in Scotland) all related to bus operations at airports.

Arriva The Shires Ltd v London Luton Airport Operations Ltd, 28 January 2014[iv]

3.39 Arriva had operated a coach service between Luton Airport and London Victoria Station for 30 years, under a contract that was rolled over from time to time. In early 2013, when the contract came up for

[47] The essential facilities test is a high hurdle because the new entrant must demonstrate an indispensable requirement for the facility. See earlier section for more detail.

renewal, the operator of Luton Airport (Luton Operations) decided to hold a tender inviting various coach operators to bid for the route concession. The new contract was awarded to National Express, which was given a seven year exclusive right to run the coach service between the airport and central London, subject to an exception for a service operated by easyBus using smaller vehicles.

3.40 Under the terms of the concession, National Express is required to pay Luton Operations an annual concession fee, based on a percentage of revenue but with a guaranteed minimum annual payment. National Express had also been granted the right of first refusal over the operation of other services on new routes between the airport and other destinations in London.

3.41 Arriva argued that Luton Operations is dominant in the market for the grant of rights to use the airport's land and infrastructure to operate bus services from the airport, and that both the way in which the tender process was run and the terms of the concession amounted to an abuse of that dominant position. In June 2013 Arriva sought an interim injunction to allow it to continue operating the service pending a full trial. This was refused on the basis that Arriva failed to demonstrate that it would be forced to cease operating before a full trial was heard. However, the judge ordered that the trial on liability should be expedited and that the issues to be covered should be agreed between the parties.

3.42 The parties agreed that the trial would proceed on the assumption that Luton Operations hold a dominant position (because they hold a 100% share of the market for the supply of facilities at the relevant bus station), and that issues relating to quantum of loss (if Arriva were to succeed on liability) would be reserved for a later date.

3.43 The English High Court found that, assuming it was dominant; the London Luton Airport operator had abused its dominant position (contrary to UK competition law) in the award and operation of an exclusive coach concession from the airport. The market found to be relevant in this regard is that for the grant of rights to use the airport land and infrastructure to operate bus services from the airport.

3.44 The first issue examined was whether the tender process itself for bus operations at airport was abuse of dominant position. The Court found the process itself to not be an abuse of a dominant position but

in Para 50, the Judge raised the possibility that a tender process could be conducted in an unfair manner so as to amount to an abuse of dominant position. (This was also found to be case in Edinburgh airport, see below.).

3.45 In this case, the abuse found was related to the terms of the concession (a seven-year exclusivity period to National Express, giving National Express a right of first refusal on services to new destinations in London). The Court found that this seriously distorted competition between coach operators wanting to provide services to/from the bus station at the airport, without there being any objective justification for that distortion of competition.

3.46 The Court then stated that a dominant undertaking can abuse its position either by distorting competition on the market on which it operates itself (the upstream market) or by distorting competition on the market on which its customers compete with each other (the downstream market). The fact that the airport operator was not a coach operator itself did not prevent any distortion of the downstream coach market arising from its conduct being an abuse.

Lothian Buses v Edinburgh Airport, May 2011[v]

3.47 Following a 2005 agreement, Lothian Buses ran an Airlink Service from Edinburgh Airport to the city centre using a stand ("stance") outside the UK arrivals hall. In 2011 the airport indicated that exclusive access to the stand would be put out to competitive tender.

3.48 In Court, the Judge halted the tender process itself as a potential contravention of competition law. The Judge said "it seems to me what is being offered in the tendering process is the exclusive right with no competition whatsoever to run a bus service to the city centre from these stances".

Arriva Scotland West Limited v Glasgow Airport Ltd, 21 April 2011[vi]

3.49 This private action heard in the Scottish Court of Session (Outer House) was similar to Edinburgh airport case (above) in that Arriva (bus company) was seeking an injunction (interim interdict) against the airport that was preventing it from access to the public transport zone (PTZ) at Glasgow airport. After a tender process, an exclusive contract was awarded to First Group operating within the PTZ. Arriva argued that this was an abuse of dominant position in the downstream

market as well as refusal of access to an essential facility.

3.50 The difference from the Edinburgh case was that Arriva was offered an alternative location at the airport (outside the PTZ) rather than being excluded completely. As a result, the judge refused to grant an injunction stating that it would require a clear-cut case of abuse of dominant position to justify one. Although the substantive issues were not considered in the injunction hearing, the judge stated that Arriva would have to meet the very high test of indispensability set out in the landmark Bronner case which set out the legal framework for the approach to essential facility (see earlier discussion on 'Essential facilities doctrine').

Summary of cases related to access to facilities by bus operators

3.51 The cases show that even when an airport does not compete in the downstream market, it is nevertheless capable of abusing a dominant position to distort competition.

3.52 The cases show that it is difficult to obtain access on the ground of the basis of needing an "essential facility" although the Purple Parking judgment appears to offer some moderation of the stringent Bronner test. The Luton and Edinburgh cases demonstrate unjustified exclusivity is not normally allowed and the Purple Parking case also prohibits unjustified discrimination.

Cases related to access to facilities by Groundhandlers

FAG-Flughafen Frankfurt/Main AG, 14 January 1998[vii]

3.53 In this landmark case, the company operating the airport was ordered to allow other undertakings to offer groundhandling services in competition to its own services.

Alpha Flight Services/Aeroports de Paris (11 June1998)[viii]

3.54 The appellant Aeroports de Paris (AdP) was a public corporation responsible for the planning, administration and development of airports[48] in the Paris region. Following the introduction of a new groundhandler, OAT, at Orly airport, the existing groundhandler, Alpha Flight Services complained about discrimination of fees. The case eventually reached the ECJ. AdP was found to be abusing a position

[48] Referred to as ' civil air installations'.

of dominance under Article 82 (now Article 102) and obliged to charge non-discriminatory fees to all the undertakings offering catering services within the airport, even though it did not have any involvement in the market itself.

3.55 The AdP judgment also confirmed that even though some airports are public corporations, if they provide facilities for a fee, they are nevertheless undertakings for the purposes of competition law (see earlier discussion about the Selex Sistemi case).

Airports Groundhandling Directive

3.56 These early cases predated the European Airports Groundhandling Directive (GHD). The GHD essentially stipulates that at the larger EU airports access to the market by suppliers of groundhandling services is free but that for certain categories of services (baggage handling, ramp handling, fuel and oil handling, freight and mail handling) the Member State may limit the number of suppliers to no fewer than two for each category of service.

3.57 Further cases for this element of airport operations relate to the interpretation of the GHD. However they are also potentially relevant to the enforcement of competition law.

Flughafen Hannover-Langenhagen v Deutsche Lufthansa AG (16 October 2003)[ix]

3.58 Lufthansa operated services in and out of Hannover airport. It provided check-in for its own passengers as well as other airlines in accordance with a contract with the airport. Until the end of 1997 it did not pay an access fee but in early 1998 the airport changed its rules and sought payment from Lufthansa of around DEM 150,000 in access fees. Lufthansa refused to pay resulting in an action brought by the airport before the regional Court in Frankfurt. The case reached the European Court.

3.59 The Court was required to give a ruling on questions relating to the interpretation of Article 16(3) of the 1997 GHD. The Court held that the airport managing authority had no right to charge an access fee to the groundhandling market in addition to the fee for use of the airport installations, i.e. for grant of a commercial opportunity. Nevertheless this did not prevent the airport from earning a profit from the economic

services that it provided for groundhandlers. Article 16(3) requires that the fee, which may be collected in return for access to airport installations, must be determined according to relevant, objective, transparent and non-discriminatory criteria. That provision, in addition to allowing the airport to cover the costs of provision of installations, does not prevent the airport making a profit. Specifically the Court found in paragraph 56 of the judgment:

> *Article 16(3) of the Directive requires that the fee which may be collected in return for access to airport installations must be determined according to relevant, objective, transparent and non-discriminatory criteria. Therefore, that provision does not prevent the fee from being determined in such a way that the managing body of the airport is able not only to cover the costs associated with the provision and maintenance of airport installations, but also to make a profit.*

Deutsche Lufthansa AG v ANA – Aeroportos de Portugal SA (5 July 2007)[x]

3.60 This case involved a reference by the Portuguese Courts for an interpretation of Articles 6[49] and 16(3) of the Groundhandling Directive. This followed a complaint by Lufthansa to the Portuguese authorities about groundhandling charges at Oporto Airport in Portugal which were based on turnover from groundhandling activities.

3.61 The matter of a right to collect a fee for access to infrastructure had been considered by the ECJ in Flughafen Hannover-Langenhagen v Deutsche Lufthansa AG (2003).

3.62 In Deutsche Lufthansa AG v ANA – Aeroportos de Portugal SA, ANA granted Lufthansa a licence to carry out groundhandling activities at the Oporto airport subject to a fee. Lufthansa claimed that the fee levied under Portuguese national decrees infringed the European Groundhandling Directive.

3.63 The Court held that community law precludes the managing body of an airport from making access to the groundhandling market subject to payment of an access fee as consideration for grant of a commercial opportunity. The matter was determined at a preliminary

[49] Article 6 binds the EU to the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

hearing of case brought by Lufthansa (a branch of which had a head office in Lisbon) against ANA in relation to assessment and levying fees for ground administration and supervision.

3.64 The Court determined that Articles 6 and 16(3) of the Directive precludes national legislation that provides for the payment of a fee for ground administration and supervision unless the fee is payable as consideration for the services defined in the Annex to the Directive (which includes access to airport installations). In addition the fee must not constitute a second charge for services already paid through another fee or tax (i.e. double charging is not permitted). This essentially affirms the decision of the Court in the Flughafen Haanover-Langenhagen case. Relevant extracts from the ECJ's decision are below.

3.65 Paragraphs 26 to 28 of the judgment says:

> *As regards the criteria of relevance and objectivity, it is for the referring Court to examine the link between the running costs incurred by ANA and the level of the fee calculated as a percentage of the turnover made by Lufthansa at the Oporto Francisco Sa Carneiro airport.*
>
> *As regards the criterion of transparency, this can be considered as satisfied only if the national law contains a clear exposition of the services provided by ANA and a precise definition of the method of calculating the relevant fee.*
>
> *Finally, as regards the criterion of non-discrimination, while it is common ground that the fee at issue in the main proceedings is payable only by the providers of groundhandling, even though the self-handling users make use of the same airport installations as those providers, it is also clear that if the only justification for the difference in treatment lies in the fact that only those service providers make a profit, then that difference must be regarded as discriminatory.*

3.66 In reaching its decision the Court took account of the Opinion of the Advocate-General, extracts from which are below.

3.67 Paragraphs 39 and 40 of the opinion of the Advocate General says:

In order to meet the relevant criteria, the fee must be linked to the costs incurred by the AMB[50] in making available those installations which it needs to provide to the suppliers and self-handlers. Indeed, I share the approach taken by Advocate General Leger in his Opinion in the Commission v Germany case that in determining the amount of the fee, it is essential that the criterion of relevance is complied with so as to ensure that the fee is actually unconnected with the cost of the AMB of granting access to the infrastructures (the latter being, for instance, the cost of maintaining the infrastructures, as argued by the Portuguese Government in the present case) could lead to the fee being converted into a disguised fee for access to the market, contrary to Article 16(3) as interpreted by the Court in Flughafen Hannover–Langenhagen.

Therefore, I agree with the view that airports should not be allowed to charge fees which are not cost-related and which instead take on a form of a royalty of sorts. Moreover, as has been pointed out, the regime introduced by the directive is meant to provide for free access to the groundhandling market whilst being conducive to actually reducing airline companies' costs, rather than the opposite.

3.68 In Paragraph 26 of the opinion, the Advocate General says:

Therefore, first, I do not see how the fee in question can be considered to be determined on the basis of relevant criteria when it is not cost-related – that is to say, based on costs incurred by the AMB……

3.69 Paragraph 49 of the opinion of the Advocate General says:

In order to be objective, the fee in question would have to be based on the relevant installations and their nature as well as on the actual use that the provider made of them.

3.70 Paragraph 53 of the opinion of the Advocate General says:

The fee in question may be characterised as transparent on condition that there is a transparent relationship between the way in which the amount of the fee is fixed…and the actual services provided for which it is payable.

[50] Airport Managing Body (AMB)

Ryanair v Commission for Aviation Regulation [3 July 2006] IEHC 291 in Irish High Court[xi]

3.71 In this case, Ryanair challenged certain charges which Aer Rianta (ART) sought to impose in respect of access to and rental of check-in desks at Dublin Airport. In particular Ryanair argued that the fees did not reflect the required criteria specified in the Regulations which transported the Groundhandling Directive in Ireland. These criteria were relevance, objectivity, transparency and non discrimination.

3.72 In its decision the Irish High Court commented on the criteria as follows:

> *Relevance - It is unsurprising that the costs of providing the service should be the most relevant factor in the calculation of the fees to be charged.*
>
> *Objectivity - When making its decision the respondent had before it a very substantial amount of material including submissions and documentation from a variety of different airport users (including the applicant). It was required to make its decision without fear or favour in a manner which was balanced and consistent with the objective of the Directive and of the Regulation.*

> *Transparency - It has been contended on behalf of the applicant that the decision made by the respondents lacks transparency. This is a contention which cannot be sustained on the evidence. All of the stages of the process which gave rise to the decision were managed by the respondent in a manner which allowed access to all relevant airport users to the manner in which the decision was being made and to the decision maker (the respondent). A consultation document was published on 17 August 2004. It initiated a full and comprehensive consultation process with all airport users having an interest in access fees to airport installations. Eight responses were received (including a response from the applicant and from ART). The respondent's written decision dated 6 October 2004, was made subject to a condition imposed on ART in respect of the transparency requirement to the effect that " the fees approved by the Commission in relation to check-in desk rental and CUTE[51] be promulgated in publications relating to the charges imposed by Aer Rianta and that any user paying the check-in desk charge be facilitated in any reasonable request made in relation to a breakdown of the components constituting the charge." In the light of the foregoing I am satisfied that the criteria applied by the respondents were applied in an entirely transparent manner.*[52]

3.73 Under the Non-Discrimination heading in the judgment, the High Court said:

> *As regards non-discrimination at paragraph 3.4 of its written decision the respondent stated under this heading that:*
>
> > *"the standard applied here was 'are the charges applied in an equitable manner to all and are identical or comparable situations treated the same; apart from the issue of the bundling of Common User Terminal Equipment (CUTE) costs into the check-in-desk rental, the Commission found no reason to suggest that any element of discrimination applied to the charging of either of the two types of fees in question"*

[51] Common User Terminal Equipment (CUTE).

[52] In the Decision section of the judgment.

It is apparent from that statement that the respondent expressly considered in detail "issue of the bundling of CUTE costs into the check-in desk".

3.74 In its decision the Court agreed that "*CUTE was bundled into the costs for the use of check-in desks at Dublin*". However it "*noted that Aer Rianta had clarified that it did not currently impose a separate fee for the use of CUTE in Dublin and that such a fee was not part of its application….*". Following these considerations, the Irish High Court rejected the airline's challenge.

3.75 Although in a different jurisdiction, this judgment may provide additional background for the CAA in dealing with groundhandling access charges.

Summary of cases related to access to facilities by Groundhandlers

3.76 With respect to charges, the case law from groundhandling cases is relatively clear that, for groundhandlers, airports cannot charge a fee for the grant of a commercial opportunity (market access) or use a fee as a way of sharing in the expected profits of the provider. However this does not prevent the airport itself earning a reasonable profit on the installations it supplies to groundhandlers, although any fees charged for access to installations or use of infrastructure must be non-discriminatory.

Cases related to access to other facilities

Heathrow Airport Limited v Forte (UK) Limited & Others (1997)

3.77 In this application, the plaintiff, Heathrow Airport Ltd ('HAL'), at the time a subsidiary of BAA, was seeking summary judgment on its claim for arrears of the rent of two buildings and adjoining land at Heathrow Airport, previously occupied by Forte (UK) Ltd ('Forte'), and then occupied by a subsidiary of the second defendant, Alpha Airport Holdings (UK) Ltd ('Alpha'), for the purpose of the supply of flight catering services to airlines.

3.78 The defendants resisted the application on the basis that there was an arguable defence that the rents were excessive, unfair and discriminatory and there had been an abuse of dominant position by HAL or by BAA contrary to Article 82 (now Article 102) of the EC Treaty.

3.79 The action related to rent for the period during which the lease had been held by Alpha. None of the factual elements in Alpha's evidence amounted to an arguable case that trade was affected to an appreciable extent by a refusal by HAL to accept a market rent instead of the contractual rent. The relevant trade here was trade to airlines at Heathrow airport, a purely local trade carried on by Alpha and its competitors at or in the vicinity of Heathrow. It was argued that the local nature of the market resulted from the need for flexibility and the need for the food to be as fresh as possible.

3.80 The judgment found in favour of HAL in that Alpha failed to show that the demand for rent stipulated in the lease was an abuse of a dominant position or that the alleged abuse affects trade between member states, whether to an appreciable extent or at all.

Cases related to access to terminals by different airlines

Ryanair v. European Commission (2011)

3.81 This case dealt with the exclusive use of Terminal 2 at Munich airport by Lufthansa and its Star Alliance partners. Terminal 1 was used by other airlines including British Airways and easyJet.

3.82 As part of an application against the European Commission for failure to act, Ryanair made a complaint to the EGC that allowing exclusive use of Terminal 2 at Munich airport amounted to an abuse of a dominant position by the airport. The Court did not rule on the complaint but commented that it failed to understand why Ryanair was "precluded from entering the Munich market" by being offered the use of the same terminal as other non-Star Alliance airlines and moreover why the airport would be abusing a dominant position by treating Ryanair in an equivalent fashion to easyJet. The complaint that the Commission failed to act in relation to the alleged abuse of a dominant position was rejected.

3.83 Although there was no decision relating to the competition complaint, a conclusion can be drawn that competitive equivalence (if relevant) is an issue the Court would expect a complainant to address.

Cases related to charges at airports

Commission decision (1995) on Zaventem airport[xii]

3.84 This case related to the system of discounts granted on landing fees at Brussels National Airport (Zaventem). As a result, in 1992, the Belgian national airline Sabena received an overall reduction of 18% on its fees compare to a smaller airline like British Midland. In this case the Commission banned the system of stepped discounts on airport charges, increasing with traffic, since the analysis showed that the structure of the discounts most benefited Sabena. According to the Commission the application of dissimilar conditions to commercial partners for equivalent transactions, placing some of them at a competitive disadvantage, amounted to an abuse of dominant position. The Commission also found that the handling of the landing and take-off of an aircraft requires the same service, irrespective of its owner or the number of aircraft belonging to a particular airline.

Commission decisions (1999 and 2001) on Portuguese airports[xiii]

3.85 The Commission banned the system of discounts on landing charges based on traffic volume at Portuguese airports and the differentiation of these charges according to the origin of the flight (50% discount for domestic flights). The findings were similar to the Zaventem case above, with analysis revealing dissimilar conditions applied to equivalent transactions that had the effect of favouring national carriers, i.e. TAP and Portugalia. The Commission maintained there was no objective justification for non-linear discounts. The Court explained in paragraph 52 of the 2001 judgment, how the discount regime could lead to the application of inequitable conditions if:

> *"the result of the thresholds of the various discount bands and the levels of discount offered, discounts (or additional discounts) are enjoyed by only some trading parties, giving them an economic advantage which is not justified by the volume of business they bring or any economies of scale they allow the supplier to make compared with their competitors".*

Commission decision (2000) on Spanish airports[xiv]

3.86 In the Commission decision on Spanish airports in 2000, again the Commission decided to ban the system of discounts on landing

charges based on traffic volume and discounts for domestic flights on similar grounds to the above two cases. According to the Commission each of the 41 airports in Spain managed by AENA was in a dominant position. The Commission found that the largest discount based on landing frequency benefited Spanish airlines. The differentiation of tariffs according to the type of flight (domestic or international) was also considered as an infringement of the Treaty.

Airport Charges Directive

3.87 The Airport Charges Directive (ACD)[53] established a common framework for regulating the essential features of airport charges and the way they are set. Among other things the Directive prohibits airports from levying charges that discriminate between airlines. This was brought into UK law, to apply to airports in the United Kingdom with more than five million passengers per annum, by the Airport Charges Regulations (ACR) in 2011.[54]

easyJet appeal over Schiphol charging practices – easyJet Co v Commission [2015][xv]

3.88 This case is relevant to the appeal process under European competition law. In January 2015, the EGC provided its judgment in the case of easyJet v. Commission on whether it is open to the European Commission to reject an antitrust complaint lodged by an undertaking on the basis that a national competition authority within the European Competition Network has already dealt with the complaint.

3.89 The original complaint (which is not discussed here) related to allegations made by easyJet about charges set by Schiphol airport, which was brought under the Netherlands law which brought into effect the Airport Charges Directive, and under competition law. The complaint was rejected by the Netherlands competition authority (NMa). easyJet then lodged a complaint with the Commission under competition law, who rejected it on the basis it had already been

53 Airport Charges Directive (ACD) is 'Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges', which can be found at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0012&from=EN

54 'The Airport Charges Regulations 2011' (ACR), which can be found at http://www.legislation.gov.uk/uksi/2011/2491/made

decided by the NMa. easyJet appealed to the EGC arguing that the Commission had erred in law.

3.90 The EGC rejected the appeal. It confirmed that one of the main purposes of Article 102 TFEU was to establish an effective decentralized scheme for the application of EU competition rules. It is not intended that a party may use the Commission to appeal the decisions of a national competition authority and that such a role is limited to the national Courts of the relevant Member State. In other words the Commission should not be used as a substitute for national Courts.

Summary of cases related to charges at airports

3.91 From our review the CAA has not identified any cases pertaining to the overall aggregate level of charges being abusive. However, it is clear from the case law that anything that appears to favour a particular airline, especially a national airline, is not allowed, including discounts relating solely to volume unless justified by differences in costs/services offered.

Chapter 4

The Competition Commission investigation into the British Airports Authority ("BAA")

Introduction

4.1 In 2006, the Office of Fair Trading (OFT)[55] made a market investigation reference to the Competition Commission (CC) in respect of the ownership by BAA of a number of airports in the Scottish Lowlands and in the SE of England. As a result, the CC undertook a detailed investigation into the supply of airport services by BAA, making positive findings on the existence of an adverse effect on competition (AEC) and ultimately recommended the divestiture of Gatwick and Stansted Airports, as well as one of the Scottish airports.

4.2 The CC's 2009 Report on BAA, contains a highly detailed and technical analysis of relevant markets/market power in relation to UK airports. Other than the limited review of some European airports and subsequent market power assessments carried out by the CAA, this is the only other example in UK or EU legislation[56] which explicitly, and in detail, considers market power for airport operation services. It therefore forms an important reference document for any work involving assessments of market power in the aviation sector.

4.3 The CC's 2009 Report also provides a model for the assessment of market power. The key question in the CC investigation was whether joint ownership of particular airports increased the market power of a particular airport operator compared to the position of those airports being under separate ownership to the extent that joint ownership

[55] The Competition and Markets Authority (CMA) is responsible for strengthening business competition and preventing and reducing anti-competitive activities. From 1 April 2014, it assumed many of the functions of the previously existing Competition Commission (CC) and Office of Fair Trading (OFT), which were abolished.

[56] It is worth noting that EU merger cases consider competitive constraints faced by airports e.g. Case No COMP/M.5648 - OTPP/ MACQUARIE/ BRISTOL AIRPORT, 11 December 2009. This case also references a number of other merger cases. http://ec.europa.eu/competition/mergers/cases/decisions/m5648_20091211_20310_en.pdf

represented a feature leading to an adverse effect on competition (AEC).

Market definition and power

4.4 When making its assessment of market power, the CC noted that, given its task of deciding whether any feature of a relevant market prevents, restricts or distorts competition, a "potentially important" element in a market investigation is to define the relevant market. However, it referred to Market Power Guidelines[57] in stating that market definition is not to be regarded as an end in itself, but rather a framework within which to analyse the effects of market features and a useful tool for identifying the competitive constraints present in the market. Where possible, it adopts a hypothetical monopolist test (HMT) to define markets but notes that it is rarely possible to apply the test in a direct sense and it is therefore usually necessary to infer what the likely outcome of the test would be.

4.5 In relation to airport services the CC made an important observation about the nature of demand. Although the immediate demand for airport services (e.g. access to infrastructure or groundhandling services) is provided by airlines, the ultimate driver is the demand, by passengers, for flights. So any change in the price (or quality) of airport services may therefore affect airline demand either directly (by inducing airlines to shift their flights to other airports) or indirectly by inducing passengers to use different airports, other methods of transport, or not to travel at all (e.g. where increased airport charges are passed on by airlines in the form of higher air-fares). For aeronautical charges, this points in the direction of assessing both the propensity of airlines to switch to other airports and of passengers to switch to other airports or flights as a result of any impact on fares or quality of service.

4.6 Against this background, the CC also considered

- whether aviation is part of a wider transport market;

[57] OFT 403, Market Definition Guidelines, paragraph 2.5 to 2.13. See also the CC's 2009 BAA Report, paragraph 2.1

- This was particularly pertinent to BAA's Scottish airports, where domestic flights account for a substantial proportion of passengers. However, on the basis of survey evidence, the CC considered that the substitution of other methods of air transport is "too weak" to justify extending the relevant product market to include surface transport:

- whether "airport services" (the product market identified by the OFT in its reference) should be subdivided further:
  - The CC considered in some detail the precise scope of the market for airport services, which had been defined in the OFT's reference to include (a) the provision of airport infrastructure, (b) the coordination and control of activities performed on or in airport infrastructure, and (c) the provision of associated commercial services (e.g. retail and car-parking for passengers).
  - In particular the CC considered whether commercial services should be part of a single, bundled airport product (as suggested by the OFT); as one or more separate markets for commercial services; or as part of one or more wider markets. As the evidence strongly suggested there was *not* interdependent demand for commercial services and for aeronautical services the CC defined two separate product markets: commercial services and aeronautical services which was an important refinement of the OFT's approach. The CAA subsequently took a similar approach in its MPDs in that they only considered the aeronautical services and did not include an assessment of commercial services.
- the scope of the geographic market within which BAA's airports operate.

- As to the relevant geographic market, the CC noted that the extent to which airlines can substitute between airports while retaining their passengers depends on airport location. However, the CC ultimately concluded that there was no advantage in defining rigid geographic markets in this way. This was in contrast to the approach taken by the (European) Commission which, in abuse of dominance cases (discussed earlier in this working paper), defined the relevant market at the level of the individual airport, without much in the way of analysis. This reflects an important point made by the CC that "markets are not necessarily unique and depend on the competition issue being addressed".

4.7 Having considered these points, the CC noted the challenges in defining geographic markets and that market shares may be of limited relevance. It said what is vital is evidence of actual and potential substitutability between airports (by passengers and airlines). Essentially the CC adopted a holistic approach to its consideration of market power in which all competitive constraints are potentially relevant. It took the view that because of the importance of geographical location of airport competition noting,

> *"..there is a continuum of substitution possibilities depending on distance and other airport characteristics. Hence, any market definition beyond a single airport is to an extent, arbitrary… An assessment of an individual airport's market power … takes account of all lost customers, including those switching to airports within the market, those switching to airports outside the market and also losses due to passengers switching to alternative modes of travel or deciding not to travel"*[58]

[58] "BAA airports market investigation; A report on the supply of airport services by BAA in the UK" 19 March 2009, paragraph 2.46 http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2009/fulltext/545.pdf

Market power

4.8 The CC concluded that the market power of an individual airport "depends on how far competition or other factors limit its ability to increase charges (or reduce the quality or range of services)": It identified three such factors: (a) changes in behaviour by airlines (e.g. switching to other airports or reducing the number of flights); (b) changes in passenger behaviour; (c) regulation.

4.9 In making its assessment, the CC looked at evidence of competition between separately owned airports (e.g. rivalry between Prestwick and Glasgow). The CC found that while no two airports are perfect substitutes, there is evidence in each case of a competitive dynamic, involving neighbouring airports, with smaller airports constraining larger ones as well as vice versa. Furthermore the CC considered that the existence of competition between separately owned, neighbouring airports provides a benchmark for what could happen if BAA's airports were under separate ownership.

4.10 As to the actual methodology employed by the CC in assessing substitutability, it adopted a more granular version of the "district threshold" approach utilised by the OFT. The CC also considered evidence from surveys of passengers at BAA airports. The overall conclusion was that BAA airports are "the closest demand substitutes for one another". Given the CC's view that substitutability is crucial to the consideration of BAA's market power, this was a vital conclusion, implying that common ownership of nearby, close substitute airports gave BAA market power which would otherwise be absent if the airports in question were separately owned (in which case, on the basis of the benchmark of separately owned airports, a competitive dynamic could be expected to emerge).

4.11 The CC did, however, go on to consider the fact that capacity constraints and price regulation, particularly in London, may continue to restrict the possibility for competition between the BAA airports even if separated (the assumption being that, if competition would be restricted in any event, common ownership is not itself entirely responsible for any AEC in the market).

Findings

4.12 Ultimately, on the basis of its approach to the assessment of market power, the CC found that, absent common ownership, there would be competition between Glasgow and Edinburgh; and between Gatwick, Heathrow and Stansted (albeit that the impact on Heathrow would have been reduced due to the specific features, particularly its status as a hub airport), which imply that it would still have unilateral market power even under separate ownership. In particular, the CC noted that while capacity constraints and price caps may themselves be features which adversely affect competition, these factors are themselves, at least in part, a result of BAA's common ownership of London's three largest airports:

4.13 The CC's 2009 report and subsequent 2011 report were both appealed to the CAT and Court of Appeal. BAA's challenge to the first report related to bias and failure to take account of material considerations when assessing the proportionality of the requirement to sell three airports "the divestiture remedy". Its challenge to the 2011 report was confined to the requirement to sell Stansted. Both appeals were ultimately dismissed by the Court of Appeal. Furthermore, these appeals did not raise any points concerning the CC's approach to the assessment of market power.

4.14 The CMA is currently conducting an evaluation of its decision in the BAA investigation and the remedies that were applied. This is likely to report in the second quarter of 2016.

Chapter 5

Our perspective

Introduction

5.1 This working paper concludes by providing the CAA's own perspective on the body of aviation case law discussed in this paper. These views do not have any legal standing but are intended to provide assistance about the assessment of market power and the application of competition law in the aviation sector. This is relevant to Test A and Test B of the market power test in the Civil Aviation Act 2012 and the exercise by the CAA of its concurrent competition powers.

Dominance

5.2 All the private action cases discussed in this working paper relate to the abuse of dominance (with dominance assumed) and only a few of the EU public enforcement cases evaluated whether the airport or operator had a dominant position in the relevant market. Even here the assessment of market power was relatively short with a conclusion that the market did not extend beyond the airport. The main examples of assessment of dominance available appear to be the specific investigations conducted by the CCC of BAA, and the CAA's market power determinations themselves.

Exclusionary Conduct

5.3 With respect to exclusionary conduct: Section 18(2) of the Competition Act 1998 is not comprehensive: it provides examples of abuse but does not require any particular course of conduct to be pigeon holed into one to the 18(2) sub groups.

5.4 However, the cases illustrate the different ways an airport can potentially abuse a dominant position as follows:

- economic dependence may be taken into account in assessing abuse (Alpha Services v AdP).
- airports can abuse a dominant position in downstream markets where they do not compete (e.g. Arriva The Shires Ltd v London Luton Airport Operations Ltd[59]) and where they do compete, (e.g. Purple Parking v Heathrow).

5.5 Case law also provides examples where airports can abuse a dominant position in the way contracts and tenders are awarded. In general the Courts have taken a rather negative view of contracts that provide exclusivity arrangements as being detrimental to competition.

5.6 Airports have tried to get cases considered under the essential facilities doctrine which requires a more stringent test than 18(2) conduct. However in view of the high benchmark set by the Bronner case Courts have preferred to focus on distortion of competition rather than elimination of competition. Furthermore a distinction may be drawn between whether the facilities were developed for the specific purpose of the alleged abuse or more generally for the running of the airport e.g. terminal forecourts.

5.7 Although it remains to be tested, an airport that applied the principle of "competitive equivalence" may be able to use this as a reasonable defence against a claim of abuse of a dominant position (Ryanair v Munich airport)

Charges

5.8 With respect to charges, the case law from groundhandling cases is relatively clear that, for groundhandlers, airports cannot charge a fee for the grant of a commercial opportunity (market access) or use a fee as a way of sharing in the expected profits of the provider. However this does not prevent the airport itself earning a reasonable profit on the installations it supplies to groundhandlers, although any fees charged for access to installations or use of infrastructure must be non-discriminatory.

[59] Although Luton did not operate in the downstream market it nevertheless had a commercial interest in that market through a concession agreement.

5.9 Although not governed by a European Directive it would seem from a competition law perspective that these groundhandling principles may also extend to the facilities for the provision of other services at an airport where there is dominance, although this has not yet been tested.

5.10 There has not been any investigation by the Commission aimed at revealing abusive prices charged by airports generally. All of the case law is centred on discrimination with respect to charges to airlines. There are no cases relating to the overall level of charges possibly being abusive.

5.11 However, in a number of cases the Commission has assessed the legality of discounts which often favoured national carriers and found that the application of dissimilar conditions to commercial partners for equivalent transactions, placing some of them at a competitive disadvantage, amounted to an abuse of dominant position. Setting access fees at airports based on turnover of the airport's customer (rather than a fixed fee) is not regarded as abuse of dominance so long as there is economic justification.

5.12 In general for an abuse of dominance case based on discrimination to succeed, the applicant usually needs to show:

- a market in which the airport operator is found or accepted to be dominant;
- an abuse of that dominance which has an anti-competitive effect so far as the consumer is concerned; and
- the conduct, which is the subject of the case, is not objectively justified.

5.13 The law requires a high degree of necessity if objective justification is relied on to justify what would otherwise be anticompetitive conduct.

Applicability - what is an undertaking

5.14 Determining what constitutes an economic activity (and is subject to competition law) can be a detailed and complex exercise and it may not always be appropriate to apply a detailed separation of activities approach. The case law in this area is inconclusive and this suggests

that the CAA would need to take a case-by-case approach.

Jurisdiction

5.15 Parties that are dissatisfied with the decision of a national competition authority are expected to follow the appeal process within the same jurisdiction rather than appeal to the European Commission, as the TFEU establishes a decentralized scheme for the application of EU competition rules.

APPENDIX A

List of cases reviewed

[i] www.ippt.eu/files/2009/IPPT20090326_ECJ_Selex_v_Commission_-_Eurocontrol.pdf

[ii] http://webarchive.nationalarchives.gov.uk/20110406082454/http://www.caa.co.uk/docs/5/ergdocs/APD11bBirminghamAirparks.pdf

[iii] www.bailii.org/ew/cases/EWHC/Ch/2011/987.html

[iv] www.bailii.org/ew/cases/EWHC/Ch/2014/64.html

[v] Unreported, see www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-13293436

[vi] https://www.scotcourts.gov.uk/search-judgments/judgment?id=44998aa6-8980-69d2-b500-ff0000d74aa7

[vii] Decision June 1998,IV.35.613, EE L 230,210

[viii] Aeroports de Paris v Commission EU:T2000:290 and Case C-82/01P

[ix] Eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62001CJ0363

[x] www.bailii.org/eu/cases/EUECJ/2007/C18106.html

[xi] http://www.courts.ie/Judgments.nsf/0/2542B574CB0C2AC28025722E00613519

[xii] Case 95/364/EC: Commission Decision June 1985. Official Journal L 216, 12/09/1995 P.0008-0014

[xiii] Case No IV/35.703 – Portuguese airports, Official Journal L069, 16/03/1999 P.0031-0039 and Case C-163/99 European Court reports 2001 Page I-02613

[xiv] Case 2000/521/EC: Commission Decision July 2000, OJEC 18.8.2000L 208/36, P.0036-0046

[xv] Case T-355/13 easyJet Co v Commission, judgment of 21.01.2015