

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that provides additional information related to the guidance issued by the CAA on its competition powers¹ and on the draft guidance on the application of the market power test contained in the Civil Aviation Act 2012.² This document is not guidance.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 CAA12⁵ 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.

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/ukxi/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/ukxi/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 article¹⁴ 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 article¹⁶ 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 effort¹⁷ 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.