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Airport's Abuse of Dominant Position on Aeronautical Charges in Europe: a case law approach

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ABSTRACT

The aim of this paper is to provide a European perspective of airports' abuse of dominant position regarding airport charges. As airports have traditionally held a monopoly position in their respective geographical market, the EU member states have regulated the airport charges paid by airlines for aeronautical services. Nevertheless, the European Comission has received complaints about airports charges (especially with regard to airport charges rebate schemes). We intent to discuss the application of the European competition rules to airports. In order to access competition issues regarding airports the first step is to identify the relevant market by considering its product and a geographic dimension. We aim at describing the main approaches that have been used to define the relevant market regarding to airports and to access airports dominance. We also intend to discuss in this paper three selected case law in respect to airport charges and, for each case, present its background, specific legal framework applied, relevant market definition, dominance, and the airport' abuse of dominant position assessment.

Keywords: airports, abuse of dominant position, aeronautical charges, regulation, competition law.

1 INTRODUCTION

The aim of this paper is to provide an overview of airports' abuse of dominant position regarding airport charges in Europe (EU). Airports have traditionally held a monopoly position in their respective geographical market. Their market power depends on the airline's ability to use another airport and on the travelers' choice of other transportation. The market power of an airport is likely to vary between different segments of the air transport market. Thus, an airport is likely to have more market power in relation to networked airline services where economies of scale and scope are pronounced than in relation to low-cost carriers, point-to-point and inclusive tour charter market. In general, inter-airport competition appears to be limited. The introduction of competition between terminals, *i.e.*, terminals under different operators could minimize this situation. Nevertheless, there are few examples of intra-airport competition.

The EU member states addressed this competition issue by regulating the airport charges [Marques & Brochado (2007)] paid by airlines for aeronautical services (infrastructure, facilities and ground handling services). However, the European Commisson (EC) has received complaints about airports charges (especially with regard to tariffs being applied at different terminals of an airport and to airport charges rebate schemes) and air carriers accuse airports of abusing their dominant position.

We will discuss the application of EU competition rules to airports in order to ensure that the facility is operated on terms which are fair, transparent and non-discriminatory and in accordance with what are considered to be proper procedures. It is generally article 102.º of the Treaty on the Functioning of the European Union (TFEU) which is the most important provision. The following to steps are necessary in order to establish whether there is dominance, namely: *(i)* the relevant market definition; and *(ii)* the assessment of whether the undertaking has monopoly power on that relevant market [*e.g.*, Kate & Niels (2009)].

In order to access competition issues regarding airports the first step is to identify the relevant market, with comprises both a product and a geographic dimension [Oliver

(2009)]. We aim at describing the main approaches that have been used to define the relevant market regarding to airports and to access airports dominance.

The Commission has found a variety of owners/operators of airport facilities to be in breach with competition law. An undertaking will be in breach of article 102.º of the TFEU if it has a dominant position in a substantial part of the common market and abusively exploits that position in such way that it affects trade between member states. In order to discuss the application of this competition provision, we selected three case laws in respect to airport charges, namely *(i)* Commission Decision (1995) on Zaventem airport - case 95/364/EC, *(ii)* Commission Decision (1999) on Portuguese airports - case 99/199/EC, and *(iii)* Commission Decision (2000) on Spanish airports - case 2000/521/EC. For each case we will present its background, the specific legal framework applied, the relevant market definition, and the airport' abuse of dominant position assessment.

The structure of this article is as follows. After this introduction, we provide an overview of the economic characteristics of airports. Indeed, to assess competition problems in relation to airports one has to have a clear understanding of the economic character of airports and how competition works in this sector. Next, the main European competition rules are analysed. Then, we intent to present a summary of some case law and practise regarding airport's abuse of dominant position in aeronautical charges and finally, some concluding remarks are presented.

2 ECONOMIC CHARACTERISTICS OF AIRPORTS

2.1 Airport operators and their business environment

"(…) *just as cities thrive on trade and commerce with other cities, airports are successful in part by their ability to successfully be the location where passengers and cargo travel to and from other airports*" [Wells (2003), p. 4].

In general terms, an airport is an interface where people and cargo change between land transport and air transport, or vice-versa, and also where they can be transferred between different flights (transfer of passengers or cargo).

Due to the technological features of air transport and also to the significant volumes of traffic usually handled, airports integrate a **significant number of economical agents**, each one performing some specific functions: airport companies (who usually owns or manages the infrastructure), air traffic control authority, air carriers (using the airport facilities to pick-up or leave their passengers and cargo), handling companies (passenger, ramp and baggage handling), concession retailers (using concession areas to sell passengers products or services, e. g. shops, car rental, bar, restaurants), catering service companies, fuel suppliers, passengers, and several others [Ashford (1996)].

The significant number of operations performed and its complexity make airports important centres not only in terms of traffic, but also in terms of jobs, with **employment** figures usually situated between some hundreds to several thousands, with the ratio between direct jobs and million passengers per annum (MPPA) comprised between 600 and 1500 [Graham (2005A), p. 211].

Technical characteristics of air transport, high volumes of traffic and land accessibility requirements make airports major investment areas, meaning that these interfaces are quite intensive in capital expenditure. This reflects in capital costs, which may represent from 20 to 50% of the cost structure of an airport [Doganis (2000), p. 49].

Airports and companies operating in the airport provide services mainly for two very different groups of **clients**: **airlines** and **air travellers**.

The services provided for the first group (airlines), include aviation services (e.g. fire and ambulance services, fuelling, ground power supply, catering), facilities (e. g. check-in counters, gates), infrastructure (e. g. runway, taxiway, stands), ground handling (e. g. baggage processing, passenger handling), and aeronautical services (e. g. air traffic control, navigational aids, meteorological services).

The most common services provided to passengers are car parking facilities, transport equipment (baggage trolleys), comercial facilities (usually exploited by retail concessionaires), waiting facilities (wanting areas, lounges), information services (flight and general airport information), car rental facilities, hotel and business facilities, etc.

In some airports **cargo** services are also significant, meaning that cargo agents (e. g. freight forwarders, air cargo carriers) might also be seen as important clients, to whom airports offer several services and facilities (warehouses, cargo apron operations).

Economic efficiency varies heavily between airports. Though this is a scientific area with recent developments [Graham (2005B), Oliveira-Brochado (2011)], airport efficiency might be partly explained by several features like demand's dimension, government regulations, airline deregulation, form of ownership and management, physical constrains or competition with other airports in its vicinity. In fact, even if airport business is globally a profitable business, it is often assumed that those having higher levels of demand tend to be more profitable. Government regulation might also affect heavily airport performance, e. g. restraining operation hours or noise levels. Physical and natural constrains, like dominant winds or frequent fog situations, may also be easily seen as determinants of efficiency, because they can heavily constrain flight operations, in particular if high level navigational aids (like Instrumental Landing System) are not available. Airline deregulation is also sometimes assumed as a key factor to increase airport performance, since those situated in areas where deregulation took place record higher annual growth rates.

2.2 Competition Issues between Airports

Traditionally, airports were seen mainly as natural monopolies, assuming that the their passenger demand depended both on the existing **connections,** offered by the companies that operated there and on the **population** who lived in its catchment area, though assuming some competition between airports for those living in the hinterland of more than one airport. In other words, it was assumed that airports competed mostly for passengers that could access easily to more than one airport, and not given much attention to attract new airline companies and connections.

In fact, from Chicago Conference of 1994 until some years ago, air transport was a market strongly controlled, with national governments defining the rules for each international connection: the companies, the frequency and the capacity allowed. Naturally, each country defended its national flag carrier in this process, resulting in a market with high fares, high costs and low productivity.

This environment placed competition between air transport companies in very low levels, since international connections where usually performed only by two companies, one national flag carrier from each country, who frequently rejected heavy rivalry between them. So, "*the world of non-competing airlines was mirrored in non-competing airports*"[1], due to very limited stimulus to innovation in terms of new airports and routes, since any "*new development required the agreement of two colluding airlines and governments*"[2].

During this era of low competition, another important issue was that national flag carriers had a significant control position over the major hub airports, due to the market share they had, being in a better position to negotiate airport taxes and allowing them to exploit grandfather rights concerning slot allocation in congested airports.

Another heavy constrain to competition between airports was due to the fact that almost all airports where owned by national government (most of them maintain this situation), contributing to this minimum competition environment, usually giving better conditions to national flag carriers, in what was usually understood as defending national airline industry.

During the last few decades, however, competition in air transport changed dramatically in several regions of the world due to airport privatisation and also to the alignment of national governments to open skies policies.

The orientation towards liberalization started in the late 70's at USA, during Carter administration, with the negotiation or renegotiation of bilateral air services agreements, eliminating restrictions on capacity, giving flexibility for multiple designation of US Airlines, authorizing more cities as international gateways and liberalizing charter flights. This new rules were applied with in several bilateral agreements, with the Netherlands, Germany and Belgium in Europe, as well as with Singapore, Thailand and Korea in the Pacific region [Doganis (2006)].

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1 Barret (2000), p. 13

2 Idem

During the 80's Europe also saw a major changes concerning air transport regulation:

In 1984 a new air services agreement between UK and the Netherlands was signed, deregulating air connections between these two countries;

In 1986 a similar air services agreement between UK and Ireland was signed;

in 1987 and 1990, two first *liberalization packages* were agreed by the European Council of Ministers.

A few years after, the governments of European Union (EU) agreed to build an open-skies regime which came into force on the 1st of January 2003, allowing airlines from member states to operate with full traffic rights any route within the EU and without capacity restrictions.

During the 90's European Commission also had to deal with another important issue concerning air transport competition, constraining national subsidies to state-owned airlines, which was distorting competition at European level. Several decisions were taken, allowing member states to make major injections of state aids in some of national flag air carriers, but imposing strict conditions to ensure that this would allow those companies to become profitable and also to guarantee that those capital injections couldn't happen anymore.

This open skies regime changed dramatically competition between airlines, not only because competition between existing airlines grows heavily but mainly because new companies arrive to the market, in particular several important low-cost carriers as Ryanair and Easyjet.

In the former times, when airlines did not compete between each other, there was not almost any struggle between airports to catch new airlines and new flight connections. More than that, there was not even competition amongst service providers at airports [Barret (2000)].

It used to be assumed that airport costs represent a small proportion of airline fares[3], so it does not count too much on airline competitiveness; the heavy reduction on airline tickets brought by low-cost carriers changed dramatically this approach.

So, when deregulation arrives to EU, competition between airports also became a major issue.

One of the reasons that brought competition between airports came from airports with excess capacity that began to apply lower taxes to new companies or new connections, in order to fulfil this spare capacity.

There are a lot of examples of this competitive approach of airport companies. One of the first cases is the one of Luton's airport, which attracted Ryanair connections from London to Dublin in 1986, catching 20% of that market and allowing it to grow as much as 65% in one year.

Another motive to develop competition between airports came from the fact that major hubs have no more capacity during peak hours, making almost impossible for new entrants to use them, so they have to find out alternative airports. Complementary, in several European regions, there were several underused airports, some of them not far from major hubs, some of them owned by local governments very motivated to increase their airport demand as a means to promote regional development.

The situations of airports that boomed their demand during recent years as a result of the attraction of new airline connections are very frequent, a majority of them associated to the attraction of new low cost companies [e. g. Charleroi (Belgium), Bergamo or Pisa (Italy), Stansted (United Kingdom), St. Etienne or Beauvais (France), Frankfurt-Hanh (Germany), Eindhoven (The Netherlands).

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[3] Even in the 80's airport and related charges represent something like 20% of airline costs [Barret (2000)]

2.3 Competition Issues within Airports

There are also some important competition issues at airport level, concerning the treatment of different airlines, namely in what concerns taxes applied, slot allocation, use of facilities and handling companies available.

It very well known that one of the main constraints for competition between airlines is the lack of slot availability at major hubs, frequently affected by congestion problems. This implies that bigger companies, performing operations at those airports for longer time, due to their grandfather's rights, have the possibility to operate during peak hours, the most interesting ones in commercial terms. On the other hand, new entrants could not get any slot at all in those major hubs or, even if they could get any slot there, that would be during periods that are not so attractive, from a commercial point of view. This has been seen as a major limitation for new entrants and some analysis have been made in order to change this situation, but, so far, without implicating major changes at European level.

Concerning taxes and charges applied to airlines for the use of infrastructure and facilities, as well as the costs for handling services, airports and handling companies have necessarily a common policy for every air carrier. Even so, there are situations where companies considerer taxes and charges discriminatory due to discounts applied by airport. This happens sometimes due to discounts applied for airlines using the airport more frequently, this usually means airlines that concentrate their operations in there, and some other time due to discounts applied for new connections, often meaning low cost carriers. The next section aims at examining airports abuse of dominant position concerning aeronautical charges in Europe.

3 SELECTED EUROPEAN CASE LAW

3.1 Legal background

Airports operate in specific national and European legal frameworks. In relation to the application of European competition rules to airports, access to airport facilities is frequently the subject of infringement proceedings under Article 102.º of the TFEU. As a result, this paper will focus primarily on the application of this provision.

Article 102.º is an instrument for controlling the abusive exercise of monopoly power and prohibits one or more undertakings from abusively exploiting a dominant position. It provides that: "*Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states*".

Accordingly, an undertaking will be in breach of Article 102.º if it has a dominant position in a substantial part of the common market and abusively exploits that position in such way that it affects trade between member states. Indeed, EU competition rules imposes a special responsibility on

3.2 Selected case law in respect to airport charges

In order to provide an overview of airport's abuse of dominant position on airport charges in Europe, three cases assessed by the European Commission will be presented, namely: *(i)* Commission Decision (1995) on Zaventem airport - case 95/364/EC, *(ii)* Commission Decision (1999) on Portuguese airports - case 99/199/EC, and *(iii)* Commission Decision (2000) on Spanish airports - case 2000/521/EC. Moreover, for each case law we intend to provide: *(i)* an overview, *(ii)* the background and *(iii)* the Commission assessment, regarding the relevant market definition and the alleged abuse of dominant position.

3.2.1 Commission decision (1995) on Zaventem airport - case 95/65/EC[4]

Overview

In this case, the Commission decided to ban the system of stepped discounts on airport charges, increasing with traffic, set up at the Brussels airport since the analyses revealed that the thresholds for this discounts were so high that they mostly benefited Sabena.

Background

This file was open based on a complaint lodged by British Midland (BM) in respect of the system of discounts on landing fees at Brussels National Airport (Zaventem). Indeed, BM considered that the rebate scheme at Brussels National Airport, based on the number of movements in a month and on the weight of the aircraft and comprising nonlinear progressive steps (5 to 10 – 7,5%, 10 to 15 – 15%, 15 to 20 – 20%, > 20 – 30%), which increased in line with an airline's volume of traffic, favored carriers with a high volume of traffic at Brussels Airport and thereby places small carriers competing with them at a disadvantage. According to BM, there was no objective justification in granting such discounts since the services which an arriving or departing aircraft requires are the same, however many times they are supplied.

Relevant Market Definition

The Commission concluded that the relevant market was the market in services linked to access to airport infrastructures for which a fee is payable, *i.e.*, the operation and maintenance of the runways, taxiways and aprons and approach guidance. The Commission also concluded that there is no realistic alternative offering the same advantages as Brussels Airport for short and medium-haul transport services (of less than two hours) to or from the Brussels catchments area. because the closest international airport is more than 100 kilometers from Zaventem.

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[4] Case 95/364/EC: Commission Decision of 28 June 1995, *Official Journal L 216, 12/09/1995 P. 0008 – 0014.*

Abuse of Dominant Position Assessment

In 1992 Sabena was the only airline qualifying for final-step discounts (30%) equivalent to an overall reduction of 18% on its take-off and landing fees, whereas the other qualifying airlines (Sobelair and BA) were eligible for only a first-step discount (7,5%) for an equivalent service from the Airways Authority.

According to the Commission, the application of dissimilar conditions to commercial partners for equivalent transactions by the Airways Authority, placing some of them at a competitive disadvantage, constitutes an abuse of a dominant position.

The Airways Authority based its defense on the following arguments: *(i)* the right of an undertaking to introduce a system of reductions as part of its commercial policy; *(ii)* the right to grant larger discounts to its loyal customers, particularly in view of the financial security they provide; *(iii)* the economies of scale in that it cost less (in terms of administration and staff) to supply services; and *(iv)* the stability for the airport with the presence of a national carrier offering an extensive network of destinations.

The Commission maintained that the rebate scheme offer a preferential treatment to the national airline Sabena, as *(i)* a commercial conduct which is considered normal may constitute abuse within the meaning of the Treaty if it is attributable to an undertaking in a dominant position; *(ii)* an airline will not choose to serve Brussels rather than another airport in the surrounding area on account of the loyalty-based commercial policy pursued by Brussels airport; *(iii)* economies of scale were not justified by the Airways Authority and possible economies of scale at the level of invoice are negligible; and *(iv)* the handling of the landing or take-off of an aircraft requires the same service, irrespective of its owner or the number of aircraft belonging to a given airline.

3.2.2 Commission decision (1999) on Portuguese Airports - Case 99/1999/EC[5] and Judgment of the Court (2001) Portuguese Republic v Commission of the European Communities C-163/99[6]

Overview

The Commission decided to ban *(i)* the system of discounts on landing charges based on traffic volume in use at Portuguese airports and *(ii)* the differentiation of these charges according to the origin of the flight (50% discount for domestic flights).

Background

The Commission begun an investigation into the way in which the discounts were allowed on landing charges at the airports of the Member States on December 1996 and asked the Portuguese authorities to send it all the information available on the Portuguese legislation on landing charges so that it could determine were the discounts were compatible with the Community rules on competition.

Relevant Market Definition

The EC defined the relevant market as the market in services linked to access to airport infrastructures for which a fee is payable, *i.e.*, the operation and maintenance of the runways, taxiways and aprons and approach guidance. The EC also sustained that the seven airports are interchangeable only to a limited extent and each can therefore be regarded as a distinct geographic market.

Abuse of Dominant Position Assessment

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[5] 1999/199/EC: Commission Decision of 10 February 1999, Case No IV/35.703 - Portuguese airports, *Official Journal L 069 , 16/03/1999 P. 0031 – 0039.*

[6] Judgment of the Court (Sixth Chamber) of 29 March 2001. - Portuguese Republic v Commission of the European Communities, Case C-163/99, *European Court reports 2001 Page I-02613.*

As the Decree-law Nº 246/79 confers on the Portuguese Authority ANA – *Aeroportos de Portugal* the exclusive right to administer the airport facilities at Lisbon, Porto, Faro and Azores, the Commission concluded that ANA holds a dominant position on the market for aircraft handling and take-off services.

The system of landing charges and discounts on charges applied by ANA and approved by the Portuguese Government (after a process of consultation) were based on landing frequency. An airline operating up to 50 operations per month received a discount of 7,2% at Lisbon airport and of 18,4% at the other Portuguese airports, from 51 to 100 landings 14,6% and 24,4%, from 101 to 150, 22,5% and 31,4% from 151 to 200, 32,7% and 40,6%, respectively.

Moreover, charges were also differentiated according to type o flight (domestic or international), being domestic flights illegible for a reduction of 50%.

As a result, the average discount received varies according to the airline: TAP (30%), Portugalia (22%), Iberia (8%), AF (6%), LH (5%), BA (4%), Swissair, Alitalia and Sabena (1%).

The Commission analysis revealed that the system of landing charges and discounts on charges applied by ANA has the effect of applying dissimilar conditions to airlines for equivalent transactions linked to landing and take-off services, thereby placing them at a competitive advantage. The effect of this system was to favor the national carriers, *i.e.*, TAP and Portugalia.

The Portuguese authority justified the nonlinear discounts due to *(i)* the competition from Madrid and Barcelona airports, which themselves have implemented this this of discount system; *(ii)* the economies of scale associated with intensive use of the facilities and *(iii)* the promotion of Portugal as a tourist destination. Regarding the differentiation of domestic flights, the Portuguese Authority claim that this measure provides support for the flights linking the Azores with the mainland, there being no alternative to them, and for the domestic services operating from mainland airports, in view of their short distances and low fares.

The Commission maintained that there is no objective justification for the difference in treatment applied by ANA to services which have the same substantive content for all airlines.

3.2.3 Commission decision (2000) on Spanish airports - case 2000/521/EC[7]

Overview

The Commission decided to ban *(i)* the system of discounts on landing charges based on traffic volume and *(ii)* the discounts for domestic flights at the airports in Spain.

Background

The Commission investigated, in own-initiative proceedings, the various methods used for discounting landing charges at Spanish airports.

According to the Spanish constitution, the Spanish Government is responsible for commercial airports which there is a 'general interest'. In this context, Spanish airports are administered by AENA - *Aeropuertos Españoles y Navegación Aérea* and the Spanish airport's landing fees are set out by Royal Decrees.

The rebate scheme at Spanish airports encompasses a stepped discount based on the number of operations per month. In fact, from 51 to 100 monthly operations the airline received a discount of 9%, from 101 to 150 of 17%, from 151 to 200, of 26% and more than 100, of 35%. The rebate scheme also differentiates between extra-community and intra-community flights and a discount of 15% to 70% for scheduled flights to the Canary Islands, the Balcaric and Melilla was also introduced on 1998.

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[7] Case 2000/521/EC: Commission Decision of 26 July 2000**,** Official Journal of the European Communities 18.8.2000L 208/36, P. 0036 – 0046.

Relevant Market Definition

The Commission has defined the relevant market as the market comprised by services linked to access to airport infrastructures for which a fee is payable. More specifically, the services in question are those linked to the exploitation and maintenance of runways, the use of taxiways and aprons, and approach guidance for civil aircraft. The Commission also concluded that the 41 airports administered by AENA are interchangeable only to a limited extent and each can therefore be regarded as a distinct geographic market.

Abuse of Dominant Position Assessment

According to the Commission assessment, each of the 41 AENA-managed airports is in a dominant position as there is normally one commercial airport for each geographic market and high entry barriers exist with regard to the construction of new airports.

The Commission concluded that the largest discount based on landing frequency benefit Spanish airlines in particular, such as Iberia, Binter Canarias, Spanair, Air Europe or Air Nostrum, which all enjoy the largest category of discount (20% to 25%).

The Commission established that, the fact that AENA has applied dissimilar conditions to its commercial customers for the provision of equivalent services, thereby placing some of them at a competitive disadvantage, constitutes an abuse of dominant position and The differentiation of the tariffs according to type of flight (domestic or international), *i.e.*, either domestic or intra-community, was also considered an infringement of the Treaty.

4 CONCLUSION

The application of the EC Competition rules has permitted the Commission to exercise control over essential facility owners, to ensure that the facility is operated on terms which are fair, transparent and non-discriminatory and in accordance with what are considered to be proper procedures.

Investigations conducted by the European Commission into the practices of owners or operators of transport infrastructures have proved to be the driving force behind the development of a body of EC case law. Indeed, the large variety of cases regarding aeronautical charges involve discrimination between domestic and international flights and nonlinear rebate schemes that favor national carriers.

As the liberalization of the European air transport market made it possible for European Airlines to compete on all the international and domestic routes within the Community and the beneficial effects of such competition would be seriously undermined if airlines cannot obtain access on reasonable terms to the necessary airport and airport facilities. It is therefore of the utmost importance that such access is guaranteed.

It has been discussed above how EU competition law and in particular article 102.º of the Treaty maybe used to ensure such access.

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