UK Legal News Analysis

**Competition Law: Is Divestment the Right Remedy?**

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**Abstract**

Following a long running dispute, the Competition Commission has confirmed BAA will be required to sell some of its airports in order to increase competition in the supply of airport services. Rebecca Owen-Howes, a Senior Associate in the EU & Competition Group at SNR Denton UK LLP, talks to Ann-Marie Day about the significance of the announcement and the implications it has for practitioners

**Analysis**

The Competition Commission's (CC) market investigation into BAA recently culminated with an announcement that the company will be required to sell Stansted Airport, together with either Edinburgh or Glasgow Airport. The announcement confirmed the CC's provisional view, issued earlier in the year, that sale of the airports will result in greater competition and benefits for both consumers and airlines.

Rebecca Owen-Howes comments that the final decision was not a surprising one: "The decision was to be expected given the CC's provisional conclusions in March this year and confirms the CC's findings in its original report in 2009." In light of these earlier indications, just how important is the decision, and the investigation out of which it arose? Owen-Howes believes the investigation, in particular, is significant on a number of levels: "It is the first market investigation under the Enterprise Act 2002 to focus on the conduct of a single firm, BAA, rather than the functioning of a market as a whole. It is also the first market investigation in which the CC has used its power to order divestment, and the first to report on material changes of circumstances before implementing remedies.

"With regard to the proposed remedies, these are significant as there is scope for the supply of aeronautical services in the South-East of England and mainland Scotland to change quite considerably once the airports in question come under different ownership. Although early days, the CC notes already that since December 2009, when London Gatwick was sold, there has been increased competition between Gatwick and each of Stansted and Heathrow with airlines and/or routes moving to Gatwick."

So how did the CC arrive at the decision it did, and how justified were arguments that the market had changed significantly since the CC made its original decision? Owen-Howes explains the background to the
decision and the means by which the CC assessed the relevant market: "In the 2009 report, the CC defined the relevant market according to its guidelines by determining the product scope and geographic scope of the market and addressing the issue of substitutability. It concluded there was a bundled product market for aeronautical services provided by airports to airlines and their ground-handling agents. It said this market was separate from that for airport commercial services and also separate from other transport markets, such as rail and road.

"As is normal practice, the CC sought to apply the hypothetical monopolist test (starting with the narrowest possible market definition and asking whether an airport would be able to increase prices by say five to ten per cent) but found this gave rise to difficulties, not least because Heathrow, Gatwick and Stansted are subject to statutory price control." She continues, "The CC concluded it was not necessary to define rigid geographic markets for aeronautical services but that it should be able to take account of all relevant constraints on BAA airports, including substitutable hubs for Heathrow. Having said that, the CC went on to define two broad markets for the purpose of considering substitutability in its competitive effects analysis: (i) airports in the South-East of England; and (ii) the main Scottish airports.

"More recently, BAA argued there had been four material changes in circumstances since the 2009 report, as follows:

(a) the change in government policy to oppose development of new runways in the South-East;
(b) intense competition between European airports to attract low cost airlines;
(c) the strengthening of Heathrow's position as a hub airport; and
(d) the reduction in the level of Stansted's profitability.

In addition, the union Unite argued the sale of Gatwick constituted a material change," she notes.

"The CC considered each of these arguments in turn and dismissed all of them except for the change in government policy, which it acknowledged was a change in circumstances since the 2009 report," Owen-Howes explains. "Nonetheless, it concluded that even without new runways, there would be greater competition between Heathrow and Stansted if they were under separate ownership due to extra capacity becoming available at Stansted since 2009.

"BAA continued to argue Heathrow and Stansted are not in the same market (in particular in relation to points (b) and (c) above) but the CC found no evidence to substantiate this and is of the view that a separate owner of Stansted would seek to attract flights from Heathrow, including networks of flights."

It was this view which confirmed the CC's approach to divestment. Given, however, that the CC's investigation did not arise as a result of a breach of competition law, could the use of a divestment remedy be said to be unduly draconian? "Divestment is draconian in the sense that BAA is being broken up because of the way in which the market operates and not because the company has been found guilty of any breach of law or regulation," says Owen-Howes.

"The authorities would not have been able to impose such a heavy-handed remedy for any infringement of the competition rules. According to the CC's final report, it did consider the managerial and/or financial separation of Heathrow and Stansted but concluded this would not address the adverse effects on competition identified in its 2009 report." She continues, "Generally speaking, the authorities' preference is to accept structural remedies over behavioural remedies--not least because it means the authorities are not then under a duty to monitor behaviour of the companies concerned going forward."

The case has also thrown the working of the Enterprise Act 2002's market investigation provisions into the spotlight. Is the existing legislative regime sufficiently flexible to adequately accommodate developments in a particular market? "The market investigation provisions of the Enterprise Act 2002, provide for the CC to amend the remedies it has recommended in its report if there has been a material change of circumstances, or it has a special reason to do so," explains Owen-Howes. "The provisions meant the CC
sought the views of BAA as to whether there had been any such change or special reason, as well as the views of interested third parties. It published its provisional conclusions on the matter on 30 March 2011, inviting further comments by 19 April. It published its final conclusions three months later on 19 July.

“The final report is 69 pages long (excluding appendices) and considers each of the possible material changes put forward by BAA and their impact on the proposed remedies,” she says. “Although BAA might not agree with the way in which the CC has carried out its review of market developments, clearly the legislation has allowed BAA to be heard on this issue and meant the CC has had to investigate further before implementing the remedies it recommended in its original report.”

According to Owen-Howes, the BAA market reference has a number of important implications for practitioners: “First, the reference shows it is possible for a market investigation to target the behaviour of a single company--this will depend on the set up of the market. Second, the CC is not afraid to use its divestment powers in a market investigation. Third, it is not enough to show simply that material changes in circumstances have occurred since the CC prepared its market investigation report; the CC has discretion in deciding whether such changes should impact on the remedies.”

Owen-Howes concludes by highlighting the significance of the delay between the launch of the investigation and the CC’s recent decision. “The BAA market investigation shows how it is possible for a party to delay proceedings,” she explains. “The Office of Fair Trading first made its reference to the CC in March 2007 and some four years later it is still not clear when the remedies put forward by the CC in its 2009 report will be implemented given that BAA may seek to challenge the CC’s latest findings.

“It is in BAA’s interest to continue to take steps to draw out proceedings (in order to secure a better sale price for its airports) and based on past performance, further review of the CC’s latest decision cannot be ruled out. Indeed, BAA has publicly announced it will now consider whether to launch a judicial review. It has two months in which to apply for review to the Competition Appeal Tribunal, with the possibility of further review to the Court of Appeal (and ultimately the Supreme Court) if appeal to the Tribunal is unsuccessful.”

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