

Applying competition rules in the liberalized aviation market:

What constitutes an abuse of a dominant position by an infrastructure operator and how to avoid it

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Croatian Transport Law Association Workshop:
'Opening of groundhandling market in the European Union and Republic of Croatia:
Challenges and questions'
Zagreb, 6 Sept 2019

Outline

- Introduction
- Competition law: procedural / substantive issues
- Art 102 TFEU: analytical framework
- Types of abuse
 - Refusal to grant access
 - Discriminatory fees
- Short revision exercise

Introduction: The aim

- Effective competition in the market
- Benefits

Introduction: The problem

- Post-liberalisation challenges
- Vertical foreclosure
- Fair access for competing suppliers
- Non-discriminatory treatment

Introduction: The solution

- a) Sector-specific solution
- b) Competition law solution

- Dual proceedings:
 - Art 102 decision: *FAG-Flughafen Frankfurt/Main*, OJ 1998 L72/30
 - Dir 96/67 decision: *Frankfurt Airport*, OJ 1998 L173/32

Competition law solution

- *Procedural* issues
 - Regulation 1/2003, OJ 2003 L 1/1
- *Substantive* issues
 - Art 101 TFEU (agts)
 - Art 102 TFEU (abuse)
 - Art 106 TFEU (state measures; 106&102 in conjunction)

Art 102 TFEU: analytical framework

1. (Undertaking)
2. Relevant market
3. Dominant position
4. Abuse of a dominant position
5. (Internal market or substantive part thereof)
6. (Effect on cross-border trade)

Undertaking

- Art 102 applies to behaviour of ‘undertakings’ – economic activity
 - ‘every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed’ (Case C-41/90 *Höfner v Macroton* (1991) ECR I-179)
 - Carrying out security checks on the passengers departing from an airport not an economic activity for the purposes of Art 101 and 102; instead, ‘activities in the public interest which form part of the essential functions of the State’ (*Athens International Airport*, COMP/38469)
- Single economic entity doctrine

Internal market or substantive part thereof

- The eleventh busiest airport in the EU = a substantial part of the common market (*Brussels Airport*, OJ 1995 L216/8)
- The London-Dublin route significant in both the UK and Ireland = a substantial part of the common market (*British Midland v Aer Lingus*, OJ 1992 L96/34)

Relevant market

- Relevant *product* market
 - Distinction btw the groundhandling services mkt and airport management services mkt (e.g. *Alpha Flight Services/Aéroports de Paris*, OJ 1998 L230/10)
 - Car parking services not a distinct relevant product market, but in competition with other means of travelling to the airport (*Athens International Airport* (COMP/38469, decn of 2 May 2005))
- Relevant *geographic* market
 - Substitutability
 - ‘no genuine alternative offering the same advantages as Brussels Airport for short and medium-haul transport services to or from the Brussels catchment area’ (*Brussels Airport*, OJ 1995 L216/8)

Dominant position

- Market shares as a proxy
 - 100% mkt share a clear and obvious indication of the existence of a dominant position, at least in the absence of low barriers to entry and expansion and/or strong countervailing buyer power (e.g. *Brussels Airport*, OJ 1995 L216/8)
- Notion
 - ‘a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and its customers’ (Case C-322/81 *Michelin*)
- Infrastructure
 - *Bronner v airport*

Abuse of a dominant position

- Special responsibility
- Various forms of abuse
 - Exclusionary
 - Exploitative
- Theory of harm

Is there a duty to supply?

- Contractual autonomy
- Duty to supply/allow access
- Essential facility doctrine
- Denial of access to companies seeking to provide a competing service & refusal to permit self-handling by airlines
 - *FAG-Flughafen Frankfurt/Main*, OJ 1998 L72/30 (general ramp-handling services), and
 - *Case T-128/98 Aéroports de Paris v Commission* (2000) ECR II-3929 (in-flight catering services)

Essential facility

- ‘a facility of infrastructure, without access to which competitors cannot provide services to their customers’ (*B&I Line/Sealink Harbours*, decn of 11 June 1992)
- ‘An essential facility can be a product such as a raw material or a service, including provision of access to a place such as a harbor or airport or to a distribution system such as a telecommunications network. In many cases the relationship is vertical in the sense that the dominant undertaking reserves the product or service to, or discriminates in favor of, its own downstream operation at the expense of competitors on the downstream market. It may however be horizontal in the sense of tying sales of related but distinct products or services.’ (AG Jacobs, *Bronner v Mediaprint*, para 50)

Refusal to grant access as abuse

- Is there refusal to supply
- Is there dominance upstream
- Indispensability
- Elimination of effective competition
- Objective justification
- Remedies

Discriminatory abuse

- Art 102(c): ‘applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage’
- Competitive disadvantage / discriminatory advantage
 - E.g. *Alpha Flight Services/Aéroports de Paris*, OJ 1998 L230/10 (fees for a self-handling licence v fees for third party handling licence)
- Art 106(1) in conjunction with Art 102
 - A tariff system for landing charges established in Portuguese legislation which offered substantial discounts for high volume users and for domestic flights unfairly favoured the national carriers over carriers from other MS (*Portuguese Airports*, OJ 1999 L69/31, confirmed Case C-163/99 *Portugal v Commission* (2001) ECR I-2613)

AZTN v ZLZ & ZLZ

Ugostiteljstvo (Croatia Airlines)

- *AZTN, decn of 30 Dec 2008*
 - Relevant product market: catering handling
 - Relevant geographic market: Pleso Airport
 - Dominance: ZLZ/ZLZ Ugostiteljstvo - 100% mkt share
 - Abuse: suspension of catering services / unfair pricing
 - Remedy: cease-and-desist order / new price lists

Short revision exercise

Please mark the correct answer. More than one answer might be correct.

- a) When applying the provision that prohibits the abuse of a dominant position, the competition authority must first define relevant product and geographic market.
- b) The essential facility doctrine means that every infrastructure operator must allow access to the infrastructure it manages.
- c) Discriminatory fees charged by the airport managing firm might amount to an abuse of a dominant position.