

Competition Commission Issues Provisional Decision on Remedies in BAA Airports Market Investigation

London
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On December 17, 2008, the Competition Commission (“CC”) published its provisional decision on remedies in its market investigation into the supply of airport services by BAA in the U.K. This provisional decision on remedies follows on from, and largely confirm the proposals contained in, the CC’s provisional findings on the existence of an adverse effect on competition, and its notice of possible remedies, both of which were published on August 20, 2008.¹

Subject to final consultation, the CC has provisionally decided that the following remedies are required to address the adverse effect on competition that arises from BAA’s provision of airport services: (i) divestiture of Stansted, Gatwick and Edinburgh airports and the appointment of a monitoring trustee; and (ii) behavioural remedies in respect of Aberdeen airport where divestiture was deemed inappropriate, and in respect of Heathrow airport (and potentially also Stansted and Gatwick airports) in the short-term pending the emergence of competition. The CC has also recommended that the Department for Transport adopt a new regulatory regime for airports and reconsider its air transport policy in light of the anticipated divestitures.

I. DIVESTITURE REMEDIES

In its provisional findings, the CC concluded that common ownership of airports by BAA resulted in an adverse effect on competition, and proposed as potential remedies divestitures to provide for separate ownership of Heathrow, Stansted and Gatwick airports, and the divestiture of either Edinburgh airport or Glasgow airport. The CC has now confirmed that divestitures are necessary because alternatives (e.g., regulatory intervention or behavioural remedies) would be insufficient to create the competitive rivalry arising from separate ownership.

¹ See “Competition Commission Issues Adverse Provisional Findings on BAA Airports Market Investigation”, CGSH Alert Memo dated September 2, 2008.

As to the choice of airports to be divested, the CC concluded that the divestiture of Stansted and Gatwick would be appropriate as this would be less restrictive on BAA than a divestiture involving Heathrow. The CC rejected BAA's proposal to divest only one airport – Gatwick, for which BAA has already begun the divestiture process – as the CC considered that this would fail to address the lack of competition between Heathrow and Stansted which the CC believed would emerge under separate ownership of those two airports. The CC also concluded that divestiture of Edinburgh airport would be preferable to divestiture of Glasgow airport as it was likely to address competition concerns more rapidly and would be more likely to find a buyer.

In considering whether the proposed divestitures would be proportionate to the harm they aimed to remedy, the CC noted that the cost to BAA of separating ownership would be relatively small as a proportion of the market value of the airports, that the current owners of BAA (the Ferrovial consortium) had acquired BAA after the OFT had announced its intention to conduct a market study into BAA in which common ownership of airports was an issue, and that divestiture would be expected to result in substantial customer benefits that would considerably outweigh the costs of divestiture.

As regards implementation of the divestiture package, the CC emphasised the importance of identifying a suitable purchaser through an effective divestiture process. Certain criteria must be met by any potential purchaser in addition to those typically required in the merger context (e.g., independence from the seller and absence of any further competition concerns). In particular, the CC will require any potential purchaser to have expertise in the operation of an airport, strong evidence of which will arise from the current operation of a comparable and well-regarded airport; failing this, the CC will require “persuasive evidence” of access to such expertise, including appropriate strategic, regulatory and financial skills at group level. The CC will also require a comprehensive business plan and clearly defined governance arrangements. A purchaser must also meet the safety requirements of the Civil Aviation Authority and the Department for Transport's security regulations. In addition, the CC will require a potential purchaser to have access to sufficient financial resources (as evidenced by long-term projections), given the importance of significant future investment, particularly at Stansted.

The CC also set out the process that will be followed to select a purchaser. At the stage of submitting indicative bids, the CC will require proof that the bidder is independent of the seller and raises no competition concerns, and will require preliminary evidence in respect of the other criteria; at subsequent stages when a bidder will have access to more detailed BAA data, the CC will undertake a detailed review of the purchaser's business plans, airport development plans (particularly for Stansted and Gatwick), expertise and financial resources; and in the final stages, the CC will review

contractual arrangements to ensure that they will not impair future rivalry between BAA and the divested airports.

In terms of timing, the CC envisions allowing BAA nine months to find a suitable buyer, although the CC will consult further as to whether the commencement of this period should be delayed to avoid the simultaneous divestiture of the three airports, and to avoid disrupting the Stansted planning inquiry. The CC intends to appoint a monitoring trustee to manage the divestiture process, to require BAA to manage the airports separately pending divestiture, and to impose interim measures in respect of Stansted to ensure that BAA's conduct during the planning inquiry does not prejudice the Stansted divestiture.

II. BEHAVIOURAL REMEDIES

The CC did not regard divestiture as an appropriate remedy for the significant lack of development at Aberdeen airport, as such concerns stemmed from its being a natural monopoly rather than from common ownership. The CC has therefore proposed a price cap and customer rebate, the latter of which may be reduced in the event of increased capital expenditure. The CC's intention is to reduce charges to a level more comparable with other airports, while still providing BAA with an incentive to invest in airport development.

As regards the London airports, the CC concluded that Heathrow would be likely to retain significant market power because of its status as the only significant hub airport in the South-East of England, and that Stansted and Gatwick might also retain significant market power over the short-term until such time as the divestitures were completed and competition emerged. In this circumstance, the CC concluded that behavioural remedies would be appropriate for Heathrow (and potentially also for Stansted and Gatwick) until such time as a new regulatory regime were introduced and the benefits of competition emerged post-divestiture. The CC therefore proposed a series of behavioural remedies aimed at improving the extent to which BAA would be required to consult with airlines regarding the operation and development of the airport, and at restricting the extent to which BAA may provide airport facilities or services to one customer that might have a significant competitive impact on other airlines for a significant length of time (e.g., moving airlines within facilities, providing new facilities).

In respect of all these behavioural remedies, the CC is proposing that a compliance officer/adjudicator be appointed, the costs of which would be borne by BAA, to assist the OFT in enforcing these remedies.

III. RECOMMENDATIONS ON REGULATION AND AIR TRANSPORT POLICY

The CC concluded that the existing system of airport regulation, put in place more than 20 years ago at the time of the privatisation of BAA, was inadequate, inconsistent with the approach taken in other regulated sectors, and distorted competition. The CC noted in this respect that an independent panel is currently advising the Department for Transport on a new regulatory regime, with which the CC largely agreed. In brief, the CC recommended that the Government adopt a licence-based regime, an important focus of which would be the promotion of competition between airports (having regard to the interests of consumers and airlines), with particular obligations imposed on the operator of Heathrow. The CC proposed that the regulator should not impose or retain price caps unless excessively high charges would otherwise result, and that legislation be amended to permit terminals to be operated separately from runway facilities. The CC also proposed that its role be changed to that of an appellate body and that airlines and others whose rights are materially affected be given a right of appeal.

Finally, given that the CC's proposal to order divestiture of Stansted and Gatwick would alter the dynamics of airport services in the South-East of England, the CC recommended that Government consider these market developments in its air transport policy statement, particularly to ensure that Government policy does not unduly restrict scope for competition from Gatwick post-divestiture.

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