Competition Appeal Tribunal publishes ruling in BAA appeal

Summary

The Competition Appeal Tribunal (the “CAT”) has quashed the findings of the Competition Commission (the “CC”)’s report into BAA Limited (“BAA”)’s ownership of UK airports. The CAT has referred the matter back to the CC to reconsider and has refused the CC’s application for permission to appeal to the Court of Appeal.

Background

In March 2009, the CC published a final market investigation report (the “Report”) on the supply of airport services by BAA in the UK, in which it concluded that BAA’s common ownership of airports in south-east England and lowland Scotland gave rise to adverse effects on competition. BAA was ordered to sell Gatwick, Stansted, and one of Glasgow or Edinburgh airports within two years to purchasers approved by the CC.

In May 2009, BAA appealed to the CAT against the CC’s findings on grounds of apparent bias and a lack of proportionality. In December 2009, the CAT upheld BAA’s appeal that the Report was made unlawful by the apparent bias of Professor Peter Moizer, an Inquiry Panel member, due to his role as an investment adviser to the Greater Manchester Pension Fund (the "Fund") which is governed by the ten local authorities of Greater Manchester. These local authorities own Manchester Airport Group ("MAC"), which is the largest airport operator in the UK after BAA and was a potential purchaser of any divested assets of BAA. However, the CAT rejected BAA’s second ground of appeal on proportionality in ordering the sale of the specified airports within two years. The CAT agreed to allow further submissions to be made on the appropriate form of relief to be granted in this case, should the parties be unable to reach agreement between themselves.

In July 2009, the CAT granted Ryanair permission to intervene in the proceedings between BAA and the CC as it had established a sufficient interest in the outcome of the case.

Meanwhile, in December 2009 the sale of Gatwick was completed following a process that begun in September 2008.

Ruling of the Competition Appeal Tribunal

In February 2010, BAA and the CC provided the CAT with a draft order, agreeing that the findings of the Report and related remedies could stand in respect of:

> the position of Aberdeen Airport;
> Heathrow’s position as the only significant hub airport; and
> aspects of the planning system, Government policy and regulatory system which distort competition.
BAA and the CC also agreed that certain parts of the Report, which address the adverse effects of, and remedies for, BAA’s common ownership of various airports, should be quashed and referred to the CC with a direction to reconsider and make a new decision in accordance with the CAT’s ruling.

BAA and the CC objected to Ryanair’s proposals that the CAT’s order should include certain procedural directions regarding the CC’s reconsideration to avoid possible delay. These included the CC identifying the staff members and documents it proposes to use, and the parts of the Report that it regards as admissible evidence upon which reliance can be placed.

The CAT found that Ryanair’s proposals would require the CC and BAA to carry out a considerable amount of work which might be unnecessary and rejected these. The CC has given an assurance that it will deal with the reconsideration as efficiently and expeditiously as possible.

Request for permission to appeal

Pursuant to the Enterprise Act 2002, permission to appeal against judgments of the CAT can only be granted where a point of law is raised. In addition, the CAT had to consider that the appeal would have a real prospect of success or that there was some other compelling reason why the appeal should be heard. On 10 February, the CC sought leave to appeal to the Court of Appeal against the CAT’s judgment of December 2009.

CC’s request:

The CC subsequently sought permission to appeal on the grounds that the CAT committed an error of law in its findings of apparent bias of Professor Peter Moizer. The CC also submitted that any such bias held by Professor Moizer cannot have had any “operative effect”, as BAA had already decided to sell Gatwick.

The CAT did acknowledge that a point of law arose, but it did not believe that the CC had a real prospect of success, as the CAT had unanimously reached a conclusion of apparent bias in a substantive hearing prior to the judgment. The CAT stated that the second submission, in relation to operative effect, went more to the question of relief than to bias, and that it did not raise a point of law. The CAT held that this argument would only be material if the CC were successful in its argument in relation to apparent bias.

Ryanair’s request:

Ryanair sought permission to appeal on the grounds raised by the CC; and also on the grounds that the CAT made an error in law in finding that BAA neither knew nor ought to have known the link between Professor Moizer, the Fund and MAG. Accordingly, Ryanair claimed that BAA had waived the apparent bias and any objection it had.

The CAT did not believe any point of law was raised by the first claim, or that it would have a real prospect of success. The CAT rejected the second claim, as it assumed the success of the other grounds of appeal.

The CAT rejected Ryanair’s additional claim as to the importance of the Report to airport customers and the damage that would be caused by quashing it as it would delay the benefits of the CC’s Report to consumers. It also rejected Ryanair’s claim that there was a need for further judicial guidance on the matters it raised in its grounds for appeal.

The CC now has until 12 March 2010 to decide whether to seek leave to appeal from the Court of Appeal.

Sources:

BAA Limited v Competition Commission [2010] CAT 9
BAA Limited v Competition Commission. Case No: 1110/6/8/09
MERGERS

OFT
1. **The Ambassador Theatre Group Limited / Live Nation (Venues) UK Ltd** – The OFT has published its clearance decision in the completed acquisition by The Ambassador Theatre Group Limited of theatres previously owned by Live Nation (Venues) UK Ltd (24.02.2010).

2. **Home Delivery Network Limited / DHL Express (UK) Limited** – The OFT has published its clearance decision in the anticipated acquisition by Home Delivery Network Limited of DHL Express (UK) Limited’s domestic ‘business to business’ and ‘business to consumer’ packet and parcel delivery service (25.02.2010).

3. **OFT accepts Aggregate Industries UK Limited undertakings** – The OFT has announced that it has accepted undertakings from Aggregate Industries UK Limited, requiring it to divest the Gunheath Divestment Business to Brookland Sand and Aggregates Limited on terms approved in advance by the OFT (03.03.2010).

Undertakings in lieu of CC reference
4. **OFT consults on undertakings in lieu of referring Co-operative Group acquisition of Plymouth & South West Co-operative** – The OFT has published a consultation on the undertakings that it intends to accept from the Co-operative Group in lieu of referring its completed acquisition of Plymouth & South West Co-operative to the CC under the Enterprise Act 2002 (02.03.2010).

ANTITRUST

5. **OFT issues Statement of Objections against Reckitt Benckiser** – The OFT has issued a Statement of Objections alleging that Reckitt Benckiser abused its dominant position in the market for the NHS supply of alginate and antacid heartburn medicines. The OFT alleges that Reckitt Benckiser sought to restrict competition to its Gaviscon brand by withdrawing and de-listing its NHS packs of Gaviscon Original Liquid from the NHS prescription channel. The OFT alleges that the withdrawal of this product from the NHS prescription list was deliberately timed to take place before the generic name of the product was published. In this way, GPs would identify a patented, more expensive Gaviscon product, and not the cheaper, delisted product (23.02.2010).

6. **Competition Commission publishes a review of the remedies process in market investigations** – The CC has produced a summary of recommendations and proposed actions (24.02.2010).

7. **Regulation of Investigatory Powers Order 2010 No. 462 published together with explanatory memorandum** – The Secretary of State has issued codes of practice regarding the exercise and performance of the powers and duties conferred or imposed under the Regulation of Investigatory Powers Act 1997 (02.03.2010).

8. **Regulation of Investigatory Powers Order 2010 No. 463 published together with explanatory memorandum** – The Secretary of State has issued codes of practice regarding the exercise and performance of the powers and duties conferred or imposed under the Regulation of Investigatory Powers Act 1997 and the Intelligence Services Act 1994 in relation to the carrying out of covert surveillance and interference with property or wireless telegraphy under those acts (03.03.2010).

CAT

9. **Court of Appeal rules on National Grid infringement** – The Court of Appeal has held that National Grid breached the law and acted anti-competitively in the domestic gas metering market. However, the Court of Appeal further reduced the fine imposed on National Grid to £15 million, which is the highest financial penalty for abuse of dominance imposed in the UK to date. This ruling endorses Ofgem’s findings in April 2008, and a subsequent decision in April 2009 in favour of Ofgem by the CAT (23.02.2010).
10. CAT publishes ruling on relief and permission to appeal in BAA / CC market investigation – See main article

11. CAT publishes order and stays claim for damages brought against Degussa Limited – The CAT has stayed a claim for damages against Degussa under section 47A of the Competition Act 1998 brought by three claimants against Evonik Degussa GmbH and its UK subsidiary. The claimants are seeking damages for losses allegedly resulting from Degussa’s participation in an illegal price-fixing cartel relating to methionine, which is used in animal feed (26.02.2010).

Other

12. Scottish Court of Session gives ruling for breach of competition warranty claim – The Scottish Court of Session has published an opinion of Lord Glennie in an action claiming damages for breach of a competition warranty. Lord Glennie considered the meaning of the warranty provision which related to the “awareness” of the warrantors, and the level of knowledge required to demonstrate a breach of the warranty (28.01.2010).

13. Northern Ireland High Court gives ruling on whether procurement actions were brought in time – The Northern Ireland High Court has given a ruling as to whether procurement actions were brought in time under the Utilities Contracts Regulations 2006. It held that where a tenderer knows that a contracting party has breached the Regulations it must bring a prompt action, and cannot wait until the outcome of the tender process before deciding whether to bring an action (09.02.2010).

14. Department of Health announces settlement with Kent Pharmaceuticals Limited – The Department of Health and Kent Pharmaceuticals have announced settlement of the claims brought against Kent Pharmaceuticals for its alleged anti-competitive cartel conduct in connection with the supply to the NHS of generic drugs. On a full and final basis, and without admission of liability, Kent Pharmaceuticals has agreed to pay the NHS an undisclosed sum (26.02.2010).

15. OFT withdraws its request to the EC in relation to Orange / T-Mobile merger – The OFT has withdrawn a request submitted on 2 February 2010 to the European Commission pursuant to Article 9 of the EU Merger Regulation seeking a reference back to the UK competition authorities of the UK aspects of the Orange / T-Mobile merger (01.03.2010).

16. Scottish Court of Session gives ruling on whether procurement actions were brought in time – The Scottish Court of Session has given a ruling as to whether procurement actions were brought in time under the Public Service Contracts Regulations 1993 and on the validity of these Regulations. It held that an action brought outside the three month limit was out of time and there were no grounds to justify the Court exercising its discretion to extend the limit (03.03.2010).

REGULATORY

Energy

17. Ofgem modifies Special Condition C8F of the National Grid Gas’s Transmission System licence – Ofgem has published a statutory notice to modify Special Condition 8F of the gas transporter licence in respect of the National Transmission System held by National Grid Gas Plc. The modification amends the National Transmission System shrinkage compressor usage volume target and the 2009/10 Environmental Incentive volume target. It applies retrospectively from 1 April 2009 (22.02.2010).

18. Ofgem publishes final gas transmission system operator incentive scheme proposals – Ofgem has published its final proposals for the gas transmission system operator incentive schemes for National Grid Gas to apply from 1 April 2010 (26.02.2010).
Telecommunications/Media/Technology

19. **CAT refers specified control matters in WLR charge controls to CC** – The CAT has referred specified control matters in wholesale line rental charge controls to the Competition Commission, pursuant to the Communications Act 2003. This order provides for the CC to determine certain issues raised by the Carphone Warehouse in its appeal against Ofcom. (25.02.2010).

20. **Ofcom publishes methodology for review of financial terms of Channel 3 and Channel 5 licences** – Ofcom has published reviews of the financial terms for the Channel 3 and Channel 5 licences following a consultation it issued in October 2010. As part of the valuation exercise, Ofcom expects to receive data submissions from licensees by May, and to determine revised terms by September 2010 (03.03.2010).

Water

21. **Ofwat publishes order for a variation of a bulk supply agreement between Albion Water and Welsh Water** – Ofwat has published an order in accordance with Section 40A of the Water Industry Act 1991 for a variation of a bulk supply agreement (22.02.2010).

22. **Ofwat publishes response to consultation on developing banking and financial services available at Post Office** – Ofwat has published its response to the consultation by the Department of Business, Innovation and Skills on developing banking and financial services available at the Post Office. Ofwat makes proposals regarding billing and payment methods with reference to its own experience regarding billing for water services (26.02.2010).

**CONSULTATIONS**

23. **ORR consults on new approach to enforcement of breaches of licences** (19.02.2010).

24. **Ofgem consults on liquidity proposals for Great Britain wholesale electricity market** (22.02.2010).

25. **Ofwat consults on varying the appointment of water and sewerage services supplier to King’s Cross Central site in London** (23.02.2010).


27. **ORR consults on modifying the financial indebtedness licence condition held by Network Rail** (26.02.2010).


29. **Ofgem consults on review of ‘ring fence’ conditions in network operator licences** (03.03.2010).

30. **Ofwat consults on variations to bulk supply pricing principles** (05.03.2010).

31. **Ofwat consults on new appointments and variations for companies offering water, sewerage or water and sewerage services** (05.03.2010).
PUBLICATIONS

32. Office of Government Commerce publishes Procurement Policy Note on the time limits for challenges under the Public Contracts Regulations and the Utilities Contracts Regulations (22.02.2010).


34. House of Commons Business, Innovation and Skills’ Committee publishes follow-up report on pub companies (23.02.2010).

35. Ofgem publishes revised set of Offshore Transmission Owner (OFTO) special licence conditions (01.03.2010).

36. Ofwat publishes strategy document for regulation of water and sewerage sectors (03.03.2010).