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Spurring Competition Among UK Airports

Law360, New York (April 13, 2009) -- On March 19, 2009, following a two-year inquiry, the Competition Commission announced that BAA Airports Ltd. must sell three of its seven UK airports within two years in order to open the UK airports sector up to competition.

The commission stated that, while the forced sale of these airports will have a significant impact on BAA's business, it could see no other alternative, given the nature and scale of the competition problems that it found during its investigation.

The commission has the authority to investigate the competitiveness of UK markets and the practices of market participants, and where it identifies problems it has the power to take action itself or to recommend actions to be taken by other governmental authorities.

Therefore, following a reference by the Office of Fair Trading on March 29, 2007, the commission launched an in-depth investigation into the supply of airport services in the UK, to determine whether any features of the market or markets for these services prevent, restrict or distort competition and, if so, what remedial action should be taken.

BAA, which is owned by Spanish group Ferrovial, owns seven UK airports (Heathrow, Gatwick, Stansted, Southampton, Edinburgh, Glasgow and Aberdeen) that together account for over 60 percent of all UK air passengers.

Heathrow, Gatwick, Stansted and Southampton account for 90 percent of air passengers in southeast England, while Edinburgh, Glasgow and Aberdeen account for 84 percent of air passengers in Scotland.

The commission concluded that common ownership by BAA of these airports has severely hampered competition among airports, adversely affecting passengers and airlines.

Therefore, and in order to kick-start competition in this sector, the commission has ordered BAA to sell three of its airports in sequence within two years, starting with Gatwick, then Stansted, and finally one of either Edinburgh or Glasgow.

Analysts estimate the combined value of the three airports could total between £3.5 billion and £4 billion.

The commission also identified additional problems, which in its view are best addressed by governmental authorities other than itself.

The commission recommended that the Department for Transport ensure that its aviation policy does not unnecessarily restrict competition, and for example it should consider the possibility of a second runway at Gatwick as a way of increasing capacity and thereby competition.

The commission also identified problems with the existing regulatory system, while acknowledging that the government was in the process of updating this.

The commission recommended that, to address the continued market power enjoyed by BAA at Heathrow and Aberdeen in the meantime, the Civil Aviation Authority (CAA — the industry regulator) should strengthen the consultation process between BAA and the airlines, and it should carry out annual audits of service levels.

The commission also emphasized that the CAA's primary objective should be the promotion of the consumer interest — the interests of airlines are secondary.

While the commission opined that it is "confident that the sale of these airports will bring substantial benefits to passengers and airlines," BAA issued a press release stating that "the commission's analysis is flawed and its remedies may be impractical in current economic conditions." This suggests there is a very real prospect that BAA will appeal the commission's recommendation.

Since BAA appears to acknowledge the need for change in this sector, the main disagreement may be over the practicalities of the sale of these airports.

BAA's CEO said that it "might have to appeal if we reach the conclusion that it is simply not practical to proceed." He added, "it is not just a question of whether we agree or not with the Competition Commissioner's analysis, it is also a question of the practicalities of selling three airports in the current, extraordinarily tough conditions."

Two potential buyers already have pulled out of the Gatwick bid, and the deadline for final binding offers for Gatwick has already been postponed to the end of April to allow bidders more time raise capital. The commission conceded that it may give BAA more time to sell the airports should market circumstances change.

BAA nevertheless may choose to appeal the commission's decision to require the divestiture of the airports, if it believes that the commission's analysis was indeed flawed.

The Competition Appeal Tribunal's decision in favor of Tesco earlier this month (as described in a prior Antitrust Alert) highlighted that it is critical that the commission give proper consideration to the possible costs to consumers and the effectiveness of the remedies it suggests.

BAA could be encouraged by Tesco's success in that case, and an appeal may give it more time and more favorable economic conditions in which to sell the three airports.

The commission's findings will have a significant impact on the structure of and developments in the market for airport services.

It is a long and eagerly awaited report in a sector that in the UK already is under pressure to respond to increasing passenger numbers, and current airport facilities are widely regarded as unsatisfactory.

The commission's report highlights its ability to force companies to make significant divestitures which have the potential to radically alter the fortunes of BAA and its industry.

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