

The UK Court of Appeal's rejects claims of apparent bias in the supply of airport services market investigation (BAA, Ryanair)

United Kingdom, Procedures, Judicial review, Effect on competition, Rights of Defence, Investigations/Inquiries, Market inquiry, Transport

The UK Court of Appeal recently rejected claims made by BAA that the Competition Commission's Report into the common ownership of the UK's main airports was tainted by apparent bias. One member of the Competition Commission's inquiry group had indirect links to a potential bidder for one of the airports BAA planned to divest. The Court of Appeal rejected in part the finding of apparent bias by the Competition Appeal Tribunal and considered that the apparent bias for a limited time period did not 'contaminate' the final Report. Although BAA is seeking to appeal this judgment to the Supreme Court, this outcome is vital to the future quality and integrity of the UK's market investigation process.

Background

In 2006 the UK Office of Fair Trading began to investigate BAA's ownership of the Heathrow, Gatwick, Stansted, Southampton, Edinburgh, Glasgow and Aberdeen airports. Following a referral from the OFT, in March 2009, the Competition Commission published its market investigation report (the "Report") into the supply of airport services by BAA within the UK. The Report found that the common ownership of the UK's main passenger airports was causing an adverse effect on competition. The remedy imposed required the divestiture of Stansted, Gatwick and Glasgow/Edinburgh airports.

In May 2009 BAA launched an appeal before the Competition Appeal Tribunal ("CAT") alleging that due to the links that a member of the inquiry group had with an active contributor to the investigation and a potential acquirer of the divested airports, the Report was flawed on the basis of apparent bias. The CAT's judgment is the subject of a previous comment [1].

Court of Appeal Judgment

In applying the maxim *nemo iudex in causa sua*, English law distinguishes between cases of actual bias (where the decision maker has a predetermination towards an outcome) and apparent bias (where, although no suggestion there was bias in fact, the perception of justice being seen to be done is the guiding principle). At the outset, it is important to underline that there has never been an accusation in this case of actual bias - but solely one of apparent bias. The law on apparent bias was uncontested in this case - the Court repeated the objective test established in *Porter v Magill* of "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

The salient point from the CAT judgment, which was "reached with great reluctance" was that Professor Moizier's membership of the Competition Commission inquiry group could be seen to be in conflict with his long term role as an advisor to the Greater Manchester Pension Fund (the "Fund") (which invests funds on behalf of the same local authorities that own the Manchester Airport Group ("Manchester Airport")). The CAT had found apparent bias in favour of Manchester Airport in the period from the beginning of the Competition Commission investigation until Professor Moizier stepped down from the inquiry. They also found apparent bias in favour of the Fund from the period following Professor Moizier learning

of the Fund's intentions as regards a potential bid for Gatwick airport.

The Court of Appeal looked upon the circumstances quite differently. As regards the apparent bias in favour of Manchester Airport, the Court re-examined the nature of Professor's Moizier's links with Manchester Airport. Given that he had no formal contractual relationship with Manchester Airport, and that his fiduciary duties in managing the Fund were to the pension beneficiaries, the fair-minded and informed observer would, on balance, not view there to be a conflict of interests giving rise to apparent bias.

However, in terms of the apparent bias in favour of the Fund, the Court agreed with the CAT - that as soon as Professor Moizier knew of the Fund's intention (on 2 December 2008) to be part of a consortium in a bid for Gatwick Airport, there was a real possibility of bias in the mind of a objective third party observer.

The Competition Commission sought to argue before the Court, that even if there was apparent bias as regards the Fund, it would have had no operative effect on the Report. BAA in September 2008 had announced it was intending to dispose of Gatwick Airport and thus any apparent bias after 2 December 2008 was ineffective. The Court rejected this argument. Factually, BAA's intentions were conditional on the Report requiring a sale of Gatwick and legally, BAA were not required to be "put in the position of having to prove operative effect once apparent bias has been established".

The intervener in the case, Ryanair, sought to argue the Report should not be annulled on the grounds that there was no 'contamination' i.e. that even if there was apparent bias as regards Professor Moizier, the remaining members of the Panel were not "afflicted" by the same issues. Lord Justice Maurice Kay admitted "that we simply do not know what influence he may or may not have had". However, given that by the time the apparent bias arose on 2 December 2008, the inquiry group had reached provisional findings and that those findings did not alter significantly in the final Report, it was in the "reaches of fantasy" that Professor Moizier tainted the Report with his apparent bias. After 2 December 2008 Professor Moizier had limited involvement in the process and there was no evidence that would entitle a fair-minded and informed observer to draw negative inferences from. On that basis, the Court allowed the appeal and restored the Report in full.

Next steps

Following the Judgment, BAA announced that it would be seeking leave to appeal to the UK Supreme Court. Meanwhile, the Competition Commission announced its intention to return its focus to the Report and ensure BAA now implements the remaining remedies contained therein i.e. to sell Stansted and Edinburgh or Glasgow airports (BAA already disposed of Gatwick in October 2009). Of particular note is the Competition Commission's reference to an independent review of their rules on conflicts of interest.

Significance

The Court of Appeal Judgment is a useful restatement of the established case law on apparent bias and may be of particular interest to administrative/public law practitioners. However, from a competition law perspective, the Judgment's impact has been to avoid an embarrassing defeat of the market investigation process - which is one unique feature of the UK competition law regime.

Firstly, if the Court of Appeal had agreed with the CAT's assessment, it would have risked rendering the lengthy and expensive BAA market investigation process nugatory. On a practical level, this would have meant the Competition Commission would have had to recommence its investigation. Given that BAA has now already divested Gatwick Airport, this certainly would have required more than a mere 'copy/paste' from its previous Report findings.

Second, a cornerstone of the Competition Commission's credibility and quality is its ability to 'outsource' decision making

to specialists from particular sectors and industries. Clearly members with experience bring with them the 'baggage' of their day jobs.

Third, an adverse Judgment would have stoked the fires of those seeking a radical redrawing of the UK competition regime. The UK government recently announced that in 2011 the OFT and Competition Commission will be merged together. One of the key arguments made by the Government was that the current process, particular as regards market investigations is lengthy and damaging to businesses. Clearly, this case is one striking example of this: the OFT's original investigation began in early 2006 and, with the potential for an appeal to the Supreme Court and, in theory, remittal back to the Competition Commission for a new Report, the case is not yet over.

[1] See Sonam Mathur, The Competition Appeal Tribunal upholds the appeal against the Competition Commission break-up decision on airport services market (BAA Ltd), 21 December 2009, e-Competitions, n° 30623.

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