Discriminatory Prices for Airport Charges:

Commentary on a Swedish Case

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This article provides a commentary on a recent Swedish court case regarding discriminatory prices for airport charges.

On 12 November 2002, the Swedish Supreme Court, the court of highest instance in Swedish civil law cases, refused the Swedish Civil Aviation Administration (SCAA) leave to appeal in a dispute between the Swedish carrier SAS and the SCAA regarding the payment for the construction of Terminal 2 at Arlanda Airport. As a consequence, the judgment of the Göta Court of Appeal stands.[1] The Göta Court of Appeal, upholding the judgment of the lower court, concluded that the SCAA had abused its dominant position by charging SAS with discriminatory airport charges, in breach of Article 82 of the EC Treaty and section 19 of the Swedish Competition Act. The SCAA will be liable to repay SAS an amount of SEK600 million (approximately €64.9 million) and SAS will be released from further payment liability for Terminal 2. In total, the case is worth approximately SEK1 billion (approximately €108.1 million) for SAS. This is the largest amount ever successfully reclaimed in a competition law dispute in Swedish courts and possibly also in European courts.

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Background

In 1990, when Terminal 2 was constructed for domestic traffic, the Swedish aviation market was not yet deregulated and SAS and Linjeflyg were the only domestic carriers. In order to support the construction of the terminal, SAS and Linjeflyg agreed to pay a contract fee, something which was customary and may have seemed justifiable at the time when only these two carriers were supposed to use the new terminal. However, when the Swedish aviation market was deregulated in 1992/1993, the SCAA changed the fee system from contract fees to

tariff-based fees. Nevertheless, in addition to paying in accordance with the new tariff-based system, SAS (which in 1992 had acquired Linjeflyg) also had to continue to pay a major part of Terminal 2 through a contract fee. As SAS was no longer using Terminal 2, but the terminal was used by other major airline companies such as British Airways, Finnair and Sabena, the situation became all the more untenable. SAS claimed that the SCAA abused its dominant position when charging SAS with discriminatory prices.[2] The SCAA rejected the claim.

Contractual claims

A key issue in the case was whether SAS's specific payment liability for Terminal 2 should be considered as comparable with the compensation for airport services according to the applicable tariffs or whether it should be seen as a compensation for a specific service that the SCAA had provided to SAS. The SCAA claimed that SAS under the original contract fee had assumed a specific payment liability for Terminal 2, since the terminal according to the SCAA had been constructed and designed in accordance with SAS's wishes. The SCAA argued that the specific payment liability should not be considered as a compensation for SAS's traffic at Arlanda Airport, but as a continuation of SAS's obligations under the original contract fee and that, consequently, the issue should be assessed under contractual rules rather than under competition rules.

The Court of Appeal dismissed the SCAA's claim regarding the inapplicability of the competition rules on the ground that the competition rules contain a mandatory prohibition of certain specified abuses that from an *objective* standpoint contain measures restricting competition, the inapplicability of which cannot be agreed on.[3] Thus, for the parties to an agreement this means that even if an agreement does not at the initial stage infringe the competition rules and thereby is valid under civil law, this does not prevent the agreement, at a later stage, from being considered as infringing the competition rules and thus becoming null and void under civil law. Applied to the case at hand, one may argue that the agreement on payment liability for Terminal 2 entered into between SAS/Linjeflyg and the SCAA *before* the deregulation did not restrict competition and was consequently valid under civil law, since SAS and Linjeflyg *at the time* had priority rights to domestic flights and compensation for airport services could therefore be regulated under similar agreements. However, subsequent to the deregulation of the domestic aviation market, the market conditions changed substantially, which was reflected, for example, in the fact that the SCAA introduced a new tariff-based system. The assessment under the competition rules thus became different.

Comparable services

Once it had been determined that SAS's specific payment liability for Terminal 2 should be considered under the competition rules, the courts went on to consider whether that payment liability should also be considered as comparable with the compensation for airport services according to the applicable tariffs. If the answer to this question would be negative, there would be no ground for price discrimination.

The courts, however, found that even if SAS had a certain influence on the construction of the terminal, this was logical considering the monopoly position that the company, together with Linjeflyg, held at the time. Furthermore, the courts held that this influence was not of such a nature that, for that reason, SAS simply should have a specific payment liability for the terminal after the deregulation and the introduction of the new tariff-based system. In addition, the terminal could, after some reconstruction, be used by other carriers and for international flights. The courts concluded that SAS's specific payment liability for Terminal 2 was part of the fees that the company had to pay for using Arlanda Airport and that the specific payment liability therefore was comparable to the compensation under the new tariff. Hence, the courts held that SAS and other airline companies received comparable services.

Objective justification

Even if a company in a dominant position charges different prices for the same service, such differences in price may be objectively justified if, for example, the dominant undertaking can show that the difference is due to cost savings or economies of scale. The SCAA argued that SAS had caused the SCAA additional costs under the construction of Terminal 2 and that the price differentiation should therefore be permitted.

The courts found that SAS had not caused any such additional costs, considering among other things that the terminal had not been constructed in

a specific manner and that it was continually used for airport traffic. The SCAA further argued that it was objectively justified to charge SAS a higher fee due to the advantage SAS had had in being able to move its domestic flights from Terminal 2 to Terminal 4 at Arlanda Airport. However, the Court of Appeal held that this could not justify the conclusion that the price differentiation was objectively justified, since the new tariff neither takes account of from which terminal a carrier is operating nor the actual costs that a particular carrier causes when using the services of the SCAA.

Concluding remarks

The case confirms that very compelling reasons are required for allowing a dominant player to differentiate in price between customers and that the requirements increase the stronger the position in the market. As the District Court held, the requirements are particularly high when the dominant player, such as the SCAA, is a monopolist. Furthermore, the case supports the conclusion that the requirements on cost justification are substantially higher where so-called *exploitative abuse* is considered, ie discriminatory pricing by a dominant undertaking in relation to its customers, than when so-called *exclusionary abuse* is considered, ie discriminatory pricing by a dominant undertaking in relation to its competitors. Accordingly, the case confirms that it is very difficult for an airport authority not to apply uniform price levels to the airline companies using the airport.[4]

Finally, it is of interest to note that the Swedish courts were willing to apply both Article 82 of the EC Treaty and section 19 of the Swedish Competition Act, and that they almost exclusively relied on EC case law. It was, however, undisputed between the parties that trade between Member States was affected. The two sets of rules are also very similar. Nevertheless, the applicability of the EC competition rules to the case is of specific relevance considering the forthcoming modernisation of Regulation 17/62, which entails that the monitoring and application of EC competition rules to a large extent will be decentralised to national courts and competition authorities.[5] ■

Notes

* The authors acted as legal counsel for SAS in the case.

1 Judgment of 27 April 2001 in Case T-33/00.

2 In accordance with EC case law, airports have been considered as separate relevant markets and the relevant aviation authority has consequently been found to have a dominant position. See, eg *Brussels National Airport* (*Zaventem*), OJ 1995 L 216/8; *Illmailulaitos/Luftfartsverket*, OJ 1999 L 69/24; *Portuguese Airports*, OJ 1999 L 69/31; *Spanish airports*, OJ 2000 L 208/36; Case C-163/99 *Portuguese Republic v Commission* [2001] ECR I-2613; *cf* Case C-179/90 *Merzi convezionali Porto di Genova v Siderurgica Gabrielli* [1991] ECR I-5889; and Case C-18/93 *Corsica Ferries Italia v Corpo dei Piloti de Porto di Genova* [1994] ECR I-1783.

3 See, eg Case T-65/89 *BPB Industries and British Gypsum* [1993] ECR II-65.

4 See also, eg *Brussels National Airport* (*Zaventem*), OJ 1995 L 216/8 and *Illmailulaitos/Luftfartsverket*, OJ 1999 L 69/24.

5 Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.