MINUTES

AVIATION: AIRPORTS POLICY

Expert Group: Thessaloniki Forum of Airport Charges Regulators
Working Group on Market Power Assessments

Brussels, 2 February 2017

Members of the Expert Group

Chair: European Commission, DG Mobility and Transport (DG MOVE)
Present (members): Belgium (BE) (represented at federal level), Germany (DE) (represented at federal level and by the Land of Hessen), Denmark (DK), Spain (ES), France (FR), Greece (EL) Ireland (IE), Italy (IT), Poland (PL), The Netherlands (NL), United Kingdom (UK).

Nature of the meeting: non-public

Introduction

DG MOVE welcomed attendees and thanked them for their interest to participate in the newly set-up Working Group on Market Power Assessments (MPA). Following approval of the agenda, DG MOVE reminded colleagues that the Aviation Strategy tasked the Forum with providing COM with recommendations on how airports’ market power assessments could be used to ensure regulation is appropriately targeted. DG MOVE also briefed the audience on the ongoing work on the evaluation of the Directive.

Discussions on the Draft Terms of Reference

DG MOVE circulated before the meeting draft ToRs where the task assigned by the Strategy is split in two different exercises: 1) how to use MPAs for economic regulation in national legislations and how these feature in the broader framework; and 2) how MPAs can be best performed. DG MOVE explained that it wishes the WG to deliver on both points, but highlighted that the priority is the first point, with a deadline by 2nd June 2017, while the second is less time critical, and the suggested deadline of October 2017 could move.

Some ISAs pointed out that the timeline is very short. DG MOVE clarified that the time constraints are linked to the evaluation schedule and acknowledged that it expects a draft report on the first task in early June, even if the product is to be finalised after that date. DG MOVE further explained that the audiences for the two tasks was different – the first recommendations paper should be directed at the Commission and address the question of how MPAs could be used to ensure economic regulation in the EU were better
targeted, while for second paper would be directed at other ISAs, and provide practical advice on best practise in performing MPAs.

Even if in the current regime, MPAs continue to remain optional, there is still some value in exploring them; they have been carried out only in a limited number of MS so far. In some MS, economic regulation of airports is stipulated in the law. ISAs agree that overall this exercise may help to address weak points of the ACD. DG MOVE underlined the usefulness in tapping into the experience of some ISAs, in particular those which have competition powers and knowledge and clarified that it does not have any intention to promote any particular model.

Regarding the notion of 'market power', DG MOVE clarified that the terminology used in competition law should be employed.

DG MOVE also suggested consulting the industry regarding market power, reminding that a similar approach proved successful during the preparation of the Recommendations on consultation and the cost of capital. However the outcome of the WG need only reflect the views of the ISAs.

ISAs agreed to focus on the first point and to separate the two exercises.

**Presentations**

**DG COMP**

The session started with DG COMP’s presentation on their approach to assessing airport market power. There are 2 possible angles to address the issue of market power: 1) *ex ante*, meaning possible justification for intervention / economic regulation; and 2) *ex post*, meaning enforcement of competition rules (antitrust and mergers). DG COMP described the principles and objectives of competition policy on abuse of dominant position, clarifying that market dominance is not prohibited in itself. The definition of market dominance (= the power of an undertaking to behave to an appreciable extent independently of its competitors) stems from EU case law. When assessing the competitive structure of the market, DG COMP generally looks at three aspects: market position (market shares, conditions, etc.); barriers to entry and expansion; and countervailing buyer power.

Following DG COMP's presentation, a discussion took place. One ISA pointed out that when defining an airport’s usual catchment area, the issue of chain substitution should also be taken into account and DG COMP agreed that the definition of the market is a very important step and must be considered on a case by case basis and recommended asking the views of different stakeholders (consumers, airlines, other companies whose business rely on the airport in question, etc). Another ISA wished to know more about the amount of evidence and work that needs to be put into such exercises and DG COMP stated that this is indeed a rather lengthy process, mainly because it involves consultation of a wide range of stakeholders (it cannot take less than 1 year). To a point raised by another ISA, DG COMP confirmed that in telecoms the markets are already defined, whether for airports there is no such background available. As to the definition of the market, DG COMP clarified that the principles applied are the same.
NL ISA

The Dutch ISA described the assessment of the competitive situation of AMS which was carried out by an external contractor in 2009-2010. The assessment looked at two markets: the provision of airport infrastructure to airlines; and the provision of infrastructure for groundhandlers and others. Within the category of infrastructure for airlines, four subdivisions were made: O&D passengers, transfer passengers, local/instruction flights; and cargo. The study concluded that AMS has market power in all four markets. The ISA concluded however that this subdivision into four markets does not help to determine whether economic regulation is necessary and the exact market definition has been left open.

Regarding a question about airlines sunk costs, the NL ISA replied that in case of AMS, 70% of total traffic is represented by KLM, 40% of which are transfer passengers; KLM made considerable investments at AMS and built its whole network relying on this hub, therefore switching away would imply very high costs. Another ISA asked a question regarding how the catchment area was assessed and the NL ISA replied that a number of interviews were carried out, since this cannot be done in a very scientific way; it was estimated that 94% of the total number of air passengers in the NL use AMS as departing airport.

UK ISA

The UK ISA presented the system implemented in the UK, which is based on MPAs, to determine whether the airport is regulated, pursuant to Article 6 (5) (b) of the Directive and national legislation. This system was introduced under the 2012 Civil Aviation Act, which also granted the CAA (ISA) concurrent competition powers, alongside the Competition and Markets Authority which has competition powers over all economic sectors. Before 2012, a number of designated airports were regulated and the designations were made by the Government, with advice from the CAA. Under the new regime, the Market Power Test (MPT), which actually consists of 3 tests (A, B and C), was introduced in the legislation. If the MPT is met, then the airport operator needs an economic licence from the CAA to levy airport charges. Test A is aimed at testing whether an airport operator has or is likely to acquire substantial market power; Test B assesses whether competition law provides sufficient protection against the risk of abuse of such power and Test C tests whether the benefits of regulating the operator outweigh the adverse effects. The most recent determinations concluded in 2014 for LHR, LGW and STN with the result that LHR and LGW remained regulated and STN was deregulated. The CAA explained in detail the methodology which it has used in reaching these conclusions and pointed to the recently published guidance. The CAA also explained that according to the national law, they may undertake MPAs whenever they decide. The CAA would also have to undertake MPAs if requested by interested parties for airports over 5 mppa (if there is no existing determination) or if there has been a material change of circumstance since the last determination.

One ISA asked about the level of service aggregation and UK ISA replied that they considered it appropriate to define the product market as the bundle of airport operation services offered to airlines. The UK ISA also mentioned that carrying out the MPAs is very resource intensive and it took them 3 years to complete the last MPTs (2011-2014). To a question about the specificities of the regulation applicable at LGW and LHR, the UK ISA explained that LGW is regulated under a 'commitments' regime which seems to be satisfactory at present and which is due to expire in 2021. That regime is lighter to the one applied at LHR and the decision to introduce it was informed by the analysis done for the MPDs, as the degree of market power at LGW is likely to be lower than that
present at LHR. LHR is subject to RAB based regulation, using single till, which takes into consideration building blocks of the business; the regulation is reviewed every 5 years and work is currently under way on the regulation of new runway financing and the next regulatory period.

**Concluding remarks and next steps**

The WG agreed to nominate the NL ISA as chair of this WG.

DG MOVE committed to circulate shortly a revised version of the ToR, asking for further suggestions, so that they are formally adopted by the WG as soon as possible.

The WG also exchanged views on how the paper on the first point (i.e. how to use MPAs for economic regulation in national legislations and how these feature in the broader framework) should be structured and agreed to meet again in March (date to be confirmed later on). The paper will aim to address a number of questions (still to be defined) and at the next meeting the airports and airlines will also be invited to present their own views on the topic.

DG MOVE thanked all participants.
Participants

Institutions
European Commission – DG MOVE

Member States
Belgium (represented at federal level) - Regulatory Body for Railway Transport and Brussels Airport Operations
Germany (represented at federal level and by the Land of Hessen) – Federal Ministry of Transport and Digital Infrastructure and Hessen Ministry for Economy, Energy, Transport and Regional Development
Denmark – Danish Transport Authority
France – General Directorate for Civil Aviation / General Council of Environment and Sustainable Development
Greece – Hellenic Civil Aviation Authority
Ireland – Commission for Aviation Regulation
Italy – National Organisation for Civil Aviation and Transports Regulation Authority
The Netherlands – Authority for Consumers & Markets
Poland – Civil Aviation Authority
Spain – National Commission for Markets and Competition
United Kingdom – Civil Aviation Authority