ABUSE OF DOMINANT POSITION (AIRPORTS): THE AdP CASE

Subject: Abuse of dominant position
Discrimination
"Undertakings".

Industry: Airport management
(Some implications for other industries)

Parties: Aéroports de Paris
Commission of the European Communities
Alpha Flight Services SAS (intervener)

Source: Judgment of the Court of Justice of the European Communities, dated 24 October 2002, in Case C-82/01 P, Aéroports de Paris v Commission of the European Communities

(Note. This case has a number of points of interest; but the most important, from a legal point of view, is the definition of an undertaking, within the meaning of Article 82 (formerly 86) of the EC Treaty. If the airport authority in question is not an "undertaking", then it is not covered by the rules on competition. However, the definition of undertakings in the case-law is extensive; and, in the present case, the Court reviews the relevant case-law and comes to the conclusion that, although AdP is a public corporation governed by French law and enjoys financial independence, it is nevertheless an undertaking and that it cannot therefore escape the Commission's claim that it has abused a dominant position. AdP submitted a number of other pleas to the Court; they were largely rejected. The extract from the judgment reported below concerns the issue of undertakings and mainly comprises paragraphs 68 to 83.)

Judgment

1. By application lodged at the Registry of the Court of Justice on 17 February 2001, Aéroports de Paris ('ADP') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 12December 2000 in Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929 ('the contested judgment'), in which the Court of First Instance dismissed ADP's application for annulment of Commission Decision 98/513/EC of 11 June 1998 relating to a proceeding under Article 86 of the EC Treaty (IV/35.613 - Alpha Flight Services/Aéroports de Paris) (OJ 1998 L 230, p. 10, 'the contested decision').

Facts giving rise to the dispute in the main proceedings

2. It is stated in the contested judgment that:
'1 The applicant, ADP, is a public corporation governed by French law and enjoying financial independence which, pursuant to Article L. 251-2 of the

French Civil Aviation Code, is responsible for the planning, administration and development of all the civil air installations which are centred in the Paris region and which seek to facilitate the arrival and departure of aircraft, to control traffic and to load, unload and groundhandle passengers, goods and mail carried by air, and also of all associated installations.

2 ADP is responsible for the running of Orly and Roissy-Charles-de-Gaulle (hereinafter Roissy-CDG) airports...

17 On 11 June 1998, the Commission adopted [the contested decision], which states:

Article 1

[ADP] has infringed Article 86 of the EC Treaty by using its dominant position as manager of the Paris airports to impose discriminatory commercial fees in the Paris airports of Orly and Roissy-Charles de Gaulle on suppliers or users engaged in ground handling or self-handling activities relating to catering (including the loading and unloading of food and beverages on aircraft), to the cleaning of aircraft and to the handling of cargo.

Article 2

[ADP] shall put an end to the infringement referred to in Article 1 by applying to the suppliers of ground handling services concerned a non-discriminatory scheme of commercial fees within two months of the date of notification of this Decision.'

The contested judgment

3. On 7 August 1998, ADP brought an action for annulment of the contested decision before the Court of First Instance.

4. By the contested judgment, the Court of First Instance rejected ADP's various pleas in law alleging, first, procedural irregularity; second, breach of the rights of defence; third, failure to comply with the obligation to state reasons; fourth, infringement of Article 86 of the EC Treaty; fifth, infringement of Article 90(2) of the EC Treaty (now Article 86(2) EC); sixth, infringement of Article 222 of the EC Treaty (now Article 295 EC) and seventh, misuse of powers...

The appeal

The seventh plea in law, alleging infringement of Article 86 of the Treaty by the Court of First Instance in characterising ADP as an undertaking

68. By its seventh plea in law, ADP submits that the Court of First Instance infringed Article 86 of the Treaty in characterising, at paragraphs 120 to 126 of the contested judgment, ADP as an undertaking within the meaning of that provision. The administration of publicly owned property, the only activity in

issue in the present case, involves the exercise of official powers and therefore cannot constitute a business activity for the purposes of Article 86 of the Treaty.

69. ADP states in that connection that, according to the case-law of the Court, the activities of public bodies which depend on the exercise of their official powers are not undertakings (see, *inter alia*, Case 30/87, *Bodson*). Applying that case-law, the Court of First Instance ought to have found that ADP was not an undertaking within the meaning of Article 86 of the Treaty.

70. ADP further submits that the case-law cited by the Court of First Instance at paragraph 123 of the contested judgment cannot, on any view, alter the fact that the administration of publicly-owned property involves the exercise of official powers and does not therefore constitute a business activity within the meaning of Article 86 of the Treaty. First, the judgment in Case 41/83, *Italy* v *Commission*, concerned telecommunications services, matters unrelated to the administration of publicly owned property, and the judgment in Case T-229/94, *Deutsche Bahn* v *Commission*, concerned the supply of locomotives and rail services, and did not address the question whether the administration of publicly-owned property constituted an economic activity.

71. Furthermore, since the sole point of importance is to determine whether the administration of publicly-owned property involves the exercise of official powers, the Court of First Instance's observation that the fact that an activity may be exercised by a private undertaking amounts to further evidence that the activity in question may be described as a business activity is irrelevant.

72. The Commission contends that that plea merely repeats the first part of the fourth plea in law raised by ADP before the Court of First Instance. It must therefore be declared inadmissible.

73. However, since the seventh plea raised in support of the appeal indicates precisely the contested elements of the judgment which it is sought to have set aside, and also the legal arguments specifically advanced in support of that application, it is admissible.

74. As regards the substance of the plea, as the Commission rightly submits, the fact that, for the exercise of part of its activities, an entity is vested with official powers does not, in itself, prevent it from being characterised as an undertaking within the meaning of Article 86 of the Treaty.

75. In that regard, it must be borne in mind that, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, *inter alia*, Joined Cases C-159/91 and C-160/91, *Poucet and Pistre*, paragraph 17). In order to determine whether the activities in question are those of an undertaking within the meaning of Article 86 of the Treaty, it is necessary to establish the nature of those activities (see, *inter alia*, Case C-364/92, *SAT Fluggesellschaft*, paragraph 19).

76. At paragraph 112 of the contested judgment the Court of First Instance drew a distinction between, on the one hand, ADP's purely administrative activities, in particular supervisory activities, and, on the other hand, the management and operation of the Paris airports, which are remunerated by commercial fees which vary according to turnover.

77. At paragraph 120 of the contested judgment the Court of First Instance pointed out that the activity as manager of the airport infrastructures, through which ADP determines the procedures and conditions under which suppliers of ground handling services operate, cannot be classified as a supervisory activity. Nor has ADP raised any argument on the basis of which it could be concluded that relations with suppliers of ground handling services fall within the exercise by ADP of its official powers as a public authority or that those relations are not separable from ADP's activities in the exercise of such powers.

78. The Court of First Instance was thus entitled to find, at paragraph 121 of the contested judgment, that the provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by ADP, constitutes an economic activity.

79. It is settled case-law that any activity consisting of offering goods and services on a given market is an economic activity (see, *inter alia*, Case C-35/96, *Commission* v *Italy*, paragraph 36 and Case C-475/99, *Glöckner*, paragraph 19).

80. Contrary to ADP's contention, the Court of First Instance could properly refer to the judgments in *Italy* v *Commission* and *Deutsche Bahn* v *Commission*, cited above, which also concerned the provision of infrastructures by entities responsible for their management.

81. In *Bodson*, cited above, the Court of Justice did not refer specifically to the existence of official powers precluding the applicability of Article 86 of the Treaty. In its judgment in *SAT Fluggesellschaft*, cited above, the Court held that, taken as a whole, the various activities of the entity concerned, by their nature, their aim and the rules to which they were subject, were connected with the exercise of powers which are typically those of a public authority and that none of those activities were separable from the others. That is not so in the present case.

82. Furthermore, contrary to ADP's argument, the Court of First Instance was right to point out, at paragraph 124 of the contested judgment, that according to the case-law of the Court of Justice, the fact that an activity may be exercised by a private undertaking amounts to further evidence that the activity in question may be described as a business activity.

83. Consequently, the seventh plea in law must be rejected as unfounded.

Court's Ruling

THE COURT (Sixth Chamber), hereby: 1. Dismisses the appeal;
2. Orders Aéroports de Paris to pay the costs. ■