

Agenda

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A bus(e) of dominance: the Arriva v Luton case

In January 2014, the High Court in London handed down a judgment in an abuse of dominance case between Luton Airport and bus operator, Arriva. Luton Airport was found to have abused its dominant position by excluding Arriva from accessing the bus station at the airport. The judgment provides useful insight into the economic and legal principles applying to access agreements in this type of case

Arriva has operated bus services to and from Luton Airport for 30 years. Until 30 April 2013 these services included the 757 bus route, which transported passengers between Luton Airport and London (Victoria) under the 'Greenline' brand.¹ On 1 May 2013, Luton stopped providing Arriva with access to the bus station, which is located just outside the terminal building at the airport. In response, Arriva brought an abuse of dominance claim against Luton at the High Court in London.² The Court ruled in Arriva's favour and the 757 bus route is now operating again from the bus station at the airport.

In 2012/13, Arriva's 757 service carried over 1m passengers a year and generated a turnover of approximately £7.5m. Arriva paid Luton Airport between 2% and 2.5% of turnover on this route under an agreement, in exchange for the use of the bus station at the airport.³ However, on 1 May 2013, Luton Airport stopped giving Arriva access to the bus station and other areas near the bus station and terminal building. Instead, the airport granted another bus operator, National Express, an exclusive concession to run bus services between the airport and London. This was in exchange for a significant proportion of National Express's passenger revenue on this route, which amounted to between 20% and 25% over the seven-year duration of the contract.⁴ This agreement also granted National Express the right of first refusal over the operation of new routes between the airport and other destinations in London. While National Express's concession was exclusive, there was a condition in the agreement that permitted another operator, easyBus, to use minibuses to run services to a particular destination in London (Earls Court) until 31 October 2015.

Arriva claimed that Luton Airport had abused its dominant position by granting National Express exclusivity for seven years and the right of first refusal over new routes, contrary to Section 18 of the Competition Act 1998. Arriva claimed that Luton Airport's actions also amounted to abuse due to

the Airport's discrimination in favour of easyBus by allowing these services to continue as an exception to the exclusivity.⁵

Luton Airport refuted this claim, in turn claiming that the agreement did not amount to an abuse, since the concession agreement did not distort competition in the downstream market and was objectively justified due to capacity constraints at the bus station. Furthermore, Luton Airport argued that, even if there were capacity for both Arriva's and National Express's services to London, it was not under an obligation to allocate space to Arriva to duplicate existing routes.

On 28 January 2014, the High Court determined that the terms of the agreement with National Express represented an abuse of dominance by Luton Airport.⁶ Specifically, the Court ruled that, while the tender itself was legitimate, the terms of the agreement—including the seven-year exclusivity period, the right of first refusal and the concession offered to easyBus—were anticompetitive.

This case raises a number of economic and legal issues that may have implications for airports or other facility operators which are considering contracting partners, holding concessions, or deciding on the terms of an agreement.

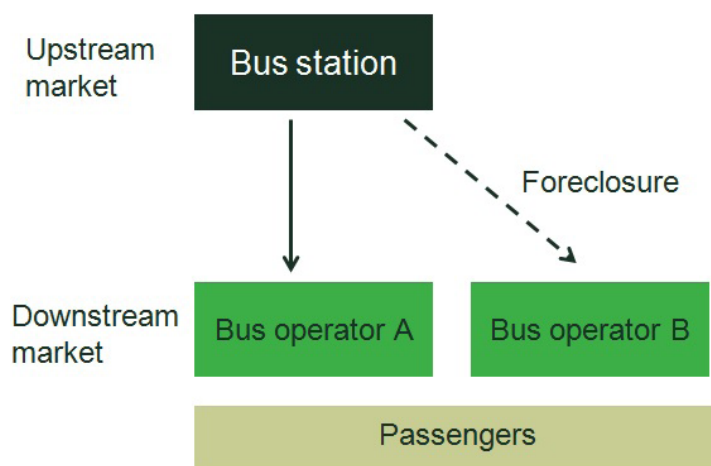
The situation: a closer look

In competition law, the principle has been established that a firm can be found to have abused its dominant position in one market with the object and/or effect of distorting competition in another, related market. A refusal to grant access to an upstream service, or granting such access in a discriminatory manner, resulting in a competitive detriment in the downstream market, can constitute anticompetitive practice. This type of case is not uncommon and can be classified as either refusal to supply or discriminatory access, or a combination of both.

Luton Airport has sole responsibility for controlling access to its facilities, including the bus station. Bus operators that wish to provide services to and from the airport need access to the bus station or nearby facilities to be able to drop off and pick up passengers. As discussed below, the bus station is the relevant upstream market and bus services to/from the airport are the relevant downstream market.

In this case, the dominant provider (Luton Airport) in an upstream market (the bus station market) refused to grant a downstream operator (Arriva) access to that market, instead providing such access exclusively (or near-exclusively) to another downstream operator (National Express). A stylised illustration is provided in Figure 1.

Figure 1 Stylised diagram of anticompetitive practice



Source: Oxera.

Here, Luton Airport operates upstream and the bus operators are downstream. Bus operator B (Arriva) is foreclosed from access to the bus station. This is to the advantage of bus operator A (National Express).

A number of economic principles can help in assessing this type of case and in determining whether Luton Airport's actions can be considered an abuse of dominance.

Is access essential (or very important)?

The first economic principle is that access to the upstream input must be very important, if not essential, for the downstream operator to compete effectively in the downstream market.

A concept that has been developed in competition policy is that of an 'essential facility'. It applies to the current case in that, if access to the bus station is essential in order for an operator to compete downstream, a refusal to grant access—or granting access in a discriminatory manner to some downstream operators but not others—is likely to significantly distort downstream competition.

The following three conditions need to be fulfilled in order for a facility to be deemed essential.⁷

- **The refusal of access to the facility is likely to eliminate all competition.** This may occur, for example, because the facility cannot be physically and economically replicated. This condition may be too stringent if applied literally. Therefore, it is often taken to mean that a significant distortion to competition can be a sufficient cause for concern from a competition policy perspective without such competition necessarily being fully 'eliminated'. Indeed, the High Court took this view in a case between Heathrow Airport and Purple Parking/Meteor Parking:

I therefore find that the case against [Heathrow Airport Limited] does not have to fit into the category of essential facilities or fail. Even if the subject of the Facilities Market can be described as essential facilities, Purple and Meteor are entitled to put their case on abuse in another way; and even if they rely on the 'essential facilities' type of abuse I doubt if elimination of competition, as opposed to a significant enough distortion, is required.⁸

In the present case, Luton Airport controls access to the bus station in the upstream market. It is not possible to replicate the bus station; nor is it feasible (or economically attractive) to drop off airport passengers at bus stops immediately outside the airport's premises. Therefore, the Court determined that refusal to supply significantly distorted competition.

- **The facility is indispensable to an equally efficient company's business—i.e. there is no substitute.** This requires consideration of whether being prevented from having access to the facility means that the company's service is no longer commercially sustainable.

After Arriva was excluded from the bus station, it used alternative drop-off/pick-up points at some distance from the airport to/from which passengers were transported by a shuttle bus.⁹ This coincided with a significant drop in passengers and revenue, and an increase in costs. These alternatives were not realistic substitutes for access to the bus station. Arriva was significantly disadvantaged from not having access and, as a result, its service was unlikely to be economically sustainable.

- **There must be no objective justification for the refusal to grant access.** Luton Airport argued that it was objectively justified in refusing access due to capacity constraints at the airport. The question of available capacity at the bus station was disputed between the parties, and expert traffic management evidence was employed to address this issue. The judge also visited the airport to experience the capacity issues first hand.

If there is no spare capacity then granting unrestricted access to multiple operators may not be feasible. However, it may still be possible to allocate capacity across multiple operators or between services in order to achieve a more competitive outcome than granting exclusivity to one operator. It is important to note that, while this may be the case for relatively simple infrastructure, such as a bus station, it may not hold for other essential facilities that are more complex to use or to modify (such as electricity grids or local telephony loops).

Regardless of whether there was a capacity constraint at the time of the trial, the Court held that there was unlikely to be such a constraint for the duration of the contract with National Express. Luton Airport has plans to improve the airport, including adding capacity to the bus station, which will be available before the end of the concession in 2021. At that point there could no longer be any objective justification based on capacity to refuse Arriva (or other operators) access to the bus station.

Competition in the downstream market must be significantly distorted

Another condition to consider in determining whether the upstream operator has abused its position is whether competition in the downstream market is distorted to a significant degree because of the refusal to supply and the discriminatory treatment of downstream operators. A number of questions are relevant in considering this condition.

What is the relevant downstream market?

In this case, the parties disputed whether the downstream market should be defined as bus/coach services alone, or more widely to include rail services. However, even if rail services were included in the relevant market, Luton Airport's refusal to supply could still have an anticompetitive effect, given that competition between two bus operators is likely to be much more direct than competition between bus and rail. With a monopoly bus operator, customers forgo the benefits of this direct competition.

Furthermore, given the planned expansion of the bus station, and Luton Airport's stated objective to increase the number of passengers travelling to/from the airport on public transport, it is likely that an even greater number of passengers would be affected going forward.¹⁰ Indeed, the Court determined that there were a sufficient number of passengers who do not regard rail as a good substitute to bus and who would benefit from competition between bus services. That was at least in part because Luton Airport operates in the 'budget airline' market segment and tends to attract a greater-than-average proportion of passengers for whom the cost of access to the airport is a material factor in how they choose to arrive/depart.

Does the upstream firm need to be dominant in the downstream market?

There can be significant distortions to downstream competition even if the upstream provider does not have a dominant position in the downstream market, and even if it does not, itself, operate in the downstream market directly.

Many cases in which exclusionary conduct is found to be abuse arise where the dominant undertaking competes in the downstream market and acts to foreclose that market to its advantage. If the upstream provider is also dominant downstream, any refusal to supply to downstream competitors or discrimination between them would produce even greater anticompetitive effects, but such effects can also be significant without dominance downstream.

Through the tender and the award of an exclusive concession, Luton Airport has raised its commercial stake in the downstream market. Although Luton Airport does not operate a bus service itself, it derives commercial benefit from the terms of the concession as the fee paid is related to the expected revenue on the route. With such a stake in the downstream service, Luton Airport would have sufficient incentive to favour one downstream provider over another; in other words, in the words of the judge, it is 'not a neutral or indifferent upstream provider of facilities'.¹¹ Therefore, the economic or commercial interest of the dominant undertaking does not necessarily need to derive from it being active in the downstream market.

What is the effect on competition in the downstream market?

Ultimately determining the effect on competition in the downstream market requires a comparison of the market situation that results from these discriminatory actions with the situation that would arise absent the actions. In this case, such a situation was determined to be one in which both National Express and Arriva are granted access to the bus station and can compete on an equal footing—head-to-head competition—particularly given the future expansion of the bus station and the airport's desire to increase passengers travelling to/from the airport by public transport.

Head-to-head competition can produce good outcomes for passengers in terms of fares, quality and choice. The market is better placed than the airport to determine how many, and which, companies should operate the route. Competitive pressure also provides incentives for operators to innovate and respond to changing demand and supply conditions—for example, by changing frequencies and route configurations.

In principle, a well-run competitive tender for an exclusive concession can mimic the competitive process. In other words, competition 'for' the market can be as effective as competition 'in' the market. For this to be the case, a number

of conditions must hold, including that the tender process must:

- be organised to ensure effective competitive bidding by multiple operators. It must be timely and transparent, and use consistent criteria;
- ensure that the winning bidder maintains a competitive service offering for the duration of the contract;
- ensure that the bidding focuses on who offers the best terms to customers (thus mimicking competition in the market) rather than on who offers the highest fee.

While Arriva brought a complaint against Luton Airport on the first condition, the Court did not ultimately uphold Arriva's concern. However, the Court clearly agreed with Arriva on the third condition—the tender process did not ensure that the best outcome for customers was obtained.

Concluding remarks

In the local bus services market there is a long-running debate about the merits of head-to-head competition versus franchise/concession-type models. Most UK bus services outside London are deregulated. In a well-functioning

market, one would expect there to be multiple operators competing on an equal footing, and determining routes and frequencies to meet demand. The market can decide whether a particular route has sufficient demand for more than one operator. Each operator would also have equal access to the relevant bus stations, based on a reasonable access fee. While what constitutes a reasonable access fee is complex, there are some established principles based on FRAND (fair, reasonable and non-discriminatory) terms, and which are in place in most local bus markets in the UK. Arriva's case was, in essence, that the market for services between Luton Airport and London should also function in this manner.

In situations where access is controlled by a dominant company, there is a trade-off between promoting competition in the downstream market and providing a company with sufficient commercial freedom to organise access as it sees fit. In this case, the Court gave more weight to the former consideration. It decided that Luton Airport had abused its dominant position through the terms of the agreement with National Express, causing a significant distortion of competition in the downstream market. Arriva has since regained access to the bus station and is operating services from Luton Airport in addition to (and in competition with) those run by National Express.

¹ The operator of this route was Arriva The Shires (ATS), which is a subsidiary of Arriva plc and forms part of the Arriva UK Bus Division.

² *Arriva The Shires Ltd vs London Luton Airport Operations Ltd*, Case No. HC13d01784. Dr Gunnar Niels, Oxera Partner, acted as an economic expert on behalf of Arriva.

³ These were the conditions in the concession agreement that ran between 28 July 2009 and 30 April 2013. There was also a minimum amount that had to be paid to the airport each year if this amount was greater than the percentage of turnover.

⁴ There were also minimum guaranteed payments of between £1.4m and £2.1m per year.

⁵ Luton Airport's dominance was assumed for the purposes of this trial. Arriva also claimed that Luton Airport had abused its dominant position in the way in which it conducted the tender, but this was not addressed directly by the economic expert, and the judge ruled that it was not an abuse of dominance.

⁶ *Arriva The Shires Ltd vs London Luton Airport Operations Ltd*, Case No: HC13d01784.

⁷ *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs*, Judgment of the Court (Sixth Chamber) of 26 November 1998.

⁸ *Purple Parking Limited, Meteor Parking Limited v Heathrow Airport Limited*, [2011] EWCH 987 (ch), para. 105. Purple Parking Limited and Meteor Parking Limited argued that Heathrow had abused its dominant position in favouring its own 'meet and greet' operation at the airport.

⁹ This included an off-site car park and Luton town centre.

¹⁰ Luton Airport's Masterplan has an objective of increasing the proportion of passengers who travel by public transport from 32% to more than 40% by 2017. *London Luton Airport Operations Limited (2012)*, 'Revised Masterplan document', consultation prior to submission of planning application, September.

¹¹ *Arriva The Shires Ltd and London Luton Airport Operations Ltd*, [2014] EWHC 64 (ch), para. 100.