



European Court of Justice upholds fine on British Airways for abuse of market dominance

EU competition law imposes limits on the commercial strategies that companies with a high degree of market power may employ. The EU's highest court yesterday (15 March) gave judgment in a case dealing with the legality of rebate or bonus schemes operated by such companies.

In 1999 the Commission fined British Airways (BA) €6,800,000 for abuse of its dominant position on the market for air travel agency services, contrary to article 82 of the EC Treaty. The abuse consisted of a system of rebates granted to travel agents that was held to be both loyalty inducing and discriminatory. BA appealed to the Court of First Instance (CFI), which dismissed the appeal in 2003. Yesterday a further appeal to the European Court of Justice (ECJ) was dismissed, with the ECJ upholding the traditional approach to article 82 taken by the Commission in this case.

This judgment has an importance beyond its own subject-matter, in that it comes at a crucial point in the Commission's long-running review of its article 82 enforcement policy. Its December 2005 Discussion Paper, and numerous statements by Competition Commissioner Neelie Kroes indicate a will to use more economic analysis and to adopt a more 'effects-based' approach to enforcement, but there is a wide spectrum of views within her service as to the extent to which change is desirable and the form it should take. This latest judgment follows a line of recent cases in which the European Courts have endorsed the Commission's traditional approach, and which put into question the scope for change in this area. Below we describe the BA case and assess the outlook for the Commission's policy review.

British Airways v Commission

BA paid travel agents a basic commission together with other financial incentives. These were of various types, but essentially involved rebates based on the extent to which agents increased their sales of BA tickets from one year to the next. The rebates were applied not only to the additional sales, but to all sales for the period in question. The Commission held that this was an abuse of BA's dominant position, because of both its loyalty inducing effects and the discrimination as between travel agents providing equivalent services. It went on to hold that it had the object and effect of excluding BA's competitors from the UK air transport markets. The CFI upheld these findings, and in particular stated that it was not necessary for the Commission to prove that the abuse had a concrete effect on the market, as it was sufficient to show that the dominant company's conduct tended to restrict competition.

The ECJ is limited to examining points of law, and cannot substitute its own view on evidence, such as market data, for that of the CFI. It upheld the CFI's judgment, largely on the basis of its own previous case law. On the question of when a dominant firm's rebate system is abusive, it appears to consider that:

- if the rebate system is purely quantity based, and applies in the same way to all customers, it is not abusive;
- if the rebates are conditional on purchasing exclusively or mainly from the dominant undertaking, then the system is in principle abusive; and

- other types of system are to be assessed on the basis of all the circumstances, and applying two main criteria.

The first criterion is whether the rebates ‘can produce an exclusionary effect, that is to say whether they are capable, first, of making market entry very difficult or impossible... and, secondly, of making it more difficult or impossible for [the dominant firm’s] co-contractors to choose between various sources of supply...’ This may occur when targets are individualised, and especially where rebates for additional sales are calculated on total sales during the period. In this case the ECJ held that the Commission was entitled to establish exclusion by referring to various features of BA’s scheme, and that it did not need to cite market evidence of exclusion.

The second step in the analysis is to examine ‘whether there is an objective economic justification for the discounts and bonuses granted... It has to be determined whether the exclusionary effect arising from such a system... may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.’

The ECJ stated that it is necessary to ‘consider all the circumstances, particularly the criteria and rules governing the grant of the discount’ but avoided the question whether a concrete effect on the market has to be shown. The CFI’s actual assessment of whether the rebate scheme in question was in fact exclusionary was not reviewed by the ECJ, as it did not have jurisdiction to do so. The ECJ also confirmed that to show a discount scheme’s negative effect on consumers it is sufficient that the Commission demonstrate a restrictive effect on competition.

As far as abusive discrimination is concerned, the requirement in article 82 to show that the discrimination placed the travel agents in question ‘at a competitive disadvantage’ was satisfied. The Court held that once the Commission had concluded that BA’s behaviour ‘tend[ed], having regard to the whole of the circumstances of the case, to lead to a distortion of competition’, it was not necessary to quantify that effect.

Will there be Commission guidelines?

The Commission has always faced an extremely difficult task in trying to produce guidelines in this area, and it is

by no means certain at this stage that it will do so. In her opinion in the BA case, Advocate General Kokott chose to emphasise the limits within which the Commission must work, stating that ‘even if its administrative practice were to change, the Commission would still have to act within the framework prescribed for it by article 82 EC as interpreted by the Court of Justice’.

Nor is BA an isolated case, as other recent judgments are very much in the same line. In *France Télécom v Commission* this January, the CFI dealt with another type of abusive conduct, predatory pricing. In particular, the emphasis on market shares over 50 per cent as a strong indication of dominance, and the restrictive application of the principle that a dominant firm has a right to protect its commercial interests in that case, reflect a traditional interpretation of article 82.

Nevertheless, these judgments, while supportive of the Commission’s past approach, certainly do not preclude the Commission adopting guidelines in which it could indicate new enforcement priorities and give detail of how it will apply the analytical framework established by the Courts. This latest judgment is above all a reminder that if the Commission’s enforcement policy is to become more economics-based, the impetus will have to come not from the European courts, but from the Commission itself and from national competition authorities, whether through guidelines or through future enforcement decisions.

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