

## **Abuse of Dominant Position - The British Airways Case -**

The European Court of Justice (ECJ) recently confirmed a decision of the Commission which condemned British Airways (BA), a leading airline established in the UK, to pay a fine of €6.8 million for acting in breach of article 82 of the EC Treaty by abusing its dominant position.

The dispute revolved around a bonus scheme implemented by BA, which rewarded travel agents via a commission-based system for selling its tickets. The commission increased once a specified sales target was achieved by the travel agent. Thus the travel agent had a strong financial incentive, especially when nearing the sales target, to promote the tickets of BA rather than of competitor airlines.

Virgin Atlantic Airways, one of BA's rivals, complained of these so-called performance reward schemes. Upon investigation, the Commission concluded that BA was abusing its dominant position on the UK market for air travel agency services. According to the Commission, the performance reward scheme had the effect of inducing travel agents to maintain or increase their sales in BA tickets, in preference to those of competitor airlines.

BA contested that decision in front of the Court of First Instance (CFI). The CFI dismissed the pleas raised by BA, confirming the decision of the Commission. The Court held that the practices adopted by BA infringed in various respects the competition rules of the European Union.

Firstly, the schemes implemented led to discriminatory treatment of travel agents in the UK. This created a competitive disadvantage to those travel agents who did not benefit under the scheme and were thus unable to compete with those competitors who did.

Secondly the CFI held that the performance reward scheme adopted by BA constituted an exclusionary device. Offering incentives to buyers through rebates would not generally be condemned as long as the discount scheme is based on economically justified considerations. Thus rebate schemes linked to quantities purchased, such as discounts for large orders or bulk purchases, are permitted.

The CFI however distinguished between these type of quantitative rebate schemes from the schemes adopted by BA, which were intended solely to encourage or secure loyalty. In fact, they had the effect of tying travel agents to selling BA tickets, which resulted in the creation of an illegal barrier to rival airlines wishing to compete on the UK market for air transport. The CFI considered irrelevant for a finding of an abuse of dominance whether the rebate system adopted succeeded in excluding competitors from the market or harming consumers as long as it could be proved that the adopted practices were likely to restrict competition.

Unsatisfied with this decision, BA lodged an appeal to the ECJ claiming that CFI had erred in its assessment of the facts and the law at issue. Its appeal was however dismissed by the ECJ.

As to the plea on the wrong assessment of facts, the ECJ held that its function is not to substitute the assessment of facts done by the CFI. To this extent, any challenges relating to assessment of facts and evidence were declared inadmissible by the ECJ. The other grounds of appeal raised by BA concerning the legality of the rebate system were dismissed by the ECJ, which endorsed the reasoning adopted by the CFI in its entirety.

© *Josette Grech 2007*