

Ba 12 June 2009

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BA v. Commission

In several decisions, the Commission condemned discount schemes and other incentives to exceed target sales especially if they applied not only to incremental purchases after the target had been reached, but retrospectively to all purchases.

On a complaint from Virgin Atlantic, the Commission imposed a fine of € 6.800.000 on British Airways, for abusing its dominant position over the acquisition of air travel agency services in the U K at a time when BA travel agents sold 85% of the flights bought in the UK. The Commission objected to three schemes to encourage travel agents to sell BA tickets:-

- 'The marketing agreements,' which provided for payment to agents selling at least £500,000 of an addition to their basic commission calculated on a sliding scale for selling tickets to a greater value than in a previous period.

- 'The global agreements,' entitled three agents to additional commission calculated by reference to the growth of BA's share in their world wide sales, and

- 'the new performance reward scheme,' which reduced the basic commission but provided additional commission depending on whether the total revenue from the sales of BA tickets issued by an agent in a particular calendar month was greater than that achieved during the corresponding month in the previous year.

The decision was upheld by the CFI and an appeal on the seventh pleas was taken to the ECJ.

British Airways plc v Commission of the European Communities, supported by Virgin Atlantic Airways Ltd, C-95/04 P, [2007] ECR I 2331.

THE COURT (Third Chamber),

Judgment of the ECJ¹

26. In paragraph 281 of the judgment under appeal, the Court of First Instance held that BA had not demonstrated that the fidelity-building character of the bonus schemes at issue was based on an economically justified consideration. In paragraphs 282 and 283 of that

¹ Italics and highlighted sections, save for the name of a case, are by Val Korah.

judgment, it considered in that respect that, since the achievement of sales growth targets for BA tickets by travel agents established in the United Kingdom resulted in the application of a higher rate of commission not just on the BA tickets sold once those sales targets had been met but on all BA tickets handled during the period under consideration, the additional remuneration of those agents bore no objective relation to the consideration arising, for BA, from the sale of the additional air tickets. ...

34. The Court of First Instance therefore concluded, in paragraph 300 of the judgment under appeal, that the seventh plea had to be dismissed.

The first plea, alleging error of law in the Court's assessment of the exclusionary effect of the bonus schemes at issue...

39. In this plea, BA criticises the findings in paragraphs 270 to 298 of the judgment under appeal, according to which the bonuses granted by BA both had a 'fidelity-building' and thus an exclusionary effect, and lacked justification from an economic point of view. ...

The first part of the first plea, concerning the criterion for assessing the possible exclusionary effect of the bonus schemes at issue. ...

Findings of the Court

57. Concerning, first, the plea that the Court of First Instance wrongly failed to base its argument on the criteria in subparagraph (b) of the second paragraph of Article 82 EC in assessing whether the bonus schemes at issue were abusive, the list of abusive practices contained in Article 86 EC is not exhaustive, so that the practices there mentioned are merely examples of abuses of a dominant position (see, to that effect, Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951, paragraph 37). According to consistent case-law, the list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by the EC Treaty (Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 26, **CB 123**; Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports a.o. v Commission* [2000] ECR I-1365, paragraph 112).

58. It follows that discounts and bonuses granted by undertakings in a dominant position may be contrary to Article 82 EC even where they do not correspond to any of the

examples mentioned in the second paragraph of that article. Thus, in determining that fidelity discounts had an exclusionary effect, the Court based its argument in *Hoffmann-La Roche* and *Michelin* on Article 82 of the EEC Treaty subsequently Article 86 of the EC Treaty, and then Article 82 EC in its entirety, and not just on subparagraph (b) of its second paragraph. Moreover, in its judgment in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraph 523, concerning fidelity rebates, the Court expressly referred to subparagraph (c) of the second paragraph of Article 86 of the EEC Treaty, according to which practices constituting abuse of a dominant position may consist, for example, in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

59. The plea that the Court of First Instance erred in law by not basing its argument on the criteria in subparagraph (b) of the second paragraph of Article 82 EC is therefore unfounded.

60. Nor does it appear that the Court's assessment of the exclusionary effect of the bonus schemes in question was based on a misapplication of the case-law of the Court of Justice.

61. In the *Hoffmann-La Roche* and *Michelin* judgments, the Court of Justice found that certain discounts granted by two undertakings in a dominant position were abusive in character.

62. The first of those two judgments concerned discounts granted to undertakings whose business was the production or sale of vitamins, and the grant of which was, for most of the time, expressly linked to the condition that the co-contractor obtained its supplies over a given period entirely or mainly from Hoffmann-La Roche. The Court found such a discount system an abuse of a dominant position and stated that the granting of fidelity discounts in order to give the buyer an incentive to obtain its supplies exclusively from the undertaking in a dominant position was incompatible with the objective of undistorted competition within the common market (*Hoffmann-La Roche*, paragraph 90).

63. In *Michelin*, unlike in *Hoffmann-La Roche*, Michelin's co-contractors were not obliged to obtain their supplies wholly or partially from Michelin. However, the variable annual discounts granted by that undertaking were linked to objectives in the sense that, in

order to benefit from them, its co-contractors had to attain individualised sales results. In that case, the Court found a series of factors which led it to regard the discount system in question as an abuse of a dominant position. In particular, the system was based on a relatively long reference period, namely a year, its functioning was non-transparent for co-contractors, and the differences in market share between Michelin and its main competitors were significant (see, to that effect, *Michelin*, paragraphs 81 to 83).

64. Contrary to BA's argument, it cannot be inferred from those two judgments that bonuses and discounts granted by undertakings in a dominant position are abusive only in the circumstances there described. As the Advocate General has stated in point 41 of her Opinion, the decisive factor is rather the underlying factors which have guided the previous case-law of the Court of Justice and which can also be transposed to a case such as the present.

65. In that respect, *Michelin* is particularly relevant to the present case, since it concerns a discount system depending on the attainment of individual sales objectives which constituted neither discounts for quantity, linked exclusively to the volume of purchases, nor fidelity discounts within the meaning of the judgment in *Hoffmann-La Roche*, since the system established by Michelin did not contain any obligation on the part of resellers to obtain all or a given proportion of its supplies from the dominant undertaking.

66. Concerning the application of Article 82 EC to a system of discounts dependent on sales objectives, paragraph 70 of the *Michelin* judgment shows that, in prohibiting the abuse of a dominant market position in so far as trade between Member States is capable of being affected, that article refers to conduct which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

67. In order to determine whether the undertaking in a dominant position has abused such a position by applying a system of discounts such as that described in paragraph 65 of this judgment, the Court has held that it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the

discount *tends to* remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (*Michelin*, paragraph 73).

68. It follows that in determining whether, on the part of an undertaking in a dominant position, a system of discounts or bonuses which constitute neither quantity discounts or bonuses nor fidelity discounts or bonuses within the meaning of the judgment in *Hoffmann-La Roche* constitutes an abuse, it first has to be determined *whether those discounts or bonuses can produce an exclusionary effect*, (in the French text, *peuvent produire un effet d'éviction*) that is to say *whether they are capable*, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position (*c'est-à-dire s'ils sont à même, d'une part, de rendre plus difficile, voire impossible, l'accès au marché pour les concurrents*) and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners.

69. It then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted. In accordance with the analysis carried out by the Court of First Instance in paragraphs 279 to 291 of the judgment under appeal, an undertaking is at liberty to demonstrate that its bonus system producing an exclusionary effect is economically justified.

70. With regard to the first aspect, the case-law gives indications as to the cases in which discount or bonus schemes of an undertaking in a dominant position are not merely the expression of a particularly favourable offer on the market, but give rise to an exclusionary effect.

71. First, an exclusionary effect may arise from goal-related discounts or bonuses, that is to say those the granting of which is linked to the attainment of sales objectives defined individually (*Michelin*, paragraphs 70 to 86).

72. It is clear from the findings of the Court of First Instance in paragraphs 10 and 15 to 17 of the judgment under appeal that the bonus schemes at issue were drawn up by reference to individual sales objectives, since the rate of the bonuses depended on the evolution of the turnover arising from BA ticket sales by each travel agent during a given period.

73. It is also apparent from the case-law that the commitment of co-contractors towards the undertaking in a dominant position and the pressure exerted upon them may be particularly strong where a discount or bonus does not relate solely to the growth in turnover in relation to purchases or sales of products of that undertaking made by those co-contractors during the period under consideration, but extends also to the whole of the turnover relating to those purchases or sales. In that way, relatively modest variations – whether upwards or downwards – in the turnover figures relating to the products of the dominant undertaking have disproportionate effects on co-contractors (see, to that effect, *Michelin*, paragraph 81).

74. The Court of First Instance found that the bonus schemes at issue gave rise to a similar situation. Attainment of the sales progression objectives gave rise to an increase in the commission paid on all BA tickets sold by the travel agent concerned, and not just on those sold after those objectives had been attained (paragraph 23 of the judgment under appeal). It could therefore be of decisive importance for the commission income of a travel agent as a whole whether or not he sold a few extra BA tickets after achieving a certain turnover (paragraphs 29 and 30 of the grounds for the Commission's decision, reproduced in paragraph 23 of the judgment under appeal). The Court of First Instance, which describes that characteristic and its consequences in paragraphs 272 and 273 of the judgment under appeal, states that the progressive nature of the increased commission rates had a 'very noticeable effect at the margin' and emphasises the radical effects which a small reduction in sales of BA tickets could have on the rates of performance-related bonus.

75. Finally, the Court took the view that the pressure exerted on resellers by an undertaking in a dominant position which granted bonuses with those characteristics is further strengthened where that undertaking holds a very much larger market share than its competitors (see, to that effect, *Michelin*, paragraph 82). It held that, in those circumstances, it is particularly difficult for competitors of that undertaking to outbid it in the face of discounts or bonuses based on overall sales volume. By reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an unavoidable business partner in the market. Most often, discounts or bonuses granted by such an undertaking on the basis of overall turnover largely take precedence in absolute terms, even over more generous offers of its competitors. In order to attract the co-contractors of the undertaking in a dominant position, or to receive a sufficient volume of orders from them, those competitors would have to offer them significantly higher rates of discount or bonus.

76. In the present case, the Court of First Instance held in paragraph 277 of the judgment under appeal that BA's market share was significantly higher than that of its five main competitors in the United Kingdom. It concluded, in paragraph 278 of that judgment, that the rival airlines were not in a position to grant travel agents the same advantages as BA, since they were not capable of attaining in the United Kingdom a level of revenue capable of constituting a sufficiently broad financial base to allow them effectively to establish a reward scheme similar to BA's (paragraph 278 of the judgment under appeal).

77. Therefore, the Court of First Instance was right to examine, in paragraphs 270 to 278 of the judgment under appeal, whether the bonus schemes at issue had a fidelity-building effect *capable of* (susceptible de) producing an exclusionary effect. ...

This, however, was a question of fact beyond the jurisdiction of the ECJ

79. The same applies to BA's allegation that the Court of First Instance overestimated the 'very noticeable effect at the margin' of the bonus schemes at issue. BA thereby calls into question the assessment of facts and evidence made by the Court of First Instance, which constitutes an inadmissible plea on appeal.

80. It follows from the whole of the above considerations that the first part of the first plea is in part inadmissible and in part unfounded.

The second part of the first plea, concerning the assessment by the Court of First Instance of the relevance of the objective economic justification for the bonus schemes at issue

Findings of the Court

84. Discounts or bonuses granted to its co-contractors by an undertaking in a dominant position are not necessarily an abuse and therefore prohibited by Article 82 EC. According to consistent case-law, only discounts or bonuses which are not based on any economic counterpart to justify them must be regarded as an abuse (see, to that effect, *Hoffmann-La Roche*, paragraph 90, and *Michelin*, paragraph 73).

85. As has been held in paragraph 69 of this judgment, the Court of First Instance was right, after holding that the bonus schemes at issue produced an exclusionary effect, to examine whether those schemes had an objective economic justification.

86. Assessment of the economic justification for a system of discounts or bonuses established by an undertaking in a dominant position is to be made on the basis of the whole of the circumstances of the case (see, to that effect, *Michelin*, paragraph 73). It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse.

87. In this case, correctly basing its examination upon the criteria thus inferred from the case-law, the Court of First Instance examined whether there was an economic justification for the bonus schemes at issue. In paragraphs 284 and 285 of the judgment under appeal, it adopted a position in relation to the arguments submitted by BA, which concerned, in particular, the high level of fixed costs in air transport and the importance of aircraft occupancy rates. On the basis of its assessment of the circumstances of the case, the Court of First Instance came to the conclusion that those systems were not based on any objective economic justification.

88. In this context, it should be noted that BA's arguments concerning the high level of fixed costs in air transport and the importance of aircraft occupancy rates are inadmissible for the reasons set out in paragraph 78 of this judgment, since, by those arguments, BA is in reality challenging the assessment of facts and evidence made by the Court of First Instance. It is not for the Court of Justice, on an appeal, to substitute its own assessment of market data and the competitive position for that of the Court of First Instance.

89. Therefore, the second part of the first plea must be dismissed as inadmissible.

90. The Court of First Instance did not therefore make any error of law in holding that the bonus schemes at issue had a fidelity-building effect, that they therefore produced an exclusionary effect, and that they were not justified from an economic standpoint.

91. The first plea must therefore be dismissed in its entirety.

The second plea, alleging error of law in that the Court of First Instance did not examine the probable effects of the commissions granted by BA, or take account of the evidence that they had no material effect on competing airlines...

Findings of the Court

96. Concerning BA's argument that the Court of First Instance did not examine the probable effects of the bonus schemes at issue, it is sufficient to note that, in paragraphs 272 and 273 of the judgment under appeal, the Court of First Instance explained the mechanism of those schemes.

97. Having emphasised the very noticeable effect at the margin, linked to the progressive nature of the increased commission rates, it described the exponential effect on those rates of an increase in the number of BA tickets sold during successive periods, and, conversely, the disproportionate reduction in those rates in the event of even a slight decrease in sales of BA tickets in comparison with the previous period.

98. On that basis, the Court of First Instance was able to conclude, without committing any error of law, that the bonus schemes at issue had a fidelity-building effect. It follows that BA's plea accusing the Court of not examining the probable effects of those schemes is unfounded.

99. Moreover, in paragraph 99 of its appeal, BA acknowledges that, in its judgment, the Court of First Instance rightly held that travel agents were given an incentive to increase their sales of BA tickets. In addition, in paragraph 113 of its appeal, it states that, if the Court of First Instance had examined the actual or probable impact of the bonus schemes at issue on competition between travel agents, it would have concluded that that impact was negligible.

100. It follows that BA is not seriously denying that those schemes had a fidelity-building effect on travel agents and thus tended to affect the situation of competitor airlines.

101. Concerning BA's allegations of evidence showing that no exclusionary effect arose from the bonus schemes at issue, of which evidence the Court of First Instance is alleged to have taken insufficient account, it is sufficient to note that this part of the second plea is inadmissible on an appeal for the reasons already set out in paragraph 78 of this judgment.

102. The second plea must therefore be dismissed as in part inadmissible and in part unfounded.

The third plea, alleging an error of law in that the Court of First Instance did not examine whether BA's conduct involved a 'prejudice [to] consumers' within the meaning of subparagraph (b) of the second paragraph of Article 82 EC

Arguments of the parties

103. In its third plea, BA considers that the Court of First Instance erred in law by failing to examine whether the bonus schemes at issue caused prejudice to consumers, as required by subparagraph (b) of the second paragraph of Article 82 EC, as interpreted by the Court of Justice in *Suiker Unie*. Without making any analysis of that condition, the Court of First Instance confined itself, in paragraph 295 of the judgment under appeal, to examining the impact of BA's conduct on its competitors in United Kingdom air transport markets.

104. Referring to the judgment in *Europemballage and Continental Can*, the Commission and Virgin argue that that plea is unfounded, since Article 82 EC covers not only practices likely to cause immediate damage to consumers but also those which cause them damage by undermining an effective structure of competition.

Findings of the Court

105. It should be noted first that, as explained in paragraphs 57 and 58 of this judgment, discounts or bonuses granted by an undertaking in a dominant position may be contrary to Article 82 EC even where they do not correspond to any of the examples mentioned in the second paragraph of that article.

106. Moreover, as the Court has already held in paragraph 26 of its judgment in *Europemballage and Continental Can*, CB Article 82 EC is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(1) (g) EC.

107. The Court of First Instance was therefore entitled, without committing any error of law, not to examine whether BA's conduct had caused prejudice to consumers within the meaning of subparagraph (b) of the second paragraph of Article 82 EC, but to examine, in paragraphs 294 and 295 of the judgment under appeal, whether the bonus schemes at issue had a restrictive effect on competition and to conclude that the existence of such an effect had been demonstrated by the Commission in the contested decision.

108. Having regard to those considerations, the third plea must be dismissed as unfounded.

115. Therefore, the first part of the fourth plea is inadmissible.

The second part of the fourth plea, concerning the requirements for proving that the bonus schemes in question had an exclusionary effect ...

Findings of the Court

120. By the second part of the fourth plea, BA accuses the Court of First Instance of a superficial approach in its analysis of the effects of the bonus schemes at issue, particularly the absence of any quantification of its findings concerning the exclusionary effect of those schemes and the recourse to general assertions, such as the ‘very noticeable effect at the margin’ of commission rates from one period to another.

121. Contrary to what the Commission argues, this part of the plea is not inadmissible under Articles 42(2) and 118 of the Rules of Procedure of the Court of Justice on the ground that BA failed, at first instance, to challenge the relevant part of the contested decision, namely the calculations appearing in paragraph 30 of the grounds for that decision, which were designed to illustrate the very noticeable effect on the commissions received by a travel agent of selling a few extra BA tickets.

122. BA’s plea does not concern the calculations given by way of example by the Commission as such, but the assessments made by the Court of First Instance concerning the bonus schemes at issue. The second part of the fourth plea is therefore admissible.

123. It is not well founded, however, since the assessments by the Court of First Instance challenged by BA must be considered in relation to the calculations contained in the contested decision. The Court of First Instance expressly cites, in paragraph 23 of the judgment under appeal, paragraph 30 in the grounds for that decision. It follows that the findings of the Court of First Instance criticised by BA are sufficiently quantified. The claim that there was no justification for the Court’s finding that BA’s competitors were not able to make counter-offers capable of counterbalancing the bonus schemes at issue has therefore not been made out on the facts.

124. Therefore, the second part of the fourth plea must be dismissed as unfounded.

125. The fourth plea must therefore be dismissed as in part inadmissible and in part unfounded.

The fifth plea, alleging that the Court of First Instance misapplied subparagraph (c) of the second paragraph of Article 82 EC as regards the discriminatory effect of the bonus schemes in question on United Kingdom travel agents...

126. As a preliminary observation, it should be noted that, whatever the findings of the Court in relation to BA's first four pleas, concerning the abusive nature of the bonus schemes at issue resulting from the exclusionary effect on BA's competitors in the absence of objective economic justification, the fifth plea must be examined since BA retains an interest in denying that those schemes are prohibited pursuant to subparagraph (c) of the second paragraph of Article 82 EC, since the amount of the fine imposed may be reduced where it is found that the schemes were not abusive under that provision. ...

Findings of the Court

133. Subparagraph (c) of the second paragraph of Article 82 EC prohibits any discrimination on the part of an undertaking in a dominant position which consists in the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, paragraph 46).

134. In the present case, it is undisputed that BA applied different commission rates to travel agents operating in the United Kingdom according to whether or not they had achieved their sales objectives by comparison with the reference period.

135. It remains to be examined, first, whether the Court of First Instance was right to rely on the equivalence of the travel agents' services in order to conclude that the bonus schemes at issue, being capable of entailing the application of different rates of commission to agents who had sold the same number of BA tickets, were discriminatory, and, secondly, whether, without committing an error of law, that Court could dispense with detailed findings concerning the existence of a competitive disadvantage.

The first part of the fifth plea, concerning the equivalence of the travel agents' services

136. In the first part of its fifth plea, BA criticises the analysis by the Court of First Instance of the comparability of the services carried out by travel agents who attained their objectives in BA ticket sales and those carried out by agents who did not attain those objectives. In particular, BA accuses the Court of First Instance of failing to take account of the greater economic usefulness from the airline's point of view of the services of travel agents who attained their sales objectives or increased their turnover.

137. On that latter point, which concerns the assessment by the Court of First Instance of the circumstances of this case from which it might be possible to deduce the comparability or otherwise of travel agents' services for an airline such as BA, it is sufficient to point out that the assessment of facts and evidence is a matter for the Court of First Instance alone. It is thus not for the Court of Justice, on an appeal, to substitute its own assessment of market data and the competitive position for that of the Court of First Instance. This claim is therefore inadmissible.

138. As for the second claim, that the Court of First Instance erred in law in relation to subparagraph (c) of the second paragraph of Article 82 EC, by holding that transactions involving a travel agent who had increased his sales of BA tickets and transactions involving an agent who had not increased them constituted 'equivalent transactions' within the meaning of that provision, it should be noted that, in paragraph 234 of the judgment under appeal, the Court of First Instance pointed out that attainment by United Kingdom travel agents of their BA ticket sales growth targets led to an increase in the rate of commission paid to them by BA not only on BA tickets sold after the target was reached but also on all BA tickets handled by the agents during the period in question.

139. The Court of First Instance logically inferred therefrom that the bonus schemes at issue led to the sale of an identical number of BA tickets by United Kingdom travel agents being remunerated at different levels according to whether or not those agents had attained their sales growth targets by comparison with the reference period.

140. The Court of First Instance does not therefore appear to have erred in law by regarding as equivalent the services of travel agents whose sales of BA tickets had, in absolute terms, been at the same level during a given period. This second claim is therefore unfounded.

141. Therefore, the first part of the fifth plea must be dismissed as in part inadmissible and in part unfounded.

The second part of the fifth plea, concerning the requirements in relation to findings of a competitive disadvantage

142. In the second part of its fifth plea, BA argues that, for the purposes of correctly applying subparagraph (c) of the second paragraph of Article 82 EC, the mere finding of the Court of First Instance, in paragraph 238 of the judgment under appeal, that travel agents, in their capacity to compete with each other, are ‘naturally affected by the discriminatory conditions of remuneration inherent in BA’s performance reward schemes’ is not sufficient, since concrete evidence of a competitive disadvantage was required.

143. The specific prohibition of discrimination in subparagraph (c) of the second paragraph of Article 82 EC forms part of the system for ensuring, in accordance with Article 3(1) (g) EC, that competition is not distorted in the internal market. The commercial behaviour of the undertaking in a dominant position may not distort competition on an upstream or a downstream market, in other words between suppliers or customers of that undertaking. Co-contractors of that undertaking must not be favoured or disfavoured in the area of the competition which they practise amongst themselves.

144. Therefore, in order for the conditions for applying subparagraph (c) of the second paragraph of Article 82 EC to be met, there must be a finding not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others (see, to that effect, *Suiker Unie*, paragraphs 523 and 524).

145. In that respect, there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as being abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually.

146. In paragraphs 237 and 238 of the judgment under appeal, the Court of First Instance found that travel agents in the United Kingdom compete intensely with each other, and that that ability to compete depended on two factors, namely ‘their ability to provide seats on flights suited to travellers’ wishes, at a reasonable cost’ and, secondly, their individual financial resources.

147. Moreover, in the part of the judgment under appeal relating to the examination of the fidelity-building effect of the bonus schemes at issue, the Court of First Instance found that the latter could lead to exponential changes in the revenue of travel agents.

148. Given that factual situation, the Court of First Instance could, in the context of its examination of the bonus schemes at issue having regard to subparagraph (c) of the second paragraph of Article 82 EC, move directly, without any detailed intermediate stage, to the conclusion that the possibilities for those agents to compete with each other had been affected by the discriminatory conditions for remuneration implemented by BA.

149. The Court of First Instance cannot therefore be accused of an error of law in not verifying, or in verifying only briefly, whether and to what extent those conditions had affected the competitive position of BA’s commercial partners. The Court of First Instance was therefore entitled to take the view that the bonus schemes at issue gave rise to a discriminatory effect for the purposes of subparagraph (c) of the second paragraph of Article 82 EC. The second part of the fifth plea is therefore unfounded.

150. The fifth plea must therefore be dismissed in its entirety.

151. Since none of the pleas raised by BA in support of its appeal can be accepted, the appeal must be dismissed.

On those grounds, the Court (Third Chamber) hereby rules:

1. The appeal is dismissed.

* Language of the case: English.

Notes and questions on *British Airways*

1. (Points 26, 34, 63, 78 & 9). Retrospective rebates are frequently given by firms with virtually no market power. Do you think that they always foreclose, or are there some circumstances that make foreclosure more or less likely?
- the retrospective nature of the discount reduces the income to be made for the goods actually sold while, on the other hand, more produce may be shifted. The likelihood of foreclosure may depend on a trade off between the extent of these influences.
 - Unless the target is set close to the likely purchases of the customer it is unlikely to foreclose.
 - Are there other routes to the final buyer, such as wholesalers? Is the market contestable?
 - How many customers are substantially locked into Domco? A captive base should not be presumed.

See Christian Ahlborn & David Bailey, ‘Discounts, Rebates and Selective Pricing by dominant Firms,’ *Special issue on Article 82 in (2006) European Competition Journal*, 101.

CRAI Competition Memo, April 2005, ‘When are Rebates Exclusionary,?’ and Brief 21 of RBB:

Economicshttp://www.rbbeconomics.com/publications/downloads/rbb_brief21.pdf

These tests involve questions of fact over which the ECJ has no jurisdiction, but should it articulate some of the criteria that are relevant? Are the criteria questions of law over which it has jurisdiction?

Many discounts are granted to dealers who satisfy a target, even retrospective discounts. There are many reasons for this:

- Where it is hard to monitor the performance of a dealer, a discount for attaining a target may help to align their interests,
- Where the supplier has to incur sunk costs, the discount may allocate the risks between the seller and its dealers and avoid hold-up problems. For these and other reasons, see Ahlborn & Bailey, op cit above, at pp 108-9.

In some circumstances loyalty discounts may be an efficient way to exclude rivals.

- Where the firms are dissimilar, e.g. if rivals face significant fixed costs and Domco has an ‘assured base’ of sales which its rivals could not make, for instance because Domco sells a ‘must buy’ product range.

2. (Points 57-9). It had often been argued by John Temple Lang that exclusionary abuses that did not come within Article 82(c) and (d) had to come within Article 82(b) which expressly mentions consumer harm. Since the list is not exclusive however, it might have been argued that consumer harm was not a required to be established to amount to 'abuse'. Did the ECJ take this position? Does the Commission's Guidance on its enforcement priorities under Article 82?
3. (Point 63). Are these factors relevant economically? See question 1 and give reasons. Can you think of other factors that should be relevant?
4. (Point 66). This is a quotation from *Hoffmann-La Roche* ¶91, CB 141. Does the structure of the market depend only on its concentration? Are substitutes and barriers to entry important? See *HLR* points 41 – 49, *Case Book* pp 132-135.
5. (Points 67, 68 & 77). Should it suffice to establish an abuse that the conduct can be or is capable of foreclosing? Should it also have to be established that it is likely to do so? I have inserted the French versions of the judgment, to which the judges in later cases are likely to refer. See opinion of AG Kokott and article by Klaus Pfeiffer (2007) 28 ECLR 597 and para. 20 of the Guidance on the Commission's Enforcement Priorities in Applying Article 82. If the Commission's views differ from those of the judgment, which are likely to prevail in;
- 1. The ECJ,
 - 2. The CFI,
 - 3. The Commission and
 - 4. A national court?
6. (Points 69 & 85). Note that in principle there may be objective economic justifications for conduct otherwise abusive.
7. (Points 73 & 74). Why is the pressure particularly strong when the discount is retrospective?
8. (Point 75). Is the better test a market share larger than its competitors, or that its customers buy a large proportion of its output and are tied in. What is the difference between these tests? Is the minimum efficient scale of operation relevant? What is competition on the merits?
9. (Points 84- 89). On whom is the onus of proof on justification?
- The French text is:
- 'seuls les rabais ou primes qui ne reposent sur aucune prestation économique qui les justifie doivent être considérés comme abusifs.'

10. (Point 85). Did ¶69 state that an exclusionary effect had been established before the CFI.
11. (Point 86). Is it possible reliably to balance the disadvantage of foreclosing competition against the benefit derived from greater efficiency? Can either be quantified?
12. (Point 87). Why is the high level of fixed costs relevant? Were those costs sunk?
13. (Points 96 - 100). Are you satisfied that the ECJ was looking to likely or actual effects? Were its arguments based solely on form?
14. (Point 101). How could the Commission establish the effect of the rebates? Could it allege that BA's market share had declined less fast than it would have done otherwise?
15. (Point 107). Is this the first case where the ECJ has considered significant consumer harm to be necessary when establishing abuse of a dominant position?
16. (Point 113). Is the ECJ stating that an anticompetitive effect had actually been found, rather than rely on the possibility of there being an anti-competitive effect?
17. (Point 126). Do you think the fine should be related to the number of ways in which abuse could be established?
18. (Points) 133 - 149. This judgment is clearer than others as to when discrimination is abusive.
19. (Points 138 - 141). Do you think that as much effort proportionally is required to sell as many tickets as an agent had sold last year as to increase turnover? If not, are the transactions equivalent? Is it discriminatory to reward more those who have worked harder to obtain the same result? Would that be a question of law within the jurisdiction of the ECJ?
20. (Point 142). On whom is the burden of proof under article 82? Does it differ as between foreclosure and discrimination?