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VIEWPOINT:

ECJ Dismisses British Airways' Appeal

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On 15 March 2007, the European Court of Justice (“ECJ”) dismissed an appeal by British Airways plc (“BA”) against a judgment of the Court of First Instance (“CFI”), which dismissed an appeal by BA against a European Commission decision of 14 July 1999 finding that BA had infringed Article 82 EC Treaty by the application of commission schemes for travel agents which the Commission considered to amount to loyalty rebates and imposing a fine of EUR 6.8 million. The ECJ’s decision followed an opinion handed down by Advocate General Kokolt on 23 February 2006 that BA’s appeal should be dismissed, finally bringing to a close the long running saga which had begun in 1993 when Virgin lodged a complaint with the Commission in respect of agreements entered into by BA with UK travel agents.

Under the agreements, the travel agents received a basic commission for all BA tickets sold as well as other financial incentives, including: (i) for those agents with at least £500,000 in annual sales of BA tickets, a performance reward calculated on a sliding scale, based on the extent to which the agent increased its sales of BA tickets on a yearly basis compared to previous years; and (ii) additional commissions for three travel agents by reference to the growth of BA’s share in their worldwide sales.

BA subsequently introduced a new performance reward scheme which provided for an additional variable commission element based on the travel agents’ performance in selling BA tickets which was measured by comparing the total revenue arising from sales of BA tickets issued by an agent in a particular calendar month in the previous year. The

benchmark above which the additional variable element became payable was 95% and its maximum level was achieved if an agent's performance level was 125%. This new scheme prompted Virgin to lodge a second complaint with the Commission in 1998.

In its decision the Commission had found that by applying the various commission or bonus schemes, BA abused its dominant position in the UK market for air travel agency services and that such abusive conduct, by rewarding loyalty from travel agents and by discriminating between travel agents, had the object and effect of excluding BA's competitors from the UK markets for air transport. Each of the schemes were considered to have a common notable element: in each case, meeting the targets for sales growth led to an increase in the commission paid on all BA tickets sold by the agent, not just on the tickets sold after the target is reached. As such, the commissions were considered to be equivalent to a loyalty discount, in other words, a discount based not on cost savings but simply on the customers' loyalty, thereby able to exclude the dominant firm's competitors from the market.

Understandably, the Commission has welcomed the ECJ's decision which it believes confirms the application of an approach under European competition law based on the effects on the market(s) of the conduct in question, the ECJ having held that a system of discounts or bonuses will be abusive where it has an exclusionary effect which is disadvantageous to competition and is not counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. In this respect the Commission is likely to take the view that the ECJ's decision is entirely consistent with the Commission's approach in its discussion paper on exclusionary abuses under Article 82, although the Commission's original decision, along with the ECJ's decision in the

Michelin case which was found by the ECJ not to have been misapplied by the CFI in the BA case, has been called into question by several commentators as being at odds with a more effects-based approach under Article 82.

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