



eSAPIENCE CENTER FOR COMPETITION POLICY

VIEWPOINT:

Virgin v. British Airways: Orthodoxy Prevails

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Virgin-v-British Airways: Orthodoxy Prevails

by

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On 15th March 2007, the European Court of Justice dismissed British Airways' appeal against the judgment of the Court of First Instance which had upheld the Commission's decision finding that BA's travel agency incentive schemes infringed Article 82. The CFI's judgment was a significant precursor to the Commission's decision to initiate the review of Article 82 that led to the publication of its staff Discussion Paper in December 2005. It is, therefore, particularly interesting to consider what impact the ECJ's judgment may have on the future course of that review (as to which, the Commission may publish a further paper later in the year).

The Judgment in Summary

The facts are well known. Under BA's incentive schemes, UK travel agents were paid additional commissions retrospectively, i.e. on the totality of their BA sales, if those sales exceeded the level achieved in the previous year. The Commission decided that the schemes discriminated amongst travel agents and, as a result, foreclosed entry to rival airlines (notwithstanding the fact that BA's share of the relevant market had declined significantly over the period reviewed by the Commission).

The ECJ's judgment concentrated on foreclosure. BA argued that its schemes represented legitimate price competition to the benefit of consumers. To cross the line into abusive foreclosure, the Commission would have to show (as it had not) that the incentives caused agents, in law or in fact, to deal wholly or mainly with BA.

The Court rejected this argument. It stressed that Article 82 is not only concerned with practices that cause direct harm to consumers but also reaches conduct that is indirectly detrimental to them through its impact on an effective competitive structure. It stated that the relevant question is whether the incentives are capable of making competitive entry and co-contractors' choice of supplier very difficult or impossible. It acknowledged that that exclusionary effect could be excused if the dominant firm demonstrates that the incentives give rise to economic gains provided that the abusive conduct is necessary to achieve the benefits claimed.

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The ECJ went on to say that three particular features enabled a court to identify the presence of such a foreclosure effect, namely the individualized nature of the sales target, the retrospective nature of the bonuses and the dominant firm's substantial share of the market relative to its rivals. The ECJ concluded that the CFI had properly assessed these issues as a matter of law and that it would not entertain a more detailed critique of the factual basis for the CFI's findings (on the ground that they went beyond its limited jurisdiction to review errors of law).

Implications of the Judgment for the Review of Article 82

All antitrust systems have to determine the relative importance that they attach to the promotion of, respectively, a competitive structure and competitive behavior; in particular, they have to decide how far to constrain competitive behavior over the short term to avoid the possibility of detriment to competitive structure over the long term. European competition law has consistently attached great importance to the maintenance of a competitive structure. There is no disagreement between the Court and the Commission as to that point.

The significance of the "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses" ("Discussion Paper") was two-fold: first, it recognized that consumer welfare is the fundamental goal of competition policy; secondly, it stated a test under which behavior should be assessed by reference to its actual impact in the market under examination. Many commentators disagreed with the way in which that test was developed, on the ground that it reintroduced a structure-based analysis by the back door, but at least the Discussion Paper recognized the fundamental principles of an effects-based analysis applied in support of a consumer welfare goal.

This judgment is written as if the Discussion Paper did not exist. It contains an unqualified restatement of the old orthodoxy with its emphasis on structure-based standards. The only market-specific factor discussed by the Court is the firm's market strength: in effect, that element may be satisfied by proof of dominance. In summary, although the Court spoke the language of market effect, it reached a conclusion of *per se* prohibition subject only to the possibility of objective economic justification.

For all that, it would be too pessimistic to see this judgment as a decisive brake upon the future development of Article 82. The fact that the Court speaks the language of market effect gives the Commission room to develop a better assessment of conduct's impact on the market. The judgment should, therefore, be seen as an encouragement to ensure that those impacts are well analyzed and well articulated both in any further version of the Discussion Paper and in individual cases.

It is also important to emphasize that this case concerns fidelity rebates, a topic with which Community law has always had particular difficulty. Admittedly, the judgment fails to acknowledge (as the Discussion Paper importantly did) that, while fidelity rebates may have foreclosure effects, they also represent a form of price competition and that, therefore, it is necessary to introduce some element of predation analysis into the assessment. As a practical matter, however, given the restrictive tests developed by the Discussion Paper, it is unlikely that they would permit many retrospective rebate schemes that would be prohibited under the Court's judgment.

Critics may say that, without a significant change to the law on rebates, the Article 82 paper will achieve little of substance and could even make matters worse (for example, in relation to refusal to supply). It would, in any event, be wrong to leave the last word to this judgment. It is important that the general principles articulated by the Discussion Paper are restated and reinforced - not simply for the evolution of the Commission's policy but also for the impact that the policy of the Community institutions has upon the application of competition law in the Member States.