

# Case C-95/04 P

**British Airways plc**

**v**

**Commission of the European Communities**

(Appeals — Abuse of dominant position — Airline — Agreements with travel agents — Bonuses linked to growth in sales of that airline's tickets over a given period in comparison with a reference period — Bonuses granted not only for tickets sold once the sales target achieved, but for all tickets sold during the period in question)

Opinion of Advocate General Kokott delivered on 23 February 2006 . . . . . I - 2336  
Judgment of the Court (Third Chamber), 15 March 2007 . . . . . I - 2373

## Summary of the Judgment

1. *Competition — Dominant position — Abuse — Goal-related discounts (Art. 82 EC)*

2. *Competition — Dominant position — Abuse — Definition*  
(Art. 3(1)(g), EC and 82 EC)
3. *Competition — Dominant position — Abuse — Application of unequal conditions to equivalent services*  
(Art. 82, para. 2(c), EC)
4. *Competition — Dominant position — Abuse — Application of unequal conditions to equivalent services*  
(Arts 3(1)(g), EC and 82, para. 2(c), EC)

1. 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 since it does not contain any obligation on the part of co-contractors to obtain all or a given proportion of its supplies from the dominant undertaking constitutes an abuse, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of those discounts or bonuses. It first has to be determined whether they can produce an exclusionary effect, 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 and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners. It then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted. An undertaking is at liberty to demonstrate that its bonus system producing an exclusionary effect is economically justified.

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, the rate of the bonuses depending on the evolution of the turnover arising from the purchases or sales of the products of the undertaking in a dominant position by each co-contractor during a given period.

The commitment of co-contractors towards the undertaking in a dominant position and the pressure exerted upon them may be particularly strong where the discounts or bonuses applied to the overall turnover relating to products of that undertaking, that is, where those discounts or bonuses do not relate solely

to the growth in purchases or sales of those products during the period under consideration, but extend also to the whole of 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. This is the case where attainment of the objectives gives rise to an increase in the bonuses paid on purchases or sales of those products during the period under consideration, and not just on the purchases or sales made after those objectives have been attained. The progressive nature of the increased commission rates thus has a very noticeable effect at the margin, with radical effects on the rates of performance-related bonuses as a result of a slight reduction in the turnover achieved.

The pressure exerted on co-contractors by an undertaking in a dominant position which grants discounts or bonuses with those characteristics is further strengthened where that undertaking holds a very much larger market share than its competitors. 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 turnover. 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.

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. 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.

(see paras 65, 67-75, 86)

2. 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. It follows that, in order to assess whether the conduct of an undertaking in a dominant position is abusive, it is not necessary to examine whether that conduct has caused prejudice to consumers within the meaning of subparagraph (b) of the second paragraph of Article 82 EC; rather, it is sufficient to examine whether it had a restrictive effect on competition.

at different levels according to whether or not the co-contractors have attained their targets by comparison with the reference period.

(see paras 138, 139)

(see paras 106, 107)

3. A system of goal-related discounts or bonuses granted by an undertaking in a dominant position which, in the event of attainment of the objectives by co-contractors, entails an increase in the rates of those discounts or bonuses not only on the marginal purchases or sales of the products of the undertaking in a dominant position beyond those objectives, but also on the whole of those purchases or sales handled during the period in question, leads to equivalent transactions within the meaning of subparagraph (c) of the second paragraph of Article 82 EC, namely the purchase or sale of an identical quantity of products of the undertaking in a dominant position, being remunerated

4. 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. 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.

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.

(see paras 143-145)