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VIEWPOINT:

The Court of First Instance: Where it (All?) Happens

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The Court of First Instance: Where it (All?) Happens

by

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Whilst the Court of First Instance of the European Communities ("CFI") had held the Commission accountable for a lack of attention to detail in a number of circumstances, in the European Court of Justice's ("ECJ") decision of 15 March 2007 in Case C-95/04 P – *British Airways v. Commission* ("Decision") it now emerges that the CFI itself will not suffer a similar fate at the hands of the ECJ.

1. The ECJ sets out the analytical framework for finding an infringement of Article 82 EC Treaty by way of fidelity rebates (bearing in mind that the finding of British Airways' dominance was not contested), i.e.

a) the exclusionary effect, where, arguably, the ECJ proceeds in two steps:

   aa) the effects of British Airways' bonus schemes on the travel agencies (Decision, para. 60 *et seq*. and paras. 98, 99),

   ab) the effect on British Airways' competitors (Decision, para. 100 – hardly containing a discussion of this step), and

b) lack of economic justification (Decision, para. 69 and 84 *et seq.*)

One may note that the ECJ explicitly denies the existence of a further step, that is the finding of a prejudice to consumers. The ECJ notes that such an explicit finding is not

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required, as it may follow from the abusive behavior's "impact on effective competition structure" (Decision, para. 106).

2. In reviewing the CFI's reasoning for each of those steps, the ECJ restricts itself to an explanation of the high-level principles of finding abusive fidelity rebates and to verifying whether the CFI has dealt with those steps. It seems, however, that the ECJ does not review whether the CFI has correctly applied this framework or the principles emanating from the latter. It remains open whether that is because the ECJ considered its jurisdiction to be limited, or whether it agreed with the CFI's findings. In any event, the ECJ only cursorily reiterates the CFI's reasoning, and it seems that any pleas by the applicant as to why this reasoning was wrong are set aside as an inadmissible attack on the CFI's assessment of facts (see Decision, paras. 78, 79 for the effect on travel agencies, and para. 88 for the lack of justification). Furthermore, the ECJ also does not review the effect on the dominant enterprise's competitors (see Decision, para. 100, where it seems, but admittedly is not entirely clear, that the effect on competitors simply follows from the effect on the travel agencies, which would render step ab) next to redundant). Finally, if one accepts the legal proposition that under Article 82 EC a detriment to consumers must not be found, but that an impact on effective competition structure is sufficient, one must note that the ECJ does not review this impact either (see Decision, para. 106).

3. For competition practitioners, the Decision must raise the question of whether an appeal to the ECJ is worth it. The high-level principles of Article 82 EC are, at least for certain forms of abusive behavior, uncontested (or are, hopefully, due to be deemed as such in the near future), and the application of that framework in detail will not be

reviewed by the ECJ anyway. Only a narrow band of cases remain, in which an appeal against the CFI's assessment would be successful, and that is a distortion of the facts or the evidence, which must explicitly be pleaded (Decision, para. 78).