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Breaking Modern Myth 'only Big is Bad': An Established Exquisite Analysis under the EU Competition Law

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ABSTRACT
The understanding of an assessment under Article 102 for the combined abuse of dominance cases has led us to believe that the principal element to establish existence of dominance of an undertaking is substantial market share, which according to the most case laws is even true. However Market shares are only indicative and not conclusive of dominance which is impeccably conveyed in the matter of *British Airways v Commission* wherein the European Court of Justiceupheld a landmark decision levying a hefty fine of 6.8 million EUR, holding British Airways guilty of abusing its dominant position in the relevant market of the United Kingdom despite havingthe lowest market share of 39.7% in the history of abuse of dominance jurisprudence.

The present article aims to break the modern myth that 'only *Big is Bad*' by economically analysing the factual background of British Airways through a legal lens with the help of existing case laws to assess whether the conduct of British Airways encompasses through objective economic justification or not. It will also ponder upon the *Odroliberal* approach with concluding remarks.

KEYWORDS: Dominance, Abuse of Dominance, Market Share, Article 102 TFEU, EU Competition Law, British Airways

I. INTRODUCTION

"There exists an inverse relationship between the identified *'market'* and the potential *'dominance'* of an undertaking within that market."[1]Therefore, the bigger is the market, the possibility of concentration of power with one undertaking is less and the smaller is the market, the possibility of concentration of power with one undertaking is high. Thus, the thoughts bring us to the central idea of this paper contemplating about dominance, abusing that dominance and its co-relationship with market share under the EU competition law.

The principal provision providing legislative framework for abuse of dominance is Article 102 of the Treaty on Functioning of European Union (hereinafter referred as 'TFEU'). The provisions under Article 102 are indicative and not exhaustive. From the above mention provision, it can be inferred that the aim of Article 102 is to catch two types of abuses (i) Exploitative Abuse and (ii) Exclusionary Abuse. Consumers are directly harmed by the exploitative practices such as increasing product price or controlling production whereas in exclusionary abuse the dominant undertaking attempts to remove the competitors from the market by refusing to deal, tying goods and similar sort of other measures not exhaustive of Article 102.[2] There is no flawless definition to define the dominant position however the Courts time and again have tried to give a meaning to it. The European Court of Justice (hereinafter referred as 'ECJ'), in *Hoffmann- La-Roche*[3] case, one of the first cases of abuse of dominance, has elucidated the concept of dominance as, *"The dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective*

[1]Schütze, R. (2012). Competition law: Abuse. In An Introduction to European Law (pp. 281-301). Cambridge: Cambridge University Press. doi:10.1017/CBO9781139177368.016, p 285.

[2] Bruce Lyons, 'The Paradox of the Exclusion of Exploitative Abuse', Dept. of Economics and the ESRC Centre for Competition Policy, University of East Anglia, CCP Working Paper 08-1, ISSN 1745-9648, December 2007, p 1.

[3] Case 85/76, European Court Reports 1979 - 00461, ECLI identifier: ECLI:EU:C:1979:3.

competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."[4]

The assessment of abuse of dominance is one of the most complex areas of competition law, which majorly is based on three- step methodological process. First of all, prior to application of any law, it is pertinent to identify the relevant market in which any potential abuse is suspected/ alleged. Secondly, in order to scrutinise identified undertaking(s) for the alleged abuse, the existence of dominance in the established in the relevant market is crucial and lastly, once steps one and two are fulfilled, such undertaking(s) must be involved into some practices violative of law that has caused or has the potential to cause appreciable adverse effect on overall competition in the established relevant market. At this point it is worthy to mention that under the EU law, dominance is not*per se* against the law, whereas abusing such a dominance to leverage a position in the market either by exploiting or excluding the competitors from the market is illegal. "However, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market".[5]

The present article aims to break the modern myth that 'only *Big is Bad*' by economically analysing the factual background of British Airways through a legal lens with the help of existing case laws to assess whether the conduct of British Airways encompasses through objective economic justification or not. It will also ponder upon the Odroliberal approach with concluding remarks.

II. SUBSTANTIAL MARKET SHARE GAME: A TRANSFORMED APPROACH

It is generally supposed that to make an assessment under Article 102 for the combined abuse of dominance cases, the fundamental element to establish the existence of dominance of an undertaking is substantial market share in the relevant market.[6]The European Court in *Hoffmann-La- Roache*[7]and *AKZO v Commission*[8]case has clearly indicated that a very large market share is a significant evidence of existence of dominance, which according to the most case laws is even true. The EU Court has expressed that generally a market share of 50% or above is indicative of dominance in the relevant market.[9]For example,in 1993, BPB Industries held a market share of 96% in the market for plasterboard in the UK.[10]In 1994 Tetra Pak was termed as '*quasi- monopolistic'* having the market share between 90-95% in the market for the aseptic packaging of liquid foods in cartons in the European Economic Area.[11] In 2004, Microsoft held more than 90% market share in the relevant market for Windows client PC operating systems.[12]

In *United Brands*[13], the Court opined that a firm can still be found dominant if the market share is ranging between 40-45% but have to

[4]*Ibid*, para 4.

[5] Case 322/81, European Court Reports 1983 - 03461, ECLI identifier: ECLI:EU:C:1983:313, para 57; Case C-209/10, ECLI:EU:C:2012:172, para 23; Case C-202/07 P France Telecom v Commission [2009] ECR I-2369, para 105; Case C-413/14 P, ECLI:EU:C:2017:632, para 135.

[6]Case 85/76 Hoffmann-La Roche & Co. v Commission [1979] ECR 461, paragraph 39-41; Case C-62/86 AKZO v Commission [1991] ECR I-3359, paragraph 60; Case T-30/89 Hilti v Commission [1991] ECR II-1439, paragraphs 90, 91 and 92; Case T-340/03 France Télécom v Commission [2007] ECR II-107, paragraph 100 as referred from Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance), OJ C 45, 24.2.2009, p. 7–20, para 13.

[7] Case 85/76, European Court Reports 1979 - 00461, ECLI identifier: ECLI:EU:C:1979:3.

[8]Case C-62/86 AKZO v Commission [1991] ECR I-3359, paragraph 5, 60.

[9] Case C-62/86, European Court Reports 1991 I-03359, ECLI identifier: ECLI:EU:C:1991:286, Summary judgment, para 5.

[10] Case T-65/89, European Court Reports 1993 II-00389, ECLI identifier: ECLI:EU:T:1993:31, para 8.

[11] Case T-83/91, European Court Reports 1994 II-00755, ECLI identifier: ECLI:EU:T:1994:246, para 13.

[12] Case T-201/04, European Court Reports 2007 II-03601, ECLI identifier: ECLI:EU:T:2007:289, para 1038.

[13] Case 27/76, European Court Reports 1978 - 00207, ECLI identifier: ECLI:EU:C:1978:22.

consider other factors affecting competition in the relevant market.[14]However, the approach of the Court in British Airways v Commission is one of its first kind when British Airways was held guilty for abusing its dominant position despite having a lowest market share of only 39.7% so far in the jurisprudence of abuse of dominance cases in the EU.

Post *British Airways* decision, the European Commission in its communication on guidance for enforcement priorities in applying Article 102 expressly indicated that notwithstanding in the history of EU competition law, it has been unlikely to find dominance below a market share of 40%, "however, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations"[15] and these cases should still deserve attention.Considering the evolutionary approach adopted by the Commission, it becomes crucial to analyse the facts and rationale given by the EU Courts in the *British Airways* case in order to apprehend the scope and applicability of Article 102.

III. BRIEF CONTEXT OF BRITISH AIRWAYS V COMMISSION

In 1993, Virgin Atlantic Airways Limited, the nearest rival of British Airways filed a case before the European Commission alleging British Airways of breaching Article 101 and 102 of the Treaty on Functioning of the European Union. The action arose as a consequence of British Airways concluding *'Marketing Agreements'* and *'Global Agreements'*,applicable from 1992, which offered rebates and other types of incentives to the International Air Transport Association (IATA) qualified travel agents. Later in 1998, by way of supplementary complaint, Virgin alleged British Airways for abusing its dominant position by offering *'Performance Reward Schemes.'*However, the Commission did not interfere with the incentives British Airways provided to its corporate clients, attached in the original complaint made by Virgin,it only focused on the bonus paid to qualified travel agents through various quantitative incentive schemes.[16]

In 2000, the European Commission charged British Airways with a fine of 6.8 million EUR for violating Article 102 of the treaty for abusing its dominant position in the market by concluding '*PerformanceRewardSchemes'* that weredirectlyrelatedtothenumberofsalestocalculatec ommission of travel agents approved by the International Air Transport Association.Under the said scheme, British Airways offered additional financial incentives to the travel agents on selling its tickets after accomplishing the set targets for both national and international flights.

The decision of the Commission was upheld by both the Court of First Instance and European Court of Justice in the year 2003 and 2007 respectively in its entirety for abusing dominant position.

Now, the interesting point here is that despite having a lowest market share so far in abuse of dominance cases, British Airways was held a dominant player in the given market of the United Kingdom. Therefore, it becomes pertinent to find out that why British Airways was held a Dominant Player?What factors in addition to market share were taken into consideration by the Commission to hold it a dominant player as BA had a very low market share?

IV. COMPUTING DOMINANCE OF BRITISH AIRWAYS

It is deduced from many EU cases[17] that higher market share is only an obvious indicative factor of dominance and not a conclusive one. Therefore, while assessing a position of dominance, a combination of factors should be taken into consideration along with market share because independently those factors wouldn't budge.[18]The Commission, while assessing the dominant position of British Airways, took into account the following aspects:

(a) the market share of Virgin, the nearest

[14] *Ibid*, paras 10 and 105.

[15] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, para 14.

[16] Virgin v British Airways (IV/D-2/34.780) Commission Decision 2000/74/EC [2000] OJ L30/1, para 3-5.

[17] Akzo v Commission, paragraph 60, Case T-30/89 Hilti v Com- mission [1991] ECR 11-1439, paragraph 92, and Case T-83/91 Tetra Pak v Commission [1994] ECR 11-755, paragraph 109).

[18] 2000/74/EC: Commission Decision of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty (IV/D-2/34.780 - Virgin/British Airways), OJ L 30, 4.2.2000, p. 1–24, para 87, 88.

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competitor of British Airways;
(b) the operative routes of both British Airways and Virgin;
(c) turnover during the relevant period;
(d) the no. of employees employed, and
(e) the ranking in terms of scheduled passenger-kilometres flown.

In the year 1997, Virgin operated its services in a few international routes while British Airways covered 15 domestic and 155 international destinations raking 1st in the world, in terms of international scheduled passenger-kilometres flown and 9th for both local as well as global kilometres flown. In contrast, Virgin was ranked 21st in the world for international scheduled passenger-kilometres flown and 31st for both domestic and international kilometres flown. The annual turnover of British Airways in the year 1994 was 8642 million GBP and of Virgin was 444 million GBP. British Airways employed 60675 employees on an average in 1998, and Virgin employed 4522 employees.[19] As per the data provided by International Passenger Survey, British Airways contributed 39.7% of total sales of all the airlines in UK in 1998[20] whereas Virgin hold only 5.5% of market.[21]

From the statistics provided above, it can be seen that British Airways is in a powerful position compared to Virgin and other players in the relevant geographic market as decided by the Commission. Therefore, even after having a lower market share it is held to have a dominant position because the competitors in the relevant market held substantially lower market share than British Airways considering the similar line of operation.

According to the Commission, the fact that British Airways is a dominant purchaser of air tickets and also offers significantly higher routes for air transport spreaded over the relevant airports in substantial slots than any other relative competitors makes it difficult for any new player to enter into the market and therefore the conduct of British Airways works as an entry barrier which ultimately hampers the competition in the market.[22]

V. THE PERFORMANCE REWARD SCHEMES IN QUESTION

So basically, there were three contracts in question concluded by British Airways namely, (i) Marketing Agreements (MAs), (ii) Global Agreements (GAs), and (iii) Performance Reward Scheme (PRS).

(i) Marketing Agreements:
UndertheMAs, an additionalbonuswaspaidon the top of basic commission onthebasisof an increaseintheshareinsectorflownlike long, short-haul, domestic or international.Individual payment was made as per sectoral growth as per the different categories specifically defined by British Airways. British Airways, under the MAs, also provided funds for training and business development in which travel agents required to perform promotional activities to increase the sale of BA tickets, as mentioned in the conditions.[23]

(ii) Global Agreements:
For 1992-93 winter period, BA under its Global Agreements exclusively with three operators, namely American Express, Rosenbluth, and Carlson, made arrangements for paying additional commission with reference to enlargement of BA's share worldwide. 10% of additional revenue, as represented by a minimum of 1.5% increase in the total sales globally, was paid to the achiever agent.[24]

(iii) Performance Reward Scheme:
British Airways, to its travel agents within the UK, was offering a 9% commission rate on the sale of international flights and at the rate of a 7.5% on domestic flights from 1976 to 1997.[25] Applicable from January 1,1998, itintroduced a new 'Performance Reward Scheme,' which mentioned and in detail explained to all the travel agentsthatnow they will receive reduced commission at a flat 7% rateforalltypes of tickets. And agents will receive additional payment at 3%

[19] Commission Decision, Official Journal L 030, 04/02/2000 P. 0001 - 0024, para 1-2, as refereed from IATA World Air Transport Statistics No WATS 4/98 and British Airways Reports and Accounts for the year ended 31 March 1998.
[20] Commission Decision, Official Journal L 030, 04/02/2000 P. 0001 - 0024, para 41.
[21] Commission Decision, Official Journal L 030, 04/02/2000 P. 0001 - 0024, para 88.
[22] 2000/74/EC: Commission Decision of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty (IV/D-2/34.780 - Virgin/British Airways), OJ L 30, 4.2.2000, p. 1–24, paras 89- 92.
[23] Commission Decision, Official Journal L 030, 04/02/2000 P. 0001 - 0024, para 7- 16.
[24] Case C-95/04 P, British Airways v Commission, ECLI:EU:C:2007:166, para 20.
[25] Case T-219/99, British Airways v Commission, ECLI:EU: T:2003:343, para 4.

and 1% commission rate for the sale of international and domestic flight tickets respectively after achieving the benchmark sale.[26]

5.1 Exclusionary Effect of the Performance RewardSchemes

Let us start by understanding and step by step analysing the reward scheme in question.So as per the opinion of the General Advocate, to assess the exclusionary effect of the bonus schemes adopted by the principal undertaking, it is necessary to establish (A) whether such plans are capable of making it impossible or challenging for the competitors to access the market and(B)if the answer to first question is affirmative then whetheritfallsundertheshelterofobjectiveeconomicjustification or not.[27]

A. TheNature of 'BonusSchemes'

Therefore, to measure anti- competitive effect of British Airways's action, we need to understand:

1. Calculation of Additional Bonus.
2. TheAnti- competitive Nature of Fidelity-Building Reward Schemes

i. Calculation of AdditionalBonus Paid

Now, we will learn how British Airways assesses and estimates the travel agent's bonus, which is sufficient to put other players in the market at a competitive disadvantage. To determine the foreclosure effect, this evaluation would be enough to check whether British Airways is in a position to exploit its clients. With this effect, making other competitors less competitive, the dominant firm (British Airways) reduced the sources of choice from the relevant market.

As discussed above, British Airways paying an additional 0.1% commission in addition to basic rate for every 1% increase in the sale for international tickets and every 3% increase in the sale of domestic tickets above the benchmark of 95% of sale.[28] This improvement in performance was measured with the corresponding month's performance in the previous year.[29]For example, if a particular travel agent's performance during April is 120%, then the variable bonus element for international tickets will be 2.5% [(120- 95) into 0.1]. And for domestic tickets it will be 0.8% [(120-95)/3 into 0.1]. From the calculation, it can be inferred that the commission increases parallel to the increase in sales.

For high-end sales performance of travel agents till 125% or more, they can earn an extra commission of up to 3% and 1% for international and domestic flight tickets respectively. Comparing this new scheme with the old flat-rate commission scheme, travel agents can now earn an additional 1% commission for the sale of international tickets and 0.5% for the sale of domestic tickets if they promote and sell British Airways's tickets compared to its other competitors in the UK to reach up to the set target.

The exciting aspect of this bonus scheme is that the additional commission is not paid on the marginal sale of the tickets, which is the number of tickets sold after the target is achieved. Although it is paid on the total sale of both international and domestic flight tickets, which makes a considerable difference in the payment received by the travel agents. This specific aspect of the PRS encourages the travel agents to sell BA tickets rather than selling any other competitor's tickets as a similar commission is also receivable under other bonus schemes. This way by putting a little extra effort to sell more of British Airways's tickets, the travel agents can earn significantly higher commission than those offered by any other competitor.

By providing the additional financial incentive, British Airways has abused its dominant position in the Air Transport Service Sector for the following reasons:

a. it encouraged and pressurized the accredited travel agents to sell British Airways's air tickets than any other competitor, and
b. the conduct of British Airways had the object and effect of distorting competition between BA and other players in the UK market.[30]

ii. The Anti- competitive Nature of Fidelity-Building Reward Schemes

It is of utmost importance to understand the purpose of the agreements alleged, to move further in analysing the potentiality of such contracts to

[26] Case C-95/04 P, British Airways v Commission, ECLI:EU:C:2007:166, paras 8,9.
[27] Opinion of Advocate General Kokott, as delivered on 23 February 2006, Case C-95/04 P, ECLI:EU:C:2006:133, para 42 as referred from Hoffmann-La-Roche, para 90 and Michelin I, para 85.
[28] Case T-219/00, (n. 2), para 16.
[29] *Ibid*, para 15.
[30] *Ibid*, paras 24-26, recital of Commission decision paras 96, 102, 103, 109, 111.

exclude competitors from the market. The economic freedom to access the market is restricted by the dominant undertaking British Airways horizontally, and such horizontal reduction has affected the choice of services for customers which were offered by other competitors.

It is opined by Kokott that, the conduct of an undertaking to protect the commercial interest maynotbeobjectionableusingthemethodsofnormalcompetition.However,similaractionsof a firm holding dominant position especially in the case of bonuses and rebates, may have the potential of distorting competition in the market, and not all types of pricing policies are welcomed under Article 102 of the treaty.[31]

While assessing the exclusionary effects of the bonus granted by British Airways, the European Court of Justice formed its argument based on settled law in*Hoffmann-La- Roche* and *Michelin I*. It held that first, it is necessary to evaluate whether such discount or bonus offered by a dominant undertaking makes the entry for new competitor in the market difficultornot.Andsecond,whetheritaffectsthefreesupplyofothercompetitor'sproductor not.[32]"The Community courts have held on several occasions that the granting of certain rebates or bonuses by a dominant undertaking can be an abuse within the meaning of Article 82 EC."[33]"In particular, loyalty rebates and loyalty bonuses can in practice bind business partners so closely to the dominant undertaking (the 'fidelity-building effect') that its competitors find it inordinately difficult to sell their products ('exclusionary,' or 'foreclosure' effect), with the result that competition itself can be damaged and, ultimately, the consumer can suffer."[34]Offering fidelity financial incentives by a dominant firm with an intention of securing supplies in the market is against the competition policy of undistorted internal market.[35]Unlike *Hoffmann-La-Roche*, in *Michelin I*, the purchasers were not bound by exclusivity of supply from the dominant firm. Still, the annual rebates based on the target set by Michelin were foundabusive.[36]

The bonus scheme in question implemented by British Airways offering huge additional commission on total turnover tries to create an entry barrier for new competitors and at the same time limits the access of market for the existing competitors. At the same timeother prevailing players in the market have comparatively less market share and are not in a position to offer a similar reward scheme to the travel agents. This fidelity bonus scheme would encourage the travel agents to sell more British Airways's ticketsand this sense is harmful for the competition in addition to competitors in the market.[37]The competitors of British Airways can't incentivize the travel agents as equivalent or more than British Airway as the bonus offered by British Airways is whole-turnover based calculation. In similarcircumstancesitmightnotbepossibleforevenaneconomicallyefficientcompetitor todosowhenBritish Airwaysisholdinghugeamountofmarketshareascomparedtoothercompetitors.[38]ThemarketshareofBritish Airwaysissignificantlyhigherthanthecombinedshareofallmaincompetitors in themarket.

B.Assessment of Objective EconomicJustification

The European Court of Justice held that the goal under Article 102 is to protect the structure of the competition in the market and not any individual competitor or consumer. However, in that process

[31] Opinion of Advocate General Kokott, as delivered on 23 February 2006, Case C-95/04 P, ECLI:EU:C:2006:133 para 24,25.
[32] Case C-95/04 P, para 68.
[33] 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 517 et seq.; Hoffmann-La Roche, paragraph 90 et seq.; Michelin I, paragraph 62 et seq.; Case C-163/99 Portugal v Commission [2001] ECR I-2613, paragraph 50 et seq. See also Case T-30/89 Hilti v Commission [1991] ECR II-1439, paragraph 101; Case T-65/89 BPB Industries and British Gypsum v Commission [1993] ECR II- 389, paragraphs 71 and 120; Case T-228/97 IrishSugar v Commission [1999] ECR II-2969, paragraphs 198, 201 and 213; Case T-203/01 Michelin v Commission (Michelin II) [2003] ECR II-4071, paragraph 53 et seq. Also the contested judgment (cited in footnote 3). As referred from opinion para 26 footnote 25.
[34] Opinion of Advocate General Kokott, as delivered on 23 February 2006, Case C-95/04 P, ECLI:EU:C:2006:133 para 25.
[35] Hoffmann-La-Roche, para 90.
[36] Opinion of Advocate General Kokott, as delivered on 23 February 2006, Case C-95/04 P, ECLI:EU:C:2006:133, para 39.
[37]*Ibid*, para 74.
[38] Opinion of Advocate General Kokott, as delivered on 23 February 2006, Case C-95/04 P, ECLI:EU:C:2006:133 para 52.

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sattainingconsumersurplusisabonusbutinno case the interest of consumers in the presence of abusive dominant firms can be risked.[39] There is no need for the regulatory bodies to economically assess the detrimental effects in the market. When a firm holds a dominant position in the marketit is the responsibility of such firm to ensure that the conduct is not hampering the healthy competition and competitive structure in the market. The European Court of Justice concluded that the approach adopted by both, the Commission and the Court of First Instance in the present matter was appropriate as the conduct of the British Airways through various bonus schemes intend to restrict competition in the market, and it was likely to have an exclusionary effect.[40] "The European Court emphasized that a dominant undertaking is open to provide justification for an alleged exclusionary conduct under Article 102."[41]Also, with respect to the applicability of 102(3), the Commission in its Guidelines on the application of Article 81(3) of the Treatyhas itself held that,"The creation, maintenance or strengthening of market power can result from a restriction of competition between the parties to the agreement. It can also result from a restriction of competition between any one of the parties and third parties, e.g. because the agreement leads to foreclosure of competitors or because it raises competitors' costs, limiting their capacity to compete effectively with the contracting parties."

British Airways argued that the scope and object of Article 102 of the treaty is to restrict dominant players from performing activities which harm the competition on merit. However, it doesn't restrict the operative firms in the market from granting discounts higher than the other competitors. The conductofBritish Airwayswasof*'fidelitybuilding'* by offeringlowerprices,and that the Commission erred in discerning the non-exclusive nature of such agreements, which doesn't restrict other competitors to conclude similar agreements.[42]On this notion, Advocate General, Kokott opined that, a dominant firm doesn't need to tie a *condition of exclusivity* so far as the effect of such bonus schemes is capable of having a foreclosure effect oncompetitors.[43]The issue whether the concerned bonus scheme in the instant matter has economically justified consideration, the Court acknowledged the fact that if an undertaking is in a dominant position it cannot deprive it of reasonable entitlement, or action that the undertaking feels appropriate to protect its own commercial interests.[44] The test for measuring whether the actions of the undertaking are lawful and appropriate, the criteria of economic efficiency shall be used to know the competitive position of such an undertaking[45].

In order to determine whether the actions of dominant undertaking are creating an exclusionary effect, are justified or not, it needs to be checked through the principle of proportionality. The discrepancy caused in competition by the actions of dominant undertaking must be outweighed, to the advantages in terms of efficiency that benefits the consumer. If the exclusionary effect bears no benefit in relation to the market or consumers, it goes beyond what is necessary in order to attain such entitlement, and any action there forth shall be regarded as an abuse of dominance.An exclusionary abuse is only possible by the actions of a dominant firm, who have successfully excluded its rivals; by abusing the dominant position. This is significant as described in the instant case that law does not require proof of consumer harm when identifying restrictive practices.[46]

The second fold of the issue was, the abuse of dominant position under Article 102 (c), which was acknowledged by the Court of First Instance and later upheld by the European Court of Justice, including the discrimination amongst the

[39] Opinion of Advocate General Kokott, as delivered on 23 February 2006, Case C-95/04 P, ECLI:EU:C:2006:133, para 68.

[40] Opinion of Advocate General Kokott, as delivered on 23 February 2006, Case C-95/04 P, ECLI:EU:C:2006:133 para 75.

[41] Note by Hans W. Friederiszick and Linda Gratz, 'Dominant And Efficient– On The Relevance Of Efficiencies In Abuse Of Dominance Cases', Roundtable On The Role Of Efficiency Claims In Antitrust Proceedings, DAF/COMP/WD(2012)70, p. 6.

[42] Case C-95/04 P, (n 2), paras 40-45.

[43]Opinion of Advocate General Kokott, as delivered on 23 February 2006, Case C-95/04 P, ECLI:EU:C:2006:133, para 44.

[44] Case T-219/99, British Airways v Commission, ECLI:EU: T:2003:343, para 279.

[45] Case T-219/99, British Airways v Commission, ECLI:EU: T:2003:343, para 280.

[46] Giorgio Monti, Article 82 EC: What Future for the Effects-Based Approach?, Journal of European Competition Law & Practice, 2010, Vol. 1, No. 1

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travel agents. The travel agents providing equivalent services during a given periodwho accounted for the same absolute number of BA tickets were paid differently under the terms of British Airway's schemes. The CFI relied on the object and effect test to determine whether British Airways's rebate scheme aimed to create loyalty among the travel agent caused discriminatory practice. To determine the actual effects of British Airways's schemes on travel agents; the test was whether the conduct of British Airways intended to distort competition between its business partners, wherein the court held that to identify the abuse it was not necessary to adduce proof of a quantifiable deterioration among the travel agents belonging to the same competitive position.[47]

The European Court of Justice in *Hoffmann-La Roche v Commission*[48] and in *Michelin*[49] had recognized the test to determine, wherein any grants by the dominant undertaking will be abusive if the subject receiving such grants is obliged, de jure or de facto, to deal exclusively for that undertaking, or in any case, if it limits the subject's choice to work for the matteroffact with any other undertaking with whom it wishes to deal, it is described as abuse. [50] The court keeping in view the reward scheme discussed that an agent receiving a higher commission on sale of British Airways tickets above the determined threshold works as an incentive for the agents to sell more tickets of British Airways. Therefore, the travel agents are motivated to market British Airways tickets than any other airline which drives the British Airway's competitors out of the market by limiting consumer choices at the same time.

The common element in the case of *Michelin* and British Airways'sperformance reward scheme is the inherent nature of the scheme itself, which focused on rewarding fidelity over the volume of sales generated. The CFI rightly demonstrated the impact of such a scheme, which would have a noticeable effect on the sales margin. An agent on accomplishing the assigned threshold will be inclined or induced to sell more British Airways's tickets to circumvent on missing out on any opportunity to earn an increased commission, yielding from the marginal sales and collective sales of British Airways's tickets achieved during the given period. Hence an agent, on the sale of a single extra ticket, will affect the remuneration generated by overall sales of British Airways's tickets achieved during the given period. Fidelity not only impacts the margin of the dominant undertakings but lowers the competitor's sale in the relevant market. It is necessary to consider the exclusionary effect in light of statistics that at the time of complaint the conducts of travel agents amounted to 85% United Kingdom air ticket sales.

The British Airways's scheme "cannot fail to have had" an exclusionary effect to the competitors in the relevant market.[51] The court determined that where the sales of air travel was dependent on travel agents for 85% of sales of the tickets; it could not have failed to create an exclusionary effect for the competitors in the United Kingdom air transport markets'.The court also relied on the *Michelin* judgment where the Commission had pointed out that it is not necessary to adduce evidence in order to show an abuse, it is sufficient to demonstrate that there is a barrier to new entry or risk of restraining competition, without proving the effect the conduct.[52]

VI. A SIGHT FROM ORDOLIBERAL VISION

The EU Courtsthrough various judgments have tried to establish an ordoliberal governance wherein, a vital role is played by the State to govern the free market to ensure that the markets try to achieve the notion of an ideal market. Ordoliberal governance is based on the ideology that in the absence of State governance, private interests would undermine competition and neutrality. The Ordoliberal approach distinguishes competition into two concepts, (i) Performance Competition and (ii) Prevention Competition. Performance competition[53] includes the capacity of performing practices like price penetrating that involves gaining competitiveness by producing high-quality goods at the lowest price. Prevention competition includes practices wherein a barrier is created for the new entrant and competitors.[54]

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[47] Case T-219/99, British Airways v Commission, ECLI:EU: T:2003:343, para 96.

[48] Case 85/76 - Hoffmann-La Roche v Commission [1979] ECR 461, para 91.

[49] Case 322/81, Michelin v. Commission, 1983 E.C.R. 3461, at para. 73.

[50] Case C-95/04 P, British Airways v Commission, ECLI:EU:C:2007:166, para 44.

[51] Case C-95/04 P, British Airways v Commission, ECLI:EU:C:2007:166, para 94.

[52] *Ibid*, para 73.

[53] David J. Gerber, Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe, Oxford University Press, https://www.jstor.org/stable/840727

[54] Gerber, 'Constitutionalizing the Economy' (n 2)

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As per Nipperdey[55] prevention competition is practiced to destruct competitor's market position without any particular implication to improved capacity to compete or indication of exclusionary abuses. The main aim of Ordoliberalism is to set pre-defined market rules to regulate the free market, to suppress activities that prevent competition as well as to suppress anti-competitive conduct by forcing players to behave in accordance with market guidelines. The concept of ordoliberal competition law is not to curb the free market system nonetheless to protect economic freedom, preventing the market structure from getting distorted and ensuring a competitive process[56].

It is necessary not to confuse ordoliberal ideas with Ordoliberalism itself. Preaching Ordoliberalism helps us to gain 'economically inclined results' as well as teleological interpretation of the statute by the EU judiciary. Venit[57] criticized the lack of seriousness in the economic assessment of provisions by the EU Courts in *Case T-219/99 British Airways v Commission*, which was the subsequent appeal *C-95/04P British Airways v Commission* concerning the limitations of the abuse of dominant power in the market.

The concept of Ordoliberalism is occasionally associated with the interpretation of Article 102 TFEU by the ECJ's, and the doctrine of special responsibility that is applicable to dominant undertakings.To achieve the notion of fairness, Ordoliberalism approach proposes that the dominant undertaking shall behave 'as if there was effective competition'. It also tries to establish standard conduct that sets as a guideline that and undertaking ought to follow. The ECJ has laid down that any dominant undertaking, is not in itself recrimination rather a position of responsibility with special obligation of not conducting any impair genuine undistorted competition in the market.[58]This concept resembles the doctrine of special responsibility on dominant undertakings, whereupon stricter limits are imposed on the dominant undertaking's freedom to act as compared to non-dominant undertakings.

The Ordoliberal approach of the European Court of Justice in the British Airways matter can be traced to para 66 of the decision which is influenced by the Advocate General Kokott's opinion[59], where the ECJ has emphasised that, "[Article 102]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."

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[55] Herrera Anchustegui, Ignacio, Competition Law Through an Ordoliberal Lens (March 1, 2015). Available at SSRN: https://ssrn.com/abstract=2579308 or http://dx.doi.org/10.2139/ssrn.2579308 p. 155.

[56]Protocol 27 of the Treaty of the European Union. See also Case C-6/72. see the opinions of AG Kokott in Case C-95/04 P British Airways v Commission [2007] ECR I-02331, Case C-85/76 Hoffmann-La Roche v Commission [1979] ECR 00461para 26;, para 68;Europemballage Corporation and Continental Can Company v Commission [1975] ECR 00495, para 125; more recently, and Case C-8/08 T-Mobile Netherlands and Others [2009] ECR I-04529, para 58; and the opinions of AG Ruiz-Jarabo Colomer in joined cases C-468/06 to C-478/06 Sot Lélos kai Sia v GlaxoSmithKline [2008] ECR I-07139, para 49.; See also Albert Sánchez Graells, Public Procurement and the EU Competition Rules (Hart 2011) 195-201; Lianos (2013) 23-28.

[57] Venit, James S. "EU COMPETITION LAW—ENFORCEMENT AND COMPLIANCE: AN OVERVIEW." Antitrust Law Journal, vol. 65, no. 1, 1996, pp. 81–104. JSTOR, www.jstor.org/stable/40843356. Accessed 16 July 2020.

[58] Case T-219/99, British Airways v Commission, ECLI:EU: T:2003:343, para 242. Case C-322/81 Michelin v Commission [1983] ECR I-03461, para 57. C-395/96 P Compagnie Maritime Belge Transports and Others v Commission [2000] I-01365, para 37; Case T-155/06 Tomra Systems and Others v Commission [2010] ECR II-04361, para 207.

[59] Opinion of Advocate General Kokott in Case C-95/04P British Airways plc v Commission, delivered on 23 February 2006. Also see, Adolphson, U. (2010) Article 102 TFEU, Aimed at Serving the Ordoliberal Agenda or European Consumers? Uppsala Universitet, Uppsala, p. 41

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VII. CONCLUDING REMARKS

Thiscaseisparticularly importantinvariousaspects for its existing reasoning as well as for future references of changing dynamics of competitive markets.Asthisisoneoftherarecaseswhere an undertaking with such a lower share of 39.7% while sniffing dominance is held liable for abusing its dominant position in the market, this swipes away a sense of relief in other alike players playing foul of competition law. Also, ever since the approach adopted by the Commission is towards protecting the structure of the market and competition as such, this decision as confirmed by the ECJ goes hand in hand with previous cases settled both under Article 101 and 102. Concerning the objectives of consumer welfare and economic freedom, the methodology is different in that economic freedom is concerned with the effects on *the structure of competition.*In contrast, consumer welfare is concerned with the effects on *consumers*.[60]

Anti-competitiveagreementsthatbyobjectareharmfulforcompetitioninthe market are restricted from operating and there is no need to further economically assess the actual effects on the market conditions to achieve the objective. This attitude adopted in this case shows a more formalistic approach and odds the effect-based approach. Under 102, the list of abuses provided is illustrative and not exhaustive.Therefore, the Commission from case to case has the power to assess the conduct of a dominant firm considering the nature of the conduct, the market they operate in and the structure of such market, level of competition, the effect on prejudice to consumers and efficiency claims made by the dominant firm whether abusive or not, and quantitative rebates or bonus by their very nature are presumed to be anti- competitive. The General Court rejected BA's claim that the bonus schemes were not exclusionary because during such abusive period the market share of competitors actually increased and commented that in the absence of such fidelity building agreements, the shares ofcompetitorswouldhaveincreasedatevenafasterrate.[61]Andwhile weighing a balance between economic freedom of consumers, competitors and economic freedomofadominantfirm,consideringtheconsumer welfaregoal,anyprobableconductofrestricting horizontalorverticalmarketsinordertoprotecteconomicfreedommustberejected.

[60] Lovdahl Gormsen, L. (2010). The role of effects in Article 82. In A Principled Approach to Abuse of Dominance in European Competition Law (Antitrust and Competition Law, pp. 113-149). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511676420.006, p 113.

[61] Ezrachi, A., 2016, EU Competition Law: an analytical guide to the leading cases, 5th edition, Hart Publishing p 252.