JUDGMENT OF THE COURT (Third Chamber)

15 March 2007 *

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* Language of the case: English.

In Case C-95/04 P,

APPEAL pursuant to Article 56 of the Statute of the Court of Justice, brought on 25 February 2004,

British Airways plc, established at Waterside, Harmondsworth (United Kingdom) represented by W. Wood QC, R. O'Donoghue, barrister, and R. Subiotto, solicitor,

applicant,

the other parties to the proceedings being:

Commission of the European Communities, represented by P. Oliver, A. Nijenhuis and M. Wilderspin, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Virgin Atlantic Airways Ltd, established in Crawley (United Kingdom), represented by N. Green QC, C. West, barrister, and J. Scott, solicitor,

intervener at first instance,

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, A. Borg Barthet and J. Malenovský, Judges,

Advocate General: J. Kokott,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 15 December 2005,

after hearing the Opinion of the Advocate General at the sitting on 23 February 2006,

gives the following

Judgment

1 In its appeal, British Airways plc ('BA') seeks the annulment of the judgment of the Court of First Instance of the European Communities of 17 December 2003 in Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917 ('the judgment under

appeal') in which the Court of First Instance dismissed BA's action for the annulment of Commission Decision 2000/74/EC of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty (IV/D 2/34.780 — Virgin/British Airways) (OJ 2000 L 30, p. 1; 'the contested decision'), imposing on BA a fine of EUR 6.8 million for abuse of a dominant position on the United Kingdom market for air travel agency services.

Background

2 The facts of this case, as they appear from the file submitted to the Court of First Instance and are set out in paragraphs 4 to 19 of the judgment under appeal, may be summarised as follows.

3 BA, which is the largest United Kingdom airline, concluded agreements with travel agents established in the United Kingdom and accredited by the International Air Transport Association (IATA), which included not only a basic commission system for sales by those agents of tickets on BA flights ('BA tickets') but also three distinct systems of financial incentives: 'marketing agreements', 'global agreements', and, subsequently, a 'performance reward scheme', applicable from 1 January 1998.

4 The marketing agreements enabled certain travel agents, namely those with at least GBP 500 000 in annual sales of BA tickets, to receive payments in addition to their

basic commission, in particular a performance reward calculated on a sliding scale, based on the extent to which a travel agent increased the value of its sales of BA tickets, and subject to the agent's increasing its sales of such tickets from one year to the next.

5 On 9 July 1993, Virgin Atlantic Airways Ltd ('Virgin') lodged a complaint with the Commission, directed in particular against those marketing agreements.

6 The Commission decided to initiate a proceeding in relation to those agreements and adopted a statement of objections against BA on 20 December 1996. BA presented its oral observations at a hearing on 12 November 1997.

7 The second type of incentive agreements, known as global agreements, was concluded with three travel agents, entitling them to receive additional commissions calculated by reference to the growth of BA's share in their worldwide sales.

8 On 17 November 1997, BA sent all travel agents established in the United Kingdom a letter in which it explained the detailed operation of a third type of incentive agreements, namely the new performance reward scheme.

9 Under that system, the basic commission rate was reduced to 7% for all BA tickets (as opposed to the previous rates of 9% for international tickets and 7.5% for domestic tickets), but each agent could earn an additional commission of up to 3% for international tickets and up to 1% for domestic tickets. The size of the additional variable element depended on the travel agents' performance in selling BA tickets. The agents' performance was measured by comparing the total revenue arising from the sales of BA tickets issued by an agent in a particular calendar month with that achieved during the corresponding 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%.

10 On 9 January 1998, Virgin lodged a supplementary complaint against that new performance reward scheme. On 12 March 1998 the Commission adopted a supplementary statement of objections in relation to that new system.

11 On 14 July 1999 the Commission adopted the contested decision, holding, in paragraph 96 of its grounds, that, by applying the marketing agreements and the new performance reward scheme (jointly, 'the bonus schemes at issue') to travel agents established in the United Kingdom, BA abused its dominant position on the United Kingdom market for air travel agency services (recital 96). That abusive conduct, by rewarding loyalty from the travel agents and by discriminating between travel agents, had the object and effect of excluding BA's competitors from the United Kingdom markets for air transport.

The action before the Court of First Instance and the judgment under appeal

12 By application lodged at the Registry of the Court of First Instance on 1 October 1999, BA brought an action for the annulment of the contested decision.

13 In the judgment under appeal, the Court of First Instance dismissed BA's application against the contested decision.

14 In support of its action, BA had made eight pleas in law, arguing that the Commission lacked competence, that it infringed the principle of non-discrimination, that it incorrectly defined the relevant product and geographic markets, that there was no sufficiently close nexus between the product markets allegedly affected, that the Commission adopted an incorrect legal basis for the contested decision, that there was no dominant position, that there was no abuse of a dominant position and, finally, that the fine was excessive.

15 Only the seventh plea is at issue in this appeal. In that plea, claiming that there was no abuse of a dominant position, BA challenged the Commission's assertion that the bonus schemes at issue engendered discrimination between travel agents established in the United Kingdom or produced an exclusionary effect in relation to competing airlines.

16 First of all, with regard to the discriminatory nature of those schemes, the Court of First Instance pointed out, in paragraph 233 of the judgment under appeal, that, according to subparagraph (c) of the second paragraph of Article 82 EC, abuse of a dominant position may consist in applying in relation to its business partners dissimilar conditions to equivalent transactions, thereby placing those partners at a competitive disadvantage within the meaning of subparagraph (c) of the second paragraph of Article 82 EC.

17 In the following paragraph of that judgment, the Court of First Instance noted that the increase in the rate of commission paid by BA applied not only on BA tickets sold once the sales target had been met but on all BA tickets handled by an agent during the relevant reference period. The Court of First Instance thus concluded, in paragraph 236 of its judgment, that by remunerating at different levels services that were identical and supplied during the same reference period, the schemes at issue distorted the level of remuneration received in the form of commissions paid by BA.

18 In paragraph 238 of the judgment under appeal, the Court of First Instance considered that those discriminatory conditions of remuneration affected the ability of travel agents established in the United Kingdom to compete in supplying air travel agency services to travellers and to stimulate the demand of competing airlines for such services.

19 In paragraph 240 of that judgment, the Court of First Instance concluded that the Commission was right to hold that the bonus schemes at issue constituted an abuse of BA's dominant position on the United Kingdom market for air travel agency services, in that they produced discriminatory effects within the network of travel agents established in the United Kingdom, thereby inflicting on some of them a

competitive disadvantage within the meaning of subparagraph (c) of the second paragraph of Article 82 EC.

20 Concerning, second, the exclusionary effect on airlines competing with BA arising from the 'fidelity-building' nature of the schemes at issue, the Court of First Instance pointed out, in paragraphs 245 and 246 of the judgment under appeal, that, according to the case-law of the Court of Justice, whilst quantitative rebate schemes linked exclusively to the volume of purchases made from a dominant producer are generally regarded as not having the effect of preventing customers from obtaining supplies from competitors, in breach of Article 82 EC, a rebate scheme linked to the attainment of a purchasing objective applied by such a producer does infringe that article (see, to that effect, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 71).

21 In paragraph 270 of the judgment under appeal, the Court of First Instance held that, in order to determine whether BA abused its dominant position by applying the bonus schemes at issue to travel agents established in the United Kingdom, it was necessary to consider the criteria and rules governing the granting of those rewards, and to investigate whether, in providing an advantage not based on any economic service justifying it, those bonuses tended to remove or restrict the agents' freedom to sell their services to the airlines of their choice and thereby hinder the access of BA's competitor airlines to the United Kingdom market for air travel agency services.

22 The Court of First Instance held, in paragraph 271 of the judgment under appeal, that it needed to be determined in this case whether the schemes at issue had a

fidelity-building effect in relation to travel agents established in the United Kingdom and, if they did, whether those schemes were based on an economically justified consideration.

23 With regard to, first, the fidelity-building character of the bonus schemes at issue, the Court of First Instance found, in paragraphs 272 and 273 of the judgment, that they did have such an effect for two reasons. Firstly, given their progressive nature and very noticeable effect at the margin, the increased commission rates were capable of rising exponentially from one period to the next. Secondly, the Court found that the higher revenues from BA ticket sales had been during the reference period, the stronger was the penalty suffered by the persons concerned in the form of a disproportionate reduction in the rates of performance rewards, in the case of even a slight decrease in such sales during the period under consideration, compared with that reference period.

24 Moreover, concerning BA's objection that the bonus schemes at issue did not prevent its competitors from concluding similar agreements with travel agents established in the United Kingdom, the Court of First Instance held at paragraph 277 of the judgment under appeal that the number of BA tickets sold by travel agents established in the United Kingdom in respect of air routes to and from United Kingdom airports invariably represented a multiple both of the ticket sales achieved by each of those five main competitors and of the cumulative total of those sales. The Court concluded, in paragraph 278 of its judgment, that it had been demonstrated to the requisite legal standard that the rival undertakings were not in a position to attain in the United Kingdom a level of revenue capable of constituting a sufficiently broad financial base to allow them effectively to establish a bonus scheme comparable with the bonus schemes at issue, which would be capable of counteracting the exclusionary effect generated by the latter.

25 Concerning, secondly, the question whether the bonus schemes at issue were based on an economically justified consideration, the Court acknowledged, in paragraph 279 of the judgment under appeal, that the fact that an undertaking is in a dominant position cannot deprive it of its entitlement, within reason, to perform the actions which it considers appropriate in order to protect its own commercial interests when they are threatened. It held, however, at paragraph 280 of its judgment, that, in order to be lawful, the protection of the competitive position of such an undertaking had to be based on criteria of economic efficiency.

26 In paragraph 281 of the judgment under appeal, the Court of First Instance held that BA had not demonstrated that the fidelity-building character of the bonus schemes at issue was based on an economically justified consideration. In paragraphs 282 and 283 of that judgment, it considered in that respect that, since the achievement of sales growth targets for BA tickets by travel agents established in the United Kingdom resulted in the application of a higher rate of commission not just on the BA tickets sold once those sales targets had been met but on all BA tickets handled during the period under consideration, the additional remuneration of those agents bore no objective relation to the consideration arising, for BA, from the sale of the additional air tickets.

27 The Court of First Instance further indicated, in paragraph 285 of its judgment, that, even if any airline has an interest in selling extra seats on its flights rather than leaving them unoccupied, the advantage represented by a better rate of occupancy of the aircraft had to be considerably reduced in the present case by reason of the extra cost incurred by BA through the increase in the remuneration of the travel agent arising from retrospective application of the increased commission.

28 The Court therefore concluded, in paragraphs 286 to 288 of the judgment under appeal, that, being devoid of any economically justified consideration, the bonus

schemes at issue had to be regarded as tending essentially to remunerate sales growth of BA tickets from one reference period to another and thus reinforce the fidelity to BA of travel agents established in the United Kingdom. Those schemes thus hindered entry into or progress in the United Kingdom market for travel agency services of airlines in competition with BA, and thereby hindered maintenance of the existing level of competition or the development of such competition on that market.

29 The Court further noted, in paragraph 290 of its judgment, that BA had itself acknowledged at the hearing that there was no precise relationship between, on the one hand, any economies of scale achieved by virtue of extra BA tickets being sold after the attainment of the sales objectives and, on the other, the increases in the rates of remuneration paid by way of consideration to travel agents established in the United Kingdom.

30 In paragraph 293 of the judgment, the Court rejected BA's argument that the Commission had failed to demonstrate that its practices produced an exclusionary effect. It held in that respect, first, that, for the purposes of establishing an infringement of Article 82 EC, it was not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned, it being sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition.

31 In the following paragraph of its judgment, the Court further held not only that the bonus schemes at issue were likely to have a restrictive effect on the United

Kingdom markets for air travel agency services and air transport, but also that such an effect on those markets had been demonstrated in a concrete way by the Commission.

32 In that respect, the Court noted, first, that since, at the time of the conduct complained of, 85% of tickets sold in the United Kingdom were sold through travel agents, BA's conduct on the United Kingdom market for air travel agency services '[could] not fail to have had the effect of excluding competing airlines (to their detriment) from the United Kingdom air transport markets' (paragraph 295 of the judgment under appeal). The Court also took the view, secondly, that 'where an undertaking in a dominant position actually puts into operation a practice generating the effect of ousting its competitors, the fact that the hoped-for result is not achieved is not sufficient to prevent a finding of abuse of a dominant position within the meaning of Article 82 EC' (paragraph 297 of the judgment).

33 Finally, in paragraph 298 of the judgment under appeal, the Court of First Instance held that the growth in the market shares of some of BA's airline competitors, which was modest in absolute value having regard to the small size of their original market shares, did not mean that BA's practices had no effect, since, in the absence of those practices, 'it may legitimately be considered that the market shares of those competitors would have been able to grow more significantly'.

34 The Court of First Instance therefore concluded, in paragraph 300 of the judgment under appeal, that the seventh plea had to be dismissed.

Forms of order sought

35 BA claims that the Court should:

— annul the judgment under appeal in whole or in part;

— annul or reduce the amount of the fine imposed pursuant to the contested decision as the Court may consider appropriate in the exercise of its discretion;

— take any other measures that the Court deems appropriate;

— order the Commission to pay the costs.

36 The Commission contends that the Court should:

— dismiss the appeal in its entirety;

— order BA to pay the Commission's costs in these proceedings.

37 Virgin contends that the Court should:

— declare the appeal inadmissible or, in any event, clearly unfounded and dismiss it by reasoned order pursuant to Article 119 of the Rules of Procedure of the Court of Justice;

— (in the alternative) dismiss the appeal and uphold the judgment under appeal in its entirety; and

— (in any event) order BA to pay the costs of the appeal, including Virgin's costs.

The appeal

38 In support of its appeal, BA raises five pleas in law, alleging respectively:

— that the Court of First Instance erred in law by applying the wrong test in assessing the exclusionary effect of the bonus schemes at issue and concluding that they had no objective economic justification;

— that the Court of First Instance erred in law by disregarding evidence that BA's commissions had no material effect on its competitors;

— that the Court of First Instance erred in law by failing to consider whether there was 'prejudice to consumers' under subparagraph (b) of the second paragraph of Article 82 EC;

— that the Court of First Instance erred in law by wrongly concluding that the new performance reward scheme had the same effect as the marketing agreements, despite the difference relating to the duration of the respective reference periods, and did not analyse or quantify the effects of that scheme on BA's competitors;

— that the Court of First Instance misapplied subparagraph (c) of the second paragraph of Article 82 EC in relation to the assessment of the discriminatory effect of the bonus schemes at issue in relation to United Kingdom travel agents.

The first plea, alleging error of law in the Court's assessment of the exclusionary effect of the bonus schemes at issue

39 In this plea, BA criticises the findings in paragraphs 270 to 298 of the judgment under appeal, according to which the bonuses granted by BA both had a 'fidelity-building' and thus an exclusionary effect, and lacked justification from an economic point of view.

The first part of the first plea, concerning the criterion for assessing the possible exclusionary effect of the bonus schemes at issue

— Arguments of the parties

40 BA argues, first, that the Court of First Instance erred in law by applying an incorrect test for assessing the bonus schemes at issue, namely the test concerning the fidelity-building effect of those schemes.

41 According to BA, Article 82 EC merely prohibits an undertaking in a dominant position from using methods different from those governing normal competition

between products or services on the basis of supplies by economic operators, or from using methods other than competition on merit, to which legitimate competition on price is allied. BA argues that the freedom which an undertaking must have to grant its business partners greater discounts than those granted by its competitors falls within the scope of that legitimate competition.

42 In its examination of the fidelity-building effect of the bonus schemes at issue, the Court of First Instance drew no distinction between the fidelity of customers resulting from the most generous commission or the lowest prices, and the fidelity of customers induced by anti-competitive or exclusionary practices, which oust competitors by creating difficulties or artificial obstacles for them.

43 BA argues that the ambiguity of the 'fidelity-building' concept used by the Court of First Instance means that it was practically inevitable that the bonus schemes at issue would be condemned once they contained a fidelity-building effect in the sense that the commissions were generous and attractive for travel agents.

44 The approach thus adopted by the Court of First Instance is, BA submits, incompatible with the case-law of the Court of Justice. In its submission, the judgments in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, and in *Michelin*, cited above, demonstrate that the granting by an undertaking occupying a dominant position of higher commissions may be abusive only if it is subject to the condition that the co-contractor is obliged, de jure or de facto, to deal solely or mainly with that undertaking or if it limits the capacity of the co-contractor to choose freely the undertaking with which it wishes to deal. By contrast, those judgments did not condemn the granting of higher commissions on all sales above a

threshold, since, even if a higher commission does give the co-contractor a strong incentive to sell more products of the dominant undertaking, it does not imply that that co-contractor accepts anything anti-competitive and does not prevent rival undertakings from granting all types of commission that they consider appropriate.

45 BA regards that distinction as fundamental. Unless it is made subject to the condition that the other party deal exclusively (or mainly) with the dominant undertaking or limits the markets of competitors in some other way, a generous commission is merely a form of competition on price.

46 According to BA, in order to distinguish between legitimate competition on price and unlawful anti-competitive or exclusionary conduct, the Court of First Instance should have applied subparagraph (b) of the second paragraph of Article 82 EC, according to which practices constituting an abuse of a dominant position may, in particular, consist in limiting production, markets or technical development to the prejudice of consumers. It should therefore have verified whether BA had actually limited the markets of rival airlines and whether a prejudice to consumers had resulted.

47 BA submits that such limitation of competitors' markets by the dominant undertaking requires more than the mere granting of generous bonuses. It can be envisaged only in two situations, neither of which is present in this case, namely:

— where the granting of bonuses is made subject to the condition that the recipient deals exclusively or mainly with the undertaking in a dominant position; or

— where the recipient of the bonuses cannot choose freely between the undertaking occupying a dominant position and its competitors. That would be the case if the recipient could expect to make profits only by dealing exclusively or mainly with the dominant undertaking or where that undertaking practises unfair competition through pricing ('predatory prices') and its competitors cannot resist that pressure.

48 Outside those situations, BA submits, subparagraph (b) of the second paragraph of Article 82 EC does not prevent an undertaking from adopting a given commercial policy on prices, services or commissions, merely because its competitors find it difficult or impossible to align themselves with it.

49 BA argues finally that, because of certain differences, the case-law in *Michelin*, cited above, does not apply to this case. It maintains in that regard that, unlike Michelin distributors, travel agents were informed by BA in writing in advance both of the thresholds and of the increase in the percentage of commissions, that they were not deprived of profit if they did not receive increased commissions from BA, inasmuch as all agents received a basic commission in any event, and that BA did not apply any pressure on them to attain the objectives on which grant of the increased commissions depended. According to BA, the only consequence, for travel agents, of not attaining those objectives was loss of the opportunity to obtain a higher commission. That, however, did not constitute an abuse.

50 The Commission and Virgin are agreed on the contrary that, in assessing the exclusionary effect of the bonus schemes at issue, the Court of First Instance applied criteria that were both correct and in accordance with the case-law, particularly with the *Hoffmann-La Roche* and *Michelin* judgments.

51 According to the Commission, *Michelin* in particular is relevant to the present case. That judgment concerned discounts which, first, were conditional on attaining certain volume objectives calculated by reference to a previous sales period, and, secondly, applied to all sales achieved during the period in question and not just marginal sales.

52 That was also the case with the bonus schemes at issue here, since the bonuses granted to travel agents which attained the volume objectives were calculated on their sales as a whole and not on the tickets sold once those objectives had been attained. The Court of First Instance rightly described that feature as having 'a very noticeable effect at the margin', since, once a travel agent was on the point of attaining those objectives, he was no longer inclined to offer tickets of airlines other than BA, for fear of missing out on the increased commission not only in respect of the marginal sales but in respect of all sales of BA tickets achieved during the period in question. Thus, for such an agent, the sale of a few tickets, or even of a single extra ticket, had a reducing effect on the remuneration generated by all sales of BA tickets achieved during the period in question.

53 The Commission rejects BA's argument that, because of a few inessential differences, the principles in *Michelin* cannot be applied to the present case.

54 First of all, the core element is common to both cases. The systems of incentives established by BA had the same characteristic as the discounts at issue in *Michelin*, namely that they rewarded fidelity more than volume. Such systems inevitably lead to the travel agent not being able to choose freely with which airline he wishes to

deal, precisely the practice which the Court of First Instance condemned in its judgment.

55 The Commission also challenges BA's argument that *Michelin* is to be distinguished from the present case in that dealers were dependent on Michelin to make a profit, which is allegedly not the case with travel agents dealing with BA in the United Kingdom. The Commission argues that BA's incentive schemes enabled considerable pressure to be exerted on travel agents, even if they did not necessarily stand to make a loss if they failed to reach the sales target. In reality, BA is seeking to restrict *Michelin* to a very narrow set of circumstances, whereas that interpretation finds no basis in the judgment.

56 According to the Commission and Virgin, the examination by the Court of First Instance is not vitiated by any error of law. It was thus correctly held that the bonus schemes in question had a fidelity-building effect in relation to United Kingdom travel agents by reason of the characteristics examined in paragraphs 272 to 292 of the judgment under appeal, were not based on an economically justified consideration, restrained the freedom of those agents to deal with other airlines, thereby produced an exclusionary effect, and were likely to restrain competition.

— Findings of the Court

57 Concerning, first, the plea that the Court of First Instance wrongly failed to base its argument on the criteria in subparagraph (b) of the second paragraph of Article 82

EC in assessing whether the bonus schemes at issue were abusive, the list of abusive practices contained in Article 86 EC is not exhaustive, so that the practices there mentioned are merely examples of abuses of a dominant position (see, to that effect, Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 37). According to consistent case-law, the list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by the EC Treaty (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 26; Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 112).

58 It follows that discounts and bonuses granted by undertakings in a dominant position may be contrary to Article 82 EC even where they do not correspond to any of the examples mentioned in the second paragraph of that article. Thus, in determining that fidelity discounts had an exclusionary effect, the Court based its argument in *Hoffmann-La Roche* and *Michelin* on Article 82 of the EEC Treaty (subsequently Article 86 of the EC Treaty, and then Article 82 EC) in its entirety, and not just on subparagraph (b) of its second paragraph. Moreover, in its judgment in 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 523, concerning fidelity rebates, the Court expressly referred to subparagraph (c) of the second paragraph of Article 86 of the EEC Treaty, according to which practices constituting abuse of a dominant position may consist, for example, in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

59 The plea that the Court of First Instance erred in law by not basing its argument on the criteria in subparagraph (b) of the second paragraph of Article 82 EC is therefore unfounded.

60 Nor does it appear that the Court's assessment of the exclusionary effect of the bonus schemes in question was based on a misapplication of the case-law of the Court of Justice.

61 In the *Hoffmann-La Roche* and *Michelin* judgments, the Court of Justice found that certain discounts granted by two undertakings in a dominant position were abusive in character.

62 The first of those two judgments concerned discounts granted to undertakings whose business was the production or sale of vitamins, and the grant of which was, for most of the time, expressly linked to the condition that the co-contractor obtained its supplies over a given period entirely or mainly from Hoffmann-La Roche. The Court found such a discount system an abuse of a dominant position and stated that the granting of fidelity discounts in order to give the buyer an incentive to obtain its supplies exclusively from the undertaking in a dominant position was incompatible with the objective of undistorted competition within the common market (*Hoffmann-La Roche*, paragraph 90).

63 In *Michelin*, unlike in *Hoffmann-La Roche*, Michelin's co-contractors were not obliged to obtain their supplies wholly or partially from Michelin. However, the variable annual discounts granted by that undertaking were linked to objectives in the sense that, in order to benefit from them, its co-contractors had to attain individualised sales results. In that case, the Court found a series of factors which led it to regard the discount system in question as an abuse of a dominant position. In

particular, the system was based on a relatively long reference period, namely a year, its functioning was non-transparent for co-contractors, and the differences in market share between Michelin and its main competitors were significant (see, to that effect, *Michelin*, paragraphs 81 to 83).

64 Contrary to BA's argument, it cannot be inferred from those two judgments that bonuses and discounts granted by undertakings in a dominant position are abusive only in the circumstances there described. As the Advocate General has stated in point 41 of her Opinion, the decisive factor is rather the underlying factors which have guided the previous case-law of the Court of Justice and which can also be transposed to a case such as the present.

65 In that respect, *Michelin* is particularly relevant to the present case, since it concerns a discount system depending on the attainment of individual sales objectives which constituted neither discounts for quantity, linked exclusively to the volume of purchases, nor fidelity discounts within the meaning of the judgment in *Hoffmann-La Roche*, since the system established by Michelin did not contain any obligation on the part of resellers to obtain all or a given proportion of its supplies from the dominant undertaking.

66 Concerning the application of Article 82 EC to a system of discounts dependent on sales objectives, paragraph 70 of the *Michelin* judgment shows that, in prohibiting the abuse of a dominant market position in so far as trade between Member States is

capable of being affected, that article 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.

67 In order to determine whether the undertaking in a dominant position has abused such a position by applying a system of discounts such as that described in paragraph 65 of this judgment, the Court has held that it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (*Michelin*, paragraph 73).

68 It follows that 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 within the meaning of the judgment in *Hoffmann-La Roche* constitutes an abuse, it first has to be determined whether those discounts or bonuses 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.

69 It then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted. In accordance with the analysis carried out by the Court of First Instance in paragraphs 279 to 291 of the judgment under appeal, an undertaking is at liberty to demonstrate that its bonus system producing an exclusionary effect is economically justified.

70 With regard to the first aspect, the case-law gives indications as to the cases in which discount or bonus schemes of an undertaking in a dominant position are not merely the expression of a particularly favourable offer on the market, but give rise to an exclusionary effect.

71 First, 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 (*Michelin*, paragraphs 70 to 86).

72 It is clear from the findings of the Court of First Instance in paragraphs 10 and 15 to 17 of the judgment under appeal that the bonus schemes at issue were drawn up by reference to individual sales objectives, since the rate of the bonuses depended on the evolution of the turnover arising from BA ticket sales by each travel agent during a given period.

73 It is also apparent from the case-law that the commitment of co-contractors towards the undertaking in a dominant position and the pressure exerted upon them may be particularly strong where a discount or bonus does not relate solely to the growth in

turnover in relation to purchases or sales of products of that undertaking made by those co-contractors during the period under consideration, but extends also to the whole of the turnover relating to 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 (see, to that effect, *Michelin*, paragraph 81).

74 The Court of First Instance found that the bonus schemes at issue gave rise to a similar situation. Attainment of the sales progression objectives gave rise to an increase in the commission paid on all BA tickets sold by the travel agent concerned, and not just on those sold after those objectives had been attained (paragraph 23 of the judgment under appeal). It could therefore be of decisive importance for the commission income of a travel agent as a whole whether or not he sold a few extra BA tickets after achieving a certain turnover (paragraphs 29 and 30 of the grounds for the Commission's decision, reproduced in paragraph 23 of the judgment under appeal). The Court of First Instance, which describes that characteristic and its consequences in paragraphs 272 and 273 of the judgment under appeal, states that the progressive nature of the increased commission rates had a 'very noticeable effect at the margin' and emphasises the radical effects which a small reduction in sales of BA tickets could have on the rates of performance-related bonus.

75 Finally, the Court took the view that the pressure exerted on resellers by an undertaking in a dominant position which granted bonuses with those characteristics is further strengthened where that undertaking holds a very much larger market share than its competitors (see, to that effect, *Michelin*, paragraph 82). It held that, 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 sales volume. 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.

76 In the present case, the Court of First Instance held in paragraph 277 of the judgment under appeal that BA's market share was significantly higher than that of its five main competitors in the United Kingdom. It concluded, in paragraph 278 of that judgment, that the rival airlines were not in a position to grant travel agents the same advantages as BA, since they were not capable of attaining in the United Kingdom a level of revenue capable of constituting a sufficiently broad financial base to allow them effectively to establish a reward scheme similar to BA's (paragraph 278 of the judgment under appeal).

77 Therefore, the Court of First Instance was right to examine, in paragraphs 270 to 278 of the judgment under appeal, whether the bonus schemes at issue had a fidelity-building effect capable of producing an exclusionary effect.

78 It should be recalled, concerning the assessment of market data and the competitive situation, that it is not for the Court of Justice, on an appeal, to substitute its own assessment for that of the Court of First Instance. In accordance with Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice, the appeal must be limited to questions of law. Assessment of the facts does not, save where there may have been distortion of the facts or evidence, which has not been pleaded here, constitute a question of law submitted as such for review by the Court of Justice (to that effect, see for example Case C-37/03 P *BioID* v *OHIM* [2005]

ECR I-7975, paragraphs 43 and 53; Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 83, and the order of 28 September 2006 in Case C-552/03 P *Unilever Bestfoods* v *Commission*, not published in the ECR, paragraph 57). BA's claim that its competitors were financially capable of making competitive counter-offers to travel agents is therefore inadmissible.

79 The same applies to BA's allegation that the Court of First Instance overestimated the 'very noticeable effect at the margin' of the bonus schemes at issue. BA thereby calls into question the assessment of facts and evidence made by the Court of First Instance, which constitutes an inadmissible plea on appeal.

80 It follows from the whole of the above considerations that the first part of the first plea is in part inadmissible and in part unfounded.

The second part of the first plea, concerning the assessment by the Court of First Instance of the relevance of the objective economic justification for the bonus schemes at issue

— Arguments of the parties

81 BA challenges as erroneous the finding by the Court of First Instance in paragraph 279 et seq. of the judgment under appeal that BA's commissions were not based on an economically justified consideration. BA argues that it is economically justified

for an airline to reward travel agents which allow it to increase its sales and help it to cover its high fixed costs by bringing additional passengers.

82 The Commission and Virgin challenge that position. The Commission points to the abruptness of BA's argument in that regard. It argues that merely stating that the airline business is characterised by high fixed costs is not enough to justify the initiatives taken by an airline in order to cover a part of those costs. In any event, competing airlines also had to bear high fixed costs. Exclusionary practices by a dominant undertaking, like BA, reduced the revenue of those companies and made it even more difficult for them to cover those costs.

83 Virgin acknowledges that a system of discounts for quantity linked solely to the volume of sales made by a dominant undertaking is in principle economically justified, since discounts for quantity are deemed to reflect efficiency gains and economies of scale achieved by that undertaking. However, before the Court of First Instance, BA had itself admitted that there was no relation between, on the one hand, the possible economies of scale achieved by virtue of BA tickets sold after the attainment of the sales objectives and, on the other hand, the increases in the commission rates granted to United Kingdom travel agents in consideration for exceeding those objectives.

— Findings of the Court

84 Discounts or bonuses granted to its co-contractors by an undertaking in a dominant position are not necessarily an abuse and therefore prohibited by Article 82 EC. According to consistent case-law, only discounts or bonuses which are not based on

any economic counterpart to justify them must be regarded as an abuse (see, to that effect, *Hoffmann-La Roche*, paragraph 90, and *Michelin*, paragraph 73).

85 As has been held in paragraph 69 of this judgment, the Court of First Instance was right, after holding that the bonus schemes at issue produced an exclusionary effect, to examine whether those schemes had an objective economic justification.

86 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 (see, to that effect, *Michelin*, paragraph 73). 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.

87 In this case, correctly basing its examination upon the criteria thus inferred from the case-law, the Court of First Instance examined whether there was an economic justification for the bonus schemes at issue. In paragraphs 284 and 285 of the judgment under appeal, it adopted a position in relation to the arguments submitted by BA, which concerned, in particular, the high level of fixed costs in air transport and the importance of aircraft occupancy rates. On the basis of its assessment of the

circumstances of the case, the Court of First Instance came to the conclusion that those systems were not based on any objective economic justification.

88 In this context, it should be noted that BA's arguments concerning the high level of fixed costs in air transport and the importance of aircraft occupancy rates are inadmissible for the reasons set out in paragraph 78 of this judgment, since, by those arguments, BA is in reality challenging the assessment of facts and evidence made by the Court of First Instance. It is not for the Court of Justice, on an appeal, to substitute its own assessment of market data and the competitive position for that of the Court of First Instance.

89 Therefore, the second part of the first plea must be dismissed as inadmissible.

90 The Court of First Instance did not therefore make any error of law in holding that the bonus schemes at issue had a fidelity-building effect, that they therefore produced an exclusionary effect, and that they were not justified from an economic standpoint.

91 The first plea must therefore be dismissed in its entirety.

The second plea, alleging error of law in that the Court of First Instance did not examine the probable effects of the commissions granted by BA, or take account of the evidence that they had no material effect on competing airlines

Arguments of the parties

92 By its second plea, BA effectively accuses the Court of First Instance of not examining the probable effects of the bonus schemes at issue, namely the existence or otherwise of an exclusionary effect, whereas Article 82 EC requires that, in each case, the actual or probable effects of the practices complained of should be examined, rather than conclusions being reached on the basis of their form, or of presumptions of such an effect.

93 In that regard, while stating that it is not in any way maintaining that it is necessary to demonstrate the existence of actual anti-competitive effects in each case, BA argues that, in this case, there was evidence clearly indicating that the bonus schemes at issue had no material effect. That evidence showed that, in the United Kingdom, the market share of competing airlines grew during the period of the alleged infringement and that the proportion of BA tickets in travel agents' sales diminished. According to BA, the Court of First Instance should have taken account of that clear evidence that there was no exclusionary effect. Having taken into consideration, in other cases, evidence of the growth in market share of the undertaking in a dominant position and the fall in market share of its competitors in order to corroborate the existence of an abuse, it should, conversely in this case, have acknowledged the relevance of evidence the other way in order to set aside allegations of abuse.

94 In the judgment under appeal, the Court of First Instance rejected that evidence, stating in paragraph 295 that since, at the time of the conduct complained of, travel agents established in the United Kingdom carried out 85% of all air ticket sales in the territory of the United Kingdom, BA's conduct 'cannot fail to have had' an exclusionary effect to the detriment of competing airlines, and, in paragraph 298, that BA's competitors would have achieved a better result in the absence of that conduct. The Court added, wrongly, in paragraph 297 of the judgment under appeal, that, where an undertaking in a dominant position puts into operation a practice generating the effect of ousting its competitors, the fact that the hoped-for result is not achieved is not sufficient to prevent a finding of abuse.

95 Virgin regards that plea as inadmissible, and the Commission regards it as unfounded. The latter argues, in particular, that the Court of First Instance examined the probable effects of the bonus schemes at length from paragraph 271 onwards of the judgment under appeal, before making an assessment of those effects in paragraphs 294 and 295. It adds that, according to consistent case-law, for a practice to constitute an abuse, it is sufficient to demonstrate that there is a risk of it restraining competition, without there being any need to prove that it actually produced that effect. The Commission points out that, in paragraph 73 of *Michelin*, for example, the Court held that it needed to be examined whether the discount in question 'tended' to have certain restrictive effects.

Findings of the Court

96 Concerning BA's argument that the Court of First Instance did not examine the probable effects of the bonus schemes at issue, it is sufficient to note that, in paragraphs 272 and 273 of the judgment under appeal, the Court of First Instance explained the mechanism of those schemes.

97 Having emphasised the very noticeable effect at the margin, linked to the progressive nature of the increased commission rates, it described the exponential effect on those rates of an increase in the number of BA tickets sold during successive periods, and, conversely, the disproportionate reduction in those rates in the event of even a slight decrease in sales of BA tickets in comparison with the previous period.

98 On that basis, the Court of First Instance was able to conclude, without committing any error of law, that the bonus schemes at issue had a fidelity-building effect. It follows that BA's plea accusing the Court of not examining the probable effects of those schemes is unfounded.

99 Moreover, in paragraph 99 of its appeal, BA acknowledges that, in its judgment, the Court of First Instance rightly held that travel agents were given an incentive to increase their sales of BA tickets. In addition, in paragraph 113 of its appeal, it states that, if the Court of First Instance had examined the actual or probable impact of the bonus schemes at issue on competition between travel agents, it would have concluded that that impact was negligible.

100 It follows that BA is not seriously denying that those schemes had a fidelity-building effect on travel agents and thus tended to affect the situation of competitor airlines.

101 Concerning BA's allegations of evidence showing that no exclusionary effect arose from the bonus schemes at issue, of which evidence the Court of First Instance is

alleged to have taken insufficient account, it is sufficient to note that this part of the second plea is inadmissible on an appeal for the reasons already set out in paragraph 78 of this judgment.

102 The second plea must therefore be dismissed as in part inadmissible and in part unfounded.

The third plea, alleging an error of law in that the Court of First Instance did not examine whether BA's conduct involved a 'prejudice [to] consumers' within the meaning of subparagraph (b) of the second paragraph of Article 82 EC

Arguments of the parties

103 In its third plea, BA considers that the Court of First Instance erred in law by failing to examine whether the bonus schemes at issue caused prejudice to consumers, as required by subparagraph (b) of the second paragraph of Article 82 EC, as interpreted by the Court of Justice in *Suiker Unie*. Without making any analysis of that condition, the Court of First Instance confined itself, in paragraph 295 of the judgment under appeal, to examining the impact of BA's conduct on its competitors in United Kingdom air transport markets.

104 Referring to the judgment in *Europemballage and Continental Can*, the Commission and Virgin argue that that plea is unfounded, since Article 82 EC

covers not only practices likely to cause immediate damage to consumers but also those which cause them damage by undermining an effective structure of competition.

Findings of the Court

105 It should be noted first that, as explained in paragraphs 57 and 58 of this judgment, discounts or bonuses granted by an undertaking in a dominant position may be contrary to Article 82 EC even where they do not correspond to any of the examples mentioned in the second paragraph of that article.

106 Moreover, as the Court has already held in paragraph 26 of its judgment in *Europemballage and Continental Can*, 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.

107 The Court of First Instance was therefore entitled, without committing any error of law, not to examine whether BA's conduct had caused prejudice to consumers within the meaning of subparagraph (b) of the second paragraph of Article 82 EC, but to examine, in paragraphs 294 and 295 of the judgment under appeal, whether the bonus schemes at issue had a restrictive effect on competition and to conclude that the existence of such an effect had been demonstrated by the Commission in the contested decision.

108 Having regard to those considerations, the third plea must be dismissed as unfounded.

The fourth plea, alleging that the Court of First Instance erred in law by holding that the new performance reward scheme had the same effect as the marketing agreements, despite the difference in relation to the duration of the period taken into consideration and despite the lack of analysis and quantification of the effects of the bonus schemes at issue on BA's competitors

109 The fourth plea by BA is in two parts, the first concerning differences between the marketing agreements and the new performance reward scheme, and the second concerning requirements as regards proof that the bonus schemes at issue had an exclusionary effect.

The first part of the fourth plea, concerning differences between the marketing agreements and the new performance reward scheme

— Arguments of the parties

110 In the first part of the fourth plea, BA complains that the Court of First Instance held that the marketing agreements and the new performance reward scheme had the same restrictive effect on competition, whereas there were important differences between them. In particular, in the case of the marketing agreements, the period

taken into consideration for granting the bonus was one year, whereas, in the case of the new performance reward scheme, it was one month. BA argues that taking as short a period as one month into consideration could not produce an appreciable exclusionary effect.

111 Virgin considers that the fourth plea is inadmissible in its entirety in that it concerns factual assessments, and that it is in any event unfounded.

112 The Commission maintains that the argument that the new performance reward scheme could not have had an exclusionary effect is unfounded.

— Findings of the Court

113 In the judgment under appeal, the Court of First Instance expressly found the existence of a fidelity-building effect in relation both to the marketing agreements and to the new performance reward scheme (paragraphs 271 to 273), although it had pointed out the differences between that scheme and those agreements in relation to the duration of the periods under consideration (paragraphs 11 and 15 of the judgment). It follows from the judgment under appeal that, irrespective of the difference in duration of the periods taken into consideration, the Court of First Instance ascribed decisive importance to the fact, first, that both those agreements and that scheme could result in exponential increases in commission rates from one period to another by reason of their 'very noticeable effect at the margin' (paragraph

272 of the judgment) and, secondly, that BA's competitors were not in a position, given their much smaller market share, to counterbalance the overall effect of those agreements and that scheme with counter-offers (paragraph 278 of the judgment).

114 In any event, that assessment of the circumstances of this case falls within the assessment of facts and evidence which is entirely a matter for the Court of First Instance. For the reasons already indicated in paragraph 78 of this judgment, it is not for the Court of Justice, on an appeal, to substitute its own assessment of market data and the competitive position for that of the Court of First Instance, particularly as regards the duration of the periods taken into consideration and the possible impact of that factor on the exclusionary effect of the bonus schemes at issue.

115 Therefore, the first part of the fourth plea is inadmissible.

The second part of the fourth plea, concerning the requirements for proving that the bonus schemes in question had an exclusionary effect

— Arguments of the parties

116 In the second part of the fourth plea, BA claims that the Court of First Instance wrongly failed to examine all the circumstances of the case in order to determine whether BA's competitor airlines were adversely affected by the bonus schemes at issue. The Court of First Instance did not in any way seek to determine whether and

to what extent those airlines were prevented from making counter-offers, and merely based its findings on generalities. It limited itself, for example, to general statements such as the 'very noticeable effect at the margin' and the possibility of an 'exponential increase' in commission rates from one period to another.

117 In BA's submission, that superficial approach contrasts with the approach adopted by the Court of Justice in *Hoffmann-La Roche* and *Michelin*. In those judgments, the Court did not conclude that there was an abuse of a dominant position solely on the ground that, under the schemes in question, attainment of a threshold gave rise to a large discount. On the contrary, it examined a series of specific factors which, in their entirety, indicated that the incentive schemes gave rise to an actual exclusion.

118 According to BA, the Court of First Instance should have followed such an approach and examined the overall and relative amounts of profit obtained upon the threshold being reached, the number of thresholds, whether the threshold or thresholds were close to the buyer's total needs, whether the market was capable of evolving, the length of the period concerned and the percentage of the overall market that was subject to the price reduction (in this case, travel agency services). In the judgment under appeal, none of those factors was taken into consideration. Instead, the Court of First Instance assumed that the possibility of obtaining a higher average commission rate in consideration for an increase in sales of BA tickets inevitably implied an unlawful exclusionary effect in relation to competitor airlines.

119 The Commission maintains that the argument concerning non-quantification of the limitation on the sales outlets of BA's competitors is inadmissible pursuant to Articles 42(2) and 118 of the Rules of Procedure, since such a quantification was carried out by the Commission in paragraph 30 of the grounds for the contested decision, and BA did not challenge that part of the Commission's argument at first instance.

— Findings of the Court

120 By the second part of the fourth plea, BA accuses the Court of First Instance of a superficial approach in its analysis of the effects of the bonus schemes at issue, particularly the absence of any quantification of its findings concerning the exclusionary effect of those schemes and the recourse to general assertions, such as the 'very noticeable effect at the margin' of commission rates from one period to another.

121 Contrary to what the Commission argues, this part of the plea is not inadmissible under Articles 42(2) and 118 of the Rules of Procedure of the Court of Justice on the ground that BA failed, at first instance, to challenge the relevant part of the contested decision, namely the calculations appearing in paragraph 30 of the grounds for that decision, which were designed to illustrate the very noticeable effect on the commissions received by a travel agent of selling a few extra BA tickets.

122 BA's plea does not concern the calculations given by way of example by the Commission as such, but the assessments made by the Court of First Instance concerning the bonus schemes at issue. The second part of the fourth plea is therefore admissible.

123 It is not well founded, however, since the assessments by the Court of First Instance challenged by BA must be considered in relation to the calculations contained in the contested decision. The Court of First Instance expressly cites, in paragraph 23 of the judgment under appeal, paragraph 30 in the grounds for that decision. It follows that the findings of the Court of First Instance criticised by BA are sufficiently quantified. The claim that there was no justification for the Court's finding that BA's competitors were not able to make counter-offers capable of counterbalancing the bonus schemes at issue has therefore not been made out on the facts.

124 Therefore, the second part of the fourth plea must be dismissed as unfounded.

125 The fourth plea must therefore be dismissed as in part inadmissible and in part unfounded.

The fifth plea, alleging that the Court of First Instance misapplied subparagraph (c) of the second paragraph of Article 82 EC as regards the discriminatory effect of the bonus schemes in question on United Kingdom travel agents

126 As a preliminary observation, it should be noted that, whatever the findings of the Court in relation to BA's first four pleas, concerning the abusive nature of the bonus schemes at issue resulting from the exclusionary effect on BA's competitors in the absence of objective economic justification, the fifth plea must be examined since BA retains an interest in denying that those schemes are prohibited pursuant to subparagraph (c) of the second paragraph of Article 82 EC, since the amount of the fine imposed may be reduced where it is found that the schemes were not abusive under that provision.

Arguments of the parties

127 In its fifth plea, which concerns paragraphs 233 to 240 of the judgment under appeal, in which the Court of First Instance confirms the Commission's findings

concerning the discriminatory effect of the schemes at issue, BA essentially accuses the Court of First Instance of holding that those schemes produced discriminatory effects amongst United Kingdom travel agents on the basis of a misapplication of subparagraph (c) of the second paragraph of Article 82 EC.

128 According to BA, the Court of First Instance based its reasoning solely on the assumption, stated in paragraph 238 of the judgment under appeal, that the mere fact that two travel agents received different commission rates whereas they achieved an identical amount of revenue from the sale of BA tickets 'naturally' had a noticeable impact on their ability to compete with each other.

129 BA argues that, for subparagraph (c) of the second paragraph of Article 82 EC to apply, a simple difference in treatment, such as the fact that two travel agents receive different rates of commission, is not enough. It submits that that provision prohibits differences in treatment only if the services compared are equivalent, the conditions applied to them are different, and the agent obtaining a lower commission suffers a competitive disadvantage in relation to agents receiving a higher commission.

130 BA argues, first, that the Court of First Instance erred in law, having regard to subparagraph (c) of the second paragraph of Article 82 EC, by holding that transactions involving a travel agent who increases his sales and transactions involving an agent who does not increase them are 'equivalent transactions' within the meaning of that article. The situation of travel agents whose sales of BA tickets have increased during a given period is not comparable with that of other agents who have not achieved such growth. The agent who increases his turnover in sales of tickets issued by a given airline is particularly useful to that airline, as he allows the airline to cover its fixed costs by bringing additional passengers, thereby meriting a reward.

131 Moreover, and also wrongly, the Court of First Instance did not examine whether travel agents suffered a competitive disadvantage, as required by subparagraph (c) of the second paragraph of Article 82 EC.

132 The Commission and Virgin, by contrast, are agreed that the bonus schemes at issue treated comparable facts differently without any objective reason. The Commission argues in particular that the services of travel agents providing outlets for BA tickets are equivalent in so far as increases in rates of commission are not linked to productivity gains by BA, with the result that no additional service is provided to the latter by agents who have increased their sales in comparison with the reference period. The Commission adds that an in-depth analysis of the competitive disadvantage of the travel agents concerned is not prescribed by law. Virgin considers that that disadvantage is obvious in any event.

Findings of the Court

133 Subparagraph (c) of the second paragraph of Article 82 EC prohibits any discrimination on the part of an undertaking in a dominant position which consists in the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613, paragraph 46).

134 In the present case, it is undisputed that BA applied different commission rates to travel agents operating in the United Kingdom according to whether or not they had achieved their sales objectives by comparison with the reference period.

135 It remains to be examined, first, whether the Court of First Instance was right to rely on the equivalence of the travel agents' services in order to conclude that the bonus schemes at issue, being capable of entailing the application of different rates of commission to agents who had sold the same number of BA tickets, were discriminatory, and, secondly, whether, without committing an error of law, that Court could dispense with detailed findings concerning the existence of a competitive disadvantage.

— The first part of the fifth plea, concerning the equivalence of the travel agents' services

136 In the first part of its fifth plea, BA criticises the analysis by the Court of First Instance of the comparability of the services carried out by travel agents who attained their objectives in BA ticket sales and those carried out by agents who did not attain those objectives. In particular, BA accuses the Court of First Instance of failing to take account of the greater economic usefulness from the airline's point of view of the services of travel agents who attained their sales objectives or increased their turnover.

137 On that latter point, which concerns the assessment by the Court of First Instance of the circumstances of this case from which it might be possible to deduce the comparability or otherwise of travel agents' services for an airline such as BA, it is sufficient to point out that the assessment of facts and evidence is a matter for the Court of First Instance alone. It is thus not for the Court of Justice, on an appeal, to substitute its own assessment of market data and the competitive position for that of the Court of First Instance. This claim is therefore inadmissible.

138 As for the second claim, that the Court of First Instance erred in law in relation to subparagraph (c) of the second paragraph of Article 82 EC, by holding that

transactions involving a travel agent who had increased his sales of BA tickets and transactions involving an agent who had not increased them constituted 'equivalent transactions' within the meaning of that provision, it should be noted that, in paragraph 234 of the judgment under appeal, the Court of First Instance pointed out that attainment by United Kingdom travel agents of their BA ticket sales growth targets led to an increase in the rate of commission paid to them by BA not only on BA tickets sold after the target was reached but also on all BA tickets handled by the agents during the period in question.

139 The Court of First Instance logically inferred therefrom that the bonus schemes at issue led to the sale of an identical number of BA tickets by United Kingdom travel agents being remunerated at different levels according to whether or not those agents had attained their sales growth targets by comparison with the reference period.

140 The Court of First Instance does not therefore appear to have erred in law by regarding as equivalent the services of travel agents whose sales of BA tickets had, in absolute terms, been at the same level during a given period. This second claim is therefore unfounded.

141 Therefore, the first part of the fifth plea must be dismissed as in part inadmissible and in part unfounded.

— The second part of the fifth plea, concerning the requirements in relation to findings of a competitive disadvantage

142 In the second part of its fifth plea, BA argues that, for the purposes of correctly applying subparagraph (c) of the second paragraph of Article 82 EC, the mere

finding of the Court of First Instance, in paragraph 238 of the judgment under appeal, that travel agents, in their capacity to compete with each other, are 'naturally affected by the discriminatory conditions of remuneration inherent in BA's performance reward schemes' is not sufficient, since concrete evidence of a competitive disadvantage was required.

143 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.

144 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 (see, to that effect, *Suiker Unie*, paragraphs 523 and 524).

145 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.

146 In paragraphs 237 and 238 of the judgment under appeal, the Court of First Instance found that travel agents in the United Kingdom compete intensely with each other, and that that ability to compete depended on two factors, namely 'their ability to provide seats on flights suited to travellers' wishes, at a reasonable cost' and, secondly, their individual financial resources.

147 Moreover, in the part of the judgment under appeal relating to the examination of the fidelity-building effect of the bonus schemes at issue, the Court of First Instance found that the latter could lead to exponential changes in the revenue of travel agents.

148 Given that factual situation, the Court of First Instance could, in the context of its examination of the bonus schemes at issue having regard to subparagraph (c) of the second paragraph of Article 82 EC, move directly, without any detailed intermediate stage, to the conclusion that the possibilities for those agents to compete with each other had been affected by the discriminatory conditions for remuneration implemented by BA.

149 The Court of First Instance cannot therefore be accused of an error of law in not verifying, or in verifying only briefly, whether and to what extent those conditions had affected the competitive position of BA's commercial partners. The Court of First Instance was therefore entitled to take the view that the bonus schemes at issue gave rise to a discriminatory effect for the purposes of subparagraph (c) of the

second paragraph of Article 82 EC. The second part of the fifth plea is therefore unfounded.

150 The fifth plea must therefore be dismissed in its entirety.

151 Since none of the pleas raised by BA in support of its appeal can be accepted, the appeal must be dismissed.

Costs

152 In accordance with the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court shall make a decision as to costs. Under Article 69(2) of those Rules, which apply to the procedure on appeal by virtue of Article 118 of those Rules, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission and Virgin have applied for costs against BA, and the latter has been unsuccessful, BA must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby rules:

1. The appeal is dismissed.

2. British Airways plc is ordered to pay the costs.

[Signatures]