JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
17 December 2003 *

In Case T-219/99,

British Airways plc, established in Waterside (United Kingdom), represented by W. Allan and O. Black, solicitors, W. Wood and H. Davies, barristers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by M. Erhart, acting as Agent, and A. Barav, barrister, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by

Virgin Atlantic Airways Ltd, established in Crawley (United Kingdom), represented by P. Binetter, solicitor, N. Green and C. West, barristers,

intervener,

APPLICATION for the annulment under Article 230 EC 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 COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: B. Vesterdorf, President, M. Jaeger and H. Legal, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 February 2003,

gives the following

Judgment

Background to the dispute

1 According to the first recital in the preamble to 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'), British Airways plc ('BA') is the largest British airline company. It operates a hub network centred on airports in the London area. During the relevant period, its network of scheduled routes served 15 destinations within the United Kingdom and 155 international destinations in 72 countries. In 1997, BA ranked first in the world in terms of international scheduled passenger-kilometres flown, and ninth for combined international and domestic scheduled passenger-kilometres flown.

2 BA's consolidated turnover in the year to 31 March 1998 was GBP 8 642 million, on which it earned net profits of GBP 460 million. During the same year, BA employed an average of 60 675 people.

3 Virgin Atlantic Airways Limited ('Virgin') is a privately owned company incorporated under English law which operates scheduled passenger services on a number of international routes. In 1997, it ranked 21st in the world in terms of

international scheduled passenger-kilometres flown, and 31st for combined international and domestic scheduled passenger-kilometres flown. Virgin's turnover in the year to 30 April 1998 was approximately GBP 942 million. It employed approximately 4 522 people at the end of 1997.

4 BA concluded agreements with travel agents established in the United Kingdom and accredited by the International Air Transport Association (IATA) entitling them to a basic standard commission on their sales of BA air tickets. Between 1976 and 1997, that commission amounted to 9% on sales of international tickets and 7.5% for ticket sales on domestic flights.

5 In addition to that basic commission system, BA concluded agreements with IATA travel agents comprising three distinct systems of financial incentives: 'marketing agreements', 'global agreements' and, finally, a 'performance reward scheme'.

Marketing agreements and global agreements

6 The first system of incentives established by BA consisted of 'marketing agreements', which enabled certain IATA travel agents established in the United Kingdom to receive payments in addition to their basic commission, namely:

— a performance reward, plus certain special bonuses, based on the volume of sectors flown on BA;

— cash sums from a fund for travel agents to use for staff training;

— cash sums from a business development fund established by BA with a view to increasing its revenue and the resources of which were to be used by each agent for financing promotional projects in favour of BA.

7 The marketing agreements also required the United Kingdom travel agents not to accord less favourable treatment to BA than that which they accorded to any other airline, particularly in relation to the display of their fares, products, brochures and timetables.

8 Those marketing agreements, concluded for one year at a time, were in principle reserved for United Kingdom IATA travel agents with more than GBP 500 000 annual sales of BA tickets ('flown revenue'). Travel agents with annual flown revenue exceeding GBP 500 000 but below GBP 10 million were offered a standard marketing agreement. Those with a flown revenue exceeding GBP 10 million entered into a marketing agreement individually negotiated with BA.

9 The performance reward was calculated on a sliding scale, based on the extent to which a travel agent increased the value of its sales of BA tickets. In addition to the general performance reward, certain routes qualified for a special performance bonus.

10 Payment of the performance reward or the special bonus was subject to travel agents increasing their sales of BA tickets from one year to the next. Although, as a general rule, neither of those two bonuses was paid in respect of sectors flown on BA domestic services within the United Kingdom, those sectors were counted in determining whether sales objectives were achieved, since those objectives were calculated in terms of global flown revenue, including longhaul, shorthaul and domestic flights.

11 In addition to the marketing agreements, BA concluded a second type of incentive agreement ('global agreements') with three IATA travel agents. For the 1992/1993 winter season, BA set up global incentive programmes with three travel agents, entitling them to receive additional commissions calculated by reference to the growth of BA's share in their worldwide sales.

12 On 9 July 1993, Virgin lodged a complaint with the Commission, directed in particular against the marketing agreements.

13 The Commission decided to initiate a proceeding in relation to BA's marketing agreements with United Kingdom travel agents and adopted a statement of objections against BA on 20 December 1996. BA presented its oral observations at a hearing on 12 November 1997.

New system of performance rewards

14 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, consisting of a new system of performance rewards, applicable from 1 January 1998 ('the new system of performance rewards').

15 In addition to the new basic flat commission rate of 7% to be applied thenceforth to all tickets sold in the United Kingdom, each travel 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 for domestic and international tickets depended on the travel agents' performance in selling BA tickets. The agents' performance was measured by comparing the total flown 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.

16 Under the new system of performance rewards, every percentage point of improvement in performance level over a benchmark of 95% earned the travel agent an additional variable element of 0.1% by way of extra commission on the sale of international tickets and in addition to the basic commission of 7%. For sales of domestic tickets, the variable element was 0.1% for every 3% increase in sales over the 95% benchmark. The maximum variable element payable to travel agents under the new performance rewards system was 3% for international tickets and 1% for domestic tickets for a performance level of 125% or above in both cases.

17 For example, if an agent's performance level for a particular calendar month was 112%, the variable element for international tickets was 1.7% [(112 - 95) × 0.1%] of the international reward revenue for that month. On the other hand, at that level of performance the variable element for domestic tickets was 0.5% [(112 - 95) ÷ 3 × 0.1%] of the domestic reward revenue for that calendar month. Payments of the variable elements under the performance rewards system took place every month.

18 The new system of performance rewards was initially intended to last until 31 March 1999. For the month of December 1997, BA established a transitional scheme whereby the new performance reward system was applied on top of the pre-existing standard commissions of 9% and 7.5% for international and domestic tickets respectively. On 8 February 1999, BA announced that that system would not be renewed for the year 1999/2000.

19 On 9 January 1998, Virgin lodged a supplementary complaint against BA's new system of performance rewards. On 12 March 1998, the Commission adopted a supplementary statement of objections in relation to that new system.

The Commission's decision

20 On 14 July 1999, on the basis of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87; 'Regulation No 17'), the Commission adopted the contested decision, holding that each of the air routes served by BA to and from United Kingdom airports was potentially a separate market for air transport services (recital 80) and that the relevant geographic market for air transport was the United Kingdom market (recital 83).

21 According to recital 31 of the contested decision, travel agents supply airlines with services consisting of promoting the air transport services provided by airlines, helping travellers choose the appropriate services, and undertaking the administrative work of issuing tickets, collecting money from travellers and remitting it to the airline. In return for those services, the airlines pay commissions to the agents based on the sales of tickets made through those agents.

22 The Commission then maintains that BA is a purchaser in a dominant position on the United Kingdom market for air travel agency services, especially because of the percentage which sales of BA tickets represent in the total of air ticket sales carried out in United Kingdom territory under the settlement scheme for travel agents operated by IATA (recitals 90 and 91).

23 In recitals 29 and 30 of the contested decision, the Commission describes the detailed operation of the marketing agreements and the new system of performance rewards as follows:

'(29) The commission schemes for travel agents described above all have one notable feature in common. In each case meeting the targets for sales growth leads to an increase in the commission paid on all tickets sold by the agent, not just on the tickets sold after the target is reached. In the [marketing agreement] schemes the cash bonus per ticket paid to the travel agent increases for all tickets sold. In the [performance reward scheme] the percentage commission paid increases for all ticket sales by the travel agent. This means that when a travel agent is close to one of the thresholds for an increase in commission rate selling relatively few extra BA tickets can have a large effect on his commission income. Conversely a competitor of BA who wishes to give a travel agent an incentive to divert some sales from BA to the competing airline will have to pay a much higher rate of commission than BA on all of the tickets sold by it to overcome this effect.

(30) An example will illustrate this effect of the BA commission schemes. Assume a travel agent's sales of international air tickets amounted to [GBP] 100 000 a month in the benchmark year. If the travel agent sells

[GBP] 100 000 worth of BA international air tickets a month it will earn the basic commission of 7% and a "performance reward" of 0.5% [(100 - 95) × 0.1%], giving a total commission income on international air ticket sales of [GBP] 7 500 [100 000 × (7% + 0.5%)]. If the travel agent diverted 1% of its international ticket sales to a competitor of BA, its "performance reward" would decrease to 0.4% [(99% - 95%) × 0.1%] and this reduced rate would be applied to all of the agent's sales of BA tickets. The agent's commission income from the sale of international BA tickets would drop to [GBP] 7 326 [99 000 × (7% + 0.4%)]. A reduction of [GBP] 1 000 in sales of international BA tickets leads to a drop of [GBP] 174 in commission income. The "marginal" commission rate can be said to be 17.4%. In practical terms, this means that a competitor to BA that could offer flights that would replace [GBP] 1 000 of the travel agent's sales of BA tickets would have to offer a commission of 17.4% on these tickets to compensate the travel agent for its loss of BA commission revenue. Although BA also has to offer this high marginal rate of commission to increase its sales of tickets, it is at an advantage over the new entrant which must offer this high rate of commission on all of its sales...

This effect increases if the number of tickets in question is a smaller percentage of the travel agent's benchmark sales of BA tickets. This effect is also increased if the travel agent in question is not only earning extra commissions under the performance reward system but can also earn bonuses under a marketing agreement.'

24 The Commission holds in the contested decision that, by applying the marketing agreements and the new system of performance rewards to air travel agents established in the United Kingdom, BA abused its dominant position on the United Kingdom market for air travel agency services (recital 96).

25 The application by BA of its performance reward systems to travel agents established in the United Kingdom constitutes an abuse of a dominant position in that, first, it has the effect of encouraging those agents to maintain or increase their sales of BA tickets rather than selling their services to BA's competitors, those financial incentives not depending on the volume of BA tickets sold by those agents in absolute terms (recital 102), and, secondly, it has the effect of imposing on the agents in question dissimilar conditions to equivalent transactions (recital 109).

26 Finally, the Commission takes the view that BA's abusive conduct on the United Kingdom market for air travel agency services has the effect of distorting competition between BA and other airlines on the United Kingdom markets for air transport services (recitals 103 and 111).

27 Therefore, the operative part of the contested decision is worded as follows:

'Article 1

[BA] infringed Article 82 [EC] by operating systems of commission and other incentives with the travel agents from whom it purchases air travel agency services in the United Kingdom, which, by rewarding loyalty from the travel agents and by discriminating between travel agents, have the object and effect of excluding BA's competitors from the United Kingdom markets for air transport.

Article 2

For the infringements referred to in Article 1, a fine of EUR 6.8 million is hereby imposed on [BA].'

Procedure

28 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, which had been notified to it on 27 July 1999.

29 By document lodged on 10 April 2000, Virgin applied for leave to intervene in these proceedings in support of the Commission.

30 By document lodged at the Court Registry on 25 April 2000, Air France also applied for leave to intervene in these proceedings in support of BA's claim for annulment, arguing that the resolution of the present dispute will have an impact on the position which the Commission will have to adopt in a proceeding against the systems of commercial incentives applied by Air France to travel agents.

31 By order of 9 February 2001, Virgin's application to intervene was allowed, as was BA's application that certain documents should be treated as confidential in relation to Virgin.

32 Air France's application was dismissed, however, on the ground that it had no interest in the resolution of the current dispute, since any impact that the judgment might have on a contested decision that the Commission might adopt against Air France was outside the subject-matter of the present proceedings.

33 By decision of the Court of First Instance the Judge-Rapporteur was attached to the First Chamber, to which the case was therefore assigned.

34 Following the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure. By way of measures of organisation of procedure, it asked BA and the Commission to reply to certain questions. BA and the Commission complied with those requests within the prescribed time-limits.

35 At the hearing on 26 February 2003, the parties presented oral argument and replied to oral questions put by the Court.

Forms of order sought

36 The applicant claims that the Court should:

— annul the contested decision in its entirety;

— order the Commission to pay the costs.

37 The Commission, supported by Virgin, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

38 In support of its action, BA makes eight pleas in law, in which it argues that the Commission lacked competence, that it infringed the principle of non-discrimination, that it incorrectly defined the 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.

The first plea in law, alleging that the Commission lacked competence

Arguments of the parties

39 BA argues that the Commission exceeded its competence by adopting the contested decision on 14 July 1999, since all its members, who had resigned on

16 March 1999 in order to avoid a motion of censure by the Parliament, had the authority only to deal with current business within the meaning of Article 201 EC, applicable by analogy, until the appointment of the members of the new Commission on 15 September 1999.

40 The reasons for the restrictions imposed on the Commission's activities by Article 201 EC, which include, first and foremost, the investing in the Parliament of the constitutional authority to withdraw the Commission's political mandate, are, BA submits, at least as valid where the Commission's resignation as a body is voluntary, as in this case, as where it follows a motion of censure by the Parliament.

41 By contrast with the retention of Commissioners in office until their replacement pursuant to the fourth paragraph of Article 215 EC, which envisages vacancies occurring in a Commission continuing to exercise the mandate under which it was appointed, the 'current business' which Commissioners continue to carry on by virtue of the second paragraph of Article 201 EC covers only the daily activities of the Commission. That excludes fresh political initiatives such as the contested decision, to which the Commission clearly intended to attribute the force of a precedent applicable to airlines holding a market position similar to that of BA.

42 Even if Article 215 EC did apply, BA submits, it did not authorise the Commission to adopt the contested decision. The first paragraph of that article provides that the duties of a Commissioner are to end when he resigns. The term 'duties' covers a decision like this one, enforcing Article 82 EC, as is emphasised by the terms of Article 213(2) EC, which requires Commissioners to be completely independent in the performance of their duties.

43 The Commission argues that, in the absence of a motion of censure by the Parliament, Article 201 EC does not apply, even by analogy, to the voluntary resignation of all Commissioners, even if simultaneous, since such a case is covered by Article 215 EC.

44 Since Article 215 EC imposes no restriction on their powers, Commissioners are legally entitled, and required, to exercise the powers conferred upon them by the Treaty until the appointment of their successors.

45 In any event, the contested decision did not represent a new political initiative and formed part of the Commission's current business.

Findings of the Court

46 Article 201 EC is worded as follows:

'If a motion of censure on the activities of the Commission is tabled before it, the European Parliament shall not vote thereon until at least three days after the motion has been tabled and only by open vote.

If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the Members of the European Parliament, the Members of the Commission shall resign as a body. They shall continue to deal

with current business until they are replaced in accordance with Article 214. In this case, the term of office of the Members of the Commission appointed to replace them shall expire on the date on which the term of office of the Members of the Commission obliged to resign as a body would have expired.'

47 In addition Article 215 EC provides:

'Apart from normal replacement, or death, the duties of a Member of the Commission shall end when he resigns or is compulsorily retired.

The vacancy thus caused shall be filled for the remainder of the Member's term of office by a new Member appointed by common accord of the governments of the Member States. The Council may, acting unanimously, decide that such a vacancy need not be filled.

In the event of resignation, compulsory retirement or death, the President shall be replaced for the remainder of his term of office. The procedure laid down in Article 214(2) shall be applicable for the replacement of the President.

Save in the case of compulsory retirement under Article 216, Members of the Commission shall remain in office until they have been replaced.'

48 By letter of 16 March 1999, the Commission President, Mr Santer, informed the president of the conference of the representatives of the Governments of the Member States of the decision of the Commission's members to resign collectively and to place their mandate in the hands of the Governments of the Member States. In that letter, the President and the Members of the Commission stated that, particularly in view of the fourth paragraph of Article 215 EC, they would carry out their duties until they were replaced in accordance with the procedures laid down by the Treaties.

49 In a statement on 22 March 1999, the Council, while considering it necessary to appoint a new Commission as quickly as possible, expressed the wish that, until that time, the Commissioners would continue to perform their duties in accordance with the Treaties.

50 It is clear from Article 201 EC that Commissioners cannot be regarded as having been 'obliged to resign as a body', within the meaning of the last sentence of the second paragraph of that article, unless the Parliament has first adopted a motion of censure under the conditions defined by the same article.

51 In the absence of such a motion, as in this case, individual resignations, even if simultaneous, of all the Commission's Members constitute a scenario that falls outside the provisions of Article 201 EC.

52 The fact that Commissioners may have recognised their political responsibility by resigning as a body is, in law, irrelevant in that respect. In the context of the organisation of the Community's powers, the choice of the legal basis for a measure may not depend simply on an institution's conviction but must be based on objective factors which are amenable to judicial review (see, to that effect, Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 11).

53 This Court therefore takes the view that the duties of the Commissioners concerned ended when they resigned, for the purposes of the first paragraph of Article 215 EC, the simultaneous nature of those individual resignations not being capable of calling into question the voluntary character of each of them.

54 Moreover, as is shown by its citations, Decision 1999/627/EC, ECSC, Euratom of the Representatives of the Governments of the Member States of the European Communities of 15 September 1999 appointing the President and the Members of the Commission of the European Communities (OJ 1999 L 248, p. 30) is based, in particular, on Article 215 EC.

55 By stating, in the first paragraph of Article 215 EC, that the duties of a Member of the Commission are to end when he resigns, the framers of the Treaty merely intended to define the legal causes of the cessation of Commissioners' duties during their mandate, without thereby wishing to prohibit Commissioners who have resigned from exercising their normal powers until their resignation takes effect on the date of their actual replacement.

56 It follows that the persons concerned remained 'in office until they [were] replaced' on 15 September 1999, in accordance with the provision in the fourth paragraph of Article 215 EC. They therefore retained their full powers until that date.

57 The Commission did not therefore exceed its competence by adopting the contested decision on 14 July 1999.

58 The first plea in law must therefore be dismissed.

The second plea in law, alleging infringement of the principle of non-discrimination

Arguments of the parties

59 BA accuses the Commission of disregarding the principle of non-discrimination and placing it in a very unfavourable competitive position by forbidding it, in the contested decision, from applying its performance reward schemes to travel agents established in the United Kingdom, without adopting similar decisions against other airlines which held at least as strong a market position as that attributed by the Commission to BA and used the same financial incentive schemes.

60 Nor, BA submits, does the fact that the Virgin complaint had been filed previously justify the adoption of a decision to bring a proceeding for infringement against BA alone. The Commission's discretion in allocating its resources to ongoing cases cannot authorise discrimination, particularly discrimination which itself produces anti-competitive effects to the detriment of the undertaking against which the proceeding is brought.

61 The Commission sees nothing discriminatory in adopting the contested decision six years after Virgin lodged its complaint. It argues that it has a discretion in allocating different degrees of priority to the cases before it, by reference to their Community interest (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 77).

62 According to the press release on the 'Principles concerning travel agents' commissions', issued on the same day that the contested decision was adopted, that decision constituted a first step in dealing with commissions paid by airlines

to travel agents. The principles established in that press release also gave clear guidance for any other airline in a situation similar to that of BA, and the Commission stated that it would take all measures necessary to ensure that those principles were complied with by other airlines in equivalent situations.

63 The contested decision produced no adverse effect on BA in geographical markets other than the United Kingdom market. Where it does not occupy a dominant position on those other markets, the Commission argues, BA may apply financial incentive schemes to counter those applied by a competitor.

64 In addition, the fact that other air carriers operating in the United Kingdom offered various bonus systems to air travel agents had no bearing on the contested decision, which concerned BA in its capacity as the dominant undertaking on the United Kingdom market for air travel agency services, on account of the special responsibility incumbent upon such an undertaking.

Findings of the Court

65 For the Commission to be accused of discrimination, it must be shown to have treated like cases differently, thereby subjecting some to disadvantages as opposed to others, without such differentiation being justified by the existence of substantial objective differences (Case T-106/96 *Wirtschaftsvereinigung Stahl* v *Commission* [1999] ECR II-2155, paragraph 103).

66 The fact that a trader in a position similar to that of an applicant has not been found by the Commission to have committed any infringement cannot in any event constitute a ground for setting aside the finding of an infringement by that applicant, provided it was properly established (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström and Others* v *Commission* [1993] ECR I-1307, paragraph 146).

67 Moreover, the plea is based on the mere allegation, not supported by any evidence, that financial incentive schemes applied to travel agents by BA's competitors were illegal under Articles 81 EC and 82 EC.

68 Furthermore, leaving aside the fact that the contested decision followed the complaint brought by Virgin against BA as early as 1993, the Commission is entitled, in order effectively to ensure the application of the Community competition rules, and as it has done in this case, to give differing degrees of priority to the complaints brought before it (Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 88) by reference to their Community interest, measured in relation to the circumstances of each case and, in particular, to the elements of fact and law which are presented to it (*Automec*, cited in paragraph 61 above, at paragraph 86).

69 In that respect, the Commission is required in each case to assess the seriousness of the alleged restrictions on competition (Joined Cases T-189/95, T-39/96 and T-123/96 *SGA* v *Commission* [1999] ECR II-3587, paragraph 53) and, as in this case, how long ago the complaint was brought before it. The Commission is under a duty to conclude its investigation procedures within a reasonable time (see, to that effect, Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraphs 55 and 56).

70 Where, as in this case, the Commission is faced with a situation where numerous factors give rise to a suspicion of anti-competitive conduct on the part of several large undertakings in the same economic sector, the Commission is even entitled to concentrate its efforts on one of the undertakings concerned, while inviting the economic operators which have allegedly suffered damage as a result of the possibly anti-competitive conduct of the other undertakings to bring the matter before the national authorities (see, to that effect, *SGA* v *Commission*, cited in paragraph 69 above, paragraph 59).

71 Finally, the Commission stated at the hearing, without being contradicted on the point by BA, that it commenced investigation procedures against eight airline companies following complaints lodged by BA in June and September 1998, and that it informed BA by letter of 6 February 2003 of its intention to terminate those procedures.

72 The onus is therefore on BA, if it thinks it has grounds for doing so, to submit its observations in that respect to the Commission and to challenge any decision by the Commission not to take further action on its complaints.

73 The second plea in law cannot therefore be accepted.

The third plea in law, alleging incorrect definition of the relevant product and geographic market

74 As the contested decision shows (see paragraph 22 above), the Commission took the view that, for the purposes of establishing the dominant position of BA, the relevant market was the United Kingdom market for air travel agency services.

Arguments of the parties

75 BA challenges that analysis by the Commission, arguing that, even if it exists, the market for services supplied by travel agents to airlines cannot constitute the relevant product market in the circumstances of this case.

76 BA submits that the Commission imputed restrictions on competition found in the disputed performance reward schemes to the position held by BA in its capacity of purchaser of the services provided by travel agents established in the United Kingdom. By so doing, the Commission departed, first, from its normal method of defining the market in question, thereby prejudging the finding of dominance and ultimately of abuse, and, second, (from the approach set out) in its Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5).

77 Travel agents represent a distribution channel allowing airlines to sell seats on their flights and providing a retail function. However, in markets for branded products, the nature of competition is assessed by taking the markets for the products in question as relevant, rather than those for the purchase of retail services supplied by the points of sale used by manufacturers to market their products.

78 BA submits that its position in relation to travel agents is not an appropriate way of assessing its market power. In defining the relevant product market for assessing the competitive effects of payments to travel agents, the relevant question is whether a single supplier of air transportation services on a particular route can profitably increase its prices.

79 As the Commission recognises in recitals 80 and 81 of the contested decision, whether or not this is the case will depend on the extent to which passengers wishing to fly a particular route consider flights on other routes to be effective substitutes. The Commission adopts this approach when considering passenger air transport to and from the United Kingdom, but mistakenly maintains that a separate market exists for air travel agency services.

80 BA argues that, following the Commission's approach, if the market in travel agency air ticket distribution services shrank to a point where it was of trivial significance, it would remain the relevant market. But, BA submits, the other forms of distribution preclude a finding that an airline has market power if it holds a preponderant share of ticket distribution through agencies.

81 Second, if there were four sets of destinations (USA, Europe, Africa and the Far East) and a single supplier of air transportation services for each of them, each carrier would be able to exercise substantial power on its own routes, unconstrained by the other airlines. On the Commission's analysis, none of those airlines would necessarily be dominant in the purchase of travel agency services, as each would account for only 25% of the purchase of those services.

82 Finally, an airline which was not dominant on the market in air travel agency services, and yet was the only airline that operated on a particular route or small set of routes, might act entirely independently of its competitors and agents so far as those routes were concerned. Nevertheless, on the Commission's analysis that situation would not come under Article 82 EC.

83 BA adds that, even if air travel agency services were the relevant product market, the relevant geographic market is broader than the United Kingdom. Many of the larger agents operate in several countries. Moreover, travel agents are increasingly doing business with airlines on an international basis, as evidenced by BA's conclusion of global agreements with certain agencies.

84 The Commission notes that, as stated in recital 31 of the contested decision, travel agents act as agents for the airlines in the capacity of independent intermediaries who provide services on an independent basis (Case 311/85 *VVR* [1987] ECR 3801, paragraph 20).

85 The services provided by the travel agents, for which the airlines pay them commission based on sales of their tickets, consist of advertising in favour of the co-contracting airlines, assisting passengers to select appropriate airlines and flights, issuing tickets, collecting money from the travellers and remitting it to the airlines.

86 There is no impediment to finding an abuse of a dominant position committed by a dominant purchaser, who is not exempted from Community competition law.

87 The Commission states that it has classified air travel agency services as a distinct market (Commission Decision 91/480/EEC of 30 July 1991 relating to a proceeding pursuant to Article [81] of the Treaty (Case No IV/32.659 — IATA Passenger Agency Programme) (OJ 1991 L 258, p. 18), and has done the same in relation to other markets related to air travel, such as computerised reservation systems (Commission Decision 88/589/EEC of 4 November 1988 relating to a proceeding under Article [82] of the Treaty (IV/32.318, London European — Sabena) (OJ 1988 L 317, p. 47).

88 Finally, the Commission argues, the limitation of the relevant geographic market to the United Kingdom is justified by various factors which localise the activities concerned to United Kingdom territory. In particular, customers normally book their tickets in their country of residence and relations between travel agents and airlines are established on a country-by-country basis.

Findings of the Court

89 The Commission took the view in the contested decision that the product market to be taken into consideration, for the purposes of establishing the dominant position of BA, is comprised by the services which airlines purchase from travel agents for the purposes of marketing and distributing their airline tickets (recital 72). In the Commission's view, that practice by airlines has the effect of creating a market for air travel agency services distinct from the air transport markets.

90 The Commission has also taken the view that the relevant geographic market in this case was the territory of the United Kingdom, given the national dimension of travel agents' business.

91 According to settled case-law (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37; Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 62, confirmed on appeal by order of the Court of Justice in Case C-241/00 P *Kish Glass* v *Commission* [2001] ECR I-7759), for the purposes of investigating the possibly dominant position of an undertaking on a given product market, the possibilities of competition must be judged in the context of the market comprising the totality of the products or services which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products or services. Moreover, since the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective

competition from being maintained and behave to an appreciable extent independently of its competitors and, in this case, its service providers, an examination to that end cannot be limited to the objective characteristics only of the relevant services, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.

92 It is clear from BA's pleadings that it itself acknowledges the existence of an independent market for air travel agency services, since it states in paragraph 11.34 of its application that travel agents themselves operate in a competitive market, competing with each other to provide the best possible service to their customers.

93 In that regard, although travel agents act on behalf of the airlines, which assume all the risks and advantages connected with the transport service itself and which conclude contracts for transport directly with travellers, they nevertheless constitute independent intermediaries carrying on an independent business of providing services (see, to that effect, the judgment in *VVR*, cited in paragraph 84 above, at paragraph 20).

94 As the Commission states in recital 31 of the contested decision, that specific business of travel agents consists, on the one hand, in advising potential travellers, reserving and issuing airline tickets, (and) collecting the price of the transport and remitting it to the airlines, and, on the other hand, in providing those airlines with advertising and commercial promotion services.

95 In that regard, BA itself states that travel agents are and will remain, in the short term at least, a vital distribution channel for airlines, allowing them efficiently to sell seats on the flights they offer, and that there is a mutual dependence between travel agents and airlines which are not in themselves in a position to market their air transport services effectively.

96 As BA has also stated, travel agents offer a wider range of air routes, departure times and arrival times than any airline could. Travel agents filter information concerning various flights for the benefit of travellers faced with the proliferation of different air transport fare structures, which arise from the real-time pricing systems operated by airlines.

97 BA has further recognised that the role which travel agents play in the distribution of airline tickets explains why airlines seek to offer them advantages so that they sell seats on their flights. The irreplaceable nature of the services which travel agents provide to airlines is thus borne out by all the payments which the airlines make to them.

98 Finally, BA has itself emphasised that major travel agents individually negotiate agreements for the distribution of air tickets and that they are thus in a position to set the airlines in competition.

99 That specific nature of the services provided to airlines by travel agents, without any serious possibility of the airlines substituting themselves for the agents in order to carry out the same services themselves, is corroborated by the fact that, at the time of the events of which complaint is made, 85% of air tickets sold in the territory of the United Kingdom were sold through the intermediary of travel agents.

100 The Court therefore considers that the services of air travel agencies represent an economic activity for which, at the time of the contested decision, airlines could not substitute another form of distribution of their tickets, and that they therefore constitute a market for services distinct from the air transport market.

101 With regard to the fact that the restrictions on competition which the Commission imputes to BA's performance reward schemes arise from the position which BA holds in its capacity not as supplier but as purchaser of air travel agency services, this is irrelevant having regard to the definition of the market in question. Article 82 EC applies both to undertakings whose possible dominant position is established, as in this case, in relation to their suppliers and to those which are capable of being in the same position in relation to their customers.

102 BA itself acknowledged at the hearing, moreover, that it is possible both for a seller and for a purchaser to hold a dominant position within the meaning of Article 82 EC.

103 BA cannot therefore validly argue that, in order to define the product market in question, with a view to assessing the effects on competition of the financial advantages which it allows to travel agents established in the United Kingdom, it is necessary to determine whether a single supplier of air transportation services on a particular route can profitably increase its prices.

104 Such a parameter, which might be relevant in relation to each airline, is not of such a kind as to enable measurement of BA's economic strength in its capacity not as provider of air transport services but as purchaser of travel agency services, on all routes to and from United Kingdom airports, either in relation to all other airlines regarded in the same capacity as purchasers of air travel agency services or in relation to travel agents established in the United Kingdom.

105 BA's objections to the relevance of the product market adopted by the Commission, based on the possible marginalisation of the distribution of airline tickets through the intermediary of travel agents, on the exclusive specialisation

of airlines by geographical destinations, and on the independent behaviour of an airline in a monopoly situation on certain routes, therefore have no bearing.

106 Those arguments are based on situations which are either hypothetical or foreign to the conditions of competition operating in the product market in question constituted by air travel agency services, both between the agents providing those services and between the airlines using them.

107 The Commission did not therefore make any error of assessment in defining the relevant product market as that for services provided by travel agents in favour of airlines, for the purposes of establishing whether BA holds a dominant position on that market in its capacity as bidder for those services.

108 As for the geographic market to be taken into consideration, consistent case-law shows that it may be defined as the territory in which all traders operate in the same or sufficiently homogeneous conditions of competition in so far as concerns specifically the relevant products or services, without it being necessary for those conditions to be perfectly homogeneous (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 91, confirmed on appeal by judgment in Case C-333/94 P *Tetra Pak* v *Commission* (*Tetra Pak II*) [1996] ECR I-5951).

109 It can hardly be denied that, in the overwhelming majority of cases, travellers reserve airline tickets in their country of residence. Although BA has argued that not all tickets sold by travel agents in the United Kingdom are necessarily sold to residents of that country, it has acknowledged that transactions taking place outside the United Kingdom could not be quantified.

110 Moreover, as the Commission has stated in recital 83 of the contested decision, without challenge from BA, IATA's rules on the order of using the coupons in airline tickets prevent tickets sold outside the territory of the United Kingdom from being used for flights departing from United Kingdom airports.

111 Since the distribution of airline tickets takes place at national level, it follows that airlines normally purchase the services for distributing those tickets on a national basis, as is shown by the agreements signed to that end by BA with travel agents established in the United Kingdom.

112 Nor has any doubt been cast on the fact that airlines structure their commercial services at the national level, that travel agents' handling of air tickets is carried out in the context of IATA's national plans for bank settlement and, in this case, through the Billing and Settlement Plan for the United Kingdom ('BSPUK').

113 Nor has BA challenged the Commission's statement that BA applies its performance reward schemes to travel agents established in the United Kingdom in a uniform manner over the whole of the territory of that Member State.

114 Nor has BA denied that the disputed financial incentives apply only to sales of BA tickets carried out in the United Kingdom, even if those incentives form part of agreements concluded with travel agents whose activities extend to more than one Member State.

115 Contrary to what BA maintains, the fact that BA concludes global agreements with certain travel agents is not capable of establishing that the latter increasingly deal with airlines on the international level. As is shown in recital 20 of the contested decision, which BA has not challenged, those global agreements were signed with only three travel agents and only for the winter season 1992/1993. Moreover, those agreements were merely added to local agreements made in the countries concerned.

116 It does not therefore appear that the Commission erred in defining the relevant geographic market as the United Kingdom market, for the purposes of demonstrating that BA held a dominant position on that market in its capacity as the purchaser of air travel agency services provided by agents established in the United Kingdom.

117 The plea alleging incorrect definition of the relevant product and geographic market cannot therefore be accepted.

The fourth plea in law, alleging lack of the requisite nexus between the product markets affected

118 In the contested decision, the Commission found the existence of effects of the disputed practices on several markets. As is shown by recitals 111 and 112 of the contested decision in particular, the Commission held that the performance reward schemes applied by BA gave rise to discrimination between travel agents established in the United Kingdom on the United Kingdom market for air travel agency services, and tended, first, to reduce the quantity of air travel agency services provided to other companies, and, secondly, to make the provision of those services subject to less favourable conditions. That abusive conduct by BA on the market for air travel agency services further produced serious anti-competitive effects on the United Kingdom air transport markets, to the detriment of airline companies competing with BA (recitals 103 and 113).

Arguments of the parties

119 BA argues that the sufficiently close nexus required for Article 82 EC to apply does not exist between, on the one hand, the United Kingdom market for air travel agency services, allegedly dominated by BA, and, on the other, the United Kingdom air transport markets, on which BA does not hold a dominant position.

120 It argues that the Commission's analysis is 'circular', in that it considers that BA's success on the United Kingdom air transport markets places it in a dominant position on the United Kingdom market for air travel agency services, the abuse of which has harmful effects on air transport markets.

121 BA further argues that its shares of United Kingdom air transport markets are too small to raise concerns, and that its position as a purchaser of travel agency services in the United Kingdom does not enable it to control the provision of those services.

122 The Commission states that it has identified the market constituted by the services of the air travel agencies established in the United Kingdom, on which BA occupies a dominant position and has abused it, by reason of unlawful discrimination between those operators and the exclusionary effects which its conduct has produced on that same market. It also took account of the exclusionary effects of that abuse on competing airlines in the product markets of air travel to and from the United Kingdom.

123 In its judgement in *Tetra Pak* (cited in paragraph 108 above, at paragraph 113), the Court of First Instance emphasised that Article 82 EC gave no explicit guidance as to the requirements relating to where on the market for products and

services the abuse took place, and the Court of Justice held (in *Tetra Pak II*, cited in paragraph 108 above, at paragraph 24) that the assessment of the Court of First Instance could not be challenged on that point.

124 Although the present case differs from *Tetra Pak*, in that BA's abuse of its dominant position produced effects on both the dominated market and other markets, the Commission argues that there can be no doubt that the United Kingdom market for air travel agency services maintains close links with the markets for air transport from, within and to the United Kingdom.

125 The intervener, Virgin, recalls that BA has queried the independent existence of the market for air travel agency services, separate from the market for air transportation. Having made that argument, BA cannot then contend that those two markets are totally separate and unrelated.

126 Virgin adds that the capacity of travel agents to exercise a determining influence on a traveller's choice of airline cannot seriously be challenged. In addition, the bonuses paid to them by airlines considerably influence their methods of reservation in relation to travellers who delegate the choice of airline to them.

Findings of the Court

127 An abuse of a dominant position committed on the dominated product market, but the effects of which are felt in a separate market on which the undertaking concerned does not hold a dominant position may fall within Article 82 EC provided that separate market is sufficiently closely connected to the first (see, to

that effect, Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 22, and Case 311/84 *CBEM* [1985] ECR 3261, paragraph 26).

128 In this case, the disputed performance reward schemes form part of a series of agreements which BA concluded with travel agents established in the United Kingdom, for the purposes of the provision of air transport agency services, including the issuing of its tickets to travellers and the provision of ancillary advertising and commercial promotion services.

129 As has been pointed out above, it is acknowledged that air travel agents carry out a retail function and that, in the short term at least, they will maintain that role and hence a vital importance for airlines.

130 The services which airlines thus sell to travellers through the intermediary of travel agents established in the United Kingdom are constituted by air transport services on scheduled flights which those airlines provide to and from United Kingdom airports.

131 The Court notes in that respect that, at the time of BA's disputed practices, 85% of air tickets sold in the United Kingdom were sold through the intermediary of air travel agents.

132 There is therefore an undeniable close connection between, on the one hand, the air travel agency services supplied to airlines by agents established in the United Kingdom, and, on the other, the air transport services provided by those airlines on the United Kingdom air transport markets constituted by air routes to and from United Kingdom airports.

133 Furthermore, BA's line of argument rests on the premiss that such a close connection exists between the markets concerned. BA notes, in point 10.28 of its application, that disinclination by an agent to promote BA's flights is likely to lead to an absolute loss of business for BA. Such a loss of revenue can come about only through a reduction in the number of BA tickets issued.

134 Conversely, BA notes in point 4.39 of its application that, to the extent that they may lead to higher demand for an airline's services, advantages granted by airlines to travel agents result in significant cost savings.

135 The Commission was therefore right to hold that the nexus required by Article 82 EC existed between the United Kingdom market for the travel agency services which airlines purchase from travel agents and the United Kingdom air transport markets.

136 In those circumstances, the fourth plea in law cannot succeed.

The fifth plea in law, alleging an incorrect legal basis

137 Regulation No 17, on the basis of which the contested decision was adopted, constitutes the first regulation implementing Articles 81 EC and 82 EC and sets out the general legal framework for applying those two provisions.

138 Under Article 1 of Council Regulation No 141 of 26 November 1962 exempting transport from the application of Regulation No 17 (OJ, English Special Edition 1959-1962, p. 291), 'Regulation No 17 shall not apply to agreements, decisions or concerted practices in the transport sector which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets; nor shall it apply to the abuse of a dominant position, within the meaning of Article [82 EC], within the transport market.'

139 According to the third recital in the preamble to Regulation No 141, however, the distinctive features of transport make it justifiable to exempt from the application of Regulation No 17 only agreements, decisions and concerted practices directly relating to the provision of transport services.

140 Finally, on 14 December 1987, the Council adopted Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374, p. 1).

Arguments of the parties

141 BA argues that, even if the relevant product market was the market for air travel agency services, the practices of which BA stands accused fall not within the regulation which the Commission took as the legal basis for the contested decision, namely Regulation No 17, but within Regulation No 3975/87.

142 In its judgment in Case C-264/95 P *Commission* v *UIC* [1997] ECR I-1287, paragraph 28, confirming the judgment of the Court of First Instance in Case T-14/93 *Union Internationale des Chemins de Fer* v *Commission* [1995] ECR II-1503, the Court of Justice rejected the argument, relied on in the present case

by the Commission, that Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1952-1972, p. 28) applied only to agreements and concerted practices directly relating to the supply of transport, on the ground that the relevant passage of Article 1 of Regulation No 1017/68 was precise and detailed and did not mention the word 'directly'.

143 The Commission attempts to distinguish *UIC* from the present case by arguing that the scope of Regulation No 1017/68 is defined more broadly than that of Regulation No 3975/87, inasmuch as the former refers to all 'agreements, decisions and concerted practices which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets'. But, as the Court of Justice held in *UIC*, those are precisely the words of Article 1 of Regulation No 141, which removes the whole of the transport sector from the scope of Regulation No 17.

144 Moreover, the terms of Regulation No 3975/87 itself demonstrate that it was not intended to have only the restrictive scope suggested by the Commission. Article 2 of that regulation provides that the prohibition laid down in Article 81(1) EC is not to apply to the agreements, decisions and concerted practices listed in the annex to that regulation. That annex includes (at letter (k)) agreements, decisions or concerted practices relating to 'the clearing and settling of accounts between air carriers and their appointed agents by means of a centralised and automated settlement plan or system, including such services as may be necessary or incidental thereto'. If the Commission's argument were correct, those matters would not fall within the scope of Regulation No 3975/87 at all.

145 On the Commission's own analysis, the practices of which BA stands accused produce their effects, or at least their principal effects, in the air transport sector (recitals 118 and 120 of the contested decision). In addition, the disputed performance bonuses constitute one of the direct costs of the sale of an air

transport ticket and influence the net price received by the airline in exchange for the air transport service provided, thus also indirectly fixing 'transport rates' within the meaning of Regulation No 141.

146 Because the Commission applied the wrong legal basis, BA was deprived of its procedural safeguards, on account of the differences in that respect between the system under Regulation No 17 and that under Regulation No 3975/87.

147 Moreover, the Commission did not have the power to adopt the contested decision in so far as it affected air routes between the European Union and non-member countries. The latter do not fall within the scope of Regulation No 3975/87, which is limited to air transport between Community airports.

148 The Commission argues that there can be no doubt that, as activities connected with, or indirectly linked to, the market in air transport in the full sense of the term, air travel agency services do not fall within the scope of the exclusion from the application of Regulation No 17 enacted by Article 1 of Regulation No 141, and that, on the contrary, they remain subject to Regulation No 17.

149 Regulation No 3975/87, the third recital in the preamble to which emphasises the features which are specific to the air transport industry, applies only to agreements directly related to the provision of air transport services.

150 By contrast, the contested decision concerned only services purchased by BA from travel agents. Both the alleged abuse and its primary effects occurred on the

market for air travel agency services (recitals 85 and 112 of the contested decision). The anti-competitive agreements between BA and United Kingdom travel agents did not relate to 'air transport services' and were not directly linked to the provision of such services.

151 The Commission submits that, whatever its scope, Regulation No 1017/68 is not relevant in this case, and that the two *UIC* judgments, cited in paragraph 142 above, concerned that regulation and not Regulation No 3975/87.

152 Whereas Article 1 of Regulation No 1017/68 gives a broad definition of its scope, Regulation No 3975/87, as amended by Council Regulation (EEC) No 2410/92 of 23 July 1992 (OJ 1992 L 240, p. 18), refers in Article 1(2) only to 'air transport between Community airports'.

153 Furthermore, the present case concerns neither the supply of transport nor the fixing of transport rates, which are explicitly envisaged by Article 1 of Regulation No 1017/68.

154 If, as BA implies, air travel agency services were not included within the scope of Regulation No 3975/87, and were excluded from the scope of Regulation No 17 by Regulation No 141, such services would not be covered by any Community regulation, which cannot be the case.

Findings of the Court

155 The performance reward schemes applied by BA form part of agreements concluded between BA and travel agents established in the United Kingdom for the purposes of supplying BA with travel agency services and, in particular, for the purpose of distributing BA tickets, thereby excluding the air transport services proper which BA provides to travellers.

156 Those air transport services form the subject-matter of individual contracts between BA and travellers and do not therefore form part of the subject-matter of the contested decision.

157 The performance reward schemes, the application of which to travel agents established in the United Kingdom is criticised by the Commission, are not therefore to be regarded as directly relating to the air transport service proper agreed between the traveller and the airline.

158 As is apparent from the third recital in the preamble to Regulation No 141, the distinctive features of transport make it justifiable to exempt from the application of Regulation No 17 only agreements, decisions and concerted practices 'directly relating to the provision of transport services' (Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, paragraph 18).

159 Thus, Article 1 of Regulation No 141 precludes the application of Regulation No 17 only in respect of agreements, decisions and concerted practices 'which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets' (*Aéroports de Paris*, paragraph 18) and 'a dominant position, within the meaning of Article [82 EC], within the transport market'.

160 BA cannot usefully rely, with reference to the *UIC* judgment, on the similarity in wording of Article 1 of Regulation No 1017/68 and Article 1 of Regulation No 141, which limits the scope of Regulation No 17 in relation to the regulations which apply to transport as a whole, in order to maintain that Regulation No 3975/87 applies to this case.

161 In the first place, it is clear from the first recital in the preamble to Regulation No 3975/87 that Regulation No 1017/68 applies exclusively to inland transport (rail, road and navigable waterway). BA cannot therefore usefully argue that Regulation No 3975/87 is relevant in this case by relying on Regulation No 1017/68, which has a different material scope.

162 Indeed, it is clear from the first recital in the preamble to Regulation No 3975/87 that, before that regulation entered into force, the Commission did not have the means of directly investigating cases of suspected infringement of Articles 81 EC and 82 EC in air transport.

163 Secondly, whilst taking account, according to the fourth recital in the preamble to Regulation No 3975/87, of certain distinctive features of transport operations viewed as a whole, the framers of that legislation held elsewhere that the air transport industry had specific features, as is clear from the second recital in the preamble to that regulation.

164 Thirdly, the general scheme of the legislative provisions applicable to air transport reveals an intention by the Community legislature, which was absent from Regulation No 1017/68, to limit the scope of Regulation No 3975/87 to activities directly relating to the provision of air transport services alone, precisely because of the specific nature of that industry.

165 Thus, the title of Regulation No 3975/87 indicates that that regulation 'lay[s] down the procedure for the application of the rules on competition to undertakings in the air transport sector', by contrast with Regulation No 1017/68, which 'appl[ies] rules of competition to transport by rail, road and inland waterway'. That difference in wording confirms that an activity falls within the scope of Regulation No 3975/87 only if it is directly linked to the provision of air transport services (see, to that effect, *Aéroports de Paris*, cited in paragraph 158 above, paragraph 22).

166 Moreover, the first recital in the preamble to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article [81](3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ 1987 L 374, p. 9), adopted on the same day as Regulation No 3975/87, recalls that Regulation No 17 lays down the procedure for the application of the competition rules to agreements, decisions and concerted practices 'other than those directly relating to the provision of air transport services' (*Aéroports de Paris*, paragraph 24).

167 In addition, Article 1(2) of Regulation No 3975/87, as amended by Regulation No 2410/92, provides that '[t]his regulation shall apply only to... air transport between Community airports.'

168 Similarly, Article 4a of Regulation No 3975/87, introduced by Council Regulation (EEC) No 1284/91 of 14 May 1991, amending Regulation No 3975/87 (OJ 1991 L 122, p. 2), applies only to practices having the object or effect of 'directly jeopardising the existence of an air service', which presupposes a direct link with the supply of air transport services (*Aéroports de Paris*, paragraph 23).

169 Therefore, BA's textual argument based on the exemption laid down by the combined provisions of Article 2 of Regulation No 3975/87 and letter (k) in the annex to that regulation in favour of agreements, decisions or concerted practices relating to the clearing and settling of accounts between air carriers and their appointed agents is in no way decisive.

170 Such agreements, decisions or concerted practices, which are purely technical in scope, are to be regarded in the legislative context described above as detachable from agreements such as those concluded between BA and travel agents established in the United Kingdom for the purposes of providing travel agency services proper.

171 Finally, there is no basis for BA's assertion that the practices of which it is accused produce their principal effects on the air transport market. The choice of the applicable regulation depends upon what is the nature of the practices in question, and not upon the prior identification of the market on which those practices produce their effects (see, to that effect, *UIC*, paragraph 42).

172 In any event, it is clear from recitals 85 and 112 of the contested decision that the Commission localised on the United Kingdom market for air travel agency services both the abuse of a dominant position ascertained in relation to BA and a number of its effects, which is enough to justify the application of Regulation No 17 to this case.

173 The Commission did not therefore make any error of law in taking Regulation No 17 as its basis for adopting the contested decision.

174 The plea must therefore be dismissed as unfounded.

The sixth plea in law, alleging that there was no dominant position

Arguments of the parties

175 BA begins by accusing the Commission of regarding it as an undertaking in a dominant position on the United Kingdom market for air travel agency services without taking proper account of the intense competition which BA faces on the United Kingdom air transport markets.

176 Irrespective of the total number of routes it serves, BA maintains that it does not act with an appreciable degree of independence either in relation to its competitors on each route or in relation to travellers who have the power to choose their carrier for each route.

177 Secondly, BA accuses the Commission of failing to explain how BA's alleged dominance in the United Kingdom market for air travel agency services 'arises from' the fact that BA was 'extremely successful' in the United Kingdom markets for air transport.

178 Thirdly, BA argues that its shares, cited by the Commission, of the United Kingdom market for air travel agency services in its capacity as customer of the agents do not establish that it holds a dominant position on that market. The Commission simply aggregated all BA ticket sales on all routes to and from United Kingdom airports, even though those routes constitute separate markets.

179 Moreover, the Commission failed to calculate correctly BA's shares of the markets. The percentages used by the Commission also included sales outside the United Kingdom, thereby overstating BA's share. The Commission based its calculations on air ticket sales through BSPUK, to which only some of the travel agents established in the United Kingdom belong. Without analysing the transactions carried out by the other agents, the Commission simply assumed that the sales through BSPUK amounted to 80 to 85% of tickets sold through agents. Finally, sales attributed to BA in BSPUK included sales made by other airlines which use BA as an agent and which do not participate in the agreements concluded between BA and travel agents established in the United Kingdom.

180 BA argues that the Commission failed to consider the impact of sales through channels other than travel agents, such as direct telephone or internet sales. As the Commission expressly recognised in recital 72 of the contested decision, those sales affect the power of airlines on the market in air travel agency services.

181 In stressing BA's particularly powerful position in relation to the leading travel agents, the Commission ignored the net decline in the percentage of their total sales represented by BA tickets and BA's relatively low share of the business of certain of the largest agents.

182 If one were to apply the test of stability of market share or susceptibility to competition, adopted in the judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, BA's share of the United Kingdom 'market' in air travel agency services would not permit the conclusion of dominance at any time.

183 A proper analysis of the market share data contradicts rather than supports a finding of dominance. Indeed, BA's market share fell from 47.7% at the beginning of the 1990s to 39.7%. By contrast, the shares of other carriers, notably Virgin and British Midland, have grown rapidly.

184 Contrary to what the Commission maintains in recital 92 of the contested decision, the fact that a single airline accounts for a large proportion of the tickets sold by a travel agency does not mean that that airline is 'an obligatory business partner' for that agency. In practice, BA argues, every agency needs to offer the tickets of a broad range of airlines. In fact, agencies have substantial bargaining power and the final choice of agent is a matter for the customer.

185 Unlike distributors in the markets concerned by *Hoffmann-La Roche* and *Michelin*, travel agents do not normally hold stocks of tickets or need actually to sell BA's tickets. Since the routes served by BA are also served by other airlines, agents are able to offer the choice that passengers demand as long as they are in a position to sell BA tickets.

186 Finally, if BA had occupied a dominant position, it would have had no incentive to commit substantial sums to improving its services in order to compete more effectively with other airlines.

187 The Commission maintains that, in order to establish BA's dominant position on the United Kingdom market for air travel agency services, it took account of the percentages of sales of BA tickets by IATA-accredited travel agents and a series of related factors, such as the size of BA, the range of its air transport services and its network.

188 BA was obviously in a position to act independently of travel agents established in the United Kingdom and, in particular, unilaterally to substitute the basic commission of 7% for that of 7.5% in respect of domestic flights and 9% in respect of international flights.

Findings of the Court

189 The dominant position referred to in Article 82 EC relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, of its customers and ultimately of its consumers (Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, paragraph 147).

190 As the examination of the third plea has shown, it is on the United Kingdom market for air travel agency services, consisting in particular in the distribution of air tickets, supplied to airlines by travel agents established in the United Kingdom, that the Commission has chosen to establish the existence of a dominant position on the part of BA.

191 As has been pointed out in paragraph 101 above, the fact that BA is to be regarded as an undertaking in a dominant position in its capacity as a purchaser of services, rather than as a provider of services, is irrelevant.

192 It follows that the number of seats offered on the services provided by BA on all routes to and from United Kingdom airports, which represent so many BA air tickets capable of being sold through the intermediary of travel agents established in the United Kingdom, is the appropriate criterion for measuring the economic strength which BA is capable of exercising in relation to those agents and the other companies which purchase the distribution services in question.

193 BA itself has stated that the operation of its hub network in the territory of the United Kingdom allows it to offer many more flights to and from its hub airports, and therefore to carry a larger number of passengers than other airlines operating point-to-point services.

194 The Commission was therefore right, for the purposes of calculating BA's shares on the United Kingdom market for air travel agency services, to aggregate all BA tickets sold through travel agents established in the United Kingdom over all routes to and from United Kingdom airports.

195 In those circumstances, BA cannot profitably disregard the total number of air routes it operates in order to deny its capacity to act with an appreciable degree of independence in relation to its competitors on each of those routes, to travel agents, and to travellers, who have the ability to choose their airline.

196 Nor can BA validly accuse the Commission of failing to explain how its dominant position in the United Kingdom market for air travel agency services arises from its successes in air transport.

197 For the purposes of establishing whether BA holds a dominant position on the United Kingdom market for air travel agency services, there is no need to assess its economic strength on that market by reference to the competition between airlines providing services on each of the routes served by BA and its competitors to and from United Kingdom airports.

198 As has been shown by the examination of the third plea, those various United Kingdom markets in air transport services are distinct from air travel agency services, including the distribution of air tickets in particular.

199 Concerning the alleged factual errors, BA cannot accuse the Commission of failing to take account of the impact of air ticket sales by telephone or internet, having regard to the specificity, as regards marketing procedures, of the services supplied by travel agents.

200 That specificity has, moreover, caused BA to state that travel agents are of vital importance, as intermediaries, for airlines. That specificity is, in addition, borne out by the fact that sales of air tickets handled by travel agents established in the United Kingdom represent 85% of all air tickets sold in that Member State.

201 Nor can BA validly blame the Commission for taking account of sales of BA tickets outside the United Kingdom in determining its shares of the United Kingdom market for air travel agency services.

202 BA acknowledged, in reply to a question put by the Court, that it was impossible to quantify the transactions which took place outside the United Kingdom. The Commission was not therefore in a position to make a distinction according to whether or not the tickets were sold inside the United Kingdom. As examination of the third plea has shown, travellers normally reserve air tickets in their country of residence. Therefore, the applicant has not shown that the Commission's assessment related to a number of tickets capable of distorting its estimate of the market share held by BA on the United Kingdom market for air travel agency services.

203 BA's argument that BSPUK is unrepresentative is not convincing. Even if BSPUK covers only 4 634 of the 7 000 travel agents established in the United Kingdom, it is undisputed that it is the largest among them that are members of that national settlement plan.

204 Considering the preponderant share of air ticket sales through BSPUK in the total of ticket sales through travel agents established in the United Kingdom, it appears that the Commission was right to hold that the shares of the six main airlines in those total sales of airline tickets could not be very different from those accounted for through BSPUK.

205 Moreover, as is shown by recital 34 of the contested decision, BA itself indicated during the administrative procedure that, between January and November 1998, it had sold 85% of its air tickets issued in the United Kingdom through IATA travel agents and BSPUK. Recital 33 of the contested decision, not challenged on this point by the applicant, shows that 4 108 of the 4 634 agents participating in BSPUK, namely some 89%, are accredited by IATA.

206 Nor is it disputed that BA ticket sales by IATA travel agents established in the United Kingdom represented 66% of the sales of the top 10 airlines handled by BSPUK in the same financial year.

207 In those circumstances, the fact that 2 366 travel agents do not participate in BSPUK does not appear likely significantly to reduce BA's share in United Kingdom air ticket sales through travel agents.

208 The same applies to ticket sales by other companies using BA as an agent and not participating in the performance reward schemes at issue. As the Commission has stated, without being contradicted by BA, the latter merely stated that the amount of those sales might represent a percentage of 5% or less.

209 The Court still needs to examine whether the reasoning followed by the Commission in order to establish BA's dominant position, on the basis of the evidence which it thus lawfully used, might not be vitiated by errors of assessment.

210 In that respect, account must be taken of the highly significant indicator which is the fact that the undertaking in question holds large shares of the market and of the ratio between the market share held by the undertaking concerned and that of its nearest rivals (*Hoffmann-La Roche*, cited in paragraph 182 above, at paragraphs 39 and 48), particularly since the nearest rivals hold only marginal market shares (see, to that effect, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 111).

211 As is shown by the table reproduced below, which is taken from recital 41 of the contested decision and the factual accuracy which BA has not been able to disprove (see paragraphs 199 to 208 above), not only is BA's market share in the total of air ticket sales handled by BSPUK to be regarded as large, but it invariably constitutes a multiple of the market shares of each of its five main competitors on the United Kingdom market for air travel agency services.

	1992	1993	1994	1995	1996	1997	1998
British Airways	46.3	45.6	43.5	42.7	40.3	42.0	39.7
American Airlines	-	5.4	7.3	7.7	7.6	3.6	3.8
Virgin	2.8	3.0	3.7	4.0	4.0	5.8	5.5
British Midland	3.6	3.4	3.2	3.0	2.7	-	-
Qantas	3.0	2.7	3.0	2.6	6.4	3.0	3.3
KLM	2.5	-	-	-	-	3.8	5.3

212 The economic strength which BA derives from its market share is further reinforced by the world rank it occupies in terms of international scheduled passenger-kilometres flown, the extent of the range of its transport services and its hub network.

213 According to BA's own statements, its network operations allow it, in comparison with its five competitors, to offer a wider choice of routes and more frequent flights.

214 It is further shown by recital 38 of the contested decision, not challenged by BA, that, in 1995, it operated 92 of the 151 international routes from Heathrow Airport and 43 of the 92 routes in service at Gatwick, that is to say several times the number of routes served by each of its three or four nearest rivals (operating) from those two airports.

215 As a whole, the services operated by BA on routes to and from United Kingdom airports have the cumulative effect of generating the purchase by travellers of a preponderant number of BA air tickets through travel agents established in the United Kingdom, and, correspondingly, at least as many transactions between BA and those agents for the purposes of supplying air travel agency services, particularly in the distribution of BA air tickets.

216 It necessarily follows that those agents substantially depend on the income they receive from BA in consideration for their air travel agency services.

217 BA is therefore wrong to deny that it is an obligatory business partner of travel agents established in the United Kingdom and to maintain that those agents have no actual need to sell BA tickets. BA's arguments are not capable of calling into question the finding, in recital 93 of the contested decision, that BA enjoys a particularly powerful position in relation to its nearest rivals and the largest travel agents.

218 The facts of this case therefore show that BA was in a position, unilaterally by circular of 17 November 1997, to impose a reduction as from 1 January 1998 of its rates of commission in force up to that date and to extend its new performance reward scheme to all travel agents established in the United Kingdom.

219 In those circumstances, neither the possibly modest size of the share of BA ticket sales in the business of some of the main agencies, which has moreover merely been alleged, nor the alleged fluctuations of BA's share in the total figure of air ticket sales by travel agents established in the United Kingdom can call into question the Commission's finding that BA holds a dominant position on the United Kingdom market for air travel agency services.

220 Nor are the great dependence of United Kingdom travel agents upon BA and BA's corresponding freedom of manœuvre in relation to other companies using the services of air travel agencies capable of being called into question by the fact that those agents do not normally hold stocks of air tickets.

221 Such a purely logistical circumstance is not of such a kind as to affect the dominant position which BA derives from its preponderant weight on the United Kingdom market for air travel agency services.

222 The argument that, as an undertaking in a dominant position, BA would have no interest in spending considerable sums improving its services so as to compete more effectively with its rivals is irrelevant in that it concerns the United Kingdom air transport markets and not the United Kingdom market for air travel agency services which the Commission took to establish the dominant position of BA.

223 Finally, for the same reason, neither the decline in the percentage of BA air ticket sales nor the advance in market share of certain rival companies is sufficiently

large to call into question the existence of BA's dominant position on the United Kingdom market for air travel agency services.

224 In this case, the reduction in BA's market share cannot, in itself, constitute proof that there is no dominant position. The position which BA still occupies on the United Kingdom market for air travel agency services remains very largely preponderant. As the table in paragraph 211 above shows, a substantial gap remained, during the whole of the period of the infringement found by the Commission, between, on the one hand, BA's market share and, on the other, both the market share of its closest rival and the cumulative shares of its five main competitors on the United Kingdom market for air travel agency services.

225 The Commission was therefore right to hold that BA held a dominant position on the United Kingdom market for air travel agency services.

226 The sixth plea in law must therefore be dismissed.

The seventh plea in law, alleging that there was no abuse of a dominant position

227 BA challenges the Commission's assertion that its performance reward schemes engendered discrimination between travel agents established in the United Kingdom or produced an exclusionary effect in relation to competing airlines.

The discriminatory character of BA's performance reward schemes in relation to travel agents established in the United Kingdom

— Arguments of the parties

228 BA accuses the Commission of failing to establish the existence of discrimination between travel agents established in the United Kingdom arising from the application of unequal criteria or not justified by legitimate commercial considerations.

229 The fact that two travel agents who sell different numbers of BA tickets may receive the same payments and that two agents who sell the same number of BA tickets may receive different incentive payments does nothing to establish discrimination within the meaning of subparagraph (c) of the second paragraph of Article 82 EC.

230 On the contrary, it reflects the fact that travel agents which differ in size may devote the same amount of effort and resources to selling BA tickets. It is a benefit of the calculation of performance rewards on the basis of the agent's sales in the previous reference period that it takes the agent's size into account.

231 In the Commission's view, BA's performance reward schemes created unlawful discrimination between travel agents because they were based on the extent to which a travel agent met, or improved on, its sales of BA tickets in the previous reference period, and were not based on a different volume of ticket sales by the travel agent or on the level of service provided by it to BA.

232 That practice placed certain United Kingdom travel agents at a disadvantage in relation to others in the acute competition between them. By distorting the level of commission earned by travel agents, the financial incentive schemes applied by BA affected the agents' ability to compete with each other.

— Findings of the Court

233 Subparagraph (c) of the second paragraph of Article 82 EC provides that abuse of a dominant position may consist in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

234 It is undisputed that, as the Commission points out in recital 29 of the contested decision, attainment by United Kingdom travel agents of their BA tickets 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 reference period in question.

235 To that extent, the performance reward schemes at issue could result in different rates of commission being applied to an identical amount of revenue generated by the sale of BA tickets by two travel agents, since their respective sales figures, and hence their rates of growth, would have been different during the previous reference period.

236 By remunerating at different levels services that were nevertheless identical and supplied during the same reference period, those performance reward schemes distorted the level of remuneration which the parties concerned received in the form of commissions paid by BA.

237 As BA has stated itself, United Kingdom travel agents compete intensely with each other, and this ability to compete depends on their ability to provide seats on flights suited to travellers' wishes, at a reasonable cost.

238 Being dependent on the financial resources of each agent, that ability of agents to compete in supplying air travel agency services to travellers and to stimulate the demand of airlines for such services was naturally affected by the discriminatory conditions of remuneration inherent in BA's performance reward schemes.

239 BA's arguments based on the importance of the size of the travel agents established in the United Kingdom are irrelevant. The performance reward schemes in dispute were, in themselves, based on a parameter unrelated to the criterion of the size of the undertakings, since they were based on the extent to which travel agents increased their sales of BA tickets in relation to the threshold constituted by the number of BA tickets sold during the previous reference period.

240 In those circumstances, the Commission was right to hold that BA's performance reward schemes 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.

The exclusionary effect on airlines competing with BA arising from the 'fidelity-building' nature of BA's performance reward schemes

241 The Court observes first that consistent case-law shows that an 'abuse' is an objective concept referring to the conduct of an undertaking in a dominant position 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 (*Hoffmann-La Roche*, cited in paragraph 182 above, at paragraph 91, and *Michelin*, cited in paragraph 91 above, at paragraph 70; Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 69; Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 111).

242 Therefore, whilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, it has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market (*Michelin*, paragraph 57, and *Irish Sugar*, paragraph 112).

243 Similarly, whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it (*United Brands*, cited in paragraph 210 above, at paragraph 189; Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 69; Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others* v *Commission* [1996] ECR II-1201, paragraph 107, and *Irish Sugar*, paragraph 112).

244 Concerning more particularly the granting of a rebate by an undertaking in a dominant position, consistent case-law shows that a fidelity rebate, granted in consideration of an undertaking by the customer to take supplies exclusively or almost exclusively from a dominant undertaking, is contrary to Article 82 EC. Such a rebate has the effect, through the granting of financial advantages, of preventing customers from obtaining supplies from rival producers (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 518; *Hoffmann-La Roche*, cited in paragraph 182 above, at paragraphs 89 and 90; *Michelin*, cited in paragraph 91 above, at paragraph 71, and *BPB Industries and British Gypsum*, paragraph 120).

245 More generally, a system of rebates which has the effect of preventing customers from obtaining supplies from market competitors will be regarded as contrary to Article 82 EC if it is applied by an undertaking in a dominant position. For that reason, the Court of Justice has held that a rebate linked to the attainment of a purchasing objective also infringed Article 82 EC (*Michelin*, paragraph 86).

246 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 (*Michelin*, paragraph 71, and Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613, paragraph 50). If the increase in the quantity supplied is translated into a lower cost for the supplier, the latter is entitled to give the customer the benefit of that reduction by means of a more favourable tariff (Opinion of Advocate General Mischo in *Portugal* v *Commission*, cited above, at point 106). Quantity rebates are thus deemed to reflect gains in efficiency and economies of scale achieved by the dominant undertaking.

247 It follows that a rebate system in which the amount of the rebate increases in relation to the volume purchased will not infringe Article 82 EC, unless the criteria and rules for granting that rebate show that the system is not based upon an economically justified consideration but tends, like a fidelity and objective rebate, to prevent customers obtaining supplies from rival producers (*Hoffmann-La Roche*, cited in paragraph 182 above, at paragraph 90; *Michelin*, cited in paragraph 91 above, at paragraph 73, and *Irish Sugar*, cited in paragraph 241 above, at paragraph 114).

248 It can be deduced from that case-law generally that any 'fidelity-building' rebate system applied by an undertaking in a dominant position tends to prevent customers from obtaining supplies from competitors, in breach of Article 82 EC, irrespective of whether the rebate system is discriminatory. The same applies to a 'fidelity-building' performance reward scheme practised by a purchaser in a dominant position in relation to its suppliers of services (see paragraph 101 above).

249 In *Michelin*, cited in paragraph 91 above, while not upholding the Commission's complaint that the rebate scheme applied by Michelin was discriminatory, the Court of Justice nevertheless held that such a scheme infringed Article 82 EC in that it made retailers dependent upon Michelin.

— Arguments of the parties

250 BA argues that the Commission merely presumed that BA's practices had an exclusionary effect, contrary to what is required by the judgment in *Hoffmann-La Roche*, cited in paragraph 182 above. The contested decision contained no analysis at all of the air transport markets, or any empirical evidence that BA's performance reward schemes had an adverse effect on competitors, customers or consumers.

251 The Commission appears to have assumed, without any supporting evidence, that travel agents can control a significant proportion of ticket sales to the detriment of consumers, whereas, in fact, agents have little influence over travellers' choice of airlines.

252 BA argues that its performance reward schemes did not prevent its competitors from concluding similar agreements with travel agents established in the United Kingdom. Since BA represented less than 50% of the total of ticket sales on the market defined by the Commission, there was no reason to conclude that other airlines as a whole should find it uneconomic to match BA's incentives. The larger agents, accounting for just under 50% of BA's total ticket sales, had negotiated agreements individually and were thus able to play airlines off against each other.

253 In any event, the structure of BA's performance rewards did not encourage agents to favour BA over other airlines. The advantages granted to agents depended upon a number of factors, such as in particular the level of the target thresholds and the rate of success of the parties concerned in relation to those thresholds.

254 The advantages offered by BA were granted in relation to the number of tickets sold and not on the basis of the percentage of the agent's transactions made on behalf of BA. Even where an agent increased its sales of BA tickets, BA's share in its business might diminish and that of other airlines increase in parallel.

255 BA argues that fidelity agreements are a means of allowing competition to operate and do not in any way distort it. The size of the increase in the market shares of other airlines demonstrates that the fidelity agreements could not have had the exclusionary effect alleged by the Commission.

256 The advantages granted to travel agents entailed significant cost savings, for the benefit of consumers, by allowing BA greater latitude to reduce its fares and/or allowing it to offer a greater number of flights on certain air routes.

257 BA challenges the Commission's criticisms of the structure of its fidelity agreements. In the first place, the discontinuous nature of the increase in the fare advantages granted to agents would have been relevant only if, which BA denies, it had had an exclusionary effect. It cannot, in any event, be assumed that the discontinuity worked to BA's advantage. In practice, across the air transport industry as a whole, it was impossible to predict that the advantages granted would systematically favour BA or other carriers.

258 Secondly, calculation of sales targets by reference to performance in the previous year, criticised by the Commission in recitals 48 and 109 of the contested decision, was, BA submits, both sensible for the parties and beneficial in its effects. In any event, the incentive effect of the agreements at issue could have been measured only over time.

259 BA notes that those first two objections of the Commission are irrelevant to the performance reward scheme that it implemented between December 1997 and March 1999. That scheme provided for both a continuous increase in, and a monthly, rather than annual, calculation of, the incentive payments made to travel agents.

260 Thirdly, BA challenges the validity of the Commission's objection, in recitals 48 and 102 of the contested decision, that there was no relation between the payments made to agents and the economies made in terms of costs. It maintains that sound economic policy encourages discounting irrespective of whether any savings are made. Fidelity agreements were a practical means of offering

incentives linked to performance without having to make the hard, if not impossible, calculation of the exact relationship, which is highly variable, between the price of a ticket and its cost. Given the level of fixed costs in the air transport business, an improvement in capacity utilisation lowers average unit cost and, therefore, yielded BA a cost saving that it is entitled to share with agents and customers.

261 BA argues, fourthly, that by attributing the fidelity effects of the contested performance reward schemes to the fact that BA operates on a wider range of routes than other airlines (recital 91 of the contested decision), the Commission ignores the fact that the global discount offered by BA was equivalent to paying differential rates of discounts on different routes. Even if smaller airlines may have a higher average cost of sale, that did not foreclose them from the various markets in question or prevent them from providing effective competition.

262 According to the Commission and Virgin, *Hoffmann-La Roche* and *Michelin* establish the principle that a dominant supplier can give discounts that relate to efficiencies, but cannot give discounts or incentives to encourage customer loyalty (recital 101 of the contested decision).

263 A rebate granted by an undertaking in a dominant position by reference to an increase in purchases made over a certain period, without that rebate being capable of being regarded as a normal quantity discount, constitutes an abuse of that dominant position, since such a practice can only be intended to tie the customers to which it is granted and place competitors in an unfavourable competitive position (*Irish Sugar*, paragraph 213).

264 Article 82 EC does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected.

265 Where, as in this case, all the determinative features which led the Court to hold that the discount system in *Michelin* constituted an abuse are present, it is not necessary to show that the characteristics and effects of a scheme such as that condemned by the Court of Justice in *Hoffmann-La Roche* are also present.

266 The structure of BA's reward schemes was such that, once the agent approached the benchmark for additional commission, the marginal commission which it earned on every additional BA sector sold increased exponentially. It was impossible for smaller, competitor airlines to offer commission rates of that order. In addition, due to the levels of marginal commission resulting from the system in question, BA sold a large number of tickets at a loss.

267 The abuse was committed since the extra commissions were not related to any cost savings or efficiency gains made by BA in its dealings with travel agents, but rather depended on the extent to which the latter met or exceeded their previous year's sales of BA tickets regardless of the size or efficiency of the travel agents or the services provided by them to BA.

268 Since travel agents remain by far the most significant channel of distribution used by airlines to sell air transport in the United Kingdom, the Commission maintains that BA's abusive conduct on the United Kingdom market for air travel agency services has also had a serious exclusionary effect on its competitor airlines on the United Kingdom markets for air transport.

269 The fact that, because of the liberalisation of the United Kingdom's air transport markets, BA's competitors have been able to take market share from BA does not demonstrate that BA's financial incentive schemes did not have anti-competitive effects.

— Findings of the Court

270 In order to determine whether BA abused its dominant position by applying its performance reward schemes to travel agents established in the United Kingdom, it is 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, they 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 (see, to that effect, *Hoffmann-La Roche*, paragraph 90; *Michelin*, paragraph 89, and *Irish Sugar*, paragraphs 114 and 197).

271 It needs to be determined in this case whether the marketing agreements and the new performance reward scheme 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 (see, to that effect, *Michelin*, paragraph 73; *Portugal* v *Commission*, cited in paragraph 246 above, paragraph 52, and *Irish Sugar*, paragraph 114).

272 Concerning, first, the fidelity-building character of the schemes in question, the Court finds that, by reason of their progressive nature with a very noticeable effect at the margin, the increased commission rates were capable of rising exponentially from one reference period to another, as the number of BA tickets sold by agents during successive reference periods progressed.

273 Conversely, the higher revenues from BA ticket sales were, the stronger was the penalty suffered by the persons concerned in the form of a disproportionate reduction in the rates of performance rewards, even in the case of a slight decrease in sales of BA tickets compared with the previous reference period. BA cannot therefore deny the fidelity-building character of the schemes in question.

274 Nor, in order to deny the fidelity-building effect of its performance reward schemes on travel agents, can BA successfully rely on the argument that those agents have only a slight influence on travellers' choice of airlines. BA has itself argued that those agents provide a useful service filtering information communicated to passengers who are faced with the proliferation of different air transport fare structures.

275 Moreover, even if, as BA maintains, the advantages granted to travel agents depended on the level of the target thresholds and the rate of success obtained in relation to those thresholds, the fidelity-building effect on travel agents arising from the performance rewards must nevertheless be regarded as established.

276 Furthermore, BA's objection that its 'fidelity agreements' did not prevent its competitors from concluding similar agreements with travel agents established in the United Kingdom does not carry conviction. BA's five main competitors on the United Kingdom market for air travel agency services cannot be regarded as having been in a position to grant the same advantages to travel agents.

277 It should be remembered in that respect that, during the whole of the period during which the disputed performance reward schemes were applied, 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.

278 In those circumstances, it has 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 reward scheme similar to BA's in order to counteract the exclusionary effect of that scheme against them on the United Kingdom market for air travel agency services.

279 Concerning, secondly, the question whether the performance reward schemes applied by BA were based on an economically justified consideration, it is true 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 (*Irish Sugar*, paragraph 112).

280 However, the protection of the competitive position of an undertaking which, like BA, occupies a dominant position must, at the very least, in order to be lawful, be based on criteria of economic efficiency (*Irish Sugar*, paragraph 189).

281 In this case, BA does not appear to have demonstrated that the fidelity-building character of its performance reward schemes was based on an economically justified consideration.

282 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 reference period in question.

283 The additional remuneration of the agents thus appears to bear no objective relation to the consideration arising for BA from the sale of the additional air tickets.

284 To that extent, BA's performance reward schemes cannot be regarded as constituting the consideration for efficiency gains or cost savings resulting from the sale of BA tickets after attainment of the said objectives. On the contrary, that retrospective application of increased commission rates to all BA tickets sold by a

travel agent during the reference period in question must even be regarded as likely to entail the sale of certain BA tickets at a price disproportionate to the productivity gain obtained by BA from the sale of those extra tickets.

285 Even if, as BA maintains, 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 must, in a case such as the present, normally be considerably reduced by reason of the extra cost incurred by BA through the increase in the remuneration of the agent arising from that retrospective application of the increased commission.

286 Being thus devoid of any economically justified consideration, the disputed performance reward schemes must 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 territory of the United Kingdom.

287 Agents were thereby deterred from offering their travel agency services to airlines in competition with BA, whose entry into or progress in the United Kingdom market for travel agency services was thereby necessarily hindered.

288 BA can have had no interest in applying its reward schemes other than ousting rival airlines and thereby hindering maintenance of the existing level of competition or the development of that competition on the United Kingdom market for air travel agency services.

289 In particular, BA cannot validly argue that, above a certain aircraft occupancy rate, additional ticket sales necessarily generate profits. As has just been mentioned, the consideration for ticket sales carried out by an agent once the latter's sales growth target had been reached represented an additional cost, in the form of retrospective application of the increased commission to all BA tickets sold during the reference period in question, which was liable to be equal to, or greater than, that profit.

290 Moreover, BA 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.

291 Contrary to what BA maintains, its performance reward schemes could not therefore constitute a mode of exercise of the normal operation of competition or allow it to reduce its costs. The opposite arguments by BA in that regard are not capable of demonstrating that its performance reward schemes had an objective economic justification.

292 The Commission was therefore right to hold that BA abused its dominant position on the United Kingdom market for air travel agency services by restricting, through the application of performance reward schemes not based on a justified economic consideration, the freedom of those agents to supply their services to the airlines of their choice and, in consequence, restricting the access of those airlines to the United Kingdom market for air travel agency services.

293 Finally, BA cannot accuse the Commission of failing to demonstrate that its practices produced an exclusionary effect. In the first place, for the purposes of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is

sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.

294 Moreover, it appears not only that the disputed practices were indeed 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 has been demonstrated in a concrete way by the Commission.

295 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 abusive conduct on the United Kingdom market for air travel agency services cannot fail to have had the effect of excluding competing airlines (to their detriment) from the United Kingdom air transport markets, by reason of the close nexus existing between the markets in question, as has been established in the examination of the fourth plea.

296 By reason of that effect produced by the reward schemes applied by BA on the United Kingdom air transport markets, the Court cannot accept BA's argument that the contested decision contains no analysis of the air transport markets or empirical proof of the damage which its financial incentive schemes caused to competitor airlines or to travellers.

297 Furthermore, 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.

298 Moreover, 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, does not mean that BA's practices had no effect. 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 (see, to that effect, *Compagnie Maritime Belge Transports*, paragraph 149).

299 The Commission did not therefore make any errors of assessment in holding that BA contravened Article 82 EC by applying to air travel agents in the United Kingdom performance reward schemes that were both discriminatory against some of their beneficiaries in relation to others and had as their object and effect, without any economically justified consideration, the reward of the loyalty of those agents to BA and thereby the ousting of rival airlines both from the United Kingdom market for air travel agency services and, as a necessary consequence, from the United Kingdom air travel markets.

300 The seventh plea in law must therefore be dismissed.

The eighth plea in law, alleging that the amount of the fine was excessive

Arguments of the parties

301 BA considers that the EUR 6.8 million fine imposed on it is excessive having regard to the Commission's Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines').

302 The fine's basic amount of EUR 4 million, set to reflect the serious nature, extent and impact of the infringement, is excessive in the light of paragraph 1.A of the Guidelines. According to that provision, in assessing the gravity of the infringement, it is necessary to take into account the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers. In this case, BA argues, it has not in any way been established that BA's reward schemes have harmed consumers.

303 In accordance with the third indent of paragraph 1.B of the Guidelines, infringements of long duration are subject to an increase of 10% per year in the amount determined for gravity. The increase in the amount of the fine by 70%, namely 10% per year since 1992, is disproportionate. The duration of BA's conduct reflects the slow progress of the Commission's own inquiry. Throughout the proceeding, BA honestly believed that its financial incentive schemes complied with Community law.

304 BA argues that its reasonable doubt as to whether its reward schemes constituted an infringement and its full cooperation with the Commission throughout the administrative proceedings were extenuating circumstances warranting a reduction of the fine pursuant to paragraph 3 of the Guidelines.

305 The Commission replies that the abuse of a dominant position which has been established should be regarded as a serious breach of Community competition law. Schemes of exclusionary rebates have already been condemned in the past. The significance of travel costs to the United Kingdom economy has been stressed and it has been noted that, despite the liberalisation of air transport, BA had preserved its average market share on the United Kingdom markets for air transport.

306 The Commission recalls that Article 82 EC is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competitive structure.

307 Moreover, abuses of a dominant position consisting, in particular, of discrimination, exclusionary conduct, and loyalty discounts made by an undertaking in a dominant position in order to shut its competitors out of the market, were categorised as 'serious infringements' by the Guidelines.

308 With respect to certain travel agents, the abusive practices at issue started in 1992. From January 1998 to March 1999, the performance reward scheme extended the abusive conduct to all United Kingdom travel agents and reinforced its effect on agents party to marketing agreements. The duration of those practices justified a 70% increase in the fine imposed for the gravity of the infringement.

309 The duration of the administrative procedure, the reasonableness of which is to be determined in relation to the particular circumstances of each case (*Irish Sugar*, paragraph 278), was not excessive and did not explain the duration of the infringements found to exist.

310 Whereas a mitigating factor, according to the Guidelines, is the termination of the infringement as soon as the Commission intervenes, it should be noted that after receipt of the first Statement of Objections dated 20 December 1996, BA extended to all United Kingdom travel agents the performance reward schemes which, until then, had been applied only to those meeting a specified amount of annual sales of BA tickets.

Findings of the Court

311 Since Article 82 EC is aimed at penalising even an objective detriment to the structure of competition itself (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 26), BA's argument that there is no proof of damage caused to consumers by its reward schemes cannot be accepted.

312 Nor can BA criticise the increase in the basic amount of the fine imposed by referring to the delays in the Commission's investigation, which was undoubtedly prolonged on account of BA's persistence in its unlawful conduct and the aggravation of that conduct.

313 The very next month after the hearing which followed the first statement of objections, held on 12 November 1997, BA reinforced the anti-competitive effects of its initial performance reward scheme by extending its new system of incentives to all United Kingdom air travel agencies.

314 Having disregarded the Commission's objections to its first performance reward scheme, BA cannot naturally be regarded as having believed in good faith, throughout the administrative procedure, that its incentive schemes were compatible with Community competition law.

315 Nor, finally, having intensified its restrictive practices during the administrative procedure, is BA justified in pleading its full cooperation with the Commission throughout that procedure. The Commission was therefore right to refuse BA the benefit of extenuating circumstances.

316 The amount of the fine determined by the Commission must therefore be confirmed, since it was fixed at a level which both corresponded to the Guidelines and constituted an appropriate penalty in all the circumstances of the case.

317 BA's arguments that the fine imposed on it was excessive must therefore be rejected.

318 It follows from the whole of the above that the application must be dismissed in its entirety.

Costs

319 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

320 Since BA has failed in all its pleadings, it must be ordered to pay, in addition to its own costs, the costs incurred by the Commission and the intervener Virgin, as those parties have pleaded.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and to pay those incurred by the Commission and by the intervener.**

Vesterdorf Jaeger Legal

Delivered in open court in Luxembourg on 17 December 2003.

H. Jung B. Vesterdorf

Registrar President