

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 July 1999

relating to a proceeding under Article 82 of the EC Treaty

(IV/D-2/34.780 — Virgin/British Airways)

(notified under document number C(1999) 1973)

(Only the English text is authentic)

(Text with EEA relevance)

(2000/74/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Articles 3 and 15(2) thereof,

Having regard to the complaint lodged by Virgin Atlantic Airways Limited on 9 July 1993, and the supplementary complaint lodged by Virgin Atlantic Airways on 9 January 1998, alleging infringements of Articles 81 and 82 of the Treaty by British Airways and requesting the Commission to put an end to these infringements,

Having regard to the Commission decision of 20 December 1996 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission in accordance with Article 19(1) of Regulation No 17 and with the Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17⁽²⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

I. FACTS

A. THE PARTIES

- (1) The complainant, Virgin Atlantic Airways Limited (Virgin), is a privately owned company incorporated in 1984 under English law. Virgin operates scheduled passenger services on a number of international routes between London and the USA, Hong Kong, Athens and Tokyo. Its principal offices are located in West Sussex, England.

In 1997 Virgin ranked twenty-first in the world in terms of international scheduled passenger-kilometres flown, and thirty-first for combined international and domestic scheduled passenger-kilometres flown.

Virgin's turnover in the year to 31 October 1994 was GBP 444 million. Virgin employed 4 522 people at the end of 1997⁽³⁾.

- (2) The respondent, British Airways plc (BA), is a privately owned company incorporated under English law. BA

⁽¹⁾ OJ 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ 127, 20.8.1963, p. 2268/63.

⁽³⁾ IATA World Air Transport Statistics No 42 WATS 4/98.

was formed in 1972 through the merger of British Overseas Airways Corporation (founded in 1940) and British European Airways (founded in 1946). BA was privatised in 1987.

BA is the largest airline in the United Kingdom. It operates a wide range of domestic and international scheduled and charter services. Its scheduled route network covers 15 destinations within the United Kingdom and 155 international destinations in 72 countries world-wide. In 1997 BA ranked first in the world in terms of international scheduled passenger-kilometres flown, and ninth for combined international and domestic passenger-kilometres flown⁽⁴⁾.

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. In the year to 31 March 1998, BA employed an average of 60 675 people⁽⁵⁾.

B. THE COMPLAINTS

- (3) On 9 July 1993 Virgin lodged a complaint against certain commercial practices of BA that were said to constitute infringements of Articles 85 and 86 (now Articles 81 and 82) of the Treaty.

In particular, three main types of practices were the subject of the complaint:

- '(a) The offering of rebates or other incentives to customers and travel agents on the explicit or implicit condition that they will obtain all or most of their flight requirements from BA (loyalty/fidelity rebates);
- (b) The offering of rebates, payable retrospectively, conditional upon customers, and travel agents, conducting a high proportion of their business with BA (target or 'kick-back' rebates);
- (c) The offering of short-haul flights, upgrades or other incentives at nominal or no cost on condition that customers purchase tickets for long-haul flights (incentives)'.

In the complainant's view, the abovementioned 'discount structures incorporated in agreements between BA and travel agents or corporate customers (...) operate as species of requirements contracts falling

within Article 85(1) of the EC Treaty'. Moreover, the complainant also claims that BA is a dominant firm in abuse of its dominant position, in breach of what is now Article 82, by implementing the abovementioned practices whose effect would be 'to foreclose a highly profitable and crucial business travel sector of the United Kingdom market' to the detriment of smaller competitors.

- (4) On 9 January 1998 Virgin lodged a supplementary complaint against BA's 'Performance Reward scheme' (PRS), alleging that 'Virgin believes that the PRS: infringes Article 86; entrenches the already serious breach of Article 86 represented by the existing discount structure operated by BA; and demonstrates a cynical disregard for the position of the Commission as set out in the SO in Case No IV/34 780 and as reflected in the statement of the Commission at the oral hearing on 12 November 1997.' Virgin considered that the PRS also breached what is now Article 81 of the Treaty.
- (5) These complaints requested the Commission to take actions against BA's incentive schemes for travel agents and BA's incentive or discount schemes for corporate customers. This Decision does not deal with BA's discount schemes for corporate customers.

C. BA's INCENTIVE SCHEMES FOR TRAVEL AGENTS

- (6) All IATA travel agents in the United Kingdom receive a basic standard commission from BA. From 1976 until 1997, this was 9% for international sales and 7,5% for domestic sales. Virgin's first complaint concerned BA's introduction of additional incentive schemes for qualifying travel agents referred to as the 'Marketing Agreements' and the 'Global Agreements'. Virgin's supplementary complaint concerned the PRS, a revision by BA of the incentive scheme applicable to all travel agents.

1. The Marketing Agreements (MAs)

- (7) BA has special agreements, called Marketing Agreements (MAs), with certain IATA travel agents in the United Kingdom under which they receive payments in addition to their basic commission under one or more of the following headings:

- (a) an additional commission, called 'Performance Reward', plus certain special bonuses, based on the volume of sectors flown on BA;

⁽⁴⁾ Ibid.

⁽⁵⁾ British Airways Report and Accounts for the year ended 31 March 1998.

- (b) cash sums from a training fund for travel agents' staff to attend BA training courses;
- (c) cash sums from a business development fund made available by BA for promotional and marketing projects of mutual interest agreed with travel agents.
- (8) These special agreements are in principle reserved for IATA agents in the United Kingdom with more than GBP 500 000 annual sales (flown revenue) with BA. As at August 1993, BA had approximately 360 MAs with the most important travel agents in the United Kingdom. All of them had been concluded for one-year terms. It was noted in the Commission's Statement of Objections of 20 December 1996 that these schemes had been in effect at least since 1992. These schemes have remained in place since the Statement of Objections⁽⁶⁾.
- (9) The scale of incentives given under the MA depend on the size of the travel agent. Travel agents with annual flown revenue exceeding GBP 500 000 but below GBP 10 million are offered a standard MA. Travel agents with a flown revenue exceeding GBP 10 million enter into an individually negotiated MA with BA. BA divides these agents into category A and category B. Category A agents are those with a flown revenue greater than GBP 50 million. Category B agents have a flown revenue greater than GBP 10 million. Category A includes, *inter alia*: Thomas Cook; Hogg Robinson; Carlson Wagonlit. Category B includes, *inter alia*, P & O.
- (a) The performance reward and other special bonuses
- (10) The Performance Reward is calculated on a sliding scale, based on the extent to which a travel agent increases the value of its sales of BA tickets (BA flown revenue). There are different scales of Performance Reward per sector sold on BA (each return ticket has two sectors), depending on the type of the sector flown: longhaul, shorthaul, etc. The higher the growth, the larger the cash payment per sector. In addition to the general Performance Reward outlined above, certain routes (for instance, North Atlantic) qualify for a special performance bonus.

Standard MAs

- (11) The Performance Reward scheme offered by BA under the 1995/1996 standard MA for travel agents with BA flown revenue exceeding GBP 500 000 but below GBP 10 million is set out below: (The 'performance award' specified in the table is paid to the travel agent for each BA ticket of the type in question that it has sold)

Target (flown revenue as % of previous year's level)	Performance award (GBP)					Special bonus (GBP)
	Longhaul Premium	World Traveller	Club Europe	Euro Traveller	Super Shuttle Executive	North Atlantic
100	[...] *	[...] *	[...] *	[...] *	[...] *	[...] *
105	[...] *	[...] *	[...] *	[...] *	[...] *	[...] *
110	[...] *	[...] *	[...] *	[...] *	[...] *	[...] *
115	[...] *	[...] *	[...] *	[...] *	[...] *	[...] *
120	[...] *	[...] *	[...] *	[...] *	[...] *	[...] *
125	[...] *	[...] *	[...] *	[...] *	[...] *	[...] *
130	[...] *	[...] *	[...] *	[...] *	[...] *	[...] *

⁽⁶⁾ BA's reply of 13 August 1993 to a Commission request for information indicated that MAs had been in operation at least since 1992. The same letter had attached to it a standard MA for the period from April 1993 to March 1994. BA's reply of 13 December 1995 to a Commission request for information indicated that the scheme had continued in operation and that MAs were in force up to the end of the 1995/1996 season. Following the Commission's Statement of Objections of 20 December 1996 none of BA's subsequent statements indicated any change in their commercial policy.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

The performance targets were a percentage of the total flown revenue produced by the agent for BA during the same period in the preceding year.

The categories were defined as follows by BA:

- Longhaul Premium is defined as Concorde, First Class and Club World;
- World Traveller is defined as World Traveller to, from, or within the Americas and Caribbean, Africa, Australia, New Zealand and Asia;
- Club Europe is defined as Club Europe to, from or within Continental Europe including the Republic of Ireland, Cyprus and Israel;
- Euro Traveller is defined as Euro Traveller to, from or within Continental Europe including the Republic of Ireland, Cyprus and Israel;
- Longhaul is defined as to, from or within the Americas and Caribbean, Africa, Australia, New Zealand, Asia including Turkey and Russia;
- Shorthaul is defined as to, from or within Continental Europe including Cyprus and Israel;
- North Atlantic is defined as to, from or within USA, Canada and Bermuda.

The individually tailored MAs

- (12) The Performance Reward (in GBP) per sector flown on BA in the specified categories that BA agreed to pay under the MA 1995/1996 with Thomas Cook (a 'Category A' travel agent) during the period 1 April 1995 to 31 March 1996 is set out below: (The 'performance award' specified in the table is paid to the travel agent for each BA ticket of the type in question that it has sold)

Target (flown revenue as % of the previous year's level)	Performance award (GBP)					Special bonus (GBP)
	Longhaul Premium	World Traveller	Club Europe	Euro Traveller	Super Shuttle Executive	North Atlantic
101,5	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
102,5	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
105,0	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
107,5	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
109,5	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
112,5	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
115,0	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
120,0	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*

- (13) The table below shows the Performance Reward and the special bonus (in GBP) payable to a sample of the other 'Category A' travel agents under the MAs 1995/96 (period 1 April 1995 to 31 March 1996) for each sector flown in Longhaul Premium and North Atlantic routes, when their sales with BA attain 105% of their preceding year's level.

Travel agent	Performance reward (GBP)	Special bonus (GBP)
	Longhaul Premium	North Atlantic
Hogg Robinson BTI	[...] *	[...] *
Carlson Wagonlit	[...] *	[...] *
American Express (at 106 %)	[...] *	[...] *

(14) The MAs also provide 'partner bonuses' on sectors flown on selected BA franchise partner routes, for instance: Cityflyer Express; GB Airways; Loganair; and Maersk Air Ltd.

(15) Two features of these bonus commissions should be noted:

- (a) travel agents are forced to increase their sales of BA tickets year on year to qualify for the payment of any Performance Reward or bonus;
- (b) although the Performance Reward or bonuses are not paid in respect of sectors flown on BA domestic services within the United Kingdom (except for Super Shuttle Executive sectors flown at Executive and Timesaver fares), domestic sectors count for the achievement of the target thresholds, since the latter are computed in terms of global flown revenue which includes: longhaul, shorthaul and domestic.

(b) Training support and business development fund

(16) Under the MAs, BA provide certain sums of money to be spent by travel agents on the training of their staff. The MAs also provide for the establishment of BA of business development/marketing funds to be spent by every travel agent in activities such as direct mail of BA's promotional material, conferences, airport tours and promotional evenings. The MAs specify that these funds are designed to generate increased revenue for BA.

(17) For instance, the provisions on training and marketing support incorporated into the MA with Thomas Cook for 1993/1994 are set out below:

'8. Thomas Cook will develop joint marketing proposals together with its British Airways Account Manager which are designed to increase passengers and revenue for both partners.

9. British Airways will provide a sum of money for the year 1 April 1993 to 31 March 1994 for the purposes of this joint activity in the areas of Marketing and Sales Promotion. The Marketing and Training Support Fund for 1993/1994 will be GBP 670 000.

(...)

11. The Marketing Fund is intended to be used to generate increased revenue for British Airways. Any promotional activity such as those listed below that can be seen to generate revenue will be preferred:

- (a) marketing activities such as direct mail of British Airways promotional material (may be customised), local advertising featuring British Airways services or campaigns;

- (b) sales promotion activities such as staff events (e.g. product updates, conferences), staff incentives, client events (e.g. airport tours, promotional evenings, secretaries workshops) and client incentives.

The above list of examples is not exhaustive. Other forms of marketing or promotional activities are open to discussion with your British Airways Account Manager.

(...)

- 17. British Airways is committed to supporting your investment in quality training through the Training Fund. This fund can be used for all courses run by Speedwing Training. A list of the available courses is attached. Depending upon demand, other regional locations will be considered. This offer can also include in-company programmes. All courses will be subject to the usual terms and conditions of Speedwing Training as detailed in their prospectus. Any applicable fee for amendments, cancellations or no-shows will be debited to your account.
 - 18. A sum of GBP 80 000 has been set aside for training and advised to Speedwing Training. This amount can be amended on consultation with your British Airways Account Manager.'
- (18) It is to be noted that the business development fund includes direct staff incentives as eligible expenditure. For instance, the provisions on direct staff incentives incorporated into the 1993/1994 MA with Thomas Cook are as follows:
- '15. Should British Airways wish to promote a specific national/local sales incentive directly or indirectly to Thomas Cook staff. British Airways agrees that written consent must be obtained from Thomas Cook before a promotion can be sent out to staff. Should this not happen Thomas Cook reserve the right to withdraw the promotion.
 - 16. As part of the retail Premier Selection programme British Airways agree for the duration of this Agreement to continue to pay 0,25 per cent of sales to leisure staff through the Thomas Cook Travel Trail Incentive Scheme. Payment to be made from the Marketing Fund allocation.'

(c) Conditions

- (19) BA's MAs contain certain conditions relating to the promotion of BA's products in a travel agent's office. In summary, they require that BA must be afforded a status which is no less favourable than that given to any other carrier. For instance, the Standard MAs for 1995/1996 included the conditions reproduced below. Similar provisions are included in all MAs.
- '21. All British Airways products shall be included in any preferred supplier list maintained by the agent.
- 22. The agent must not enter into any activity which discriminates against the sales of British Airways products or services. British Airways must therefore be afforded a status which is no less favourable than that given to any other carrier.
- 23. Where applicable the agent will display in a position no less favourable than that given to any other fare, throughout the year, the lowest return schedule fare of British Airways in your automated (electronic) fares database accessible by its travel offices. The destinations will be those covered by such databases.

24. The agent will give prominence in its promotions and displays to British Airways and British Airways Holidays products such that they are drawn to its customers' attention. These must certainly be displayed in no less favourable position than that given to any other carrier. Where window display facilities are available, the agent will commit to providing British Airways with a minimum of two display opportunities per year in all its branches at times to be mutually agreed.
25. Retail agencies will display British Airways scheduled timetables and all British Airways and British Airways Holidays brochures must be racked by the agent at eye level in all outlets all year round. These must certainly be displayed in no less favourable a position than that given to any other carrier.'

2. The global agreements

- (20) The arrangements with travel agents described in paragraphs 7 to 19 relate to tickets purchased in the United Kingdom. However, for the 1992/1993 winter season, BA had arranged special global incentive programmes with three travel agents: American Express, Rosenbluth, and Carlson Travel. These programmes entitled these travel agents to receive additional commissions calculated by reference to the growth of BA's share in their world-wide sales. The arrangements were additional to the local agreements in particular countries. If the travel agents achieved a minimum 1,5% increase in BA's share of their overall international sales in the markets specified in the agreements over the winter period, BA rewarded the travel agent with 10% of the incremental revenue represented by the share increase. In addition, if the travel agent was willing to drive the programme by means of a staff incentive, BA provided the travel agent with an amount fixed in the contract which was not even refundable in the event of missing the growth target fixed in the contract.

3. The Performance Reward Scheme

- (21) From 1976 to 1997, rates of BA's standard commission paid to travel agents in the United Kingdom on international flights and domestic flights remained static at 9% and 7,5% respectively.
- (22) On 17 November 1997 BA wrote to all United Kingdom travel agents with details of a revised approach to the way in which BA will reward travel agents' sales performance. This new approach involved two changes:
- (23) First, BA announced its decision to pay from 1 January 1998 a standard 7% commission on all BA's tickets sold in the United Kingdom.

Secondly, BA announced its intention to implement from 1 December 1997 a so-called Performance Reward Scheme (PRS). BA explained that: 'The PRS allows agents the opportunity to earn rewards greater than the reduction in standard commission on a performance related basis'. This PRS is to be distinguished from the 'performance reward' paid to those travel agents with whom BA had an MA.

- (24) This new method of calculating commissions will apply to all travel agents in the United Kingdom. Under the new approach, in addition to the new standard flat commission rate of 7%, each travel agent may earn an additional commission of up to 3% for international tickets and up to 1% for domestic tickets. The size of the variable elements for domestic and international tickets will depend on the travel agents' performance with BA. The travel agent's performance level is measured by comparing the total flown revenue accruing to the BA Group on tickets issued by the travel agent for travel on BA flights in a particular calendar month to that achieved during the corresponding month in the previous year. These supplementary commissions are in addition to any other 'bonuses' under existing MAs.
- (25) To calculate the additional variable element, the performance benchmark is 95% of the BA-related turnover achieved in the corresponding month of the previous year. If the travel agent's performance is greater than 95%, the agent is entitled to the payment of a variable element. The actual size of the variable element increases in line with the performance achieved.
- It is to be noted that although the actual performance level of every travel agent, which determines its qualification for the granting of the variable elements, is calculated by combining both international and domestic flown revenue, the variable element for international and domestic revenue is calculated separately.
- (26) The variable element for international and domestic tickets is a percentage of the respective international

and domestic reward revenue, this latter being the proportion of BA total flown revenue accruing from tickets issued using the BA identification plate.

Under the PRS, every percentage point of improvement in the performance level over the 95% benchmark earns the travel agent a 0,1% additional variable element to its commission on international tickets above the standard 7%. For sales of domestic tickets, the variable element is 0,1% for every 3% increase in sales over the 95% benchmark. The maximum variable element payable to travel agents under the PRS is 3% for international tickets and 1% for domestic tickets for a performance level of 125% or above in both cases.

- (27) For example, if the agent's performance level for a particular calendar month is 112%, the variable element for international tickets will be 1,7% $((112 \text{ minus } 95) \times 0,1\%)$ of the international reward revenue for that month. On the other hand, at that level of performance the variable element for domestic tickets will be 0,5% $((112 \text{ minus } 95) \div 3 \times 0,1\%)$ of the domestic reward revenue for that calendar month. Payments of the PRS variable elements takes place every month.
- (28) The PRS was intended to last until 31 March 1999. For the month of December 1997, BA established a transitional period of introduction. During that month, the PRS 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 the scheme would not be renewed for the year 1999/2000.

4. Common features of these commission schemes

- (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 MA schemes the cash bonus per ticket paid to the travel agent increases for all tickets sold. In the PRS 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% $((100 \text{ minus } 95) \times 0,1\%)^{(7)}$ giving a total commission income on international air ticket sales of GBP 7 500 $(100\ 000 \times (7\% + 0,5\%))$. If the travel agent diverted 1% of its international ticket sales to a competitor of BA, its 'performance reward' would decrease to 0,4% $((99 \text{ minus } 95) \times 0,1\%)$ 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 $(99\ 000 \times (7\% + 0,4\%))$. 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 who must offer this high rate of commission on all of its sales. Also, the context of this behaviour is BA seeking to maintain its position in a relatively recently deregulated market where it should be facing new competition.

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 PRS but can also earn bonuses under an MA.

D. MARKETS

1. Air travel agency services in the United Kingdom

- (31) Travel agents do not act as principals in the sale of air tickets. They act as agents for the airlines, who assume all of the risks and rewards of providing air travel

⁽⁷⁾ Following the formula reproduced in paragraph 26.

services and enter into contracts directly with travellers. Agents publicise the services provided by airlines, help travellers choose the appropriate services on what is supposed to be an impartial basis, and undertake the administrative work of issuing a ticket, collecting money from the traveller and remitting it to the airline. In return for these services to the airlines, the airlines pay the agents commissions based on the sales of tickets made through the agents.

- (32) The essence of the service provided by a travel agent, and its ability to attract members of the public is that it can arrange travel by all means and via all carriers. To this end the IATA system referred to below imposes limits on the ability of an airline to refuse to deal with a given agent⁽⁸⁾. In summary, IATA accredited agents have certain rights of appeal against an airline's decision not to deal with them. It should also be noted that if an airline has a powerful position in a given market, a travel agent operating in that market will not only have to deal with that airline but will also find that a large portion of the air tickets it sells are inevitably for that airline. As a result the commissions paid by that airline constituting a major part of the agent's income from all airlines. Even if the agent wished to deal in the tickets of other airlines, the agent's income would be significantly affected by the type of commission offered by the powerful airline.
- (33) In 1995 there were approximately 7 000 travel agents in the United Kingdom. The largest and most important

of them are agents participating in the IATA Billing and settlement plan United Kingdom ('BSPUK'). The total number of agents participating in BSPUK is 4 634. Of these, 4 108 are IATA accredited agents that can sell tickets for international scheduled air transport under the IATA passenger agency programme. The remaining 526 agents in the BSPUK are agents that only sell air transport within the United Kingdom. The travel agents outside the BSPUK could only sell scheduled air transport on the basis of an individual agreement with an airline.

- (34) On average, according to ECTAA, the European industry association for travel agents, 70% of air tickets in Europe are currently sold through travel agencies. In the United Kingdom an average of 80 to 85% of air tickets are currently sold through travel agents, according to the estimates of ABTA, the United Kingdom industry association for travel agents⁽⁹⁾. The remainder are sold through the airlines' own offices. For example, BA's sales of tickets in the United Kingdom were GBP 2 911 million for the period January to November 1998, of which GBP 2 479 million (85%) were sold through IATA travel agents and transacted through BSPUK⁽¹⁰⁾.
- (35) In 1992 the sales of BA's tickets through IATA travel agents accounted for 66% of the sales of the top 10 airlines transacted that year through BSPUK. In 1998 the GBP 3 276 million of BA's sales transacted through BSPUK accounted for 57% of BSPUK sales of the top 10 airlines selling through BSPUK in that year.

(36) BA's shares of total sales through the BSPUK in the years 1992 to 1998 were as set out below:

Year	1992	1993	1994	1995	1996	1997	1998
Total BSPUK sales (GBP million)	4 235	4 709	5 420	5 877	7 369	7 885	8 246
BA's BSPUK sales (GBP million)	1 961	2 149	2 357	2 508	2 970	3 311	3 276
BA's share (%)	46,3	45,6	43,5	42,7	40,3	42,0	39,7

⁽⁸⁾ Commission Decision 91/480/EEC, IATA Passenger Agency Programme (OJ L 258, 16.9.1991, p. 18), paragraph 38.

⁽⁹⁾ Letter of 19 April 1999 from The Association of British Travel Agents to the Commission.

⁽¹⁰⁾ Letter of 20 April 1999 from BA to the Commission.

- (37) BA's share of airline sales through the 10 largest travel agents is set out below:⁽¹⁾

Travel agent	BA gross revenue (GBP million)	Total BSP gross revenue (GBP million)	BA share 1997/1998 (%)
American Express UK	[...]*	[...]*	[...]*
Hogg Robinson	[...]*	[...]*	[...]*
Carlson Wagonlit	[...]*	[...]*	[...]*
Carlson Worldchoice	[...]*	[...]*	[...]*
Going Places TVL Ltd	[...]*	[...]*	[...]*
Thomas Cook	[...]*	[...]*	[...]*
Brittanic Travel	[...]*	[...]*	[...]*
P&O Travel	[...]*	[...]*	[...]*
Portman Travel Ltd	[...]*	[...]*	[...]*
The Travel Company	[...]*	[...]*	[...]*
Totals	[...]*	[...]*	[...]*

2. Passenger air transport to and from the United Kingdom

- (38) BA offers more flights on the routes to, from and within the United Kingdom than any other airline.

As regards domestic services, according to CAA estimates, in 1994 there were 10,7 million domestic passengers in the United Kingdom, of which 5,9 million on routes to or from London airports and 4,8 million on other domestic routes. The share of United Kingdom domestic passengers carried by BA was 60,6% on London routes and 22,4% on other domestic routes, which makes a global market share of 46,5% in the total United Kingdom domestic market.

As regards international routes, in July 1995 there were 151 routes operated from Heathrow and 92 from Gatwick. The number of routes operated by BA was 92 and 43, respectively. Its three nearest competitors operated 11, 10 and 9 routes, respectively, from Heathrow, and 4, 4 and 4, respectively, from Gatwick.

In winter 1998 BA held 38% of the weekly slots available at Heathrow. Its nearest competitor accounted for only 14% of the total. BA's five nearest competitors together totalled only 27,42%.

- (39) According to the International Passenger Survey (IPS), in 1994 BA accounted for respectively 40% and 21% of the 37,9 million passengers and 18,6 million passengers of international traffic at Heathrow and Gatwick.
- (40) This gave BA a share of 34% of international traffic from Heathrow and Gatwick.
- (41) In 1998 total sales of all airlines in the United Kingdom transacted through BSPUK amounted to GBP 8 245 million of which BA accounted for GBP 3 276 million (39,7%).

⁽¹⁾ NERA report presented by BA on 28 April 1999.

The table below sets out the shares of the top five United Kingdom airlines ranked by sales volume through IATA BSPUK over the period 1992 to 1998.

	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

It should be noted that, as the IATA BSPUK represents a large proportion (about 85%) of total scheduled air ticket sales in the United Kingdom, there is no reason to consider that the overall shares of the abovementioned airlines in total scheduled air ticket sales, including sales by the airlines' own offices, differs significantly from those reported through the BSPUK.

- (42) The products in question are flights to and from United Kingdom airports. This group contains several different product markets defined by the origins and destinations of passengers' journey and the extent to which the passengers are time-sensitive or price-sensitive. For example non-stop, fully flexible business tickets from Heathrow to a major business centre like New York will constitute a separate product market as the business people who purchase such tickets would only consider substituting a similar London-New York ticket for their journey. At the other end of the scale, a restricted, advance booked economy tickets from London to Paris could be part of a wider product market. Non-time-sensitive and price-sensitive leisure travellers will consider alternative means of travelling to Paris, and many of the tickets might be sold to non-time-sensitive travellers making a lengthy but economical journey to a point beyond Paris who would also consider another stopping-off point.
- (43) All of these separate products are sold on several geographic markets, principally at each end of the route in question but also elsewhere when the ticket is being bought as part of a journey including stops. BA sells these products in the United Kingdom through United Kingdom travel agents subject to the arrangements described above, and these transactions are all settled through the BSPUK mechanism of IATA. BA's competitors in the United Kingdom would also sell through these distribution channels applying the same conditions to sales to United Kingdom residents.

E. THE MAIN ARGUMENTS OF THE PARTIES

1. Virgin

- (44) Virgin's original complaint on 9 July 1993 was based on the incentive schemes for travel agents described in sections C.1 and C.2 above. Virgin's supplementary complaint on 9 January 1998 was based on the 'Performance Reward Scheme' described in section C.3

above. Virgin's original complaint also concerned discount arrangements between BA and large corporate customers. These are not dealt with in this Decision.

- (45) Virgin alleged that the discount arrangements between BA and both travel agents and large corporate customers were in breach of Article 81(1) as 'requirements contracts' and of Article 82 as attempts by a dominant firm, BA, to foreclose some of the market

or markets for air travel to and from the United Kingdom from its competitors.

2. The Commission's Statements of Objections

- (46) The Commission's initial Statement of Objections issued on 20 December 1996 argued that BA was dominant on both the United Kingdom market for travel agency services and the United Kingdom markets for air travel for corporate customers on business travel. This Statement of Objections criticised BA's arrangements with both travel agents and corporate customers. The Commission's supplementary Statement of Objections restated and updated the Commission position on dominance and criticised the PRS scheme for travel agents as being abusive of a dominant position. This Decision does not cover BA's arrangements with corporate customers.

Dominance

- (47) The Commission's Statements of Objections state that BA is dominant on the United Kingdom market for travel agent services on the basis of:
- (i) its structural position of offering the largest selection of flights in and out of the United Kingdom,
 - (ii) its share of total sales of air travel in the United Kingdom and hence its share of the purchases of air travel agency services,
 - (iii) its share of the markets for the sale of air travel and purchase of air travel agency services relative to the share of its competitors,
 - (iv) the fact that it is an obligatory trading partner for travel agents wishing to offer a full service to their customers.

Abuse in arrangements with travel agents

- (48) The Commission's Statements of Objections argue that BA's commission arrangements with travel agents are abusive of a dominant position. The extra commissions are based on the extent to which a travel agent meets or

exceeds its own previous year's sales of BA tickets and not on the size or efficiency of the travel agent or the services provided to BA by the travel agent. Therefore, they are not related to any cost saving or efficiencies realised by BA in its dealing with travel agents. In fact, the Commission was not aware of any cost saving or efficiencies for BA when a travel agent sold a large number of tickets. On this basis, the Commission took the view that the commissions given discriminated between travel agents. In addition, because of these features of the schemes, that is the fact that the extra discounts were awarded on an increasing scale so giving them a very large effect at the margin and the fact that the effect would increase from year to year if an agent increased its sales of BA tickets, the Commission took the view that they were illegal 'exclusionary' commission schemes. The additional benefits and cash payment made under some of the commission schemes for travel agents had the effect of reinforcing the discriminatory and exclusionary effect of the schemes.

3. BA's responses to the Statements of Objections

- (49) BA made the following responses to the Commission's Statements of Objections:
- (i) a written response to the Commission's Statement of Objections on 27 March 1997;
 - (ii) a supplementary memorandum of 15 October 1997;
 - (iii) oral presentations at the oral hearing of 12 November 1997;
 - (iv) at the oral hearing of 12 November 1997 a paper prepared by Professor Robert S. Pindyck of MIT, at the request of BA was presented to the Commission;
 - (v) BA's response to the Commission's supplementary Statement of Objections of 20 May 1998;
 - (vi) at a meeting on 28 April 1999, BA presented a report prepared at their request by National Economic Research Associates;
 - (vii) miscellaneous letters between May 1998 and April 1999.

(50) BA made a large number of factual and legal arguments relating to questions of market definition, determination of dominance, the finding of abusive behaviour, the applicable procedural law for this case and questions relating to the obligations of the Commission in deciding whether or not to proceed with this case. These arguments are summarised below.

BA's arguments on general obligations of the Commission

(51) In its responses to the Commission's Statements of Objections, BA has drawn the Commission's attention to incentive schemes operated by other European airlines for travel agents and large corporate customers. These schemes, which are now the subject of separate cases arising from complaints by BA against a number of European airlines, may be similar to the schemes to which the Commission has objected in this case. BA has argued that for the Commission to proceed against it before taking action against these schemes operated by other airlines represents discrimination by the Commission. BA argues that this discrimination is in breach of fundamental legal obligations of the Commission. BA also argues that to proceed against its incentive schemes before acting on schemes operated in other European countries where BA sells its tickets would worsen the overall state of competition on the relevant markets. BA has suggested that, rather than proceeding with an individual case, some form of general legislation, applicable to all EEA airlines, such as that governing computerised reservation systems⁽¹²⁾ should be adopted by the Commission.

BA's arguments on applicable procedural law

(52) For reasons developed further below BA does not believe that the provision of air travel agency services in the United Kingdom constitutes a valid market. It therefore argues that its commission schemes for travel agents are only relevant to a market for 'the sale of air transport through travel agents' and so fall outside the scope of Regulation No 17.

BA's arguments on market definition

(53) BA argues that the supply of travel agency services by travel agents to air carriers is not a properly defined product market. It bases this opinion on the following factors:

(i) travel agents also provide other services such as hotel reservations and car hire 'interwoven' with their air transport activity. BA describes this as giving rise to supply side substitutability and hence widening the relevant product market definition;

(ii) travel agents are not a 'clearly delineated class', for example some are vertically integrated with tour operators. BA claims that this gives rise to what it refers to as supply side substitutability, and that this changes the definition of a relevant market;

(iii) BA points out that the travel agents also provide agency services to charter airlines, and that this activity is not included in the market data relied on by the Commission. BA estimates that up to 50% of air journeys out of the United Kingdom sold to United Kingdom residents may be charters, and that the provision of agency type services to charter operators should be included in the market;

(iv) BA refers to the fact that passengers do not only buy air tickets from travel agents but also buy them directly from airlines by phone or using the Internet. This, it states, should also change the Commission's market definition;

(v) BA argues that since the practices at issue concern the distribution of air transport the relevant market should be that for air transport;

(vi) BA alleges that by not applying the 'SSNIP' (small but significant and non-transitory increase in price) test for defining markets the Commission has departed from its own guidelines on market definition.

(54) BA argues that since many travel agents operate in more than one Member State the geographic market for air travel agent services must be wider than just the United Kingdom.

⁽¹²⁾ Commission Regulation (EC) No 3652/93 of 22 December 1993 on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings relating to computerised reservation systems for air transport services (OJ L 333, 31.12.1993, p. 37).

BA's arguments on dominance

(55) With respect to the market for air travel agency services BA argues as follows:

- (i) BA has an obligation under IATA rules to deal with all travel agents, so reducing BA's power with respect to travel agents.
- (ii) Unlike the situation in markets for physical goods travel agents do not hold a 'stock' of BA flights and so, BA argues, cannot be prevented or discouraged from promoting other airlines' tickets.
- (iii) Following on from its arguments about 'supply-side substitution' by travel agents BA argues that these other revenue-producing activities of travel agents prevent BA from being able to enjoy a position of dominance with respect to them.

(56) With respect to the Commission's findings on the markets for air transport to and from the United Kingdom, BA makes a number of arguments as to the intensity of competition in the airline industry. In particular it draws attention to the success of new entrants such as Virgin, and to an alleged ease of entry into the market. It provides market share figures for individual routes in and out of the United Kingdom where BA competes with Virgin. On some of these routes Virgin even outsells BA in terms of point-to-point traffic. BA also points out that it acts as a 'General Sales Agent' for a number of airlines. Sales of tickets for these airlines may be included in the BSP figures for BA sales. These figures may therefore overstate BA's market share. BA estimates, without providing any basis, that up to five percentage points of the share shown by the BSP figures may be accounted for by these sales of other airline's tickets.

BA's arguments on abusive behaviour

(57) BA argues that although the judgment of the Court of Justice of the European Communities in the Michelin case⁽¹³⁾ condemned a discount scheme operated by a dominant supplier not based on an economic service justifying it, that this should be 'read in the context of Roche'⁽¹⁴⁾ and considered only to apply to discount

schemes which have the effect of forcing a customer to take all or most of its requirements from the dominant supplier.

(58) BA has also provided evidence that there may be some cost savings for BA in selling its tickets using an agency that generates a large volume of business. BA argue that certain costs of dealing with an agency are either fixed regardless of the size of the agency or do not increase directly in proportion to the volume of business done by an agency, so realising cost savings for BA in dealing with larger agencies. They give the example of marketing and communication costs such as brochure production and product education, operational costs of processing enquiries from agencies, checking and inputting orders received from an agency and communicating fare information to agencies and commercial cost of entering into and managing a contractual relationship with an agency. The majority of these savings arise from dealing with a chain of travel agencies rather than a single-location travel agent.

(59) BA attempts to use against the Commission a preliminary opinion by a senior official of the institution that it was not sufficiently obvious that these discounts might be in breach of Article 82 to justify the grant of interim measures⁽¹⁵⁾.

(60) BA also argues that discounts promoting extra sales have efficiency benefits, that the discount schemes in question have not had the effect of eliminating competition, that they are common practice in the airline industry, and that other airlines can match the effect of these discounts. In the opinion of BA, these factors mean that the discounts in question are not abusive.

(61) BA has provided evidence that there are in fact efficiency benefits for it if a travel agent sells a large number of BA tickets. BA has provided evidence that certain costs of selling tickets through travel agents are less per ticket if the tickets are sold via a large chain of travel agents or chain of agencies rather than through a small agency. The costs where these 'economies of scale' exist are operational costs such as: query processing, production and checking reports from the agency, distribution of fare information to agencies and certain operational costs such as query processing.

⁽¹³⁾ Case 322/81 Michelin [1983] ECR 3461.

⁽¹⁴⁾ Case 85/76 Hoffmann-La Roche [1979] ECR 541.

⁽¹⁵⁾ Letter to Ms Frances Farrow of Virgin on 24 September 1993.

- (62) Efficiencies can also be realised in commercial costs such as managing the relationship with the agency, and marketing and communication costs such as the production and mailing of promotional material and product education.
- (63) BA has argued that the Commission has only shown an effect on BA's competitors and not on consumers and that this is not enough to establish abuse.
- (64) BA has argued that there are ways for travel agents and competing airlines to minimise the effects of these commission schemes and that, despite these commission schemes, competing airlines have been able to take market share from BA. On this basis, it argues that the commission schemes do not have enough effect to be considered abusive.

II. LEGAL ASSESSMENT

A. GENERAL OBLIGATIONS OF THE COMMISSION

- (65) As noted in recital 51, BA has argued that the Commission is in breach of a general obligation of non-discrimination in pursuing this investigation. It is true that the Commission will have to apply the same standards to incentive schemes operated by other air transport firms as it has to the schemes operated by BA. If, on investigating the complaints referred to in recital 51, the Commission finds that comparable practices to BA's are being carried out by firms in a comparable position to BA, then it will treat these in the same way as BA's current practices are being treated. It should be noted that this decision arises from a complaint made by Virgin in 1993. The complaints referred to in recital 51 were made in 1998.
- (66) However, the Commission is not required to take decisions on similar cases at the same time. The Commission has a discretion to allocate its scarce resources to the many potential cases that exist, so as to achieve its public policy goals⁽¹⁶⁾. One way of doing this is to establish precedents by taking leading cases. For example, in a long line of decisions the Commission has condemned manufacturers who seek to partition the

Community market by granting absolute territorial protection to their distributors, and in particular it has always insisted that exclusive distributors should be able to meet unsolicited orders from outside their assigned territories⁽¹⁷⁾. It has never been suggested that the Commission should have delayed any of these cases until it had identified all of the similar practices taking place in a given industry, and taken action against them all simultaneously.

- (67) A related argument has been made that it would be discriminatory to proceed with this decision while BA still faces competition in other geographic markets from air carriers engaged in similar practices in those geographic markets. Bringing an end to abusive behaviour in the United Kingdom geographic market will increase competition on the relevant United Kingdom markets, so benefiting consumers. The state of competition in other geographic markets will be unchanged, leaving consumers there no worse off. The only way a decision relating to the United Kingdom market would reduce the extent of competition on other markets where BA also operates would be if it had the effect of driving BA out of business, and so out of these markets. BA has not suggested that this is even a possibility. A decision bringing abuses to an end in the United Kingdom market therefore has only positive effects, and cannot be considered as having a distortive effect on competition.

B. APPLICABLE REGULATIONS

- (68) This decision is concerned with BA's behaviour on the United Kingdom market for air travel agency services. This activity has been treated as a separate product from air transport⁽¹⁸⁾. As such it falls outside the scope of application of Council Regulation (EEC) No 3975/87⁽¹⁹⁾ which applies only to 'air transport between Community airports'⁽²⁰⁾. The relevant procedural regulation is therefore Regulation No 17. This situation can be distinguished from the recent UIC case⁽²¹⁾ where the Court of Justice found that the applicable regulation was

⁽¹⁷⁾ For example, the long line of prohibition decisions starting with Joined Cases C-56 and 58/64 *Consten & Grundig v. Commission* [1966] ECR 299.

⁽¹⁸⁾ See note 8, IATA Passenger Agency Programme.

⁽¹⁹⁾ Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, (OJ L 374, 31.12.1987, p. 1).

⁽²⁰⁾ See Article 1 thereof.

⁽²¹⁾ Case C-264/95 P *Commission v. Union internationale des chemins de fer* [1997] ECR I-1287.

⁽¹⁶⁾ Case T-24/90 *Automec II* [1992] ECR II-2223.

Council Regulation (EEC) No 1017/68⁽²²⁾. The scope of Regulation (EEC) No 1017/68 is defined more broadly than that of Regulation (EEC) No 3975/87. The relevant part of Regulation (EEC) No 1017/68, which the Court interpreted to include travel agency services refers to 'all agreements, decisions and concerted practices which have as their effect the fixing of transport rates and conditions, the sharing of transport markets, ...'⁽²³⁾.

the airline tickets. In the airline industry these services are purchased by airlines from travel agents, as travel agents are not traditional distributors who take ownership of products and sell them for their own account. More recently airlines have started to increase their efforts to sell tickets directly, particularly using modern communication methods such as the Internet, and have started to perform these services 'in-house' as an alternative to purchasing air travel agency services from travel agents. However, as noted in recital 34, some 85% of airline tickets are still sold through travel agents.

C. RELEVANT MARKETS

(69) For the purposes of Community competition law 'a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use ... the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas'⁽²⁴⁾.

(70) The Commission has provided detailed guidance on how it applies this principle in practice in its Notice on market definition⁽²⁵⁾. The Notice describes how the Commission uses information about product characteristics, evidence of past substitution and so forth to define a product market. The Notice mentions the idea of a hypothetical price rise but does so to explain the concept of a relevant market.

(72) This practice in the air transport industry creates a market in air travel agency services, which are purchased from travel agents by airlines. The fact that airlines are increasing their efforts to perform these activities themselves, in effect to perform these services 'in-house' rather than buying the services of travel agents, does not alter the fact that this is a distinct market. There are many markets where customers have the option of producing some or all of their requirements for a product themselves. This does not prevent these being a relevant market for these products, but does affect the market power of the various suppliers and purchasers.

(73) Travel agents provide services other than the services related to the marketing and distribution of tickets that they provide to airlines. Several of these, such as booking hotels and cars, may be provided at the same time as the selling of air tickets. Travel agents may also provide similar services to charter airlines. BA has stated that these travel agency services are sometimes performed by vertically integrated tour operators. BA feels that these factors indicate that there is 'supply side substitutability' between air travel agency services and other services provided by travel agents and/or tour operators, and that this means that the appropriate market definition should be broader than air travel agency services.

1. The market for air travel agency services

(71) As was outlined in recitals 31 to 37, for airlines to operate, a number of other services have to be performed related to the marketing and distribution of

(74) The proper treatment of supply side substitutability in Community competition law is discussed in the Commission's Notice on market definition⁽²⁶⁾. The example given in the Notice is the paper industry. The Notice observes that paper producers produce a wide range of qualities of paper, and that these different qualities of paper are not substitutable in the hand of users. However, the Notice points out that since any paper producer can easily produce any grade of paper they all compete with each other in the production and supply of all grades of paper. In these circumstances the different grades of paper can be grouped together into one market.

⁽²²⁾ Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, (OJ L 175, 23.7.1968, p. 1).

⁽²³⁾ See Article 1 thereof.

⁽²⁴⁾ See Commission Notice on the definition of the relevant market for the purposes of Community competition law, (OJ C 372, 3.12.1997, p. 5), which quotes these definitions from Form A/B and Form CO.

⁽²⁵⁾ See footnote 24.

⁽²⁶⁾ See footnote 24.

(75) It is not appropriate to aggregate the different services performed by travel agents into a single market definition as BA has claimed in seeking to rebut the Commission's market definition. First, the travel agents are not free to decide to concentrate on one service or another as in the example of paper manufacturers. It is in the nature of travel agency services that travel agents have to offer all of these services. A travel agent cannot replace its activity in air travel agency services with other activities. This is particularly clear in this case where, as is set out below, a powerful buyer of these services is in a dominant position despite the fact that the travel agents also sell other services.

(76) Secondly, it is not appropriate to aggregate the different services provided by travel agents into a single market, as BA argued the Commission should, since these different services are provided under different conditions of demand and supply. Travel agents do provide air travel agency services both to charter airlines and to scheduled airlines. However, the charter airlines are operating in a different market from the scheduled airlines. The only potential overlap is the possible substitution of 'seat only' charter flights for scheduled flights by a travel agent's customers. This theoretically gives the travel agent a choice between providing the same agency services to a scheduled or a charter airline. However this does not arise in practice to a material extent in the United Kingdom as charter airlines operate almost entirely for tour operators and do not provide alternatives to scheduled flights through travel agents to an appreciable extent⁽²⁷⁾.

(77) In addition, as noted in recital 68, the Commission has in the past recognised that air travel agency services form a separate product market where services are provided by travel agents to airlines⁽²⁸⁾.

(78) The relevant geographic market is the United Kingdom. Travel agents tend to operate within national boundaries, since customers normally book tickets in their country of residence. In the present case, customers residing in the United Kingdom purchase their tickets from travel agents in the United Kingdom; transactions are generally made in pounds sterling; and travel agents operate on the basis that the markets they are serving are delineated on national boundaries. The carriers therefore market their services and purchase air travel agency services within the same boundaries.

(79) Although BA has pointed out that some of the travel agents with which it deals operate in more than one Member State, BA is able to apply different conditions to its purchases of air travel agency services in the United Kingdom from those it applies elsewhere. BA has consistently applied different conditions to its purchases of air travel agency services in the United Kingdom from its purchases outside the United Kingdom. In fact BA purchases air travel agency services on a country-by-country basis, even when it deals with a travel agency with operations in more than one Member State. The MAs and the PRS described at sections I.C.1 and I.C.3 above apply only to sales in the United Kingdom, even where they are entered into with a travel agent with operations in more than one Member State. BA applies its incentive schemes for travel agents uniformly throughout the United Kingdom.

2. Air transport markets

(80) BA is active in the provision of air transport to and from points in the United Kingdom. The behaviour complained of has its effects on the market or markets for this air transport. Each of the routes served by BA is potentially a separate product market. To determine whether a given scheduled route does constitute a separate market the Court of Justice has stated: 'The test to be employed is whether the scheduled flight on a particular route can be distinguished from the possible alternatives by virtue of specific characteristics as a result of which it is not interchangeable with those alternatives and is affected only to an insignificant degree by competition with them'⁽²⁹⁾.

(81) Applying this test to the flights offered by BA identifies a large number of product markets for air transport to and from the United Kingdom. Non-time-sensitive passengers, and in particular those who wish to complete their journey at the lowest possible cost will have several viable alternatives to a given BA flight between two points. They may travel to a different airport to start their journey, they may complete their journey by flying to an intermediate airport or airports and connecting with another flight on to their eventual destination. They may even consider alternative modes of transport such as rail, ferries or combinations of these. Time-sensitive passengers who can complete their journey by taking a direct flight from their nearest airport will be in a different situation. These passengers will not be prepared to take the extra time required to make stops on their journeys and connect to other flights. Unless an alternative non-stop, speedy means of

⁽²⁷⁾ CAA report CAP 685 'The Single European Aviation Market: The First Five Years' 6/98, point 70 *et seq* and Appendix D.

⁽²⁸⁾ See footnote 8.

⁽²⁹⁾ Case 66/86 Ahmed Saeed Flugreisen [1989] ECR 803, paragraph 40.

transport exists to their destination, such as for those passengers travelling from London to Paris or Brussels who may be able to substitute the Eurostar for a direct flight, these passengers will only consider direct flights from their nearest airport to their destination as being interchangeable.

- (82) The flights operated by BA are sold on a variety of product markets depending on the needs of passengers and the alternative modes of transport available. On some of these product markets BA will face competition from alternative modes of transport and alternative routes to complete a given journey by air. On the lucrative business market a BA flight between two points may only face competition from the direct flights between these two points offered by other airlines.
- (83) IATA rules on the sequential use of coupons (the individual portions of an air ticket) allow airlines to apply different conditions to a journey from the United Kingdom to a point outside the United Kingdom and back, to the conditions applied to a journey made using the same flights but originating outside the United Kingdom. The IATA rule prevents arbitrage between the two markets by buying tickets for journeys originating outside the United Kingdom, separating these into their constituent parts and re-packaging them as journeys originating inside the United Kingdom. The relevant geographic market for air transport is therefore, at most, UK wide. BA sets prices and conditions for its tickets uniformly throughout the United Kingdom using the IATA BSPUK and publicises these throughout the United Kingdom on computerised reservation systems. The United Kingdom therefore forms the relevant geographic market for each of the set of products referred to in recital 82.
- (84) This case is based on a dominant position enjoyed by BA on the United Kingdom market for air travel agency services, so its position on each of the many product markets for air transport to and from the United Kingdom is not examined. Its aggregate position on all of these markets is as set out in section I.D.2 above.

D. SUBSTANTIAL PART OF THE COMMON MARKET

- (85) BA enjoys a dominant position and carries out the abuses described above on a United Kingdom-wide market for air travel agency services. This market is a

substantial part of the common market⁽³⁰⁾. In addition, these abuses will also have an effect on the markets for air transport to and from points in the United Kingdom.

E. DOMINANCE

- (86) The Court of Justice has defined a dominant position as being a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers⁽³¹⁾.
- (87) A combination of factors can lead to the conclusion that a firm enjoys a dominant position, although market share is the most direct indicator. This point was made by the Court of First Instance in *CMB v. Commission* where it stated that 'a dominant position may be the result of a number of factors which, considered separately, would not necessarily be determinative'⁽³²⁾.
- (88) In 1998 BA had a share of 39,7% of United Kingdom sales through travel agents. Its nearest rival (Virgin) accounted for only 5,5% of sales of air travel. BA's market share was over 2,2 times the combined share of its four largest rivals in 1998. This position has been maintained for several years. In 1992 BA's share was as high as 46,3% compared with 3,6% for its nearest rival. This was over 3,9 times the combined share of its four largest rivals.
- (89) BA has argued that the BSPUK figures for BA sales include some sales of other airlines for which BA is a sales agent or franchise partner, where the airline concerned issues a ticket using BA ticket stock or BA's plate. They have not quantified this amount, merely

⁽³⁰⁾ Cf. Case C-179/90 *Porto di Genova* [1991] ECR I-5889, where the market for dock services in one Italian port was considered to form a substantial part of the common market since that port accounted for a substantial part of the trade of one Member State.

⁽³¹⁾ Case-85/76 *Hoffmann-La Roche*, cited in footnote 14.

⁽³²⁾ Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v. Commission* [1996] ECR II-1439, at paragraph 76.

stating that it could be as high as 5%. There is no indication of which airlines these sales should be attributed to, or the extent to which a similar situation arises with the other airlines in the BSPUK. Because of this it can be assumed that the BSPUK figures correctly show the relative position of the various airlines operating in the United Kingdom. These sales do not count towards thresholds in the MA or PRS schemes, nor do they give rise to payments under the MA or PRS schemes. However, they do involve a travel agent earning basic commission by issuing a ticket on BA ticket stock or using a BA plate which is processed through the agent's BSPUK account with BA.

(90) BA is the dominant purchaser on the United Kingdom market for air travel agency services. Its position on the United Kingdom markets for air travel gives it a unique position of dominance with respect to United Kingdom travel agents from which it buys air travel agency services.

(91) BA's dominance arises from its position on the United Kingdom markets for air travel. As described in section I.D.2, BA is extremely successful on these markets. To summarise some of the main points: it offers significantly more routes to and from the United Kingdom than any other airline. The level of BA's success on the markets represented by these routes is shown by the fact that in 1998 it accounted for 39,7% of all United Kingdom sales of air travel through the settlement scheme for travel agents operated by IATA. As well as being large in absolute terms, this share is a multiple of that of any other airline.

BA's position on the markets for air transport is reinforced by the substantial proportion of slots it holds in the relevant airports and by the system of grandfathering that currently exists for their reallocation. This system hampers new entries and therefore strengthens the position of well-established airlines like BA. For instance, in winter 1998 BA held 38% of the weekly slots available at Heathrow. Its nearest competitor accounted for only 14% of the total. BA's five nearest competitors together totalled only 27,4%.

(92) BA's position on the markets for air transport make it an obligatory business partner for travel agents. As BA has pointed out, the IATA passenger agency programme may oblige it to deal with all travel agents who meet certain objective criteria. However what makes BA

dominant is the fact that travel agents are in a situation where an extremely large proportion of the air tickets they sell will be BA tickets, and hence a similar proportion of their sales of air travel agency services will be to BA. This allows BA, in its purchases of air travel agency services, to act independently of the other airlines who purchase air travel agency services. Regardless of the conditions on which BA buys these services from travel agents, agents have to deal with BA and accept that a large portion of their income from these services will be that generated by the sale of BA tickets.

(93) This overall statistic including all travel agencies and all airlines may conceal the extent of BA's influence in key areas. In 1998 BA accounted for 39,7% of all air ticket sales through travel agents, but 57% of sales by 'top 10' airlines. In 1998 BA accounted for 43,7% of the sales of air tickets through the 10 largest travel agents in the United Kingdom. In other words, BA enjoys a particularly powerful position relative to its leading rival airlines, and with respect to the most important travel agencies.

(94) The extent to which travel agents are obliged to deal with BA is shown by the statistics in section I.D.2 above. In 1998, BA accounted for 39,7% of all sales of air tickets through travel agents. As indicated in recital 41, this is a multiple of the volume represented by any other airline.

(95) This has allowed BA to behave in the manner described above, that is to agents in a situation where they may lose commission income by selling a ticket from a BA competitor unless that competitor pays a commission on the ticket which is a multiple of that paid by BA. BA points out that agents do not hold 'stocks' of tickets or have to devote scarce storage or display space to tickets as do distributors of physical goods, and argues that they are not under pressure to sell BA tickets rather than those of BA's competitors. It is clear from the operation of these discount schemes as described above, and analysed under section F below, that BA has been able to place even more direct pressure than this on travel agents not to deal in non-BA air tickets. As noted above, the fact that travel agents provide other services than the air travel agency services provided to BA does not prevent BA from exerting power over the agents in the market for air travel agency services. Travel agents have not, and could not have, responded to BA's new discount schemes by concentrating their efforts on booking hotel rooms for clients. Equally they could not respond by increasing their sales of charter flights, since these flights are not a substitute for scheduled flights for the majority of customers.

F. ABUSE OF A DOMINANT POSITION

being not the maximum quantity but the maximum requirements'.

(96) Given that BA is dominant on the United Kingdom market for air travel agency services the commission schemes described above represent abuses of that dominant position. In particular they represent loyalty discounts as condemned in the Michelin⁽³³⁾ and Hoffmann-La Roche⁽³⁴⁾ cases and abusive discrimination between travel agents.

(99) The Hoffmann-La Roche case established that a system of discounts or rebates could have an equivalent effect to an exclusivity requirement in a supply contract and so be an abuse if practised by a dominant supplier. It also confirmed the Commission's decision that the system of discounts operated by Hoffmann-La Roche was such a system. The subsequent Michelin⁽³⁷⁾ case clarified when a discount scheme could be considered to be exclusionary and so be abusive when operated by a dominant supplier.

Exclusionary rebate schemes

(97) Community competition law limits the type of discount scheme that can be operated by a dominant firm. Discount schemes that are quite legitimate, and a normal part of business activity when practised by a non-dominant firm can be abusive when practised by a dominant firm. However it is clear from the Hoffmann-La Roche case that a dominant firm cannot enter into an agreement with a customer where the customer agrees to obtain all or most of their requirements for a product from that dominant supplier⁽³⁵⁾. The same case also indicates that a dominant supplier cannot operate a discount scheme which has an equivalent effect to an agreement that a customer obtain all or part of its requirements from a dominant supplier⁽³⁶⁾.

(100) The Court stated that the scheme in Michelin was not the same as the particular scheme in Hoffmann-La Roche⁽³⁸⁾. The Court held that it had to decide whether the Michelin discount scheme was abusive, that is whether 'in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose ...'⁽³⁹⁾. The Court went on to find that the system of discounts operated by Michelin, where rebates were given on a customer's purchases for a whole year in return for meeting sales targets, set for each customer in view of its requirements, was such a scheme. The Court concluded that this was a system that rewarded loyalty rather than being related to costs saved or extra benefits secured by the supplier.

(98) In the Hoffmann-La Roche case, the Court agreed with the Commission that the discounts given by Hoffmann-La Roche were 'fidelity rebates' and were abusive of a dominant position as being equivalent to an exclusivity requirement. The Court distinguished the 'fidelity rebates' granted by Hoffmann-La Roche from legitimate quantity discounts as follows: 'This method of calculating the rebates differs from the granting of quantitative rebates, linked solely to the volume of purchases from the producers concerned in that the rebates at issue are not dependent on quantities fixed objectively and applicable to all possible purchasers but on estimates made, from case to case, for each customer according to the latter's presumed capacity of absorption, the objective which it is sought to attain

(101) The Hoffmann-La Roche and Michelin cases establish a general principle that a dominant supplier can give discounts that relate to efficiencies, for example discounts for large orders that allow the supplier to produce large batches of product, but cannot give discounts or incentives to encourage loyalty, that is for avoiding purchases from a competitor of the dominant supplier. They also establish that the two discount schemes that gave rise to the cases were of that type and abusive. The commission schemes operated by BA are in breach of this general principle and are very close in form to that condemned by the Court in the Michelin case. Although it is true, as BA argues, that cases must be read in context and that Michelin should be considered 'in the context of Roche' this cannot mean that a commission scheme that shows all the same features that the Court found determinative in Michelin must also show the features of the scheme condemned in Hoffmann-La Roche to be considered abusive. The

⁽³³⁾ Cited in footnote 13.

⁽³⁴⁾ Cited in footnote 14.

⁽³⁵⁾ Hoffmann-La Roche, at paragraph 89.

⁽³⁶⁾ Hoffmann-La Roche, at paragraph 90.

⁽³⁷⁾ Cited in footnote 13.

⁽³⁸⁾ Michelin, at paragraph 72.

⁽³⁹⁾ Michelin, at paragraph 73.

two cases taken together establish that a dominant company can only give rebates in return for efficiencies realised and not in return for loyalty, and establish that the two particular discount schemes concerned are of the type that rewards loyalty rather than efficiencies.

recitals 16, 17 and 18, a travel agent had to take part in the MA commission scheme. In addition, the general conditions described in recital 19 were part of the MA. Although the fund and the general conditions are not abusive in themselves, they were used as an extra incentive to take part in the MA and reinforced their effect.

(102) The commission schemes set out above are clearly related to loyalty rather than efficiencies. Although BA has provided evidence that it may realise efficiencies when dealing with a travel agent that sells a large number of tickets those commissions are not related to those efficiencies. As discussed in the section on 'Discrimination', below, a travel agent that sells an inefficiently small number of tickets can earn the maximum commission provided its small sales represent a 25% increase over its sales in the previous year. Equally, a high volume travel agent will not get extra commission in return for the economies of scale it realises for BA unless its sales increase over the previous year. BA has historically enjoyed a powerful position on the United Kingdom market for air travel, which has led to its dominant position in the market for air travel agency services. As this powerful position on the United Kingdom markets for air travel comes under threat from new entrants and the removal of regulatory barriers to competition, BA is using its commission scheme to directly reward loyalty. Travel agents are encouraged to remain loyal to BA rather than to sell their services to competitors of BA by being given incentives to maintain or increase their sales of BA tickets which do not depend on the absolute size of those sales. Such commission schemes carried out by a firm enjoying a dominant position as a purchaser of services from travel agents are illegal, regardless of any possibility for the travel agents or competing airlines to minimise or avoid their effects.

(103) Airlines competing with BA have alternatives to purchasing air travel agency services from travel agents. The main alternative is direct sales by telephone or Internet, which amounts to 'in-house' production of air travel agency services. Travel agents remain by far the most significant method used by airlines to sell air transport in the United Kingdom, accounting for some 85% of air travel sales. BA's abusive conduct on the market for air travel agency services has serious effects on its competitor airlines on the United Kingdom markets for air transport.

(104) In the case of the MAs there is further evidence that these schemes are related to loyalty rather than efficiencies. In order to benefit from the 'training support and business development fund' described in

(105) As to BA's arguments based on the letter it received from a senior official of the Commission⁽⁴⁰⁾, that letter was clearly stated to be a 'personal and provisional reaction to your (Virgin's) request for interim measures' and as such it does not and cannot bind the Commission. In any event the only finding in that letter was that there was not a *prima facie* case that BA's discounts for corporate customers infringed Article 82 of the Treaty. Those corporate discounts are not the subject of this Decision. In addition, the absence of a *prima facie* case does not exclude that on full examination of the facts an abuse does exist. Further investigation was carried out by the Commission and the result thereof was the analysis set out here.

(106) The exclusionary effect of the commission schemes affects all of BA's competitors and any potential new entrants. They therefore harm competition in general and so consumers, rather than only harming certain competitors who cannot compete with BA on merit.

(107) Despite the exclusionary commission schemes, competitors of BA have been able to gain market share from BA since the liberalisation of the United Kingdom air transport markets. This cannot indicate that these schemes have had no effect. It can only be assumed that competitors would have had more success in the absence of these abusive commission schemes.

Discrimination

(108) One of the examples of an abuse of a dominant position given in Article 82 of the Treaty is 'applying

⁽⁴⁰⁾ See footnote 15.

dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage' ⁽⁴¹⁾.

- (109) The obligation on a dominant firm not to discriminate means that it cannot apply dissimilar conditions to equivalent transactions with different customers so placing one customer at a competitive disadvantage ⁽⁴²⁾. The MA and PRS schemes described above will have precisely this effect. Two travel agents handling the same number of BA tickets and providing exactly the same level of service to BA will receive a different commission rate, that is a different price for their air travel agency services if their sales of BA tickets were different in the previous year. Conversely two travel agents selling different volumes of BA tickets and providing a different level of service to BA could earn the same commission rate, that is be paid the same price by BA for their air travel agency services, if their sales of BA tickets have increased by the same percentage over the previous year.
- (110) BA points out that there may be cost savings for it if a travel agent sells a large volume of tickets and that different travel agents operate at different levels of efficiency and provide different levels of service to BA. Although this might justify the payment of different commission rates to different travel agents, it does not prevent the commission schemes which are the subject of this Decision from being discriminatory. The commission schemes at issue do not respond to different volumes of sales by travel agents or different levels of service provided by travel agents to BA. Under these schemes extra commission is related to the extent to which a travel agent meets or exceeds its previous year's sales of BA tickets.
- (111) The effect of these discriminatory commissions will be to place certain travel agents at a competitive disadvantage relative to each other. Travel agents must compete with each other to provide agency services to the public and to persuade members of the public to book air tickets through them. The resources available to the travel agents to do this by, for example, promoting their services to the public or by splitting commission with travellers, come from their commission income. By distorting the level of commission income earned by travel agents these schemes will affect the ability of travel agents to

compete with each other. In addition, as discussed more fully in the section 'Exclusionary rebate schemes', above, these schemes will distort competition between BA and other airlines on the markets for air transport services.

G. EFFECT ON TRADE BETWEEN MEMBER STATES

- (112) The practices that are the subject of this Decision have their primary effect on the market where BA and other airlines purchase air travel agency services. The effect of these practices is illegally to induce United Kingdom travel agents to supply these services to BA rather than to other airlines in competition with BA. These practices tend to reduce the quantity of air travel agency services provided to other airlines, and worsen the terms on which these services are provided. Since many of these airlines are based outside the United Kingdom these practices clearly affect intra-Community trade in air travel agency services.
- (113) In addition, the air transport sales that result in the commissions that are the subject of this Decision include routes within the United Kingdom, between the United Kingdom and the other Member States and between the United Kingdom and third countries. The effect of these abusive commission schemes will be felt on the markets for this air transport. In particular these practices have the object and effect of excluding competitors to BA from the markets for air transport originating in the United Kingdom. These air transport services are sold between Member States. These practices therefore have a further effect on trade between Member States.

H. ARTICLE 3 OF REGULATION NO 17

- (114) Pursuant to Article 3 of Regulation No 17, where the Commission, upon application or upon its own initiative finds that there is an infringement of Article 81 or Article 82 of the Treaty, it may by decision require undertakings or associations of undertakings concerned to bring such infringements to an end.

⁽⁴¹⁾ Article 82(c) of the Treaty.

⁽⁴²⁾ See for example Commission Decision 97/1315/EC, Irish Sugar plc, (OJ L 258, 22.9.1997, p. 1), where the Commission followed the Court's judgment in Case 27/76 United Brands v. Commission [1978] ECR 207.

(115) It is necessary for the Commission to require BA to bring the infringements described in Section F to an end, to the extent that it has not already done so, and henceforth to refrain from any agreements or behaviour which may have the same or similar object or effect.

(121) For these reasons the amount of the fine imposed to reflect the gravity of the infringement is set at EUR 4 million, reflecting the serious nature, extent and impact of the infringement.

Duration of the infringement

I. ARTICLE 15 OF REGULATION NO 17

(116) Under Article 15 of Regulation No 17, infringements of Article 82 of the Treaty may be sanctioned by fines of up to EUR 1 million or 10% of the turnover of the undertaking in the preceding business year, whichever is the greater. Regard must be had to both the gravity and duration of the infringement.

(122) BA's abusive behaviour has been carried out with respect to selected large travel agents through MAs at least since 1992 until the present. The PRS extended the abusive behaviour to all UK travel agents and reinforced the effect on agents party to an MA from 1 January 1998 to 31 March 1999. The abuses have persisted for seven years. The amount of the fine imposed to take account of the gravity of the infringement should therefore be increased by 70% to take account of its long duration. This gives a fine amount of EUR 6,8 million.

(117) In fixing the fine in this case, the Commission will take particular account of the following factors:

Aggravating and attenuating circumstances

(123) There are no aggravating or attenuating circumstances relevant to this Decision.

Gravity of the infringement

(118) The behaviour at issue, an exclusionary rebate scheme of the type which has been consistently condemned in the past by the Commission and the Community judicature, is a serious abuse of a dominant position and was intended to eliminate or at least prevent the growth of competition to BA in the UK markets for air transport. Such behaviour is considered a serious infringement of Community competition law.

HAS ADOPTED THIS DECISION:

Article 1

British Airways plc infringed Article 82 of the Treaty 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.

(119) Air transport represents a major item of consumer spending, and is an important cost for businesses in the United Kingdom, particularly those businesses that trade outside the United Kingdom, so this behaviour has effects throughout the UK economy.

Article 2

(120) It seems reasonable to assume that it is partly as a result of this behaviour that BA has been able to preserve an average market share as high as 40% in the UK markets for air transport, despite the liberalisation that has removed the legal and regulatory environment which allowed it to initially establish its leading position. It follows from this conclusion that the object and effect of these abuses has been to prevent the benefits of deregulation from being achieved in full.

For the infringements referred to in Article 1, a fine of EUR 6,8 million is hereby imposed on British Airways plc.

The fine shall be paid, within three months of the date of notification of this Decision, into bank account No 310-0933000-43 of the European Commission, Banque

Bruxelles Lambert, Agence Européenne, Rond Point Schuman 5, B-1040 Brussels. After the expiry of that period, interest shall be automatically payable at the rate applied by the European Central Bank to its repo operations on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 6%.

Article 3

British Airways plc shall immediately bring to an end the infringements referred to in Article 1 in so far as it has not already done so.

British Airways plc shall refrain from repeating any act or conduct described in Article 1, and from adopting any measure having equivalent effect.

Article 4

This Decision is addressed to British Airways plc, Waterside, PO Box 365, Harmondsworth, UB7 0GB, United Kingdom.

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Brussels, 14 July 1999.

For the Commission
Karel VAN MIERT
Member of the Commission
