**[Avis juridique important](http://europa.eu.int/eur-lex/lex/en/editorial/legal_notice.htm)**

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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.

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

BA's consolidated turnover in the year to 31 March 1998 was GBP 8642 million, on which it earned net profits of GBP 460 million. In the year to 31 March 1998, BA employed an average of 60675 people.

B. THE COMPLAINTS

(3) Virgin lodged a complaint against certain commercial practices of BA that were said to constitute infringements of Articles 102 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 102, 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) Later, Virgin lodged a supplementary complaint against BA's "Performance Reward scheme" (PRS), alleging that "Virgin believes that the PRS: infringes Article 102; entrenches the already serious breach of Article 102 represented by the existing discount structure operated by BA.

(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. 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;

(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 500000 annual sales (flown revenue) with BA. 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.

(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 500000 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 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) (13) (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 670000.

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 80000 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 minus 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 will be 0,5 % ((112 minus 95) ÷ 3 × 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 100000 a month in the benchmark year. If the travel agent sells GBP 100000 worth of BA international air tickets a month it will earn the basic commission of 7 % and a "performance reward" of 0,5 % ((100 minus 95) × 0,1 %)(7) giving a total commission income on international air ticket sales of GBP 7500 (100000 × (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 minus 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 7326 (99000 × (7 % + 0,4 %)). A reduction of GBP 1000 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 1000 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 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) There were approximately 7000 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 4634. Of these, 4108 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.

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 8245 million of which BA accounted for GBP 3276 million (39,7 %).

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.

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 was based on the incentive schemes for travel agents described in sections C.1 and C.2 above. Virgin's supplementary complaint 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.

E. THE MAIN ARGUMENTS OF THE PARTIES

(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.

 (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(11) should be adopted by the Commission.

 (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.

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(12) 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"(13) 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(14).

(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.

(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.