

Access to car parking facilities at East Midlands International Airport – CAA decision CA98-001 (non-confidential)

CAP 1507



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Confidential information in the original version of this Decision has been redacted for the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [X]. The names of individuals mention in the description of the infringement in the original version of this Decision have been removed from the publish version on the public register. Names have been replaced by employee references. The original decision was set out in sections A to H this non-confidential version runs in chapter 1 to 8, paragraph numbers are unaffected.

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Chapter 1

Introduction

1. The Civil Aviation Authority (CAA) is issuing to East Midlands International Airport Limited (EMIA), its parent company Manchester Airport Group Investments Limited (MAG) and Prestige Parking Limited (Prestige) (each a Party, together the Parties) this Notice of decision (Decision) pursuant to Rule 10 of the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (CMA Rules) on the grounds that the CAA concludes that the Parties have infringed the prohibition in section 2 (the Chapter I prohibition) of the Competition Act 1998 (the Act). This Decision is dated 15 December 2016.
2. This Decision sets out the facts and analysis on which the CAA relies in support of its decision.¹
3. This is a non-confidential version of the decision.
4. [paragraph not used]
5. At Appendix B we present the calculation of the penalty that we propose to impose on EMIA/MAG. At Appendix C we present the calculation of the penalty that we propose to impose on Prestige.

The Parties

6. The Parties to whom this Decision is addressed are:
 - a) East Midlands International Airport Limited (EMIA), Company No. 2078271, its registered office is at East Midlands International Airport, Castle Donington, Derby DE74 2SA; and EMIA's parent company Manchester Airport Group Investments Limited (MAG),

¹ A list of documents referred to in this decision and which are disclosed with it to the Parties is at Appendix D.

Company No. 08338555, its registered offices at 6th Floor Olympic House, Manchester Airport, Manchester, Greater Manchester, M90 1QX; and

- b) Prestige Parking Limited (Prestige), Company No.4919592, its registered offices at 14 Pavilion Way, Castle Business Park, Loughborough, Leicestershire, LE11 5GW.
7. EMIA owns and operates East Midlands International Airport (the Airport). It is a wholly owned subsidiary of MAG. MAG also owns Bournemouth, Manchester and Stansted airports.²
 8. Prestige is owned by two private individuals and operated car parking services at the Airport from 2004 to 2012.

Background to the CAA's formal investigation

9. EMIA submitted an application for leniency on 26 June 2013 to the CMA's predecessor body, the Office of Fair Trading (OFT) in relation to price fixing activities between 2007 and 2012 at the Airport. Following the entry into force of the Enterprise and Regulatory Reform Act 2013, implementing the transition from the OFT to the CMA and improving the working of the concurrency regime, EMIA was granted a marker for Type A leniency on 31 March 2015 by the CMA in respect of the suspected cartel activity between MAG/EMIA and Prestige comprising the fixing and/or coordination of prices for the provision of car parking services at the Airport between January 2007 and December 2012.
10. The CMA shared the information in its possession relating to this matter with the CAA on the basis that it appeared that the CMA and CAA had concurrent jurisdiction and because there were reasonable grounds for suspecting that the Chapter I prohibition had been infringed. The

² Bournemouth is some 231km to the south, Manchester is some 86km to the northwest and Stansted is some 150km to the southeast of the Airport.

information was shared in accordance with the relevant provisions of the concurrency regime.³

11. Having established reasonable grounds for suspecting a breach of the Chapter I prohibition in relation to the infringement, and having conducted a prioritisation assessment to determine that the case fell within the CAA's casework priorities, the CAA opened a formal investigation on 26 March 2015 pursuant to section 25 of the Act.
12. On 6 March 2015 Prestige applied to the CAA for leniency confessing to having taken part in price fixing activities between 2007 and 2012. The CAA granted Prestige a marker for Type C leniency on 20 March 2015 in respect of the suspected cartel activity between Prestige Parking Ltd and MAG/EMIA comprising the fixing and/or coordination of prices for the provision of car parking services at the Airport between January 2007 and December 2012.
13. On 13 October 2016 the CAA entered into settlement discussions with Prestige and informed MAG/EMIA of the CAA's intention to enter a streamlined process. Prestige and the CAA agreed terms of settlement on 30 November 2016. The case proceeded on a streamlined process.

The infringement

14. The CAA finds that between at the latest 11 October 2007, when the Parties entered into a lease and concession agreement and 25 September 2012, when the lease and concession arrangement between the Parties were terminated, (the Relevant Period), EMIA and Prestige infringed the Chapter I prohibition by participating in an agreement which had as its object the prevention, restriction or distortion of competition in relation to access to car parking facilities at the Airport.

³ The Competition Act 1998 (Concurrency) Regulations 2014 and the Memorandum of understanding between the Competition and Markets Authority and the Civil Aviation Authority – concurrent competition powers published on 19 June 2014 and updated on 24 February 2016.

15. The infringement took the form of an agreement by which the Parties agreed during the Relevant Period to fix the minimum price that Prestige charged its customers for car parking services at the Airport, as a condition of EMIA granting to Prestige access to its facilities for car parking services at the Airport. This condition is referred to in this Decision as the “minimum pricing obligation” or “MPO”. This agreement was supported by ancillary concerted practices consisting of an information exchange where the Parties exchanged pricing information to facilitate Prestige’s adherence to the MPO between at least November 2010 and September 2012 and monitoring of Prestige’s prices by EMIA.
16. In addition, the CAA further finds that the conduct described above comprises a single continuous infringement. It is clear that the Parties shared a common objective, took steps to achieve the common objective, and that each Party was aware of the other Party’s conduct.
17. The CAA finds that the infringement constitutes a restriction of competition ‘by object’ and therefore the CAA is not required to, and has not sought to, demonstrate that it resulted in any anti-competitive effects.

Chapter 2

Jurisdiction

18. The CAA has concurrent jurisdiction with the CMA to apply and enforce the Chapter I prohibition so far as it relates to anything which relates to airport operation services (AOS).⁴
19. For the reasons set out in Chapter 4 and 5 below, the CAA finds that the matters to which this Decision relates are matters that relate to the Chapter I prohibition. The CAA is also finds that the matters relate to AOS. The Civil Aviation Act 2012 (CAA12) defines AOS to include the provision at an airport of facilities for car parking.⁵ Specifically, AOS includes permitting a person to access or use land that forms part of an airport or facilities at an airport for a purpose. Those purposes include ‘the provision at an airport of facilities for car parking’.⁶
20. In addition, AOS also includes permitting a person to access or use land that forms part of an airport or facilities at an airport for the purpose of the arrival or departure of passengers and their baggage.⁷ CAA12 provides further guidance by saying that a passenger will arrive or depart from an airport where that activity takes place at a passenger terminal or the terminal forecourt of a qualifying car park. To be a qualifying car park, the car park must be part of the terminal or have pedestrian access to the terminal.⁸
21. Applying the definition of AOS set out in CAA12 to the facts of this case, the CAA concludes that EMIA, through the grant of successive concession and lease agreements to Prestige, permitted Prestige to (i) access facilities for car parking services at the Airport and (ii) access or

⁴ Section 62 of the Civil Aviation Act 2012.

⁵ Section 68(5)(a) CAA12.

⁶ Section 68(5)(a) CAA12.

⁷ Section 68(1)(c) CAA12.

⁸ Section 67(6) CAA12.

use land that forms part of the Airport for the arrival or departure of passengers and their baggage. Access was provided at Building 107, which was adjacent to the terminal and had pedestrian access to the terminal, enabling passengers to drop off their vehicle and depart with their bags (or conversely to land and collect their vehicle on arrival). A site visit to the Airport conducted by the CAA confirmed that Building 107 has pedestrian access to the terminal building.⁹

22. The CAA also finds that the requirements of the concurrency regime are met as the case was allocated by the CMA to the CAA on 7 November 2014.

⁹ Site visit conducted on 26 May 2016.

Chapter 3

Legal framework for the Chapter I prohibition

Legal test and proof of an infringement

23. The Chapter I prohibition in section 2 of the Act prohibits “(1)... agreements between undertakings, decisions by associations of undertakings or concerted practices which—
- a) may affect trade within the United Kingdom, and*
 - b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom”.*¹⁰
24. The Chapter I prohibition applies only where the agreement, concerted practice or decision is, or is intended to be, implemented in the UK. References to the UK are to the UK or part of the UK.¹¹
25. In addition, UK competition law must be applied in a manner which is consistent with the application of corresponding EU law.¹² This means that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition law within the UK should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law. The provision in EU competition law which most closely corresponds to the Chapter I prohibition is Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), on which the Chapter I prohibition is modelled.
26. The CAA must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing that there is no inconsistency with the principles laid down by the TFEU and the European Courts, and any relevant decision of the European Courts. The CAA must, in addition,

¹⁰ Unless they are exempt, excepted or excluded under Part I of the Act.

¹¹ Sections 2(1), 2(3) and 2(7) of the Act.

¹² Section 60 of the Act.

have regard to any relevant decision or statement of the European Commission.

Standard of proof

27. In order to make a decision that the Chapter I prohibition has been infringed, the CAA is required to demonstrate that there is sufficient evidence to prove the infringement on the balance of probabilities (i.e. more likely than not or above 50%).¹³
28. In terms of evidence, the CAT recognises that cartels are by their nature secret and difficult to detect and that available evidence is sparse and fragmentary. It accepts that even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard.¹⁴ There may be an element of deduction involved where the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement.¹⁵
29. In its case law, the CAT has established a “hierarchy” of evidence, including:
- a) **contemporaneous documents**, are given the most weight and credibility, unless there is a good reason not to do so;¹⁶
 - b) **background evidence as to the economic and market context**, both before and after the alleged agreements, is relevant to the assessment whether the alleged agreements or concerted practices are likely to have occurred;¹⁷ and

¹³ Napp v DGFT [2002] CAT 1, §§105-106. JJB v OFT [2004] CAT, §196.

¹⁴ Claymore Dairies [2005] CAT 30 at §§3 to 10 and JJB, §206.

¹⁵ Cases 204/00P etc. Aalborg Portland v Commission [2004] |EC|R, §55-57.

¹⁶ JJB, §287.

¹⁷ JJB, §286.

- c) **witness evidence**, all witness accounts will be treated with caution and should only be relied upon where they are consistent or supported by corroboration, whether from market context, documents, or other witnesses.

Proof of an “object” infringement

30. Anti-competitive arrangements may be prohibited in one of two ways: either because they have an anti-competitive "object" or because they have an anti-competitive "effect". It is well established law that where an agreement has the “object” of restricting competition, there is no need to establish any anti-competitive effects.¹⁸ An “object” infringement encompasses the most severe forms of anti-competitive restrictions (such as price fixing and market sharing) and therefore rarely qualifies for an exemption under section 9(1) of the Act. Such arrangements also count as “hardcore restrictions” disqualifying the wider agreement from exemption under any EU block exemption regulation. In any event, the burden of proof to demonstrate that an agreement which infringes the Chapter I prohibition satisfies the four conditions in section 9(1) of the Act lies with the infringing undertaking.¹⁹
31. At the heart of the object test lies the concept that the agreement in question is "by its nature" anti-competitive and therefore prohibited. It is trite law that a finding of object-based infringement removes the necessity of enquiring further as to the actual effects that such agreement may have had on competition in the relevant market.²⁰ The principle has recently been affirmed in more recent case law.²¹

¹⁸ Case 56/65 *Société Technique Minière v Commission* ("STM") [1966] ECR 235

¹⁹ Section 9(2) of the Act.

²⁰ *Consten and Grundig v Commission* 56 and 58/64 [1966] ECR 299.

²¹ *Beef Industry Development Society Ltd, Barry Brothers (Carrigmore) Meats Ltd* Case C-209/07. Paragraphs 16 and 17. See also *Toshiba (2016)* (Case C-373/14) (paragraph 25): Thus, where the anticompetitive object of the agreement is established, it is not necessary to examine its effects on competition.

32. The General Court has held that object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.²² The General Court has characterised as the ‘essential legal criterion’ for a finding of anti-competitive object that the coordination between undertakings ‘reveals in itself a sufficient degree of harm to competition’ such that there is no need to examine its effects.²³
33. To determine whether an agreement reveals a sufficient degree of harm to constitute a restriction of competition ‘by object’, regard must be had to:
- a) the content of its provisions;
 - b) its objectives; and
 - c) the economic and legal context of which it forms a part.²⁴
34. In determining that context, it is also necessary to take into consideration all relevant aspects of the context, having regard in particular to the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.²⁵
35. While the Parties’ subjective intention is not a necessary factor in determining whether an agreement restricts competition, there is nothing prohibiting that factor from being taken into account.²⁶
36. An agreement may be regarded as having an anti-competitive object even if its sole aim is not to restrict competition but also to pursue other legitimate objectives.²⁷
37. Case law and decisional practice demonstrate that there are several ways in which prices can be fixed. Restrictions may be **horizontal**, which

²² C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204 (‘*Cartes Bancaires*’), paragraph 50; affirmed in C-373/14 P *Toshiba v Commission* EU:C:2016:26 (‘*Toshiba*’), paragraph 26.

²³ *Cartes Bancaires*, paragraphs 49 and 57. See also *Toshiba*, paragraph 26.

²⁴ See *Cartes Bancaires*, paragraph 53 and *Toshiba*, paragraph 27.

²⁵ See *Cartes Bancaires*, paragraphs 53 and 78.

²⁶ See *Cartes Bancaires*, paragraph 54; affirmed in C-286/13 P *Dole v Commission*, EU:C:2015:184, paragraph 118.

²⁷ *BIDS*, paragraph 21.

involve “cooperation between two or more actual or potential competitors” or **vertical**, involving “cooperation between companies operating at different levels of the production or distribution chain”²⁸ or they may have **hybrid** features.

38. In the Bathroom Fittings investigation (which concerned online resale price maintenance)²⁹, the CMA³⁰ affirmed that vertical agreements were capable of being agreements restricting competition ‘by object’:
Whilst vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, the fact that an agreement is entered into in the vertical context does not exclude the possibility that it constitutes a restriction of competition by object.
39. Price competition has been found to have been restricted by agreements on minimum prices,³¹ maximum prices³² or on levels of discount.³³
40. An agreement not to undercut a competitor’s price has been found to constitute a restriction of competition by object.³⁴

²⁸ Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

²⁹ Case CE/9857-14. At A-44.

³⁰ (citing Case C-32/11 Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal, EU:C: 2013:160, paragraph 43.)

³¹ See for example joined cases T-217/03 and T-245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d’exploitants agricoles (FNSEA) and Others v Commission (French Beef)* EU:T:2006:391, at paragraph 85.

³² See, for example, *Raw Tobacco Spain*, decision of 20 October 2004, at paragraphs 299 to 302.

³³ See, for example, Case 246/86 *S C Belasco v Commission* EU:C:1989:301, at paragraph 12.

³⁴ *Agreements between manufacturers of glass containers*, OJ [1974] L160/1, at paragraphs 34 and 35. This case concerned a set of rules on ‘fair trading’ which a number of companies in various EEC (at that time) Member States agreed with each other to implement. Two of the rules concerned undercutting: rule A.1.(c) prohibiting systematic undercutting of a competitor and rule A.7, which permitted only the matching and not the undercutting of a competitor’s prices, when such a competitor introduced new price measures. These rules along with a number of other rules, were found to have as their object the prevention of price competition between the parties.

Information exchange

41. The following principles apply to the exchange of information which constitutes an infringement of the Chapter I prohibition:
- a) To establish a concerted practice involving the exchange of pricing information, the CAA needs to show “a meeting of minds”, or “a concurrence of wills” or “a joint intention to conduct themselves on the market in a specific way”.³⁵
 - b) The CAA needs to show “reciprocal contacts”³⁶, namely that:
 - i. one party (A) has invited or requested the other (B) to adopt a coordinated course of action relating to a price increase;
 - ii. the other party (B) accepts that invitation or is taken to have tacitly acquiesced with it by its failure to object to the request (“non-distanciation”); and
 - iii. once the parties have agreed to the course of action, under EU law, it is not necessary to show that Party B has implemented the course of action.
 - c) To involve a restriction of competition, the arrangement must reach the stage where the companies involved “*knowingly substitute practical cooperation for the risks of competition*”.³⁷ That assessment normally applies in a horizontal arrangement between direct competitors but is also relevant in vertical situations, where the parties operate at different levels of the market.
 - d) Pricing exchanges will normally be unlawful if they relate to information that has an appreciable adverse effect on important aspects of competition such as price, output, quality or range of services provided. That impact has to be assessed by reference to the characteristics of the information exchanged as well as the

³⁵ See, in particular, *JJB Sports v OFT* [2004] CAT 17 and *Argos Limited v OFT* [2004] CAT 24.

³⁶ Joined Cases T-25/95 etc. *Cimenteries CBR v Commission* [2000] ECR II-491, paras 1849-1852; Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383.

³⁷ Commission Horizontal Guidelines §60 and Case C8/08 *T-Mobile Netherlands* [2009] ECR I-4529, §26 and Joined Cases C-89/95 a.o. *Wood Pulp* [1993] ECR 1307, §63.

economic conditions of the market such as the degree of transparency and concentration and stability.³⁸

42. An information exchange will, by and of itself, constitute an object infringement if it restricts competition by its very nature. That will have to be determined by reference to the legal and economic context.³⁹ There will normally be an object case where companies exchange future pricing intentions, as that is likely to lead to a collusive outcome, where the companies can arrive at a higher price without the risks of a price war. An exchange of current prices may not be an object infringement but will be an infringement by effect where the presentation and regularity of the data increases transparency in the market by making it easier for competitors to collate data and monitor or anticipate their competitors' pricing movements. Exchange of current pricing information or other sensitive data and/or monitoring regimes will also be unlawful if they reinforce or facilitate an existing anti-competitive arrangement or concerted practice.

Single continuous infringement

43. The concept of a 'single continuous infringement' was introduced to European competition jurisprudence in *Polypropylene*, where it was described as *an overall framework agreement manifested in a series of more detailed sub-agreements worked out from time to time*.⁴⁰ This was affirmed in *Anic*⁴¹, which held that:
- "It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 85 of the Treaty."*

³⁸ Horizontal Guidelines, §§58.

³⁹ Joined cases C-501/06 P *Glaxo SmithKline a.o.* §58 and Case C-209/07 BIDS, §§15 et seq.

⁴⁰ [1986] OJ L230/1, Recital 81.

⁴¹ (1999) [C-49/92](#), [1999] ECR I-4125.

44. In order to establish the existence of a single continuous infringement, it will not be enough for the CAA to determine that the arrangements in question were all designed to distort competition. The CAA must go further and establish the complementarity of the arrangements as constituent elements in a plan with a single objective. The judgment of the General Court in *BASF* is instructive⁴² it sets out that actions should be complementary in nature directed at the same set of anti-competitive effects having a single objective.
45. A useful survey of the relevant criteria in establishing a single continuous infringement was set out by the General Court in *Trelleborg*,⁴³ setting out that there is a single infringement where there is an identical nature of:
- the objectives of the practices at issue;
 - the goods or services concerned;
 - the undertakings which participated in the infringement; and
 - the rules for implementation of the practice.
46. Other factors that may be considered include the identical nature of the legal persons involved in the infringement and geographic scope of the infringement.
47. Accordingly, the doctrine of single continuous infringement can be used to group together diverse parties and agreements over time into a single infringement which pursues a common aim or purpose.

⁴² T-101/05 and T-111/05, paragraphs 179-181.

⁴³ *Trelleborg Industrie SAS (T-147/09) and Trelleborg AB (T-148/09) v European Commission*.

Chapter 4

Factual evidence

48. The CAA finds that in this case, the existence of the agreement and the ancillary concerted practices is demonstrated by contemporaneous documentary evidence and interviewee transcript evidence from individuals⁴⁴ who worked at EMIA and Prestige during the Relevant Period which, viewed as a whole, corroborates the contemporaneous documentary evidence. The CAA considers that viewed together the documentary and oral evidence meets the evidential standard necessary to make a decision that the Parties have infringed the Chapter I prohibition. In making this Decision, the CAA notes that a face-value interpretation of the contemporaneous documentary evidence and the majority of the interviewee evidence obtained by the CAA together support a finding of a single and continuous infringement of the Chapter I prohibition.

Chronology of events

49. This section sets out the chronology of events in the matters related to the CAA's findings together with relevant context.

⁴⁴ The list of individuals interviewed is contained in Annex 1.

Figure 1: Annotated map of East Midlands International Airport



Notes: Blue markers relate to Prestige Parking LTD's facilities, green markers relate to East Midland Airport Ltd's facilities. Sources: maps.google.co.uk 21/11/2014 and information from the Case Files.

50. **2004:** Prestige and EMIA entered into a concession agreement and a lease agreement, both dated 25 March 2004 (the “2004 arrangements”) under which EMIA permitted Prestige access to and use of facilities (known as “Building 107”) at the Airport so that Prestige could provide undercover secure car parking and associated services at the Airport.⁴⁵
51. **2007:** Following the expiry of the 2004 agreements, Prestige and EMIA entered into a new lease and a new concession agreement on 11 October 2007, each backdated to 26 March 2007 for the same car parking facilities (the “October 2007 concession”)⁴⁶ The October 2007 concession included a pricing policy in the following terms at Schedule 1 clause 3:
“Prestige will not charge customers daily or equivalent daily parking rates

⁴⁵ Concession agreement between EMIA and Prestige, 25 March 2004, signed.

⁴⁶ Concession agreement between EMIA and Prestige, 11 October 2007 signed.

which are lower than the daily rate from time to time applicable in EMIA's short stay car park at the Airport and Prestige shall provide to EMIA full details of its applicable charges and tariffs on demand".

The CAA refers to this clause as a "minimum pricing obligation" or "MPO".

52. **2007:** Pursuant to the October 2007 concession, Prestige's car parking services were provided from the south yard of Building 107 and from another facility known as "Building 35". Building 107 was Prestige's customer-facing facility where passengers handed their vehicles over to Prestige. Prestige then parked the vehicles in Building 35. A further, three-year concession agreement, including a MPO in similar terms to the October 2007 concession, was entered into between the Parties on 27 November 2007 along with an associated lease agreement of the same date (the "November 2007 arrangements").⁴⁷ Schedule 1 Clause 3 of the November 2007 concession stated that:
- "Prestige will not charge customers daily or equivalent daily parking rates which are lower than the daily rate from time to time applicable in EMIA's short stay car park at the Airport and Prestige shall provide to EMIA full details of its applicable charges and tariffs on demand"*
53. **2008:** In 2008, Prestige acquired a separate lease over additional facilities (known as "Building 97") at the Airport. This building was leased from the Trustees of the Derwent Freight Services Limited Directors Pension Scheme. EMIA was the head landlord and granted the Pension Scheme a licence to underlet Building 97 to Prestige.⁴⁸
54. **2009:** Prestige and EMIA collaborated to provide a 'Meet and Greet' service. Prestige was responsible for the delivery of the service with a fee [X] paid by EMIA [X]. Prestige used EMIA's short stay car park to exchange the vehicle with the customer for which it was charged [X]. Cars were left in the short stay car park for up to 12 hours. The service was initially a trial but was extended beyond its original period. Revenues

⁴⁷ Concession agreement between EMIA and Prestige, 27 November 2007 signed.

⁴⁸ Licence to underlet relating to 97 Beverley Road East Midlands International Airport between EMIA, Trustees of the Derwent Freight Services Limited Directors Pension Scheme and Prestige, dated 2008 unsigned.

Prestige derived from the Meet and Greet service were counted as part of the concession.⁴⁹

55. **2010:** EMIA introduced public charges for access to drop off and pick up from the forecourt of the Airport. This was set at £1 for stays of 20 minutes or less with additional charges applied for stays over 20 minutes. At this time, the trial 'meet and greet' service was ongoing and [§<].

56. The concession agreement relating to Building 107 and Building 35 was renegotiated for a further 12 months, culminating in a concession agreement dated 9 November 2010 and associated lease of the same date (the "November 2010 arrangements").⁵⁰ This covered the services as set out in the October and November 2007 concessions and did not incorporate the Meet and Greet service. The MPO was also revised to read:

"Prestige will not charge customers daily or equivalent daily parking rates which are lower than the daily rate from time to time applicable in EMIA's published parking tariff for the car park at the date of this agreement numbered 1 plus 15% at the Airport and Prestige shall provide to EMIA full details of its charges on demand. EMIA will notify Prestige of changes to the published parking tariff and Prestige shall make corresponding changes to customers' daily or equivalent daily parking rates within 48 hours of such notification."

57. **2011:** The concession came up again for renewal in 2011 and a new concession agreement, along with an associated lease, was signed on 20 July 2011 containing the revised MPO to run until 2014 (the "July 2011 Concession").⁵¹ The agreement contained a clause which stated that:

"Prestige will not charge customers daily or equivalent daily parking rates which are lower than the daily rate from time to time applicable in EMIA's published parking tariff for the car park at the date of this agreement

⁴⁹ Letter EMIA employee Five to Prestige employee Two regarding Valet Parking Trial at East Midlands Airport dated 26 June 2009, 11 September 2009, 17 December 2009 and 10 August 2010.

⁵⁰ Concession agreement between EMIA and Prestige, 9 November 2010 signed.

⁵¹ Concession agreement between EMIA and Prestige, 20 July 2011 signed.

numbered 1 plus 15% at the Airport and Prestige shall provide to EMIA full details of its charges on demand. EMIA will notify Prestige of changes to the published parking tariff and Prestige shall make corresponding changes to customers' daily or equivalent daily parking rates within 48 hours of such notification."

58. In 2011, the trial 'Meet and Greet' service was terminated. [§<].⁵²
59. **2012:** EMIA served Prestige notice of termination of the July 2011 Concession on 14 June 2012. The arrangements were terminated on 25 September 2012 and Prestige vacated Building 107.⁵³ As a result, Prestige down-sized its car parking operation to operate out of Building 97 only. Prestige undertook renovations to make the premises suitable for providing customer-facing parts of its service.
60. **December 2012:** Prestige ceased trading at the Airport.
61. We note the following as context to the developments over the Relevant Period in relation to the relevant market which is discussed in Chapter 7 below.
62. We find that significant barriers to entry created by the local planning regime reduced the scope for new entry at the facilities level, by limiting the extent of land available for use as secure car parking premises near the Airport. Notably:
- a) The Town and Country Planning (General Permitted Development) Order 1995 granted extensive development rights to Airport Operators to carry out development within their own operational land – this includes the construction of car parks. In EMIA's case, the Airport's operational land is identified on the Proposals Map

⁵² Letter EMIA employee Five to Prestige employee Two regarding Valet Parking Trial at East Midlands Airport dated 26 June 2009, 11 September 2009, 17 December 2009 and 10 August 2010.

⁵³ Letter from [§<] (EMIA) to Prestige employee One (Prestige), Subject: Lease dated 20 July between (1) EMIA and (2) Prestige, Part Building 35 and Northern Yard and South Yard of Building 107 EMIA 14 June 2012.

(North)⁵⁴. Therefore in relation to airport operational development (which would include the development of passenger car parking), within airport operational land, EMIA simply has to consult with the Local Planning Authority (NWLDC) prior to carrying out the development; there is no other restriction on their ability to carry out these works. EMIA does not need to submit a planning application for any operational development within airport operational land.

- b) The North West Leicestershire Local Plan (1991 – 2006) (NWLLP)⁵⁵ (& Proposals Map – North)⁵⁶ sets out detailed policies and specific proposals for the development and use of land, and guides most day-to-day planning decisions. The Airport sits in land designated for ‘Limits to development’ and designated ‘countryside’. Further the Leicester and Rutland Structure Plan 1991-2016 (LSP)⁵⁷ at paragraph 2.23 gives the following guidance on development in the countryside:

“The “Countryside” for the purposes of this policy, ..., will be the area beyond development limits, green wedges and areas of separation. In this area built development will not normally be appropriate.”

63. Over the Relevant Period, as owner of the Airport, EMIA held a persistently strong share of supply; being the largest supplier of car parking spaces and controlling a pay wall for passenger pick up and drop off. Prestige was the new entrant, starting initially with premium parking. It appears to have offered a superior product, with differentiated services, in terms of its close proximity to the Airport terminal and undercover feature.

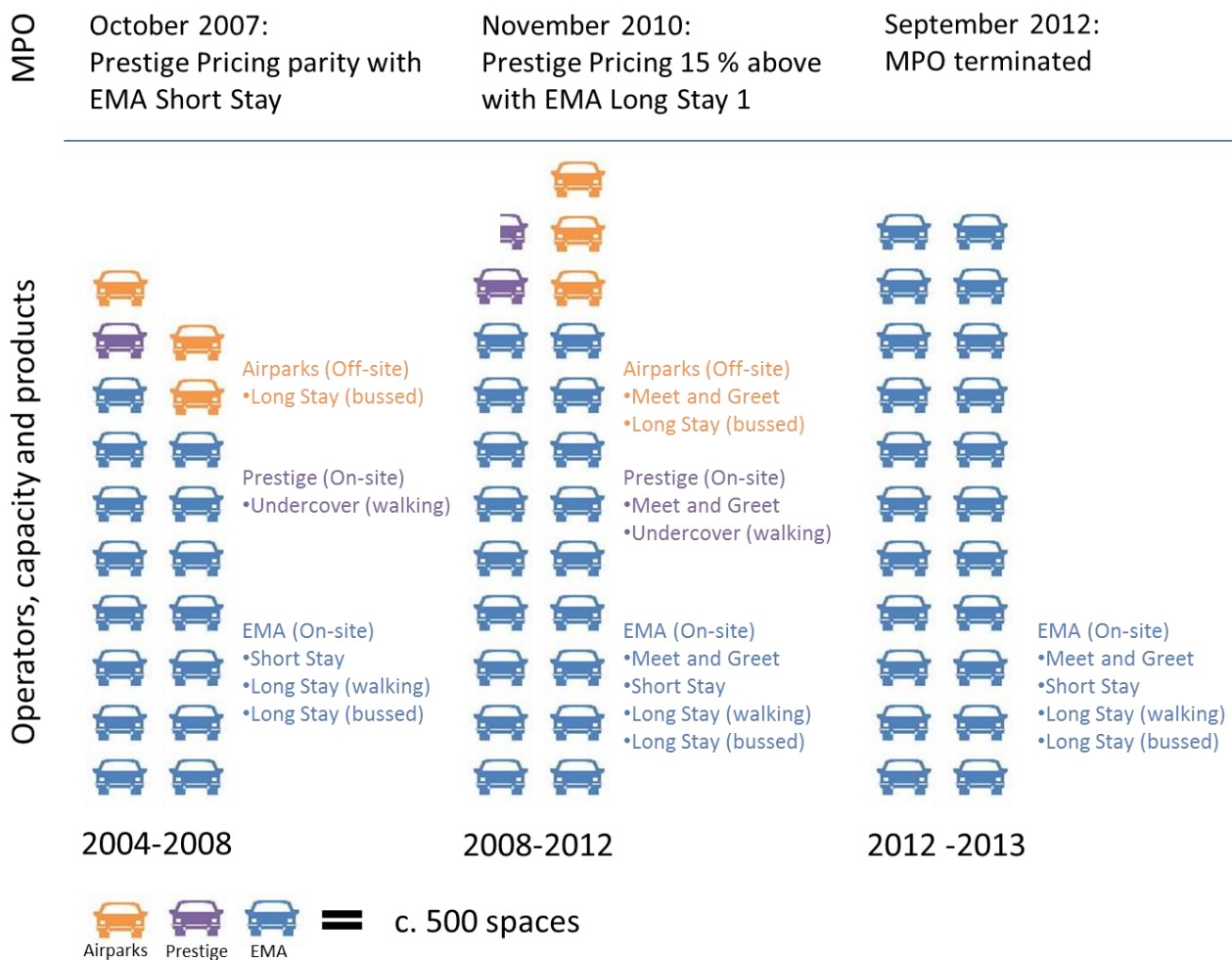
⁵⁴ Map North West Leicestershire Local Plan proposals map north undated.

⁵⁵ North West Leicestershire Local Plan written statement adopted, 22 August 2002.

⁵⁶ Map North West Leicestershire Local Plan proposals map north undated.

⁵⁷ Leicestershire, Leicester and Rutland Structure Plan 1996 to 2016 written statement adopted, 7 March 2005. This guidance was replaced in 2009 but was relevant for a significant proportion of the Relevant Period.

Figure 2: The MPO and development of car parking services



Source: CAA analysis

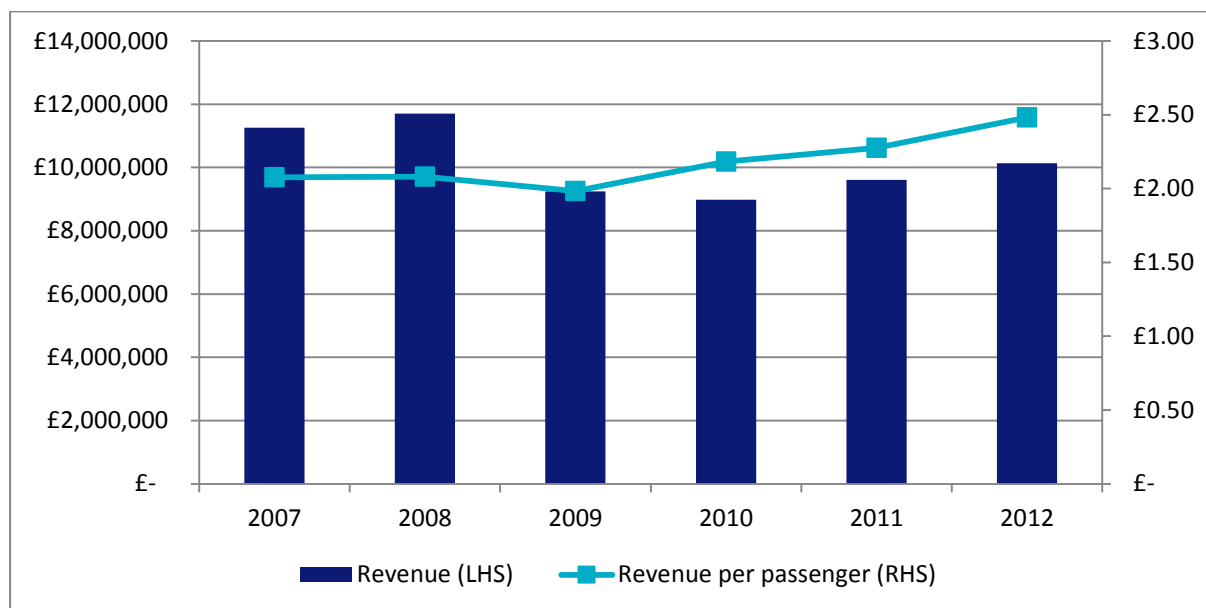
64. We find that products were priced in a hierarchy such that those that offered most convenience (i.e. closeness to the terminal) were more expensive than those further away. As such, ‘Short Stay’ car parking, which was provided directly in front of the terminal, and ‘Meet and Greet’ services were the most expensive services at the Airport. ‘Long Stay (Walking)’ products, such as EMIA’s Long Stay 1 product, form the next tier down due to their increased walking distance to the terminal. ‘Long Stay (Bussed)’ products, such as that offered by Airparks, were the cheapest products due to the need for a transit time between the off-site premises and the terminal building. Between 2007 and 2010, therefore, Prestige’s pricing for its car parking services was linked to EMIA’s most expensive car park “Short Stay”. From November 2010, this restriction

was changed to be 15 per cent above the price of EMIA's Long Stay Car Park 1, which was a cheaper product than the "Short Stay".

65. The way that customers purchased airport car parking services at the Airport changed over the Relevant Period. The advent of the e-commerce introduced dynamic pricing moving away from the traditional "pay at gate" pricing structure that EMIA had been used to:
*"People do not just turn up at the car park and pay any more. They pre-book, which means that price is, you're starting to get yield management coming in ... the car park market changed, in that for the first 20-odd years of my time there, you simply turned up and paid the man at the gate or, you know, an exit machine, whatever the version was. For the last few years it's become more and more pre-book and that makes it much more complicated".*⁵⁸
66. EMIA secures a significant proportion of its revenue from car parking services. According to MAG *"in recent years non-aeronautical revenue streams such as parking and retail have played an increasing role in the overall commercial success of the airport"*.⁵⁹ EMIA's commercial revenues (which include car parking) increased from 38% of total revenues in 2007/8 to 52% of current total revenues in 2014/2015.
67. Figure 3 below shows that overall revenues fell for car parking during the Relevant Period by 10 per cent as passenger numbers dropped by 25 per cent (which is likely attributable to the 2008 economic crisis which had a significant impact on passenger numbers across the UK and particularly at regional airports). EMIA however was able to maintain and grow revenue around 19 per cent per passenger over the Relevant Period.

⁵⁸ Interview transcript of EMIA employee Two, dated 12 April 2016 page 57 line 23-25 and 33 to page 58 1-2.

⁵⁹ MAG, Overview and Development of Car Parking at East Midlands Airport, 22 September 2015 paragraph 12.1.

Figure 3: EMIA car parking revenue during the Relevant Period of the infringement**Notes:**

- revenue per passenger is calculated on the basis of total passengers at the Airport and not car parking transactions
- the Relevant Period is from at the latest October 2007 to September 2012
- data shown is for full calendar years

Source: CAA analysis of EMIA accounts data and CAA passenger statistics

68. Despite falling passenger numbers and new entry from a competitor (Prestige), EMIA was able to increase its revenue per passenger over the period and eventually the new entrant exited the market in 2012.

Chapter 5

Analysis – the legal, economic and evidential basis for a finding of an infringement of the Chapter I prohibition

69. This Chapter sets out the CAA's legal assessment of the facts which support the CAA's decision that the Parties entered into an agreement and ancillary concerted practices in the form of an exchange of sensitive pricing information between the Parties and monitoring of prices by EMIA to facilitate adherence to the anti-competitive agreement. This Chapter also sets out the CAA's assessment of the evidence supporting finding that the agreement and ancillary concerted practices formed part of a single continuous infringement which had as its object the restriction of price competition.
70. To establish a Chapter I infringement on the balance of probabilities, the CAA must establish the following elements: (a) an agreement, decision or concerted practice; (b) between two or more undertakings; (c) which has, as its object or effect, the prevention, restriction or distortion of competition within the United Kingdom and (d) has the potential to affect trade within the United Kingdom.

Two or more undertakings

71. Undertakings include any natural or legal persons who engage in economic activity.⁶⁰ The evidence set out below shows that both EMIA and Prestige are separate undertakings for the purposes of the Act. They do not form part of the same economic unit. Both are independent businesses that carried out their economic operations in pursuit of profit with separate management and control.

⁶⁰ See Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, [1993] 4 CMLR 306 and Case T-319/99 *Ferin v Commission*, [2003] ECR IT-357.

72. The key documentary evidence which supports this conclusion comprises:
- a) The entries for each company at Companies House.
 - i. EMIA is Company No.2078271, with its registered office at East Midlands Airport Castle Donington Derby DE74 2SA.⁶¹
 - ii. Prestige is Company No.4919592, with its registered office at 14 Pavilion Way, Castle Business Park, Loughborough, Leicestershire, LE11 5GW.⁶²
 - b) Separate ownership:
 - i. EMIA is ultimately owned by a consortium including IFM Investors (35.5%), Manchester City Council (35.5%) and nine other Greater Manchester Councils (29%).⁶³
 - ii. Prestige is ultimately owned by two shareholders as private individuals [X].
 - c) The concession agreements between the Parties signed October 2007⁶⁴, November 2007,⁶⁵ November 2010,⁶⁶ and July 2011⁶⁷ all identify EMIA and Prestige as separate contracting parties.
73. Interviewee evidence indicates that some of the personnel at EMIA may initially have thought of Prestige as a partner rather than an independent competitor. This view was expressed by interviewees at interview:
- a) “[X] I guess. It’s because you believe whoever is outsourcing some operations... There were other examples of outsourcing operations. So, security operations, within the terminal itself, baggage handling – all those sorts of services have... There’s a consideration as to whether you’re better placed to do it yourself or whether somebody else operating it is better positioned to do so. Clearly, to do so, we

⁶¹ Certificate of incorporation of a public limited company for East Midlands International Airport, dated 27 November 1986.

⁶² Certificate of incorporation of a private limited company for Prestige Parking Ltd, dated 2 October 2003.

⁶³ MAG’s corporate website:
<http://www.magworld.co.uk/magweb.nsf/Content/AboutUsAndOurAirports>.

⁶⁴ Concession agreement between EMIA and Prestige, 11 October 2007 signed.

⁶⁵ Concession agreement between EMIA and Prestige, 27 November 2007 signed.

⁶⁶ Concession agreement between EMIA and Prestige, 9 November 2010 signed.

⁶⁷ Concession agreement between EMIA and Prestige, 20 July 2011 signed.

believed somebody was better positioned to do so, on behalf of our customers. Because, ultimately, any issues or any benefits that come on the airport site, even though you know you're a landlord and they're somebody who's operating a service within the airport, customers all see it as the airport – even Airparks at times.”⁶⁸

b) *“I always saw it as that they were working with us not competing against us.”⁶⁹*

74. Nevertheless - regardless of what some EMIA employees might have thought - Prestige was not in law an agent or part of a partnership with EMIA. EMIA did not regard Prestige as an agent, which would have given it authority to act on EMIA's behalf. The concession agreements do not amount to agency agreements. The documentary evidence clearly establishes that the Parties operated at arm's length and negotiated for their own private advantage. The evidence for this is that:

- a) Each of the Concession Agreements provided for Prestige to pay EMIA consideration in the form of a share of Prestige's gross revenue⁷⁰ in addition to building rents. Operations were under the control of Prestige themselves and service delivery under Prestige's control. The risk of operation, therefore, was held by Prestige.
- b) Each of the Concession Agreements contained a clause (Clause 23)⁷¹ headed 'No Partnership' which stated:

Nothing in this Agreement and no action taken by the parties pursuant to this Agreement shall constitute, or be deemed to constitute the parties a partnership, association, joint venture, or other co-operative entity.

⁶⁸ Interview transcript of EMIA employee One, dated 13 April 2016, page 21 line 16 – 25.

⁶⁹ Interview transcript of EMIA employee Five, dated 10 March 2016, page 8 line 201.

⁷⁰ Concession agreement between EMIA and Prestige, 11 October 2007 signed; Concession agreement between EMIA and Prestige, 27 November 2007 signed; Concession agreement between EMIA and Prestige, 9 November 2010 signed; and Concession agreement between EMIA and Prestige, 20 July 2011 signed.

⁷¹ Concession agreement between EMIA and Prestige, 11 October; 2007 signed; Concession agreement between EMIA and Prestige, 27 November 2007 signed; Concession agreement between EMIA and Prestige, 9 November 2010 signed; and Concession agreement between EMIA and Prestige, 20 July 2011 signed.

- c) Internal emails⁷² within EMIA, which set out the correct position: *We have to remember that this [Prestige] is not a management contractor they have entered into a business venture with our blessing...*⁷³

The MPO arrangements

Existence of an agreement

75. The fact that there was an agreement in place is clearly evidenced by four signed concession agreements between the Parties. The concession agreements between the Parties signed October 2007,⁷⁴ November 2007,⁷⁵ November 2010,⁷⁶ and July 2011⁷⁷ are all formal, written contracts to which Prestige and EMIA freely contracted. They all contained an explicit clause setting out the “Pricing Policy” requiring Prestige to take account of EMIA’s price points when setting its own charges for its car parking services. Those documents speak for themselves as agreements which evidence a ‘meeting of minds’ for the purposes of competition law.
76. The other contemporaneous documents show that the Parties made reference to the concession agreements in dealing with each other and that EMIA actively monitored compliance with the MPO by Prestige.
- a) *My final observation is that Prestige is cheaper on 3 and 4 nights- can you please check the contract and challenge/change accordingly?*⁷⁸

⁷² The manner in which the Parties thought about their commercial relationship is not determinative of its legal status. However, it is instructive to note that they also (at times) apprehended the correct legal position.

⁷³ Email of EMIA employee Four to EMIA employee Two, EMIA employee Three, EMIA employee Five, EMA Legal of 25 March 2010. EMA Legal was legal service manager for MAG based at EMIA.

⁷⁴ Concession agreement between EMIA and Prestige, 11 October 2007 signed.

⁷⁵ Concession agreement between EMIA and Prestige, 27 November 2007 signed.

⁷⁶ Concession agreement between EMIA and Prestige, 9 November 2010 signed.

⁷⁷ Concession agreement between EMIA and Prestige, 20 July 2011 signed.

⁷⁸ Email from EMIA employee Three to EMIA employee Five, Subject: Car park price comparisons, 23 June 2010 .

- b) *On the Prestige website I have noticed that booking 30 days in advance, Prestige are lower than our website price... Do you know of or could you forward me the contract area that relates to the Prestige contract and any pricing restrictions that are in place regarding the difference in pricing policy?*⁷⁹
- c) *there is still evidence that Prestige are failing to sell at 'not less than 15% more than our CP1 so/ price.' (think that is what the agreement says) Have you received a response yet and if not [EMA Legal] can we discuss?*⁸⁰
- d) *I am aware that you have sold your product below our car park 1 web price on a number of occasions during the current concession year. As you will recall the Airport put a provision in the existing concession to ensure that we avoided your premium product undercutting the EMA car park 1 web price.*⁸¹
- e) *"We noticed last week that you were displaying these products at a discount and that is not permitted under any distribution agreement that we have with any of the 3rd parties that we work with. I can see that [sic] you are currently advertising at parity but I was wondering if you are able to tell me with which agent you are placing these bookings?"*⁸²

Object of restricting competition

77. There is strong evidence that the MPO agreed between the Parties had as its object the prevention, restriction, or distortion of competition.
78. In this case, there is clear documentary evidence as well as contextual background that the MPO was hybrid in nature, with the arrangements in

⁷⁹ Email from [X] to EMIA employee Four, Subject: Prestige Pricing, 08 October 2010. We believe that [X] was an intern reporting to EMIA employee Five.

⁸⁰ Email from EMIA employee Four to [X], EMIA employee Three, EMA Legal and EMA Two, Subject: Prestige, 26 October 2010.

⁸¹ Statement appeared in Letters from EMIA employee Four (EMIA) to Prestige employee One (Prestige), Subject: Lease and concession for part building 35 plus the meet and greet yard/site for cabin, East Midlands Airport, dated 4 Feb 2011, 22 March 2011 and 24 March 2011.

⁸² Email from EMIA employee Five (EMIA) to Prestige employee Two (Prestige), Subject: EMIA price changes, 21 April 2011.

place between EMIA and Prestige having both vertical and horizontal elements:

- a) The arrangements are **vertical** since EMIA included the pricing policy in the concession arrangements as a condition of providing Prestige access to the car parking facilities at the Airport. There is a vertical relationship, where EMIA operates as landlord providing access to facilities at the Airport and Prestige acts as tenant, operating in the downstream market.
- b) There are also **horizontal** implications due to the competitive relationship between the Parties. When it entered the market in 2004, Prestige offered undercover car parking services. Both companies were active, during the Relevant Period, in providing competing car parking services at the Airport.

79. As price fixing arrangements which impose a MPO on Prestige as the downstream operator, the MPO, by its very nature, clearly restricted and distorted competition. It is not apparent why EMIA, as owner of the Airport and the car parking facilities, should consider that it has the prerogative to dictate the minimum prices and types of services offered to consumers by an independent operator and downstream competitor.
80. These arrangements also share similarities with resale price maintenance, whereby the upstream supplier restricts the minimum sale price that a downstream retailer may charge for its products. In this case, EMIA was supplying car parking facilities to Prestige and, as a condition of such supply, determined the minimum price for the services to be sold by Prestige using those facilities. Prestige's prices were fixed by reference to the prices that EMIA itself charged for its equivalent services, so as not to undercut EMIA's competing offering in the same market.
81. For the reasons given above, we therefore consider that this was a hybrid arrangement.

Motive

82. We have not been able to ascertain the origins of the MPO and the reasons behind EMIA's decision to include it in the October 2007 Concession. There is no requirement for us to establish EMIA's motives to prove an object case but the Parties' intentions can sometimes shed light on the intended purpose of the constraint.
83. Even if EMIA's motive cannot be stated clearly, there is clear evidence that, when framing the terms of the MPO, EMIA was conscious of the restrictions it could potentially place on Prestige's business. It was aware of the need to calibrate the MPO so as to allow Prestige to offer a premium product but at the same time limit Prestige's ability to compete directly with EMIA's more basic car parking offering.
- a) *I suggest that maybe we tie the pricing policy in to our pre book prices as opposed to the gate prices otherwise that would impose a serious commercial restriction on Prestige.*⁸³
 - b) When put to EMIA employee Five at interview, he described this comment as: *trying to adopt a position of being fair and reasonable in trying to work with them and not tie their hands completely.*⁸⁴
84. In addition, there is clear evidence that early on the Parties suspected that the MPO may be anti-competitive and a potential breach of the law. However, it appears that neither Party communicated its concerns to the other and that the concerns were not acted upon.
- a) EMIA's internal legal adviser stated to his colleagues that, '*Re pricing, if tested in Court I think this could be challengeable on competition and restraint of trade grounds*'.⁸⁵

⁸³ Email EMIA employee Five to EMIA employee Four cc EMA Legal, EMIA employee Two, EMIA employee Three 25 March 2010.

⁸⁴ Interview transcript of EMIA employee Five, dated 10 March 2016, Page 45, Lines 1148-1158.

⁸⁵ Email from EMA Legal to EMIA employee Five cc EMIA employee Four, EMIA employee Two and EMIA employee Three 25 March 2010.

- b) In a Heads of Terms for the 2007 agreement⁸⁶ annotated by Prestige the MPO is circled crossed and labelled 'NO!' When asked at interview what that 'NO!' meant Prestige employee One stated that at the time he considered the clause may be illegal as '*that is restrictive, which is against the law*'⁸⁷ Prestige employee One could not recall whether he sought legal advice on this or raised it with EMIA.

Nature and purpose of the agreement

85. The key documentary evidence which supports an object finding comprises the concession agreements between the Parties each of which contains clauses which manifestly have the object of restricting competition (Schedule 1, Paragraph 3):

- a) *Prestige will not charge customers daily or equivalent daily parking rates which are lower than the daily rate from time to time applicable in EMIA's short stay car park at the Airport and Prestige shall provide to EMIA full details of its applicable charges and tariffs on demand.*⁸⁸
- b) *Prestige will not charge customers daily or equivalent daily parking rates which are lower than the daily rate from time to time applicable in EMIA's short stay car park at the Airport and Prestige shall provide to EMIA full details of its applicable charges and tariffs on demand.*⁸⁹
- c) *Prestige will not charge customers daily or equivalent daily parking rates which are lower than the daily rate from time to time applicable in EMIA's published parking tariff for the car park at the date of this agreement numbered 1 plus 15% at the Airport and Prestige shall provide to EMIA full details of its charges on demand. EMIA will notify Prestige of changes to the published parking tariff and Prestige*

⁸⁶ Letter from EMIA employee Four (EMIA) to Prestige employee One (Prestige), Subject: Lease and concession for Hanger 35, East Midlands Airport, 24 January 2007. Annotated.

⁸⁷ Interview transcript of Prestige employee One, dated 11 March 2016 lines 667-668.

⁸⁸ Concession agreement between EMIA and Prestige, 11 October 2007 signed.

⁸⁹ Concession agreement between EMIA and Prestige, 27 November 2007 signed.

*shall make corresponding changes to customers' daily or equivalent daily parking rates within 48 hours of such notification.*⁹⁰

- d) *Prestige will not charge customers daily or equivalent daily parking rates which are lower than the daily rate from time to time applicable in EMIA's published parking tariff for the car park at the date of this agreement numbered 1 plus 15% at the Airport and Prestige shall provide to EMIA full details of its charges on demand. EMIA will notify Prestige of changes to the published parking tariff and Prestige shall make corresponding changes to customers' daily or equivalent daily parking rates within 48 hours of such notification.*⁹¹

86. Those clauses, by their very nature, are capable of restricting and distorting competition to a serious degree as they prevent the new entrant, Prestige (who was the only competitor to EMIA at the Airport⁹²) from offering lower prices for its own car parking services that undercut EMIA's offering.
87. It appears that the MPO was imposed by EMIA on Prestige, originally as a requirement of the October 2007 concession agreement and was then passed into subsequent successive concessions.⁹³ The first mention of the MPO between the Parties is in a letter dated 24 January 2007.⁹⁴ Prestige has claimed that it did not respond to EMIA on the imposition of the MPO. However, a red line mark up of the Heads of Terms for 24 January 2007⁹⁵ indicates that Prestige sought to amend the MPO and that active negotiations did take place on the MPO for concluding the October 2007 concession at least. At interview, Prestige employee One contested

⁹⁰ Concession agreement between EMIA and Prestige, 9 November 2010 signed.

⁹¹ Concession agreement between EMIA and Prestige, 20 July 2011 signed.

⁹² All other third party car parking provision, such as that provided by Airparks from the Donington Raceway, required some form of transfer service (generally bus) and was at some distance from the Airport terminal.

⁹³ Interview transcript of Prestige employee One, dated 11 March 2016 lines 625-626.

⁹⁴ Letter from EMIA employee Four to Prestige employee One, Subject: Lease and concession for Hangar 35, East Midlands Airport, 24 January 2007.

⁹⁵ Letter from EMIA employee Four (EMIA) to Prestige employee One (Prestige, Subject: Lease and concession for Hangar 35, East Midlands Airport, 24 January 2007 [with red annotations].

that the red mark-up Heads of Terms originates from Prestige.⁹⁶ However, in the CAA's view, the content of the letter,⁹⁷ a covering email provided by EMIA⁹⁸ and commentary by EMIA employee Four⁹⁹ on how negotiations would have taken place indicated more strongly that it is a Prestige annotated document.

88. The MPO started off in 2007 as an equality clause ("no lower than EMIA's charges"). Then in 2010, the clause was changed such that Prestige's prices had to remain 15% higher than EMIA's Long Stay Car Park 1. Whilst this may have lessened the restriction (depending on the differential that EMIA maintained between Long Stay Car Park 1 and its Short Stay Car Park), that differential, by its very nature, sheltered EMIA from competition from Prestige, by potentially preventing consumers from having the benefits of lower prices, the convenience of a shorter walking distance and differentiated services offered by the new entrant Prestige. Such denial is sufficient to constitute a sufficient degree of harm to competition.
89. There is clear documentary evidence that EMIA wished to use the MPO as leverage in negotiations regarding the grant or renewal of the concessions in order to control Prestige's pricing and the extent of its ability to compete downstream. See, notably Contractual Heads of Terms Documents, provided by EMIA to Prestige:
- a) *Airport will require a provision in connection with your pricing policy and the Airports own car parking product, the specifics need to be discussed with EMIA employee Five¹⁰⁰ [Statement appeared in*

⁹⁶ Interview transcript of Prestige employee One, dated 11 March 2016 lines 736-737.

⁹⁷ Letter from EMIA employee Four (EMIA) to Prestige employee One (Prestige, Subject: Lease and concession for Hangar 35, East Midlands Airport, 24 January 2007 [with red annotations].

⁹⁸ Email chain from EMIA employee Four (EMIA) to [redacted] (EMIA) EMIA employee Two (EMIA), [redacted] subject Fw: Prestige H.O.T.' Dated: 6 March 2007.

⁹⁹ Interview transcript of EMIA employee Four, dated 8 March 2016, line 300-302.

¹⁰⁰ Statement appeared in letters, Letter from EMIA employee Four (EMIA) to Prestige employee One (Prestige). Subject: Lease and concession for part building plus the meet and greet yard/site for cabin, EMA, 4 March 2010 and Letter from EMIA employee Four (EMIA) to Prestige employee Two (Prestige) , Subject: Lease and concession for building 96a plus the meters and greeters yard and site for cabin, EMA, 28 January 2010.

Letters from EMIA employee Four to Prestige employee Two of 28 January 2010; and 4 March 2010.

- b) *"The Airport requires a provision in connection with your pricing policy and the Airports own pre-booked car parking products as offered for sale on the Airport's own website, currently at www.eastmidlandsairport.com. The Airport require that your car parking rates never drop below a figure which is equal to the minimum published parking tariff for the car park currently known as car park 1 plus 15%. The prices will vary according to any given arrival date in line with a pricing calendar to be provided by the Airport and which may be changed from time to time. The Airport will keep you informed as to any price changes to our car parking product and require you to make any changes to your tariff within 48 hours of formal notification from the Airport."¹⁰¹*
- c) *I am aware that you have sold your product below our car park 1 web price on a number of occasions during the concession year. As you will recall the Airport put a provision in the existing concession to ensure that we avoided your premium product undercutting the EMIA car park 1 web price. The rationale is you are providing a complimentary [sic] product and should not be competing on price with EMIA. This is a fundamental point and without compliance to this point I will not get the consent of the Airport Directors to renew the concession and lease.¹⁰² [emphasis added]*

90. Interviewee evidence indicates that EMIA considered that as Prestige's landlord, it was entitled to limit Prestige's ability to compete and prevent it acting as a direct competitor for basic short-stay services. This was echoed by EMIA employee Five:

¹⁰¹ Letter from EMIA employee Four to Prestige employee One, Subject: Lease and concession for part building 35 plus the meet and greet yard/ site for cabin, East Midlands Airport, 1 April 2010.

¹⁰² Letter from EMIA employee Four (EMIA) to Prestige employee One (Prestige), Subject: Lease and concession for part building 35 plus the meet and greet yard/site for cabin, East Midlands Airport, 22 March 2011.

- a) *“it was perceived that we were working with them, why would we want to provide somebody with rented space to provide what we thought was a premium product and then find ourselves in competition with them... You wouldn’t... It’s not something you would particularly...you wouldn’t want to encourage a competitor into your own back yard”.*¹⁰³
- b) *“if the retail outlets had been selling, I don’t know, giving away carrier bags that said “cheaper to park offsite at Air Parks” we would have said hang on a minute, you cannot do that because we are working together here, we are kind of trying to be a jigsaw rather than compete with each other.”*¹⁰⁴

91. Whilst EMIA may be entitled to ensure that Prestige complied with objective qualitative criteria, such as ensuring that its premises were in keeping with EMIA’s standards¹⁰⁵ and that the quality of its services did not reflect badly on the Airport’s reputation, the CAA considers that it had no legitimate interest in seeking to dictate Prestige’s prices.

92. The likely extent of those constraints is set out in interviewee evidence:

- a) On Prestige’s ability to price to meet competition EMIA employee Five noted *“if Prestige had wished to take £5 off their price for Sunday stay in June to compete with Holiday Extras I am guessing provided that didn’t compromise where their product fitted with us then that would have been OK.”*¹⁰⁶
- b) Prestige employee Two noting in relation to Prestige’s ability to recover from events outside of their control, such as ash clouds, *“working within the constraints of what they wanted us to do, you know, I couldn’t suddenly do a flash sale. I couldn’t go, ‘Right, you*

¹⁰³ Interview transcript of EMIA employee Five, dated 10 March 2016, lines 309 to 316.

¹⁰⁴ Interview transcript of EMIA employee Five, dated 10 March 2016, lines 338 to 341.

¹⁰⁵ Such as the requirement in the concession that ‘[all] drivers of vehicles must have a full driving licence of the appropriate class as required by law for the class of vehicle driven by such driver and for the purpose for which it is used...’ Concession agreement between EMIA and Prestige, 9 November 2010 signed – Schedule 1 (2.3).

¹⁰⁶ Interview transcript of EMIA employee Five, dated 10 March 2016, lines 836-838.

*know, we're flying again. Book your car parking at £5.99', and, and that sort of stuff. You just, you know, you just couldn't do it."*¹⁰⁷

93. This illustrates the potential extent to which Prestige's ability to compete was constrained in that it was prevented from reacting to both its customers and competitors, by altering its product or pricing to reflect changing market conditions. In restricting Prestige's pricing flexibility, the MPO had the potential to reduce significantly competitive pressure for EMIA's own car parking services. The agreement therefore, by its very nature, had potential to raise prices artificially particularly for car parking services within walking distance of the terminal to distort competition between such services and those provided at the Airport's own car parks.
94. In the light of the all of the above considerations, the CAA therefore finds that the agreements constitute an infringement with the object of preventing, restricting or distorting competition both vertically by potentially limiting the ability of Prestige to respond to market conditions and also horizontally by potentially restricting the price competition faced by EMIA's own car parking services.

Appreciability

95. The CMA¹⁰⁸ and EC¹⁰⁹ Guidance sets out thresholds for the assessment of the appreciability of agreements. The *de minimis* thresholds do not apply where agreements have as their object the prevention, restriction or distortion of competition.

Effect on trade

96. The MPO clearly had the potential to affect, directly or indirectly, the pattern of trade in the UK by potentially diverting custom away from Prestige in favour of EMIA.

¹⁰⁷ Interview transcript of Prestige employee Two data 25 April 2016 page 64 line 14 to 17.

¹⁰⁸ OFT (2004), Agreements and Concerted Practices, OFT 401.

¹⁰⁹ 2014/C 291/01 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice).

97. Given the revenues earned by EMIA from leasing its car parks facilities (including its percentage concession arrangements on revenues from car parking services), those potential effects were appreciable.
98. Car parking is an important source of revenue for airports providing 14 per cent of revenue for MAG in 2012.¹¹⁰ Our analysis of revenue data provided by EMIA indicates that car parking generated revenue on average of £9.8 million a year for the period of the infringement.¹¹¹ This equates to almost a fifth of EMIA's total revenue in 2012 and almost a fifth of MAG total revenue from car parking in 2012.¹¹²

Information exchange and monitoring

99. The following key documentary evidence supports the CAA's finding that the Parties engaged in the exchange of pricing information with a preference for cooperating together in lieu of competition:
- a) The 2010 concession agreement introduced an information exchange to the agreement whereby *"EMIA will notify Prestige of changes to the published parking tariff and Prestige shall make corresponding changes to customers' daily or equivalent daily parking rates within 48 hours of such notification."*¹¹³
 - b) The 2011 concession agreement which contained an identical provision: *"EMIA will notify Prestige of changes to the published parking tariff and Prestige shall make corresponding changes to customers' daily or equivalent daily parking rates within 48 hours of such notification."*¹¹⁴

¹¹⁰ Manchester Airport Group, Annual Report and Accounts 2012-13 show MAG (as a group) had total revenues of £373.1 million and total car park revenues of £52 million.

¹¹¹ Table "Car Parking Incomes". From April 2004 to March 2015 provided by MAG in response to Section 26 notice of 23 June 2015.

¹¹² Manchester Airport Group, Annual Report and Accounts 2012-13 show EMIA had a total revenue £50.2 million and MAG as a group had total car park revenues £52 million.

¹¹³ Concession agreement between EMIA and Prestige, 9 November 2010 signed.

¹¹⁴ Concession agreement between EMIA and Prestige, 20 July 2011 signed.

100. The evidence shows that, pursuant to the terms of the Concession Agreements, EMIA provided Prestige with regular information regarding its current pricing policies which were given several months in advance in an easy accessible format:
- a) There are numerous emails¹¹⁵ from EMIA employee Five to Prestige employee Two, which have pricing data attached. Though the attachments have not been submitted to the CAA, the covering sheets for many of these sheets shows that pricing data was being provided months in advance. For example, the 13 October 2011 email from EMIA employee Five to Prestige employee Two reads: *for your information here are our updated calendars through to 31st March 2013 plus some tariff band amendments*. This document was put to EMIA employee Five in interview and he was asked if he knew what his prices were so far in advance. He stated: *We would have. We were always... We wanted to have a long date so that anybody wanting to book car parking could find it.*¹¹⁶
 - b) *They did send me, they used to send me a graph with their bandings of prices on which were a coloured banded pricing structure as to what they were, they were doing. So yes, I did, they did send me that. That did come from EMIA employee Five and I was given that for a good six-monthly period and I would structure my prices not to be plus 15% but I would structure my prices accordingly to ensure that we were competitive.*¹¹⁷
 - c) Prestige employee Two, when asked at interview how long it would take him to manually compile the information being sent to him by EMIA told us that it would be a cumbersome task as he would be gathering information regarding 300 days' worth of pricing.¹¹⁸

¹¹⁵ 33 emails sent between 20 October 2010 to 31 January 2012 see annex 5 for details.

¹¹⁶ Interview transcript of EMIA employee Five, dated 10 March 2016, Page 91, Line 2323-2324.

¹¹⁷ Interview transcript of Prestige employee Two data 25 April 2016 Page 47, Lines 22-26.

¹¹⁸ Interview transcript of Prestige employee Two data 25 April 2016 Page 71, Line 31 – Page 72, Line 26.

101. Those clauses have to be seen in the wider context that the information exchange was implemented as a means of facilitating compliance with, the MPO. This was affirmed by EMIA employee Five at interview who acknowledged that the purpose of the exchange of pricing data was to facilitate compliance by Prestige with the MPO.¹¹⁹
102. Even where it concerned current pricing information, the schedules sent by EMIA to Prestige had the effect of simplifying what would otherwise have been a time-consuming process of gathering pricing data. The level and frequency of the information also facilitated the collation of data and made it easier for Prestige to know EMIA's pricing and ensure its compliance:
- a) *I appreciate that you have been able to access these via our website but you may find it easier to refer to the attached sheet which highlights the prices and price bands on which we are currently pricing all of pre bookings for the Car Park 1 Special Offer product. It is my intention to issue updates of this schedule to you as and when the prices for the pre booked product are revised and I hope that you will find this useful.*¹²⁰
 - b) The variety of emails from EMIA employee Five to Prestige employee Two providing pricing data from EMIA.¹²¹
103. That conclusion is further corroborated by the following evidence from the interviewee interviews:
- a) Prestige employee Two stated that acquiring the current prices of future car parking dates manually would have been a *10 to 12-hour task, I would have said, because you've got seven different car parks with anything from one to 28 day stays, so what's that it's seven times 28.*¹²²

¹¹⁹ Interview transcript of EMIA employee Five, dated 10 March 2016, Page 71 Lines 1805-1811.

¹²⁰ Email from EMIA employee Five to Prestige employee Two cc EMIA employee Four EMA Legal, Subject: Car Park 1 Prices, 10 February 2011 15:24.

¹²¹ 33 emails sent between 20 October 2010 to 31 January 2012 see annex 5 for details.

¹²² Interview transcript of Prestige employee Two data 25 April 2016 Page 72, Lines 27-28.

b) *...what we did to them was to say in simple form is, em, these are our pre-booked prices for 1, 2, 3, 4, 5, 6 you know days' duration and for somebody travelling during this week on the calendar it's band A...*¹²³ EMIA employee Five described the job of gathering price data manually as 'tedious' and 'time consuming' and agreed that sending the data simplified matters.¹²⁴

104. There is evidence that the clauses were put into effect by EMIA and Prestige. There are numerous emails communications where EMIA notified Prestige of its prices and sent spreadsheets and schedules on a regular basis. Prestige did not object to receiving those schedules but accepted them and, according to the evidence of Prestige employee Two, took them into account when formulating its own pricing policy.¹²⁵ Even if Prestige did not comply with the differential, it still priced "under the radar" and adopted prices that were higher than they otherwise might have been.¹²⁶

105. In addition, the pricing information disclosed by EMIA often went beyond the information that Prestige would have needed to comply with the MPO. For instance, the attachment to an email between EMIA employee Five and Prestige employee Two 10 February 2011¹²⁷ shows a pricing table that covers 'Car Parks 1, 2, 3 & VIP M&G', a number of these price band update emails appear to have been sent by BCC to EMIA's car parking agents as well – for example an email of 17 November 2011¹²⁸ is addressed to 'All' and draws attention to 'Price changes for Longs Stay 1, 2, 3, Shuttle Plus and Shuttle Economy 1 and 2'. This practice may have saved EMIA officials time, however it means that EMIA shared additional

¹²³ Interview transcript of EMIA employee Five, dated 10 March 2016, Page 70 1777-1779.

¹²⁴ Interview transcript of EMIA employee Five, dated 10 March 2016, Page 70.

¹²⁵ Interview transcript of Prestige employee Two data 25 April 2016.

¹²⁶ Interview transcript of Prestige employee One, dated 11 March 2016.

¹²⁷ Email from EMIA employee Five to Prestige employee Two cc EMIA employee Four EMA Legal, Subject: Car Park 1 Prices, 10 February 2011 15:24.

¹²⁸ Email from EMIA employee Five to EMIA employee Five, Subject: Car park calendar and price changes, 17 November 2011 16:11.

pricing data with Prestige for car parking products other than those for Long Stay Car Park 1 as specified in the concession agreements.

106. With respect to EMIA's monitoring of Prestige's adherence to the MPO, we find that a number of times over the Relevant Period EMIA monitored and sought to take action on Prestige's pricing as set out in paragraph 73 above.
107. We therefore find that there were ancillary concerted practices consisting of information exchanges between the Parties, whereby EMIA and Prestige exchanged pricing information in a way that significantly reduced the cost of collection of those prices by EMIA and Prestige as compared to competitors not party to the exchange, as well as the monitoring of prices by EMIA. The purpose of this exchange was to facilitate adherence by Prestige to the written agreements which imposed the MPO.

Chapter 6

Single continuous infringement

108. There is a strong evidential basis for characterising the MPO arrangements and the ancillary concerted practices consisting of information exchange and monitoring as a single continuous infringement having met the conditions set out in Chapter 3 above. The Parties (both individuals and companies) are the same in each case, the method of enforcement is the same, the services concerned are the same, the rules for implementation are similar, and the objectives of the arrangements are identical.
109. Both the MPO and the ancillary practices of information exchange and monitoring had the common goal of limiting or distorting competition for airport parking at the Airport by ensuring that Prestige would only have access to such facilities on condition that it did not charge lower prices for its car parking prices than those charged by EMIA.
110. It would be cumbersome and artificial for the CAA to isolate each of the agreements separately and conduct an independent analysis. The fact that Prestige did not fully comply with the MPO at all times is irrelevant.

Chapter 7

Relevant markets

111. When applying the Chapter I prohibition, the CAA is obliged to define the relevant market only if it would be impossible without such a definition to determine whether the agreement, concerted practice or decision by an association of undertakings under investigation had as its object or effect the appreciable prevention, restriction or distortion of competition.¹²⁹
112. As stated above, the CAA concludes that there is a single continuous infringement comprised of a series of successive concession agreements and ancillary concerted practices which have as their object the restriction of competition. Therefore, the CAA considers that it is not obliged to define the relevant market in this case.¹³⁰
113. Notwithstanding the above, the CAA sets out below a high level overview of its view of the relevant market in order to calculate the relevant turnover of EMIA and Prestige in the market(s) affected by the infringement for the purposes of determining the level of any financial penalty that may be imposed on the Parties.
114. The CAA considers that there are two relevant markets in this case:
- the “upstream” or “primary” market in which EMIA grants to Prestige access to car parking facilities. These facilities constitute a “qualifying car park”;¹³¹ and

¹²⁹ Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, at paragraph 230 and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, at paragraph 74 .

¹³⁰ This principle was applied by the CAT in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, in which the CAT stated at [176] that ‘[i]n Chapter I cases, unlike Chapter II cases, determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement’.

¹³¹ See assessment of Airport Operation Services at paragraphs 15-18 above.

- the “downstream” or “secondary” market in which both EMIA and Prestige competed during the Relevant Period to provide car parking services to passengers.¹³²

115. In both cases, the geographic market is the Airport.

¹³² EMIA has argued that the downstream market is wider, covering a number of access modes to the Airport, including bus services, exclusive private hire or taxis agreements as well as car parking spaces and passenger pick up and drop off. For the purposes of this Decision, in order to establish an object infringement, it is not necessary or appropriate to engage in a detailed analysis of the competitive constraints of the market, include the degree of substitutability between various access modes. For present purposes, we refer to the car parking services market to provide an analytical framework for our analysis.

Chapter 8

Conclusions

116. The CAA finds that between at the latest 11 October 2007, when the Parties entered into a lease and concession agreement and 25 September 2012, when the lease and concession arrangements between the Parties were terminated, (the Relevant Period), EMIA and Prestige infringed the Chapter I prohibition by participating in an agreement which had as its object the prevention, restriction or distortion of competition in relation to access to car parking facilities at the Airport.
117. The infringement took the form of an agreement by which the Parties agreed during the Relevant Period to fix the minimum price that Prestige charged its customers for car parking services at the Airport, as a condition of EMIA granting to Prestige access to its facilities for car parking services at the Airport. This condition is referred to in this Decision as the “minimum pricing obligation” or “MPO”. This agreement was supported by ancillary concerted practices consisting of an information exchange where the Parties exchanged pricing information to facilitate Prestige’s adherence to the MPO between at least November 2010 and September 2012 and monitoring of Prestige’s prices by EMIA.
118. In addition, the CAA further finds that the conduct described above comprises a single continuous infringement. It is clear that the Parties shared a common objective, took steps to achieve the common objective, and that each Party was aware of the other Party’s conduct.

Signature:

Date: 15 Dec 2016

Kate Staples

Senior Responsible Officer

General Counsel and Secretary to the CAA

Appendix A

Key Individuals interviewed

Name	Positions	Dates
[REDACTED] Prestige employee One	[REDACTED]	[REDACTED]
Prestige employee Two	[REDACTED]	[REDACTED]
EMIA employee One	[REDACTED]	[REDACTED]
EMIA employee Two	[REDACTED]	[REDACTED]
EMIA employee Three	[REDACTED]	[REDACTED]
EMIA employee Four	[REDACTED]	[REDACTED]
EMIA employee Five	[REDACTED]	[REDACTED]

Appendix B

Penalties notice to EMIA/MAG pursuant to Rule 12 of the CMA Rules

1. This documents sets out penalties calculation for MAG / East Midlands International Airport. The CAA finds that MAG/EMIA is in breach of Chapter I of the Competition Act as set out in the substantive analysis of the Decision to which this notice is annexed.
2. The penalty contained within this document has been calculated in accordance with the OFT's Guidance as the appropriate amount of a penalty (OFT423) which has been adopted by the CMA Board and the CAA as a concurrent regulator (the Guidance). The Guidance sets out six steps for the calculation of financial penalty:¹³³
 - **Step 1:** calculation of a starting point
 - The starting point takes account of the seriousness of the infringement and the relevant turnover of the undertaking. To reflect the serious of the infringement the CAA may apply a factor of up to 30 per cent of relevant turnover. The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year prior to the cessation of the infringement.
 - **Step 2:** adjustment for duration
 - A multiple is applied for the duration of the infringement. The starting point may be increased by a multiple of 1 for each year or part year that the infringement persisted.
 - **Step 3:** adjustments for aggravating or mitigating factors
 - Adjustments can be made for aggravating factors, to increase the penalty, or mitigating factors, to reduce the penalty.
 - **Step 4:** adjustments for deterrence and proportionality

¹³³ OFT423.

- Adjustments can be made in relation to specific deterrence or proportionality.
- **Step 5:** adjustment for the statutory cap and to avoid double jeopardy
 - Adjustments must be made in relation to the statutory cap to ensure that the penalty does not exceed 10% of the worldwide turnover of the undertaking's corporate group, based on its turnover in the financial year prior to the decision. At this stage adjustments can also be made to account for any double jeopardy.
- **Step 6:** adjustment for leniency and/or settlement discounts
 - At step 6 adjustments are made for leniency and for whether the party has settled.

Relevant market

3. For the purpose of the penalties notice we consider that there are two relevant markets, which were affected by the infringement.
 - a) The “upstream” or “primary” market in which EMIA is providing Prestige with access to car parking facilities¹³⁴; and
 - b) The “downstream” or “secondary” market in which both EMIA and Prestige are competing to provide retail car park services.¹³⁵
4. The geographic scope of both relevant markets is the Airport.

Step 1

5. The CAA has selected a starting point of 25 per cent to reflect the seriousness of the infringement as a hardcore infringement whereby the

¹³⁴ The product market is at least as wide as the provision of facilities for car parking services at the Airport but could conceivably be wider to include the provision of access to facilities for the arrival and departure of passengers at the Airport.

¹³⁵ EMIA has argued that the downstream market is wider, covering a number of access modes to the Airport, including bus services, exclusive private hire or taxis agreements as well as car parking spaces and passenger pick up and drop off. For the purposes of this draft penalty statement, it is not necessary or appropriate to engage in a detailed analysis of the competitive constraints of the market, including the degree of substitutability between various access modes. For present purposes, we refer to the car parking services market to provide an analytical framework for our summary analysis.

parties sought to fix minimum prices in respect of car parking services at the Airport.

6. For relevant turnover the CAA has taken the parties' respective turnover accrued from the provision of car parking services – including payments made to EMIA by Prestige. It is these revenues that were directly affected as a result of the price fixing agreement.
7. On average over the term of the infringement, EMIA earned revenues of approximately £9.8m a year over the relevant period. In the last financial year prior to the cessation of the infringement EMIA earned revenues of £9,492,843 (Revenue data provided by MAG 2011/12).¹³⁶ This figure has already been modified for direct taxes, during 2011 the VAT was set at a rate of 20 per cent, and requires no further adjustment.
8. The starting point for the penalty calculation is therefore
*Step 1: £9,492,843 * 0.25 = £2,373,210.75*

Step 2

9. The infringement took place between at the latest 11 October 2007 and 25 September 2012, equating to a period of 5.0 years. In line with the Guidance, the CAA rounds the multiplier to the nearest quarter year. A multiplier of 5.0 is therefore applied to the starting point and the calculation is as follows:
*Step 2: £2,373,210.75 * 5.0 = £11,866,053.75*

Step 3

10. Step 3 entails an adjustment for aggravating or mitigating factors. We consider that there are a number of aggravating factors in this matter i) EMIA's aggravating role as instigator of the policy and; ii) MAG's failure to act on internal legal advice regarding the unlawful nature of the agreement under competition law.
11. The file indicates that, as owner and occupier of the Airport, EMIA exercised sole control over car parking slots at the Airport terminal. On a number of occasions in correspondence with Prestige EMIA relied on its

¹³⁶ See Guidance, para 2.7. These figures are derived from data provided by EMIA in its response to a section 26 notice dated 23 June 2015.

control of facilities in negotiations regarding the pricing policy. EMIA made access to its facilities contingent on the MPO being in place.¹³⁷ Evidence shows that EMIA instigated the pricing policy requirement.

12. It also appears from the file that MAG did not take sufficient account of internal legal advice at the time of the drafting of the November 2010 agreement. It appears that a legal risk was raised by its in-house lawyers as to the legality of the agreement. MAG disregarded this advice and continued to implement the policy without taking further external advice or immediately reporting the previous arrangements to the authorities.
13. We consider that, together, these aggravating factors should increase the penalty by 10 per cent.
14. We also note that MAG/EMIA has conducted a series of competition law compliance activities which acts as a mitigating factor. This scheme appears to be in alignment with the CMA guidance on effective compliance schemes.
15. We consider that this mitigating factor should reduce the penalty by 5 per cent.
16. In light of such circumstances, overall the CAA increases the penalty by 5 per cent to reflect aggravating and mitigating factors
Step 3: $£11,866,053.75 * 1.05 = £12,459,356.44$

Step 4

17. Adjustments may be made for proportionality to ensure specific or general deterrence. These factors may reflect the size of the company, whether it earns significant revenue outside the relevant market or to reflect the economic benefit gained from the infringement. Although we acknowledge that the undertaking earns significant revenues outside the relevant market (both at the Airport and from other airports in the group), we consider that in this particular instance the penalty represents a significant

¹³⁷ See for example Letter from EMIA employee Four (EMIA) to Prestige employee Two (Prestige), Subject: Lease and concession for building 96a plus the meters and greeters yard and site for cabin, EMA, 28 January 2010, Letter from EMIA employee Four to Prestige employee One, Subject: Lease and concession for part building 35 plus the meet and greet yard/ site for cabin, East Midlands Airport, 1 April 2010 and Letter from EMIA employee Four (EMIA) to Prestige employee One (Prestige), Subject: Lease and concession for part building 35 plus the meet and greet yard/site for cabin, East Midlands Airport, 22 March 2011.

proportion of revenue of EMIA and a significant proportion of profit for MAG. On that basis we do not propose to make any specific adjustments to reflect proportionality or specific deterrence in this matter.

Step 4: no adjustments

Step 5

18. At Step 5 we are required to consider whether the penalty fits within the statutory cap. The statutory cap is defined as up to 10 per cent of the worldwide turnover of the undertaking as a whole.¹³⁸ As EMIA is a wholly owned subsidiary of MAG, it is the worldwide turnover of MAG that is used to calculate this cap, based on the last business year preceding the CAA's decision. This should be the financial year 2015/16 but as these figures are not yet available, we have therefore considered the audited accounts from the previous financial year, 2014/15. The 2014/15 accounts indicate that MAG had a worldwide turnover of £738.4m. The statutory cap therefore equates to £73.84m. As the level of the penalty is considerably lower than that cap, no adjustments are required to the penalty.

Step 5: no adjustments

Step 6

19. At Step 6 adjustments are made for leniency. EMIA is a leniency applicant and has been granted Type A immunity. As of this date, EMIA has met all of the requirements to qualify for immunity and is therefore eligible for 100 per cent discount on the level of the penalty.

Step 6: £12,459,356.44 - £12,459,356.44 = £0

20. We therefore impose a zero penalty for EMIA/MAG.

¹³⁸ Calculated in accordance with The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) (as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259)).

Summary table

Step	Penalty (millions)
Step 1: Starting point (25% of relevant turnover)	<i>£2,373,210.75</i>
Step 2: Duration (5 years)	<i>£11,866,053.75</i>
Step 3: Adjustment for Aggravating or mitigating circumstances	10% increase for aggravation and 5% decrease for mitigation = overall 5% increase <i>£12,459,356.44</i>
Step 4: Adjustment for proportionality	£0
Step 5: Adjustment for statutory cap	£0
Step 6: Adjustment for Leniency discount (100%)	<i>-£12,459,356.44</i>
Total penalty	£0

Appendix C

Penalties notice to Prestige pursuant to Rule 12 of the CMA rules

1. This documents sets out penalties calculation for MAG / East Midlands International Airport. The CAA finds that MAG/EMIA is in breach of Chapter I of the Competition Act as set out in the substantive analysis of the Decision to which this notice is annexed.
2. The penalty contained within this document has been calculated in accordance with the OFT's Guidance as the appropriate amount of a penalty (OFT423) which has been adopted by the CMA Board and the CAA as a concurrent regulator (the Guidance). The Guidance sets out six steps for the calculation of financial penalty:¹³⁹
 - **Step 1:** calculation of a starting point
 - The starting point takes account of the seriousness of the infringement and the relevant turnover of the undertaking. To reflect the serious of the infringement the CAA may apply a factor of up to 30 per cent of relevant turnover. The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year prior to the cessation of the infringement.
 - **Step 2:** adjustment for duration
 - A multiple is applied for the duration of the infringement. The starting point may be increased by a multiple of 1 for each year or part year that the infringement persisted.
 - **Step 3:** adjustments for aggravating or mitigating factors
 - Adjustments can be made for aggravating factors, to increase the penalty, or mitigating factors, to reduce the penalty.
 - **Step 4:** adjustments for deterrence and proportionality

¹³⁹ OFT423.

- Adjustments can be made in relation to specific deterrence or proportionality.
- **Step 5:** adjustment for the statutory cap and to avoid double jeopardy
 - Adjustments must be made in relation to the statutory cap to ensure that the penalty does not exceed 10% of the worldwide turnover of the undertaking's corporate group, based on its turnover in the financial year prior to the decision. At this stage adjustments can also be made to account for any double jeopardy.
- **Step 6:** adjustment for leniency and/or settlement discounts
 - At step 6 adjustments are made for leniency and for whether the party has settled.

Relevant market

3. For the purpose of the penalties notice we consider that there are two relevant markets, which were affected by the infringement.
 - a) The “upstream” or “primary” market in which EMIA is providing Prestige with access to car parking facilities;¹⁴⁰ and
 - b) The “downstream” or “secondary” market in which both EMIA and Prestige are competing to provide retail car park services.¹⁴¹
4. The geographic scope of both relevant markets is the Airport.

Step 1

5. The CAA has selected a starting point of 25 per cent to reflect the seriousness of the infringement as a hardcore infringement whereby the

¹⁴⁰ The product market is at least as wide as the provision of facilities for car parking services at the Airport but could conceivably be wider to include the provision of access to facilities for the arrival and departure of passengers at the Airport.

¹⁴¹ EMIA has argued that the downstream market is wider, covering a number of access modes to the Airport, including bus services, exclusive private hire or taxis agreements as well as car parking spaces and passenger pick up and drop off. For the purposes of this draft penalty statement, it is not necessary or appropriate to engage in a detailed analysis of the competitive constraints of the market, including the degree of substitutability between various access modes. For present purposes, we refer to the car parking services market to provide an analytical framework for our summary analysis.

parties sought to fix minimum prices in respect of car parking services at the Airport.

6. The relevant turnover is Prestige's revenue from car parking services, based on the year prior to the cessation of the infringement. It has not been possible to separate out revenue earned separately from the concession in Prestige's audited accounts. However, Prestige's business was centred on car parking services at the Airport. In the last business year prior to the cessation of the infringement (financial year 2011/12), Prestige's turnover was £779,462. This figure has already been modified for direct taxes; during 2011 the VAT was set at a rate of 20 per cent.
7. The starting point is therefore
Step 1: $£779,462 * 0.25 = £194,865.50$

Step 2

8. The infringement took place between at the latest 11 October 2007 and 25 September 2012, equating to a period of 5.0 years. In line with the Guidance, the CAA rounds the multiplier to the nearest quarter year. A modifier of 5.0 is therefore applied to the starting point the calculation is as follows
Step 2: $£194,865.50 * 5.0 = £974,327.50$

Step 3

9. Step 3 entails an adjustment for aggravating or mitigating factors.
10. We consider that it is appropriate to reduce the penalty to reflect the mitigating circumstances in Prestige's role as a comparatively small player, which was a new entrant in the market, and dependent on EMIA for critical inputs, in the form of access to car parking facilities, in order to operate its business. EMIA made it clear that an MPO was a non-negotiable condition of Prestige obtaining access to those facilities and its concession would not be renewed without Prestige accepting its pricing policy. Conversely, however, by admission of the managing director Prestige was aware that the policy may have been illegal yet sought to

take no action.¹⁴² We consider this aggravating circumstance cancels out the mitigating adjustment.

Step 3: no adjustment

Step 4

11. Adjustments for proportionality. As of 24 December 2012 Prestige had ceased trading. The accounts for the financial year 2012/2013 show revenue of £456,963, the accounts filed for 2013/2014 show revenues of just £386. For the latest financial year (2014/2015), the company shows no revenue in its published accounts and current assets of only £17,322 with net assets of -£146,836. However, the company is not in administration, it is therefore possible that the company could recommence trading at some point in the future. On this basis we do not propose to make any adjustments for proportionality.

Step 4: no adjustment

Step 5

12. At step 5 we are required to consider whether the penalty complies with the statutory cap. The statutory cap is defined as up to 10 per cent of the worldwide turnover of the undertaking.¹⁴³ In the business year ending 31 March 2015, Prestige was not trading and had no turnover. The statutory cap is therefore zero. As a result, the penalty is therefore reduced to zero.

Step 5: Penalty reduced to £0 to comply with the statutory cap.

Step 6

13. At Step 6, the CAA applies discounts, where appropriate, for leniency and settlement purposes. The CAA granted Prestige Type C leniency. At the time of writing, Prestige has met the requirements of the leniency programme and is therefore entitled to a discount of up to 50 per cent on any penalty levied. The CAA consider in this instance a 50 per cent

¹⁴² Interview transcript of Prestige employee One, dated 11 March 2016 lines 667-668.

¹⁴³ Calculated in accordance with The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) (as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259)).

reduction would have been granted. Further Prestige agreed a settlement of the investigation and to pursue a streamlined administrative procedure. It is therefore entitled to a further 20 per cent discount to reflect its cooperation and settlement. Given the statutory cap these discounts have no material effect on the level of the penalty to be imposed.

14. The final penalty for Prestige is therefore zero.

Summary table

Step	Penalty
Step 1: Starting point (30% of relevant turnover)	£194,865.50
Step 2: Duration (5.75 years)	£974,327.50
Step 3: Adjustment for Aggravating or mitigating circumstance	£0
Step 4: Adjustment for proportionality	£0
Step 5: Adjustment for statutory cap	-£974,327.50
Step 6: Adjustment for Leniency discount (50%)	£0
Total penalty	£0

Appendix D

Key documents

[✂]

Appendix E

33 emails sent between 20 October 2010 to 31 January 2012

Email from EMIA employee Five to EMIA employee Five, Subject: long stay 1,2,3 price changes, 24 November 2011 15:21

Email from EMIA employee Five to Prestige employee Two, Subject: car park prices, 1 July 2011 08:59

Email from EMIA employee Five to Prestige employee Two, Subject: car park prices, 1 March 2011 15:53

Email from EMIA employee Five to Prestige employee Two cc EMIA employee Four EMA Legal, Subject: Car Park 1 Prices, 10 February 2011 15:24

Email from EMIA employee Five to Prestige employee Two, Subject: EMIA revised calendar, 10 May 2011 10:03

Email from EMIA employee Five to Prestige employee Two, Subject: Car Park 1 prices, 11 August 2011 13:50

Email from EMIA employee Five to Prestige employee Two, Subject: revised car parks 1 to 3 prices, 13 April 2011 09:52

Email from EMIA employee Five to Prestige employee Two, Subject: Calendar and price changes, 13 October 2011 15:54

Email from EMIA employee Five to Prestige employee Two, Subject: EMIA car park prices , 14 June 2011 10:40

Email from EMIA employee Five to Prestige employee Two, Subject: Price changes, 15 April 2011 16:50

Email from EMIA employee Five to Prestige employee Two, Subject: Amended calendar, 15 July 2015 09:09

Email from EMIA employee Five to Prestige employee Two, Subject: longs stay 1,2,3 price changes, 15 November 2011 11:29

Email from EMIA employee Five to Prestige employee Two, Subject: Car pak 1 price error, 16 February 2011 16:29

Email from EMIA employee Five to Prestige employee Two, Subject: Car Park 1 prices, 16 February 2011 10:39

Email from EMIA employee Five to Prestige employee Two, Subject: Tariff calendar changes, 20 June 2011 14:21

Email from EMIA employee Five to Prestige employee Two, Subject: Car Park 6 and 7 discounted prices, 20 October 2010 13:10

Email from EMIA employee Five (EMIA) to Prestige employee Two (Prestige), Subject: EMIA price changes, 21 April 2011 10:24

Email from EMIA employee Five to Prestige employee Two, Subject: amended calendar, 23 June 2011 13:31

Email from EMIA employee Five to Prestige employee Two, Subject: Changed calendar and tariff, 24 March 2011 15:07

Email from EMIA employee Five to Prestige employee Two, Subject: car park 1-3 prices, 24 October 2011 15:32

Email from EMIA employee Five to Prestige employee Two, Subject: Car park 1 pre book price changes, 25 February 2011 15:30

Email from EMIA employee Five to Prestige employee Two, Subject: EMIA revised tariffs and calendar, 27 April 2011 11:54

Email from EMIA employee Five to Prestige employee Two, Subject: Car park 1 - 3 prices, 28 February 2011 15:15

Email from EMIA employee Five to Prestige employee Two, Subject: Calendar changes, 28 June 2011 15:51

Email from EMIA employee Five to Prestige employee Two, Subject: EMIA car park calendar and price changes, 31 May 2011 17:09

Email from EMIA employee Five to Prestige employee Two, Subject: Revised Car park 1 pre book tariffs, 4 April 2011 10:51

Email chain from EMIA employee Five to Prestige employee Two, Subject: FW: Revised Car park 1 pre book tariffs, 4 April 2011 10:53

Email from EMIA employee Five to Prestige employee Two, Subject: long stay 1, 2, 3 prices, 4 January 2012 13:34

Email from EMIA employee Five to Prestige employee Two, Subject: revised car parks 1 to 3 prices, 5 May 2011 08:36

Email from EMIA employee Five to Prestige employee Two, Subject: LS1 , 2, 3 prices, 6 January 2012 14:53

Email from EMIA employee Five to Prestige employee Two, Subject: EMIA price and b and changes, 17 January 2012 14:19

Email from EMIA employee Five to EMIA employee Five, Subject: Car park calendar and price changes, 17 November 2011 16:11

Email from EMIA employee Five to EMIA employee Five, Subject: EMIA Feb price changes, 31 January 2012 10:28

Email from EMIA employee Five to EMIA employee Five, Subject: long stay 1, 2, 3 price change, 4 November 2011 09:58