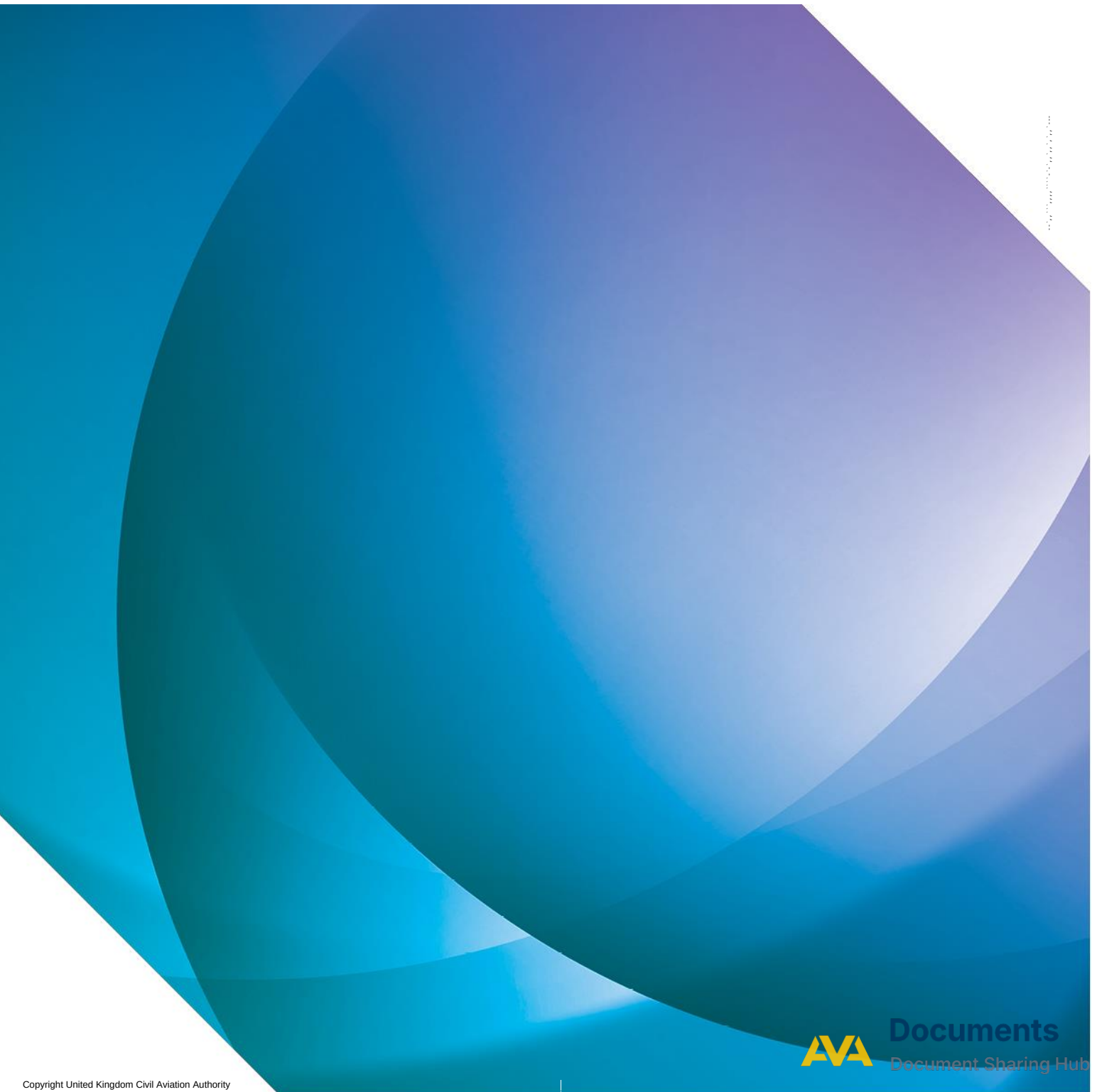


Access to car parking facilities at East Midlands International Airport – CAA decision CA98-001 (non-confidential)

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 Names have been replaced by employee references.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 *Groupeement 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.