Decision of the Competition and Markets Authority

Conduct in the transport sector (facilities at airports)

Case 50523

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [✂].

The names of individuals mentioned in the description of the infringement in the original version of this Decision have been removed from the published version on the public register. Names have been replaced by a general descriptor of the individual's role.

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1. Introduction and glossary

A. Introduction

1.1. This Decision is addressed to:

(a) Heathrow Airport Limited ('HAL') and its parent company Heathrow Airport Holdings Limited ('HAHL') (collectively referred to as 'Heathrow'); and

(b) Heathrow T5 Hotel Limited ('HTHL'), and its parent company Arora Holdings Limited ('AHL') (a holding company within the Arora group) (collectively referred to as 'Arora'),

(together the 'Addressees').

1.2. By this Decision, the Competition and Markets Authority (the 'CMA') finds that from 31 July 2008 to 27 April 2018 (the 'Relevant Period'), Heathrow and Arora (the 'Parties') infringed the prohibition in section 2(1) of the Competition Act 1998 (the 'Act') (the 'Chapter I prohibition') by participating in a signed, written agreement under which Arora agreed to a tenant's covenant which precluded it from charging non-guests using the T5 Sofitel hotel ('T5 Sofitel') car park rates lower than those charged at Heathrow airport's car parks. The CMA finds that the agreement had as its object the prevention, restrict ion or distortion of competition within the UK or a part of it and may have affected trade within the UK or a part of it ('the Infringement').

1.3. The CMA hereby imposes a financial penalty on Heathrow for the Infringement under section 36 of the Act, holding HAL and HAHL jointly and severally liable for this penalty. No financial penalty will be imposed on Arora provided that it continues to co-operate and comply with the conditions of the CMA's leniency policy.

B. Glossary

1.4. In this Decision, the following terms shall have the definitions set out below. Where in this Decision it is helpful for the reader to reference a defined term in the text, such term may also be defined in the text.

Term	Definition
the Act	the Competition Act 1998

Addressees	Heathrow Airport Limited ('HAL') and its parent Heathrow Airport Holdings Limited ('HAHL') (collectively referred to as 'Heathrow'); and Heathrow T5 Hotel Limited ('HTHL'), and its parent Arora Holdings Limited ('AHL') (a holding company within the Arora group) (collectively referred to as 'Arora').
AHL	Arora Holdings Limited
AMSL	Arora Management Services Limited
Arora	HTHL and AHL
CAA	the Civil Aviation Authority (the UK's specialist aviation regulator)
CAT	the Competition Appeal Tribunal
Clause 22	Clause 22 (Unauthorised Parking) of Schedule 2 of the Head Lease
CC	Competition Commission
CJEU	The Court of Justice of the European Union
the Chapter I prohibition	the prohibition in section 2(1) of the Competition Act 1998
HAL	Heathrow Airport Limited
HAHL	Heathrow Airport Holdings Limited
Head Lease	Two head leases created on 1 July 2005 between (i) HAL the (Landlord), (ii) BAA Lynton Developments Limited (Tenant) and (iii) BAA plc, for the T5 Sofitel site

Head Lease Pricing Restriction	Car park pricing restriction contained in the Head Lease
Heathrow	HAL and HAHL
HTHL	Heathrow T5 Hotel Limited
Infringement	As defined in paragraph 1.2
the OFT	the Office of Fair Trading, one of the CMA's predecessor bodies
Parties	Heathrow and Arora
Relevant Period	31 July 2008 to 27 April 2018
Sale and Purchase Agreement	Agreement for the sale and purchase of leasehold property known as T5 Hotel Heathrow Airport between BAA Lynton Developments Limited (seller), Arora Heathrow T5 Limited (buyer) and Arora Holdings Limited (guarantor) and HAL, dated 1 July 2005, as amended by a supplemental agreement dated 21 March 2006.
Settling Party	Heathrow
Settlement Letter	As defined in paragraphs 2.12 and 6.9
Supplemental Head Leases	A supplemental head lease dated 8 January 2008 between (i) HAL and (ii) Mourant & Co. Trustees Limited and Hill Street Trustees Limited in their capacity as trustees for the Arora Heathrow Unit Trust; and A supplemental head lease dated 20 October 2016 between (i) HAL and (ii) Arora Heathrow Holdings Limited.
T5 Sofitel	Sofitel hotel located at Terminal 5, Heathrow airport, London, TW6 2GD

Terms of Settlement	As defined in paragraphs 6.3 and 6.9
TFEU	Treaty on the Functioning of the European Union
the UK	the United Kingdom

2. Summary of the investigation

A. Launch of the investigation

2.1. On 7 December 2017, the CMA opened a formal investigation under the Act into suspected agreements and/or concerted practices involving Heathrow and certain hotel operators relating to the provision of car parking services.

2.2. In particular, the CMA had reasonable grounds for suspecting that Heathrow and Arora were party to one or more agreement(s) and/ or concerted practice(s) under which Heathrow has granted an interest in land for the operation of a hotel(s) and associated car parking facilities at, or near, Heathrow airport which contained restrictions on the provision of car parking services at the hotel(s), including on pricing, in breach of the Chapter I prohibition.

B. Leniency

2.3. Prior to the CMA starting its investigation, Arora applied to the CMA for leniency and provided information to the CMA under the CMA's leniency policy.

2.4. On 6 August 2018, the CMA entered into a leniency agreement under the CMA's leniency policy with AHL, HTHL and Arora Management Services Limited ('AMSL')[1], in relation to their involvement in the Infringement. Arora was the first and only applicant to apply under the policy and was granted immunity from financial penalty, conditional on it continuing to meet the requirements of the CMA's leniency policy.

C. Evidence gathering

2.5. The CMA required each of the Parties to produce documents, and to provide information relevant to the investigation under section 26 of the Act on 7 December 2017 (Heathrow) and 20 February 2018 (Arora). Heathrow and Arora each responded in tranches.[2]

2.6. The CMA asked Heathrow certain follow-up questions on 15 February 2018, 29 March 2018, and 19 April 2018. Heathrow responded to those questions on 23

1 AMSL is a limited liability company registered in England and Wales with company number: 05636920. It was incorporated on 27 November 2005 and its registered office is the same as AHL's. It provides property management services to companies within the Arora group and is a wholly owned subsidiary of AHL. AMSL made a leniency application to the CMA on behalf of the Arora group.
2 Heathrow provided responses to the section 26 notice on 20 December 2017, 5 January 2018 (URN 0046), and 12 January 2018. Arora provided responses to the section 26 notice on 9 March 2018 (URN 0252), 3 April 2018, 24 April 2018, and 27 April 2018 (URNs 0437 and 0438).

February 2018, 12 April 2018, and 23 April 2018 respectively.[3] In addition, Heathrow submitted an additional paper to the CMA on 30 April 2018.[4]

2.7. On 12 April 2018, the CMA conducted a voluntary interview with, [Arora Director] of AHL.[5]

D. State of play meetings

2.8. The CMA held State of Play meetings with Heathrow on 29 March 2018 and with Arora on 6 June 2018.

E. Settlement

2.9. On 15 June 2018, Heathrow expressed a genuine interest and willingness to enter into settlement discussions with the CMA in relation to the investigation.

2.10. On 13 July 2018, the CMA issued a Summary Statement of Facts to Heathrow.[6] Heathrow was given an opportunity to make submissions on material factual inaccuracies in the Summary Statement of Facts. Heathrow made written submissions on 20 July 2018 and oral submissions at a settlement meeting on 2 August 2018. These submissions were considered and, to the extent relevant, reflected in a final version dated 9 August 2018.

2.11. As part of the settlement process, the CMA also issued a draft penalty calculation to Heathrow on 25 July 2018 and provided Heathrow with an opportunity to make representations on the draft penalty calculation, which were taken into account in determining the final maximum penalty calculation issued to Heathrow on 9 August 2018.[7]

2.12. On 16 August 2018, Heathrow entered into a settlement agreement with the CMA. It admitted that it had infringed the Chapter I prohibition as set out in the Summary Statement of Facts dated 9 August 2018 which is now reflected in this Decision, and agreed to co-operate in expediting the process for concluding the investigation. The settlement letter signed by Heathrow and the Terms of

3 Heathrow provided responses to the CMA's follow-up questions on 23 February 2018, URN 0217, 12 April 2018, and 23 April 2018.
4 Heathrow's submission of 30 April 2018, URN 0441.
5 Transcript of interview with [Arora Director] held on 12 April 2018, URN 0498.
6 According to paragraph 14.13 of the CMA's Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8), a business with whom settlement discussions take place will be presented with a Summary Statement of Facts.
7 Final penalty calculation.

Settlement annexed to that letter dated 14 August 2018 set out all the conditions of the agreement.[8]

F. Statement of Objections

2.13. On 18 September 2018, the CMA issued a Statement of Objections ('SO') to the Parties,[9] in which it proposed to make a decision that they had infringed the Chapter I prohibition.

2.14. On 1 October 2018 Heathrow made limited representations on material factual inaccuracies in the SO. Arora confirmed on 1 October 2018 that it had no representations on material factual inaccuracies in the SO.

8 Heathrow signed Settlement Letter and Terms of Settlement.
9 In accordance with section 31 of the Act and Rules 5 and 6 of the The Competition Act 1998 (Competition and Market Authority's Rules) Order 2014, SI 2014/458 (the 'CA98 Rules').

3. Factual background

A. Parties

I. Arora

3.1. AHL is registered as a limited liability company and had turnover of approximately £236 million in its last financial year.[10] AHL is a holding company within the larger Arora group of companies and has wholly owned HTHL since March 2013, following a company re-organisation within the Arora group. AHL is a privately-owned company operating property, construction and hotel divisions in the UK, with property interests at Heathrow, Gatwick and Stansted airports.

3.2. HTHL (formerly Arora Heathrow Holdings Limited[11]) is registered as a limited liability company and had turnover of £7.2 million in its last financial year.[12] HTHL is a property investment company. From March 2013 to date HTHL has been the head leasehold tenant of the T5 Sofitel site. Between 21 March 2006 to March 2013, other companies within the Arora group were the head lease tenant. Arora confirmed to the CMA that HTHL is the economic successor to those previous head lease tenants.[13]

II. Heathrow

3.3. HAL is registered as a limited liability company and had turnover of £2,828 million in its last financial year.[14] HAL's principal activity is the operation of Heathrow airport.

3.4. Following a market power assessment undertaken by the CAA, HAL currently operates Heathrow airport under a CAA licence which came into force on 1 April 2014.[15]

3.5. During the period relevant to this investigation, HAL has been the freeholder and leasehold landlord of the T5 Sofitel site.

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10 Registered at Companies House under company number 08121840 and incorporated on 27 June 2012. Group of companies' accounts made up to 31 March 2017 available at https://beta.companieshouse.gov.uk/company/08121840/filing-history.
11 HTHL (03896804) was previously named 'Arora Heathrow Holdings Limited' (24 November 2015 to 11 July 2016) and previously Arora Holdings Limited (20 December 1999 to 24 November 2015).
12 Registered at Companies House under company number 03896804 and incorporated on 27 June 2012. Group of companies' accounts made up to 31 March 2017 available at https://beta.companieshouse.gov.uk/company/03896804/filing-history.
13 Arora submission dated 14 September 2018, URNs 0784 and 0785.
14 Registered at Companies House under company number 01991017. Heathrow Airport Limited Annual report and financial statements for the year ended 31 December 2017, available at https://beta.companieshouse.gov.uk/company/01991017/filing-history.
15 See CAA website: https://www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Licensing-and-price-control/Economic-licensing-of-Heathrow-Airport/

3.6. HAHL is registered as a limited liability company and had turnover of £2,884 million in its last financial year.[16] Throughout the period relevant to this investigation, HAHL wholly owned HAL.

3.7. HAHL is a wholly owned subsidiary of FGP Topco Limited.[17] Prior to its acquisition by the Ferrovial consortium[18] via FGP Topco Limited in November 2006, HAHL was named BAA Ltd.[19]

B. Overview of car parking services at Heathrow airport

3.8. This section provides an overview of the subject of this investigation, namely the provision of car parking services at Heathrow airport.

I. Car parking services offered by Heathrow

3.9. Heathrow airport is the largest London airport and the busiest airport in Europe with 78 million travellers using the airport in 2017.[20] Heathrow generates income from the provision of facilities and services at the airport, including landing fees for airlines operating at its terminals and concession fees from retail operators.

3.10. Heathrow also generates significant income from car parks which it owns and controls within Heathrow airport.[21] There are currently four operational terminals at Heathrow airport, all of which have some form of car parking facilities.[22] Heathrow has subcontracted the operation of all of these facilities to a third party, APCOA.[23]

3.11. With the exception of some car parking spaces available for general public use at hotel car parks where permitted by planning conditions, nearly all car parking spaces (however designated – see paragraph 3.13 below) available for public use at Heathrow airport are owned and controlled by Heathrow. Heathrow also

16 Registered at Companies House under company number 05757208. Heathrow Airport Holdings Limited Annual report and financial statements for the year ended 31 December 2017, available at https://beta.companieshouse.gov.uk/company/05757208/filing-history.
17 FGP Topco Limited is a company registered in England and Wales with company no: 05723961. It was incorporated on 28 February 2006 and has the same registered address as HAHL.
18 FGP Topco Limited is owned and led by the infrastructure specialist Ferrovial S.A. (25.00%), Qatar Investment Authority (20.00%), Caisse de dépôt et placement du Québec (CDPQ) (12.62%), GIC (11.20%), Alinda Capital Partners of the United States (11.18%), China Investment Corporation (10.00%) and Universities Superannuation Scheme (USS) (10.00%).
19 BAA Limited was previously incorporated as BAA plc when listed on the London Stock Exchange.
20 Heathrow Airport Limited, Annual Report and financial statements for year ended 31 December 2017, page 2.
21 In 2017, HAHL revenues derived from car parking services amounted to £120 million of some £659 million of revenue derived from non-aeronautical revenue streams (including catering and retail concessions at Heathrow airport), see HAHL accounts made up to 31 December 2017.
22 https://www.heathrow.com/transport-and-directions/heathrow-parking
23 HAL's response to section 26 notice dated 5 January 2018, Appendix 3 (tab 2) indicates that all HAL owned car parks are operated by APCOA, except for three car parks which are leased to Arora and operated by Maple Manor. See URNs 0046 and 0060.

leases land within the airport perimeter to Arora which is used for valet car parking storage operated by a third party, Maple Manor Parking.[24]

3.12. As part of the planning approval for Terminal 5, in 2001 the Secretary of State for Transport capped the number of parking spaces at Heathrow airport at 42,000 (of which 17,500 spaces are made available for staff working at the airport).[25]

3.13. Heathrow designates its car parks as either 'short stay', 'business' or 'long stay' depending on their proximity to a terminal building, short stay being the closest to a terminal building and long stay the furthest. Whilst customers are free to use any airport car park for as long as they wish, the tariff they will be charged for the period of their stay will vary depending on whether the car park is designated as short stay, business or long stay.[26]

3.15. Heathrow has two types of car parking tariffs:[27]

(a) 'Headline tariffs' are set annually by the HAL Commercial Revenue Team taking effect in early January each year. These are the tariffs that are publicly displayed at Heathrow's car parks and represent the maximum price that may be charged to users. Headline tariffs in short stay designated car parks are generally the highest reflecting the convenience of being in close proximity to the terminal building. The longer the stay, the cheaper the tariffs available in designated long stay car parks relative to short stay and business designated car parks. The headline tariffs in, for example, a short stay designated car park located in Terminal 5 will usually be the same as those in a short stay designated car park located in Terminals 1 to 4; and

(b) 'Pre-booked tariffs' are subject to regular amendment by the HAL Commercial Revenue team. These tariffs change regularly in response to market conditions and HAL uses a dynamic price modelling tool to adjust them. The pre-booked tariffs never exceed the headline tariffs displayed at each of the car parks.[28]

3.15. Section 4 below contains further detail on the car parking facilities at Heathrow airport.

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24 The land leased to Arora comprises three car parks accounting for 780 car parking spaces used for valet storage by Maple Manor Parking (see tab 2 of Appendix 3 of Heathrow submission dated 5 January 2018, URN 0060).
25 Heathrow Terminal 5 Planning Decision dated November 2001 granted by the Secretary of State for Transport (REFERENCE 47853/93/246), URN 0502.
26 HAL's response to section 26 notice dated 5 January 2018, pages 21 to 23, URN 0046.
27 HAL's response to section 26 notice dated 5 January 2018, pages 22 to 23, URN 0046.
28 HAL's response to section 26 notice dated 5 January 2018, page 23, URN 0046.

II. Other car parking available at hotels located at Heathrow

3.16. As noted above, where permitted by planning conditions, some hotels located at Heathrow airport may offer car parking spaces for general public use, and this section describes the availability of such parking. It also describes Heathrow's ability to control the parking services offered by these hotels where it is the freeholder of the land on which a hotel is built.

3.17. There are a large number of hotels located outside of Heathrow airport, some of which may offer car parking to guests during their stay or visit and to non-guests. However, as Heathrow does not own the freehold or have any control over car parking services offered at these hotels, they are not considered further for the purposes of this investigation.

3.18. HAL is currently the freeholder of five hotel sites with car parking facilities located at or near Heathrow airport:[29]

- Hilton Garden Inn: a 364 room hotel with conference facilities located on the Eastern perimeter of the airport operated by the Jurys Doyle group, with [✂] parking spaces;
- Hilton London Heathrow Hotel: a 398 room hotel with conference facilities located with easy access of Terminal 4 operated by the Hilton group of companies, with [✂] parking spaces;
- Renaissance (formerly Ramada): a 710 room hotel with conference facilities located near Terminals 2 and 3 outside of the northern perimeter of Heathrow airport operated by the Arora group, with [✂] parking spaces;
- T5 Sofitel: a 605 room hotel with conference facilities located at Terminal 5 operated by the Arora group, with [✂] parking spaces; and
- Crowne Plaza/Holiday Inn Express hotels: a Terminal 4 development to construct two hotels (with 300 and 450 rooms respectively) which is due to open before the end of 2018 and will be operated by the Arora group, with [✂] parking spaces.[30]

3.19. Hotels operated on sites to which HAL retains the freehold will generally have been built following a tender process. As part of the award process, the company which is appointed to develop the hotel may also be granted a leasehold interest in the land on which the hotel is situated (potentially for a significant period of time, for example 999 years). The company which develops the hotel site may operate the hotel itself or may enter into an occupational lease (sometimes referred to as an under lease), hotel management agreement,

29 There is a further hotel, Yotel, located within Terminal 4 which has no car parking facilities.
30 Heathrow Airport Limited, Heathrow T4 LP, Grove Developments Limited and Arora Hotels Limited signed a development agreement on 15 October 2015 in relation to this site, URN 0226.

franchise agreement or other commercial arrangement with another company to operate the hotel.

3.20. Development of the site will usually have required planning permission which may have been granted subject to conditions. These conditions can relate to the use of facilities on the land, including in relation to car parking.

3.21. Where HAL as freeholder has divested the leasehold of a hotel site to a third party, such as Arora, it may also impose conditions over the use of the land.

3.22. Airport hotels which have car parks use these facilities primarily to serve their guests although hotels with car parks with sufficient capacity and appropriate location can also potentially serve non-guests, subject to any terms in the relevant lease. Like Heathrow's own car parks, most hotels offer short stay parking (24 hours or less) and longer stay parking.

3.23. Where longer stay parking is offered, it may include holiday parking services (sometimes also referred to as a 'stay, park and fly' or similar) whereby hotel guests stay at the hotel the night before their flight and leave their cars at the hotel for the duration of their holiday (for example for 3, 7 or 14 nights). The guest's car is either kept on site or the hotel may have entered into an arrangement with a third-party parking provider whereby the car is stored off site for the duration of the guest's holiday and delivered back to the hotel for collection on their return, potentially as part of a 'meet and greet' service.

3.24. Furthermore, Heathrow offers packages combining a hotel stay with car parking at Heathrow's designated long stay car parks or using its meet & greet parking.[31]

III. Car parking available at the T5 Sofitel hotel

3.25. The T5 Sofitel opened in July 2008. It currently has 813 parking spaces located at the hotel.[32] Of these parking spaces, 400 are sub-leased back to HAL pursuant to a sub-lease agreement dated 7 August 2008.[33] BMW and Sixt each lease a further 19 spaces from T5 Sofitel at this site.[34] Therefore, Arora has 375 parking spaces available for its use at the T5 Sofitel.

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31 See https://www.heathrow.com/transport-and-directions/heathrow-parking/heathrow-hotel-and-parking.
32 Arora response to section 26 notice, dated 9 March 2018, para 50.2, URN 0252.
33 Sub-underlease of basement level 3 car park dated 7 August 2008 between (i) Mourant & Co Trustees Limited and Hill Street Trustees Limited (as Trustees of the Arora T5 Heathrow Unit Trust) and (ii) Heathrow Airport Limited. HAL has explained that it uses these spaces for valet parking see footnote 21 of Heathrow submission dated 5 January 2018), URN 0046.
34 Arora response to section 26 notice, dated 9 March 2018, para 50.2, URN 0252.

3.26. The T5 Sofitel is the only hotel which is integrated with Terminal 5 and a link bridge connects the hotel to the terminal building. The hotel is also adjacent to a Heathrow short stay designated car park which has 3,493 parking spaces.

3.27. Arora explained that the T5 Sofitel car park is primarily used by guests of the hotel, including guests staying overnight as well as users of the hotel's conference, restaurant and bar facilities. However, the car park is accessible by non-guests of the T5 Sofitel and in interview [Arora Director] estimated that [✂] or [✂] of current users are non-guests.[35]

3.28. Arora has submitted that the car park is [✂] or [✂] utilised.[36] There are times of the year when the car park is capacity constrained, particularly when catering for large conferences.[37] However, there are other times of the year when there is significant spare capacity, [✂] .[38] The T5 Sofitel was built as part of the wider T5 development, following receipt of planning permission in 2001 by instruction of the Secretary of State and the London Borough of Hillingdon.[39] On 22 July 2011, the London Borough of Hillingdon granted permission for the creation of a further 77 parking spaces near the T5 Sofitel as part of a proposed extension of the T5 Sofitel and the development of an air crew hotel.[40] Planning permission for these additional parking spaces was granted on condition that they were to be used by hotel staff and guests only and strictly for the duration of their stay at the hotel. However, this proposed development did not proceed. The CMA is not aware of any planning conditions relating to use of the car park at the T5 Sofitel.

Arora's use of the T5 Sofitel car park

3.29. The T5 Sofitel car park is accessible by the general public. There is a barrier at the entrance and exit and, as such, car park users (including non-residents users) must pay a fee in order to validate a ticket to exit the car park.

3.30. Hotel users have their parking ticket validated by the reception desk and receive a discount off the tariffs displayed in the car park or free parking depending on

35 [Arora Director] interview held on 12 April 2018, transcript page 28, line 1, URN 0498. See also para 50.8 of Response to section 26 notice dated 9 March 2018, URN 0252.
36 [Arora Director] interview held on 12 April 2018, transcript page 30, lines 14-16, URN 0498.
37 [Arora Director] interview held on 12 April 2018, transcript page 30, lines1-9, URN 0498.
38 [Arora Director] interview held on 12 April 2018, transcript page 31, lines 14 to 21, URN 0498. [Arora Director] stated: [✂]
39 See the Heathrow Terminal 5 Planning Decision dated 20 November 2001 granted by the Secretary of State (REFERENCE 47853/93/246, URN 0502, An amendment to the T5 Planning Decision dated 27 January 2003 (REFERENCE 47853/APP/2002/1882) URN 0503, Planning Permission Decision issued by the London Borough of Hillingdon on 26 January 2005 (REFERENCE 47853/APP/2004/2935), URN 0504.
40 Grant of Planning Permission dated 22 July 2011, 47853/APP/2011/1642 (Application for a New Planning Permission to Replace an Extant Planning Permission Comprising: Extension to Northern End of the Terminal 5 Hotel (75 Extra Bedrooms) and Erection of a 239-Bedroom Airline Crew Hotel Including 77 Parking Spaces (Reference 47853/AOO/2008/1333) (URN 0501).

the type of guest and any promotions being run. For example, conference guests usually get higher discounts whilst guests who are only using the bar or restaurant receive a lower discount and may pay the full displayed tariff.[41] Non-guests pay the full displayed tariffs in the car park. In 2017, the T5 Sofitel displayed tariffs, for example, for two hours parking at £9.95 and for 12 to 24 hours at £49.00. The displayed tariffs for hotel guests were £18 for 24 hours parking and for conference guests £15.[42]

3.31. Rates for holiday parking where the customer has stayed one night at the hotel, however, are priced differently with no set rates. T5 Sofitel benchmarks holiday parking rates against those of its competitors and closely monitors publicly available prices to set its own offering.[43]

C. The Head Lease Pricing Restriction

3.32. This section sets out the evidence of an agreement between Heathrow and Arora since 31 July 2008 until 27 April 2018 under which Arora, as the T5 Sofitel leasehold tenant, was required to charge non-guests of the T5 Sofitel car parking rates no lower than those charged elsewhere at Heathrow airport.

I. Creation of the T5 Sofitel Head Lease and subsequent transfer to Arora

3.33. An inter-company head lease was created on 1 July 2005 between three BAA entities (Heathrow Airport Limited (Landlord), BAA Lynton Developments Limited (Tenant) and BAA plc) (the 'Head Lease') for the T5 Sofitel site[44] which contained a pricing restriction (the 'Head Lease Pricing Restriction').

3.34. The Head Lease Pricing Restriction is contained in the tenant's covenants of the Head Lease at Schedule 2, Clause 22 (Unauthorised Parking) ('Clause 22') which provides that:

"[the Tenant Covenants] whilst the Property is being used as an hotel to charge users of the car park during the period of their use of the Hotel at rates no lower than the equivalent rates from time to time charged elsewhere on the Airport by

41 Note of call between CMA and Arora, paragraph 6, URN 0347a and paragraph 53.5 of Arora section 26 response dated 9 March 2018, URN 0252.
42 See document URN 0003a. See also Annex to Arora section 26 response dated 9 March 2018, URN 0254.
43 See Arora section 26 response at paragraph 53.4, dated 9 March 2018, URN 0252.
44 For completeness, the T5 Sofitel hotel (including its parking facilities) is built on land included in four head leases: two head leases both dated 1 July 2005 relating to part of the land at the T5 Sofitel site (AGL144178 and AGL145310) (URNs 0073 and 0076); and two supplemental head leases dated 8 January 2008 (AGL181309) and 20 October 2016 (AGL394318) (URNs 0079 and 0257), the ('Supplemental Head Leases'). For these purposes the 'Head Lease' is used to refer to the two head leases dated 1 July 2005 that relate to land on which the T5 Sofitel and car park are situated and not the two Supplemental Head Leases that relate to surrounding strips of land used for landscaping/access.

the Landlord save that resident guests of the hotel may during their stay in the hotel or Property park at rates to be set by the Tenant in its discretion and for the avoidance of doubt the Tenant will not offer or provide holiday parking schemes of any nature".

3.35. On the same date, BAA Lynton Developments Limited (seller), Arora Heathrow T5 Limited (buyer) and Arora Holdings Limited (guarantor) and HAL entered into an agreement for the sale and purchase of the Head Lease (the 'Sale and Purchase Agreement').[45] Pursuant to the Sale and Purchase Agreement, the tenant's interest under the Head Lease transferred to Arora on 21 March 2006.[46] HAL continued to own the freehold.[47]

3.36. Under the Sale and Purchase Agreement certain clauses, including the Head Lease Pricing Restriction, were suspended until the date of practical completion of the hotel.[48] Arora has confirmed that the date of practical completion and hotel opening was during the course of July 2008.[49] As it is unclear the exact date of practical completion and the date on which the hotel opened, the CMA considers that the Head Lease Pricing Restriction commenced from 31 July 2008 at the latest.

3.37. Arora has confirmed that it does not recollect any discussions regarding the Head Lease Pricing Restriction in 2005 at the time that Arora acquired the Head Lease.[50] The CMA requested that Heathrow search for documents which inter alia discuss negotiations regarding car park pricing restrictions at the T5 Sofitel. However, Heathrow's searches did not reveal any documents which fell into this category.

II. Scope of Head Lease Pricing Restriction

3.38. The Head Lease Pricing Restriction applies to "*users of the car park during the period of their use of the Hotel* [defined as the hotel operated on the Property]". Arora is permitted to freely set its car parking charges to *"resident guests of the*

45 Agreement for the sale and purchase of leasehold property known as T5 Hotel Heathrow Airport, dated 1 July 2005 (URN 0422), amended by a supplemental agreement dated 21 March 2006 (URN 0426). On the same date, two Arora companies (Arora Heathrow T5 Limited and its parent Arora Holdings Limited) also entered into a development agreement with HAL, URN 0421.
46 HAL response dated 5 January 2018, Appendix 3, URNs 0046 and 0060.
47 HAL response dated 23 February 2018, appendix 7, URNs 0217 and 0225.
48 Clause 15 of the Sale and Purchase Agreement provides: 'Following the Completion Date the terms and conditions of clauses […] Schedule 2 (other than paragraphs 2, 6, 9, 11 and 24) […] of the Headlease and Supplemental Lease (mutatis mutandis) shall be suspended pending the Date of Practical Completion but on and from the Date of Practical Completion such terms and conditions shall come into effect and HAL hereby confirms and agrees to such suspension', URN 0422.
49 Arora submission dated 27 April 2018, Appendix 1, see URNs 0437 and 0438.
50 Arora submission dated 9 March 2018, paragraph 15.2 and 15.3, URN 0252.

hotel […] during their stay in the hotel or Property" but charges for all other users of the T5 Sofitel car park must be "*no lower than the equivalent rates from time to time charged elsewhere*" at Heathrow airport.

3.39. [Arora Director] explained to the CMA that he considers that resident guests include overnight guests and day guests i.e. guests using the hotel facilities including the restaurant or bar.[51]

3.40. HAL confirmed on 5 July 2018 that: "…the [pricing] restrictions are limited to non-resident users of the hotel. Resident guests (which includes, in HAL's understanding, conference and day residents as well as overnight guests), are not subject to the provision. There is no restriction relating to the pricing of holiday parking or parking for guests".[52]

3.41. The CMA therefore finds that the Head Lease Pricing Restriction precluded Arora from freely setting car parking rates at the T5 Sofitel for non-resident guest users of the car park. Resident guests include guests staying overnight as well as day guests using the T5 Sofitel hotel facilities at any time and for any period. In the remainder of this SO, car park users who do not use the T5 Sofitel hotel facilities and to whom the Head Lease Pricing Restriction applied are referred to as 'non-guests'.

III. Clause 22 and Holiday Parking

3.42. As set out in paragraph 3.34 above, as drafted, in addition to a pricing restriction Clause 22 explicitly prohibits Arora from offering any form of holiday parking whether to guests of the hotel or non-guests.

3.43. In an interview with the CMA, [Arora Director] explained that in 2008 as the T5 Sofitel has a large car park, holiday parking could potentially be offered but Arora believed that HAL would refuse given the terms of Clause 22.[53][Arora Director] recollected that shortly after the hotel opened in 2008, the T5 Sofitel [General Manager and Hotel Sales Director], raised the matter with him "*This is restricting us a bit because we are getting guests asking why they cannot buy a package to leave their car at the hotel*".[54]

3.44. [Arora Director] recollects calling [former BAA employee] (who negotiated the agreements regarding the T5 Sofitel on behalf of BAA Lynton Development Limited) regarding the scope of Clause 22 as it related to holiday parking.

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51 Transcript of interview with [Arora Director] held on 12 April 2018, page 18 lines 14 to 17, URN 0498.
52 Confirmed by email on 5 July 2018, URN 0509.
53 Transcript of interview with [Arora Director] held on 12 April 2018, page 19 lines 4 to 5, URN 0498.
54 Transcript of interview with [Arora Director] held on 12 April 2018, page 21 lines 22 to 24, URN 0498.

During this discussion, [Arora Director] stated that it was agreed that the T5 Sofitel could offer holiday parking provided that the customer had stayed at least one night at the hotel.[55] Arora confirmed that it has offered holiday parking from the T5 Sofitel on this basis.[56]

3.45. [Arora Director] also stated that this variation to Clause 22 was reflected in the drafting of the final form lease agreement attached as an annex to the development agreement entered into by HAL and Arora for the Terminal 4 development of two hotels (see further paragraph 3.18 above). Negotiations between Heathrow T4 LP and HAL regarding the Crowne Plaza/Holiday Inn Express development took place in 2014. Arora stated that it ensured that the terms of the new lease agreement would reflect the variation agreed verbally to Clause 22 explicitly permitting Arora to offer holiday parking to guests of the hotel who had stayed at least one night.[57]

3.46. Heathrow has stated that [former BAA employee] left Heathrow (BAA at the time) in July 2007 and was therefore not employed by BAA at the time of the conversation described by [Arora Director].[58]

3.47. The CMA does not consider it necessary to determine for the purposes of this Decision whether the discussion described by [Arora Director] took place either at that time or another time and/or in the way described by [Arora Director]. The CMA notes that Arora has offered holiday parking to guests who have stayed at the hotel for at least one night contrary to the terms of Clause 22 and Heathrow has not objected to this. Moreover, the equivalent to Clause 22 in the agreed form lease agreements for the T4 Crowne Plaza/Holiday Inn Express development in 2014 expressly permitted such offering. Taken together, this indicates that at least by 2014 Heathrow had confirmed to Arora that it was agreeable to such holiday parking being provided by hotels operating at Heathrow.

55 Transcript of interview with [Arora Director] held on 12 April 2018, page 20 lines 15-17, URN 0498. See also Arora response dated 9 March 2018, paragraph 15.4 (URN 0252): "[…] there was a discussion between [Arora Director] and [former BAA employee](of BAA) in 2008 clarifying that Arora was able to offer holiday parking to consumers provided they were staying at the hotel for at least one night".
56 [Arora Director] interview held on 12 April 2018, transcript page 19, lines 16-19, URN 0498: '[…] what we agreed to then was the fact that, if it was related to the hotel; as long as someone had a night's stay at the hotel it would not affect them; that would be permitted'.
57 Arora response dated 9 March 2018, paragraphs 23.4 and 23.5, URN 0252.
58 Heathrow representations dated 20 July 2018 on the Summary Statement of Facts, paragraph 2.7, URN 0521.

IV. Enforcement, monitoring and compliance

Initial compliance in 2008

3.48. In response to a section 26 notice Arora stated that when T5 Sofitel first opened in 2008, it was informed of the current pricing of the airport parking by Heathrow.[59] Heathrow has not identified any evidence to support this. However, Heathrow has confirmed that its parking rates were publicly available in 2008, both online and on display at the T5 short stay car park which is adjacent to the Sofitel car park. [60]

3.49. Arora, considers that it "*complied*" with the Head Lease Pricing Restriction by pricing at or above the Heathrow airport rates.[61] Arora confirmed this with [General Manager and Hotel Sales Director] the T5 Sofitel hotel general manager) who was responsible at the time for getting the rate cards printed and placing them at the entrance of the T5 Sofitel car park.[62]

3.50. Arora has stated that it has no record of the rates charged historically at the T5 Sofitel.[63] [Arora Director] explained that his understanding of the Head Lease Pricing Restriction is that the minimum rates to be displayed by T5 Sofitel were Heathrow airport's headline short-stay parking rates.[64]

3.51. The CMA therefore finds that Arora set its initial prices at or above those of Heathrow's short stay car parking rates, in accordance with the Head Lease Pricing Restriction in 2008.

Conduct after initial compliance

3.52. Neither Heathrow nor Arora has provided any further evidence of Heathrow seeking to ensure compliance with or enforcement of the Head Lease Pricing Restriction.

3.53. Arora considers that any attempts by Heathrow to enforce the Head Lease Pricing Restriction or raise compliance issues would have been reported to Arora's head office by the T5 Sofitel management.[65] Other than being informed of Heathrow's tariffs when the T5 Sofitel opened in 2008 as described at paragraph 3.48 above, Arora is not aware of Heathrow having contacted Arora

59 See Arora section 26 response at paragraph 19.1, dated 9 March 2018, URN 0252.
60 Confirmed by email from Heathrow's legal advisor dated 6 August 2018.
61 Interview with [Arora Director], 12 April 2018, transcript page 23 lines 1 to 15, URN 0498. [former BAA employee] explained that all rates were the same except for one category which was priced above the Heathrow rates.
62 Interview with [Arora Director], 12 April 2018, transcript page 23, lines 1 to 3, URN 0498.
63 Arora response dated 9 March 2018, paragraph 53.3, URN 0252.
64 Interview with [Arora Director], 12 April 2018, transcript page 18, lines 5 to 7, URN 0498.
65 Arora response dated 9 March 2018, paragraph 19.2, URN 0252.

in relation to car parking rates.[66] In interview, [Arora Director] further confirmed that to his knowledge there has been no contact or updates from Heathrow on the rates to be charged subsequent to 2008.[67]

3.54. Heathrow explained that its searches "did not uncover any evidence to suggest any awareness of the price provisions on the part of any employee of HAL and did not uncover any evidence of actual or attempted enforcement or monitoring of the price provisions by HAL."[68] However, Heathrow provided, in response to the section 26 notice, a series of internal email exchanges and a briefing note in March and April 2015 expressly referencing Clause 22.[69] In these emails, a senior property manager at Heathrow raised concerns over Arora's compliance with the holiday parking prohibition in Clause 22 and sought legal advice on Heathrow's ability to enforce it.[70] The exchange of internal emails and briefing note also include a reference to the T5 Sofitel advertising online short-term parking at the T5 Sofitel at that time 'in direct conflict with our appreciation of the agreement'.[71]

3.55. A further set of internal emails in August 2015 raised similar questions on the extent to which Heathrow was able to limit Arora through lease restrictions from competing with Heathrow in the provision of airport parking.[72]

3.56. The CMA considers that whilst these internal email exchanges show an awareness internally at a senior level of Clause 22 as recently as August 2015,[73] there is no evidence to suggest that Heathrow monitored compliance with or actively enforced the Head Lease Pricing Restriction. This is confirmed by Arora's statements which indicate that there is unlikely to have been any

66 Arora response dated 9 March 2018, paragraph 20.1, URN 0252.
67 Interview with [Arora Director], 12 April 2018, transcript page 24 lines 16 to 17, URN 0498.
68 Heathrow submission dated 23 February 2018, paragraph 20.11, URN 0217.
69 Email exchanges regarding potential breaches of use restriction by sub-leasing space to Sixt dated March and April 2014 (URNs 0161 and 0162), email exchanges regarding T5 Sofitel advertising parking on Holiday Extras (URNs 0172, 0173 and 0174), Briefing note from [Head of Planning] to [Chief Executive] dated April 2015, URN 0175.
70 Heathrow submitted on 30 April 2018 and on 20 July 2018 that the internal email exchanges concerned the use of the car park (holiday parking) and not the pricing restriction aspects of Clause 22. The CMA does not dispute this. However, the CMA considers that it would not be feasible for the relevant personnel including legal advisers involved in the email exchanges to have only been aware of the holiday parking aspect of Clause 22 and not the pricing aspects of Clause 22.
71 Heathrow email between [Senior Property Portfolio Manager] and [Property and Planning Legal Counsel] dated 17 March 2015, URN 0172. It is unclear which agreement is being referenced in this context as the CMA is not aware of any provision in the Head Lease which would preclude T5 Sofitel from advertising short stay parking to non-guests.
72 Heathrow email between [Head of Property] and [Head of Planning] dated 13 August 2015, URN 0178.
73 The CMA also refers to paragraphs 2.6 and 3.19 above and the inclusion of an equivalent to Clause 22 in the Crowne Plaza/Holiday Inn agreed form lease agreement in 2014, URN 0226.

meaningful exchanges with Heathrow about the Head Lease Pricing Restriction post 2008.[74]

Car park pricing at T5 Sofitel post 2008

3.57. After setting its car parking rates to be in line with Heathrow airport's short stay headline tariffs when the hotel opened in July 2008, there was no set mechanism at the T5 Sofitel for setting and reviewing car parking tariffs subsequently.[75]

3.58. In interview, [Arora Director] explained that the T5 Sofitel displayed car park tariffs may not have been reviewed or amended subsequent to 2008.[76] In preparing Arora's response to the section 26 notice, [General Manager and Hotel Sales Director] told [Arora Director] that he did not review the T5 Sofitel rates during his tenure as hotel manager between 2008 and 2012 and he does not recollect any changes to the car parking rates during this time.[77] Arora also confirmed that no changes had been made to the T5 Sofitel car parking rates since at least 1 April 2014.[78]

3.59. HAL has confirmed that it reviews annually its headline car parking tariffs.[79] The T5 Sofitel car park prices have therefore deviated over time from the headline tariffs at Heathrow airport's short stay designated car parks. A comparison undertaken by Arora of T5 Sofitel's car parking rates and Heathrow airport's short stay headline tariffs in November 2017 indicates that, for all but one parking tariff, T5 Sofitel's rates were below those of Heathrow airport's in breach of the Head Lease Pricing Restriction.[80]

3.60. However, in its response to the section 26 notice, Arora also stated that since 2008 "*it has never intentionally deviated from the pricing restrictions and considers that it has generally been compliant.*"[81] In interview, [Arora Director] explained that Arora considered that it was generally compliant because "*we did*

74 The internal emails referred to at paragraph 3.28 suggest that at least from April/May 2015, Heathrow had competition law concerns as to whether Clause 22 was enforceable, notwithstanding its inclusion in the Crowne Plaza/Holiday Inn agreed form lease agreement in 2014, URN 0226.
75 Arora section 26 response, dated 9 March 2018, paragraph 53.3, URN 0252.
76 [Arora Director] has indicated that it is possible that the rates may not have been reviewed since 2008 at all which would explain why Arora is now "somewhat cheaper in most areas than HAL". See transcript page 25 lines 3-5 and page 26 line 5, URN 0498.
77 Interview with [Arora Director], 12 April 2018, transcript page 24 lines 11 to 12, URN 0498.
78 Arora section 26 response dated 9 March 2018, paragraph 53.3, URN 0252.
79 Heathrow section 26 response dated 5 January 2018, page 23, URN 0046.
80 Arora submission of 29 November 2017, URN 0003a. See also Appendix 6 Heathrow car park rates effective from 11 January 2017, Heathrow submission dated 5 January 2018, URN 0063.
81 Arora section 26 response dated 9 March 2018, paragraph 19.1, URN 0252.

not consciously go out and undercut the prices. […] *We were ignorant of the fact that we were undercutting*."[82]

3.61. In addition, [Arora Director] has stated that Arora did not compete as actively as it might have done absent the Head Lease Pricing Restriction. [Arora Director] confirmed that given the size of the T5 Sofitel car park and its close proximity to Terminal 5, there would have been times of the year when the hotel would have had capacity to provide more car parking to non-guests.

3.62. In particular, [Arora Director], explained that there were certain periods in the year when the T5 Sofitel would have capacity to offer competitively priced parking to non-guests: [✂].[83]

3.63. [Arora Director] also said that if Arora advertised discounted parking to non-guests, for example by putting up a banner at the T5 Sofitel advertising discounted parking, he anticipated that HAL would have taken some action.[84]

3.64. The CMA has not seen any evidence to suggest that Heathrow took any action in response to advertising by Arora of car parking at T5 Sofitel for non-guests.[85]

V. Head Lease Pricing Restriction replicated in occupational lease arrangements by Arora

3.65. Arora explained that it has replicated the Head Lease Pricing Restriction in a number of intra-company occupational lease arrangements since the transfer of the Head Lease to Arora.[86] It included covenants equivalent to the Head Lease Pricing Restriction in the relevant occupational leases as, if an under tenant failed to comply with the tenant's covenants in the Head Lease including the

82 Interview with [Arora Director], 12 April 2018, transcript page 25 lines 13 to 15, URN 0498.
83 Interview with [Arora Director], 12 April 2018, transcript page 30 lines 13 to 20, URN 0498.
84 Interview with [Arora Director], 12 April 2018, transcript page 32 lines 6 to 18, URN 0498.
85 The CMA notes that Arora has advertised short stay parking online on Holiday Extras and Purple Parking websites.
86 An occupational lease was entered into between Mourant and Co Trustees Limited and Hill Street Trustees Limited as trustees of Arora T5 Heathrow Unit Trust (Landlord) and Arora Heathrow T5 Limited (Tenant) and Arora Holdings Limited (Guarantor) (all Arora corporate entities) on 20 April 2006 (the 'Occupational Lease'), URN 0430. The Occupational Lease contained a requirement for the tenant to perform and observe the covenants on the part of the lessee contained in the Head Lease and the Sale and Purchase Agreement both dated 1 July 2005 (clause 4.29), URN 0422. It also contained a specific clause regarding unauthorised parking which replicated the Head Lease Pricing Restriction (clause 4.38). A further under lease, which replaced the Occupational Lease, was granted by Arora Heathrow Holdings Limited (now named Heathrow T5 Hotel Limited) to Grove T5 Limited on 20 October 2016 which obliges the under lease tenant to covenant with its under lease landlord not to cause the head tenant to be in breach of its obligations in the Head Lease including the pricing restriction (clause 4.27), URN 0085.

Head Lease Pricing Restriction, Arora as tenant of the Head Lease could be held liable.[87]

VI. Findings in relation to the Head Lease Pricing Restriction

3.66. In summary, the CMA finds that:

- Heathrow and Arora entered into a Sale and Purchase Agreement in July 2005 which contained the Head Lease Pricing Restriction whose effect was suspended until practical completion of the T5 Sofitel (by 31 July 2008).
- The Head Lease Pricing Restriction required Arora to charge non-guests of the T5 Sofitel car parking rates no lower than those charged elsewhere at Heathrow airport.
- Arora set its car parking tariffs at the T5 Sofitel in accordance with Heathrow's short stay parking rates in or around July 2008 when the T5 Sofitel opened.
- Neither Arora nor Heathrow monitored each other's car parking rates after July 2008 and Heathrow did not seek to enforce the Head Lease Pricing Restriction.
- Arora did not actively seek to undercut Heathrow airport's car parking rates but did not review its tariffs to keep them in line with Heathrow's. The parking tariffs at the T5 Sofitel therefore became out of line with the car parking rates at Heathrow airport.
- Arora replicated the Head Lease Pricing Restriction in a number of intra-company occupational lease arrangements following the transfer of the Head Lease to Arora.
- Whilst capacity constrained at times, Arora could have offered competitively priced parking for non-guests were it not for the Head Lease Pricing Restriction, particularly during certain periods when it had spare capacity.

87 Arora states at paragraph 17.1 of section 26 response dated 9 March 2018, URN 0252: "Pursuant to paragraph 10.6 of Schedule 3 [sic] [2] of the Head Lease, HTHL is required to indemnify the landlord of the Head Lease against all expenses losses damages penalties fines charges or other sanctions and liabilities incurred by the landlord of the Head Lease resulting from any breach by an undertenant of any covenant on the part of HTHL contained in the Head Lease." And further at paragraph 17.2 of section 26 response dated 9 March 2018, URN 0252: "The Head Lease contains a provision equivalent to the pricing restriction in the Occupational Lease (at paragraph 22 of Schedule 3 [sic] [2]), meaning if HTHL does not enforce the pricing restriction in the Occupational Lease, it will be in breach of the Head Lease, and therefore open to enforcement action by the landlord of the Head Lease."

VII. Removal of the Head Lease Pricing Restriction

3.67. HAL wrote to Heathrow T5 Hotel Limited[88] on 27 April 2018 indicating that it wished to enter into a deed to remove the Head Lease Pricing Restriction from the Head Lease. In the same letter, HAL also confirmed that it did '*not consider that the Relevant Provisions are enforceable'*. Arora confirmed that it would consent to such a variation on 4 May 2018.[89]

3.68. Heathrow confirmed on 25 June 2018[90] that it executed the deed of variation to remove the Head Lease Pricing Restriction and Arora confirmed on 12 July 2018 that it had also executed the deed of variation (which also removes equivalent obligations pursuant to the Under Lease).[91]

88 Letter from Heathrow's legal advisers (BCLP) to HTHL dated 27 April 2018 enclosing deed of variation in relation to the Head Lease and Supplemental Head Lease dated 8 January 2008, URN 0506. Heathrow's legal advisers (BCLP) also wrote to Arora Heathrow Holdings Limited on 27 April 2018 enclosing a deed of variation in relation to Supplemental Head Lease dated 20 October 2016, URN 0507.
89 Email from Heathrow's legal advisers, BCLP, dated 15 June 2018, URN 0505.
90 Email from Heathrow's legal advisers, BCLP, dated 25 June 2018, URN 0511.
91 Email from Arora's legal advisers, Burges Salmon, dated 12 July 2018, URN 0516.

4. Market definition

A. Purpose of, and framework for, assessing the relevant market

4.1. When applying the Chapter I prohibition, the CMA is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement in question had as its object or effect the appreciable prevention, restriction or distortion of competition.[92]

4.2. However, the CMA will still form a view of the relevant market in order to calculate the parties' 'relevant turnover' in the market affected by the Infringement, for the purposes of establishing the level of any financial penalties that may be imposed on each party.[93]

4.3. In this respect, the Competition Appeal Tribunal (the 'CAT') and the Court of Appeal have accepted that it is not necessary to carry out a formal analysis of the relevant market in order to assess the appropriate level of the penalty. Rather, the CMA must be '*satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement*.'[94]

4.4. In the present case, the CMA considers that it is not necessary to reach a definitive view on market definition in order to determine whether there is an agreement between undertakings which has as its object the appreciable prevention, restriction or distortion of competition.

4.5. Nonetheless, the CMA has considered the market(s) to be taken into account for the purposes of calculating the level of any financial penalty to be imposed on Heathrow.

4.6. The analysis below first considers on a broad view what products and/or services could reasonably be considered part of the market(s) for the purposes of calculating the penalty in this case (the relevant product market) and then the geographic scope of the relevant market(s) (the relevant geographic market).

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92 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. This principle has also more recently been 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'.

93CMA's guidance as to the appropriate amount of a penalty (CMA73, 18 April 2018), paragraphs 2.1 and 2.3 to 2.11.

94 Argos and Littlewoods v OFT and JJB Sports v OFT [2006] EWCA Civ 1318 ('Argos, Littlewoods and JJB'), paragraphs 169 to 173 and 189 and CAT judgment on penalty, Argos and Littlewoods v OFT [2005] CAT 13, paragraph 178.

Finally, it sets out the CMA's view on the likely relevant market(s) for the purposes of calculating the penalty.[95]

B. Relevant product market(s)

4.7. The Head Lease Pricing Restriction concerns car parking services at Heathrow airport. The CMA considered first whether the relevant product market should be wider than car parking services, for example to include alternative modes of transport to access Heathrow airport for the purposes of the penalty calculation. There are several access modes to Heathrow airport, including both private and public transportation. When choosing an access mode to the airport, passengers consider access time, service frequency, quality of access to terminal and cost. Generally, the more time involved in the journey or the lower the quality of access, the cheaper the transportation method and vice-versa.[96]

4.8. Heathrow submitted to the CMA that there are several ways to access the airport and that car parking is only one of these methods and is decreasing in use.[97] In the same submission, Heathrow also noted that there is an increasing competitive constraint from public transport and that this is expected to continue to increase as additional infrastructure projects are completed.

4.9. The CAA's final report on market conditions for surface access at UK airports[98] noted that that around 30% of passengers used a car to access Heathrow in 2016, while around 40% of passengers used public transport and around 30% used a taxi or minicab.

4.10. Of those that used a car to access the airport, only around a third[99] used car parks in the airport. Also, different passengers will have different needs and preferences and not all modes of transport will be perfect substitutes or be considered substitutes from the perspective of all passengers.[100]

4.11. Heathrow derives some revenues upstream from other modes of transport which could potentially be part of the relevant market and/or affected by the Head Lease Pricing Restriction. The CMA has not undertaken a detailed analysis to determine whether car parking services at Heathrow airport are part of a much broader market comprising other transport modes. The CMA has exercised its discretion and not undertaken the analysis necessary to determine

95 In this assessment of the relevant market, car parking which is dedicated for airport-related employee use, which includes both Heathrow employees and other staff employed by other businesses located at the airport, is excluded. None of this parking is available for public use.
96 Airport Accessibility in Europe - European Commission - Europa EU, 2010.
97 Heathrow's submission of 30 April 2018, paragraphs 4.2-4.7, URN 0441.
98 https://publicapps.caa.co.uk/docs/33/CAP%201473%20DEC16.pdf
99 Mostly cars were driven away but there are also some examples of car rentals.
100 Airport Accessibility in Europe - European Commission - Europa EU, 2010.

whether the relevant product market should be wider than the provision of car parking services at Heathrow airport.

4.12. The CMA then considered whether the provision of car parking services at Heathrow airport should be segmented into several relevant product markets by reference to:

(a) Types of parking; and

(b) Types of consumers.

4.13. The CMA has considered evidence on demand and supply side substitutability, and the scope of the Head Lease Pricing Restriction.

Types of parking

4.14. Airport car parking can take several formats.

4.15. There are a number of options for consumers parking at Heathrow airport, including Heathrow's car parks, third-party valet parking (specifically three car parks leased to Arora and operated by Maple Manor) and a number of hotel car parks.

4.16. As described at paragraph 3.13 above, Heathrow's car parks are designated as short stay, business and long stay depending on their proximity to the relevant terminal building. Heathrow also offers valet parking and 'meet and greet' parking to consumers irrespective of their length of stay, and these are treated by Heathrow as falling under one of the short stay, business and long stay designations.[101]

101 HAL response to question 9 of section 26 notice, dated 5 January 2018, URNs 0046 and 0060. See also HAL's website (https://www.heathrow.com/transport-and-directions/heathrow-parking) refers to the following types of parking: Short Stay Parking (located adjacent to the terminals); Long Stay Parking (a bus journey from the terminals); Business Parking (closer to terminals than long stay); 'Pod Parking' (a self-parking service aimed at business travellers at Terminal 5); Meet and Greet Parking (a valet parking service based at the short stay car park); Valet Parking (with drop-off right outside the terminals); Hotel and Parking (packages combining overnight hotel stays with Long Stay or Meet & Greet parking); and Motorcycle Parking.

4.17. The CMA has considered whether different types of airport car parking belong to the same relevant product market or different product markets.[102]

4.18. The CMA notes in this context that:

(a) Short stay designated car parks are typically used by passengers making very short trips to the airport because of their proximity to the terminal building. Long stay designated car parks are typically used by passengers that wish to leave their car parked at or near the airport while they are away on holiday, as they are cheaper for this purpose. Valet parking and meet and greet parking differ from the other types of parking services in that the consumer is met at or near the terminal and their car is driven away and parked (typically off-site) instead of the consumer self-parking.[103]

(b) Heathrow has indicated that consumers can park in any HAL car park for as long as they wish. However, [90-100]% of transactions in short stay car parks are [✂].[104] In long stay car parks at T5, the average stay is [✂]. Business car parks are located closer to terminals than long stay car parks and the average stay is [✂].[105]

(c) There do not appear to be fundamental differences between different categories of car parks other than in terms of price and proximity to the terminal. In general, therefore, it is possible to shift capacity and adapt pricing accordingly from offering one sort of parking to another at any car park.[106]

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102 This issue has been considered in previous competition and regulatory decisions. For example: See CC's 2009 Market Investigation report on BAA airports market investigation. In this decision, the CC noted "we consider that the market includes all car parks offering transfers to the airport concerned. In the current inquiry, it has not been necessary for us to reach a view on the precise definition of car parking markets—that is, whether there are separate markets for one or all of short-term, long-term and valet car parks."

See also EC decision Case COMP/M.7398. The Commission notes "As regards a possible segment for the provision of car parking services at airports, based on the UK decisional practice, the market includes on-airport (i.e. car parks located at the airport premises) as well as off-airport parking within the vicinity that offers transfers to the airport concerned (i.e. a dedicated shuttle service to and from the airport terminal)."

See also CAA decision on Access to car parking facilities at East Midlands International Airport 2017. The CAA noted "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."

103 See the Competition Commission's ('CC') 2009 Market Investigation report on BAA airports market investigation, CAA Report on Review of market conditions for surface access at UK airports 2016.

104 HAL response to question 9 of section 26 notice, dated 5 January 2018, URNs 0046 and 0060.

105 See paragraph 1.20 of HAL's submission of 29 June 2018, URN 0513. This is inconsistent with the statistics previously provided as part of HAL's response to Q9 of section 26, received on 5 January 2018, URN 0046.

106 This might be more difficult when it comes to turning longer stay designated parks into short-stay designated car parks. Since short stay car parks are located close to a terminal, the supply of short stay parking may be inherently limited, whereas there may be more flexibility in the locations that can be used for the supply of long stay parking.

(d) The structure of HAL's tariffs across different types of car parks suggests there is some trade-off between convenience on the demand side and cost, so different types of parking could be considered substitutes for at least some consumers.[107]

4.19. The CMA considers that all types of car parking services could in principle be offered by T5 Sofitel from its car park. The displayed tariffs at the T5 Sofitel car park range from shorter stay parking through to a 24 hour rate.

4.20. The Head Lease Pricing Restriction does not distinguish between periods of stay or other car parking types (eg valet services and 'meet and greet' services). Therefore, the CMA considers that the Head Lease Pricing Restriction potentially affects the provision of parking services, including short stay, longer stay parking, valet parking and 'meet and greet' services.

4.21. In light of the above evidence, whether different types of parking constitute separate product markets or are part of a single product market, does not affect the CMA's view as to the nature of the Head Lease Pricing Restriction and the types of parking it potentially affected. Therefore, for the purpose outlined in paragraph 4.2 above, the CMA does not need to determine whether each type of parking is a separate product market or a single wider market for all types of car parking services.

Types of consumers (business/leisure)

4.22. The CAA's final report on market conditions for surface access at UK airports distinguished between business and leisure consumers.[108] The CAA's Passenger Survey of 2017 also distinguishes between types of passengers

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107 See Appendix 6 of HAL's response to section 26 dated 5 January 2018 URN 0063.
Short stay parking is cheaper than long stay car parking for short durations but becomes more expensive than long stay car parks for longer durations. It is relevant to note that HAL's long-stay car parking allows up to the first 2 hours free parking. However, most customers looking to park for a very short period of time are unlikely to wish to park there, given the distance to the terminal.
Parking at HAL's business car parks is more expensive than at its short stay car parks for short durations of time but cheaper than short stay parking for longer durations. Business parking is always more expensive than long stay parking as the business car parks are located closer to the terminal.
HAL's Valet and 'Meet and Greet' parking charging structure suggests valet parking is much more expensive than self-parking (including short-term, long-term and business parking) for short periods of time. However, valet parking becomes cheaper than short stay parking and sometimes even cheaper than long stay parking the longer the period of time the car is parked for.
Precedents also seem to be in accordance: See CC's 2009 Market Investigation report on BAA airports market investigation, CAA decision on Access to car parking facilities at East Midlands International Airport 2017.
See also Annex 10 of Heathrow's response to section 26 notice of 5 January 2018, URN 0047.
108 https://publicapps.caa.co.uk/docs/33/CAP%201473%20DEC16.pdf

using Heathrow airport on the basis of leisure or business (in both cases whether they were domestic or international). [109]

4.23. Heathrow also distinguishes between leisure and business consumers when designating car parks depending on convenience and cost, ie some of the car parking services provided at Heathrow are specifically designated for business consumers.[110]

4.24. It is therefore possible that there may be separate relevant markets for car parking services to different categories of consumer.[111]

4.25. However, the Head Lease Pricing Restriction only excludes resident hotel guests from its scope. It does not distinguish between different types of consumer, all of whom could park at the T5 Sofitel car park. The CMA therefore considers that car parking services to all types of consumer could in principle be offered by T5 Sofitel from its car park. Hence, the CMA considers that the Head Lease Pricing Restriction potentially affects car parking services to all types of consumer.

4.26. Given this, for the purpose outlined at paragraph 4.2 above, it is not necessary for the CMA to determine whether the provision of car parking services at Heathrow airport constitutes a single relevant product market, or should be segmented into several relevant product markets by types of consumer.

Conclusion on the relevant product market(s)

4.27. As noted above, all types of parking and types of consumer are covered by the Head Lease Pricing Restriction. The evidence available to the CMA indicates that it is reasonable to consider that the relevant product market(s) affected by the Infringement includes at least all types of car parking to all customers. It is not therefore necessary for the CMA to conclude whether each type of parking or customer type is a separate relevant product market. The CMA also considers it unlikely that the Head Lease Pricing Restriction would have affected the provision of other modes of transport given its limited scope. Therefore, the CMA has used turnover from all types of airport car parking to all types of

109 CAA Passenger Survey Report 2017: https://www.caa.co.uk/uploadedFiles/CAA/Content/Standard_Content/Data_and_analysis/Datasets/Passenger_survey/PassengerSurvey2017.pdf

110 For example, see Annex 10 of HAL's response to Section 26 notice of 5 January 2018, URN 0047.

111 None of the key decisions on car parking has defined separate markets based on business/leisure consumer distinction. Even though these decisions have discussed business and leisure consumers, they have not considered the possibility of different relevant markets based on this consumer distinction. For example, see CC's 2009 Market Investigation report on BAA airports market investigation, EC decision Case COMP/M.7398 and CAA decision on Access to car parking facilities at East Midlands International Airport 2017.

consumers for the purpose of the calculation of any financial penalties imposed in this case on Heathrow.

C. Relevant geographic market(s)

4.28. The CMA has taken the airport perimeter as its starting point for relevant geographic market definition. Previous European Commission decisions have concluded that the provision of airport commercial services (which includes car parking) is limited to a specific airport or its immediate surroundings.[112,113]

4.29. It has not been necessary for the CMA to reach a view on whether parking outside the airport perimeter is within the relevant market because Heathrow does not derive any revenues from car parking services outside Heathrow airport's perimeter.[114]

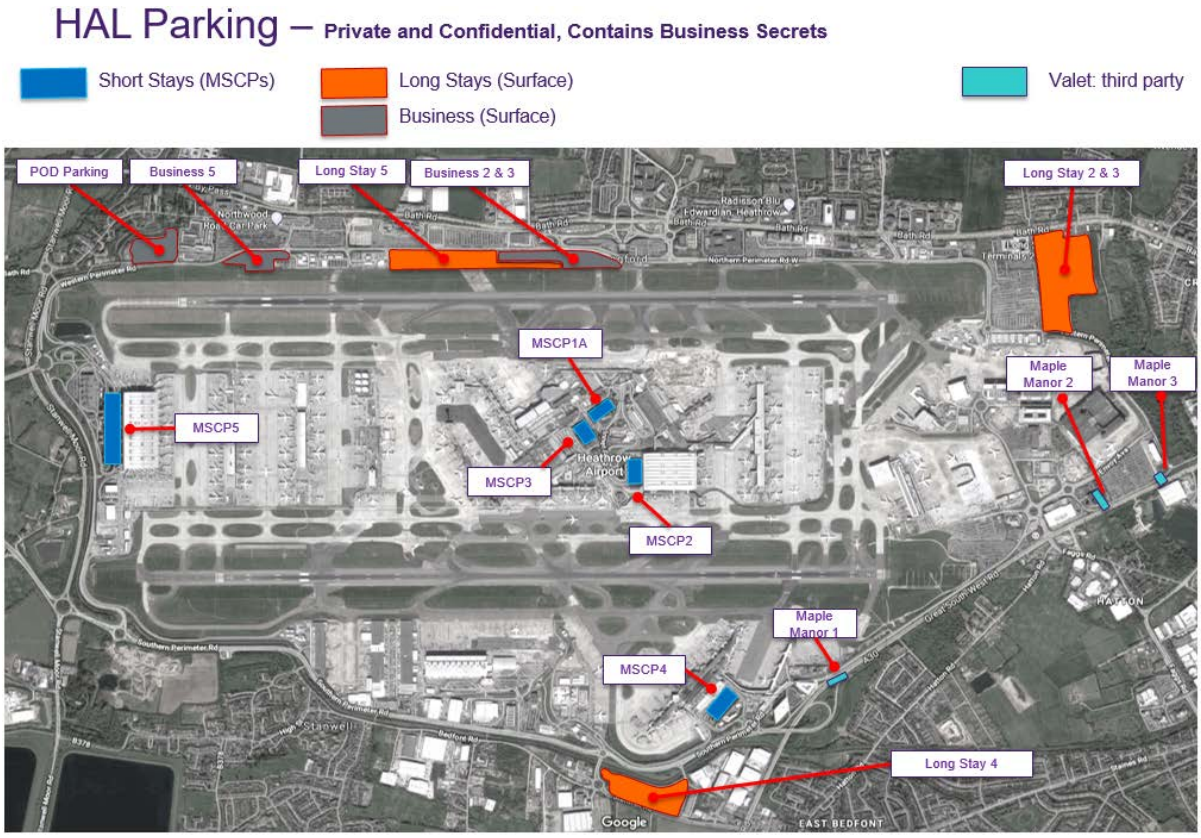
4.30. The CMA has therefore focused on whether one or more terminals should be included in the relevant geographic market(s).

4.31. Parking facilities at different terminals might be considered substitutable from a demand-side perspective depending on the distance between them, accessibility and relative prices.

4.32. Figure 1 below shows the location of HAL's car parks and hotels' car parks. Those highlighted in yellow correspond to Sofitel's T5 car parking and HAL's car parking focused on Terminal 5.

112 For example, see Commission decisions: COMP/M.4164, COMP/M.6862 and COMP/M.7398.
113 The CMA has not considered a market bigger than Heathrow airport and the immediate surrounding area. As such, the CMA has not considered the extent to which the choice to fly through Heathrow and use a car park is constrained by other airports (and their associated transportation methods).
114 Therefore, defining the market more widely would not affect the calculation of Heathrow's turnover for the setting of any financial penalty in this case.

Figure 1: HAL and hotel car parking at Heathrow airport



Source: Annex 4 of Heathrow's response to the CMA's section 26 notice dated 5 January 2018.[115]

4.33. The CMA notes that:

(a) The Head Lease Pricing Restriction required that the T5 Sofitel should not undercut Heathrow airport's car parking prices, and did not distinguish between terminals.

(b) Heathrow's Headline Tariffs apply across all terminals.[116]

(c) However, Terminal 5 and T5 Sofitel's car park are co-located and geographically distant from the other Heathrow terminals (see Figure 1 above).[117]

(d) Heathrow has provided evidence that, given the physical distance, transfer times between car parks located at other terminals are significant and in some cases rely on several transfers, and so it might be difficult for parking in other terminals to be a credible substitute to parking in Terminal 5.[118]

115 Appendix 4 of Heathrow's response to section 26 notice dated 5 January 2018, URN 0061.
116 Appendix 6 of Heathrow's response to section 26 notice dated 5 January 2018, URN 0063.
117 This is not necessarily the case with respect to the other terminals inside Heathrow airport.
118 See paragraph 1.21-1.29 of HAL's submission on the 29 June 2018 URN 0513.

4.34. In light of the co-location of the Parties' Terminal 5 car parks and Heathrow's evidence, and taking into account the limited purpose for which the relevant geographic market is defined in the present case (see paragraph 4.2 and 4.3 above), the CMA considers that it is likely that the relevant geographic market is Terminal 5.

Conclusion on the relevant geographic market

4.35. The CMA therefore in this case has included, for the purposes of paragraph 4.2, turnover in the provision of car parking services at Terminal 5.

D. Relevant market(s): conclusion

4.36. The CMA finds that the relevant market(s) for the limited purpose of determining Heathrow's relevant turnover is the provision of all types of car parking services to all types of customer at Terminal 5.

5. Legal assessment

A. Introduction

5.1. Section 2 of the Act prohibits agreements between undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless an applicable exclusion applies or the agreements in question are exempt in accordance with the provisions of Part 1 of the Act.[119]

5.2. For the reasons set out below, the CMA finds that between 31 July 2008 and 27 April 2018, the Parties infringed the Chapter I prohibition, by participating in an agreement which had as its object the prevention, restriction or distortion of competition in the supply of car parking services at Terminal 5 of Heathrow airport.

B. Undertakings

I. Legal framework

5.3. For the purposes of the Chapter I prohibition, the term 'undertaking' covers every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.[120] An entity is engaged in 'economic activity' where it conducts any activity '*… of an industrial or commercial nature by offering goods and services on the market ...*'.[121]

5.4. The term 'undertaking' designates an economic unit, even if in law that unit consists of several natural or legal persons.[122]

II. Assessment

5.5. The CMA finds that throughout the Relevant Period:

(a) Heathrow was a supplier of, among other things, airport and car parking services, and was therefore engaged in economic activity and formed an undertaking for the purpose of the Chapter I prohibition; and

(b) Arora was a supplier of, among other things, hotel and car parking services, and was therefore engaged in economic activity and formed an undertaking for the purpose of the Chapter I prohibition.

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119 References to the 'UK' are to the whole or part of the UK: the Act, sections 2(1) and 2(7).
120 C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH, EU:C:1991:161, paragraph 21.
121 C-118/85 Commission v Italian Republic, EU:C:1987:283, paragraph 7.
122 C-97/08 P Akzo Nobel NV and Others v Commission, EU:C:2009:536, paragraph 55.

5.6. Paragraphs 5.11 to 5.13 below provide a description of the agreement to which the CMA objects in this SO. Properly considered, the relevant parties to that agreement are only Heathrow and Arora.

C. Agreement between undertakings

5.7. For the reasons set out below, the CMA finds that Heathrow and Arora entered into an agreement within the meaning of the Chapter I prohibition.

I. Legal framework

5.8. The key question in establishing an agreement for the purposes of the Chapter I prohibition is whether there has been 'a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties' intention'.[123] It has been held that: '…it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way…'.[124]

5.9. However, it is not necessary to establish a joint intention to pursue an anti-competitive aim.[125] The fact that a party may have played only a limited part in setting up an agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties, does not mean that it is not party to the agreement.[126]

5.10. The fact that a party does not act on, or subsequently implement, the agreement does not preclude the finding that an agreement existed.[127] In addition, the fact that a party does not respect the agreement or comes to recognise that it can 'cheat' on the agreement at certain times does not preclude the finding that an agreement existed.[128]

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123 T-41/96 Bayer AG v Commission, EU:T:2000:242, paragraph 69 (upheld on appeal in Joined cases C-2/01 P and C-3/01 P Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG, EU:C:2004:2, paragraphs 96–97).

124 T-7/89 SA Hercules Chemicals NV v Commission, EU:T:1991:75, paragraph 256.

125 T-168/01 GlaxoSmithKline Services Unlimited v. Commission, EU:T:2006:265, paragraph 77 (upheld on appeal in Joined cases C-501/06P etc GlaxoSmithKline Unlimited v Commission, EU:C:2009:610).

126 Agreements and Concerted Practices (OFT401, December 2004), adopted by the CMA Board, paragraph 2.8. See also T-25/95 Cimenteries CBR and Others v Commission, EU:T:2000:77, paragraphs 1389 and 2557 (this judgment was upheld on liability by the CJEU in Joined cases C-204/00 P etc. Aalborg Portland A/S and Others v Commission, EU:C:2004:6, although the fine was reduced); and T-28/99 Sigma Tecnologie di Rivestimento Srl v Commission, EU:T:2002:76, paragraph 40 and C-49/92 P Commission v Anic Partecipazioni SpA, EU:C:1999:356, paragraphs 79–80.

127 T-66/99 Minoan Lines, EU:T:2003:337, paragraph 208; C-86/82 Hasselblad v Commission, EU:C:1984:65, paragraph 46; and C-277/87 Sandoz prodotti farmaceutici SpA v Commission, EU:C:1990:6, paragraph 3. See also C-373/14 P Toshiba Corporation v Commission, EU:C:2016:26, paragraphs 61–63.

128 T-588/08 Dole v Commission, EU:T:2013:130, paragraph 484.

II. Assessment

5.11. The Parties entered into a Sale and Purchase Agreement under which Arora acquired and the Parties entered into 999 year leases containing the Head Lease Pricing Restriction which, from at least 31 July 2008, precluded Arora from charging non-guests using the T5 Sofitel hotel car park prices lower than those charged at Heathrow airport's car parks.

5.12. The Head Lease Pricing Restriction constituted an agreement within the meaning of the Chapter I prohibition. It is an agreement in written form, entered into and signed on behalf of both Parties, and its existence is beyond doubt and reflects the faithful expression of the Parties' joint intention to conduct themselves in a specific way, namely through the fixing of prices at the T5 Sofitel hotel car park.

5.13. Proof of implementation is not necessary for a finding that Heathrow and Arora were a party to an agreement for the purpose of the Chapter I prohibition. Nevertheless, in the circumstances of this case, as described above at paragraph 3.66, the CMA notes that:

(a) Arora set its car parking tariffs at the T5 Sofitel in accordance with Heathrow's short stay parking rates in or around July 2008 and, in line with the Head Lease Pricing Restriction.

(b) Arora did not actively seek to undercut Heathrow airport's car parking rates.

(c) Arora replicated the Head Lease Pricing Restriction in a number of intra-company occupational lease arrangements following the transfer of the Head Lease to Arora. It included covenants equivalent to the Head Lease Pricing Restriction in the relevant occupational leases as, if an under tenant failed to comply with the tenant's covenants in the Head Lease including the Head Lease Pricing Restriction, Arora as tenant of the Head Lease could be held liable.[129] Therefore, Arora sought to ensure that its current and future tenants were bound by the Head Lease Pricing Restriction.

129 Arora states at paragraph 17.1 of section 26 response dated 9 March 2018, URN 0252: "Pursuant to paragraph 10.6 of Schedule 3 [sic] [2] of the Head Lease, HTHL is required to indemnify the landlord of the Head Lease against all expenses losses damages penalties fines charges or other sanctions and liabilities incurred by the landlord of the Head Lease resulting from any breach by an undertenant of any covenant on the part of HTHL contained in the Head Lease." And further at paragraph 17.2 of section 26 response dated 9 March 2018, URN 0252: "The Head Lease contains a provision equivalent to the pricing restriction in the Occupational Lease (at paragraph 22 of Schedule 3 [sic] [2]), meaning if HTHL does not enforce the pricing restriction in the Occupational Lease, it will be in breach of the Head Lease, and therefore open to enforcement action by the landlord of the Head Lease."

(d) Whilst capacity constrained at times, Arora considered it could have offered competitively priced parking for non-guests were it not for the Head Lease Pricing Restriction, particularly during certain periods when it had spare capacity.

5.14. In light of the above, the CMA finds that the Head Lease Pricing Restriction constituted an agreement between the Parties within the meaning of the Chapter I prohibition.

D. Object of preventing, restricting, or distorting competition

5.15. For the reasons set out below, the CMA finds that the Head Lease Pricing Restriction had as its object the prevention, restriction or distortion of competition.

I. Legal framework

General

5.16. The Chapter I prohibition prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition.

5.17. The term 'object' in both prohibitions refers to the 'aim', 'purpose', or 'objective', of the coordination between undertakings in question.[130]

5.18. Where an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement has had, or would have, any anti-competitive effects in order to establish an infringement.[131]

5.19. 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.[132] The '*essential legal criterion*' for a finding of an anti-competitive object is that the coordination between undertakings '*reveals in itself*

130 See, for example, respectively: C-56/64 Consten & Grundig v Commission, EU:C:1966:41, paragraph 343 ('…Since the agreement thus aims at isolating the French market… it is therefore such as to distort competition…'); Joined cases 96-102, 104, 105, 108 and 110/82 IAZ and Others v Commission, EU:C:1983:310, paragraph 25; C-209/07 Competition Authority v Beef Industry Development Society, EU:C:2008:643, paragraphs 32–33.
131 See, for example, C-8/08 T-Mobile Netherlands BV v NMa, EU:C:2009:343, paragraphs 28–30 and the case law cited therein, and Cityhook Limited v Office of Fair Trading [2007] CAT 18, paragraph 269.
132 C-67/13 P Groupement des Cartes Bancaires v Commission, EU:C:2014:2204, paragraph 50; affirmed in C-373/14 P Toshiba Corporation v Commission, EU:C:2016:26, paragraph 26.

a sufficient degree of harm to competition' such that there is no need to examine its effects.[133]

5.20. In order to determine whether an agreement reveals a sufficient degree of harm such as to constitute a restriction of competition 'by object', regard must be had to:

- the content of its provisions,
- its objectives; and
- the economic and legal context of which it forms a part.[134]

5.21. Although the parties' subjective intention is not a necessary factor in determining whether an agreement is restrictive of competition, there is nothing prohibiting that factor from being taken into account.[135]

5.22. An agreement may be regarded as having an anti-competitive object even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives.[136]

Price-fixing agreements

5.23. Section 2(2)(a) of the Act prohibits agreements and/or concerted practices which '*directly or indirectly fix purchase or selling prices*'.

5.24. The CMA, European Courts and the European Commission have held on numerous occasions that agreements or concerted practices that relate to the fixing of prices between competitors, or that involve the sharing between competitors of pricing or other information of commercial or strategic significance, or both, restrict competition by object under the Chapter I prohibition and Article 101 of the Treaty on the Functioning of the European

133 C-67/13 P Groupement des Cartes Bancaires v Commission, EU:C:2014:2204, paragraphs 49 and 57. See also C-373/14 P Toshiba Corporation v Commission, EU:C:2016:26, paragraph 26.
134 C-67/13 P Groupement des Cartes Bancaires v Commission, EU:C:2014:2204, paragraph 53 and C-373/14 P Toshiba Corporation v Commission, EU:C:2016:26, paragraph 27. According to the CJEU in Cartes Bancaires, paragraphs 53 and 78, 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.
135 C-67/13 P Groupement des Cartes Bancaires v Commission, EU:C:2014:2204, paragraph 54; affirmed in C-286/13 P Dole Food and Dole Fresh Fruit Europe v Commission, EU:C:2015:184, paragraph 118.
136 C-209/07 Competition Authority v Beef Industry Development Society, EU:C:2008:643, paragraph 21.

Union ('TFEU').[137] Such agreements or concerted practices represent particularly serious restrictions of competition, and the CMA may limit the analysis of the economic and legal context of which the practice forms part to what is strictly necessary in order to establish the existence of a restriction of competition by object.[138]

5.25. Price fixing can take many forms.[139] Price fixing may involve fixing either the price itself or the components of a price, setting a minimum price below which prices are not to be reduced,[140] establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move. Price fixing may also take the form of an agreement to restrict price competition, and an agreement may restrict price competition even if it does not entirely eliminate it.[141]

5.26. The CJEU has also held that, even though fixed prices might not have been observed in practice, the decisions fixing them had the object of restricting competition.[142]

II. Assessment

Legal and economic context

5.27. The characteristics of the market(s) potentially affected by the Head Lease Pricing Restriction are set out in section 4.

5.28. As noted above at paragraph 3.26, the T5 Sofitel car park is located in Terminal 5 at Heathrow airport and is in close proximity to car parking offered by Heathrow in particular Heathrow's short stay designated car park at Terminal 5. Heathrow and Arora are the only suppliers of car parking services located at

137 See for example: CMA decision of 16 December 2016 in Case CE/9859-14, Conduct in the modelling sector, CMA decision of 20 August 2015 in Case CE/9784-13, Conduct in the ophthalmology sector, C-286/13 P Dole Food and Dole Fresh Fruit Europe v Commission, EU:C:2015:184, paragraphs 113 to 127; Case C-8/08, T-Mobile v Commission ECLI:EU:C:2009:343, paragraph 43. See also the Commission Notice: Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements, OJ C 11/1, 14 January 2011, paragraphs 72 to 74; and Article 101(3) Guidelines.
138 C-469/15 FSL v Commission, EU:C:2017:308, paragraph 107.
139 Agreements and Concerted Practices, paragraphs 3.4 to 3.8.
140 T-46/10 Faci SpA v European Commission, EU:T:2014:138; C-101/07 Coop de France bétail et viande & Others v Commission of the European Communities, EU:C:2008:741. Commission decision of 25 June 2014 in Case 39.965 Canned mushrooms. European Commission decision COMP/39165 Flat glass, 28 November 2007. Commission decision of 29 October 2005 in Case 38.281/B.2 Italian Raw Tobacco, Commission decision of 20 October 2004 in Case 38.238/B.2 Spanish Raw Tobacco. Fixing minimum prices includes decisions aimed at imposing minimum prices, see Commission decision of 8 December 2010 in Case 39.510 ONP; and C-27/87SPRL Louis Erauw-Jacquery v La Hesbignonne SC, EU:C:1988:183, paragraph 15.
141 T-325/01 DaimlerChrysler AG v Commission of the European Communities, EU:T:2005:322, paragraphs 196 to 212; and CMA decision of 20 August 2015 CE/9784-13 Conduct in the ophthalmology sector, paragraphs 4.125, 4.145 and 4.150. Guidance on Agreements and Concerted Practices, paragraphs 3.5 and 3.6.
142 Case 246/86, Belasco v Commission, ECLI:EU:C:1989:301, paragraph 15.

Terminal 5.[143] In addition, whilst capacity constrained at times, the CMA has found that absent the Head Lease Pricing Restriction, Arora could have offered competitively priced parking for non-guests, particularly during certain periods when it had spare capacity. During the Relevant Period, the Parties were therefore actual or at least potential competitors for car parking services at T5 Heathrow airport. Given the absence of other car parking facilities located at Terminal 5 not owned and/or controlled by Heathrow or Arora, the Parties were therefore also each other's only competitors.

Content and objectives of the Head Lease Pricing Restriction

5.29. Under the terms of the Head Lease Pricing Restriction, Arora was prevented from freely setting its prices for non-guests parking at the T5 Sofitel. The Head Lease Pricing Restriction expressly precluded Arora from charging non-guests using the T5 Sofitel hotel car park prices lower than those charged at Heathrow airport's car parks.

5.30. As set out above, agreements between actual or potential competitors that restrict price competition have consistently been found to constitute agreements that have the object of restricting competition.

5.31. It follows from the CMA's findings on market definition and the legal and economic context, in particular the fact that the Parties were actual or potential competitors, that the Head Lease Pricing Restriction restricted Arora from freely competing on price.

5.32. The Head Lease Pricing Restriction therefore had the clear objective aim of protecting Heathrow's own car parking operations from price competition from the T5 Sofitel. Such an agreement by seeking to remove or limit the potential benefit to consumers of price competition between Arora and Heathrow was by its very nature harmful to the proper functioning of normal competition. It reveals in itself a sufficient degree of harm to competition and therefore constitutes a restriction of competition 'by object' such that there is no need to examine its effect.[144]

5.33. For the reasons set out above, the CMA finds that the Head Lease Pricing Restriction between Heathrow and Arora had as its object the prevention, restriction or distortion of competition.

143 Heathrow response to Question 9 of CMA section 26 Notice dated 5 January 2018 (URN 0046).
144 C-373/14 Toshiba Corporation v Commission, EU:C:2016:26, paragraph 28.

E. Appreciable restriction on competition

I. Legal framework

5.34. An agreement that is restrictive of competition by 'object' will fall within the Chapter I prohibition only if it has the object of perceptibly restricting, preventing or distorting competition.[145]

5.35. An agreement that may affect trade between EU Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.[146] In accordance with section 60(2) of the Act,[147] this principle also applies *mutatis mutandis* in respect of the Chapter I prohibition: accordingly, an agreement that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

II. Assessment

5.36. The CMA has found that the Head Lease Pricing Restriction had the object of preventing, restricting or distorting competition (see paragraph 5.33 above) and that it may have affected trade within the UK (see paragraph 5.44, below). The CMA therefore also finds that the Head Lease Pricing Restriction constitutes, by its very nature, an appreciable restriction of competition for the purposes of the Chapter I prohibition.

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145 It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market. If it is to fall within the scope of the prohibition under Article 101(1) TFEU, an agreement of undertakings must have the object or effect of perceptibly restricting competition within the common market and be capable of affecting trade between Member States. See C-226/11 Expedia Inc. v Autorité de la concurrence and Others, EU:C:2012:795, paragraph 16 citing, among other cases, C-5/69 Völk v Vervaecke, EU:C:1969:35, paragraph 7. See OFT401, paragraph 2.15.

146 C-226/11 Expedia Inc. v Autorité de la concurrence and Others, EU:C:2012:795, paragraph 37; and European Commission Notice on agreements of minor importance [2014] OJ C291/01, paragraphs 2 and 13.

147 The Act, section 60(2) provides that, when determining a question in relation to the application of the Act, Part 1 (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the European Court in respect of any corresponding question arising in EU law. See also Carewatch Care Services Limited v Focus Caring Services Limited and Others [2014] EWHC 2313 (Ch) paragraph 148.

5.37. In any event, and in the alternative, the CMA finds that the Head Lease Pricing Restriction had an appreciable impact in the supply of car-parking services in Heathrow Terminal 5 (for the purposes of the Chapter I prohibition). This conclusion is based on the following findings:

(a) only Heathrow and Arora have car parking facilities available to the public located at Terminal 5.[148]

(b) Each Party is a substantial undertaking.[149] Heathrow had a turnover of £2,884 million in the financial year ended December 2017 and Arora had a turnover of £236 million in the financial year ended March 2017.

(c) Heathrow airport is the largest airport in the UK, serving 78.0 million passengers in 2017. Heathrow served 32.3 million passengers from Terminal 5 alone in 2017 and generated over [✂] of revenues from car parking services at Terminal 5.

F. Duration

5.38. The CMA finds that the Head Lease Pricing Restriction had started by 31 July 2008 and continued until 27 April 2018.

5.39. As described at paragraph 3.36 above, under the terms of the Sale and Purchase Agreement, the Head Lease Price Restriction was suspended until the date of practical completion of the hotel. T5 Sofitel was opened in July 2008. The CMA therefore considers that the appropriate start date of the infringement was 31 July 2008.

5.40. Heathrow submitted that the period of infringement should begin on 6 April 2011 as prior to that date the Head Lease Pricing Restriction would have been excluded from the scope of the Chapter I prohibition by virtue of certain statutory instruments.[150] As discussed further at paragraph 5.48 below, the CMA finds that these instruments did not apply to land agreements containing price restrictions. Therefore, the CMA finds that the start date of the infringement is unaffected by these submissions.

5.41. The Head Lease Pricing Restriction could only formally be removed via deed executed by both parties. As described at paragraph 3.68 above, Heathrow executed a deed removing the Head Lease Pricing Restriction from the Head

148 Heathrow response to Q9 of CMA s26 Notice of 7 December dated 5 January, URN 0046.
149 In North Midland Construction PLC v Office of Fair Trading [2011] CAT 14, paragraph 60, the CAT took into account that the parties to the infringement were 'substantial undertakings' (one of which had turnover of £10 million) in concluding that the alleged infringement was appreciable.
150 The Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 (SI 2004/1260) and, prior to that, the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (SI 2000/310).

Lease on 25 June and Arora on 12 July 2018. However, on the facts of this case, the CMA finds that the Head Lease Pricing Restriction ended on 27 April 2018 as:

(a) This was the date on which Heathrow contacted Arora and confirmed that it did not consider that the Head Lease Pricing Restriction was enforceable and that it wanted to formally remove the Head Lease Pricing Restriction by deed of variation. It also provided a draft of this document to Arora;

(b) Very shortly after this date, Arora confirmed its mutual consent for the removal of the Head Lease Pricing Restriction;

(c) Both parties acted in good faith to enter into the deed of variation without delay; and

(d) Both parties subsequently formally entered into a deed of amendment and removed the Head Lease Pricing Restriction.

G. Effect on trade within the UK or a part of it

I. Legal framework

5.42. The Chapter I prohibition applies to agreements which may affect trade within the UK or a part of it.[151] The effect on trade does not necessarily need to be 'appreciable'.[152]

II. Assessment

5.43. The CMA finds that the Head Lease Pricing Restriction may have affected trade within a part of the UK. As noted above, the Head Lease Pricing Restriction applied to the supply of car parking services at Heathrow Terminal 5. Heathrow airport is the largest airport in the UK, serving 78.0 million passengers in 2017. Heathrow served 32.3 million passengers from Terminal 5 alone in 2017 and generated over [✂] of revenues from car parking services at Terminal 5. The Head Lease Pricing Restriction therefore may have affected trade within the UK or a part of it.

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151 The UK includes any part of the UK in which an agreement operates or is intended to operate: the Act, section 2(7). As is the case in respect of Article 101 TFEU, it is not necessary to demonstrate that an agreement has had an actual impact on trade – it is sufficient to establish that the agreement is capable of having such an effect: joined cases T-202/98, T-204/98 and T-207/98 Tate & Lyle plc and Others v Commission, EU:T:2001:185, paragraph 78.

152 Aberdeen Journals v Director of Fair Trading [2003] CAT 11, paragraphs 459–461. The concept of 'appreciable effect on inter-state trade' is an EU law jurisdictional requirement which demarcates the boundary line between the application of EU competition law and national competition law. According to the CAT, this requirement should not be read into the Act, section 2.

5.44. The CMA also finds that, insofar as required, the effect on trade within part of the UK may have been 'appreciable' – given, in particular, the following points:

(a) the object of the Head Lease Pricing Restriction was to restrict prices. By its very nature, therefore the Head Lease Pricing Restriction was capable of affecting trade;

(b) only Heathrow and Arora have car parks available to the public located at Terminal 5 [153]; and

(c) the Parties are both substantial undertakings, for the reasons set out at paragraph 5.37 above.

H. Individual exemption, exclusion or block exemption

I. Legal framework

5.45. 'Agreements' which are found to restrict competition under section 2 of the Act, but satisfy the criteria set out in section 9 of the Act are exempt from the Chapter I prohibition.

5.46. Pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it does not affect trade between EU Member States, but otherwise falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation. Agreements that restrict competition may be exempt from the Chapter I prohibition if they fall within the vertical agreements block exemption[154] or the technology transfer agreements block exemption.[155] Agreements which contain pricing restrictions are however excluded from these block exemptions.[156]

5.47. The Chapter I prohibition does not apply in any of the cases in which it is excluded by or as a result of Schedules 1 to 3 of the Act.[157]

5.48. Prior to 6 April 2011, land agreements which included certain obligations and restrictions were also excluded from the scope of Chapter I of the Act.[158] The

153 Heathrow response to Q9 of CMA s26 Notice of 7 December dated 5 January, URN 0046.

154 European Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices [2010] OJ L102/1.

155 European Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the TFEU to categories of technology transfer agreements [2014] OJ L 93/17.

156 Art 4(a) VABER, Art 4(1)(a) and 4(2)(a) TTBER.

157 The Act, section 3(1). Schedule 1 covers mergers and concentrations. Schedule 2 covers competition scrutiny under other enactments. Schedule 3 covers general exclusions.

158 By virtue of the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 (SI 2004/1260) and, prior to that, the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (SI 2000/310).

relevant restrictions were defined as restrictions on "*activity that may be carried out on, from, or in connection with the relevant land*". The exclusion therefore did not intend to capture land agreements with pricing restrictions.[159] From 6 April 2011 onwards, the Chapter I prohibition applies to land agreements that have been entered into prior to and continue to exist after 6 April 2011 and also to land agreements that are entered into on or after that date.[160]

I. Assessment

5.49. The Parties have not sought to prove that the Head Lease Pricing Restriction should be exempted from the Chapter I prohibition by operation of section 9 of the Act or one of the block exemption regulations. Notwithstanding that the burden of proving that the conditions for exemption under section 9 of the Act or Article 101(3) TFEU would rest with the Parties, the CMA considers it unlikely that the conditions would be met in this case. In particular, it is difficult to see how the Head Lease Pricing Restriction could be said to have contributed to improving the production or distribution of services, promoting technical or economic progress or how consumers could be said to have benefited, while not imposing on the Parties restrictions which are not indispensable to the attainment of those objectives.

5.50. The Parties have also not sought to prove that the Head Lease Pricing Restriction should be exempted from the Chapter I prohibition by operation of one of the block exemption regulations. In any event, given that the Head Lease Pricing Restriction is a pricing restriction, it follows that it is not exempt from the application of the Chapter I prohibition by virtue of section 10 of the Act.

5.51. Finally, none of the exclusions from the Chapter I prohibition provided for by section 3 of the Act apply. The exclusion that existed prior to 6 April 2011 in respect of land agreements, would also not apply as the Head Lease Pricing Restriction is a pricing restriction.

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159 See also the OFT's Land Agreements guidance issued in March 2011 (OFT1280a) and adopted by the CMA board in 2014. The guidance is intended to provide guidance on agreements that were previously excluded by the 2004 Order. At paragraphs 4.33 and 4.34 it explicitly differentiates between those restrictions which fell within the scope of the previous exemption (ie 'use' restrictions relating to the way the land may be used or how a right over the land may be exercised) and those that did not – such as pricing restrictions. It confirms that restrictions not relating to the use of land, such as pricing restrictions, may nonetheless infringe the Chapter I prohibition.
160 By virtue of the Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010160 (SI 2010/1709).

I. Attribution of liability

I. Legal framework

5.52. Competition law refers to the activities of undertakings. If an undertaking infringes the competition rules, it falls, under the principle of personal responsibility, to that undertaking to answer for that infringement.[161]

5.53. An undertaking may consist of several persons, legal or natural. Given the requirement to impute an infringement to a legal entity or entities on which fines may be imposed and to which an infringement decision is to be addressed, it is necessary to identify the relevant legal persons that form part of the undertaking in question.[162]

Parent companies and subsidiaries

5.54. The conduct of a subsidiary may be imputed to its parent company where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities.[163] This is because, in such a situation, the parent company and its subsidiary form a single economic unit, and therefore a single undertaking for the purposes of the relevant prohibitions.[164]

5.55. Where a parent company owns 100% of a subsidiary which has infringed the competition rules, there is a rebuttable presumption that:

(a) the parent company is able to exercise 'decisive influence' over the conduct of its subsidiary; and

(b) the parent company does in fact exercise such decisive influence over the conduct of its subsidiary,

161 C-97/08 P Akzo Nobel NV and Others v Commission, EU:C:2009:536, paragraphs 54–56.
162 C-97/08 P Akzo Nobel NV and Others v Commission, EU:C:2009:536, paragraph 57.
163 C-155/14 P Evonik Degussa GmbH v Commission, EU:C:2016:446, paragraph 27, citing the judgement in C-93/13 P and C-123/13 P, Commission and Others v Versalis and Others, EU:C:2015:150, paragraph 40; See also Cases C-628/10 P and C-14/11 P Alliance One & Others v Commission, EU:C:2012:479, paragraph 44 citing C-97/08 P Akzo Nobel NV and Others v Commission, EU:C:2009:536, paragraphs 58–59.
164 C-155/14 P Evonik Degussa GmbH v Commission, EU:C:2016:446, paragraph 27.

such that the two entities can be regarded as a single economic unit and thus jointly and severally liable.[165]

5.56. It is for the party in question to rebut the presumption by adducing sufficient evidence to show that its subsidiary acts independently on the market.[166] The presumption also applies to situations where the parent company indirectly holds 100% of a subsidiary, for example, via one or more intermediary companies.[167]

Economic succession

5.57. Liability for the infringement of an undertaking may pass from one legal entity to a successor in the following specific circumstances:

(a) the legal entity that committed the infringement has ceased to exist in law[168] or economically[169] after the infringement was committed;

(b) the business that contributed to the infringement is transferred from one entity (the transferor) to another (the transferee) at a time when transferor and transferee form part of the same undertaking (the principle of economic continuity).[170]

II. Assessment

5.58. In determining which entities are liable for an infringement in this case, the CMA has identified for each of Heathrow and Arora the relevant legal entities which form part of these undertakings.

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165 C-155/14 P Evonik Degussa GmbH v Commission, EU:C:2016:446, paragraph 28 and the case law cited; Cases C-628/10 P and C-14/11 P Alliance One & Others v Commission, EU:C:2012:479, paragraphs 46–48; C-97/08 P Akzo Nobel NV and Others v Commission, EU:C:2009:536, paragraphs 60–61; See also C-107/82 Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission, EU:C:1983:293, paragraph 50.
166 C-628/10 P and C-14/11 P Alliance One & Others v Commission, EU:C:2012:479, paragraph 47, citing C-97/08 P Akzo Nobel NV and Others v Commission, EU:C:2009:536, paragraph 61.
167 C-90/09 P General Química SA and Others v Commission, EU:C:2011:21, paragraphs 86–87.
168 Case C-49/92 P Commission v Anic Participazioni, EU:C:1999:356, paragraph 145, Office of Fair Trading decision of 20 November 2006 in Case CE/2890-03, Exchange of information on future fees by certain independent fee–paying schools, paragraph 1395.
169 Case C-280/06 - Autorità Garante della Concorrenza e del Mercato v Ente tabacchi italiani – ETI SpA and Philip Morris, ECLI:EU:C:2007:775.
170 Cases C-204/00 P etc. Aalborg Portland A/S v Commission EU:C:2004:6, paragraphs 354–360; T-43/02 Jungbunzlauer v Commission EU:T:2006:270, paragraphs 132-133; and T-117/07 and 121/07 Areva and Others and Alstom v Commission EU:T:2011:69, paragraphs 66-69. See also OFT decision of 20 November 2006 in Case CE/2890-03, Exchange of information on future fees by certain independent fee–paying schools, paragraph 1395.

Heathrow

5.59. For Heathrow, the CMA finds HAL and HAHL jointly and severally liable for the Infringement.

5.60. HAL was directly involved in the Infringement as it was party to the Head Lease Pricing Restriction from at least July 2008 by being a signatory of the Sale and Purchase Agreement transferring the Head Lease to Arora, as well as the Head Lease. The CMA therefore has attributed liability for the Infringement to HAL.

5.61. As noted above, HAL is a wholly owned subsidiary of HAHL. HAHL was therefore able to exercise decisive influence over the conduct of HAL and there is a rebuttable presumption that HAHL did in fact exercise decisive influence over HAL, such that HAL and HAHL formed a single economic unit, and therefore a single undertaking for the purpose of the Chapter I prohibition. The CMA has applied this presumption and holds HAHL jointly and severally liable with HAL for the Infringement.

Arora

5.62. For Arora, the CMA holds HTHL (formerly Arora Heathrow Holdings Limited[171]) liable for the entire Relevant Period of the Infringement and AHL jointly and severally liable with HTHL for the Infringement from March 2013 to 27 April 2018 for the reasons set out below.

5.63. HTHL was directly involved in the Infringement from at least March 2013 when it became the Head Lease tenant. In addition, Arora submitted evidence that HTHL is the sole relevant successor entity to the Arora entities which previously directly held Arora's interest as tenant[172] in the Head Lease and that, at the time the relevant business was transferred to HTHL, there were structural links between the entity that carried out this business (the transferor) and HTHL (the transferee) as they were part of the Arora undertaking.[173] The CMA therefore attributes liability for the entire Relevant Period of the Infringement to HTHL.

5.64. As noted above, HTHL, has been a wholly owned subsidiary of AHL since March 2013.

5.65. AHL was therefore able to exercise decisive influence over the conduct of HTHL between March 2013 and 27 April 2018 and there is a rebuttable presumption that AHL did in fact exercise decisive influence over HTHL, such that HTHL and AHL formed a single economic unit, and therefore a single undertaking for the

171 HTHL (03896804) was previously named 'Arora Heathrow Holdings Limited' (24 Nov 2015-11 July 2016).
172 As set out in paragraph 3.2 between 21 March 2006 to March 2013, other companies within the Arora group were the head lease tenant before HTHL.
173 Arora submission dated 14 September 2018, URNs 0784 and 0785.

purpose of the Chapter I prohibition. The CMA has applied this presumption and holds AHL jointly and severally liable with HTHL for the Infringement from March 2013 to 27 April 2018.

6. The CMA's action

A. The CMA's decision

6.1. On the basis of the evidence set out above, the CMA has concluded that the Parties infringed the Chapter I prohibition by participating in an agreement under which Arora agreed to a tenant's covenant which precluded it from charging non-guests using the T5 Sofitel car park rates lower than those charged at Heathrow airport's car parks. The CMA concludes that the agreement had as its object the prevention, restriction or distortion of competition within the UK or a part of it and may have affected trade within the UK or a part of it.

6.2. The CMA has concluded that the duration of the Infringement was from 31 July 2008 to 27 April 2018.

6.3. The remainder of this Chapter sets out the enforcement action which the CMA is taking and its reasons for taking that action.

B. Directions

6.4. Section 32(1) of the Act provides that if the CMA has made a decision that an agreement[174] infringes the Chapter I prohibition, it may give such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

6.5. For the reasons described in paragraph 3.68 above, the CMA considers that the Infringement has ceased. Therefore, the CMA considers that it is not necessary to give directions to the Parties in this case.

C. Financial penalty

General points

6.6. Section 36(1) of the Act provides that on making a decision that an agreement[175] has infringed the Chapter I prohibition, the CMA may require an undertaking which is a party to the agreement concerned to pay the CMA a penalty in respect of the infringement. In accordance with section 38(8) of the Act, the CMA must have regard to the guidance in force at the time when setting the amount of the penalty (the Penalties Guidance).[176]

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174 Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.
175 Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.
176 The CMA's guidance as to the appropriate amount of a penalty (CMA73, April 2018).

6.7. The CMA holds HAL and its parent company HAHL jointly and severally liable for the Infringement. Therefore, the CMA considers that it is appropriate to impose a financial penalty jointly and severally on HAL and HAHL.

6.8. HTHL, AMSL and their parent company AHL (collectively referred to as 'Arora'), were granted full immunity from financial penalties under the CMA's leniency policy on 6 September 2018. Provided these companies continue to co-operate and comply with the conditions of the CMA's leniency policy, as set out in the immunity agreement between HTHL, AMSL, AHL and the CMA dated 6 September 2018, no financial penalty will be imposed on Arora. Consequently, the CMA has not calculated the level of any financial penalty that would be applied to Arora if immunity had not been granted.

The CMA's margin of appreciation in determining the appropriate penalty

6.9. Provided the penalty it imposes in a particular case is (i) within the range of penalties permitted by section 36(8) of the Act[177] and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000,[178] and (ii) the CMA has had regard to the Penalties Guidance in accordance with section 38(8) of the Act, the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.[179]

6.10. The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.[180] Rather, the CMA makes its assessment on a case-by-case basis[181] having regard to all relevant circumstances and the objectives of its policy on financial penalties. In line with statutory requirements and the twin objectives of its policy on financial penalties, namely:

- to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and
- the objective of deterring both the undertaking on which the penalty is imposed and other undertakings from engaging in behaviour that breaches

177 Section 36(8) is addressed at paragraph 6.38 and following below.
178 SI 2000/309, as amended by the Competition Act (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.
179 Argos Limited and Littlewoods Limited v OFT [2005] CAT 13, at [168] and Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT [2005] CAT 22, at [102].
180 See, for example, Eden Brown and Others v OFT [2011] CAT 8, at [78].
181 See, for example, Kier Group and Others v OFT [2011] CAT 3, at [116] where the CAT noted that 'other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent'. See also Eden Brown and Others v OFT [2011] CAT 8, at [97] where the CAT observed that '[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case'.

the prohibition in Chapter I of the Act (as well as other prohibitions under the Act).[182]

Intention/negligence

6.11. The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition if it is satisfied that the infringement has been committed intentionally or negligently.[183] The CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.[184]

6.12. The CAT has defined the terms 'intentionally' and 'negligently' as follows:

'*…an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition*'.[185]

6.13. This is consistent with the approach taken by the CJEU which has confirmed:

'*the question whether the infringements were committed intentionally or negligently…is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty.*'[186]

6.14. The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement or conduct in question has as its object the restriction of competition.[187] Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.[188]

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182 Section 36(7A) of the Act and paragraph 1.4 of the Penalties Guidance.

183 The Act, section 36(3).

184 Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading [2002] CAT 1, paragraphs 453–457; see also Argos Limited and Littlewoods Limited v Office of Fair Trading [2005] CAT 13, paragraph 221.

185 Argos Limited and Littlewoods Limited v Office of Fair Trading [2005] CAT 13, paragraph 221.

186 C-280/08 P Deutsche Telekom v Commission, EU:C:2010:603, paragraph 124.

187 Enforcement (OFT407, December 2004), adopted by the CMA Board, paragraph 5.9.

188 The fact that the Head Lease Pricing Restriction was contained in an agreement drafted by Heathrow's external legal counsel does not prevent a finding of an intentional infringement. See C-681/11 Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and others, EU:C:2013:404, paragraph 38: '…the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could be unaware of the anti-competitive nature of that conduct'; and paragraph 41: 'It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine'. See also Enforcement (OFT407, December 2004), adopted by the CMA Board, paragraph 5.10.

6.15. Heathrow has, as part of its Terms of Settlement, accepted that it infringed the Chapter I prohibition and that it is liable to pay a penalty. Arora has made the same admission of liability as confirmed in its Leniency Agreement. In addition, for the reasons given at paragraphs 5.27 to 5.33 above, the Infringement had as its object the prevention, restriction or distortion of competition and therefore Heathrow and Arora are considered to have acted intentionally.

6.16. In any case, at the very least, the CMA finds that each of the Parties ought to have known that the Head Lease Pricing Restriction was capable of harming competition, such that at a minimum, they committed the Infringement negligently. The CMA notes, for example, the following:

(a) As set out in paragraphs 5.24, it is well established that price restrictions are regarded as serious infringements of competition law.

(b) The Head Lease Pricing Restriction was contained within signed, written agreements relating to a high value property transaction. The Sale and Purchase Agreement dated 1 July 2005 was signed at Director level.

(c) As set out in paragraphs 3.48 to 3.49 above, there is evidence that in 2008 when T5 Sofitel first opened Arora complied with the Head Lease Pricing Restriction by pricing at or above the Heathrow airport rates.

(d) As described in paragraph 3.65 Arora subsequently included the Head Lease Pricing Restriction in intra-company agreements.

(e) As set out in paragraph 3.54 above, there is evidence that in 2014, a senior property manager at Heathrow raised concerns over Arora's compliance with the holiday parking prohibition in Clause 22 of the Head Lease, which is the clause that also contains the Head Lease Pricing Restriction and sought legal advice on Heathrow's ability to enforce it.[189] The exchange of internal emails and briefing note also include a reference to the T5 Sofitel advertising online short-term parking at the T5 Sofitel at that time 'in direct conflict with our appreciation of the agreement'.

(f) Further a set of internal emails in August 2015 raised similar questions on the extent to which Heathrow was able to limit Arora through lease restrictions from competing with Heathrow in the provision of airport parking.

[189] Heathrow submitted on 30 April 2018 and on 20 July 2018 that the internal email exchanges concerned the use of the car park (holiday parking) and not the pricing restriction aspects of Clause 22. The CMA does not dispute this. However, the CMA considers that it would not be feasible for the relevant personnel including legal advisers involved in the email exchanges to have only been aware of the holiday parking aspect of Clause 22 and not the pricing aspects of Clause 22.

(g) There was awareness across the sector that restricting pricing of car parking services was anti-competitive. On 15 December 2016, the CAA issued a decision which found that East Midlands International Airport Ltd, its parent company the Manchester Airports Group Plc (EMIA), and Prestige Parking Ltd had infringed Chapter I of the Act by agreeing to fix parking prices at EMIA, supported by an information exchange and monitoring. At the same time, the CAA also concluded a review of market conditions for surface access at UK airports and issued an advisory letter to licensed airport operators setting out some concerns identified by the review.

6.17. The CMA therefore finds that the Parties committed the Infringement intentionally or, at the very least, negligently.

D. Calculation of penalties

6.18. As noted at paragraph 6.6 above, when setting the amount of the penalty, the CMA must have regard to the guidance on penalties in force at that time. The Penalties Guidance establishes a six-step approach for calculating the penalty. The six steps and their application in this Decision are set out below.

Step 1 – the starting point

6.19. The starting point for determining the level of financial penalty that will be imposed on an undertaking is calculated having regard to the relevant turnover of the undertaking and the seriousness of the infringement.[190]

I. Relevant turnover

6.20. The 'relevant turnover' is defined in the Penalties Guidance as the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.[191] The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.[192]

6.21. In the present case, the CMA has applied the Penalties Guidance and taken into account Heathrow's turnover from the supply of car parking services at Terminal

190 Penalties Guidance, paragraphs 2.3 to 2.10.
191 Penalties Guidance, paragraph 2.11. The CMA notes the observation of the Court of Appeal in Argos Ltd and Littlewoods Ltd v OFT and JJB Sports plc v OFT [2006] EWCA Civ 1318, at paragraph 169 that: '[…] neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty.' The Court of Appeal considered that it was sufficient for the OFT to 'be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement' (at paragraphs 170 to 173).
192 Penalties Guidance, paragraph 2.11.

5 of Heathrow airport for the financial year ending 31 December 2017, which results in a relevant turnover of [✂].

II. Seriousness of the Infringement

6.22. To reflect the seriousness of an infringement, the CMA may apply a starting point of up to 30% of an undertaking's relevant turnover.[193] The actual percentage that is applied to the relevant turnover depends, in particular, on the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.[194] When making its assessment of the seriousness of an infringement, the CMA will consider a number of factors, including the nature of the products or services, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the infringement's effect on competitors and third parties. The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future. The damage caused to consumers whether directly or indirectly will also be an important consideration. The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.[195]

6.23. The starting point for the penalty in this case takes into account the fact that the Infringement had as its 'object' the prevention, restriction or distortion of competition (see paragraphs 5.27 to 5.33 above). Price fixing agreements are inherently anticompetitive, as they can affect prices offered to customers within the scope of the relevant agreements. The CMA considers price fixing to be a serious infringement of the Chapter I prohibition. The CMA has taken into account the need to deter both Heathrow and other undertakings from engaging in such infringements in the future.

6.24. The CMA has also taken into account the following factors in assessing the seriousness of the Infringement:

- The nature of the product: The CMA finds that the relevant market(s) for the limited purpose of determining Heathrow's relevant turnover is the supply of car parking services at Terminal 5 of Heathrow airport[196]. Price and convenience are important parameters of competition in the supply of car parking services at Terminal 5.
- The structure of the market: The CMA finds that competition in the relevant market is limited as a result of Heathrow's ownership of the majority of car parks within the airport perimeter.

193 Penalties Guidance, paragraph 2.4.
194 Penalties Guidance, paragraph 2.5 to 2.6.
195 Penalties Guidance, paragraph 2.8.
196 See paragraph 4.23 above.

- Impact on consumers: The CMA has particularly taken into account the fact that any impact on consumers may have been limited in this case.
    - the Head Lease Pricing Restriction only applied to non-guests using the T5 Sofitel car park, which accounted for a small proportion of T5 Sofitel car park users.
    - A significant proportion of the T5 Sofitel car park is currently sub-let by Arora and not available for it to offer parking to non-guests.
    - The T5 Sofitel car park is primarily needed for hotel guests (both overnight and day guests), so in practice there would only be spare capacity at certain times of the year for Arora to compete for non-guests.
    - There is no evidence of monitoring or enforcement of the Head Lease Pricing Restriction by Heathrow and Arora has been unknowingly undercutting some of Heathrow's rates.

6.25. In view of the foregoing and the specific circumstances of this case, the CMA considers that the Infringement does not fall within the category of the most serious infringements of the Chapter I prohibition (such as horizontal price fixing, market sharing and other cartel activities), which would ordinarily attract a starting point towards the upper end of the 30% range. Accordingly, the CMA has applied a starting point of 18% of relevant turnover for the Infringement.

Step 2 – adjustment for duration

6.26. The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement.[197] Where the total duration of an infringement is less than one year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the infringement.[198] Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional circumstances decide to round up the part year to a full year.[199]

6.27. The CMA has found that the Infringement lasted from 31 July 2008 to 27 April 2018 (9 years, 9 months). However, the CMA has taken into account that Heathrow confirmed on 5 January 2018 that it had not sought, and would not seek to enforce the Head Lease Pricing Restriction. It also confirmed that it was minded to address proactively the Head Lease Pricing Restriction with Arora but was mindful of the CMA's ongoing investigation and did not wish to take any steps which may negatively impact on the investigation. It subsequently took appropriate steps to remove the Head Lease Pricing Restriction without delay

197 Penalties Guidance, paragraph 2.16.
198 Penalties Guidance, paragraph 2.16.
199 Penalties Guidance, paragraph 2.16.

(taking into account this had to be effected by a deed). The CMA therefore considers that in the particular circumstances of this case a multiplier of 9.5 for duration is appropriate.

6.28. The CMA has accordingly applied a multiplier of 9.5 to the figure reached at the end of step 1 for the Infringement.

Step 3 – adjustment for aggravating and mitigating factors

6.29. The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are mitigating factors.[200] A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.[201] In the circumstances of this case, the CMA has adjusted the penalty at step 3 to take account of the following mitigating factor.

I. Compliance

6.30. The CMA may decrease the penalty at step 3 where adequate steps have been taken by an undertaking with a view to ensuring future compliance with competition law.[202]

6.31. Following the CMA's investigation and the settlement discussions in the present case, Heathrow has engaged constructively with the CMA to introduce a number of enhancements to its competition law compliance programme.

6.32. The CMA considers that the enhancements to compliance activities by Heathrow demonstrates a clear and unambiguous commitment to competition law compliance, in that it has engaged in appropriate steps relating to risk identification, assessment, mitigation and review.

6.33. In particular, the CMA has been provided with evidence that, prior to this Decision, Heathrow has rolled out an updated competition law compliance policy, implemented an enhanced internal sign-off procedure and has taken steps to introduce enhanced face-to-face competition law training tailored to different areas of business on a risk basis.[203]

6.34. Heathrow will also submit a report to the CMA on its compliance activities 15 months after the date of this Decision.

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200 Penalties Guidance, paragraph 2.17.
201 Penalties Guidance, paragraphs 2.18 and 2.19.
202 Penalties Guidance, paragraph 2.19.
203 Heathrow will also roll out in early 2019 a new online training programme, which is currently under development.

6.35. The CMA therefore considers that it is appropriate to decrease the penalty for the Infringement by 10% to reflect Heathrow's enhanced compliance activities.

Step 4 – adjustment for specific deterrence and proportionality

6.36. The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future), or to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.[204] At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.

6.37. Where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the infringing undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.[205]

6.38. The penalty for the Infringement after step 3 is [✂]. The CMA has applied a reduction to that amount, to arrive at a figure of £2,000,000, to ensure that the level of penalty is sufficient for deterrence and appropriate in the circumstances. As set out at paragraphs 3.52 to 3.56 above, the CMA has taken into account evidence that Heathrow did not monitor or enforce the Head Lease Price Restriction and that any impact on competition may have been limited. The CMA therefore considers that in the specific circumstances of this case, a proportionate penalty sufficient for deterrence is £2,000,000 (before any settlement discount), representing approximately [✂] of Heathrow's relevant turnover.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

6.39. The CMA may not impose a penalty for an infringement that exceeds 10% of an undertaking's 'applicable turnover', that is the worldwide turnover of the

204 Penalties Guidance, paragraph 2.20. The CMA has considered a range of financial indicators in this regard, based on published accounting information and information provided by Heathrow at the time of calculating the penalty. Those financial indicators included total worldwide turnover for the last financial year, total worldwide turnover over a three year average, net assets for the last financial year, adjusted net assets for the last financial year, profit after tax for the last financial year, and profit after tax over a three year average.
205 Penalties Guidance, paragraph 2.24.

undertaking in the business year preceding the date of the CMA's decision.[206] The CMA has assessed the penalty against this threshold. This assessment has not necessitated any reduction to the penalty at step 5 of the penalty calculation.

6.40. In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another Member State in respect of the same agreement or conduct.[207] As there is no such applicable penalty or fine, no adjustments are necessary in this case in that regard.

Step 6 – application of reduction for settlement

6.41. The CMA will apply a penalty reduction where an undertaking agrees to settle with the CMA, which will involve, among other things, the undertaking admitting its participation in the infringement.[208]

6.42. Heathrow expressed a genuine interest and willingness to enter into settlement discussions with the CMA before the CMA issued the Statement of Objections.

6.43. As part of settlement Heathrow cooperated with the CMA and expedited the process for concluding the investigation both prior to and after the issue of the Statement of Objections.

6.44. Heathrow has admitted the facts and allegations of the Infringement as set out in the Summary Statement of Facts,[209] which are now reflected in this Decision. In light of those admissions, and Heathrow's cooperation in expediting the process for concluding the investigation, the CMA has reduced Heathrow's financial penalty by 20% at step 6.

I. Payment of penalty

6.45. The CMA requires Heathrow to pay the penalty applicable to it as set out in the table below, resulting in a penalty payable of £1,600,000. The individual figures in the tables below are rounded to the nearest pound.

206 Section 36(8) of the Act and the 2000 Order, as amended. See also Penalties Guidance, paragraph 2.25.
207 Penalties Guidance, paragraph 2.28.
208 Penalties Guidance, paragraph 2.30.
209 See Terms of Settlement dated 14 August 2018 signed by Heathrow.

Heathrow Penalty

Step	Description		Adjustment	Figure (£)
	Relevant turnover			[✂]
1	Starting point as a percentage of relevant turnover		18%	[✂]
2	Adjustment for duration		X 9.5	[✂]
3	Adjustment for aggravating or mitigating factors	Mitigating factor: Enhanced compliance programme	-10%	[✂]
		Total adjustment	-10%	[✂]
4	Adjustment for specific deterrence or proportionality		-	2,000,000
5	Adjustment to take account of the statutory maximum penalty		n/a	-
	Penalty after step 5			2,000,000
6	Settlement discount		-20%	-400,000
	Final penalty payable			£1,600,000

6.46. The penalty will become due to the CMA on 27 December 2018[210] and must be paid to the CMA by close of banking business on that date.[211]

[✂]

25 October 2018 Ann Pope

Senior Director of Antitrust Enforcement
for and on behalf of the Competition and Markets Authority

210 The next working day two calendar months from the expected date of receipt of the Decision.
211 Details of how to pay are set out in the letter accompanying this Decision.