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Consultation on issues affecting passengers' access to UK airports:

a review of surface access (CAP1364)

SUBMISSION ON BEHALF OF
THE INDEPENDENT AIRPORT PARKING ASSOCIATION (IAPA)

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APPENDIX

DEFINITIONS AND INTERPRETATIONS

1. The following words and phrases have the meanings hereafter ascribed to them.

Definition	Interpretation
"AO"	airport operators
"AOS"	Airport Operation Services defined in CAA12 Section 68
"AMP"	Airport Master Plans
"Albion Water"	Albion Water Limited and Albion Water Group Limited -v- Water Services Regulation Authority [2008] CAT31
"APF"	Aviation Policy Framework - March 2013
"ASAS"	Airport Surface Access Strategies
"BAA"	BAA plc and where the context admits shall include its subsidiary companies and any one or more of them and their respective successors
"CA98"	Competition Act 1998
"CAA"	Civil Aviation Authority
"CAA12"	Civil Aviation Act 2012
Chapter II Prohibition	The prohibition on abuse of a dominant position contained in CA98 section 18

"DOPU"	on-airport drop off and pick up locations for Park and Ride operator's vehicles and/or locations for Meet and Greet operators to collect and return customers' vehicles
"EA02"	Enterprise Act 2002
"EAL"	Edinburgh Airport Limited
"Frankfurt Case"	Airparks Hahn and ABC Holiday Plus GmbH -v- Flughafen Frankfurt-Hahn GmbH a privately obtained translation of the judgment of which is annexed to the submission
"Frankfurt/Main Case"	European Commission Decision 98/190/EC
"HAL"	Heathrow Airport Limited
"Heathrow Case"	Purple and Meteor – v – HAL [2011] EWHC 987 (Ch)
"IAPA"	Independent Airport Parking Association
"IAPA's Previous Submission"	IAPA's submission dated 25 June 2013 on CAA's proposals for regulating Heathrow (CAP1027) Gatwick (CAP1029) and Stansted (CAP1030)
"Kiss & Fly"	the mode of transport to airports where a family member, friend or colleague will drive the airline passenger(s) to the airport and drop them off and/or pick the airline passenger up at the airport after the return flight
"Market Power Test"	the test in CAA12 section 6
"Meet and Greet"	an airport parking product (also known as "Valet Parking") where the customer's vehicle is collected from the customer by the PO at or near the airport terminal, is parked at the PO's car park and returned to the customer by the PO at or near the airport terminal
"MMC2"	the report of the Monopolies and Mergers Commission on the Economic Regulation of the South-East Airport Companies (HAL, GAL and STAL) presented to the CAA in June 1991.
"NPPF"	National Planning Policy Framework
"OAPO"	an Off-Airport Parking Operator
"Park and Ride"	an airport parking product where the customer is transported between the car park and the airport terminal in a coach or other vehicle operated by the PO.
"PO"	an on- or off-airport car park operator
"Principles Statement"	a statement of good practice principles for AOs for access to their surface access facilities which reflect previous jurisprudence in the sector as mentioned in **[16]**
"SAO"	a Surface Access Operator

2. Reference to any UK Airport shall where the context admits include a reference to the operator of that Airport and reference to an Airport Operator shall where the context admits include a reference to the UK airport(s) operated by the Airport Operator.

References to a forecourt or airport forecourt shall where the context admits include on-airport short stay car parks, on-airport coach parks and DOPU facilities located elsewhere on-airport.

References to surface access shall where the context admits include DOPU facilities.

References to the UK include Northern Ireland.

References in bold in square brackets are references to paragraphs of CAP1364.

IAPA

3. IAPA is a trade association representing the UK's independent off-airport parking industry.

4. IAPA (previously known as the Independent Airport Park and Ride Association, "IAPRA") was established in 2002 to promote security measures and high standards of customer service in the off-airport Park and Ride industry; to ensure that the role of the industry is fully understood and properly reflected in the operation, regulation and development plans for UK airports and their associated surface access strategies; and to assist its members with their dealings with AOs.

5. Having regard to the increasing demand for Meet and Greet services, it was decided that the Association should additionally perform the functions it had provided for Park and Ride operators for Meet and Greet operators and the Association's name was changed to the Independent Airport Parking Association.

6. IAPA members comprise the majority of the UK's OAPOs providing Park and Ride services as well as the majority of the larger OAPAs providing Meet and Greet services.

7. Between them IAPA members provide 45,000 airport parking spaces to several million passengers travelling to and from UK airports each year.

OAPO'S RELIANCE ON SURFACE ACCESS TO AIRPORTS

8. Across the UK, around 1 in 4 airline passengers (excluding transfer passengers) drive to the airport and park long-term on- or off-airport. The car will, for the foreseeable future, remain the preferred method of travel for a significant proportion of passengers.

9. A supply of airport parking adequate to meet demand is essential for the efficient operation of the UK's airports. As airline passenger numbers increase and UK airports expand the amount of airport parking will need to increase to meet increased demand for airport parking services.

10. Travel by passengers in their own vehicle which is parked at or near the airport awaiting the passengers' return flight is, after public transport, the most sustainable transport mode. Park and Ride involves two journeys in the passengers' car, one to and one from the airport. Meet and Greet involves two additional short journeys between the airport terminal and either the on-airport car park or the OAPO's car park. This compares with travel by taxi or the Kiss & Fly mode which usually involve four car journeys including one "empty" journey each way either after the passenger has been dropped off or before the passenger is picked up.

11. Surface access to airports and the ability to use DOPU amenities are essential facilities for OAPOs' businesses without which they could not operate.

THE CASE FOR LICENCING POWERS FOR AIRPORT FORECOURTS

12. "Airport operators tend to control a large proportion of the required facilities needed to run surface access operations, both at the forecourt and in surrounding areas (such as land suitable for car parks, surface transport interchanges, etc). Airport operators also provide many surface access products directly to consumers often in competition with independent operators that require access to the airport's facilities. Airport operators are therefore active in both the provision of facilities (upstream) and in the service itself (downstream)" **[13]**. The propensity of AOs to abuse their position in the upstream market to benefit their downstream operations is discussed in the next section of this submission.

13. SAOs depend upon access to airports and DOPU facilities on airport forecourts for their businesses. AOs, however large their airport, will (with virtually no exceptions) own airport roads and airport forecourts and have a monopoly on the access to and use of DOPU facilities at their airports.

14. CAP1370 summarises several private competition cases where AOs have been found to have abused their dominant position in the upstream facilities market thereby adversely affecting competition in downstream markets **[3]**. The abuses found include, protecting their own road access products from competition and extracting high charges from SAOs for use of forecourt facilities. The CAA review is "particularly focused on the competitive conditions for road access to airports including interactions between airport operators and road access providers." **[1.4]**

15. "Airport surface access is an important part of the passenger journey and passengers can spend fairly large amounts getting to/from the airport" **[1.7]**. The most effective way for the CAA to control AOs' conduct in relation to surface access, DOPU facilities and charges for such facilities would be through the exercise of its licencing powers contained in CAA12.

16. Whilst we welcome the suggestion that a Principles Statement be developed the CAA will have limited powers to enforce against breaches of a Principles Statement unless it can invoke its licencing powers under CAA12.

17. We believe that where an AO abuses competition law in relation to the provision of surface access the Market Power Test would be likely to be met if surface access facilities were provided in the "core area" of an airport.

18. At present the prohibition in CAA12 section 3 (including the prohibition against making a relevant charge in respect of airport operation services) only applies when an airport area becomes a dominant area located at a dominant airport (CAA12 section 4(1)). CAA12 section 5 provides that for the purposes of section 3 an airport is only dominant if all or part of its core area is a dominant area.

19. CAA12 section 5(4) contains the definition of "core area". This includes passenger terminals but not the forecourt of a passenger terminal or a qualifying car park (at which DOPU facilities are often provided) which are separately referred to in CAA12 section 67(1).

20. CAA12 section 67(2) provides that the forecourt of a passenger terminal does not include a car park, bus station, tram station or railway station. This exclusion means that these areas (other than "qualifying car parks) do not fall within the definition of an airport in section 6(1). DOPU facilities are frequently provided in car parks and coach parks/bus stations at airports. In order to provide the CAA with more effective enforcement powers for abuses of competition law relating to surface access the CAA could seek an amendment to the Act to include all car parks, coach parks and bus stations in the airport definition and request the Secretary of State to make regulations providing that the following areas are "core areas" of an airport:

(a) the forecourt of a passenger terminal
(b) a qualifying car park
(c) a coach park/bus station
(d) an airport access road.

21. Alternatively it may be possible to amend the definition of "core area" by providing that it includes any airport area where surface access facilities are provided. Surface access facilities could be defined to include, DOPU facilities.

22. Unless all areas at the airport where surface access facilities are provided are included in the definition of "core area" the AO will be able to avoid the licencing requirements of CAA2012 and the prohibition contained in CAA2012 section 3 by providing surface access facilities in parts of the airport which do not comprise the "core area".

23. Test A of the Market Power Test applies to markets for AOS. AOS include services "for the arrival or departure of passengers and their baggage" which for passengers arriving by road will include use of one or more of the airport roads, the forecourt of a passenger terminal, a qualifying car park and a bus/coach station yet none of these areas form part of the airport's "core area". This means that for this category of AOS the CAA cannot regulate and enforce against the abuse of an AO's dominant market position by using its licencing powers in the CAA2012 but instead needs to rely upon its competition law powers contained, inter alia, in the CA98 and the EA02. It would be preferable if the CAA had the option of using licencing powers to regulate and enforce competition law in relation to all AOS if this was more appropriate than relying on its other competition law powers.

AOs' PROPENSITY TO ABUSE DOMINANT MARKET POWER

24. The CAA refers to cases where AOs have abused their dominant position in the upstream facilities market in order to leverage their position in downstream markets including those for car parking **[3]**. This abuse has included imposing or seeking to impose discriminatory or unfair prices for surface access facilities. The CAA has identified **[16]** that airport parking is one of the few, if not only, markets in which AOs provide services direct to passengers and where they compete with other providers of such services. As the AO is the only provider of surface access facilities there is a particular danger that the AO will abuse this position to benefit its parking business.

25. Where there is the greatest incentive for an AO to abuse its dominant position it is important that the CAA has all powers at its disposal, including its licencing powers (as argued for in paragraphs 15-23) to regulate and enforce compliance.

26. The CAA found that AOs of larger airports were more likely to base their charges for surface access on the basis of cost recovery **[3.4]**. IAPA believes that the principle reason why larger airports, particularly the London airports, are more likely to base charges for surface access on cost recovery is the public interest conditions recommended in MMC2. The public interest conditions which were imposed on BAA as the operator of Heathrow, Gatwick and Stansted airports provided an expectation that charges for using "specified facilities" (which included charges to bus and coach operators including off-airport car parks) should be set in relation to costs and that charges, costs and revenues of such facilities should be transparent to users **[2.6]**. These public interest conditions only continue to affect the operator of Heathrow airport pursuant to paragraphs C2.1 - C2.5 of the Licence granted by the CAA to HAL under the CAA2012.

27. The CAA have indicated that an additional reason for regulated AOs not to seek to include in their charges for surface access non-related cost items is that the single-till form of economic regulation take those revenues into account to lower revenues AOs are allowed to make from airlines **[3.4]**.

28. As unregulated airports have never been subject to public interest conditions to regulate charges for surface access and are not disincentivised by the single-till form of economic regulation from increasing such charges:

    28.1 The CAA needs to have all of its powers of regulation and enforcement, including licencing powers, available to it to ensure compliance with competition law in relation to both access to and charges for surface access facilities.

    28.2 The development of a Principles Statement would encourage AOs to consider their legal responsibilities under competition and consumer law when negotiating with SAOs.

    28.3 An extension of the CAA's licencing powers and the development of a Principles Statement will make it less likely that the CAA will need to exercise heavy-handed control in relation to surface access or enforce against abuses of competition law.

29. IAPA's Previous Submission included a number of case studies. Appendix 2 is a case study relating to Edinburgh Airport.

30. In 2006 EAL served notices for early termination of licence agreements with OAPOs in order to attempt to increase licence fees for surface access facilities. EAL subsequently accepted that the notices of termination were invalid.

31. Subsequently EAL attempted to impose excessive charges for surface access facilities.

32. At the time of these disputes Heathrow, Gatwick, Stansted and Edinburgh airports were all owned by BAA. Assuming that BAA would have had a group policy on surface access the fact that BAA based surface access charges for its London airports on the cost-plus charging principle but sought to impose charges at Edinburgh airport in excess of those justified by the cost-plus principle suggests that BAA's policy on surface access charges was to recover the highest charges it could where it was not constrained by the public interest conditions referred to above.

33. The Heathrow Airport case study which appeared at appendix 6 of IAPA's previous submission concerned blatant discriminatory conduct by HAL proposing to move off-airport Meet and Greet operations to short-stay car parks whilst keeping its own Meet and Greet operations on the terminal forecourts.

34. The public interest conditions referred to above only related to charges for surface access and not to the location of surface access facilities for OAPOs. This again demonstrates that when not constrained by licencing or other regulation AOs, whatever the size of their airports, will abuse their dominant position in the upstream facilities market in order to leverage their downstream operations.

35. At **[3.6]** the CAA states that competition law is being applied in the surface access sector, as there have been a number of competition cases relating to access to facilities required to provide surface access services. The consultation states that some stakeholders have indicated that "decisions in those cases, in some circumstances, have had a positive deterrent effect on how airport operators treat independent surface access operators."

36. The case studies to IAPA's Previous Submission demonstrate that notwithstanding case law AOs frequently abuse their dominant market position in the facilities market, to leverage their downstream operations. AOs frequently argue that the case law precedents do not apply to them (for example, because they are not regulated) or seek to distinguish case law from a particular dispute. AOs will also use the high cost of litigation (which is often prohibitive especially for smaller OAPOs) to impose unfair surface access charges or discriminatory DOPU locations.

NEED TO ASSESS COMPETITION IN AIRPORT PARKING MARKETS

37. "[The CAA] have a statutory duty to promote competition, where appropriate. [The CAA] believe that competition between airport operators and between different surface access operators is the best way to keep prices at competitive levels and quality of service high" **[2.2]**.

38. "[A] situation where there is more than one competing provider of each mode, or at least, the possibility of new entry will provide more choice to passengers compared to a situation where passengers have to rely solely on competition between modes" **[1.11]**.

39. The CAA's initial view is that airport surface access is a dynamic sector with a variety of parties active in providing surface access services of different types to consumers **[9]**.

40. **[5.3(h)]** asks whether the CAA have identified the key issues on market structure within the scope of its review.

41. **[4.18]** includes an initial conclusion on market structure that AOs "may have a dominant position in a relevant market defined as the upstream provision of surface access facilities or forecourt access particularly where there are planning restrictions around the use of land for car parking near the airport."

42. In order to fully understand how surface access markets function and to form the view expressed in **[9]**, particularly in relation to the airport parking market which is the only sector where AOs compete with off-airport SAOs the CAA need to obtain evidence and make a finding on whether different AOs have dominant market power in downstream airport parking markets.

43. Whilst Figure 2 of the consultation compares surface access modal share at large UK airports the CAA's initial investigations did not ascertain the level of competition in the car park mode between AOs and OAPOs. Competition is essential if passengers are to have a choice of providers as mentioned in **[1.11]** and for there to be dynamic competition in the car parking market.

44. IAPA suggest that the CAA gathers evidence for each UK airport of:

- the number of authorised Long Stay Parking spaces on-airport; and
- the number of authorised Long Stay Parking spaces off-airport

45. This evidence will enable the CAA to make assessments of:

- AOs' market share and dominant market positions in airport parking markets;

- whether there can be effective competition in those markets; and
- the level of consumer choice of airport parking products/providers.

46. The proportion of authorised airport parking controlled by an AO will be a good indicator of whether the AO has acquired substantial market power in the airport parking market to satisfy Test A of the Market Power Test.

47. The private competition cases summarised in CAP1370, the case studies set out in IAPA's Previous Submission and the other cases and disputes referred to herein suggest that competition law does not provide sufficient protection against the risk that AOs may engage in conduct that amounts to an abuse of substantial market power and accordingly that Test B of the Market Power Test would be likely to be met in relation to the upstream surface access market if surface access facilities were provided in the "core area" of an airport.

48. For virtually all consumer markets it is accepted that competition results in lower prices and higher service standards. **[2.2]** acknowledges that this is the case for surface access markets which include airport parking markets. Accordingly it is very likely that where tests A and B of the Market Power Test are satisfied the abuse of the AOs' substantial market power will be to the detriment of users of air transport services and that test C of the Market Power Test would be satisfied.

49. As previously explained the CAA does not currently have power to regulate airport operation services which are not provided in a core area of an airport.

50. If, as we have suggested in paragraph 20, the definitions of "airport" and "core areas" were amended to include parts of the airport where surface access facilities are provided it is likely that the Market Power Test would be met for the upstream facilities market.

51. The consultation requests AOs to develop Principles Statements as part of their submission to the consultation. **[16]**

52. So far as the Principles Statements affect airport parking IAPA through its members would be able to monitor adherence to the Principles Statements and report any non-compliance to the CAA.

53. IAPA has suggested that the CAA may wish to amend, including by regulation, CAA12 so that it has in its enforcement powers the ability to issue licences for parts of an airport where surface access facilities are provided. It may be that the CAA would only wish to seek such powers if either AOs are not willing to adopt appropriate Principles Statements or do not subsequently comply therewith. In the meantime the CAA could only enforce against abuse in the surface access facilities and airport

parking markets by the more cumbersome exercise of its competition law powers under CAA98 and EA02.

CONTENT OF PRINCIPLES STATEMENTS

Surface Access Facilities Charges

54. IAPA suggest that the Principles Statement(s) include provisions to the following effect relating to charges for Surface Access Facilities:

> *At the commencement of negotiations for a licence to use Surface Access Facilities or of a change in the charges for use of such facilities the AO shall:*
>
> 1. *Inform the SAO of the system used by it to allocate costs to the Surface Access Facilities to which the licence will relate and the pricing principles for each item charged.*
> 2. *Provide to the SAO a statement of actual costs and revenues for the Surface Access Facilities for the previous year.*
> 3. *Provide to the SAO an estimate of costs and revenues for the Surface Access Facilities for the first year of the term of the proposed licence or for the first year that the proposed change in prices shall apply adequate to verify that the charges derive from the pricing principles.*
> 4. *Where the AO is providing Surface Access Facilities to a competitor in a downstream market (for example to OAPOs) charges shall be based on the recovery of costs plus a reasonable return.*

55. The charging principles suggested above are based on the "public interest conditions" for charging for Specified Facilities set out in paragraphs C2.1 - C2.6 of the Licence dated 13 February 2014 granted by the CAA to HAL for the operation of Heathrow Airport.

56. The cost-plus pricing principle suggested at 4. above is justified by the special market conditions which apply where an organisation with significant market power in the upstream market is supplying services to a competitor in a downstream market.

57. The following are extracts from the Judgment of the Competition Appeal Tribunal in Albion Water:

> "213. ...factors that establish a dominant position, notably barriers to entry, may well be relevant to determining whether a price is so high as to amount to an abuse of an

undertaking of its dominant position. This is particularly true in excessive pricing cases, in which it is important to distinguish excessive prices shielded from effective competitive pressure from temporarily high prices that are the subject of normal market forces in a competitive market..."

"236. ...in the Tribunal's judgment it is the fact that Dŵyer R Cymru is a competitor of Albion in the downstream market, and therefore in a position to lower its own retail price to the level of its input cost, which means that the economic value of the service (here, common carriage) to its downstream competitors (here, Albion) may be equivalent to the costs reasonably attributable to the transportation and partial treatment of non-potable water..."

"264. The Tribunal has given detailed consideration to whether there are relevant non-cost related factors in this case, and has concluded that there are none. Further, in the Tribunal's judgment, there is no reason why, in these circumstances, the costs of supply cannot be held to represent the economic value of the services being provided to Albion..."

"266. When assessing the relationship between the disputed price and the economic value of a service, and thus the potential unfairness of a price, we must take into account the competitive conditions and any related abusive conduct that may enable the undertaking concerned to fulfil its pricing ambitions (see paragraph [213] above)."

58. Similar points relating to charges for services by a dominant supplier in an upstream market to a competitor in a downstream market were made in the Frankfurt Case by the Higher Regional Court of Koblenz [U1274/09.Kart] pronounced on 17 December 2009. It is appreciated that judgments in competition law cases by courts in other States of the European Union only have persuasive authority in English courts. The Frankfurt Case concerned a situation where the AO refused to allow an OAPO to use a DOPU location directly in front of the terminal building used by the AO's own shuttle service and where it was alleged that the AO was squeezing the margins of the OAPO by both reducing charges for its own parking products and imposing an excessive charge for use of surface access facilities. The following are extracts from the judgment in the Frankfurt Case relating to the charging issue.

"To determine the reasonable consideration within section 19, para.4 no.4 GWB, and based on the legal concept of section 19, para.4 no.2 GWB, the overwhelming view is that the access fee should, as far as possible, reflect the costs, which would ensue if there were effective competition... reference literature recommends as a rough guideline, apart from the additional costs brought about by the use of [the ring road], a payment of the share of fixed costs - which are admittedly difficult to determine in

practical terms - and a reasonable return on the capital invested..., as is even laid down by positive law for special industrial sectors, eg for passing through gas or electricity networks... these principles can also be applied to the present case.

In the present case, no special costs are apparent, which would be caused by allowing the plaintiff under 1) to access the terminal ring road. The appropriate consideration shall therefore be calculated as the total of the operating costs, applicable to the terminal ring road..., the total of a reasonable interest on equity capital... and an imputed amount for depreciation...

The danger of losses that cannot be made good again, exists for the plaintiff under 1) even after the issue, by the regional court of the interim injunction which is contested here. On account of the burden resulting from the consideration fixed by the interim injunction, it is no longer possible for the plaintiff under 1), as proprietor... to operate a profitable business. The latter substantiated the fact that the sales of his company declined sharply after the defendant reduced the prices for its P7 car park and therefore, significantly lower sales are expected in future than in previous years. The plaintiff under 1) up to now offers a price of 3.00 EUR per parking space per day or 27.00 EUR per week, has to react to the fact that the defendant only charges 2.50 EUR per day or 17.50 EUR per week. If the plaintiff under 1) were also to incur additional costs amounting to more than 30,000 EUR per year, then its business would at the very least, be severely put at risk..."

59. The actions of the AO in the Frankfurt Case demonstrates the risk mentioned in paragraph 236 of the Judgment in Albion Water that the ability of a dominant undertaking in an upstream market to lower its own retail price to the level of input costs, thereby affecting the viability of competitors in downstream markets. This means that the economic value of the service provided in the upstream market may be equivalent to costs reasonably attributable to the service provided in the upstream market.

Allocation of Surface Access Facilities

60. We suggest that provisions to the following effect be included in Principles Statements relating to the allocation of surface access facilities:

1. *Where practicable Surface Access Facilities (including DOPU facilities) for downstream markets in which the AO competes with an SAO should be at a single location used by both the AO and the SAO.*
2. *Where it is not practicable for the same DOPU location to be allocated for use by the AO and the SAO the DOPU location for the SAO shall*

be as close as practicable to the DOPU location used by the AO and in any event shall not be materially less convenient in any material respect for customers of the SAO than the DOPU location used by customers of the AO.

61. The principle that a dominant supplier of essential facilities to competitors in the same market should allocate each competitor materially equivalent facilities is based on the example of abuse of the chapter II prohibition set out in section 18(2)(c) of the CAA98, namely "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".

62. Theoretically conduct which would otherwise be discriminatory can be justified on objective grounds. However, case law shows that only in very exceptional circumstances, particularly in the market for surface access facilities, will it be possible for a dominant supplier in the upstream market to justify discriminatory conduct.

63. In the Heathrow Case HAL sought to justify moving the DOPU location for Meet and Greet operators at Terminals 1 and 3 to short-term car parks whilst leaving its own valet parking operations on the forecourts on grounds of (i) reducing forecourt congestion (ii) improving forecourt security (iii) improving forecourt safety and (iv) for environmental reasons. At paragraphs 216 of the judgment in the Heathrow Case Mann J reached the following conclusion:

"216. I have considered the above points individually and in aggregate. I find that the real motivation for the change in relation to Terminal 1 was a commercial one. That commercial one was to force the off-airport meet and greet operators off the forecourts and into the car park, in order to increase revenue from the car park and to decrease the effectiveness of those operators in their valet parking operation. There was no real eye on the other factors referred to above.

217. That commercial justification is not a good objective justification for the purposes of the section. The other purported justifications are either non-existent or weak, and do not amount to good objectively justifiable reasons for creating the anti-competitive environment that HAL created (or wishes to create) there, taking each individually and in aggregate."

64. At paragraph 238 Mann J reached a similar conclusion in relation to HAL's attempt to objectively justify discrimination at Terminal 3:

"I therefore conclude that there is no objective justification for the changes at T3 either. Purple and Meteor have demonstrated that there are other steps which could

be taken to alleviate congestion, and that removing the off-airport meet and greet operators is not a step which has a useful result to such an extent as to justify the otherwise prohibited anti-competitive effects. I also find that the motivation of HAL was not, in any event, simply to produce objectively justifiable effects. It intended an anti-competitive effect.

65. Mann J's conclusion in relation to T3 refers to there being other steps which HAL could have taken to alleviate congestion. At paragraphs 234 and 235 of Mann J's judgment he refers to the Commission decision in the Frankfurt Main Case for his opinion that "the law requires a high degree of necessity if objective justification is relied on to justify what would otherwise be forbidden as anti-competitive conduct."

66. At paragraph 86 of the judgment in the Frankfurt Main Case the Commission found:

"In addition to not being borne out by the facts, the arguments put forward by FAG to justify its monopoly (namely the impossibility of admitting competitors to the ramp because of the lack of spade) and not such as to constitute an objective justification within the meaning of the Court's judgments, since there are solutions which would allow any lack of space to be overcome."

67. At paragraph 88 the Commission found, in the following terms, that the discriminatory conduct of excluding competitors was not as a result of necessity but a matter of choice:

"Thus, FAG's decision not to authorise self-handling and not to admit independent handlers is not the result of an overriding need, but was a matter of choice for FAG, which did not take the measures which would have obviated the constraints imposed by the lack of space at the airport"

68. The Commission made clear at paragraph 80 of its judgment that the measures which FAG was required to take to obviate the need for discriminatory conduct extended to designing the airport to provide sufficient space for competition to be viable:

"...the supposed lack of space invoked by FAG could easily have been overcome if FAG had taken into account the need for space to park handling equipment when it re-designed the airport layout and had allocated some of the space that recently became available... to parking areas..."

69. The DOPU location dispute in the Frankfurt Case arose from the AO requiring an OAPO to drop off and collect customers of its Park and Ride service in the bus station situate approximately 250 metres from the terminal building rather than on the

terminal forecourt used by the AO's Park and Ride operation. The following extensive extract from the Judgment in the Frankfurt Case comprehensively explains why the allocation of discriminatory DOPU locations is a Chapter II abuse which is likely to have an adverse effect on competition:

"bb) The defendant dominates the market for car parks with shuttle services to and from its airport.

A company dominates the market, amongst other things, if, as a supplier or demander of a particular type of goods or commercial services, it has a predominant market position in relation to its competitors in the factually and spatially relevant market (section 19, para.2, no.2 GWB). This is assumed acc. to section 19 para.3, sentence 1 GWB, if the company has a market share of at least one third. This is the case here. The car park P7 maintained by the defendant has 3,500 parking spaces and car park P8 has 400 spaces. The car parks of the other companies that operate shuttle services to and from Frankfurt-Hahn airport make up a total of only roughly 1,000 parking spaces. If we ignore car park P8, which according to the defendant is only used exceptionally, then the defendant has a market share of roughly 75%.

The dominant market position of the defendant is further reinforced by the fact that it alone has direct access to the airport terminal. The roadway, by which the terminal building is directly reached, is owned by the defendant so that without the latter's permission, shuttle vehicles may not set down or pick up passengers in front of the terminal entrance, but must do so at a distance of roughly 250 metres away. Here lies a legal and factual barrier in terms of market access by other companies (section 19, para.2, no.1, half p.2, 5 Alt. GWB). However, it remains to be seen whether, as a result, activity in the relevant market is only impeded or whether the shuttle services, which carry their passengers immediately up to the front of the terminal building, serve a part of the market that can be differentiated from the other car park and shuttle service market, in which, it is absolutely impossible for these companies to operate without using the terminal access road (section 19, para.4, no.4 GWB). In any case, the distance between the shuttle service stop and the terminal represents, for the demander, a significant component of the service offered. The decision by an interested party in favour of one or other car park with shuttle service is decisively influenced by whether the customer is set down or picked up by the shuttle vehicle directly in front of the terminal entrance or at a not inconsiderable distance from it - in this case 250 metres. Therefore, if the price and quality are the same, the customer will decide in favour of the provider whose shuttle service takes him close to the front of the terminal building.

cc) The fact that the defendant refuses the plaintiff under 1) access to the terminal ring road, represents a considerable impairment of competition in the relevant market (section 19, para.4, no.1 GWB) and the plaintiff under 1) is thereby prevented from carrying on a business which is usually accessible to the same type of companies (section 20, para.1 GWB).

Obstruction of another company according to section 20, para.1 GWB means, in a purely objective sense, any impairment of its potential to operate in competition, irrespective of whether anti-competitive or otherwise controversial means are employed (see section 26 para.2 GWB old version: Federal Supreme Court NJW 1982, 46, 47). This is such a case. Because the plaintiff under 1) is prevented from transporting its customers directly in front of the defendant's terminal and to pick them up from there again, it suffers a severe competitive disadvantage. The only decisive way of answering the question of whether there is obstruction within the meaning of section 20, para.1 GWB or impairment within the meaning of section 19, para.4, no.1 GWB, is the behaviour of the demanding consumers. When a potential customer decides which of the services offered in the car park with shuttle service market he will choose, the degree of convenience offered plays a decisive role in addition to the price and therefore, according to the belief of the senate, so too does the question of whether the customer - with luggage as appropriate - can get from the shuttle vehicle to the aircraft or from the aircraft to the shuttle vehicle in the shortest time and with as little effort as possible. At a competitive disadvantage therefore, are those providers whose shuttle vehicles do not stop directly in front of the terminal but set down or pick up their passengers at the point provided by the defendant, approximately 250 metres away, the more so since the footpath to the terminal building is not under cover and is uneven in parts. Completely irrelevant in this connection is whether the effort associated in covering this distance on foot is reasonable for the customers, as the defendant believes. For the demander, who has to decide between two providers, who offer a different level of convenience at the same price, this is unimportant.

dd) The defendant obstructs the plaintiff under 1) "in business dealings that are usually accessible to companies of the same kind (section 20, para.1 GWB). What is important here is not the business practice of that company, which is subject to obstruction. Rather, the argument should be based on the practice that grows out of natural commercial development and the understanding of the business groups in question (Federal Supreme Court, NJW 1972, 483, 383), ie in the present case the normal practice at airports. This includes being allowed to drive shuttle services up to the front of the terminals. Accordingly to the undisputed submission of the plaintiffs, this is the practice in, at least, fourteen German airports. Even at the airport of the defendant, it was usual, up until 2009 for shuttle services to be allowed to use the

road directly in front of the terminal. Business practice relating to car parks with shuttle services, which transport their customers directly up to the front of the airport terminals, is normally accessible to companies like the plaintiff under 1). The ban now imposed by the defendant on all shuttle services alters nothing.

ee) The obstacle put in front of the plaintiff under 1) by the defendant is unfair (section 20, para.1 GWB). It is done without any justified reason (section 19, para.4, no.1 GWB).

The feature of unfairness within the meaning of section 20, para.1 GWB shall be reinforced by virtue of an overall evaluation and assessment of the interests of the parties involved, taking into account objectives of the law aimed at freedom of competition (Federal Supreme Court, NJW 1982, 46, 48). The same applies to the lack of any objectively justified reason under section 19, para.4, no.1 GWB (Federal Supreme Court, NJW 1969, 1716, 1717; Immenga / Markert section 19 marginal no. 115). Speaking for the obstructed norm-addressees, all interests can, in principle, be considered when weighing up the interests, provided they are not directed towards illegal purposes or breach prohibitions and legal appraisals of the GWB, in particular section 19, para.1 GWB or of other legal provisions. The limit on acknowledging these interests under section 20, para.1 GWB only becomes apparent from consideration of the individual interests of other parties involved and the standard assessment of interests (Immenga / Markert section 20 marginal no. 131). Speaking for the obstructed company, its interest has to be considered so that its ability to operate competitively is not jeopardised by power-related behaviour of norm-addressees of section 20, para.1 GWB. This includes in the first place, interest in freedom of market access and interest not to be disadvantaged by the impairment of equality of opportunity in operating competitively in the market compared with other companies, where there is open market access (see for example, Federal Supreme Court, NJW 1969, 1716, 1718; Immenga / Markert section 20, marginal no.132).

In the present case we have, on the one hand, the interest of the plaintiff under 1) in operating its car park with shuttle service profitably and for this purpose in free access to the terminal ring road. Against this, is the interest of the defendant to have free disposal over the airport site in its possession, to maintain smooth operation of the airport, in particular to protect users of the airport against damage and interference and to operate its own car parks as profitably as possible. Any overriding interest of the defendant is denied in this case.

aaa) The interest of the plaintiff under 1) in being able to set down or pick up passengers with its shuttle service directly in front of the terminal building arises from

the fact that, as already stated, there is otherwise a considerable competitive disadvantage for it compared with those companies for which this is possible, ie compared with the defendant. The plaintiff under 1) could only compete with this disadvantage by offering its services at a lower price than the defendant. However, the plaintiff under 1) would run the risk of no longer being able to operate profitably."

Airport Public Access Information

70. The CAA has suggested that the Principles Statements deal with how AOs provide information to the public about options for getting to and from the airports.

71. Every airport is a major piece of national transport infrastructure. The AO as the operator of the airport should provide the public with information on options for getting to and from the airport and with contact details of all authorised reputable surface access operators including rail, coach, taxi and parking operators whether based on- or off-airport.

72. Whilst the AO as the provider of on-airport parking competes with SAOs providing other modes of transport to the airport it is unlikely that the AO has any material commercial interest in not providing the public with information concerning non-parking modes of transport to the airport.

73. There is, however, an obvious commercial reason why an AO may not wish to provide the public with information concerning OAPOs with which its own airport parking operations compete. The AO has a conflict of interest between its position as the operator of a major piece of public transport infrastructure and as one of the providers of airport parking in a competitive downstream market.

74. IAPA suggest that AOs should maintain on their websites public access information pages which provide contact details (telephone numbers, addresses and email addresses) of all SAOs, including OAPOs, with links to the SAOs' websites.

75. Should an AO decide to operate separate websites for its public surface access information and for advertising and marketing its own airport parking products the AO should ensure that when a prospective airport parking customer searches for airport parking products the AO's public access information website appears close to the top of search engine results.

76. In the event that an AO decides to include public surface access information and the market for its own parking products on the same website the public surface access information should appear before any advertising or information relating to its own airport parking products.

77. In order to avoid any conflict of interest between the AO's capacity as the operator of a major piece of public transport infrastructure and the provider of airport parking products the CAA may wish to consider whether public access information and advertising of airport parking products should be on different websites.

78. The SAOs featured on the airport's public access information website/web pages should be all operators who have a current licence to use DOPU facilities or who pay the airport for such facilities.

PRINCIPLES STATEMENTS COULD HAVE CONTRACTUAL EFFECT

79. IAPA suggest that the CAA give consideration to asking AOs to make their Principles Statement contractually binding between themselves and SAOs.

80. This is the form of regulation adopted for the economic regulation of Gatwick Airport in the CAA notice granting licence for the operation of the airport (CAP1152). Appendix K of CAP1152 incorporates GAL's commitments on price and service into the Gatwick Conditions of Use making them enforceable by users of facilities at the airport covered by the commitments.

81. In the event that AOs are prepared to make their Principles Statements enforceable by SAOs AOs could also be asked to agree that disputes relating to compliance with the Principles Statements should be referable to expert determination as is the case with enforcement of the Gatwick Conditions of Use.

82. Direct enforceability of the Principles Statements by SAOs and the ability to refer disputes to expert determination is likely to be an effective way of ensuring compliance with the Principles Statements and will reduce the need for intervention by the CAA.

PLANNING ISSUES

83. The planning regime for airport development requires AOs to prepare their own development plans in the form of AMPs AND ASASs. The APF and the NPPF require planning authorities to have regard to the AO's development proposals when drafting planning policies and making planning decisions. This is one of the principal causes of AOs having established dominant positions in airport parking markets.

84. The planning regime and how it affects airport parking markets is dealt with in detail in Holiday Extras Limited's submission to this review. IAPA has seen and supports the Holiday Extras Limited submission.

85. The thrust of the HX submission is the need to reform the wider planning regime for airports to facilitate the granting of planning permission for sufficient off-airport parking spaces to create effective airport parking markets.

86. The airport planning process also has a role to play in ensuring that when transport hubs and other surface access facilities are planned or reconfigured they are designed to accommodate DOPU facilities for both on- and off-airport car parking operators in the same hub/facility.

87. The judgment in the Frankfurt/Main Case (paragraph 80) indicates that AOs cannot justify denying access to or providing discriminatory access on the grounds of lack of space/lack of space at a particular location where the AO could design or redesign the airport layout to provide sufficient capacity and at a non-discriminatory location.

GENERAL

88. IAPA welcomes the CAA's review of issues concerning surface access to airports. The outcome of the review and action taken by the CAA to ensure the competitive functioning of surface access markets, including airport parking markets, will potentially be of great benefit to both consumers and surface access operators.

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Mark Hinge
Chairman, IAPA

APPENDIX 1

Airparks Hahn and ABC Holiday Plus GmbH -v- Flughafon Frankfurt-Hahn GmbH

Privately obtained translation of judgment