

**Competition Act 1998 ('CA98') and
Treaty on the Functioning of the European Union ('TFEU')**

Decision of the Office of Fair Trading:

Airline passenger fuel surcharges for long-haul flights

**Infringement of Chapter I of the CA98 and Article 101 of the
TFEU by British Airways Limited and Virgin Atlantic Airways
Limited**

Decision No. CA98/01/2012

Case CE/7691-06

19 April 2012

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 [...] or for example, [5-10].

The names of individuals mentioned 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 Names have been replaced by a general descriptor of the individual's role.

COMPETITION ACT 1998

DECISION

Airline passenger fuel surcharges for long-haul flights

Case CE/7691-06

19 April 2012

CONTENTS

I.	INTRODUCTION	5
	A. The purpose of this document	5
	B. Summary of the Infringement and the OFT's enforcement action	5
II.	FACTUAL BACKGROUND	6
	A. The Parties	6
	i. British Airways plc.....	6
	ii. Virgin Atlantic	7
	B. The OFT's investigation	11
	i. Leniency applications	11
	ii. Civil and criminal investigations	11
	iii. Section 27 inspection.....	12
	iv. Section 26 notice	12
	v. Information obtained not using formal powers.....	12
	C. Industry overview – the passenger airline industry	15
	i. Market trends	15
	ii. Regulatory framework	15
	iii. Airlines	16
	iv. Air fares	17
	v. Fuel costs and surcharges	17
	D. The relevant market	19
	i. Introduction	19
	ii. Product market.....	20
	iii. Geographic market.....	23
	iv. Affected Markets.....	24
	v. Market Shares.....	26
III.	THE CONDUCT OF THE PARTIES.....	29
	A. Introduction	29
	B. Structure of this part.....	29
	C. Relevant individuals.....	30
	i. British Airways plc.....	30
	ii. Virgin Atlantic	30
	D. PFS decision-making structures within BA and VAA	30
	i. PFS Decision-making structure within BA	31
	ii. PFS Decision-making structure within VAA.....	32
	E. Context of the PFS introduction and subsequent movements.....	33
	i. Increasing fuel costs	33
	ii. Media interest	34
	F. Overview of the conduct of the Parties	36

G. May 2004 – Introduction of the PFS.....	38
i. Background	38
ii. 10 May 2004.....	38
iii. 11 May 2004.....	38
iv. 12 to 18 May 2004	39
H. August 2004 – Increase to £6 per sector	40
i. Background	40
ii. End of July 2004.....	40
iii. 5 August 2004.....	41
iv. 6 August 2004.....	41
v. 7 and 8 August 2004.....	44
vi. 9 August 2004.....	44
I. October 2004 – Increase to £10 per sector	45
i. Background	45
ii. 1 to 5 October 2004	45
iii. 6 October 2004	46
iv. 7 October 2004	46
v. 8 October 2004	47
J. March 2005 – Increase to £16 per sector	48
i. Background	48
ii. 18 March 2005	49
iii. 20 March 2005	51
iv. 21 March 2005	52
v. 22 March 2005	59
K. June 2005 – Increase to £24 per sector	59
i. Background	59
ii. 21 June 2005	59
iii. 22 and 23 June 2005	60
iv. 24 June 2005	63
L. September 2005 – Increase to £30 per sector	65
i. Background	65
ii. 29 to 31 August 2005	66
iii. 1 and 2 September 2005.....	66
iv. 4 September 2005.....	67
v. 5 September 2005.....	67
vi. 6 September 2005.....	70
vii. 7 September 2005.....	71
viii. 8 September 2005.....	72
ix. 15 September 2005	73
M. November 2005 – VAA decrease to £25 per sector	73
i. Background	73
ii. 15 to 17 November.....	73
iii. 18 November 2005.....	74
iv. 19 to 22 November 2005	78
N. January 2006 – VAA increase to £30 per sector	79
i. Background	79
ii. December 2005	79
iii. January 2006	80
IV. LEGAL ANALYSIS.....	82
A. Introduction	82
B. Chapter I prohibition and Article 101	82
i. The Chapter I prohibition.....	82

ii.	Consistency with European Union law	82
iii.	Article 101	83
C.	Law on Burden of Proof and Standard of Proof.....	83
i.	Burden of proof	83
ii.	Standard of proof	84
D.	Undertakings.....	88
i.	Principles.....	88
ii.	Application to this case	88
E.	Agreements or concerted practices between undertakings	88
i.	Principles.....	88
ii.	Application to this case	93
F.	Prevention, restriction or distortion of competition	98
i.	Principles.....	98
ii.	Application to this case	100
G.	Single continuous infringement	103
i.	Principles.....	103
ii.	Application to this case	104
H.	Appreciable effect on competition	104
i.	Principles.....	104
ii.	Application to this case	105
I.	Effect on trade	105
i.	Principles.....	105
ii.	Application to this case	107
J.	Exclusion or exemption	107
K.	Conclusion on the application of the Chapter I prohibition and Article 101	108
V.	THE OFT'S ACTION	109
A.	The OFT's decision	109
B.	Directions	109
C.	Penalties	109
i.	Introduction	109
ii.	Statutory cap on penalties	109
iii.	Small agreements	109
iv.	Intention/negligence	110
v.	VAA's application for immunity.....	111
vi.	Calculation of BA's penalty	111
vii.	Application of OFT's leniency policy and early resolution policy	116
viii.	Payment of penalty	116
	APPENDIX A: LIST OF INDIVIDUALS MENTIONED IN THIS DECISION	118
	APPENDIX B: DRAFT EMAIL CREATED AT 13:56 ON 21 MARCH 2005	119

I. INTRODUCTION

A. The purpose of this document

1. By this decision (the 'Decision'), the Office of Fair Trading (the 'OFT') has concluded that:
 - British Airways plc ('BA'); and
 - Virgin Atlantic Airways Limited and Virgin Atlantic Limited (together, 'Virgin Atlantic')(each a 'Party', together 'the Parties') have infringed the prohibition imposed by section 2(1) (the 'Chapter I prohibition') of the Competition Act 1998 (the 'Act') and/or Article 101(1) ('Article 101') of the Treaty on the Functioning of the European Union (the 'TFEU').
2. The Chapter I prohibition provides that agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom (the 'UK') and which have as their object or effect the prevention, restriction or distortion of competition within the UK are prohibited. The Chapter I prohibition is modelled on Article 101, which prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States of the European Union (the 'EU') and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.¹

B. Summary of the Infringement and the OFT's enforcement action

3. The OFT has concluded that the Parties infringed Article 101 and/or the Chapter I prohibition by participating between August 2004 and January 2006 (the 'Relevant Period') in an agreement and/or concerted practice by which they coordinated their pricing in relation to their respective passenger fuel surcharges for long-haul flights ('PFS') through the exchange of pricing and other commercially sensitive information regarding the PFS, with the object of preventing, restricting or distorting competition (the 'Infringement').
4. By this decision, the OFT is imposing financial penalties under section 36 of the Act, subject to the application of the OFT's leniency policy.² Virgin Atlantic is a successful immunity applicant and therefore benefits from total immunity from financial penalties under the OFT's leniency policy.³ Virgin Atlantic is not therefore required by this Decision to pay a penalty under section 36 of the Act. BA applied for leniency under the OFT's leniency policy and also entered into an early resolution agreement ('ERA') with the OFT originally signed on 31 July 2007 and subsequently revised as regards the level of penalty by means of a further agreement dated 17 April 2012. The penalty imposed on BA is set out at paragraphs 426 to 454 of this Decision.

¹ Formerly the 'common market'.

² See OFT Guideline 423, *OFT's Guidance as to the Appropriate Amount of a Penalty*, December 2004 (the 'Penalty Guidance').

³ *Penalty Guidance* (fn2), paragraphs 3.1 to 3.18.

II. FACTUAL BACKGROUND

A. The Parties

5. The Parties, described in turn below, are each airlines which provide (amongst other services) long-haul passenger flights.
 - i. British Airways plc
6. British Airways plc is a public limited company registered in England and Wales, company number 1777777.⁴ Its registered address is Waterside, PO Box 265, Harmondsworth, UB7 0GB.⁵ At the time of its involvement in the Infringement, BA provided air passenger transport services for passengers, freight and mail, and ancillary services.⁶
7. BA has a number of alliances with other airlines. In relation to long-haul routes, it is part of the oneworld alliance (comprising, in addition to BA, American Airways, Cathay Pacific, Finnair, Iberia, Japan Airlines, Lan Airlines, Malév, Mexicana, Qantas, Royal Jordanian and S7 airlines) and has a full joint services agreement with Qantas on flights between the United Kingdom/Continental Europe and Australia and any intermediate points.⁷ BA has code-share agreements with all oneworld alliance airlines, as well as Aer Lingus, airberlin, Flybe, Kingfisher Airlines, Loganair and Meridiana fly.⁸ It also offers transatlantic services on its wholly-owned subsidiary, OpenSkies. BA has a three-way joint business agreement with American Airlines and Iberia on flights between North America and Europe.⁹
8. On 21 January 2011, BA and Iberia completed a merger transaction with the formation of International Consolidated Airlines Group S.A. ('IAG') to hold the interests of both the existing airline groups. IAG is a Spanish company registered in Madrid. On 24 January 2011, the listings of BA and Iberia shares were cancelled. IAG shares were admitted to the Official List by the UKLA and to trading on the London Stock Exchange and on the Madrid, Barcelona, Bilbao and Valencia stock exchanges (through the Spanish Stock Exchange Interconnection

⁴ British Airways Annual Report & Accounts to December 2010, p119. See also pages 1 of Forms 363a received by Companies House for British Airways Plc dated 8 August 2003, 6 August 2004, 10 August 2005, 4 August 2006, 6 August 2007, 15 August 2008, 13 August 2009 and 12 August 2010.

⁵ British Airways Annual Report & Accounts to December 2010, p119.

⁶ British Airways Annual Report & Accounts for the year ended 31 March 2004, p13. British Airways Annual Report & Accounts for the year ended 31 March 2005, p13. British Airways Annual Report & Accounts for the year ended 31 March 2006, p9.

⁷ See British Airways website (www.britishairways.com/travel/airline-alliances/public/en_gb). As regards the joint services agreement with Quantas, the Australian Competition and Consumer Commission granted authorisation in March 2010 for this joint services agreement to continue for another five years from 22 April 2010. See

www.accc.gov.au/content/index.phtml/itemId/899538/fromItemId/401858/display/acccDecision.

⁸ See British Airways website (www.britishairways.com/travel/airline-alliances/public/en_gb).

⁹ BA press release 6 October 2010 AA, BA and Iberia announce better deal for transatlantic flyers: <http://press.ba.com/?p=1488>.

System).¹⁰ Following the merger, both BA and Iberia retained their individual brands.¹¹

9. As IAG did not form part of the same economic entity as BA at the time of the Infringement, and since BA is still in existence as a legal entity, the OFT considers that liability should rest with BA for payment of the penalty imposed by this Decision. This Decision is addressed therefore to BA.
10. BA's turnover or revenue for each of the financial years 2003-04 to 2009-10 (ending 31 March in each case) and for nine months until 31 December 2010 (prior to the merger with Iberia in January 2011) was as follows:¹²

• 2003-04	£7,560 million
• 2004-05	£7,772 million ¹³
• 2005-06	£8,515 million ¹⁴
• 2006-07	£8,492 million
• 2007-08	£8,753 million ¹⁵
• 2008-09	£8,992 million
• 2009-10	£7,994 million
• Nine months ending 31 December 2010	£6,683 million

ii. Virgin Atlantic

11. Virgin Atlantic Airways Limited ('VAA') is a private limited company registered in England and Wales, company number 1600117.¹⁶ VAA's registered office is at The Office, Manor Royal, Crawley, West Sussex, RH10 9NU.¹⁷ At the time of its involvement in the Infringement described in this Decision, VAA's principal activities were the operation of scheduled air services for the carriage of passengers and freight.¹⁸

¹⁰ IAG news release 24 January 2011: www.iagshares.com/phoenix.zhtml?c=240949&p=irol-Print&ID=1519016&highlight.

¹¹ See www.iairgroup.com/phoenix.zhtml?c=240949&p=aboutoverview.

¹² British Airways Annual Report & Accounts for the year ended 31 March 2004, p2; British Airways Annual Report & Accounts for the year ended 31 March 2005, pages 3; British Airways Annual Report & Accounts for the year ended 31 March 2006, p3; British Airways Annual Report & Accounts for the year ended 31 March 2007, p2; British Airways Annual Report & Accounts for the year ended 31 March 2008, p5; British Airways Annual Report & Accounts for the year ended 31 March 2009, p3; British Airways Annual Report & Accounts for the year ended 31 March 2010, p4; British Airways Annual Report & Accounts for the year to December 2010, p8.

¹³ British Airways Annual Report & Accounts for the year ended 31 March 2005, pages 1 and 36 state "turnover" of £7,813m. However, British Airways Annual Report & Accounts for the year ended 31 March 2006, pages 2 and 56 list "revenue" for year ended 31 March 2005 in the amount of £7,772m. The OFT has used the lower of these two figures.

¹⁴ Restated in British Airways Annual Report & Accounts for the year ended 31 March 2007 as £8,213m, due to the sale of BA Connect.

¹⁵ Restated in British Airways Annual Report and Accounts for the year ended 31 March 2009 as £8,738m, due to an accounting rule change. The OFT has used the lower of these two figures.

¹⁶ Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidate financial statements for the year ended 28 February 2011, cover page.

¹⁷ Form 363a received by Companies House for Virgin Atlantic Airways Limited for electronic filing on 1 August 2011, p1.

¹⁸ Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the ten months ended 29 February 2004, p3; Virgin Atlantic Airways Limited and

12. As at March 2012, VAA has airline partnership agreements with Air China, Air New Zealand, All Nippon Airways, bmi, Continental Airways, Gulf Air, Hawaiian Airlines, Jet Airways, Malaysia Airlines, Scandinavian Airlines, Singapore Airlines, South African Airways, US Airways, Virgin Australia, Virgin America, and Virgin Australia.¹⁹ Of these, VAA has code-share arrangements with Singapore Airlines, South African Airways, bmi, Continental Airlines, Air China, Virgin Australia, Air New Zealand and Jet Airways.²⁰
13. At the time of the Infringement and at the date of its most recent financial statements, VAA was and is wholly owned by Virgin Atlantic Limited ('VAL') through a holding company, Virgin Travel Group Limited ('VTG').²¹ VAL is a private limited company registered in England and Wales, registered number 3552500,²² whose principal activities were and are scheduled air transport services for passengers and freight and tour operating (and freight handling in

subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2005, p2; Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2006, p2.

¹⁹ See www.virgin-atlantic.com/en/gb/frequentflyer/fcpartners/airlines/index.jsp.

²⁰ See www.virgin-atlantic.com/en/gb/whereintheworld/codesharepartners/index.jsp.

²¹ At the time of the Infringement and as at the date for its most recently published results (28 February 2011), VAA's immediate parent company was VTG, a private limited company registered in England and Wales, registered number 02274332, whose principal activity is as a holding company (Virgin Travel Group Limited Directors' report and consolidated financial statements for the year ended 29 February 2004, p1; Virgin Travel Group Limited Directors' report and consolidated financial statements for the year ended 28 February 2005, p1; Virgin Travel Group Limited Directors' report and consolidated financial statements for the year ended 28 February 2006, p1; Virgin Travel Group Limited Directors' report and consolidated financial statements for the year ended 28 February 2010, p1). At the time of the Infringement and as at the date for its most recently published results (28 February 2010), VTG owned 100 per cent of the shares in VAA (Form 363a received by Companies House for Virgin Atlantic Airways Limited dated 30 April 2004 and 1 August 2004, p11; Form 363a received by Companies House for Virgin Atlantic Airways Limited for electronic filing on 4 August 2005 p4; Form 363a received by Companies House for Virgin Atlantic Airways Limited for electronic filing on 14 August 2006, p4; Virgin Travel Group Limited Directors' report and consolidated financial statements for the year ended 28 February 2010, p16). At the time of the Infringement and as at the date for its most recently published results (28 February 2010), VTG was a wholly owned subsidiary of VAL (Form 363a received by Companies House for Virgin Travel Group Limited dated 30 April 2004 and 1 August 2004, p11; Form 363a received by Companies House for Virgin Travel Group Limited for electronic filing on 4 August 2005; Form 363a received by Companies House for Virgin Travel Group Limited for electronic filing on 14 August 2006, p4, Virgin Travel Group Limited Directors' report and consolidated financial statements for the year ended 29 February 2010, p17). VTG's registered office is at The Office, Manor Royal, Crawley, West Sussex, RH10 9NU (www.companieshouse.gov.uk as at 28 February 2011).

²² Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2011, cover page.

2004 only).²³ VAL's registered office is at The Office, Manor Royal, Crawley, West Sussex, RH10 9NU.²⁴

14. VAL is 51 per cent owned indirectly by Virgin Holdings Limited ('VHL') and 49 per cent owned by Singapore Airlines Limited ('SAL').²⁵
15. VAA's turnover, including turnover from its subsidiary companies, for each of the financial years 2003-2004 to 2010-2011 was as follows:²⁶

• 10 months ended 29 February 2004	£1,004 million
• year ended 28 February 2005	£1,342 million
• year ended 28 February 2006	£1,591 million
• year ended 28 February 2007	£1,816 million
• year ended 29 February 2008	£2,011 million
• year ended 28 February 2009	£2,239 million
• year ended 28 February 2010	£1,984 million
• year ended 28 February 2011	£2,264 million

²³ Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the ten months ended 29 February 2004, p2; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2005, p2; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2006, p2; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2007, p3; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 29 February 2008, p3; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2009, p3; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2010, p3; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2011, p3.

²⁴ www.companieshouse.gov.uk as at 28 February 2011.

²⁵ Form 363a received by Companies House for Virgin Atlantic Limited for electronic filing on 26 August 2011, p25. Note that at the time of the Infringement, VHL's stake in VAL was held through Virgin Investments S.A.

²⁶ Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the ten months ended 29 February 2004, p7; Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2005, p6; Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2006, p7; Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2007, p8; Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 29 February 2008, p9; Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 29 February 2009, p8; Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 29 February 2010, p10; Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 29 February 2011, p10.

16. VAL's turnover, including turnover from its subsidiary companies, for each of the financial years 2003-2004 to 2010-2011 was as follows:²⁷

• 10 months ended 29 February 2004	£1,272 million
• year ended 28 February 2005	£1,630 million
• year ended 28 February 2006	£1,912 million
• year ended 28 February 2007	£2,225 million
• year ended 29 February 2008	£2,380 million
• year ended 28 February 2009	£2,579 million
• year ended 28 February 2010	£2,357 million
• year ended 28 February 2011	£2,658 million

17. Where a parent company exerts decisive influence on the policy of a subsidiary such that the latter does not enjoy real autonomy in determining its own course of action on the market, the conduct of the subsidiary may be attributed to the parent company.²⁸ Furthermore, where the subsidiary is wholly owned by its parent, the OFT is entitled to presume, in the absence of evidence to the contrary, that the parent company exercises decisive influence over the conduct of the subsidiary.²⁹

18. The OFT notes that VAL is the 100 per cent owner of VAA through the holding company VTG. The OFT also notes that neither VAL nor VAA has put forward any evidence which would suggest that VAL does not exercise decisive influence over the conduct of VAA. In the circumstances, the OFT presumes that VAL exercised decisive influence over VAA's commercial policy during the Relevant Period. Thus VAA's conduct in participating in the Infringement may be attributed to VAL.
19. The OFT notes in addition that, during the time of the Infringement there were a number of common directors and officers in each of VAA, VTG and VAL, which reinforces this analysis. For example, for each company from 1 May 2004 onwards for the Relevant Period:

²⁷ Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the ten months ended 29 February 2004, p6; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2005, p6; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2006, p6; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2007, p8; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 29 February 2008, p9; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2009, p9; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2010, p10; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2011, p10.

²⁸ Case 48/69 *ICI v Commission* [1972] ECR 619 ('Dyestuffs'), paragraph 130 onwards; Case 107/82 *AEG v Commission* [1983] ECR 3151 paragraphs 47 onwards; Case C-286/98 P *Stora Kopparbergs* [2000] ECR I-9925 ('Stora Kopparbergs'), paragraphs 26 to 29. See Case C-97/08 *Akzo Nobel and others v Commission*, judgment of 10 September 2009, paragraphs 27 to 28. See also *Durkan v OFT* [2011] CAT6 ('Durkan'), paragraph 22.

²⁹ *Stora Kopparbergs* (fn28), paragraph 29.

- Richard Branson was Chairman of all three companies;³⁰ and
 - Julie Southern and Steve Ridgway were directors of each of these companies,³¹ as well as being head of finance and Chief Executive Officer of VAA respectively.³²
20. Given the joint ownership of VAL and in the absence of indications that either VHL or SAL exercised decisive control over VAL, the OFT does not propose to attribute VAA's conduct in participating in the Infringement upwards to VHL or SAL.
21. This Decision therefore is addressed to VAA and VAL (together 'Virgin Atlantic').

B. The OFT's investigation

i. Leniency applications

22. On 10 March 2006, Virgin Atlantic approached the OFT for immunity under the OFT's leniency policy and the OFT granted an immunity marker. On 20 April 2006, Virgin Atlantic made its first oral proffer for immunity. On 7 June 2006, Virgin Atlantic made an interim oral proffer. Virgin Atlantic's final proffer for immunity was given orally on 18 July 2006. It subsequently provided documents and information to support its proffers, including telephone records and results of searches of computers, servers, mobile telephones and PDAs. The immunity agreement with Virgin Atlantic was signed on 4 December 2008 by Virgin Atlantic.
23. On 26 July 2006, BA made an oral proffer for leniency. It subsequently provided documents and information to support its proffer. The OFT entered into a leniency agreement with BA on 31 July 2007. At the same time, BA agreed to an early resolution of the civil investigation by admitting it had infringed competition law and agreeing to co-operate in the expedition of the process for concluding the investigation. The ERA with BA was subsequently revised as regards the level of penalty by means of a further agreement dated 17 April 2012; see paragraph 39 below.

ii. Civil and criminal investigations

24. The OFT carried out a civil investigation under the Act as to whether BA and Virgin Atlantic infringed the Chapter I prohibition and/or Article 101, and carried out a separate criminal investigation into whether certain individual employees of BA and Virgin Atlantic committed the cartel offence contrary to section 188 of

³⁰ VAA: Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2005, p2; Virgin Atlantic Airways Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2006, p2. VTG: Virgin Travel Group Limited Directors' report and financial statements for the year ended 28 February 2005, p1; Virgin Travel Group Limited Directors' report and financial statements for the year ended 28 February 2006, p1. VAL: Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2005, p2; Virgin Atlantic Limited and subsidiary companies Directors' report and consolidated financial statements for the year ended 28 February 2006, p2.

³¹ *Ibid.*

³² [...] first interview: Document 1146, p6 and [...] first interview: Document 1145, p5.

the Enterprise Act 2002 ('EA02'). Separate case teams carried out the civil and criminal investigations.

25. In August 2008, pursuant to the criminal investigation, the OFT charged [*four individuals*] with the cartel offence under section 188 of the EA02. Following the preliminary hearing of legal arguments, the trial commenced on 26 April 2010. On 10 May 2010, the OFT offered no evidence on behalf of the prosecution and the trial judge directed the jury to acquit the four defendants.

26. This Decision relates only to the civil investigation and the infringement of the Chapter I prohibition and/or Article 101. Accordingly, the criminal investigation is not described further in this Decision, except so far as necessary for the understanding of the civil investigation. This Decision does not concern the application of the cartel offence to the conduct of any individual and nothing contained in this Decision should be interpreted as such.

iii. Section 27 inspection

27. On 13 June 2006 the OFT conducted an unannounced inspection under section 27 of the Act at the headquarters of BA, at Waterside, Harmondsworth, West Drayton UB7 0GB. The criminal case team carried out a parallel informal visit by consent in which notices requiring the production of documents under section 193 of the EA02 were served on BA and three of its employees. Not all documents requested were available on the day and some hard-copy documents were made available to each case team at a later date at the offices of BA's solicitors, Slaughter and May.

28. BA provided telephone records requested by the OFT under section 27 of the Act on 21 June and 20 October 2006.

29. Forensic searches of computers, servers, mobile telephones and PDAs were carried out by BA under the supervision of the OFT's criminal case team and BA provided the relevant results to the civil case team under section 27 of the Act on 11 January, 16 February and 2 April 2007.

iv. Section 26 notice

30. On 12 January 2007, the OFT sent a notice to BA under section 26 of the Act, which comprised seven questions. The OFT received a response to questions 2 to 7 on 5 February 2007 and a response to question 1 on 19 February 2007.

v. Information obtained not using formal powers

31. The OFT carried out a number of voluntary interviews of serving or former BA and VAA staff during its investigation without the use of formal powers. The interviews, which commenced on 12 July 2006, were carried out by the OFT's criminal case team, and the resulting transcripts and witness statements, together with related correspondence and documents, were transferred to the civil case team. Supplementary interviews of current or former VAA staff were carried out by the civil case team in August 2011.

32. The OFT made informal information requests to BA as follows:

Request date	Response date(s)
14 May 2007	2 June 2007
8 June 2007	Questions 1, 3, 6 and 7 – 13 June 2007
	Question 4 – 14 June 2007
	Question 2 – 15 June 2007
	Question 5 – 25 June 2007
3 August 2007	9 August 2007
19 October 2007	2 November 2007

33. The OFT made informal information requests to VAA as follows:

Request date	Response date(s)
15 January 2007	Questions 3, 6 and 7 – 5 February 2007
	Questions 1, 2 and 4 – 6 February 2007
	Question 5 – 7 February 2007 (oral response by a legal representative)
21 June 2007	25 July 2007
Follow-up question to 25 July 2007 response	6 September 2007
3 August 2007	23 August 2007
18 October 2007	9 November 2007

34. By way of memoranda from the criminal case team in 2010 and 2011, additional evidence was transferred from the criminal investigation file to the civil case team, comprising:
- further witness statements and interview evidence;
 - results of searches of a telephone database; and
 - further VAA documentation.
35. In August 2010, VAA notified the OFT that it was in the process of complying with a subpoena for evidence issued by the US Department of Justice ('DoJ') in the context of the DoJ's criminal investigation into passenger fuel surcharges. The OFT requested that a detailed search of the evidence being produced in response to that subpoena be carried out within parameters identified by the OFT. The results of that search were provided to the OFT on 25 February 2011, 20 May 2011, 3 June 2011, 23 June 2011 and 1 July 2011.
36. On 8 November 2011, the OFT issued a statement of objections (the 'Statement of Objections'), giving the Parties notice under section 31(1)(a) of the Act and

rules 4 and 5 of the OFT's procedural rules (the 'OFT's Rules')³³ of its proposed infringement decision.

37. Under the OFT's Rules, the OFT is required to give each Party a reasonable opportunity to inspect the documents on the OFT's file that relate to the matters referred to in the Statement of Objections, and may exclude or withhold '*internal documents*' and documents to the extent that they contain '*confidential information*', as those terms are defined in the OFT's Rules.³⁴ In accordance with the agreements reached with the Parties regarding access to the OFT's file in this matter,³⁵ the OFT did not make available a full set of all the documents on its case file. Instead, Parties were sent on 8 November 2011 a CD-ROM containing electronic copies of all documents on the OFT's file which were referred to in the Statement of Objections.
38. As required by the OFT's Rules,³⁶ the Parties were also notified of the period within which they may make written representations to the OFT on the matters referred to in the Statement of Objections and of the possibility of making oral representations to the OFT on such matters. Written representations were restricted to the scope agreed between the OFT and the Parties in the contexts of early resolution and leniency.³⁷ VAA provided written representations on 'material factual inaccuracies' on 6 December 2011.³⁸ BA confirmed on 25 January 2012 that it had no submissions on 'material factual inaccuracies' in the Statement of Objections.³⁹ Neither Party requested the opportunity to make oral representations.
39. On 31 July 2007, the OFT and BA signed an ERA in which BA admitted it had infringed competition law and agreed to pay a penalty of £121.5 million. The ERA was subsequently revised as regards the level of penalty by means of a further agreement dated 17 April 2012 pursuant to which BA agreed to pay a penalty of £58.5 million. The calculation of the penalty and reasons for it are set out at paragraphs 426 to 454 below. The other conditions of the agreement remain as set out in the original ERA.⁴⁰ The key terms of the agreed resolution, as revised, are as follows:
 - (a) BA admitted that it had infringed the Chapter I prohibition and/or Article 101 by participating in the Infringement;
 - (b) BA would pay a penalty of £58.5 million, which includes a reduction of 20 per cent in recognition of the ERA;

³³ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751).

³⁴ OFT's Rules (fn33), Rules 5(3) and 1(1).

³⁵ As regards VAA, see letters exchanged between the OFT and VAA's legal representatives on 18 July 2007, 27 July 2007 and 23 December 2008 (Documents 2153, 2172 and 2523). As regards BA, see letter of agreement between the OFT and BA dated 31 July 2007 (Document 2177).

³⁶ OFT's Rules (fn33), Rules 5(2)(c) and 5(4).

³⁷ As regards VAA, see letters exchanged between the OFT and VAA's legal representatives on 18 July 2007, 27 July 2007 and 23 December 2008 (Documents 2153, 2172 and 2523). As regards BA, see letter of agreement between the OFT and BA dated 31 July 2007 (Document 2177).

³⁸ Documents 3545 and 3547. VAA's representations on factual inaccuracies have been addressed in paragraphs 11, 12, 13, 14, 41, 49, 50, 56, 97, 111, 125, 220, 226, 258, 262; at Table 5; and at fn46, fn75, and fn463 of this Decision.

³⁹ Document 3580.

⁴⁰ Letter of agreement between the OFT and BA dated 17 April 2012 (Document 3590); Document 2177.

- (c) the OFT would issue a statement of objections in respect of the Infringement setting out in full the evidence and findings in support of the OFT's proposed infringement decision;
- (d) BA would refrain from seeking access to documents on the OFT's file, other than those documents directly relied on and referred to in the Statement of Objections;⁴¹
- (e) BA would submit a concise memorandum indicating any material factual inaccuracies in the Statement of Objections; and
- (f) the OFT would adopt a decision in respect of the Infringement which would set out the OFT's findings of the facts which had taken place in materially the same form as set out in the Statement of Objections, subject to any amendments deemed necessary and appropriate by the OFT as a result of representations referred to in (e) above or equivalent representations from the other recipient of the Statement of Objections.

C. Industry overview – the passenger airline industry

- i. Market trends
- 40. There has been substantial long term growth in air passenger numbers. In 1970, 32 million passengers used UK airports. By 2007 the figure had risen to 240 million. However in recent years, the recession has had an impact on the industry with a decline in passenger numbers to 210 million in 2010 (see Table 1 below). The Department for Transport's recent forecasts, however, expect long-term growth with between 415 and 500 million passengers per annum using UK airports by 2030.⁴²

Table 1: Terminal Passengers at UK Airports (millions)

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010
Terminal Passengers	188.0	199.2	214.9	227.4	234.4	240.0	235.4	218.1	210.7

Source: UK Airport Statistics, Civil Aviation Authority.⁴³

- ii. Regulatory framework
- 41. The airline industry is subject to significant regulation at a UK, EU and international level. Of particular note is that flights between the UK and non-EU countries are subject to Air Service Agreements.⁴⁴ These are agreements between countries which, along with any accompanying Memoranda of Understanding, set out the terms under which access to each other's airspace is granted. These terms may include restrictions on:

⁴¹ The OFT subsequently confirmed that it would disclose all evidence referred to in the Statement of Objections, including any potentially exculpatory material (see Documents 2588 and 2821).

⁴² Department for Transport, UK Passenger Demand and CO2 Forecasts, January 2009: <http://webarchive.nationalarchives.gov.uk/+www.dft.gov.uk/pgr/aviation/atf/co2forecasts09/co2forecasts09.pdf>.

⁴³ www.caa.co.uk/default.aspx?catid=80&pagetype=88&sgrid=3&fld=2010Annual.

⁴⁴ Air passenger services within the EU have been liberalised such that any EU registered airline can operate air services between any pair of airports within the EU and can itself determine what type of aircraft to use, the service frequency and fares.

- the number, size and destination points of flights that can operate between the countries; and
 - the airlines' ability to set their own fares, often requiring fares to be approved by one or both of the contracting countries.
42. These restrictions are increasingly being removed. For example, in April 2007, the EU and the United States of America signed an 'open skies' agreement. This agreement, which came into effect in March 2008, removed a number of restrictions and allows any EU-based airline to operate flights between any EU city and any US city. The second stage agreement was signed on 24 June 2010 and strengthened the framework of cooperation on issues such as the environment, social protection, competition and security, including greater access for EU airlines to provide services to the US.⁴⁵
- iii. Airlines
43. Passenger airlines can be segmented into three categories:
- 'Full-service' airlines, which offer a traditional range of scheduled services such as 'business' class premium seats and executive lounges, in addition to standard services. Certain full-service airlines also offer 'business class' only flights on certain routes (such as BA's London City-JFK route, marketed as 'Club World London City').⁴⁶
 - Low-cost airlines, which offer a 'no-frills' service on scheduled flights. For example, they do not provide executive lounges or in-flight entertainment. Other services, such as in-flight meals/refreshments or seat reservations, may be provided but carry an additional charge.
 - Charter airlines, which do not provide scheduled services but instead sell their seats to tour operators or, to a lesser extent, directly to passengers either on a seat-only basis or as part of a holiday package.
44. There are a number of global airline alliances. Alliances allow member airlines to market a wider range of destinations and connecting services. The three largest global alliances are oneworld, Star Alliance and SkyTeam. BA is a member of the oneworld global alliance. Virgin Atlantic is not a member of any multilateral global alliance.⁴⁷
45. A feature of the airline industry is interlining between airlines. Interlining means passengers can purchase a single ticket for their entire journey even when they have to use more than one airline for that journey. It also means that passengers (and their baggage) can be checked through to their final destination at the start of their journey.

⁴⁵ See European Union press release 24 June 2010: www.eurunion.org/eu/2010-News-Releases/EUROPEAN-COMMISSION-WELCOMES-THE-SIGNATURE-OF-THE-SECOND-STAGE-EUROPEAN-UNION-UNITED-STATES-OPEN-SKIES-AGREEMENT.html.

⁴⁶ See www.britishairways.com/travel/cwlcepx/public/en_gb. Business class only airlines, which started up in the mid-2000s, have generally not succeeded.

⁴⁷ VAA is wholly owned by VAL, which is part-owned by Singapore Airlines. Singapore Airlines is a member of Star Alliance (see paragraphs 12 to 14 above).

46. Another feature of the airline industry is code-share arrangements for particular routes or flights. A code-share arrangement is an agreement between two or more airlines whereby the airline operating a given flight allows the other airline(s) to market and sell tickets on that flight. The other airline(s) also add their own airline designator code and flight number.
47. Both Parties have entered into bilateral interlining and code-share arrangements with other airlines.
- iv. Air fares
48. Full-service airlines offer a range of ticket classes and fares for travel on a particular route. On long-haul flights, there are usually a number of ticket classes, such as premium, business and economy. Within each class, airlines offer a range of fares. Fares vary according to a number of factors such as whether the ticket is sold with or without restrictions,⁴⁸ how far in advance of travel the ticket is sold and the date/time of travel. Airlines also occasionally offer promotional airfares. Some airlines, including BA and VAA, also sell tickets through deals with corporate customers.
- v. Fuel costs and surcharges
49. During the Relevant Period both Parties purchased most of their aviation fuel requirements under fixed-term contracts (for a term of one to three years).⁴⁹ These contracts specify how the fuel price is determined. This is often based on a reported price of aviation fuel traded on a particular commodity exchange, such as the International Petroleum Exchange in London. A 'differential' is added to this, which covers additional costs (such as costs of transporting the fuel to the airport and the supplier's margin) and any applicable taxes, duties or fees. In addition to purchasing under a fixed-term contract, some airlines may also make supplementary one-off 'spot' purchases of aviation fuel from time to time.
50. The fuel price can vary during the term of the contract. This creates a risk for airlines, which can be alleviated through the use of financial 'hedging' instruments, albeit that these also carry their own risks. Both Parties hedged part of their aviation fuel requirements during the period of the Infringement.⁵⁰
51. Due to the rising level of crude oil prices and aviation fuel prices, both Parties introduced a PFS in May 2004.⁵¹ Table 2 below shows oil prices, aviation fuel prices and the Parties' PFSs when their respective PFSs were introduced and for each of the months in which they were reviewed or revised.

⁴⁸ For example, an unrestricted ticket may mean the passenger can freely transfer the ticket to another flight or get a refund if the ticket is not used. A restricted ticket may mean the passenger is unable to transfer the ticket to another flight or may have to pay an additional charge to do so.

⁴⁹ VAA information request response: Document 1169, response to question 6; BA information request response: Document 1162, response to question 6.

⁵⁰ VAA information request response: Document 1169, response to question 6; BA information request response: Document 1162, response to question 6. In addition, see Document 0816 (BA press release, *Fuel surcharge increased on long-haul flights*, 9 August 2004, which states that BA had hedged 72 per cent of its fuel needs up to March 2005).

⁵¹ See Part III, Section G below.

Table 2: Fuel prices and long-haul passenger fuel surcharge

	May 2004	Aug 2004	Oct 2004	Mar 2005	June 2005	Sept 2005	Nov 2005	Jan 2006
Oil price (US\$ per barrel)	37.6	42.7	49.8	53.1	54.4	62.9	55.2	63.0
Jet fuel price (US\$ per gallon)	1.1	1.3	1.6	1.6	1.7	2.0	1.7	1.8
BA's PFS (£ per sector)	2.5	6.0	10.0	16.0	24.0	30.0	30.0	30.0
VAA's PFS (£ per sector)	2.5	6.0	10.0	16.0	24.0	30.0	25.0	30.0

Sources and notes: Fuel prices from US Department of Energy, Energy Information Administration.⁵²

52. Both Parties applied a PFS to all applicable ticket sales.⁵³ For tickets sold in the UK, the PFS shown in Table 2 above applied (the 'Standard PFS'). For tickets sold outside the UK, the PFS applied was usually a conversion of the Standard PFS into US dollars or local currency (and this is included therefore in the term 'Standard PFS'). However, there were some exceptions to the application of the Standard PFS for both Parties.
53. VAA⁵⁴ did not apply its Standard PFS on:
 - tickets sold in Barbados between June and July 2005;
 - tickets sold in the US between July and September 2005;
 - tickets sold in Japan between April and August 2005; and
 - tickets sold for travel to and/or from Hong Kong regardless of where they were sold for the entire period of the Infringement.
54. BA⁵⁵ did not apply its Standard PFS on:
 - tickets sold in Europe (excluding Spain and UK) from July 2005;
 - tickets sold in Spain for the entire period of the Infringement;
 - tickets sold in the US between June and September 2005;
 - tickets sold in Australia for the entire period of the Infringement;
 - tickets sold in Hong Kong for the entire period of the Infringement; and

⁵² The oil price is for Brent Crude. The jet fuel price is that for delivery in the Amsterdam-Rotterdam-Antwerp area. Both price series are an average of daily closing spot market prices for the month. PFS amounts are as applied by the Parties. A sector is a direct flight between two airports.

⁵³ Some ticket sales are not subject to the PFS, such as sales to members of staff. See VAA information request response: Document 1168, response to question 4; BA information request response: Document 1162, response to question 2 and Document 1401A.

⁵⁴ VAA information request response: Document 1168, response to question 2 and Annex B.

⁵⁵ BA information request response: Document 1162, response to question 2; BA further response: Document 1401A; BA consolidated information request response: Document 2091.

- tickets sold in Canada and Japan at certain times during the period of the Infringement.
55. There are a number of reasons why the Standard PFS was not applied on the above ticket sales,⁵⁶ namely:
- aviation regulators in some jurisdictions did not approve the local currency equivalent of the Standard PFS;
 - changes to the PFS levied outside the UK were not consistently timed with changes to the Standard PFS for tickets sold in the UK; and
 - exchange rate fluctuations would give rise to differences between the Standard PFS for UK ticket sales and that applied overseas.
56. As regards ticket sales made through agents for code-share and interline passengers only, the agent may, on occasion, have inadvertently applied the wrong amount for the PFS or not applied one at all.⁵⁷ Additionally, for interlining and code-share arrangements, both Parties had differing arrangements in place as to the level of PFS which applied to such ticket sales.⁵⁸
57. For the purposes of this Decision, references to the 'PFS' or to passenger fuel surcharges are to the Standard PFS unless otherwise indicated.
- D. The relevant market**
- i. Introduction
58. When applying the Chapter I prohibition and/or Article 101, the OFT is only obliged to define the relevant market(s) where it is not possible, without such a definition, to determine whether the agreement and/or concerted practice is liable to affect trade in the UK and/or between Member States, and whether it has as its object or effect the prevention, restriction or distortion of competition.⁵⁹
59. No such obligation arises in this case because, as set out in paragraphs 380, 403 and 405 below, the Infringement involves an agreement and/or concerted practice that had as its object the prevention, restriction or distortion of competition and was by its nature liable to affect trade in the UK and/or between Member States.
60. Nevertheless, the OFT does define the relevant market(s) for the purposes of assessing the appropriate level of the financial penalty.⁶⁰

⁵⁶ VAA information request response: Document 1168, response to question 2; BA information request response: Document 1162, response to question 2; BA further response: Document 1401A; BA consolidated information request response: Document 2091.

⁵⁷ VAA information request response: Document 1168, response to question 4.

⁵⁸ VAA information request response: Document 1721, response to question 4; BA information request response: Document 1162, response to question 4.

⁵⁹ Case T-62/98 *Volkswagen AG v European Commission* [2000] ECR II-2707 ('Volkswagen'), paragraph 230 and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, paragraph 74.

⁶⁰ See *Penalty Guidance* (fn2), paragraph 2.7.

61. A market definition will normally comprise two dimensions: a product and a geographic area. The term 'product' is used for convenience and may include, as in this instance, a service.
 62. The Competition Appeal Tribunal ('CAT') and the Court of Appeal have accepted that it is not necessary for the OFT to carry out a formal analysis of the relevant product market in order to assess the appropriate level of the penalty.⁶¹ Rather, the OFT must be '*satisfied on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement*'.⁶² To this end, it is also relevant to consider the '*commercial reality*', insofar as it '*can reasonably be shown that the products so grouped were "affected" by the infringement*'.⁶³ The OFT considers that this principle also applies when assessing the relevant geographic market.
 63. In the present case, because the OFT is defining the relevant market for the purposes of determining the level of financial penalties, the OFT has adopted a conservative approach to market definition which is favourable to the Parties. The OFT has therefore limited itself to considering only those relevant markets where both Parties overlap, as these markets are those that will have been most directly affected by the Infringement (see paragraphs 77 and 78 below). The OFT considers also that the resulting financial penalties based only on those relevant markets where the Parties overlap (the 'Affected Markets') will be sufficient in this case to meet the twin objectives of the OFT's policy on financial penalties. These objectives are: (i) to impose penalties which reflect the seriousness of the infringement; and (ii) to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.⁶⁴
 64. The OFT notes that the Parties apply their PFS to commercial ticket sales on all long-haul routes, not just those routes where they overlap.⁶⁵ It is likely therefore that all routes on which the Parties applied their PFS are affected markets. However, the OFT considers that for the purposes of this Decision, it need not reach a view on this because, as explained in paragraph 63 above, the narrower definition of Affected Markets will result in financial penalties which are sufficient to meet the OFT's policy objectives in this case.
- ii. Product market
65. There is a large body of precedent to guide the approach to market definition in cases involving scheduled air-transport passenger services. This has arisen from merger and anti-trust cases and has been followed by the European Commission (the 'Commission'), the OFT and the Competition Commission ('CC'). This approach has also been confirmed by the Court of Justice of the European Union

⁶¹ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] ECWA Civ 1318 ('*Argos, Littlewoods and JJB (EWCA)*'), paragraphs 169 to 173 and 189 and CAT judgment on Penalty, *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13 ('*Argos and Littlewoods (penalty)*'), paragraph 178.

⁶² *Argos, Littlewoods and JJB (ECWA)* (fn61), paragraph 170.

⁶³ *Argos, Littlewoods and JJB (ECWA)* (fn61), paragraphs 170 to 173 and 228.

⁶⁴ See *Penalty Guidance* (fn2), paragraph 1.4.

⁶⁵ VAA information request response: Document 1168, response to question 2; BA information request response: Document 2091, response to question 2.

('CJEU') (comprising the Court of Justice and the General Court)⁶⁶ on various occasions.⁶⁷ The OFT is not bound by market definitions adopted in previous cases (either by itself or by other competition authorities) and whilst previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.⁶⁸

66. The standard approach to market definition for scheduled passenger air transport services is to start from a point of origin and a point of destination ('O&D') pair.⁶⁹ For the purposes of this Decision, the starting point for market definition is the O&D airport pairs on which both Parties offered long-haul flights and in relation to which both charged the PFS.
67. The OFT has then considered whether each O&D airport pair should be considered a separate market or whether, for any given airport pair, the market should be widened to a city pair (i.e. where the point of origin or destination includes more than one airport) or significantly overlapping catchment areas (i.e. where the point of origin or destination is wider than a city):⁷⁰
 - For those O&D airport pairs where the Parties overlap, the OFT did not consider this question further as it is not necessary to consider whether the relevant Affected Market is wider than this (see paragraph 63 above).⁷¹
 - For those O&D pairs where the Parties do not have an overlapping airport pair, the OFT considered whether there are any O&D city pairs where the

⁶⁶ Formerly known as the European Court, the European Court of Justice and the Court of First Instance respectively.

⁶⁷ See case 66/86 *Ahmed Saeed Flugreisen v Zentrale zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803, paragraphs 39 to 41; case T-2/93 *Air France v Commission*, 19 May 1994, ECR 320, paragraph 84 to 85; case T-177/04 *EasyJet v Commission*, 4 July 2006, ECR [2006] II-1913, paragraph 54 to 61; and case T-342/07 *Ryanair Holdings Plc v European Commission*, judgment dated 6 July 2010.

⁶⁸ OFT Guideline 403, *Market Definition*, December 2004, paragraph 5.7.

⁶⁹ On the demand side, passengers generally want to travel from a specific origin (a city or region) to a specific destination (another city or region) and would not be prepared to substitute another origin and/or destination when faced with a small but significant increase in price (see, for a consideration of demand sensitivity, COMP/M.4439, *Ryanair/Aer Lingus*, 27 June 2007 ('*Ryanair/Aer Lingus*'), paragraph 63). On the supply side, airlines could not introduce services quickly on an O&D pair without incurring significant additional costs and risks (see for example, *Ryanair/Aer Lingus*, paragraph 64 and COMP/M.2041, *United Airlines/US Airways*, 12 January 2001 ('*United Airlines/US Airways*'), paragraph 12).

⁷⁰ The Commission has identified a number of factors which may determine an airport's catchment area, such as the geographic distribution of the population and the quality of land-transport links, and has found that substitutability between airports may vary according to the services provided, such as flight duration, frequency and price (see *United Airlines/US Airways* (fn69), paragraph 20). Airport substitutability may also depend on the type of passenger concerned, for example, time-sensitive passengers may prefer to use the airport which takes the least time to reach and therefore would not consider alternative airports to be substitutes (see Case COMP/D2/38.479 *British Airways/Iberia/GB Airways*, 10/12/2003 ('*BA/Iberia/GB Airways*'), paragraph 24). It has also been found that passengers are generally more willing to travel further to get to the departure airport for long-haul flights, as the travel time to the airport, as a proportion of the total travel time, becomes less significant (see Case COMP/JV.19, *KLM/Alitalia*, 11 August 1999 ('*KLM/Alitalia*')).

⁷¹ Similarly, it is not necessary to reach a view in this case on whether individual O&D airport pairs, such as London Heathrow and New York JFK, and London Heathrow and New York Newark, are in fact part of a wider O&D city pair market, that is, London and New York, as this would not affect either Party's turnover and hence would not lead to a different financial penalty being levied.

Parties overlap (i.e. where each Party flew from or to different airports but those airports had significantly overlapping catchment areas).⁷²

- The OFT also considered whether there are any O&D pairs wider than city pairs (such as a region) that could be considered as relevant markets and where both Parties overlap. However, it did not identify any such pairs that ought to be considered Affected Markets in this case.⁷³
68. In carrying out its assessment, the OFT considered those O&D pairs where both Parties provided direct flights. For the reasons set out in paragraph 63 above, the OFT has not included those O&D pairs where one Party operated direct flights and the other Party indirect flights, either through its own network or through interlining agreements with other airlines⁷⁴ or those O&D pairs where both Parties provided indirect flights, either through their own network or through interlining agreements with other airlines.⁷⁵
69. The standard approach to market definition then considers whether an O&D pair market ought to include alternative possibilities for passengers to travel between the O&D points, principally:
- flights offered by different types of airlines, such as low-cost and charter; and
 - other modes of transport, such as road, rail and sea.

⁷² The OFT identified one such pair (see paragraph 80 below).

⁷³ In this regard, the OFT identified those VAA routes where BA did not overlap on either an O&D airport or city pair basis. There were three such routes: London to Havana, Las Vegas and Port Harcourt. On the Havana route, the OFT notes that BA does not fly to Cuba and hence there is no wider overlap. On the Las Vegas route, the OFT notes that BA provides an indirect connecting service to Las Vegas through a code-share partner. The OFT has considered this in its assessment of direct and indirect overlaps (see fn74). On the Port Harcourt route, both Parties also provide direct services to Lagos and BA also provides a service to Abuja. All of these cities are in Nigeria and may therefore form part of the same regional market (that is, the relevant O&D pair market would be London and Nigeria). It should be noted that, given that both Parties overlap on the O&D airport pair London Heathrow and Lagos, the OFT has in any case identified this as an Affected Market and hence each Party's revenue on this route is included as relevant turnover. If the relevant market is wider than this, then VAA's revenue on its Port Harcourt route and BA's revenue on its Abuja route should also be included as relevant turnover. However, it is not necessary to reach a view on this as the OFT considers the resulting financial penalties based on O&D airport or city pairs will be sufficient to meet the twin objectives of the OFT's policy on financial penalties (see paragraph 63 above).

⁷⁴ The OFT has identified a number of examples, such as, Manchester and Barbados where VAA flies direct and BA flies indirect via London Gatwick, and London Heathrow and Las Vegas where VAA flies direct and BA flies indirect via a number of alternative US cities through its code-share arrangements with American Airlines and America West (BA information request response: Document 1787, response to questions 2 and 3). For the reasons set out in paragraph 63 above, the OFT has not considered whether direct and indirect flights are part of the same relevant market for these O&D pairs and hence whether the Parties overlap on these routes. The OFT has not considered therefore whether these O&D pairs are Affected Markets.

⁷⁵ For example, as at 21 June 2007, VAA had a code-share arrangement with bmi British Midland ('bmi') for bmi operated flights from/to Amsterdam, Brussels, Dublin, Hannover, Naples, Nice, Palma, Paris and Venice, which connected with VAA operated long-haul flights from/to London Heathrow (VAA information request response: Document 1720, response to question 5). During the period of the Infringement, BA also operated flights from/to these European cities, which connect with its other services from/to London Heathrow or Gatwick (BA information request response: Document 1787, response to question 1). For the reasons set out in paragraph 63 above, the OFT has not considered those O&D pairs where the Parties overlap in providing indirect services and has not considered therefore whether these O&D pairs are Affected Markets.

70. Whether these alternatives are substitutes depends on a wide range of factors, such as the overall travel time, frequency of services and price. It may also depend on the type of passenger concerned, as in some cases it may be appropriate to draw a distinction between time-sensitive and non-time-sensitive passengers. As a consequence, whether these alternatives are substitutes can only be determined on a route-by-route basis.
71. However, given that the OFT is only defining the relevant markets in this case in order to determine the level of financial penalties and, as set out above at paragraph 63, the OFT considers that the resulting financial penalties based on the 'Affected Markets' will be sufficient to meet the OFT's policy objectives in this case, the OFT does not consider it necessary to examine the above factors. Additionally, it is not necessary for the OFT to examine whether a distinction ought to be drawn between time-sensitive and non-time-sensitive passengers, since the PFS was applicable to all ticket types.

Staff Airline Tickets

72. BA has suggested⁷⁶ that tickets sold to its staff (for non-business purposes) and offered as an employment perk are not in the same market as commercial ticket sales because:
- they are subject to onerous restrictions compared to commercial tickets: for example, BA staff have no certainty of travel on a particular flight, as this depends on whether there are vacant seats on the plane at the time of departure (that is, commercial sales take priority);
 - they are heavily discounted compared to commercial tickets; and
 - when time and/or destination are important, BA staff would purchase commercial tickets instead.
73. BA did not apply any PFS to tickets sold to its staff.
74. VAA also does not consider tickets sold to members of its staff to be '*revenue passengers*' and would have applied no PFS or a reduced PFS to them.⁷⁷
75. The OFT accepts for the purposes of calculating relevant turnover in this case that tickets sold to BA or VAA staff as an employment perk should not be treated as forming part of the same market as commercial ticket sales. Consequently, for the purposes of calculating relevant turnover, the OFT has considered commercial ticket sales only.
- iii. Geographic market
76. The geographic market in airline cases is normally defined on the basis of the O&D pair concerned.⁷⁸ The evidence obtained by the OFT does not suggest that it would be appropriate to depart from this standard 'route-by-route' approach.

⁷⁶ BA information request response: Document 1728; BA information request response: Document 1729.

⁷⁷ VAA information request response: Document 1168, response to question 4.

⁷⁸ See, for example, *KLM/Alitalia* (fn70); *United Airlines/US Airways* (fn69); *RyanAir/Air Lingus* (fn69); Case COMP/M.5403 *Lufthansa/BMI* (14 May 2009).

iv. Affected Markets

77. Based on the above approach to market definition, the OFT considers that for the purposes of calculating relevant turnover in this case at least the O&D airport or city pair markets set out below will have been affected by the Infringement, and so should be treated as the Affected Markets for the purpose of determining the penalties in this case. This is because during the period of the Infringement both Parties:
- provided full-service, direct scheduled passenger air-transport services between these O&D pairs;
 - competed against each other in order to attract passengers onto these services; and
 - applied their Standard PFS on a significant majority of their commercial ticket sales for these O&D pairs.⁷⁹
78. The OFT does not need to reach a view on whether additional O&D pairs where one, but not both, of the Parties applied its PFS should also be considered to be Affected Markets. This is because, as noted above at paragraph 63, the OFT considers that the financial penalties based on a definition of Affected Markets limited to those O&D pairs where the Parties overlap will be sufficient in this case to meet the objectives of the OFT's policy on financial penalties.

O&D Airport Pairs

79. The OFT is of the view that, at the very least, each O&D airport pair identified in Table 3 below is an Affected Market.

Table 3: Affected O&D Airport Pair Markets⁸⁰

Airport	Airport
London Heathrow	Cape Town
London Heathrow	Johannesburg
London Heathrow	Lagos
London Heathrow	Mumbai
London Heathrow	Delhi
London Gatwick	Antigua
London Gatwick	Grenada ⁸¹

⁷⁹ The OFT acknowledges that some commercial tickets sold by the Parties on these routes did not have the PFS applied, such as tickets sold at certain times and in certain jurisdictions outside the UK, as set out in paragraphs 52 to 56 above. These paragraphs describe all the circumstances in which the PFS was not applied. Other than those situations, passengers on the routes set out below paid the PFS, including the majority of those purchasing tickets in the UK.

⁸⁰ On the O&D pair London Heathrow to Hong Kong, neither BA nor VAA applied its PFS on any ticket sales throughout the Relevant Period because of the regulatory regime in Hong Kong which governed the level of PFS. For this reason, the OFT has not included this O&D pair as an Affected Market despite both Parties operating direct flights on this route.

⁸¹ VAA operated a 'one-stop direct' service on this route. VAA markets the flight as a direct service and uses the same plane for the entire journey but the plane stops in Tobago en route (Document 1720, response to question 1). The OFT notes that it is usual to distinguish between indirect, connecting services and 'one stop direct' services. The former (i.e. a connecting service) is where passengers have

London Gatwick	Barbados
London Gatwick	St Lucia
London Gatwick	Tobago
London Heathrow	Shanghai
London Heathrow	Tokyo Narita
London Heathrow	Sydney ⁸²
London Heathrow	New York JFK
London Heathrow	New York Newark
London Heathrow	Miami
London Heathrow	Boston
London Heathrow	Washington
London Heathrow	Los Angeles
London Heathrow	San Francisco
London Gatwick	Orlando

Affected O&D City Pair Markets

80. The OFT is of the view that, at the very least, the O&D city pair identified in Table 4 below is also an Affected Market.

Table 4: Affected O&D City Pair Markets

City	City	Notes
London	Bahamas	VAA flies from Gatwick, BA from Heathrow.

81. In reaching this view, the OFT has had regard to the following considerations:

- previous cases have found that London airports are sufficiently substitutable for non-time-sensitive passengers (although this is less clear cut for time-sensitive passengers);⁸³
- as noted above (fn70) the Commission has previously found that the catchment areas for airports are likely to be wider for long-haul flights (compared to short-haul flights); and

to change planes at the intermediate stage of their journey. The latter (i.e. a 'one stop direct' service) is where the same plane makes the whole journey but with a stop to allow for refuelling, passengers to get off and (if permitted under the Air Service Agreement with the country concerned) passengers to get on.

⁸² Although there are no 'non-stop direct' services as such on this route as all airlines have to stop en route to refuel their aircraft, the Parties market their flights as a direct service and use the same plane for the entire journey (VAA information request response: Document 1720, response to question 3; see also www.britishairways.com/travel/flights-to-sydney/public/en_gb).

⁸³ See, for example, the Commission's cases *Ryanair/Aer Lingus* (fn69), paragraph 125 and *BA/Iberia/GB Airways* (fn70), paragraphs 21 to 24, the CC's reports into *British Airways and CityFlyer Express Limited*, July 1999, Cm 4346, paragraphs 2.61 to 2.62 and 2.66 and *Air Canada and Canadian Airlines Corporation*, August 2000, Cm 4838, paragraphs 4.81 to 4.84; the OFT's *Decision of the Director General of Fair Trading, Notification by British Midland and United Airlines of their Alliance Expansion Agreement*, 1 November 2002, paragraph 61.

- the Bahamas is primarily a destination for leisure rather than business purposes, therefore passengers are likely to be predominantly non-time-sensitive.⁸⁴
82. The OFT has defined the relevant Affected Markets in this case for the sole purpose of determining the level of financial penalty. It has reached the conclusions set out in this case without prejudice to its discretion to adopt a different market definition in any subsequent case in the light of the relevant facts of that case.
- v. Market Shares
83. As set out in paragraph 63 above, in order to determine the level of the financial penalty, the OFT has used a narrow definition of the relevant market, in this case, direct flights operated by full-service airlines between O&D airport or city pairs on which the Parties overlap and charged the PFS. As a consequence the OFT has not reached a view on whether the following are part of the relevant market:
- passengers flying on indirect flights between the relevant O&D airport or city pairs;
 - passengers flying on charter or low-cost airlines; and
 - passengers using other modes of transport.
84. Table 5 below sets out the combined market shares of the Parties during the Relevant Period in relation to each of the Affected Markets based on this narrow definition.⁸⁵ On this basis, the OFT notes that these shares are significant and, in any event, significantly in excess of 10 per cent (the threshold for an agreement/concerted practice to be found to have an 'appreciable effect on competition' in those cases where such an effect cannot be assumed; see further paragraphs 389 to 393 below).
85. The OFT notes that because the relevant markets are based on a narrow definition, this data may overstate the Parties' position on a broader market definition. However, the OFT also notes that both Parties were at the time of the Infringement, and still are, major airlines servicing a large number of routes and with very significant turnovers, both in the Affected Markets and overall.⁸⁶
86. Moreover the OFT considers that even if a broader definition were to be adopted, any resulting reduction in the market shares of the Parties is unlikely to lead to combined market shares of below 10 per cent. In this regard, the OFT notes the following:

⁸⁴ In 2006 (the latest year for which the OFT has obtained statistics), less than eight per cent of visitors to the Bahamas stated that their visit was for the purposes of business. See Bahamas Ministry of Tourism, *Statistics 2006*, available at:

www.tourismbahamas.org/think/regattascripts/click.php?c_category=&c_section=2160&c REGARD=188&filename=General+Statistics+2006.xls.

⁸⁵ The data provided by the Parties regarding their respective market shares relates to 2005.

⁸⁶ See paragraphs 5 to 16 above and also the Parties' web sites: www.ba.com and www.virgin-atlantic.com.

- On the London Heathrow and Sydney O&D pair, the Parties have a combined market share of 18 per cent of 'direct' and connecting (that is, indirect) services (not shown in Table 5).
- The OFT has also estimated the Parties' combined share of those relevant markets where charter airlines operated. Again, their combined market shares were in excess of 10 per cent (not shown in Table 5).⁸⁷

Table 5: 2005 Estimated Parties' Combined Market Share on Affected Markets

City/Airport	City/Airport	Direct flights
London Heathrow	Cape Town	50%
London Heathrow	Johannesburg	60%
London Heathrow	Lagos	98%
London Heathrow	Mumbai	47%
London Heathrow	Delhi	71%
London Gatwick	Antigua	100%
London Gatwick	Grenada	100%
London Gatwick	Barbados	100%
London Gatwick	St Lucia	100%
London Gatwick	Tobago	100%
London Heathrow	Shanghai	68%
London Heathrow	Tokyo Narita	59%
London Heathrow ⁸⁸	New York JFK	54%
London Heathrow	New York Newark	97%
London Heathrow	Miami	100%
London Heathrow	Boston	67%
London Heathrow	Washington	56%
London Heathrow	Los Angeles	59%
London Heathrow	San Francisco	62%
London Gatwick	Orlando	100%
London	Bahamas	91%

Source: OFT calculations based on data provided by BA.⁸⁹

⁸⁷ VAA has provided passenger data for charter airline flights (VAA information request response: Documents 1169 and 1170, response to question 3). This data shows that charter airlines operated on only four of the relevant markets: Antigua, Grenada, Barbados and Tobago. The OFT has used this data to estimate the Parties' combined market shares on these four relevant markets if charter airlines are also included in the relevant market. It should be noted that VAA's passenger data is not consistent with BA's data (see fn89 below) or the OFT's approach to market definition (for example, it includes all passengers travelling on the route including connecting passengers and is based on a different source). For these reasons, the OFT considers VAA's charter airline passenger data to be an upper bound estimate. In any event, the Parties' combined market share exceeded 10 per cent in all of these four relevant markets.

⁸⁸ The OFT has not estimated the Parties' combined market share should this relevant market also include business class only flights from/to London Stansted. The OFT notes that these services began operation only in the last few months of the period of the Infringement and thus should not have a significant impact on the combined market share presented.

87. On this basis, the OFT considers that the Parties' combined market share on each of the Affected Markets is significant and, in any event, in excess of 10 per cent.

⁸⁹ The OFT based its calculations on passenger data provided by BA (BA information request response: Document 1164, response to question 3). This data most closely reflects the OFT's market definition approach (that is, it relates to passengers travelling on each O&D pair). The data included passengers that flew direct and indirect. The OFT has separated these out for the purposes of Table 5 based on the identity of the airline carrying the passengers. BA's data is based on Computer Reservation System (CRS) data and therefore does not include passengers who booked directly with the airline or did not go through the CRS system. BA has specified that in 2005, on average about 26 per cent of passengers booked directly with it, and this varied significantly by route (from five per cent to 52 per cent). This is also likely to vary by airline. Whilst recognising this data limitation, the OFT has no better data sources available and considers this approach appropriate in the circumstances.

III. THE CONDUCT OF THE PARTIES

A. Introduction

88. As set out in paragraph 3 above, the OFT has found that the Parties infringed Article 101 and/or the Chapter I prohibition by participating between August 2004 and January 2006 in an agreement and/or concerted practice by which they coordinated their pricing in relation to their respective PFSs through the exchange of pricing and other commercially sensitive information regarding the PFS, with the object of preventing, restricting or distorting competition.
89. The evidence obtained by the OFT shows that, although the contact between the Parties varied in intensity during the Relevant Period, each change in PFS movement was preceded by an exchange of commercially sensitive information by the Parties of their intended action, with the exception of the October 2004 increase, where VAA attempted but failed to make contact.
90. This Part sets out the narrative of contacts between BA and VAA relating to the long-haul PFSs levied by those undertakings during that period and the underlying evidence.

B. Structure of this part

91. Section C of this Part provides a list of the individuals within BA and VAA who were most closely involved in the setting of the PFSs.
92. Section D of this Part describes the decision-making structures within BA and VAA regarding pricing and PFSs.
93. Section E of this Part describes the context to the introduction of the PFS and the subsequent movements in PFS amount.
94. Section F of this Part provides an overview of the conduct of the Parties throughout the Relevant Period in light of the evidence that the OFT has obtained during its investigation.
95. Sections G to N of this Part give details of the conduct of the Parties in relation to the PFS movements set out below:
 - Section G: May 2004 – Introduction of the PFS;
 - Section H: August 2004 – Increase to £6 per sector;
 - Section I: October 2004 – Increase to £10 per sector;
 - Section J: March 2005 – Increase to £16 per sector;
 - Section K: June 2005 – Increase to £24 per sector;
 - Section L: September 2005 – Increase to £30 per sector;
 - Section M: November 2005 – VAA decrease to £25 per sector; and
 - Section N: January 2006 – VAA increase to £30 per sector.

C. Relevant individuals

96. A list of the individuals mentioned in this Decision, together with details of their positions during the relevant period, is attached at the end of this Decision as Appendix A.
97. The following individuals were most closely involved with the setting and communication of the PFS at BA and VAA respectively and the conduct with which this Decision is concerned:
- British Airways plc

Name	Position(s) or department(s) during the Relevant Period	Contact with VAA counterpart
[...]	[BA senior manager A]	Direct contact with [VAA senior manager A]
[...]	[BA senior manager B]	Direct contact with [VAA senior manager B]
[...]	[BA senior manager C]	
[...]	[BA senior manager D]	

- Virgin Atlantic

Name	Position(s) or department(s) during the Relevant Period	Contact with BA counterpart
[...]	[VAA senior manager A]	Direct contact with [BA senior manager A]
[...]	[VAA senior manager B]	Direct contact with [BA senior manager B]
[...]	[VAA senior manager C]	

D. PFS decision-making structures within BA and VAA

98. Although the PFS formed part of the overall price paid by consumers for long-haul flights during the Relevant Period, the standard fare setting structures and processes were not applied to the PFSs by either BA or VAA.⁹⁰ It is helpful therefore to set out briefly the decision-making structures in place during the Relevant Period at each airline in respect of PFSs.

⁹⁰ Within BA, fares for the UK and Ireland were generally set by a special pricing team prior to May 2005 and, from that time, were merged into the Revenue Management department, [...] (BA consolidated information request response: Document 2091, response to question 5A). Within VAA, passenger fares were the responsibility of the pricing team, led by [VAA manager (revenue management)], who reported to [VAA senior manager A] (see VAA information request response: Document 1171, response to question 5A).

- i. PFS Decision-making structure within BA
- 99. Following the introduction of the PFS, which was done on an *ad hoc* basis and coordinated by *[BA senior manager C]*,⁹¹ a PFS review group was set up in June 2004 to provide a more structured approach to dealing with the PFS.⁹²
- 100. The PFS review group generally met monthly and also reactively on occasion.⁹³ It was headed by *[BA manager (delivery)]* and composed of representatives of various departments, including Revenue Management and BA's various regional sales departments.⁹⁴ None of *[BA senior manager D], [BA senior manager C], [BA senior manager B] or [BA senior manager A]* attended the group's meetings,⁹⁵ although the departments for which *[BA senior manager A]* was successively responsible were represented at the group.⁹⁶
- 101. The purpose of the PFS review group was to consider whether a change to the PFS level was warranted, the amount of any potential increase, and questions of timing and implementation, with a view to making a proposal for action.⁹⁷
- 102. The PFS review group reported to *[senior management who would]* come to a final decision.⁹⁸ *[BA senior manager A]* stated that the recommendation of the PFS review group was effectively a 'decision' as to the PFS amount [...].⁹⁹ However, the general understanding of the others involved is that the final decision would rest with *[relevant senior management]*.¹⁰⁰
- 103. The process for reviewing the PFS was relatively 'consensus'-driven and flexible.¹⁰¹ The evidence obtained by the OFT shows that, if circumstances indicated that action was needed and there was no proposal or recommendation

⁹¹ *[BA senior manager C]* canvassed views from the relevant departments [...]. [...] before reaching a final decision. See BA consolidated information request response: Document 2091; [...] first interview: Document 1477, p15.

⁹² BA consolidated information request response: Document 2091, response to question 5A; see also Document 0414 (email [from *[BA manager (delivery)]*] to various on 01/06/2004).

⁹³ BA consolidated information request response: Document 2091, response to question 5A.

⁹⁴ BA consolidated information request response: Document 2091, response to question 5A; [...] interview: Document 1483, pp 26-27. Individuals' membership of the group changed from time to time.

⁹⁵ BA consolidated information request response: Document 2091, response to question 5A.

⁹⁶ While *[BA senior manager A]* was [...], his representative on the PFS review group was *[a BA employee]*: see [...] first interview: Document 1150, p4, 13; [...] interview: Document 1490, p12. However it appears that *[that BA employee]* did not in fact attend any of the group's meetings: [...] interview: Document 1490, pp 17-19. From January 2005, *[BA senior manager A]* became [...], and his representative on the PFS review group was *[BA PFS review group member 1]*: see [...] first interview: Document 1150, pp 5, 13-14; [...] interview: Document 1484, pp 14-22; [...] interview: Document 1483, p27.

⁹⁷ [...] interview: Document 1484, pp 36-37.

⁹⁸ BA consolidated information request response: Document 2091, response to question 5A; [...] interview: Document 1483, p29; [...] second interview: Document 1856, pp 10-13, 27-30, 40-41, 147; see also [...] interview: Document 1493, pp 24-25, [...] interview: Document 1485, pp 12-13.

⁹⁹ [...] first interview: Document 1474, pp 5, 7-8, 11-12.

¹⁰⁰ [...] first interview: Document 1477, pp 15-20; [...] interview: Document 1483, pp 29, 30-32; [...] interview: Document 1731, pp 14, 17-18, 32; [...] interview: Document 1676, pp 15-17, 26; [...] witness statement: Document 3191, pp 4-5; [...] second witness statement: Document 3190, p1; [...] second interview: Document 3288, pp 136-137; [...] witness statement: Document 3186, p3; [...] witness statement: Document 3296, pp 3-4.

¹⁰¹ [...] first interview: Document 1477, pp 16-20; [...] second interview: Document 1856, pp 11-15, 27-30; [...] interview: Document 1676, pp 15-17; [...] witness statement: Document 3191, pp 4-6.

from the review group, the matter would be discussed between Revenue Management and the Sales Groups (primarily, UK&I Sales) and a view reached as to an appropriate course of action.¹⁰²

104. A decision to change the PFS amount would be implemented by *[BA manager (delivery)]*'s team, which would discuss with *[the]* Communications Department the preparation of a press release.¹⁰³ PFS changes were considered to be market sensitive and so were released via the London Stock Exchange's Regulatory News Service ('RNS').¹⁰⁴ The announcements were sent either for immediate release or under embargo for release at a later time/date.¹⁰⁵ The Communications Department prepared the master press release to go to the stock exchange and also reactive press logs to respond to media queries.

ii. PFS Decision-making structure within VAA

105. Decisions on the PFS were taken primarily by *[VAA senior manager C]*, *[VAA senior manager A]* and *[VAA senior manager B]*.¹⁰⁶ Other *[senior managers]* were often consulted as part of the process, including *[VAA senior manager D]*, *[VAA senior manager E]* and *[VAA senior manager F]*.¹⁰⁷ The evidence obtained by the OFT shows that, depending on the circumstances, the input of these other senior executives varied from being a 'sounding board' or inputting into the press announcements, to taking a substantive position as regards the appropriate level of PFS.
106. The decision as to the final amount would generally be made between *[VAA senior manager A]* and *[VAA senior manager C]*. From *[VAA senior manager C]*'s perspective, he was involved in the decision-making '*at some times more than others*' [...] but *[VAA senior manager A]* would often '*consult and seek agreement*' from him.¹⁰⁸ According to *[VAA senior manager A]* and the others involved in the process, however, the final say on the PFS decisions did rest with *[VAA senior manager C]*.¹⁰⁹ *[VAA senior manager B]*'s primary role was in relation to the timing and announcement of the PFS, although as sections H, J, K and M below demonstrate, he played a significant part in VAA's determination of its PFS level in a number of instances.
107. A change to the PFS would be notified to the press by *[the]* Communications Department. Generally, VAA made announcements relating to its PFS by notifying the Press Association (primarily through *[a Press Association correspondent]*), which provided a fast and effective way of getting news

¹⁰² See further Sections J, K and L below in relation to the PFS movements in March 2005, June 2005 and September 2005.

¹⁰³ BA consolidated information request response: Document 2091, response to question 5A; [...] interview: Document 1483, pp 32-33.

¹⁰⁴ [...] witness statement: Document 1935, p1.

¹⁰⁵ For example, the announcement issued on 24 June 2005 was sent to the London Stock Exchange ('LSE') on 23 June 2005 at 21:07 embargoed for release until 07:00 the following day (at which time the LSE opened for business), see [...] witness statement: Document 1925, p18.

¹⁰⁶ VAA information request response: Document 1171, response to question 5A.

¹⁰⁷ For example, see sections J, K, L and M below.

¹⁰⁸ [...] witness statement: Document 3208, p3.

¹⁰⁹ [...] first interview: Document 1144, pp 13-14; [...] second interview: Document 1713, pp 6, 22-24; [...] first interview: Document 1143, p50; [...] second interview: Document 1714, pp 18-19; [...] first interview: Document 1142, p57; see also [...] first interview: Document 1145, p12.

coverage of the announcements.¹¹⁰ VAA would also inform particular journalists of its announcements and prepare a 'line to take' in anticipation of queries from others.¹¹¹

E. Context of the PFS introduction and subsequent movements

108. The PFS was a significant issue for both airlines. It was a measure introduced to deal with record-level fuel costs and was subject to heightened media interest throughout the Relevant Period. With the PFS in 2005 accounting for '*around 50% of [BA's] operating profit*', it was clearly of commercial and financial importance.¹¹² More indirectly, it had the potential to impact significantly on the Parties' brands/reputations and, as a consequence, their commercial 'bottom lines'.¹¹³ The interplay between the fuel costs, the communications/PR issues and the PFS is considered below.
 - i. Increasing fuel costs
109. Fuel costs constitute a significant portion of an airline's overall costs. This is particularly true for VAA, as a long-haul only airline. As set out above at paragraph 50, while some of the risks of increasing fuel costs could be addressed through hedging instruments, both Parties (together with all major airlines worldwide) faced substantially increased fuel costs from early 2004.¹¹⁴ As Table 2 above shows, throughout the Relevant Period, fuel costs (both underlying crude oil prices and jet fuel prices) continued to rise, to the point of almost doubling.
110. Given the increasing fuel costs, which could not be absorbed, airlines had essentially two options; either increase fares directly or use an add-on (surcharge) mechanism.
111. A surcharge mechanism offered some distinct advantages in terms of efficacy (for the most part, it could be applied globally instantaneously), ease of implementation and transparency.¹¹⁵ However, it would likely be viewed negatively by consumers and ran the risk of having a negative PR impact, as well as being susceptible to the volatility of underlying oil prices.¹¹⁶ Additionally, within BA it was considered likely that it would be understood as a temporary measure and thus, if costs were likely to continue to rise, it could reasonably be expected that it would be rolled into the overall price at some stage. Towards

¹¹⁰ [...] first interview: Document 1142, pp 48-49.

¹¹¹ [...] first interview: Document 1142, pp 48-49, 53; [...] witness statement: Document 3203, pp 2, 5.

¹¹² See Document 1064 (email from *[BA senior manager C]* to *[BA senior manager D]* and others on 21/04/2005). See also Document 3091, a paper presented to the BA Board on 6 August 2004 to obtain approval for BA's proposed hedging strategy, which notes that the proposed £3.50 increase in PFS would be worth an additional £20 million for the financial year.

¹¹³ See, in particular, paragraphs 119 to 121 below. The OFT also notes the extensive and careful consideration given to the PFS issue, including by senior management for both BA and VAA, throughout the relevant period, which it considers indicative of the potential for the PFS to impact on the Parties' respective commercial 'bottom lines'. For example, in October 2004, the impetus for considering an increase to VAA's PFS came directly from *[VAA senior manager F]* (see paragraph 165 below).

¹¹⁴ [...] interview: Document 1485, p10; [...] first interview: Document 1144, pp 10-11.

¹¹⁵ [...] first interview: Document 1477, pp 11-12; [...] interview: Document 1483, p9; [...] interview: Document 1485, pp 10-11.

¹¹⁶ [...] first interview: Document 1144, pp 11-12; see also Document 3061 (BA press log 30/06/2004).

the end of the Relevant Period, a specific project (Project [...] was initiated within BA to explore this issue.¹¹⁷

112. The use of the surcharge mechanism was debated within BA and VAA, both at the time of its introduction and throughout the Relevant Period.¹¹⁸ Surcharges had been imposed by airlines in the 1990s due to rising fuel costs as a result of the Gulf War¹¹⁹ and had more recently been put in place to cover increased security costs as a result of 9/11.¹²⁰ The mechanism of a fuel surcharge was therefore a potentially viable means of addressing the fuel cost issue.
113. With the impact of increasing fuel costs being keenly felt throughout the industry, a fuel surcharge was put in place by most major airlines worldwide (low cost carriers being a notable exception).¹²¹ Both BA and VAA took note of what other major airlines (in particular, Air France, Lufthansa and US carriers) were doing in terms of recouping some of the increasing fuel costs through a PFS mechanism throughout the Relevant Period.¹²²
114. Despite it being viewed as a less than perfect solution, the PFS was considered by BA to be the most appropriate means of recouping at least some of the continually rising costs.¹²³ For VAA, despite concerns about the consumer reaction to fuel surcharges and the impact on VAA's image, once the fuel surcharge was introduced by BA and other carriers, it was the logical mechanism to adopt.¹²⁴

ii. Media interest

115. In the run-up to and throughout the Relevant Period, the media took an active interest in rising fuel costs and their impact on airlines, reporting on significant rises in crude oil prices and the actions that airlines were likely to take in response. The transport press also reported frequently on the hedging positions of various airlines, including the Parties.
116. Prior to the introduction of the PFS and throughout the Relevant Period, both BA and VAA received numerous press queries asking whether they were likely to increase price/PFS in light of increased fuel costs. These press queries were often made for the purpose of feature articles in the Sunday papers, with BA and VAA press offices receiving calls from journalists on Friday afternoons.¹²⁵

¹¹⁷ See Document 0035 (draft recommendations from Project [...] submitted to *[BA senior manager D]* and others on 11 April 2006); see also Document 0960 (email from *[BA manager (revenue analysis)]* to various re: short, medium and long term PFS options).

¹¹⁸ This is evident from the conduct described below in sections G-N. See also [...] first interview: Document 1474, p6.

¹¹⁹ [...] second interview: Document 1713, p37.

¹²⁰ See Document 1067 (fuel surcharge Q&A document).

¹²¹ Document 3214 (Reuters Factbox – European airline fuel surcharges and hedging, 20 May 2004); Document 3216 (PA News article on Ryanair' rejection of fuel surcharges, 09 August 2004).

¹²² See, for example, Document 3080 (email from *[BA manager (revenue analysis)]* to various providing market overview on 06/10/2004); Document 0819 (email from *[VAA senior manager A]* to *[VAA senior manager F]* on 07/10/2004). See also [...] interview: Document 1493, p15.

¹²³ See, for example, [...] interview: Document 1485, pp 10-11; [...] interview: Document 1493, pp 14-15.

¹²⁴ See [...] second interview: Document 1713, pp 37-41; [...] witness statement: Document 3207, p3.

¹²⁵ See [...] first interview: Document 1142, pp 20, 33; [...] first interview: Document 1148, pp 24, 44.

117. In a number of instances, notably in September and November 2005, queries from the press or press reports on increasing fuel costs provided the trigger for internal consideration within BA and VAA about the level of the PFS and whether it would be a good time to announce an alteration.¹²⁶
118. Both Parties were keenly aware of the importance of press coverage and of the media's reaction to the introduction of, and any subsequent changes to, the PFS. For example, BA considered in September 2005 that it could not lead a PFS increase on the market, despite a surge in underlying fuel costs, because of BA's bad press positioning at that time.¹²⁷
119. Managing the tone of media coverage of the PFS was clearly very important for both Parties throughout the Relevant Period:
- From BA's perspective, although increasing fuel costs were '*a shared pain across the industry*', the PFS mechanism of dealing with those increasing costs '*gave something for the press to shoot at*' which was particularly problematic for BA because negative stories in the UK media were more likely to focus on BA than other airlines.¹²⁸
 - Similarly, for VAA the media and consumer reaction to its PFS action was a significant business concern.¹²⁹ According to [VAA senior manager E], he '*waded in*' on the PFS issue at various times because the impact that the PFS could have on VAA's reputation as the '*honest underdog*' was a '*big issue*' and if VAA was to '*fail in the court of public opinion*' then '*the cost of that is horrendous for our business*'.¹³⁰ This is borne out by the recognition of [BA senior manager D] that VAA's '*strategy of positioning itself as the customers' champion and underdog*' made it a serious commercial rival to BA.¹³¹
120. The importance of the media's coverage of the PFS movements, as well as confirmation of the different level (and more critical nature) of coverage given by the media to BA, is apparent from handwritten notes of [VAA senior manager B] following the PFS increases in March 2005 ('*BA matched VAA £6 increase and got far more coverage. Articles typically devoted 5 paras to BA and one line to us*')¹³² and September 2005 ('*The increase in fuel surcharge by VAA attracted*

¹²⁶ See paragraphs 235 and 240 to 241 and paragraphs 268 to 270 below.

¹²⁷ Document 1811 (Email from [BA PFS review group member 2] to [BA PFS review group member 3] on 31/08/2005). See paragraph 238 below.

¹²⁸ See [...] interview: Document 1493, pp 18, 29-30, [*in which BA senior manager E*] pointed out '*if anything was happening, it was always BA who was in the line -- you know, if there was a bag lost at Heathrow, it was -- you know, they worried about BA losing bags*' (p30). The difference in press coverage given to BA, as compared to VAA or other airlines, was also discussed by [BA senior manager B]: Document 1684, pp 21-22, 115).

¹²⁹ [VAA senior manager A] described the PFS as '*a critical PR issue*' [*in his*] first interview: Document 1144, p13) and '*a particularly high profile issue and would attract press attention and, indeed, that accounted for [VAA senior manager B]'s heavy involvement in it as well ...*' [...] second interview: Document 1713, p22).

¹³⁰ See [...] first interview: Document 1143, p14.

¹³¹ [...] first interview: Document 1474, p10.

¹³² Document 3174 ([...] notebook extract).

some press coverage but not so much as BA's decision two days later to follow us').¹³³

121. The media interest in the PFS also offered some benefits from a commercial perspective. Dealing pro-actively with the press gave the Parties, in particular BA, the opportunity to 'soften' the likely reaction from the market, by hinting at a possible increase in PFS before an announcement.¹³⁴ The extent of the 'softening-up' could vary from a general statement that the level of surcharge was being 'kept under review' to a more detailed pre-briefing giving a potential range for a surcharge increase (as, for example, given by BA in August 2004).¹³⁵

F. Overview of the conduct of the Parties

122. In May 2004, in response to the fuel cost pressures described above and in the context of significant interest from the media, both BA and VAA introduced a PFS. As set out in section G below, the introduction of the PFS was carefully considered by both Parties, taking into account the fuel costs, the press coverage and the actions of competitors (including each other) on the market. The evidence obtained by the OFT suggests that the introduction of the PFS was a normal reaction to market forces.
123. Following the introduction of the PFS, it became apparent that fuel prices were continuing to rise and that the PFS level would need to be increased. It was also apparent that the media would continue to give the issue considerable coverage and, as set out above, the reaction of the media to any increase was a key factor for both Parties. Additionally, since the amount of the PFS increased considerably and in large increments (more than doubling from its initial amount at the first increase and rising to 12 times the initial amount before the end of the Relevant Period), having a higher PFS could have a significantly negative impact on sales.¹³⁶
124. At this stage, and continuing throughout the Relevant Period, in the lead up to a movement in PFS level, the Parties contacted each other to discuss the intended new amount of PFS and/or the timing of the announcement to increase (see sections H to N below).¹³⁷

¹³³ Document 3172 ([...] notebook extract).

¹³⁴ [...] second interview: Document 1684, pp 18-19.

¹³⁵ See paragraphs 148 and 156 below.

¹³⁶ See, for example, [...] interview: Document 1483, p41. See also the statement of *[VAA senior manager CJ]* in relation to the PFS increase in June 2005, that '*if the surcharge was increased much further it might start to affect demand and we were therefore unwilling to lead the market and risk increasing our prices to uncompetitive levels*' ([...] witness statement: Document 3208, p10). As to the potential for the PFS to have a negative impact on demand, see also Document 2638 and Document 2639, a JP Morgan report at the time of the June 2005 increase noting that the PFS had now reached £48 per round-trip and had increased by 50 per cent on longhaul. According to the report, although there had been no evidence of consumer push-back up to that point, JP Morgan believed that the '*threshold for passengers' lack of price elasticity is now being reached on longhaul sectors*' (Document 2639, p1).

¹³⁷ The contacts between the parties were made via telephone conversations. The evidence that these calls took place is contained in a database of telephone calls prepared by Grant Thornton under the instruction of the OFT. The details of the preparation of the database and its revision are described in three witness statements prepared by *[a senior manager at Grant Thornton]* (Documents 3244, 3245 and 3246). The database has been reproduced in documentary form. All calls are listed in separate documents; each document containing the calls for one month.

125. As demonstrated below, the OFT considers that there were two principal advantages for each airline in adopting this course of conduct. First, the contact between the Parties allowed each to make its decisions on PFS changes with foreknowledge of its main UK competitor's reaction. Both BA and VAA were, through the contact, able to obtain some certainty in advance of going to the market that the other would increase its PFS to the same level, so that neither would stand alone in the marketplace for a period of time and thus risk losing business. Additionally, Parties received some comfort that they would face a less hostile reaction in the media than would be the case if they were to risk announcing an increase that may not be followed by the other Party.
126. There were two channels of communication between the Parties in respect of the PFS changes; one at a communications level and the other at a commercial level.
127. The communications channel involved *[VAA senior manager B]* and *[BA senior manager B]*. Both had known each other on a professional level for some time and had been involved in a number of joint or industry-wide media initiatives on behalf of their respective airlines.¹³⁸ Just prior to the first increase in PFS amount, in early August 2004, *[VAA senior manager F]* and *[BA senior manager E]* had come together to support London's bid for the 2012 Olympics and both *[VAA senior manager B]* and *[BA senior manager B]* had been responsible for the media handling for their respective airlines.¹³⁹ *[VAA senior manager B]* and *[BA senior manager B]* therefore had an open, contemporaneous and relatively familiar line of communication. In the context of the media interest in both Parties' response to increasing fuel costs and the need to manage the media reaction to increases in the PFS, this channel of communication provided the opportunity for the Parties to influence each other's competitive reactions.
128. The commercial channel for the exchange of information involved *[VAA senior manager A]* and *[BA senior manager A]*, who had known each other, both professionally and personally, since late 2000/early 2001 (when *[VAA senior manager A]* moved to the UK to *[work for another airline]*).¹⁴⁰ They remained in touch generally and also professionally (for example as regards the negotiation of air traffic rights in India in 2004, where both BA and VAA briefed the UK government on the approach to take).¹⁴¹ The relationship between *[VAA senior manager A]* and *[BA senior manager A]* offered a secondary line of communication.
129. The evidence obtained by the OFT shows that, although the contact between the Parties varied in intensity during the Relevant Period, each change in PFS movement was preceded by an exchange of commercially sensitive information by the Parties of their intended action, with the exception of the October 2004 increase, when VAA attempted but failed to make contact.

¹³⁸ [...] witness statement: Document 3203, pp 2-3; [...] first interview: Document 1148; pp 27-28.

¹³⁹ See, for example, Document 3215 (PA News article, dated 03/08/2004, discussing the joint backing of the London Bid).

¹⁴⁰ [...] first interview: Document 1144, p14; [...] witness statement: Document 3207, p2; [...] first interview: Document 1150, p7.

¹⁴¹ [...] first interview: Document 1144, p16; [...] witness statement: Document 3207, p3; [...] first interview: Document 1150, pp 7-8.

130. The sections below set out the events surrounding the introduction of the PFS and each movement in PFS amount during the Relevant Period.

G. May 2004 – Introduction of the PFS

i. Background

131. In May 2004, both Parties introduced a PFS of £2.50 per sector. The background to the introduction of the PFS was a significant increase in oil prices through April and early May. On 7 May 2004, BA was asked by the Times whether it was considering introducing a fuel surcharge to cope with oil prices rising to their highest level for 13 years (American Airlines had just introduced a US\$2 surcharge).¹⁴² By 8 May 2004, the press was reporting on the rise of oil prices to levels '*last seen during the Gulf War*' and both BA and VAA let it be known that action would be required - BA signalled the possibility of an emergency surcharge; VAA signalled that increased costs may be reflected in prices.¹⁴³

ii. 10 May 2004

132. Within VAA, *[senior managers]* had been discussing whether to respond to the fuel increase with a surcharge or price increase and, given the perceived PR risks of a surcharge, decided that it would be best to increase fares.¹⁴⁴ On 10 May 2004, VAA announced an increase in its prices for flights originating in the UK by £5 per sector.¹⁴⁵ VAA stated internally that the price increase was being filed '*in the hope that OAL [other airlines] will match and we will be monitoring the situation closely*'.¹⁴⁶

iii. 11 May 2004

133. BA, having also discussed the issue internally and decided that a surcharge mechanism had greater advantages, announced the introduction of a PFS of £2.50 per sector (i.e. £5 per return flight) on flights originating in the UK, with effect from Thursday 13 May 2004.¹⁴⁷
134. BA's announcement quickly came to the attention of the *[senior managers]* within VAA and discussions took place *[between them]* regarding this and the fuel issue generally [...].¹⁴⁸ The agreed 'line to take' with the media, should VAA

¹⁴² Document 3060 (BA press log created 07/05/2004).

¹⁴³ Document 3212 (Times Report on 8 May 2004).

¹⁴⁴ [...] first interview: Document 1144, pp 10-11; [...] second interview: Document 1713, pp 25-26; [...] first interview: Document 3292, pp 18-20; [...] first interview: Document 1143, p16; [...] first interview: Document 1146, p15.

¹⁴⁵ [...] first interview: Document 1146, p15; [...] first interview: Document 1144, p19; [...] first interview: Document 1142, pp 13-14; Document 0853 (emails between *[VAA employees]* on 10/05/2004).

¹⁴⁶ Document 0853 (emails between *[VAA employees]* on 10/05/2004).

¹⁴⁷ Document 0813 (BA press announcement 11/05/2004); BA information request response: Document 1893, pp 1, 5-7. From Document 0368 (email chain between *[BA manager (delivery)]* and various), it appears that the discussions within BA took place primarily between Revenue Management and the Area General Managers (Sales), possibly with the involvement of *[BA senior manager D]* [...].

¹⁴⁸ Document 0857 (email *[VAA senior manager B]* to Public Relations and others on 11/05/2004); Document 0854 (emails between *[VAA senior manager C]* and *[VAA senior manager E]* on 11/05/2004); [...] witness statement: Document 3203, pp 4-5.

be asked for a reaction, was that VAA '*are keeping the issue under review but have not followed BA's (£5) fuel surcharge today and have no immediate plans to do so*'.¹⁴⁹ It was agreed that [VAA senior manager A] would keep an eye on developments over the next day or so and that VAA would review how the market reacted to the moves by BA and VAA.¹⁵⁰ At this stage, VAA was still debating internally whether it would be right to deal with the fuel issue through pricing or surcharges.¹⁵¹

iv. 12 to 18 May 2004

135. VAA decided to wait until Thursday 13 May 2004 to see whether other airlines matched its announced fare increase. If they did not, the view, as stated by [VAA senior manager A], was that VAA would '*likely go for a fuel surcharge ourselves*'.¹⁵²
136. A telephone call was made from the VAA switchboard to [BA senior manager B]'s landline on Thursday 13 May 2004 that morning, but this does not appear to have concerned the introduction of the PFS - [VAA senior manager B] does not recall making such a call and neither [VAA senior manager B] nor [BA senior manager B] recalls discussing the introduction of the PFS.¹⁵³
137. On 14 May 2004, due to lack of competitor response to its fare increase, VAA withdrew the fare increase announced on 10 May and introduced a PFS of £2.50 per sector (with effect from the following morning, 15 May) bringing VAA into line with BA.¹⁵⁴
138. Notification of the removal of the fare increase and introduction of a PFS was forwarded to [VAA senior manager B] on Monday 17 May 2004, who queried whether a public announcement ought to be made or whether VAA would simply respond to any queries from the press.¹⁵⁵ A line to take was agreed between the Communications Department and [VAA senior manager A] (with input from [VAA senior manager F]) and was announced to the press on 18 May 2004.¹⁵⁶

¹⁴⁹ Document 0857 (email [VAA senior manager B] to Public Relations and others on 11/05/2004). The '£5' refers to a return-trip (i.e. two sectors).

¹⁵⁰ Document 0857 (email [VAA senior manager B] to Public Relations and others on 11/05/2004).

¹⁵¹ Document 0854 (emails between [VAA senior manager C] and [VAA senior manager E] on 11/05/2004).

¹⁵² Document 0858 (email from [a VAA employee] to [VAA senior manager E] on 12/05/2004 titled 'message from [VAA senior manager A]'); [...] first interview: Document 1143, pp 22-23; [...] second interview: Document 1713, pp 38-39.

¹⁵³ Document 1646: call from VAA switchboard to [BA senior manager B] at 10:47 (45 sec). See [...] first interview: Document 1148, p19; [...] second interview: Document 1639, p14; [...] witness statement: Document 3203, pp 5-6.

¹⁵⁴ Document 0860 (email from [a VAA employee] to various on 14/05/2004); Document 0861 (VAA tariff bulletin); Document 0864 (email from [VAA senior manager A] to [a VAA employee] on 17/05/2004).

¹⁵⁵ Document 0862 (email from [VAA senior manager B] to Public Relations on 17/05/2004); [...] witness statement: Document 3203, p5.

¹⁵⁶ Document 3213 (email from [VAA senior manager B] to various on 17/05/2004); Document 0865 (email from [VAA senior manager B] to [VAA press officer 2] on 18/05/2004); [...] witness statement: Document 3203, p.6.

H. August 2004 – Increase to £6 per sector

i. Background

139. During the Summer of 2004, fuel prices were continuing to rise, prompting both Parties to review their costs and consider the PFS internally during June and July 2004.¹⁵⁷
140. Additionally, as mentioned above, in July and early August 2004, both BA and VAA were involved in supporting London's bid for the 2012 Olympics, which gave rise to a number of contacts between the Parties on this subject.¹⁵⁸

ii. End of July 2004

141. Within BA, on 26 July, a PFS review group meeting was held to discuss a potential increase.¹⁵⁹ To assist PFS review group discussions, *[BA manager (delivery)]* had provided an indicative matrix linked to fuel prices in June.¹⁶⁰ This suggested that an amount of £6 would be appropriate; however, the group agreed to recommend an increase to £5. According to *[BA manager (delivery)]*, the lower amount was probably agreed upon at the behest of the represented Sales Groups.¹⁶¹ *[BA manager (delivery)]* circulated the review group's recommendation to colleagues from Revenue Management, Sales, Comms and Finance.¹⁶²
142. The following day, on the basis of PR concerns set out by *[a BA press officer], [BA senior manager B]* replied to the email, suggesting that any increase should be announced alongside BA's first quarter trading results on Monday 9 August 2004.¹⁶³ *[BA manager (delivery)]* circulated this suggestion at 18:47 on 27 July.¹⁶⁴

¹⁵⁷ For example, within VAA, a note taken by *[VAA manager (revenue management)]* at a meeting of *[VAA senior manager A]*'s staff on 21 June 2004 stated 'Fuel Surcharge – how can we get it up'. (Document 3273). Within BA, an email discussion between *[BA manager (delivery)]* and those responsible for Chinese routes noted that the original PFS was based on oil prices at the beginning of May and 'will be reviewed in the next 2 weeks', whereas a recently filed increase by Cathay Pacific more accurately reflected fuel costs (Document 0403, p3).

¹⁵⁸ See [...] first interview: Document 1148, pp 12-13; [...] first interview: Document 1142, pp 23-24; Document 2907 (email from *[VAA senior manager B]* to *[PA to VAA manager B]* on 02/07/2004). On 14 July 2004, a meeting was to be held between BA and VAA to discuss support for the bid; in an email to *[BA senior manager B]* regarding this, *[VAA senior manager B]* suggested meeting *[BA senior manager B]* afterwards for 'a bit of a catch up'; however, *[BA senior manager B]* could not make it (Document 3089; Document 3011).

¹⁵⁹ Document 1093 (email from *[BA manager (delivery)]* to various on 26/07/2004).

¹⁶⁰ Document 0414 (email from *[BA manager (delivery)]* to various on 01/06/2004).

¹⁶¹ Document 1093 (email from *[BA manager (delivery)]* to various on 26/07/2004); [...] first interview: Document 1483, p36.

¹⁶² Document 1093 (email from *[BA manager (delivery)]* to various on 26/07/2004); [...] first interview: Document 1148, p13.

¹⁶³ Document 3052 (*[a BA press officer]*'s document on PFS dated 27/07/2004); Document 0373 (email from *[BA senior manager B]* to *[BA manager (delivery)]* on 27/07/2004); [...] first interview: Document 1148, p14.

¹⁶⁴ Document 0016 (email from *[BA manager (delivery)]* to various on 27/07/2004). *[BA senior manager C]* considers that *[BA manager (delivery)]* could not have taken the decision to delay the announcement alone and considers that it would have been up to *[senior management]* to take the decision, [...] [...] second interview: Document 1856, pp 46-51).

143. While there was still some debate concerning the viability of a PFS increase versus a price increase (as well as some country-specific regulatory issues regarding implementation) during that evening and the next day, by 2 August 2004, it was expected that the increase to the PFS would go ahead.¹⁶⁵ By this time, the amount being discussed internally within BA was £6 (rather than the £5 originally proposed).¹⁶⁶

iii. 5 August 2004

144. On Thursday 5 August, FT.com ran an article (authored by *[a Financial Times journalist]*), which speculated that BA might announce an increase in its PFS '*as early as Monday, when it reports its first-quarter results*'.¹⁶⁷ *[BA senior manager C]* circulated this and confirmed the agreement within BA that BA's PFS would increase to £6, to be announced alongside BA's Quarter 1 results.¹⁶⁸
145. On the same day, *[a Financial Times journalist]* informed *[VAA senior manager B]* that BA was proposing to increase its PFS (although no amount was mentioned).¹⁶⁹

iv. 6 August 2004

146. At VAA, on the morning of 6 August, discussions were ongoing as to how much the PFS would need to be increased to cover higher fuel costs.¹⁷⁰ At 13:09, *[VAA senior manager B]* emailed the VAA Public Relations group to inform them that *[VAA senior manager C]* and *[VAA senior manager A]* had agreed an increase to the PFS '*probably doubling it to £5 per sector*'.¹⁷¹ *[VAA senior manager B]* had said to *[VAA senior manager C]* and *[VAA senior manager A]* that he was reluctant for VAA to lead the increase and he wanted to wait for BA to announce first, given that he knew (from *[a Financial Times journalist]*) that BA was planning to increase its PFS imminently.¹⁷² However, if BA did not announce before Wednesday 11 August, VAA planned to go ahead with

¹⁶⁵ Documents 0366 (email from *[BA senior manager C]* to *[BA senior manager H]* on 02/08/2004), 0368 (email from *[BA senior manager F]* to various on 28/07/2004), 0369 (email from *[a BA employee]* to *[BA manager (delivery)]* on 28/07/2004).

¹⁶⁶ Document 0366 (email from *[BA senior manager C]* to *[BA senior manager H]* on 02/08/2004). *[BA senior manager C]* considers that the decision to increase to £6 was consensus-driven and that if people wanted to increase the amount, he would not have objected (*[...]* second interview: Document 1856, pp 51-52). *[BA manager (delivery)]* was not involved in discussions to change the amount and would simply have '*waited for the powers that be to make their minds up*' (*[...]*'s first interview: Document 1483, pp 43-44). See also *[...]* witness statement: Document 3294, p6.

¹⁶⁷ Document 0361 (email from *[BA senior manager C]* to various on 05/08/2004).

¹⁶⁸ Document 0361 (email from *[BA senior manager C]* to various on 05/08/2004); *[...]* first interview: Document 1148, pp 14-15, 31; *[...]* first interview: Document 1477, pp 25-28.

¹⁶⁹ Document 0815 (email from *[VAA senior manager B]* to Public Relations on 06/08/2004).

¹⁷⁰ Document 0868 (email from *[VAA manager (pricing)]* to *[a VAA employee]* on 06/08/2004). While *[VAA senior manager B]*, *[VAA senior manager A]* and *[VAA senior manager C]* recall general discussions in early August as regards the need to increase the PFS, the meeting in the morning of 6 August is not specifically recalled by them: Document 1142, pp 25-26; Document 1713, pp 56-57, 60-61; Document 1739, pp 32-35.

¹⁷¹ Document 0815 (email from *[VAA senior manager B]* to Public Relations on 06/08/2004).

¹⁷² Document 0815 (email from *[VAA senior manager B]* to Public Relations on 06/08/2004).

announcing its increase. *[VAA senior manager B]* also suggested in the same email that he might call his counterpart at BA to 'agree a joint date'.¹⁷³

147. Although VAA could have increased the PFS without reference to what BA (as the market leader) was doing, according to *[VAA senior manager A]*, if BA did not match, the chances of VAA sustaining the increase were slim.¹⁷⁴
148. During the afternoon of Friday 6 August, both BA and VAA were briefing journalists in relation to articles being prepared for the Sunday papers.¹⁷⁵ In particular, *[BA senior manager B]*, together with *[a BA employee]*, was attempting to 'soften the blow' for BA's upcoming PFS increase by pre-briefing journalists from the business papers and broadsheets such as the Sunday Times.¹⁷⁶
149. It was in this context that *[BA senior manager B]* and *[VAA senior manager B]* spoke to each other between 16:22 and 16:38, following earlier attempts to make contact.¹⁷⁷ Although both *[BA senior manager B]* and *[VAA senior manager B]* are certain as to being in contact at this time, they have differing recollections as to who initiated the contact and how many calls took place.¹⁷⁸ Similarly, while both recall that the conversation effectively began with words to the effect of '*we're not having this conversation*', each attributes this phrase to the other.¹⁷⁹
150. Nonetheless, both clearly recall that *[BA senior manager B]* informed *[VAA senior manager B]* of the specific amount of BA's planned PFS increase and the timing

¹⁷³ Document 0815 (email from *[VAA senior manager B]* to Public Relations on 06/08/2004). In interview with VAA's legal representatives prior to his interview by the OFT, *[VAA senior manager B]* considered whether the statement that he might call *[BA senior manager B]* to agree a joint date meant that there had already been some contact between them as regards the PFS (i.e. at the time of the introduction of the PFS), since he could not explain why he would have said this without having had a prior discussion. However, review of his contemporaneous emails and handwritten notes, together with his recollection of the first contact with BA being tied in with a story in the Sunday papers, led *[VAA senior manager B]* to recall that the first contact between *[VAA senior manager B]* and *[BA senior manager B]* regarding the PFS took place on 6 August 2004 (see Document 3037, pp 2-10; and Document 3097, pp 11-22, 36-45, 56-64).

¹⁷⁴ [...] witness statement: Document 3207, p4.

¹⁷⁵ [...] first interview: Document 1142, p23; [...] first interview: Document 1148, pp 15, 24, 26-27; [...] second interview: Document 1684, pp 18-19.

¹⁷⁶ [...] second interview: Document 1684, pp 18-19.

¹⁷⁷ Document 3226, p27: A call was made from the VAA switchboard to *[BA senior manager B]*'s landline at 13:06 (22 sec). *[PA to BA senior manager B]* noted in *[BA senior manager B]*'s call log for the 6 August 2004 a request that *[BA senior manager B]* contact *[VAA senior manager B]*: Document 3197, p2; Document 1563, p2. Document 3226, pp 27-28: a call was made from *[BA senior manager B]* to the VAA Press Office at 14:41 for 28 seconds and then further calls were made by *[BA senior manager B]* to the VAA press office at 16:22 (1 min, 57 sec) and at 16:25 (3 min, 36 sec).

¹⁷⁸ [...] first interview: Document 1142, pp 16, 19-20, 27-28; [...] second interview: Document 1639, pp 22-24, 27; [...] witness statement: Document 3203, p8; [...] first interview: Document 1148, pp 15-17, 21; [...] second interview: Document 1684, pp 15-17, 20-21.

¹⁷⁹ [...] first interview: Document 1148, p15; [...] second interview: Document 1684, pp 20, 25, 37-38; [...] first interview: Document 1142, pp 16, 18-19, 27; [...] second interview: Document 1639, p27. According to *[BA senior manager B]*, language such as '*this is a conversation we are not having*' was in common usage in their trade when pre-briefing the press and other media: Document 1684, p39). The OFT does not accord significance to which of *[BA senior manager B]* or *[VAA senior manager B]* may have used the phrase.

of BA's public announcement of this increase. *[VAA senior manager B]* recalls the conversation in the following terms:

'I think [BA senior manager B] said to me, you know, 'Don't be surprised if you read in the Sunday papers that we're thinking of an increase to £6-£8 per sector' ... And I remember actually saying to him, I mean, almost naively saying, 'Oh, does that mean £7?' and he said, 'No, £6'... I finished the conversation with something, possibly echoing some of his remarks, so I may have said something like, 'Don't be surprised if we follow'. I mean, because I – like I say, I can't remember the exact words, but some form of comfort'.¹⁸⁰

151. *[VAA senior manager B]*'s recollection of what he was informed of by *[BA senior manager B]* is supported by his contemporaneous handwritten note of the call.¹⁸¹ *[BA senior manager B]*'s recollection of the information he passed on to *[VAA senior manager B]* also tallies with *[VAA senior manager B]*'s.¹⁸²
152. *[BA senior manager B]* recalls that he passed on this information [...] *[BA senior manager D]* [...] *[BA senior manager D]* that *[VAA senior manager B]* told him of VAA's intention to increase its PFS).¹⁸³ *[BA senior manager D]* denies that he received such information from *[BA senior manager B]* or [...] *[BA senior manager B]* [...] *[VAA senior manager B]*.¹⁸⁴ From *[the perspective of BA senior manager B]*, this exchange of information with *[VAA senior manager B]* 'didn't appear to be a thousand miles away from the sorts of things that we were doing [in pre-briefing the press], and expected to do as well' (although he acknowledged that it was 'unusual and different').¹⁸⁵
153. Immediately following his conversation with *[BA senior manager B]*, *[VAA senior manager B]* informed *[VAA senior manager C]* and *[VAA senior manager A]* of the information he had received, telling them 'you won't believe the call I just had'.¹⁸⁶ Both seemed relieved and pleased that BA were going to increase the PFS, given the pressure that they were under and the likelihood that a unilateral

¹⁸⁰ [...] first interview: Document 1142, p16.

¹⁸¹ Document 0814, p4 ([...] notebook extract 06/08/2004).

¹⁸² [...] first interview: Document 1148, pp 20-21; [...] second interview: Document 1684, pp 24-25.

¹⁸³ [...] first interview: Document 1148, pp 16-17, 20-23; [...] second interview: Document 1684, pp 20-23. *[BA senior manager B]*'s recollection is that there were two calls with *[VAA senior manager B]* (as is confirmed by the phone records above at fn177). According to *[BA senior manager B]*, having received from *[VAA senior manager B]* the information that VAA was considering an increase in its PFS, *[BA senior manager B]* [...] *[BA senior manager D]* [...].

¹⁸⁴ [...] second interview: Document 1895, p5. *[BA senior manager B]* did already have sufficient information at this time to have discussed the matter with *[VAA senior manager B]* in the terms recalled (as he was copied in to *[BA senior manager C]*'s email of 5 August (Document 0361) and was pre-briefing the press in similar terms); [...] first interview: Document 1148, pp 14-15, 31). However, the timing of the calls (see fn177 above) would allow for *[BA senior manager B]* to [...] *[BA senior manager D]* between the call at 16:22 and the call at 16:25 (*[BA senior manager B]* and *[BA senior manager D]* worked in an open plan office in close proximity to each other, see fn268).

¹⁸⁵ [...] second interview: Document 1684, pp 26-27.

¹⁸⁶ [...] first interview: Document 1142, pp 21-22; [...] second interview: Document 1639, p28; [...] witness statement: Document 3203, p9; [...] first interview: Document 1144, pp 20-21, 25; [...] witness statement: Document 3207, p4; [...] first interview: Document 1146, pp 21, 28, 29; [...] second interview: Document 1739, p39; [...] witness statement: Document 3208, pp 6-7.

increase by VAA would have to be withdrawn if BA did not follow.¹⁸⁷ The veracity of the information that [VAA senior manager B] had been given by [BA senior manager B] was not disputed by [VAA senior manager C] or [VAA senior manager A].¹⁸⁸

154. Although he does not recall being involved in the final decision to increase to £6, [VAA senior manager C] considered that '*in light of the information received, [VAA senior manager A] would have planned to increase the fuel surcharge and simply waited to follow BA*'.¹⁸⁹ Similarly, while [VAA senior manager A] does not recall whether the decision to match BA was made on 6 August or later, he states that '*having had information that they were going to 6, then obviously we were going to go to 6*'.¹⁹⁰ Since [VAA senior manager B]'s concern was preparation of the announcement of the PFS, he cannot speak as to when the decision to match (rather than announce) was made.¹⁹¹
 155. At 18:12 that evening, BA sent its announcement to the London Stock Exchange, embargoed for release until 07:00 on Monday 9 August.¹⁹²
- v. 7 and 8 August 2004
156. Over the course of the weekend, there was a considerable amount of press coverage reporting a possible increase in the PFS by BA and VAA, with some articles suggesting an increase in the range of £6 to £8, with a possible announcement on Monday 9 August.¹⁹³
- vi. 9 August 2004
157. At 07:01 on Monday 9 August, BA publicly announced an increase in its PFS to £6, with an effective date of 11 August.¹⁹⁴

¹⁸⁷ [...] first interview: Document 1142, p22; [...] second interview: Document 1639, p28; [...] witness statement: Document 3203, p9; [...] first interview: Document 1144, p26; [...] witness statement: Document 3207, p4; [...] first interview: Document 1146, pp 29-30; [...] witness statement: Document 3208, p7.

¹⁸⁸ [...] witness statement: Document 3203, p9; [...] witness statement: Document 3208, p7. [VAA senior manager A] recalls volunteering to check the information with his contact at BA and subsequently obtaining confirmation from [BA senior manager A]: Document 1144, pp 24-25, 27-28, Document 1713, pp 64, 66-75; Document 3207, pp 4-5. Neither [VAA senior manager B] nor [VAA senior manager C] recall this and none of the three recall [VAA senior manager A] later reporting back: Document 1713, pp 73-74; Document 3207, p5; Document 3203, p9; Document 3208, p7. Additionally, although a call took place from the VAA switchboard to [BA senior manager A] on 6 August 2004 (48 sec), this call was made at 15:59, i.e. before the conversation between [VAA senior manager B] and [BA senior manager B] had taken place (Document 3226, p28). The OFT does not therefore place reliance on [VAA senior manager A]'s recollections in this respect.

¹⁸⁹ [...] witness statement: Document 3208, p7; See also [...] second interview: Document 1739, p48.

¹⁹⁰ [...] second interview: Document 1713, p79; [...] witness statement: Document 3207, p5. See also [...] second interview: Document 1713, p90 - when asked whether the contact with BA had an effect on what VAA did in relation to the PFS amount, [VAA senior manager A] responded '*Well, clearly it did. I mean, we went to £6 instead of 5*'.

¹⁹¹ [...] third interview: Document 3185, pp 9-11.

¹⁹² [...] witness statement: Document 1925, pp 5-7.

¹⁹³ Press clippings (Document 1524); [...] first interview: Document 1148, p24.

¹⁹⁴ Document 0816 (BA press office statement); [...] witness statement: Document 1925, pp 8-11. [VAA press officer 1] circulated the BA press announcement within VAA at 10:18 (Document 3072: email from [VAA press officer 1] to various on 09/08/2004).

158. During the course of the morning and early afternoon, VAA received press enquiries, asking for a reaction to BA's announced PFS increase, to which it responded that VAA was keeping its PFS under review.¹⁹⁵ According to one article of that date, VAA had '*sent a clear signal that it was likely to follow BA's lead*'.¹⁹⁶
159. At 15.46 that afternoon, VAA announced an increase in its PFS to £6 (via email to the Press Association), with an effective date of 11 August.¹⁹⁷

I. October 2004 – Increase to £10 per sector

i. Background

160. The price of fuel had continued to rise since August and, in response, airlines, including Lufthansa, began to announce further increases to their PFSs.¹⁹⁸
161. At VAA, from around the end of August 2004, *[VAA senior manager F]* had been pushing for an increase in VAA's PFS, because of the rising fuel price.¹⁹⁹ However, in the run up to the October increase, *[VAA senior manager C]* did not feel that VAA would be able to take the lead in making such an increase.²⁰⁰
162. *[BA senior manager A]* and *[VAA senior manager A]* met for lunch (as they did on occasion) on 17 September 2004.²⁰¹ At lunch, although they may have discussed the PFS in general terms, *[BA senior manager A]* and *[VAA senior manager A]* principally discussed other issues.²⁰²

ii. 1 to 5 October 2004

163. On 1 October, with the price of oil at around US\$50 a barrel, *[BA senior manager C]* emailed a number of recipients (including *[BA senior manager A]*, *[BA senior manager D]* and *[BA senior manager B]*), noting that if oil prices remained high BA would be '*a long way off where the surcharge needs to be*'.²⁰³ Responses over the next few days from *[BA senior manager A]* (then in charge

¹⁹⁵ [...] witness statement: Document 3188, p5; [...] witness statement exhibits: Document 3189, pp 3-13 (articles at 12:59, 13:37 reference statements to this effect from VAA).

¹⁹⁶ Press clippings: Document 0817, p3.

¹⁹⁷ [...] witness statement: Document 3188, pp 5-6; [...] witness statement exhibits: Document 3189, pp 10-13; VAA information request response: Document 1769, p3 and Document 0818 (email *[VAA press officer 1]* to *[a VAA press officer]* on 09/08/2004).

¹⁹⁸ See Document 3064 (BA press log 06/10/2004); Document 3080 (email from *[BA manager (revenue analysis)]* to various on 06/10/2004).

¹⁹⁹ [...] first interview: Document 3292, pp 54-55; noted by *[VAA senior manager B]* in his notes of a meeting of VAA's Senior Executive Group on 24 August 2004 (Document 0873, p3); [...] first interview: Document 1142, pp 29-30.

²⁰⁰ [...] first interview: Document 1146, p39.

²⁰¹ [...] first interview: Document 1150, p17; [...] second interview: Document 1788, p9; [...] second interview: Document 1713, p88.

²⁰² *[BA senior manager A]* believes that he and *[VAA senior manager A]* also discussed the PFS, and indeed that this was the first time they had done so, although the discussion was in general terms only: Document 1150, p17; see also Document 1788, p9. *[VAA senior manager A]* does not recall discussing fuel surcharges on this date, but is sure that they talked about the increase in fuel costs and the general industry environment: Document 1713, p89; Document 3207, p5.

²⁰³ Document 1365 (email from *[BA senior manager C]* to various on 01/10/2004); [...] second interview: Document 1856, pp 65-66.

of [...]'),²⁰⁴ [BA manager (sales)] and [BA senior manager G] were generally in favour of rolling the surcharge into fares (rather than increasing the PFS) but they agreed to get feedback from their respective markets.²⁰⁵

iii. 6 October 2004

164. BA received enquiries from the press on 6 October, asking whether it intended to increase its PFS in light of Lufthansa's recently announced increase.²⁰⁶ [A BA press officer] prepared a press log in response, following consultation with [BA manager (delivery)], which stated '*not to be discussed until a decision is made on Thursday 7 October*' and that '*it is likely that the [PFS] will be increased to £10 per sector*'.²⁰⁷
 165. On the same date, at VAA, [VAA senior manager F] asked [VAA senior manager A] and [VAA senior manager C] '*if we haven't already done so we should consider putting the fuel surcharge up?*'.²⁰⁸ Although neither [VAA senior manager B] nor [VAA senior manager C] recalls, [VAA senior manager A] says that they had already been discussing a PFS increase before [VAA senior manager F]'s email came in and that this gave some further impetus to the debate.²⁰⁹
- iv. 7 October 2004
166. On 7 October, [VAA senior manager A] replied to [VAA senior manager F]'s query, stating that VAA was '*processing an increase from £6 to £10*' to take effect from 14 October 2004.²¹⁰
 167. Although a call was placed at 12:20 to [BA senior manager A] from a VAA landline, [BA senior manager A] does not recall a conversation with [VAA senior manager A] regarding the PFS on this date (or in relation to the October increase generally).²¹¹ Further, [VAA senior manager A]'s evidence as to his recollections

²⁰⁴ [...] ([...] first interview: Document 1150, p4).

²⁰⁵ Document 1365 (email from [BA senior manager C] to various on 01/10/2004); Document 1865 (email from [BA manager (sales)] to [BA senior manager C] on 05/10/2004); Document 1867 (email from [BA senior manager A] to [BA senior manager C] on 04/10/2004). On 15 October 2005, a week after the PFS was increased, [BA senior manager G] noted that both American Airlines and VAA had matched, saying '*I think this should stick which is good news. It was the right plan to try it. cheers [...]*' (Document 0051).

²⁰⁶ [...] witness statement, Document 3426, p2; Document 3064 (BA press log 06/10/2004).

²⁰⁷ Document 3064 (BA press log 06/10/2004); [...] witness statement, Document 3426, p2.

²⁰⁸ Document 0819 (email from [VAA senior manager F] to [VAA senior manager C] and [VAA senior manager A] on 06/10/2004); [...] first interview: Document 1146, pp 40-41; [...] first interview: Document 1144, pp 33-34.

²⁰⁹ [...] first interview: Document 1144, pp 33-35; [...] witness statement: Document 3207, pp 5-6; [...] first interview: Document 1142, pp 30-31; [...] witness statement: Document 3203, p11; [...] first interview: Document 1146, pp 40-42; [...] witness statement: Document 3208, p8.

²¹⁰ Document 0819 (email from [VAA senior manager F] to [VAA senior manager C] and [VAA senior manager A] on 06/10/2004); [...] first interview: Document 1144, pp 34-35; [...] witness statement: Document 3207, p6; [...] second interview: Document 1654, pp 65-66.

²¹¹ Document 3240, p36; call from VAA landline to [BA senior manager A] at 12:20 (23 sec). See [...] first interview: Document 1150, pp 19-20; [...] second interview: Document 1788, pp 10-11.

regarding contact with */BA senior manager A*) at the time of the October increase is unclear.²¹²

v. 8 October 2004

168. On the morning of 8 October 2004, the Daily Mail ran a story that BA was '*today expected to increase its fuel surcharge for the second time*' and that VAA was '*expected to follow suit*'.²¹³
169. At 11:44 on 8 October 2004, *[VAA senior manager A]* telephoned */BA senior manager A*'s landline.²¹⁴ */BA senior manager A* was in South Africa and does not believe that he spoke to *[VAA senior manager A]*, but rather that *[VAA senior manager A]* may have spoken to *[PA to BA senior manager A]*.²¹⁵ This possibility was confirmed by *[PA to BA senior manager A]* and by *[VAA senior manager A]* (who does not specifically recollect the call).²¹⁶
170. At midday on the same day, *[VAA senior manager A]* sent a text message to */BA senior manager A*'s mobile.²¹⁷ While *[VAA senior manager A]* does not recall it specifically, he says that he may have done so to inform */BA senior manager A* of VAA's upcoming announcement of its increase to £10.²¹⁸ */BA senior manager A* does not recall receiving this message.²¹⁹
171. At some point between 13:34 and 15:32, BA announced to the press an increase in its PFS to £10 with effect from 14 October 2004.²²⁰ */BA senior manager C* suggests that the decision to increase BA's PFS may have been taken without a meeting of BA's PFS review group, in the light of conversations

²¹² In interview, *[VAA senior manager A]* stated that he did not recall whether he in fact obtained any comfort from */BA senior manager A* concerning BA's intentions on this occasion: [...] second interview: Document 1713, pp 94, 96. In his third interview, *[VAA senior manager A]* noted that as regards the conversations with */BA senior manager A* in October 2004, '*I didn't recall any details [at the time he was first interviewed] and I don't, I don't now*'. (Document 3181, p28). However, in his witness statement of 1 May 2008, *[VAA senior manager A]* states his belief that he '*ultimately did speak to /BA senior manager A before replying to [VAA senior manager F]'s email. [BA senior manager A] told me that BA was considering a similar increase*' (Document 3207, p6).

²¹³ Document 2721 (email from *[VAA press officer 1]* to various on 08/10/2004).

²¹⁴ Document 3240, p46; call from VAA switchboard to */BA senior manager A* at 11:44 (3 min; 19 sec). See [...] second interview: Document 1713, pp 99-100.

²¹⁵ [...] first interview: Document 1150, pp 18-19; [...] second interview: Document 1788, pp 10-11; [...] third interview: Document 3291, pp 8-9; see also Document 1184 (*/BA senior manager A* calendar entry). *[PA to BA senior manager A]* has confirmed that she was in the office all day on 8 October 2004 (BA letter to OFT: Document 1891, p1).

²¹⁶ [...] interview: Document 1486, pp 17-19; [...] witness statement: Document 3298, p2; [...] second interview: Document 1713, pp 99-100, 109; [...] witness statement: Document 3207, p6.

²¹⁷ Document 3240, p46: call from *[VAA senior manager A]* to */BA senior manager A* at 12:00 (1 sec).

²¹⁸ [...] first interview: Document 1144, pp 44-45; [...] second interview: Document 1713, p103; [...] witness statement: Document 3207, p6.

²¹⁹ [...] first interview: Document 1150, p18; [...] second interview: Document 1788, pp 10-11; [...] third interview: Document 3291, p8.

²²⁰ BA Information request response: Document 1893, p1 and Appendices 3(b) and 3(c); */BA senior manager A* states that the announcement was made at 15:00: Document 1150, p18); PA news issued a story on the announced increase at 15:32 ([...] witness statement exhibits: Document 3189, pp 15-16).

occurring internally, possibly in response to the press activity noted above (the next PFS review group meeting was scheduled for mid-October).²²¹

172. At 15:39, */VAA press officer 1* circulated the BA announcement *[internally within VAA]* to various recipients (including */VAA senior manager B*, */VAA senior manager A* and */VAA senior manager C*).²²² At the same time, she circulated a 'line to take' to colleagues in the Comms department stating that VAA had reluctantly decided to increase its PFS in light of recent increases in the price of oil.²²³
173. At 16:09, */VAA press officer 1* circulated the statement for the press within VAA, stating that following BA's announcement, VAA had '*just started to inform the media*' of its own increase.²²⁴

J. March 2005 – Increase to £16 per sector

i. Background

174. By March 2005, as a result of increasing fuel prices, VAA *[senior managers]* (at least */VAA senior manager C*, */VAA senior manager A* and */VAA senior manager B*) were considering the need for a PFS increase.²²⁵ For a number of reasons, their feeling was that VAA ought to take the lead in announcing an increase on this occasion. For */VAA senior manager B* in particular, the feeling was that taking the lead was the '*right thing for [VAA] to volunteer to do*' or '*the honourable thing*' since BA had led the previous increases and had taken the PR hit that went with that.²²⁶ From */VAA senior manager C*'s perspective, VAA had been '*getting quite a lot of flack and criticism*' for following behind BA and he wanted to avoid such criticism.²²⁷ Finally, it was hoped that, if VAA led the increase by the amount it considered necessary, BA would be inclined to follow VAA's lead and increase by the same amount.²²⁸
175. As */VAA senior manager C* stated, the idea that VAA could lead was, by this time, '*more realistic, because there was contact going on with British Airways*',

²²¹ [...] second interview: Document 1856, pp 69-73.

²²² Document 2794 (email from */VAA press officer 1*) to various on 08/10/2004).

²²³ Document 2795 (email from */VAA press officer 1*) to various on 08/10/2004).

²²⁴ Document 2796 (email from */VAA press officer 1*) to various on 08/10/2004). The Press Association reported the announcement at 16:25 ([...] witness statement exhibits: Document 3189, pp 15-16).

²²⁵ [...] first interview: Document 1146, pp 45-46; [...] second interview: Document 1739, p70; [...] first interview: Document 1144, pp 47-48; [...] first interview: Document 1142, p33.

²²⁶ [...] second interview: Document 1639, pp 45-46; [...] witness statement: Document 3203, p12. See also [...] first interview: Document 1144, pp 47-48; [...] second interview: Document 1713, p116.

²²⁷ [...] second interview: Document 1739, p69. See also [...] first interview: Document 1146, pp 45-46, 50; [...] second interview: Document 1739, pp 70, 72; [...] witness statement: Document 3208, p9. In this respect, see Document 2814, an email from a journalist at the Sunday Times to */PA to VAA senior manager B* at VAA following VAA's announcement of a later increase in June 2005, saying '*Why does Virgin never take its own decisions and always parrot what BA says?!*'.

²²⁸ See [...] second interview: Document 1639, p47; [...] witness statement: Document 3203, p12; [...] fragmentary interview transcript: Document 3097, pp 80-81; [...] witness statement: Document 3207, p7.

'so they knew what we were doing'.²²⁹ Without that contact, 'it would have been more difficult' to decide to lead.²³⁰

176. In early March, BA was similarly considering what to do in light of the fact that Brent crude oil had increased to US\$50 per barrel.²³¹ The initial reaction was not to increase the PFS for a number of reasons: the oil price was thought to be a temporary spike, an increase would raise PR difficulties and other carriers did not appear to be moving at that time.²³² However, *[BA senior manager D]* stated that the situation would be kept under review.²³³ It was, at this time, decided to look at the possibility of increasing fares rather than increasing the PFS.²³⁴
177. However, by mid-March, it was apparent (to *[BA senior manager C]*, at least) that the price increases would '*in no way offset the current oil increases*' and *[his]* '*instinct says that [BA] will need to put the surcharge up*' even though this would entail '*communication challenges along with competitive risk*'.²³⁵ He circulated his thoughts to *[BA senior manager D and others]* and suggested that the issue be discussed between the representatives of the various groups and then at the Commercial Leadership Team meeting the following week.²³⁶

ii. 18 March 2005

178. Around Friday 18 March 2005, there was media interest in increasing fuel prices and the possibility of increases in BA's and VAA's PFSs.²³⁷ Both Parties were contacted by the press during the day and each of *[VAA senior manager B]* and *[BA senior manager B]* spoke to journalists preparing articles for the Sunday newspapers.²³⁸

²²⁹ [...] first interview: Document 1146, pp 50-51.

²³⁰ [...] first interview: Document 1146, p51.

²³¹ The price increase was brought to the attention of *[BA manager (delivery)]* and *[BA senior manager H]* by *[BA employee (sales)]* (Document 0230: email from *[BA employee (sales)]* to *[BA manager (delivery)]* and *[BA senior manager H]* on 02/03/2005). *[BA senior manager H]* asked *[BA senior manager D]* and *[BA senior manager C]* to '*have a look at the surcharge*' as a result (Document 1879: emails between *[BA senior manager H]*, *[BA senior manager D]* and *[BA senior manager C]* on 02-03/03/2005).

²³² Document 1879 (emails between *[BA senior manager H]*, *[BA senior manager D]* and *[BA senior manager C]* on 02-03/03/2005).

²³³ Document 1879 (emails between *[BA senior manager H]*, *[BA senior manager D]* and *[BA senior manager C]* on 02-03/03/2005). A handwritten note by *[BA senior manager C]* from a one-to-one meeting with *[BA senior manager D]* on 11 March 2005 states: '*Fuel surcharge: review 3rd week March*' (Document 3167).

²³⁴ Documents 1879 (emails between *[BA senior manager H]*, *[BA senior manager D]* and *[BA senior manager C]* on 02-03/03/2005) and 1401d (email from *[BA manager (pricing)]* to various on 07/03/2005). The latter notes that a PFS review group meeting on 4 March agreed not to propose an increase to the PFS despite rising costs, but to look at opportunities to increase fares.

²³⁵ Document 0040 (email from *[BA senior manager C]* to various on 15/03/2005).

²³⁶ Document 0040 (email from *[BA senior manager C]* to various on 15/03/2005). [...] second interview: Document 1856, pp 93-94. The Commercial Leadership Team was composed of *[various senior managers and others]* (see [...] first interview: Document 1477, p26).

²³⁷ [...] first interview: Document 1148, p43; [...] second interview: Document 1639, pp 43-44; Document 1525 (article from the Daily Express dated 18 March 2005). VAA, at this time, was preparing a 'line to take' which was based on its previous announcement in October (Document 2815: email *[between VAA press officers]* on 18/03/2005).

²³⁸ [...] first interview: Document 1142, p33; [...] first interview: Document 1148, p44; see also Document 0930 (press clippings on Sunday 20/03/2005).

179. That afternoon, */VAA senior manager B* and */BA senior manager B* had contact with each other a number of times.²³⁹ After an initial call from */VAA senior manager B* to */BA senior manager B* at 13:52, which lasted for over eight minutes, the pair spoke again when */BA senior manager B* called */VAA senior manager B* at 17:50.²⁴⁰ */VAA senior manager B* originally considered his call to */BA senior manager B* 'was more of a fishing trip' to see what BA was thinking, although he later considered that he could not recall in detail what prompted the conversation or who called whom.²⁴¹ */VAA senior manager B*'s initial recollection is consistent with */BA senior manager B*'s recollection that '*VAA senior manager B approaches me again to say, "Surcharge time," my words not his ... you know, "How are we fixed?"*'.²⁴²

180. */BA senior manager B* informed */VAA senior manager B* that BA was holding a meeting that day at which BA's PFS would be discussed, but that no decision was likely until the following Tuesday.²⁴³ */VAA senior manager B* made a note of this, as follows:

'/BA senior manager B'

- *meeting today*
- *but not likely to make decision today*
- *decision on Tuesday*²⁴⁴

181. It is unclear whether, at this stage, */VAA senior manager B* informed */BA senior manager B* that VAA was also considering increasing its PFS and leading the announcements.²⁴⁵

²³⁹ Document 3236, p122: call from */VAA senior manager B* to */BA senior manager B* at 13:52 (8 min, 35 sec); Document 3236, p126: text message from */VAA senior manager B* to */BA senior manager B* at 17:44; call from */BA senior manager B* to */VAA senior manager B* at 17:50 (2 min, 6 sec). Earlier that day (at 10:18), */VAA senior manager B* received from *[a VAA employee]* an email telling him that */BA senior manager B* had suggested to *[that VAA employee]* that they and some others get together in the name of '*good relationship building*' (Document 2691). There is no indication from */VAA senior manager B*'s evidence that this email informed his contact with */BA senior manager B* on that date. In any event, the substance of that contact is described and evidenced below.

²⁴⁰ */VAA senior manager B* does not appear to recollect having two calls with */BA senior manager B* and does not recall who instigated the conversation (see Document 1142, p32; Document 3203, p11). While */BA senior manager B* initially recalled only the later call, having been informed that the 13:52 call took place, he then remembered having two calls during which the parties exchanged information, with */VAA senior manager B* instigating the initial discussion and */BA senior manager B* the latter (*.../ second interview: Document 1684, pp 49-50*).

²⁴¹ See *[...]* fragmentary interview transcript: Document 3097, p77; *[...]* witness statement: Document 3203, p11.

²⁴² *[...]* second interview: Document 1684, p49.

²⁴³ *[...]* first interview: Document 1148, pp 51-52; *[...]* second interview: Document 1684, pp 50-51. According to */BA senior manager B*, he *[...]* */BA senior manager D* *[...]* the above information to */VAA senior manager B* on 18 March 2005: Document 1684, pp 49, 51, see also Document 1148, pp 43, 45-46, 51-52. */BA senior manager D* denies *[...]*: Document 1895, p7. Although */BA senior manager B* would, regardless of *[discussions with BA senior manager D]*, have known that the PFS was due to be discussed at the Commercial Leadership Team ('CLT') meeting the following Tuesday (having been copied on */BA senior manager C*'s email of 15 March 2005: Document 0040), */BA senior manager B* was not a member of the PFS review group and there is no evidence that he would have known that the PFS was to be discussed by the review group that day *[...]*.

²⁴⁴ Document 0822 (*[...]* notebook extract 18/03/2005), p2; *[...]* first interview: Document 1142, p32; *[...]* second interview: Document 1639, pp 44-45; *[...]* witness statement: Document 3203, p11.

182. Having received the information from BA about its likely time for reaching a decision on a potential increase in its PFS, *[VAA senior manager B]* is '*fairly sure [he] updated [VAA senior manager C] and [VAA senior manager A], either in person or by telephone, after the conversation with [BA senior manager B]*'.²⁴⁶
183. Within BA, the PFS review group met that afternoon to discuss the rising fuel cost situation, coming to '*the inevitable conclusion ... that fuel surcharges will need to rise again and this will be discussed at CLT on Tuesday. The Group did not agree on a specific increase to recommend but a matrix [was] being developed to ...help CLT reach a view*'.²⁴⁷ The group considered the benefit that would be obtained from a PFS increase (the email uses a £4 increase to give recipients '*a sense of where [BA] might end up*').²⁴⁸
184. As at the close of 18 March, neither BA nor VAA had finalised the timing or amount of any planned increase to its PFS.
- iii. 20 March 2005
185. On Sunday 20 March, there was press speculation regarding a potential increase in the Parties' PFSs. The Observer ran an article stating that BA '*is set to lead a fresh round of fuel surcharge increases on air fares in the wake of the recent surge in oil prices. BA's move, expected this week, is likely to be followed by similar measures by [VAA], which has ratcheted up surcharges in step with the Heathrow-based airline*'.²⁴⁹ The article gave £3 as a possible figure for the amount of the increase.²⁵⁰
186. In light of this press coverage, *[BA senior manager C]* sent an internal email to *[BA senior manager D and others]* (i.e. to the Commercial Leadership Team) that evening, suggesting that an increase to BA's PFS be moved forward and announced the next day (Monday 21 March), and proposing an amount of £4.²⁵¹

²⁴⁵ *[VAA senior manager B]* did not state, and was not asked in interview, whether he, in turn, gave *[BA senior manager B]* any information regarding VAA's plans at this time. *[BA senior manager B]* considers that the information may have been passed to him on this date or possibly on 21 March (See Document 1148, pp 43-44; Document 1684, pp 49, 52-53).

²⁴⁶ [...] witness statement: Document 3203, p12. See also [...] first interview: Document 1142, p34; [...] second interview: Document 1639, p44.

²⁴⁷ Document 1931, p3 (email from *[BA manager (marketing)]* to various on 18/03/2005). See also Document 1089 (email from *[BA senior manager C]* to various summarising the discussions and outcome of the PFS review group meeting on 18 March 2005).

²⁴⁸ Document 1931, p3 (email from *[BA manager (marketing)]* to various on 18/03/2005). See also Document 1089 (email from *[BA senior manager C]* to various summarising the discussions and outcome of the PFS review group meeting on 18 March 2005).

²⁴⁹ Document 0930 (press clippings on 20/03/2005).

²⁵⁰ Document 0930 (press clippings on 20/03/2005).

²⁵¹ Document 1089 (email from *[BA senior manager C]* to various summarising the discussions and outcome of the PFS review group meeting on 18 March 2005). The recipients of this email are the same as those to whom *[BA senior manager C]* sent the email on 15 March 2005 (Document 0040: email from *[BA senior manager C]* to various on 15/03/2005).

iv. 21 March 2005

187. At 08:49 on Monday 21 March, *[BA senior manager A]* replied to *[the email]* of the previous evening, questioning whether a £4 increase was sufficient.²⁵² *[BA manager (sales)]* [...] replied at 09:28 to similar effect.²⁵³ *[BA senior manager C]* replied to *[that]* email at 09:54, copying his response to *[BA senior manager D]*, *[BA senior manager B]* and *[BA senior manager A]* among others, and requesting views on the suggestion that BA increase its PFS by £6.²⁵⁴
188. It appears that the internal decision at BA to increase its PFS to £6 had effectively been made by lunchtime that day when *[BA senior manager G]* followed up with *[BA senior manager C]* on the discussions.²⁵⁵
189. Meanwhile, within VAA, the impact of the press coverage over the weekend was also being considered. At 08:54, *[VAA press officer 2]* circulated a newswires story on the likely announcements to a number of recipients, including *[VAA senior manager B]*, *[VAA senior manager C]* and *[VAA senior manager A]*.²⁵⁶ At 10:40, *[VAA press officer 1]* sent an email to *[VAA senior manager A]*, stating that she was adjusting the PFS 'line to take' in line with the press reports ('*we are going to say that it is presently being reviewed and then should the situation change in the next few days we will issue something similar to [the previous October announcement]*') and asking for *[VAA senior manager A]*'s thoughts.²⁵⁷
190. *[VAA senior manager A]* replied to *[VAA press officer 1]* at 10:57, agreeing with the suggested approach and mentioning a possible VAA PFS increase of £3 or £5.²⁵⁸ In the same email, *[VAA senior manager A]* stated '*We might also want to*

²⁵² Document 0224 (email from *[BA senior manager A]* to *[BA senior manager C]* and various on 21/03/2005); *[BA senior manager A]* states that he sent this email following discussions with *[BA PFS review group member 1]*: Document 1150, p21; Document 1788, p13). *[BA PFS review group member 1]* considers this '*quite plausible*': Document 1484, pp 54-55; see also Document 3297, p10).

²⁵³ Document 1092 (emails between *[BA senior manager C]*, *[BA manager (sales)]* and others on 21/03/2005), p2.

²⁵⁴ Document 1092 (emails between *[BA senior manager C]*, *[BA manager (sales)]* and others on 21/03/2005). The email contains a typographical error in line 5 of the first paragraph, where 'SH' (an abbreviation for short haul) was substituted in error for 'LH' (long haul). That passage ought therefore to read: '*so that brings me back to LH where I'd be interested in views on pushing this to £6*'. (See [...] second interview: Document 1788, p14).

²⁵⁵ See [...] second interview: Document 3096, pp 61-63. *[BA senior manager G]* recalls speaking to *[BA senior manager C]* about this either on his way to work or when he got to work and saw the email chain. He worked at that time in New York and normally arrived at work between 08:30 and 08:50 EST (for *[BA senior manager G]*'s role and location at the relevant time, see [...] first interview: Document 1676, p5).

²⁵⁶ Document 2932 (email from *[VAA press officer 2]* to various on 21/03/2005).

²⁵⁷ Document 2677 (email from *[VAA press officer 1]* to *[VAA senior manager A]* on 21/03/2005).

²⁵⁸ Document 2891 (email from *[VAA senior manager A]* to *[VAA press officer 1]* on 21/03/2005). *[VAA senior manager A]* does not recall why the email refers to £3 and considers he may have meant £6 and been confused between a one way and a return trip: Document 1713, p123; Document 3207, p8).

'lead and if so will need to make this decision today'.²⁵⁹ [VAA senior manager A] asked [VAA manager (pricing)] to research some supporting figures.²⁶⁰

191. Late that morning, *[VAA senior manager C]* called *[VAA senior manager B]* into his office and informed *[VAA senior manager B]* that VAA was considering increasing its PFS by £5 to £15.²⁶¹ *[VAA senior manager C]* and *[VAA senior manager B]* discussed whether VAA ought to take the lead in announcing an increase. As recorded by *[VAA senior manager B]* in his notebook, they speculated about BA's possible response, namely whether BA might (a) not increase its PFS, (b) increase its PFS by a lesser amount (such as £2.50); or (c) follow VAA.²⁶² According to *[VAA senior manager B]*, *[VAA senior manager C]* asked him to '*sound out BA by speaking with [his] contact to try to find out what they would do*'.²⁶³

Contact between *[VAA senior manager B]* and *[BA senior manager B]*

192. *[VAA senior manager B]* recalls that, '*almost immediately*' after his meeting with *[VAA senior manager C]*, he contacted *[BA senior manager B]*.²⁶⁴ *[VAA senior manager B]* called *[BA senior manager B]* at 14:12 for just under one minute and *[BA senior manager B]* called him back at 14:16, at which point they spoke for over two and a half minutes.²⁶⁵ Both *[VAA senior manager B]* and *[BA senior manager B]* consider that they initiated the substantive conversation (*[VAA senior manager B]* following his meeting with *[VAA senior manager C]*)²⁶⁶ and *[BA senior manager B]* [...] *[BA senior manager D]*).²⁶⁷ Given that two calls were

²⁵⁹ Document 2891 (email from *[VAA senior manager A]* to *[VAA press officer 1]* on 21/03/2005). The OFT notes that this timing tallies with the information given by *[BA senior manager B]* to *[VAA senior manager B]* on 18 March 2005 (paragraph 180 above).

²⁶⁰ Document 2891 (email from *[VAA senior manager A]* to *[VAA press officer 1]* on 21/03/2005); see also Documents 3218, 3220 and 3221.

²⁶¹ [...] witness statement: Document 3203, p12. See also [...] first interview: Document 1142, p34; [...] second interview: Document 1639, pp 46-47; [...] first interview: Document 1146, p51.

²⁶² Document 0823 ([...] notebook extract 21/03/2005), p2; [...] witness statement: Document 3203, p12; [...] first interview: Document 1142, p34; [...] second interview: Document 1639, pp 46-47. See also [...] first interview: Document 1146, p51.

²⁶³ [...] witness statement: Document 3203, p12; [...] first interview: Document 1142, pp 34, 37; [...] second interview: Document 1639, p47. *[VAA senior manager C]* denies that he instructed *[VAA senior manager B]* to contact BA but accepts that *[VAA senior manager B]* may have '*taken comfort*' that he should do so from *[their conversation]* that morning or that *[VAA senior manager B]* may have '*inferred that [VAA senior manager C] approved and/or authorised such contact*': Document 1146, pp 51-52; Document 3208, p9). Although, see [...] second interview: Document 1739, pp 73-74.

²⁶⁴ [...] witness statement: Document 3203, p12.

²⁶⁵ Document 3236, p135: call from *[VAA senior manager B]* to *[BA senior manager B]* at 14:12 (54 sec); call from *[BA senior manager B]* to *[VAA senior manager B]* at 14:16 (2 min, 40 sec). The phone records show that *[BA senior manager B]* had a voicemail delivery at 14:13 (34 sec). While it may be that *[VAA senior manager B]*'s initial call to *[BA senior manager B]* was him leaving a message, which *[BA senior manager B]* immediately picked up, it may also be that someone else called *[BA senior manager B]* while he was speaking to *[VAA senior manager B]* and left a voicemail. In this respect, the OFT notes that *[VAA senior manager B]* considered in interview that '*54 looks slightly long to leave a message*' ([...] second interview: Document 1639, p48) and also notes that the length of the voicemail pick-up (34 sec) is approximately half that of the call from *[VAA senior manager B]* (54 sec).

²⁶⁶ [...] first interview: Document 1142, p38; see also [...] second interview: Document 1639, pp 47-48; [...] witness statement: Document 3203, p12.

²⁶⁷ See [...] first interview: Document 1148, p44; [...] second interview: Document 1684, pp 63-64, 67-68. In particular, in his second interview (which dealt in detail with the calls on 21 March 2005) *[BA senior manager B]* specifically recalls [...] the information regarding VAA's intended increase [...] *[BA senior manager D]* [...] £6 '*is a better number*' ([...] second interview: Document 1684, p64).

made, the first by *[VAA senior manager B]* and the second by *[BA senior manager B]*, neither scenario is precluded.²⁶⁸

193. Both *[VAA senior manager B]* and *[BA senior manager B]* recall that *[VAA senior manager B]* informed *[BA senior manager B]* that VAA was considering taking the lead in announcing an increase in its PFS and that it proposed to increase by £5, and that *[BA senior manager B]* informed *[VAA senior manager B]* that £6 (£12 for a return trip) 'would be a better number'.²⁶⁹ As *[VAA senior manager B]* recalls:

*'I said, you know, "We're thinking of going up £5". He said, "Oh well", he came straight back at me. I think he said, "You might want to think about going up by £6", or, "We've been thinking of going up by £6". But he, as I said, literally came right back at me with the figure of £6'.*²⁷⁰

194. *[VAA senior manager B]* responded with words to the effect of '*that sounds good to me*' or '*I expect we'll probably do that then*'.²⁷¹
195. Within BA, following the call, *[BA senior manager B]* believes he may have [...] *[BA senior manager D]* [...] in a series of telephone calls between 14:29 and 14:59 (something which *[BA senior manager D]* disputes).²⁷²
196. Within VAA, following the call, *[VAA senior manager B]* reported to *[VAA senior manager C]* that BA intended to increase its PFS by £6.²⁷³ *[VAA senior manager C]* recalls that *[VAA senior manager B]* 'said that "*he had* found out that it

²⁶⁸ *[BA senior manager D]* denies [...] *[BA senior manager B]* [...] *[VAA senior manager B]*. He states that *[BA senior manager B]* would have been aware separately of BA's current thinking (via *[BA senior manager C]*'s email at 09:54) and that '*on the basis of the telephone schedule provided by the OFT, [BA senior manager D] would not have been in a position to have any contact with [BA senior manager B]*' [...] second interview: Document 1895, pp 7-8). However, since *[BA senior manager D]* and *[BA senior manager B]* sat within sight of each other in an open plan office, *[BA senior manager B]* stated in relation to the calls on 18 March that he could walk up to *[BA senior manager D]* and verbally pass information to him: (Document 1684, pp 55-56). Between the call with *[VAA senior manager B]* at 14:12 and the call at 14:16, *[BA senior manager B]* could therefore have approached *[BA senior manager D]* in person with the information he obtained on the first call and [...] how to respond to *[VAA senior manager B]*. Additionally, and importantly, the email from *[BA senior manager C]* did not state that BA had reached a final position on the increase but simply asked for 'views' on the suggestion to increase by £6. There is therefore no evidence that [...] *[BA Senior Manager D]*, *[BA senior manager B]* would have been able to definitively provide the £6 figure to *[VAA senior manager B]*.

²⁶⁹ [...] first interview: Document 1142, p38; [...] second interview: Document 1639, p48; [...] witness statement: Document 3203, p13; [...] first interview: Document 1148, p44; [...] second interview: Document 1684, pp 63-64, 67.

²⁷⁰ [...] first interview: Document 1142, p38.

²⁷¹ [...] witness statement: Document 3203, p13. See also [...] first interview: Document 1142, p38; [...] second interview: Document 1639, p48.

²⁷² Document 3236, pp 135-136: call from *[BA senior manager B]* to *[BA senior manager D]* at 14:29 (41 sec); call from *[BA senior manager D]* to *[BA senior manager B]* at 14:46 (1 min, 27 sec); call from *[BA senior manager D]* to *[BA senior manager B]* at 14:54 (10 sec); call from *[BA senior manager B]* to *[BA senior manager D]* at 14:55 (10 sec); call from *[BA senior manager B]* to *[BA senior manager D]* at 14:59 (38 sec). See [...] first interview: Document 1148, pp 44-45; [...] second interview: Document 1684, p68 (however, see also p70). Although he does not specifically deal with these calls in his evidence, *[BA senior manager D]* disputes that *[BA senior manager B]* ' [...] any improper conversations [...]'

²⁷³ [...] first interview: Document 1142, pp 38-39; [...] second interview: Document 1639, pp 48-49; [...] first interview: Document 1146, pp 48-49; [...] witness statement: Document 3208, p9.

*'should be a six", or words close to that' (in other words, that the PFS should be increased to £16 not £15) because '*that was the number that BA were more confident and would liked [sic] to have gone for*'.²⁷⁴*

197. */VAA senior manager BJ* recalls that he also informed */VAA senior manager DJ* and probably also */VAA senior manager AJ* that VAA would now increase its PFS by £6 rather than £5, as a result of his conversation with BA.²⁷⁵ */VAA senior manager BJ* joked that he had become a '*revenue generator*'.²⁷⁶ As */VAA senior manager AJ* recalls:

'[VAA senior manager BJ] was happy and made it a bit of a joke about doing my work for me, in terms of collecting revenue and being a commercial person, rather than just simply PR, which is why it sticks out in my mind'.²⁷⁷

Contact between */VAA senior manager AJ* and */BA senior manager AJ*

198. There was also contact between */BA senior manager AJ* and */VAA senior manager AJ* that afternoon following the conversation between */VAA senior manager BJ* and */BA senior manager BJ*.²⁷⁸ While */VAA senior manager AJ* cannot recall in detail his contact with */BA senior manager AJ* that day, he recalls that he '*was keen to tell */BA senior manager AJ* that *[VAA]* would lead and */BA senior manager AJ* was happy about it*'.²⁷⁹
199. */BA senior manager AJ* recalls that he [...] */BA senior manager DJ* just before going in to a meeting with senior management of UK&I Sales at 14:00 [...] */BA senior manager DJ* [...] */BA senior manager C* [...] */VAA senior manager AJ* [...] */BA senior manager BJ*.²⁸⁰ */BA senior manager AJ* spoke with */BA senior manager*

²⁷⁴ [...] first interview: Document 1146, p49. See also [...] witness statement: Document 3208, p9.

²⁷⁵ [...] first interview: Document 1142, pp 39-40; [...] second interview: Document 1639, pp 49, 54, 57-59; [...] witness statement: Document 3203, p13; [...] first interview: Document 1144, pp 50-53; [...] witness statement: Document 3207, p8; [...] first interview: Document 1145, pp 32-33; [...] second interview: Document 1712, pp 24-27.

²⁷⁶ [...] first interview: Document 1145, p33; [...] second interview: Document 1712, pp 24-27; [...] first interview: Document 1142, p47; [...] witness statement: Document 3203, p13. (In his second interview (Document 1639 at p49), */VAA senior manager BJ* attributed the comment about his being a revenue generator to */VAA senior manager DJ*. It is clear from */VAA senior manager DJ*'s evidence that the two engaged in some back and forth banter on the subject. Although it is not necessary definitively to attribute the comment to either of */them*, on balance, it appears that the quip originated with */VAA senior manager BJ*). See also [...] first interview: Document 1146, p55; [...] witness statement: Document 3208, p10; [...] first interview: Document 1144, pp 47, 52-53; [...] witness statement: Document 3207, p7.

²⁷⁷ [...] first interview: Document 1144, p47.

²⁷⁸ Document 3236, p135: call from */BA senior manager AJ* to */VAA senior manager AJ* at 14:52 (2 min, 2 sec).

²⁷⁹ [...] witness statement: Document 3207, p7. */VAA senior manager AJ* also sent a text message to */BA senior manager AJ* that morning (see Document 3236, p133: call from */VAA senior manager AJ* to */BA senior manager AJ* at 10:28 (1 sec)). While */VAA senior manager AJ* does not recollect specifically the text message, since he cannot recall any other reason for texting */BA senior manager AJ* that day, he considers that '*in all likelihood it was about fuel surcharge*' ([...] second interview: Document 1713, pp 114, 121-122; see also [...] witness statement: Document 3207, p7). */BA senior manager AJ* does not recall the content of the text message he received from */VAA senior manager AJ*: (Document 1788, p14).

²⁸⁰ [...] first interview: Document 1150, pp 22-24; [...] second interview: Document 1788, pp 14-15. */BA senior manager DJ* denies [...] */BA senior manager AJ* [...] (Document 1895, p8).

CJ during a break in his meeting (at 14:49) for less than a minute, before calling *[VAA senior manager A]* at 14:52.²⁸¹

200. *[VAA senior manager A]* confirmed that VAA would lead the increase and make an announcement later that day.²⁸² Neither recollects clearly whether *[VAA senior manager A]* told *[BA senior manager A]* the amount by which VAA intended to increase.²⁸³
201. *[VAA senior manager A]* does not appear to have reported back to anyone on his conversation with *[BA senior manager A]* and does not recall doing so.²⁸⁴ Following the call with *[VAA senior manager A]*, *[BA senior manager A]* placed a call to *[BA senior manager B]* at 14:57 and *[BA senior manager B]* then called *[BA senior manager D]*.²⁸⁵ In interview, both *[BA senior manager A]* and *[BA senior manager B]* recalled that *[BA senior manager A]* [...] the information he had obtained from *[VAA senior manager A]* and the timing of the calls supports this.²⁸⁶ However, their respective recollections are not consistent and differ from their initial recollections to BA's legal representatives.²⁸⁷ Thus, the confirmation provided by *[VAA senior manager A]* of VAA's intention to lead may not have been further discussed within BA.

VAA's actions following the contact between *[VAA senior manager B]* and *[BA senior manager B]*

202. Having obtained the information from BA that an increase by £6 would be better than £5, VAA made arrangements to announce an increase to £16 per sector in

²⁸¹ Document 3236, p135: call from *[BA senior manager A]* to *[BA senior manager C]* at 14:01 (45 sec); call from *[BA senior manager A]* to *[BA senior manager C]* at 14:49 (40 sec); call from *[BA senior manager A]* to *[VAA senior manager A]* at 14:52 (2 min, 2 sec). While *[BA senior manager A]* does not recall the detail of his conversation with *[BA senior manager C]*, he believes [...] VAA's intentions regarding a proposed increase: (Document 1150, pp 22-25; Document 1788, p15; Document 3291, p10). *[BA senior manager C]* confirms that he may have spoken with *[BA senior manager A]* about the PFS, since it was under consideration at the time, but denies discussing with *[BA senior manager A]* any contact between *[BA senior manager A]* and *[VAA senior manager A]* on this date: (Document 1477, pp 42, 45-47; Document 1856, pp 120-124).

²⁸² [...] first interview: Document 1150, pp 25-26; [...] second interview: Document 1788, p15; [...] third interview: Document 3291, p10; [...] second interview: Document 1713, pp 114-115, 126-127; [...] witness statement: Document 3207, p7.

²⁸³ Although *[BA senior manager A]* initially thought *[VAA senior manager A]* had discussed the amount of the increase ([...] first interview: Document 1150, pp 23, 25-26), he did not subsequently recall this ([...] second interview: Document 1788, p15; [...] third interview: Document 3291, p10). See also [...] second interview: Document 1713, pp 126-127; [...] witness statement: Document 3207, p7.

²⁸⁴ [...] witness statement: Document 3207, p7.

²⁸⁵ Document 3236, p136: call from *[BA senior manager A]* to *[BA senior manager B]* at 14:57 (1 min, 30 sec); call from *[BA senior manager B]* to *[BA senior manager D]* at 14:59 (38 sec).

²⁸⁶ See fn285 above. See also [...] first interview: Document 1150, pp 23, 26; [...] second interview: Document 1788, p15; [...] third interview: Document 3291, p11; [...] first interview: Document 1148, p45; [...] second interview: Document 1684, pp 60, 70-71.

²⁸⁷ [...] (See [...] third interview: Document 3291, p11; [...] second interview: Document 1684, pp 71-72). See also [...] internal interview summary 29/06/06: Document 3276, p1; [...] internal interview summary 29/06/06: Document 3279, p1, where neither recalled the contact. Although, see [...] internal interview summary 17/07/06: Document 3280, p1, where during the interview process with BA's legal representatives, *[BA senior manager A]*'s recollections had been 'jogged' by the phone records and he recalled informing *[BA senior manager B]*. While he does not address this call specifically, *[BA senior manager D]* denies that *[BA senior manager B]* [...] or that he knew *[BA senior manager A]* and *[VAA senior manager A]* shared information as to intended changes to the PFS: (Document 1895, p10).

its PFS. As *[VAA senior manager C]* stated '*VAA was able to announce an increase to £16 because of the contact with BA. Without the contact, although VAA might have led the increase, we would have done so to £15 and, if BA had not followed, would almost certainly have had to withdraw the increase*'.²⁸⁸

203. The change in the amount of VAA's planned increase is evident from two series of internal VAA emails that afternoon concerning the draft announcement.

(i) *Emails from [VAA manager (pricing)]:*

- At 13:41 (prior to the call between *[VAA senior manager B]* and *[BA senior manager B]* at 14:16), *[VAA manager (pricing)]* requested on *[VAA senior manager A]*'s behalf some figures regarding the PFS history from colleagues in finance and attached a document entitled 'History of Fuel Surcharge', which listed previous PFS amounts but did not contain a figure for the forthcoming PFS increase.²⁸⁹
- At 14:50 (some thirty minutes after the call between *[VAA senior manager B]* and *[BA senior manager B]*), *[VAA manager (pricing)]* emailed *[a VAA employee]* (who was based in the US), informing him that VAA's PFS was being increased by £6 with immediate effect.²⁹⁰
- Shortly thereafter, having received the financial figures she had requested earlier,²⁹¹ *[VAA manager (pricing)]* inserted the information into the 'History of Fuel Surcharge' document and sent it to *[VAA senior manager A]* via email at 15:28.²⁹² This document noted an increase in VAA's surcharge to £16 (but had an incorrect effective date of 22 March).

(ii) *Emails from [VAA press officer 1]:*

- At 13:46 (prior to the call between *[VAA senior manager B]* and *[BA senior manager B]* at 14:16), *[VAA press officer 1]* sent an email to *[VAA senior manager B]* containing a summary of previous PFS amounts and a '*new line to take TBC*'. This '*new line*' stated that VAA would be increasing its PFS by £5 (in line with what *[VAA senior manager C]* had told *[VAA senior manager B]* in his meeting that morning). The '*new line*' did not yet list an effective date.²⁹³

²⁸⁸ [...] witness statement: Document 3208, p10.

²⁸⁹ Document 3102 (email from *[VAA manager (pricing)]* to *[a VAA employee]* on 21/03/2005); Document 3217 ('History of Fuel Surcharge' attachment). The email asked for price per barrel and current average price.

²⁹⁰ Document 3103 (email from *[VAA manager (pricing)]* to *[a VAA employee]* on 21/03/2005).

²⁹¹ *[VAA manager (pricing)]* appears to have received no response to her email of 13:41 requesting figures in support of the PFS and she forwarded her request to *[other VAA employees]* at 14:48 (Document 3218). At 15:12, *[one of the email recipients]* replied by email to *[VAA manager (pricing)]*'s request, supplying monthly average prices for Brent Crude (per barrel) and the current average price (also per barrel) (Document: 3219).

²⁹² Document 3220 (email from *[VAA manager (pricing)]* to *[VAA senior manager A]* on 21/03/2005); Document 3221 ('History of Fuel Surcharge' attachment).

²⁹³ Document 2631 (email from *[VAA press officer 1]* to *[VAA senior manager B]* and others on 21/03/2005).

- At 13:56, *[VAA press officer 1]* created a new draft email detailing the previous PFS amounts and a line to take for the forthcoming PFS increase.²⁹⁴ This draft was not sent. The amount of VAA's PFS increase listed in the draft is £6 and it contained a number of other differences from the text of the 13:46 email, including an (incorrect) effective date. The evidence obtained by the OFT does not establish that the content of the draft email was finalised by 13:56. On the contrary, as set out in Appendix B to this Decision, the evidence indicates that *[VAA press officer 1]* began to create the email at 13:56 and that the information in the draft email was likely amended on a number of occasions subsequently. In particular, *[VAA press officer 1]*'s evidence is that she would have amended it and resaved it during the course of the afternoon as she received updated information.²⁹⁵ The evidence obtained shows that the draft was resaved at 15:15 (i.e. following the 14:16 call between *[VAA senior manager B]* and *[BA senior manager B]*), at 17:52 and 18:06 (when it was saved in her drafts folder).²⁹⁶
 - At 18:32 (following the call between *[VAA senior manager B]* and *[BA senior manager B]*, *[VAA press officer 1]* sent an internal email to a large number of addressees (including *[VAA senior manager B]*), setting out the press office's statement on the new PFS increase (with the correct amount of £6 and correct effective date of 24 March) and stating that '*the press will be briefed on this shortly*'.²⁹⁷
204. Shortly after 18:32, by means of an oral statement, VAA announced an increase in its PFS to £16 with effect from 24 March 2005, which was reported by the Press Association at 19:25.²⁹⁸
205. At 18:53 that evening, *[VAA senior manager B]* sent a text message to *[BA senior manager B]*.²⁹⁹ While he does not have a specific recollection of sending the text, he believes he would have done so in order to confirm that VAA had made its announcement.³⁰⁰

²⁹⁴ Document 2681 (*[VAA press officer 1]* draft email); Document 2924 (*[VAA press officer 1]* draft email: version forwarded in June 2005 to *[VAA senior manager B]*).

²⁹⁵ The OFT has conducted an analysis of the metadata underlying *[VAA press officer 1]*'s draft email, which shows that the email was not sent on 21 March 2005 and that it was created initially at 13:56, resaved a number of times during the afternoon and saved into *[VAA press officer 1]*'s drafts folder at 18:06. *[VAA press officer 1]*'s evidence is that she would have edited and resaved the draft as and when she obtained new information. She also considered that the draft email contained '*useful timeline information for future reference*' and that her practice was to save such types of documents in her drafts folder so that she could go back to them. See Appendix B for a detailed examination of the evidence regarding this draft.

²⁹⁶ See Appendix B for a detailed examination of the metadata of the draft email.

²⁹⁷ Document 2632 (email from *[VAA press officer 1]* to various on 21/03/2005). The statement is in other respects the same as the text of *[VAA press officer 1]*'s draft created at 13:56 in relation to the March 2005 increase.

²⁹⁸ [...] witness statement: Document 3188, p6; [...] witness statement exhibits: Document 3189, p17.

²⁹⁹ Document 3236, p138: call from *[VAA senior manager B]* to *[BA senior manager B]* at 18:53 (1 sec).

³⁰⁰ [...] first interview: Document 1142, p48; [...] second interview: Document 1639, p49; [...] witness statement: Document 3203, p13.

v. 22 March 2005

206. The PFS does not appear to have been considered further within BA following VAA's announcement of the previous evening.³⁰¹
207. At 13:00, BA announced an increase in its PFS to £16 with effect from 28 March 2005.³⁰²

K. June 2005 – Increase to £24 per sector

i. Background

208. In early Summer 2005, fuel prices continued to rise significantly, reaching a then all-time high around US\$60 per barrel.³⁰³

ii. 21 June 2005

209. Within VAA, fuel costs and the PFS were discussed at the 21 June meeting of the Senior Executive Group where *[VAA manager (finance)]*, gave a presentation on the group's financial performance. The minutes of the meeting note a comment made following *[that]* presentation that VAA was '*hesitant to lead any further increase*'.³⁰⁴ *[VAA senior manager B]* and *[VAA senior manager A]* were both present at the meeting and the former also made a handwritten note to the same effect.³⁰⁵
210. There is no record of the amount to which VAA thought the PFS could possibly be increased, but *[VAA senior manager C]*'s recollection is that VAA had thought '*£20 was a target number that would have been not unrealistic in the market*'; equally *[VAA senior manager A]* considered that £20 would have been '*the logical place to go*'.³⁰⁶
211. Within BA, the PFS had been considered at the PFS review group meeting on 17 June but the group had not reached a recommendation on a possible increase at that time.³⁰⁷ The matter was discussed further (at least between Revenue Management and UK&I Sales) and, on the afternoon of 21 June, the decision was taken to increase the PFS by £8 per sector, taking the PFS to £24 per

³⁰¹ *[BA senior manager G]*'s notebook contains a 'to-do list' for 22 March that has an entry '*[...] – Fuel surcharge*' (Document 3170: *[...]* notebook extract). While *[BA senior manager G]* does not specifically recall this item, he considers it most likely to be a follow-up from a conversation he had the previous day with *[BA senior manager J]* that concerned the mechanics/process for PFS review going forward (see Document 3169: *[...]* notebook extract; *[...]* first interview: Document 1676, p47).

³⁰² *[...]* witness statement: Document 1925, pp 12-17.

³⁰³ See *[...]* witness statement exhibits: Document 3189, p24.

³⁰⁴ Document 0882 (SEG meeting minutes), p5; *[...]* witness statement: Document 3195, pp 2-3.

³⁰⁵ Document 0848 (*[...]* notebook extract 21/06/2005), p2; *[...]* second interview: Document 1639, pp 64-66.

³⁰⁶ *[...]* first interview: Document 1146, p58; *[...]* first interview: Document 1144, p66.

³⁰⁷ Document 1401e (emails between *[BA manager (delivery)]* and others 21-22/06/2005); *[...]* second interview: Document 3288, p143.

sector.³⁰⁸ The decision was reported by email to UK&I Sales branch heads by [BA PFS review group member 1] at 19:10 that evening.³⁰⁹

212. [BA PFS review group member 1]'s email stated that [BA manager (delivery)] aimed to have this 'ready for announcement tomorrow afternoon [22 June] with a Monday [27 June] go live date'.³¹⁰ The circulation list of the email included [BA employee (sales)]. At 23:49 the same evening, [BA manager (delivery)] circulated the proposal to [BA senior manager C] and [BA manager (delivery)]'s peers in Revenue Management, again giving an effective date of Monday 27 June, 'subject to comms going out today'.³¹¹ The intention, according to [BA manager (delivery)], was that the proposed increase would go ahead unless someone was 'to shout, "stop!"'.³¹²

iii. 22 and 23 June 2005

213. On 22 June, the BA CLT held the first day of a two-day meeting, during which the decision was taken to postpone the announcement pending further discussion in the following week – an update to this effect was circulated by [BA PFS review group member 1] to UK&I Sales branch heads in the early afternoon of 23 June.³¹³
214. In the meantime, however, on the morning of 22 June, a member of [BA employee (sales)]'s team opened [BA PFS review group member 1]'s earlier email (of 21 June) in [BA employee (sales)]'s absence and forwarded it to his direct reports, advising them that an announcement would be made that afternoon. Two of his direct reports then informed their trade accounts of this.
215. The leak of information came to [BA PFS review group member 1]'s and [BA manager (delivery)]'s attention on the afternoon of 23 June, whereupon all sales managers were requested to withdraw any communications to the trade.³¹⁴ By that time, the information had already been passed, probably by a travel agent, via email to [VAA employee (sales)]. [VAA employee (sales)] forwarded the information to colleagues in pricing at 14:43 in the afternoon and does not recall doing anything further or receiving any response to her email.³¹⁵ The most senior

³⁰⁸ Document 1401e (emails between [BA manager (delivery)] and others 21-22/06/2005); [...] second interview: Document 3288, pp 143-145; Document 0795 (email from [BA PFS review group member 1] to various on 21/06/2005); [...] second interview: Document 1856, pp 132-133.

³⁰⁹ Document 0795 (email from [BA PFS review group member 1] to various on 21/06/2005); [...] Interview: Document 1484, pp 82-84; [...] first interview: Document 1150, p28; [...] second interview: Document 1788, pp 16-17.

³¹⁰ Document 0795 (email from [BA PFS review group member 1] to various on 21/06/2005).

³¹¹ Given the timing of [BA manager (delivery)]'s email, recipients would have been unlikely to read it before 22 June, as is indicated by the timing of the response received from [a BA employee]: Document 1401e (emails between [BA manager (delivery)] and others 21-22/06/2005).

³¹² [...] second interview: Document 3288, p152; [...] second witness: Document 3295, pp 14-15.

³¹³ Document 1205 (email from [BA PFS review group member 1] to various on 23/06/2005); Document 1401C (Commercial Leadership Team meeting minutes); [...] Interview: Document 1484, p83; [...] second witness statement: Document 3297, p13. Although [BA PFS review group member 1] asked in her email for [BA senior manager A] to provide clarity on the decision to postpone (since he was at the Commercial Leadership Team meeting), he does not appear to have responded to the email.

³¹⁴ See reports prepared for internal review of the leak: Document 1401f; Document 1401g.

³¹⁵ Document 3149 (email from [VAA employee (sales)] to various on 23/06/2005). See also [...] interview: Document 3271 and [...] witness statement: Document 3272.

recipient of her email was *[VAA manager (revenue management)]*, who does not recall discussing the information with *[VAA senior manager A]* or anyone else involved in the PFS.³¹⁶ There is no indication from the evidence obtained by the OFT that the information received by *[VAA employee (sales)]* was passed on to any of *[VAA senior manager B]*, *[VAA senior manager A]* or *[VAA senior manager C]*. Equally, there is no indication from the evidence obtained by the OFT that BA was aware that any information had been passed to anyone within VAA.

216. Later in the afternoon, at the end of BA's CLT meeting, *[BA manager (delivery)]* informed *[BA senior manager D]*, *[BA senior manager C]* and *[BA senior manager I]* of the leak. A meeting was called involving *[BA senior manager D]*, *[BA senior manager I]*, *[BA senior manager A]* and *[BA manager (delivery)]* to discuss how to deal with the situation.³¹⁷ The discussions also involved *[BA senior manager C]*, *[BA senior manager H]*, and *[BA senior manager E]*, and continued through the evening.³¹⁸
217. The outcome of the discussions was a decision to bring forward the announcement of the increase to the following day.³¹⁹ At 21:07, an announcement was sent to the London Stock Exchange, embargoed for release until 07:00 on 24 June.³²⁰ At this point, although the decision had been made within BA to announce the following morning, it would have been possible to withdraw the announcement if circumstances changed.³²¹
218. Some five minutes later, following a call from *[BA senior manager D]* at 21:10, *[BA senior manager B]* called *[VAA senior manager B]* at 21:12 and got through to his voicemail.³²² *[VAA senior manager B]* called back at 21:17 and they spoke

³¹⁶ See [...] second interview: Document 3290 and [...] second witness statement: Document 3427. In interview, *[VAA manager (revenue management)]* stated that his '*normal practice*' would have been to '*pass [such an email] on to my manager [VAA senior manager A]*' and '*wait further notice from management on how they wanted to respond*'. However, he cannot recall doing so in this instance (Document 3290, pp 7-8).

³¹⁷ [...] first interview: Document 1150, pp 29-30; [...] second interview: Document 1788, p17; [...] second interview: Document 1684, pp 86-87; [...] second interview: Document 3288 pp 156-159.

³¹⁸ Document 3235, pp 142-146: call from *[BA senior manager D]* to *[BA senior manager C]* at 17:10 (1 min, 3 sec); call from *[BA senior manager D]* to *[BA senior manager C]* at 17:22 (2 min, 40 sec); call from *[BA senior manager D]* to *[BA manager (delivery)]* at 17:38 (14 sec); call from *[BA senior manager D]* to *[BA manager (delivery)]* at 17:42 (8 sec); call from *[BA senior manager D]* to *[BA senior manager H]* at 18:00 (18 sec); call from *[BA senior manager D]* to *[BA senior manager C]* at 18:35 (13 sec); call from *[BA senior manager D]* to *[BA senior manager E]* at 18:36 (5 min, 41 sec); call from *[BA senior manager C]* to *[BA senior manager D]* at 19:16 (3 min, 5 sec); call from *[BA senior manager D]* to *[BA senior manager H]* at 19:31 (14 sec); call from *[BA senior manager H]* to *[BA senior manager D]* at 19:34 (25 sec); call from *[BA senior manager H]* to *[BA senior manager D]* at 19:59 (46 sec); call from *[BA senior manager H]* to *[BA senior manager D]* at 20:14 (1 min, 52 sec); call from *[BA senior manager D]* to *[BA senior manager E]* at 20:54 (35 sec); call from *[BA senior manager D]* to *[BA senior manager C]* at 20:58 (19 sec); call from *[BA senior manager D]* to *[BA manager (delivery)]* at 20:59 (48 sec); call from *[BA senior manager D]* to *[BA senior manager A]* at 21:00 (1 min, 52 sec). See also [...] interview: Document 1485, pp 30-32; [...] first interview: Document 1474, p8.

³¹⁹ [...] second interview: Document 3288 p160; [...] first interview: Document 1474, p8.

³²⁰ [...] witness statement: Document 1925, p18.

³²¹ It would have been possible for BA to retract the submitted announcement '*any time prior to 0700 on 24 June 2005*' by '*either deleting the entry on the system or contacting RNS by telephone, before the intended release time*' ([...] witness statement: Document 1925, p2).

³²² Document 3235, p146: call from *[BA senior manager D]* to *[BA senior manager B]* at 21:10 (46 sec); call from *[BA senior manager B]* to *[VAA senior manager B]* at 21:12 (26 sec). *[VAA senior manager B]*

for just over one minute.³²³ *[VAA senior manager B]* recalls that *[BA senior manager B]* informed him that BA would be announcing an increase of £8 (from £16 to £24 per sector) the following morning. While *[BA senior manager B]* does not recall the detail of the conversation, he does clearly recollect making the call, acting as the '*conduit*' to pass this information to VAA [...].³²⁴

219. Neither *[BA senior manager B]* nor *[VAA senior manager B]* can now recollect exactly how *[VAA senior manager B]* reacted to the information, although both consider it unlikely that he debated or queried the amount of the increase during the call.³²⁵ *[VAA senior manager B]* would typically have ended the call with a statement to the effect that '*we're thinking the same thing*' or '*I wouldn't be surprised if we follow*'.³²⁶
220. Immediately following the call, *[VAA senior manager B]* called *[VAA senior manager D]*, *[VAA senior manager A]* and *[VAA senior manager C]* in quick succession to give them the information he had just received from BA.³²⁷ *[VAA senior manager C]* then had a discussion with *[VAA senior manager D]* and again with *[VAA senior manager B]*, both of which conversations concerned the impending BA increase by £8 and VAA's reaction to it.³²⁸ Both *[VAA senior manager C]* and *[VAA senior manager D]* recall that *[VAA senior manager C]* mentioned the information regarding BA's proposed increase came to VAA's attention through '*another one of [[VAA senior manager B]’s] non-conversations*' with BA.³²⁹
221. *[VAA senior manager B]* recalls that the discussion he had with *[VAA senior manager C]* that evening '*was more one about handling and timing, as much as*

recalls that his phone was on voicemail as he was cycling home from his brother's house having collected some things he needed for Glastonbury that weekend: Document 3203, p14.

³²³ Document 3235, p146: call from *[VAA senior manager B]* to *[BA senior manager B]* at 21:17 (1 min, 25 sec).

³²⁴ [...] first interview: Document 1148, pp 55-58; [...] second interview: Document 1684, pp 82-83. *[BA senior manager D]* denies [...] *[BA senior manager B]* [...] *[VAA senior manager B]*: Document 1474, pp 8-9; Document 1895, p 9. It is unclear to what extent *[BA senior manager B]* was involved in the preparation of the announcement the following day (see Document 1148, p56; Document 1684, p83; Document 3288, pp 162-164) and thus the extent of his knowledge prior to receiving the call from *[BA senior manager D]* at 21:10. The OFT considers that the fact that *[BA senior manager B]*'s call to *[VAA senior manager B]* took place immediately following his call from *[BA senior manager D]* further supports *[BA senior manager B]*'s recollection [...].

³²⁵ [...] first interview: Document 1148, pp 57-58; [...] first interview: Document 1142, p51. The OFT considers that the fact that *[VAA senior manager B]* did not react to or debate the amount of the increase with *[BA senior manager B]* is consistent with *[VAA manager (revenue management)]* not having passed on the 'leak' information, i.e. with *[VAA senior manager B]* hearing this information for the first time.

³²⁶ [...] witness statement: Document 3203, p14; [...] first interview: Document 1142, p51.

³²⁷ Document 3235, p146: calls from *[VAA senior manager B]* to *[VAA senior manager D]* at 21:19 (44 sec); to *[VAA senior manager A]* at 21:20 (2mins; 31 sec); to *[VAA senior manager C]* at 21:23 (4 min, 46 sec). See [...] first interview: Document 1146, pp 59-60, 69; [...] first interview: Document 1144, pp 65-68; [...] second interview: Document 1713, p132.

³²⁸ Document 3235, pp 146-147: call from *[VAA senior manager C]* to *[VAA senior manager D]* at 21:31 (10 min, 50 sec). This call may also have dealt with some Virgin Nigeria issues (see [...] first interview: Document 1146, pp 61-62, 65, 68; [...] second interview: Document 1739, pp 91-92; [...] first interview: Document 1145, pp 41-43, 48-49). Document 3235, p147: call from *[VAA senior manager B]* to *[VAA senior manager C]* at 21:50 (2 min, 5 sec).

³²⁹ [...] first interview: Document 1146, p68; [...] second interview: Document 1739, p101; [...] first interview: Document 1145, p40; [...] second interview: Document 1712, p40.

anything else' and that during the discussions 'it was clear to us that we would increase in line with British Airways'.³³⁰ From [VAA senior manager B]’s perspective, in his call with [VAA senior manager C], he needed to find out 'what my body language would be to any journalists who were calling up that morning [after the BA announcement]. So, you know, if we weren't going to follow, I would have been saying, "We aren't going to follow". The fact is we were, and it was just a matter of time, so that morning, I would have played any media inquiries with a straight bat, whilst preparing the statement we were subsequently going to issue'.³³¹

222. Since VAA was launching new services to Havana and Nassau on the following Monday (27 June) and had scheduled a press conference for that day, [VAA senior manager B] was concerned to get the story out quickly that VAA had followed BA, so that it would be a '*done deal and a dead story*' by the Monday.³³²
- iv. 24 June 2005
223. At 07:00 on Friday 24 June 2005, BA announced an increase in its PFS by £8 per sector (taking the PFS to £24 per sector), with effect from Monday 27 June 2005.³³³
224. A follow-up Press Association announcement at 07:41 stated: '*Virgin looked set to follow BA's lead today after a spokesman said the matter was under review. He added: "It has been actively under review over the past week as oil prices have reached new highs. Clearly we will be looking at it again"*'.³³⁴
225. At 09:10, [VAA senior manager B] circulated an email to VAA's Senior Executive Group (SEG) and the Public Relations department with BA's announcement and VAA's line to take, which stated that VAA had been reviewing its PFS level in recent days and while no final decision had yet been taken, the issue would be reviewed again that day.³³⁵
226. Between 08:58 and 09:28, [VAA senior manager C] had discussions with [VAA senior manager D], [VAA senior manager A] and [VAA senior manager E].³³⁶ [VAA senior manager D] and [VAA senior manager A] recall that the discussions arose out of concerns regarding the level of the increase.³³⁷ At £8 it was the largest increase and it brought the PFS above the £20 threshold, which meant that VAA considered it would be necessary to clearly justify its position to the

³³⁰ [...] first interview: Document 1142, pp 52, 57.

³³¹ [...] first interview: Document 1142, pp 58-59.

³³² [...] second interview: Document 1639, p69; [...] first interview: Document 1142, p54; [...] witness statement: Document 3203, p15.

³³³ [...] witness statement: Document 1925, pp 19-25.

³³⁴ [...] witness statement exhibits: Document 3189, pp 20-26 at p20.

³³⁵ Document 0884 (email from [VAA senior manager B] to various on 24/06/2005).

³³⁶ Call log: Document 1685, p10.

³³⁷ [...] second interview: Document 1712, pp 34-36; see also [...] first interview: Document 1145, pp 48-50; [...] second interview: Document 1713, p141; [...] witness statement: Document 3207, p9. [VAA senior manager C] has no specific recollection of these discussions but supposed they occurred ([...] second interview: Document 1739, pp 97-99). [VAA senior manager E] does not recall discussions regarding the PFS on this date (see Document 1143, pp 38-39).

media and consumers. *[VAA senior manager D]*, in particular, was concerned that she might be questioned by the media at the Havana launch the following Monday and so she wanted to be certain that she '*could be clear and justify any increase in the fuel surcharge that was going to happen*'.³³⁸

227. It is uncertain whether the discussions between these *[senior managers]* at that time proceeded on the basis that a decision had been made to match and the only outstanding issue was managing the PR (as was *[VAA senior manager B]*'s understanding) or whether there was still a genuine debate as to whether VAA would follow BA (given the size of the increase).³³⁹ In any event, having given its holding position to the media, VAA had already begun preparations to announce a matching increase shortly after BA's announcement and these were progressing at the time of the discussions.³⁴⁰
228. At 09:53, *[VAA senior manager B]* sent an email to *[VAA senior manager C]* and *[VAA senior manager A]* with a draft announcement, stating that VAA had '*reluctantly decided to increase its fuel surcharge by £8 per sector on all its tickets sold in the UK from Monday 27????? June 2005*' and providing supporting figures as regards oil prices, the fuel costs for VAA and the proportion of those costs recovered through the PFS in order to justify the increase.³⁴¹ According to *[VAA senior manager B]*, he had '*probably spent part of the previous hour or two trying to chase down*' these figures for the draft announcement.³⁴² Both *[VAA senior manager C]* and *[VAA senior manager A]* confirm that the decision to match had certainly been made by the time that *[VAA senior manager B]* circulated this email.³⁴³
229. In his email, *[VAA senior manager B]* suggested that the announcement should be made that lunchtime or early afternoon, to avoid overshadowing news coverage of Monday's inaugural flight to Havana.³⁴⁴ Work continued on the press announcement during the morning and over lunchtime.³⁴⁵
230. At 11:09, an internal email was circulated within VAA by *[a VAA employee]* announcing that the PFS would increase by £8, with effect from Monday 27 June.³⁴⁶

³³⁸ [...] second interview: Document 1712, p35.

³³⁹ [...] first interview: Document 1146, pp 59-69; [...] second interview: Document 1739; pp 92-98; [...] witness statement: Document 3208, pp 11-12; [...] first interview: Document 1144, pp 72-73, 76.

³⁴⁰ See [...] witness statement: Document 3208, p11; Document 0885. See also the holding statement given to the press (paragraph 224 above).

³⁴¹ Document 0885 (email from *[VAA senior manager B]* to *[VAA senior manager C]* and *[VAA senior manager A]* on 24/06/2005); [...] first interview: Document 1142, pp 53, 56.

³⁴² [...] first interview: Document 1142, p56.

³⁴³ [...] first interview: Document 1146, p64; [...] first interview: Document 1144, pp 72, 76; [...] second interview: Document 1713, p137.

³⁴⁴ Document 0885 (email from *[VAA senior manager B]* to *[VAA senior manager C]* and *[VAA senior manager A]* on 24/06/2005). See also [...] first interview: Document 1142, pp 54, 57; [...] first interview: Document 1144, pp 71-72; [...] second interview: Document 1639, p69.

³⁴⁵ *[VAA senior manager B]* asked *[VAA manager (finance)]* for further finance facts at 11:29 (Document 0886); *[VAA senior manager B]* sent a further draft of the announcement to *[VAA senior manager C]* and *[VAA senior manager A]* at 13:40 (Document 0887); See also [...] witness statement: Document 3203, p15.

³⁴⁶ Document 2971 (email from *[a VAA employee]* to various on 24/06/2005).

231. At 14:06, *[VAA senior manager B]* circulated a draft of the announcement to the SEG and the Public Relations group, which he described as '*a statement we're issuing to the media now*'.³⁴⁷ He forwarded this email to *[PA to VAA senior manager B]* at 14:08, asking her to email the statement to '*the guys from earlier*' and VAA's transport correspondents list.³⁴⁸
232. He then (at 14:09) forwarded the email to *[BA senior manager B]* saying '*[BA senior manager B], fyi – this is going out now*'.³⁴⁹ According to *[VAA senior manager B]*, he did this so that, if BA received calls from journalists, they could let them know quickly that VAA had matched, which would '*hopefully help to get the story out that day to create some distance between the announcement and the inaugural flight on Monday*'.³⁵⁰ *[VAA senior manager B]* also forwarded the email to *[BA manager (public relations)]* within the BA Communications department approximately 10 minutes later.³⁵¹
233. At 16:28, *[VAA senior manager B]* sent the announcement to the Press Association City Desk by email, saying '*Here you go!!!*'.³⁵²
234. Once *[BA senior manager B]* and *[BA manager (public relations)]* had been informed at the time of the announcement that VAA had matched BA, there does not appear to have been any further contact between the two companies as regards this increase.

L. September 2005 – Increase to £30 per sector

i. Background

235. At the end of August/beginning of September, underlying fuel prices were increasing significantly. In particular, Hurricane Katrina, which hit the US coast on 29 August 2005, caused an immediate surge in crude oil prices to over US\$70 per barrel.³⁵³
236. Additionally, for BA at this time, the Gate Gourmet 'wildcat strikes' in early August were continuing to cause significant disruption to their operations and to their press positioning in the UK.³⁵⁴ This impacted on BA's thinking as regards its

³⁴⁷ Document 0888 (email from *[VAA senior manager B]* to various on 24/06/2005).

³⁴⁸ Document 0889 (email from *[VAA senior manager B]* to *[PA to senior manager B]* on 24/06/2005); *[VAA senior manager B]*'s recollection is that 'the guys from earlier' were the journalists who had proactively contacted VAA earlier: (Document 3185, p20; Document 3204, p3).

³⁴⁹ Document 0829 (emails between *[VAA senior manager B]* and *[BA senior manager B]* on 24-25/06/2005). *[BA senior manager B]* responded to the email the following day (25 June 2005), saying '*Great call!*' (Document 0829).

³⁵⁰ [...] witness statement: Document 3203, pp 15-16; [...] third interview: Document 3185, p22.

³⁵¹ Document 1399 (email from *[VAA senior manager B]* to *[BA manager (public relations)]* on 24/06/2005). While *[VAA senior manager B]* does not recall forwarding the email to *[BA manager (public relations)]*, he does recall that he actively wanted the media to know that VAA had followed BA and was '*almost hoping that [BA] might mention [it] in conversation*' and considers it possible that he sent it to *[BA manager (public relations)]* for that purpose (see [...] third interview: Document 3185, p22; [...] second witness statement: Document 3204, p3).

³⁵² Document 1781 (email from *[VAA senior manager B]* to Press Association on 24/06/2005).

³⁵³ See <http://business.timesonline.co.uk/tol/business/economics/article560389.ece>.

³⁵⁴ [...] first interview: Document 1150, p32. The 'wildcat strikes' occurred when BA baggage handlers, loaders and bus drivers went on strike in sympathy with workers who had been sacked by Gate Gourmet, the firm which provided BA's in-flight meals.

ability to alter the PFS ex-UK, making BA more reluctant to lead an increase (see further paragraph 238 below).³⁵⁵

ii. 29 to 31 August 2005

237. Within BA, on 29 August 2005, *[BA manager (delivery)]* sent *[BA senior manager C]* an update on matters that had arisen while the latter had been away on holiday, including the PFS. While the update mainly concerned action on ex-US routes, *[BA manager (delivery)]* noted that he spoke to *[BA senior manager A]*, who had spoken to *[BA senior manager D]*, and that, as regards the PFS level, the '*preference was to wait and see if VS made a move*'.³⁵⁶ The email noted *[BA manager (delivery)]*'s view that that position was likely to hold at least for a few days but also noted who would be available in the event of further debate or a decision to change the PFS (as *[BA manager (delivery)]* was going on leave).³⁵⁷
238. On 31 August 2005, an internal BA email following a PFS review group meeting confirmed that BA had no plans to increase the PFS ex-UK, due to continuing poor press positioning (arising, at least in part, from the Gate Gourmet situation).³⁵⁸ It also confirmed that, if VAA were to increase, BA would follow ex-UK, however the view of the group was that '*a straight match is possibly not best way to go, but rather apply what BA thinks is the right amount*'.³⁵⁹ Various amounts were debated at the meeting to determine the order of magnitude of a possible increase (the number being mooted was an increase from £24 to £32). According to *[BA PFS review group member 3]* (who chaired the meeting in *[BA manager (delivery)]*'s absence), ultimately BA did not increase by this amount, primarily due to issues of credibility in the UK marketplace which meant that BA felt it could not have a premium over its competitors.³⁶⁰

iii. 1 and 2 September 2005

239. On Thursday 1 and Friday 2 September, there were a number of contacts between *[VAA senior manager B]* and *[BA senior manager B]*.³⁶¹ These were primarily concerned with arrangements for an upcoming cricket match to be held on 4 September 2005 at *[VAA senior manager F]*'s residence to mark *[BA senior manager E]*'s departure from BA. This is supported by the wording of an email from *[VAA senior manager B]* to *[BA senior manager B]* at 15:55 on 2 September relating to starting times for the match and other items, referencing

³⁵⁵ See handwritten note by *[BA senior manager G]* on 22 August 2005 regarding an internal PFS discussion, which notes '*reputation concerns*' for the UK (Document 3168: *[BA senior manager G]* notebook extract).

³⁵⁶ Document 1809 (email from *[BA manager (delivery)]* to *[BA senior manager C]* on 29/08/2005). The abbreviation 'VS' is the IATA airline code for VAA.

³⁵⁷ Document 1809 (email from *[BA manager (delivery)]* to *[BA senior manager C]* on 29/08/2005).

³⁵⁸ Document 1811 (email from *[BA PFS review group member 2]* to various on 31/08/2005 and response by *[BA PFS review group member 3]* on 02/09/2005); [...] second interview: Document 3183, pp 63-65.

³⁵⁹ Document 1811 (from *[BA PFS review group member 2]* to various on 31/08/2005 and response by *[BA PFS review group member 3]* on 02/09/2005).

³⁶⁰ [...] second interview: Document 3183, p75.

³⁶¹ Document 3243, pp 4-14: calls on 1 September at 15:38 (2 min, 35 sec), 17:11 (1 min, 59 sec), and 17:18 (23 sec); calls on 2 September at 11:35 (22 sec); 14:10 (25 sec); 15:44 (1 min, 31 sec); 16:31 (36 sec – *[BA senior manager B]* to VAA press office line); 17:21 (10 min, 57 sec); 17:37 (6 sec); 17:38 (44 sec); 17:56 (1 sec – text msg); 18:01 (0 sec – text msg).

previous discussions about the arrangements and also asking *[BA senior manager B]* to 'call me when you get the chance to discuss one or two other points'.³⁶²

240. *[VAA senior manager B]* recalls that, while his discussions with *[BA senior manager B]* related primarily to the cricket match, they also generally covered fuel and the pressure that the price surge following Hurricane Katrina was putting on both airlines; a possibility which *[BA senior manager B]* acknowledges, although he does not recall it.³⁶³ *[VAA senior manager B]*, in particular, notes that the calls on 2 September would have taken place at a time when both Parties were receiving press queries about a possible increase in preparation for pieces in the Sunday press that week and notes also that both airlines took a very similar line with the Sunday papers.³⁶⁴

iv. 4 September 2005

241. The Independent on Sunday ran an article on 4 September concerning the impact of Hurricane Katrina on airlines. It quoted both BA and VAA as saying that they were monitoring the situation closely and that they were reviewing their fuel surcharges. According to the article, '*it is expected that they will increase [their PFSs] this week*'.³⁶⁵

242. That day, the BA/VAA cricket match was held at *[VAA senior manager F]*'s home. Neither *[BA senior manager A]* nor *[BA senior manager B]* attended the cricket match, for personal reasons. Following the match, *[VAA senior manager B]* called *[BA senior manager B]* (at 18:32) to update him on the match score and the day's events.³⁶⁶ The evidence obtained by the OFT does not indicate that the level of PFS was discussed between the Parties at the cricket match.

v. 5 September 2005

243. On the morning of 5 September, discussions took place within VAA about the possibility of increasing the PFS and potentially taking the lead in announcing any such increase. A handwritten note by *[VAA manager (revenue management)]* of a 09:30 staff meeting of *[VAA senior manager A]*'s group notes '*talking about increasing fuel surcharge again to £30 ([VAA senior manager E] and [VAA senior manager C] waiting)*'.³⁶⁷

244. According to *[VAA senior manager A]*, the feeling within VAA was that an increase was necessary and '*our state of mind at the time was that there would*

³⁶² Document 0895 (email from *[VAA senior manager B]* to *[BA senior manager B]* on 02/09/2005); see also [...] first interview: Document 1142, pp 65-66.

³⁶³ [...] first interview: Document 1142, pp 65, 78-79; [...] second interview: Document 1684, pp 121-122.

³⁶⁴ [...] first interview: Document 1142, pp 65-66, 79; [...] second interview: Document 1639, pp 73-75.

³⁶⁵ Document 0934 (Press Article 04/09/2005).

³⁶⁶ Document 3243, p18: call from *[VAA senior manager B]* to *[BA senior manager B]* at 18:32 (9 min, 53 sec). *[VAA senior manager B]* also sent a text to *[BA manager (public relations)]* for the same reason (Document 3243, p18: call from *[VAA senior manager B]* to *[BA manager (public relations)]* at 18:45 (1 sec); see Document 1639, pp 79-80).

³⁶⁷ Document 3178 ([...] notebook extract). *[VAA manager (revenue management)]* does not recall the discussion at this meeting: (Document 3200, p3).

have to be a pretty significant increase and being at, I think, £24, you know, £30 was the obvious number to go to.³⁶⁸

245. Since [VAA senior manager C] was out of the country (as part of a trade delegation to China), the decision to increase the PFS was made primarily between [VAA senior manager A] and [VAA senior manager B], but with the involvement of [VAA senior manager C] to ensure he was comfortable and to get his sign-off on the amount.³⁶⁹ [VAA senior manager D] was also consulted on this increase but does not recall inputting particularly into the decision.³⁷⁰
246. At 12:22 on 5 September, [VAA senior manager B] emailed [VAA senior manager A], [VAA senior manager C] and [VAA senior manager D] to inform them that he had discussed the timing of VAA's increase with [VAA senior manager A]. Since the price of fuel was in the media spotlight at the time, they had agreed to announce an increase at latest on the afternoon of 6 September, although [VAA senior manager B] expressed his preference for waiting until the price of petrol on the forecourts hit £1 per litre. The email gave the amount of the increase as £6 (leading to a £30 PFS) and required some of the financial details to be completed.³⁷¹
247. Given what VAA saw as a favourable media environment at the time (coverage of fuel approaching the US\$70 mark and petrol prices about to hit £1/litre), VAA was confident that it was the right time to announce an increase in its PFS to £30.³⁷² In particular, [VAA senior manager B] states that '*as a result of my conversations with [BA senior manager B] in the preceding days, coupled with the rising price of fuel, I was confident that BA were thinking along the same lines and that they would follow us*'.³⁷³
248. Nonetheless, as [VAA senior manager C] states, '*obviously, we remained nervous about doing it on our own*'³⁷⁴ since if BA hadn't followed, '*it would probably have been unlikely that we would have been able to keep it there*'.³⁷⁵ Although he was no longer involved in VAA's deliberations (since he was engaged with his duties as part of the trade delegation), [VAA senior manager C] '*would have assumed that contact may have occurred and been taken into consideration prior to the increase being announced by VAA*'.³⁷⁶

³⁶⁸ [...] second interview: Document 1713, p165; see also [...] first interview: Document 1142, pp 72, 79.

³⁶⁹ [...] second interview: Document 1713, pp 177-179; [...] first interview: Document 1142, p72; [...] second interview: Document 1639, p81; [...] first interview: Document 1146, p74; [...] second interview: Document 1739, pp 123-124. There was a call between [VAA senior manager C] and [VAA senior manager A] at 11:28 for 4 min, 56 sec during which the PFS was discussed (Document 3243, p21).

³⁷⁰ [...] first interview: Document 1145, pp 58-60; [...] second interview: Document 1712, pp 53-55. See also [...] second interview: Document 1713, p179.

³⁷¹ Document 0898 (email from [VAA senior manager B] to various on 05/09/2005).

³⁷² [...] first interview: Document 1146, pp 70-71; [...] second interview: Document 1739, p117; [...] second interview: Document 1713, p167; [...] second interview: Document 1639, pp 81-82.

³⁷³ [...] witness statement: Document 3203, p19.

³⁷⁴ [...] second interview: Document 1739, p117.

³⁷⁵ [...] first interview: Document 1146, p76.

³⁷⁶ [...] witness statement: Document 3208, p15.

249. At 12:12, [VAA senior manager A] called [BA senior manager A] for 27 seconds (probably leaving a message asking [BA senior manager A] to call him back).³⁷⁷ [VAA senior manager A] was similarly of the view that, although VAA was confident of announcing an increase, it was '*helpful to know that [BA] were going to follow us*'.³⁷⁸
250. At 13:43, [BA senior manager A] received a telephone message from [BA senior manager D], asking him to call him back, which he did at 13:48 for three minutes.³⁷⁹ [BA senior manager A] recalls clearly that [...] [BA senior manager D] [...] [VAA senior manager A] [...] [BA senior manager C].³⁸⁰
251. Immediately following his call with [BA senior manager D], [BA senior manager A] attempted to reach [VAA senior manager A] and, having failed to do so, likely left him a message.³⁸¹ He then attended a UK&I Sales branch heads meeting, which commenced at 14:00.³⁸² At a break in the meeting (at 15:29), [BA senior manager A] again called [VAA senior manager A] and this time spoke to him for over five minutes, following which [BA senior manager A] straight away telephoned [BA senior manager C] and left him two short messages.³⁸³
252. [BA senior manager A]'s recollection is that during his conversation with [VAA senior manager A], [VAA senior manager A] told him of VAA's intention to increase its PFS and to announce first, although he cannot recall definitively whether a figure was mentioned.³⁸⁴ [BA senior manager A] further recalls that his messages to [BA senior manager C] were to update him on the conversation he had had with [VAA senior manager A].³⁸⁵ [BA senior manager C] does not support [BA senior manager A]'s recollection that [...].³⁸⁶ However, [VAA senior

³⁷⁷ Document 3243, p21: call from [VAA senior manager A] to [BA senior manager A] at 12:12 (27 sec); [...] first interview: Document 1144, pp 93-94; [...] first interview: Document 1150, p35; [...] second interview: Document 1788, p23.

³⁷⁸ [...] second interview: Document 1713, p167. When asked whether it was important for VAA to know that BA would also implement the same increase, [VAA senior manager A] stated '*Yes...what we would have done if...we'd gone to £30 and BA had not followed, I don't know*' ([...] first interview: Document 1144, p95).

³⁷⁹ Document 3243, p22: call from [BA senior manager D] to [BA senior manager A] at 13:43 (19 sec); call from [BA senior manager A] to [BA senior manager D] at 13:48 (3 min, 4 sec).

³⁸⁰ [...] first interview: Document 1150, pp 35-36; [...] second interview: Document 1788, pp 23-24. [BA senior manager D] denies [...] [BA senior manager A] [...] [VAA senior manager A] and does not recall speaking to [BA senior manager A] on 5 September ([...] Document 1474, pp 9-10; Document 1895, pp 12-13).

³⁸¹ Document 3243, p22: call from [BA senior manager A] to [VAA senior manager A] at 13:52 (34 sec). See [...] first interview: Document 1150, p36; [...] second interview: Document 1788, p24.

³⁸² [...] first interview: Document 1150, p36; [...] second interview: Document 1788, p24.

³⁸³ Document 3243, p23: calls from [BA senior manager A] to [VAA senior manager A] at 15:29 (5 min, 46 sec); [BA senior manager A] to [BA senior manager C] at 15:35 (39 sec); [BA senior manager A] to [BA senior manager C] at 15:39 (43 sec).

³⁸⁴ [...] first interview: Document 1150, p36; [...] second interview: Document 1788, p24.

³⁸⁵ [BA senior manager A] states that he updated [BA senior manager C] '*as he [...] would need to know the information*'. [BA senior manager A] believed that [BA senior manager C] [...] [BA senior manager D]. See [...] first interview: Document 1150, pp 36-37; [...] second interview: Document 1788, p25.

³⁸⁶ [...] first interview: Document 1477, p55; [...] second interview: Document 1856, pp 157-158.

manager A] believes that he did confirm to *[BA senior manager A]* that VAA would be increasing the PFS to £30.³⁸⁷

253. It does not appear that, in this conversation, *[BA senior manager A]* informed *[VAA senior manager A]* of BA's intentions as regards increasing its own PFS, although he may have let *[VAA senior manager A]* know that he would check with the leadership team and come back to him.³⁸⁸ *[BA senior manager A]*'s impression was that *[VAA senior manager A]* assumed BA would follow.³⁸⁹
254. There were further internal emails within VAA later that afternoon regarding the proposal to announce an increase, in view of media reports that fuel prices were falling. In his email of 16:21, *[VAA senior manager B]* noted that he had the impression from the media that BA were '*briefing against an early increase*' and asked whether VAA should review its timings.³⁹⁰ However, a few moments later, *[VAA senior manager B]* circulated a further story that petrol was nonetheless continuing to increase and so he took the view that VAA could still '*safely increase*' its PFS.³⁹¹ *[VAA senior manager B]* and *[VAA senior manager A]* spoke at 16:29; *[VAA senior manager A]* was convinced at that time that the increase should go ahead.³⁹²

vi. 6 September 2005

255. Early on 6 September, work continued within VAA on finalising the press announcement. At 07:55, *[VAA press officer 2]* circulated the draft announcement to colleagues in the Finance Department, stating that it was to be made that afternoon and requesting some final information, which was provided later that morning/early afternoon.³⁹³
256. At an informal VAA operational meeting that day, *[VAA senior manager A]* reported that VAA was likely to increase its PFS to £30 and to lead the announcement, as recorded in handwritten notes of the meeting taken by *[VAA senior manager B]* and *[VAA manager (finance)]*.³⁹⁴
257. VAA's increase in its PFS was announced to the press at 17:04, by means of an email from *[VAA senior manager B]* to *[a Press Association correspondent]*.³⁹⁵ The increase was announced to be effective from Wednesday 7 September 2005.

³⁸⁷ [...] witness statement: Document 3207, p12; [...] first interview: Document 1144, pp 95-96; [...] second interview: Document 1713, pp 181-182.

³⁸⁸ [...] second interview: Document 1788, pp 24-25; [...] first interview: Document 1144, pp 97-98; [...] second interview: Document 1713, p182; [...] witness statement: Document 3207, p12.

³⁸⁹ [...] first interview: Document 1150, p36; [...] second interview: Document 1788, p24.

³⁹⁰ Document 0899 (email from *[VAA senior manager B]* to various on 05/09/2005).

³⁹¹ Document 0900 (email from *[VAA senior manager B]* to various on 05/09/2005).

³⁹² Document 3243, p24: call from *[VAA senior manager B]* to *[VAA senior manager A]* at 16:29 (2 min, 15 sec). [...] witness statement: Document 3207, p13.

³⁹³ Document 2652 (email from *[VAA press officer 2]* to *[VAA senior manager B]* on 06/09/2005).

³⁹⁴ Document 3171, p2 ([...] notebook extract 06/09/2005); [...] witness statement: Document 3195, pp 3-4; [...] witness statement exhibits: Document 3196, p3.

³⁹⁵ Document 0830 (email from *[VAA senior manager B]* to Press Association on 06/09/2005).

258. Prior to VAA's announcement that day, both *[VAA senior manager B]* and *[VAA senior manager A]* had made contact with BA. *[VAA senior manager A]* sent a text message to *[BA senior manager A]* at 08:49 which he considers may have confirmed VAA's upcoming announcement.³⁹⁶ *[VAA senior manager B]* called *[BA senior manager B]* at 13:17, which he considers would have been to inform BA that the announcement of an increase to £30 would be made that afternoon. He '*[does] not recall [BA senior manager B] being surprised or suggesting a different figure*'.³⁹⁷
259. Shortly after sending the announcement to the Press Association, *[VAA senior manager B]* texted *[BA senior manager B]*, which he does not recall but suspects he did in order to confirm to *[BA senior manager B]* that the announcement had gone out.³⁹⁸
260. The same day, the BA press department created a draft press log stating that BA had decided to increase its PFS to £30 with effect from Monday 12 September. This press log referenced the fact that VAA had put its PFS up to £30 with effect from 7 September.³⁹⁹ The press log was created at 09:47 on 6 September (i.e. in advance of VAA's public announcement), but was worked on subsequently, thus it is not possible to determine exactly when the information regarding VAA's increase was inserted.⁴⁰⁰

vii. 7 September 2005

261. At 09:00 on 7 September, *[BA PFS review group member 1]* attended a weekly meeting of the Revenue Management Leadership Team [...] at which the VAA announcement was discussed.⁴⁰¹ According to *[BA PFS review group member 1]*, who updated her team by email at 12:35, it was agreed to match the VAA increase and the intention was to issue the press release by the end of the day.⁴⁰²

³⁹⁶ Document 3243, p27: call from *[VAA senior manager A]* to *[BA senior manager A]* at 08:49 (1 sec). See Document 3207, p13; Document 1144, pp 101-102. *[BA senior manager A]* does not recall the content of the text message but says that it is possible it related to the PFS (see Document 1788, p25). Given the timing and lack of alternative reason for the text message, the OFT considers it likely that the text was to confirm VAA's upcoming increase.

³⁹⁷ Document 3243, p30: call from *[VAA senior manager B]* to *[BA senior manager B]* at 13:17 (3 min, 33 sec). See [...] witness statement: Document 3203, p20; [...] first interview: Document 1142, pp 79-80; [...] internal interview summary: Document 3037, pp 18-19. *[BA senior manager B]* does not specifically recall being informed by *[VAA senior manager B]* of VAA's intentions but believes that '*that was the course of events*' (See [...] second interview: Document 1684, pp 117, 122). *[BA senior manager D]*'s evidence is that he '*vaguely recall[s] one comment from [BA senior manager B] ... when I think he told me that he had heard that Virgin was going to put its surcharge up*' ([...] second interview: Document 1895, p9). *[BA senior manager D]* cannot '*put a date on*' when *[BA senior manager B]* made this comment, but BA in its 'Analysis of the Evidence Currently Available to BA' considers that this may have been in September 2005 (Document 3282, p51).

³⁹⁸ Document 3243, p33: call from *[VAA senior manager B]* to *[BA senior manager B]* at 17:16 (1 sec). See [...] first interview: Document 1142, pp 75-76; [...] second interview: Document 1639, pp 86-87; [...] witness statement: Document 3203, p21.

³⁹⁹ Document 3058 (BA press log 06/09/2005).

⁴⁰⁰ Document 3058 (BA press log 06/09/2005); [...] witness statement: Document 3426, p3.

⁴⁰¹ [...] first interview: Document 1484, p86.

⁴⁰² Document 0794 (email from *[BA PFS review group member 1]* to various on 07/09/2005).

262. That day, *[BA senior manager A]* was attending a meeting and client lunch at the client's offices. On his way there, he spoke with *[BA senior manager C]* about unrelated issues and then turned off his telephone.⁴⁰³ When the meeting/lunch ended, *[BA senior manager A]* switched his telephone back on and picked up a message that *[BA senior manager C]* had left, asking *[BA senior manager A]* to call him, which he did at 15:21.⁴⁰⁴ According to *[BA senior manager A]*, *[BA senior manager C]* informed him of BA's plan to match VAA [...] *[VAA senior manager A]* although the evidence obtained by the OFT, on balance, does not confirm that *[BA senior manager A]* [...].⁴⁰⁵ In any event, following his call with *[BA senior manager C]*, *[BA senior manager A]* called *[VAA senior manager A]* and informed him of BA's plan to also announce an increase.⁴⁰⁶
263. During the afternoon of 7 September, there were also a number of calls between *[BA senior manager D]* and *[BA senior manager B]* and between *[BA senior manager B]* and *[VAA senior manager B]*.⁴⁰⁷ According to *[BA senior manager B]*, he [...] *[BA senior manager D]* [...] *[VAA senior manager B]* [...] BA's intention to announce a matching increase and [...].⁴⁰⁸ While this is contradicted by *[BA senior manager D]*,⁴⁰⁹ *[VAA senior manager B]* considers it possible that *[BA senior manager B]* did give him this information that afternoon.⁴¹⁰
- viii. 8 September 2005
264. At 09:00 on 8 September 2005, BA announced an increase in its PFS to £30, with effect from 12 September 2005.⁴¹¹

⁴⁰³ Document 3243, p38: call from *[BA senior manager C]* to *[BA senior manager A]* at 10:56 (3 min, 47 sec). See [...] second interview: Document 1788, pp 25-26.

⁴⁰⁴ Document 3243, p42: call from *[BA senior manager C]* to *[BA senior manager A]* at 15:01 (11 sec); call from *[BA senior manager A]* to *[BA senior manager C]* at 15:21 (1 min, 15 sec).

⁴⁰⁵ See [...] first interview: Document 1150, p37; [...] second interview: Document 1788, p26. While *[BA senior manager C]* considers that his call with *[BA senior manager A]* may have been about the PFS, he does not agree [...] *[VAA senior manager A]* [...] second interview: Document 1856, pp 167, 169). *[A BA employee]*, who was with *[BA senior manager A]* and overheard both conversations, confirms the general substance of the conversations [...] ([...] interview: Document 1487, pp 16-21, 23-27, 32-34, 38-42; [...] witness statement: Document 3199, pp 2-3). Additionally, although *[BA senior manager A]* recalled in interview with the OFT that [...] *[BA senior manager C]* [...] *[VAA senior manager A]*, his earlier recollection in interview with BA's legal representatives is inconsistent with this (Document 3280, p3). On balance, therefore, the OFT considers that *[BA senior manager A]* may have [...] *[VAA senior manager A]* [...].

⁴⁰⁶ Document 3243, p42: call from *[BA senior manager A]* to *[VAA senior manager A]* at 15:24 (1 min, 31 sec). See [...] first interview: Document 1150, pp 37-38; [...] second interview: Document 1788, p26. See also [...] second interview: Document 1713, pp 193-194.

⁴⁰⁷ Document 3243, pp 43-44: calls from *[BA senior manager D]* to *[BA senior manager B]* at 16:38 (29 sec); *[BA senior manager B]* to VAA Press Office at 17:20 (9 sec); *[BA senior manager B]* to *[VAA senior manager B]* at 17:21 (32 sec); *[BA senior manager D]* to *[BA senior manager B]* at 18:08 (37 sec). The call records also show a text message from *[VAA senior manager B]* to *[BA senior manager B]* at 18:20 (1 sec), which *[VAA senior manager B]* considered was to congratulate BA on a marketing initiative at that time that centred on the Ashes and garnered a lot of positive publicity (see Document 1142, pp 80-81). *[VAA senior manager B]* also had contact with *[BA senior manager D]* directly to congratulate him on this marketing initiative (see Document 1639, pp 88-90).

⁴⁰⁸ [...] first interview: Document 1148, pp 61-62.

⁴⁰⁹ [...] second interview: Document 1895, p14; see generally [...] interview: Document 1474, pp 8-9, 10.

⁴¹⁰ [...] second interview: Document 1639, p91.

⁴¹¹ BA information request response: Document 1893, p1 and Appendix 6; Document 0831 (BA press statement).

ix. 15 September 2005

265. Although there was no further contact between BA and VAA regarding this increase in PFS level, on 15 September 2005, *[BA senior manager B]* and *[VAA senior manager B]* were in contact regarding some pictures from the cricket match that had been held on 4 September. They had previously decided to hold back publishing pictures in their respective newsletters because it '*would not look good*' to have been '*fraternising*' just before announcing matching PFS increases.⁴¹²

M. November 2005 – VAA decrease to £25 per sector

i. Background

266. Fuel costs declined in the months following Hurricane Katrina. Within VAA it was felt, particularly by *[VAA senior manager B]* and *[VAA senior manager E]*, that if costs were to decline significantly, VAA would have to review its PFS because it had always taken the line with the media that VAA would reduce the PFS if underlying costs reduced.⁴¹³ As *[VAA senior manager B]* stated '*we were there only really under the kind of tacit understanding and support from the public and media...that the surcharges were justified because of the high cost*'.⁴¹⁴

ii. 15 to 17 November

267. At a meeting of VAA's SEG on Tuesday 15 November 2005, senior management discussed the issue of the PFS and it was agreed that VAA's PFS would be reviewed if fuel prices continued to decrease for three months.⁴¹⁵ The decision was not universally popular; the finance and commercial departments were not in favour of a reduction at that time, not least because the PFS was never high enough to actually recover the fuel costs.⁴¹⁶ Since neither *[VAA senior manager C]* nor *[VAA senior manager B]* was present at the meeting, *[VAA senior manager E]* felt he was '*pretty much a lone voice*' in arguing in favour of a reduction from a strategic, brand reputation point of view.⁴¹⁷
268. At this time, *[VAA senior manager B]* was in Dubai, but he was informed on 16 November by one of VAA's press officers that the Sunday Times had contacted VAA, pointing out that fuel prices had fallen and asking whether VAA intended to reduce its PFS. *[VAA senior manager B]* dictated an email to be sent by his secretary to *[VAA senior manager A]*, *[VAA senior manager C]*, *[VAA senior manager D]* and *[VAA senior manager E]*, requesting that VAA's PFS position be

⁴¹² [...] first interview: Document 1148, p62; [...] first interview: Document 1142, pp 77-78; [...] witness statement: Document 3203, p21. See also Document 0850 (email from *[VAA senior manager B]* to *[VAA press officer 2]* on 07/09/2005).

⁴¹³ [...] first interview: Document 1142, pp 82, 87; [...] witness statement: Document 3203, p22; [...] first interview: Document 1143, p45; See also [...] first interview: Document 1145, pp 60-61.

⁴¹⁴ [...] first interview: Document 1142, p82.

⁴¹⁵ Document 0906, p4 (SEG meeting minutes 15/11/2005).

⁴¹⁶ [...] first interview: Document 1145, p61; [...] first interview: Document 1143, pp 45-46; [...] first interview: Document 1144, pp 104-105; [...] witness statement: Document 3207, p13.

⁴¹⁷ [...] first interview: Document 1143, p45; [...] second interview: Document 1714, pp 88-89. For attendance at the meeting, see Document 0906 (SEG meeting minutes 15/11/2005).

discussed upon his return to the office at the end of the week.⁴¹⁸ [VAA senior manager C] recalls receiving this email and was in favour of reducing the level of VAA's PFS.⁴¹⁹ [VAA senior manager D] and [VAA senior manager A] were both away ([VAA senior manager D] in Nigeria; [VAA senior manager A] in Japan) at the time and did not see the email.⁴²⁰

269. On 17 November, [VAA senior manager E]'s deputy sent him an email (copied to [VAA senior manager B]) noting some press coverage of the fact that VAA's latest increase was in September when oil prices reached US\$70 per barrel and that oil prices had now dropped below US\$60 per barrel.⁴²¹ [VAA senior manager E] emailed [VAA senior manager C] asking him to take a decision on VAA leading a reduction in the PFS (since it would '*take a "just do it" edict from the top (ie you)...to make it happen'*).⁴²²

iii. 18 November 2005

270. [VAA senior manager B] emailed [VAA senior manager A], [VAA senior manager C], [VAA senior manager D] and [VAA senior manager E] again on the morning of 18 November (at 10:32), explaining that the press office had received further press contact on the PFS issue and expressing the view that VAA should reduce its PFS back to its previous level of £24.⁴²³ [VAA senior manager B] recalls that he had '*had a general conversation about fuel with [BA senior manager B] at some point between the end of September and early November ... [and that they] agreed that a sustained reduction in fuel costs would require a reduction in the fuel surcharge*'.⁴²⁴ [VAA senior manager B] therefore wrote in his email to [VAA senior manager A], [VAA senior manager C], [VAA senior manager D] and [VAA senior manager E] that he would be '*amazed if BA didn't follow us but ... [VAA] should take the lead – and any benefit that goes with it*'.⁴²⁵
271. In the same email, [VAA senior manager B] also suggested that VAA '*tip BA off first then announce it this morning*'.⁴²⁶ [VAA senior manager C] says that he did not notice the reference to 'tipping off' in this email and would have been surprised by that reference because '*given that we knew this was sensitive, it was probably unwise to write that in an email*'.⁴²⁷ [VAA senior manager A] did

⁴¹⁸ Document 0833 (email from [VAA senior manager B] to various on 16/11/2005); [...] first interview: Document 1142, pp 82-83; [...] witness statement: Document 3203, p22.

⁴¹⁹ [...] first interview: Document 1146, pp 77-79; [...] witness statement: Document 3208, p15.

⁴²⁰ [...] first interview: Document 1145, p61; [...] first interview: Document 1144, pp 105-106.

⁴²¹ Document 0908 (email from [VAA deputy to senior manager E] to [VAA senior manager E] and others on 17/11/2005). [VAA deputy to senior manager E] was present at the SEG meeting the previous day (see Document 0906: SEG meeting minutes 15/11/2005; Document 1143, p48).

⁴²² Document 0909 (email from [VAA senior manager E] to [VAA senior manager C]); See [...] first interview: Document 1143, pp 46-47.

⁴²³ Document 0834 (email from [VAA senior manager B] to various on 18/11/2005); [...] first interview: Document 1142, pp 85-86.

⁴²⁴ [...] witness statement: Document 3203, p23. See also [...] first interview: Document 1142, pp 86-87. However, [BA senior manager B] denies that he and [VAA senior manager B] had discussed the need to reduce the PFS in the event that oil prices fell: (Document 1684, p124).

⁴²⁵ Document 0834 (email from [VAA senior manager B] to various on 18/11/2005).

⁴²⁶ Document 0834 (email from [VAA senior manager B] to various on 18/11/2005).

⁴²⁷ [...] first interview: Document 1146, pp 80, 85; [...] witness statement: Document 3208, p16. In his second interview, [VAA senior manager C] stated that he did not specifically recall conversations about tipping BA off about the reduction and that '*I think where we were was that we felt that we had to do*

not see the email until his return from Japan on 19 November but says that '*by this stage in the process, I mean, there'd been enough contacts [between VAA and BA] that, really, I didn't have any reaction to [the "tipping off" reference]*'.⁴²⁸

272. *[VAA senior manager E]* responded to *[VAA senior manager B]*'s email at 11:18, expressing his agreement with the proposed reduction and then emailed *[VAA senior manager B]* separately about 20 minutes later, to inform him that *[VAA senior manager C]* was also in agreement.⁴²⁹ At 11:52, *[VAA senior manager B]* had a telephone call with *[VAA senior manager F]*, who recalls giving *[VAA senior manager B]* support for such a reduction in VAA's PFS.⁴³⁰
273. Early that afternoon, *[VAA senior manager B]* sent an internal circular email noting that '*following discussions with [VAA senior manager F], [VAA senior manager D] etc*' VAA planned to reduce its PFS to £25 and to announce the reduction that afternoon.⁴³¹ It was decided that the amount of the new PFS should be £25, rather than the £24 that *[VAA senior manager B]* had suggested, so as not to raise the expectation that VAA would follow the same steps in reducing the PFS as it did when increasing it.⁴³²
274. At 15:29, *[VAA senior manager B]* circulated a proposed press statement within VAA setting out the decision to reduce the PFS to £25, stating that the announcement was '*going out...now*'.⁴³³
275. However, prior to making the public announcement, *[VAA senior manager B]* attempted repeatedly between 15:31 and 15:40 to contact *[BA senior manager B]* at BA (*[BA senior manager B]* was attending a school reunion that day and was not contactable).⁴³⁴ *[VAA senior manager B]* did so to let *[BA senior*

this and we wanted to be the first to do it because we were just very worried about journalists or the media really getting on top of us, and it not looking good so we were driving this very much on our own. (...) second interview: Document 1739, p134).

⁴²⁸ (...) first interview: Document 1144, p107.

⁴²⁹ Document 0910 (email from *[VAA senior manager E]* to various on 18/11/2005); (...) first interview: Document 1143, pp 47-48; see also (...) first interview: Document 1146, pp 82-83; (...) second interview: Document 1739, pp 135-136; (...) witness statement: Document 3208, p16.

⁴³⁰ Document 3239, p167: call from *[VAA senior manager B]* to *[VAA senior manager F]* at 11:52 (14 min, 18 sec). See (...) first interview: Document 3292, pp 73-74; (...) second interview: Document 1654, pp122-123, 128. See also (...) second interview: Document 1639, p95.

⁴³¹ Document 0912 (email from *[VAA senior manager E]* to *[VAA senior manager B]* on 18/11/2005). It had earlier been considered that the announcement would have to be put back until the following Monday because of a potential clash with a separate announcement on 'open skies'. However, the 'open skies' announcement was moved shortly thereafter (see Document 0911; Document 0912). *[VAA senior manager D]* does not recall any specific discussions at this time and considers that *[VAA senior manager B]* may have been referring to a general discussion prior to her departure for Nigeria on 16 November 2005 (see Document 1145, pp 63-64; see also Document 1712, pp 60-62).

⁴³² The size of the reduction had been debated in various emails between *[VAA senior manager B]*, *[VAA senior manager E]* and *[VAA senior manager C]* (Document 0911; Document 0912; Document 0913). See also (...) first interview: Document 1142, p84; (...) second interview: Document 1739, pp 137-138; (...) witness statement: Document 3203, p22.

⁴³³ Document 0913 (email from *[VAA senior manager B]* to various on 18/11/2005). The announcement was circulated via email by *[VAA press officer 2]* to her counterparts at 15:44 (Document 1783).

⁴³⁴ Document 3239, p171: calls from *[VAA senior manager B]* to *[BA senior manager B]* at 15:31 (1 min, 34 sec); at 15:33 (35 sec); at 15:35 (1 sec); at 15:36 (35 sec); at 15:39 (31 sec); and at 15:40 (20 sec). As to *[BA senior manager B]*'s movements that day, see Document 1148, p68.

manager B] know that VAA was going to announce a reduction in its PFS and to get some 'reassurance' that VAA was 'doing the right thing'.⁴³⁵

276. Having failed to reach *[BA senior manager B]* directly, and '*in desperation to speak to someone at BA about VAA's intention to reduce [the surcharge]*', *[VAA senior manager B]* telephoned *[BA manager (public relations)]*.⁴³⁶ *[BA manager (public relations)]* [...] (reporting to *[BA senior manager B]*) and he and *[VAA senior manager B]* had had '*reasonably regular*' contact previously in relation to industry-wide projects and the arrangements for the BA/VAA cricket match (although *[VAA senior manager B]* had never discussed the PFS with him before).⁴³⁷
277. *[VAA senior manager B]* informed *[BA manager (public relations)]* that VAA was about to announce a reduction of £5 to its PFS (that is, reducing its PFS to £25) because of queries from the media about the level of oil prices and that BA may receive calls from the media as a result.⁴³⁸ *[BA manager (public relations)]* did not signal BA's intentions in return.⁴³⁹
278. *[BA manager (public relations)]* immediately went to *[BA senior manager D]*'s desk and told him that VAA was announcing a reduction in its PFS to £25, whereupon *[BA senior manager D]* called a meeting with *[BA senior manager C]* and one other person.⁴⁴⁰ While *[BA senior manager D]* does not recall this,⁴⁴¹ both *[BA senior manager C]* and *[BA employee (fuel risk)]* recall discussing VAA's proposed reduction in a meeting with *[BA senior manager D]*.⁴⁴² *[BA employee (fuel risk)]*, who was responsible for preparing fuel cost graphs for the PFS review group, was there because he was asked by *[BA senior manager C]* to '*pull together one of [his] graphs and come along to the meeting*'.⁴⁴³
279. VAA announced the reduction in its PFS to £25 at 16:00 by way of email to *[a Press Association correspondent]* and it was released publicly by the Press Association at 16:30.⁴⁴⁴ *[BA manager (public relations)]* made copies of the

⁴³⁵ [...] witness statement: Document 3203, p23. See also [...] first interview: Document 1142, p88.

⁴³⁶ Document 3239, p171: call from *[VAA senior manager B]* to *[BA manager (public relations)]* at 15:40 (6 min, 51 sec). See [...] witness statement: Document 3203, p23.

⁴³⁷ [...] first interview: Document 1149, pp 9-10, 26-27; [...] witness statement: Document 3201, p2; [...] first interview: Document 1142, pp 88-89; [...] witness statement: Document 3203, p23.

⁴³⁸ [...] first interview: Document 1142, p89; [...] witness statement: Document 3203, p23; [...] first interview: Document 1149, p3; [...] second interview: Document 1890, pp 21-22; [...] witness statement: Document 3201, p4; Document 1680 (*[BA manager (public relations)]* handwritten note: for interpretation of this document, which is in shorthand, see Document 1890, p40).

⁴³⁹ [...] first interview: Document 1142, p89.

⁴⁴⁰ [...] first interview: Document 1149, pp 3-4, 13-15; [...] second interview: Document 1890, pp 22-23; [...] witness statement: Document 3201, pp 4-5. *[BA manager (public relations)]* recalls that *[BA senior manager D]* telephoned some people once *[BA manager (public relations)]* had given him the news, which he assumed was to invite them to a meeting: (Document 1149, pp 14-15). Telephone records show a call from *[BA senior manager D]* to *[BA senior manager C]* at 15:49 for 49 seconds (Document 3239, p171).

⁴⁴¹ [...] second interview: Document 1895, pp 14-15.

⁴⁴² [...] first interview: Document 1477, p61; [...] second interview: Document 1856, p176; [...] second interview: Document 3184, pp 5-7, 14-15.

⁴⁴³ [...] second interview: Document 3184, p6.

⁴⁴⁴ Document 0832 (email from *[VAA senior manager B]* to *[a Press Association correspondent]* at 16:00 stating '*You're the first to receive it!!!!*'). For the release of the announcement at 16:30, see Document 3188, p8; Document 3189, p30.

announcement and brought them in to the meeting, giving *[BA senior manager D]* and *[BA senior manager C]* an indication of what he was drafting as a possible statement in case BA decided to reduce its PFS as a result.⁴⁴⁵ He was there for a few minutes while *[BA senior manager D]* and *[BA senior manager C]* considered the issue and, approximately ten minutes after he left the meeting, *[BA senior manager D]* informed him that BA would not match VAA's reduction in PFS.⁴⁴⁶ Both *[BA senior manager C]* and *[BA employee (fuel risk)]* also recall *[BA manager (public relations)]* coming to the meeting with a copy of the announcement.⁴⁴⁷

280. A number of calls took place that afternoon between the time *[VAA senior manager B]* informed *[BA manager (public relations)]* of VAA's upcoming announcement and 16:32 (just after the announcement was released by the PA):⁴⁴⁸

- The first series of calls involved *[BA senior manager A]*.⁴⁴⁹ He was called by *[BA senior manager C]* at 15:55 and he then called *[VAA senior manager A]* at 16:03. As he could not reach *[VAA senior manager A]*, he left a message. He called *[BA senior manager C]* back at 16:58 (after *[BA senior manager C]* had left him a message at 16:56). While *[BA senior manager A]* has no distinct recollection of the second call with *[BA senior manager C]* (which he thinks was simply updating *[BA senior manager C]* that he had left a message for *[VAA senior manager A]*), he recalls that in the earlier conversation he was informed by *[BA senior manager C]* that VAA had reduced its PFS [...] *[VAA senior manager A]* to find out why.⁴⁵⁰ *[BA senior manager C]* considers that he may have spoken to *[BA senior manager A]* about VAA's reduction in its PFS but did not [...] *[VAA senior manager A]*.⁴⁵¹
- The second series of calls involved *[BA senior manager B]*.⁴⁵² *[BA senior manager C]* called and left *[BA senior manager B]* a message at 16:03, which *[BA senior manager B]* picked up together with the earlier message from *[VAA senior manager B]*, at 16:08 (when he checked his telephone

⁴⁴⁵ [...] first interview: Document 1149, pp 4, 16-17; [...] witness statement: Document 3201, p5.

⁴⁴⁶ [...] first interview: Document 1149, pp 4, 18; [...] witness statement: Document 3201, p5.

⁴⁴⁷ [...] second interview: Document 1856, pp 184-185; [...] second interview: Document 3184, pp 17-19 (*[BA employee (fuel risk)]* does not know *[BA manager (public relations)]*). While he recalled a man coming to the meeting with the press announcement, he could not identify that man).

⁴⁴⁸ *[BA manager (public relations)]*'s recollection is that the call from *[VAA senior manager B]* (which took place at 15:40) was very close in time to when BA picked up the Press Association announcement on the wire (Document 1149, p8) and he placed the time of the Press Association announcement at about ten minutes past four in his witness statement ([...] witness statement: Document 3201, p5). In fact, the announcement was not released by the Press Association until 16:30 (see fn444 above).

⁴⁴⁹ Document 3239, pp 171-173: call from *[BA senior manager C]* to *[BA senior manager A]* at 15:55 (41 sec); call from *[BA senior manager A]* to *[VAA senior manager A]* at 16:03 (31 sec); call from *[BA senior manager C]* to *[BA senior manager A]* at 16:56 (42 sec); call from *[BA senior manager A]* to *[BA senior manager C]* at 16:58 (2 min, 4 sec).

⁴⁵⁰ [...] first interview: Document 1150, pp 45-46; [...] second interview: Document 1788, pp 27-28. See also [...] internal interview summary: Document 3280, pp 3-4.

⁴⁵¹ [...] first interview: Document 1477, p60; [...] second interview: Document 1856, pp 176-178, 183-184. In any event, *[BA senior manager A]* did not reach *[VAA senior manager A]* at this time, as *[VAA senior manager A]* was in Japan (see Document 1713, pp 214-215; Document 1150, p46).

⁴⁵² Document 3239, p172: call from *[BA senior manager C]* to *[BA senior manager B]* at 16:04 (45 sec); *[BA senior manager B]* picks up voicemail at 16:08; call from *[BA senior manager B]* to *[BA senior manager C]* at 16:11 (40 sec).

messages at the school reunion). *[BA senior manager B]* then called *[BA senior manager C]* back at 16:11. He presumes, although he cannot recall, that at this point he relayed to *[BA senior manager C]* the news that *[VAA senior manager B]* had given him in his message (assuming that *[VAA senior manager B]* did leave him a message regarding VAA's intentions).⁴⁵³

Following this, *[BA senior manager B]* called *[VAA senior manager B]* at 16:13, *[BA senior manager C]* at 16:19 and *[VAA senior manager B]* again at 16:27.⁴⁵⁴ Again, while he cannot recall, *[BA senior manager B]* believes that he discussed with *[BA senior manager C]* BA's response to the reduction in PFS by VAA and [...] *[VAA senior manager B]* know that the issue was '*under review*' within BA.⁴⁵⁵ *[BA senior manager C]* considers that he may have discussed the reduction and general press gossip about fuel surcharges with *[BA senior manager B]* but denies that [...] VAA and the evidence obtained by the OFT, on balance, does not confirm [...] *[BA senior manager B]* [...].⁴⁵⁶

- Finally, although neither recalls having a further conversation, records show a call from *[BA manager (public relations)]* to *[VAA senior manager B]* at 16:32.⁴⁵⁷

281. For his part, *[VAA senior manager B]* recalls that at some point after VAA had announced the reduction in its PFS, *[BA senior manager B]* did make contact and give him some general degree of comfort that VAA had '*made the correct decision*'.⁴⁵⁸

iv. 19 to 22 November 2005

282. After his return from Japan on 19 November, *[VAA senior manager A]* left a voicemail message for *[BA senior manager A]*, apologising for not having informed *[BA senior manager A]* of VAA's decision to reduce its PFS because '*by then, obviously, there'd been a sort of practice had built up [sic] erm between the two airlines of er tipping each other off as to when fuel surcharge increases or fuel surcharges were going to be moved*'.⁴⁵⁹

⁴⁵³ [...] first interview: Document 1148, pp 68-69; [...] second interview: Document 1684, pp 124-127.

⁴⁵⁴ Document 3239, p172: call from *[BA senior manager B]* to *[VAA senior manager B]* at 16:13 (5 min, 32 sec); call from *[BA senior manager B]* to *[BA senior manager C]* at 16:19 (7 min, 32 sec); call from *[BA senior manager B]* to *[VAA senior manager B]* at 16:27 (2 min, 2 sec). Telephone records show a second call from *[BA senior manager B]* to *[VAA senior manager B]* at 16:14 for 4 min, 2 sec. This would put the call as taking place during the call from *[BA senior manager B]* to *[VAA senior manager B]* at 16:13.

⁴⁵⁵ [...] first interview: Document 1148, p69; [...] second interview: Document 1684, pp 125-128.

⁴⁵⁶ [...] first interview: Document 1477, pp 62-63; see also [...] second interview: Document 1856, pp 179-180, 187-189. *[BA senior manager B]* was at a school reunion at the time and had been '*enjoying a few beverages*' [...] second interview: Document 1684, p124). He cannot recall in any detail his conversations with either of *[BA senior manager C]* or *[VAA senior manager B]*. Additionally, it appears that he did not recall anything about these calls in his earlier interview with BA's legal representatives [...] internal interview summary: Document 3277, p1).

⁴⁵⁷ Document 3239, p173: call from *[BA manager (public relations)]* to *[VAA senior manager B]* at 16:32 (39 sec). See [...] witness statement: Document 3201, pp 5-6; [...] first interview: Document 1142, p89.

⁴⁵⁸ [...] second interview: Document 1639, p96; [...] first interview: Document 1142, p 91; [...] witness statement: Document 3203, p23.

⁴⁵⁹ Document 3239, p182: call from *[VAA senior manager A]* to *[BA senior manager A]* at 18:30 (47 sec). See [...] first interview: Document 1144, pp 111-112. See also [...] second interview: Document 1713,

283. *[VAA senior manager A]* and *[BA senior manager A]* subsequently had a conversation on 22 November 2005 to the same effect.⁴⁶⁰ *[BA senior manager A]* considers that he may have informed *[VAA senior manager A]* that BA would not be following with a similar reduction in its PFS, although as *[BA senior manager A]* notes, that '*would have been obvious to him*' at that point.⁴⁶¹

N. January 2006 – VAA increase to £30 per sector

i. Background

284. Since November 2005, fuel prices had continued to rise, leading VAA to reconsider the level of its PFS. An additional consideration for VAA was the fact that BA's PFS had remained at £30 in the intervening period.

ii. December 2005

285. On 6 December, following discussions with *[VAA senior manager F]*, *[VAA senior manager B]* emailed those involved in the PFS, noting a recent increase in fuel prices and VAA's worsening fuel cost situation. In light of this, he and *[VAA senior manager F]* had considered that the current level of PFS should be increased (possibly to an amount of £1 less than BA's PFS). *[VAA senior manager B]* also passed on *[VAA senior manager F]*'s query as to whether VAA had benefitted from the PFS reduction.⁴⁶²

286. Both *[VAA senior manager A]* and *[VAA senior manager E]* responded in favour of increasing the PFS, with *[VAA senior manager A]* noting that in his view, there had not been '*any discernible positive effect on selling*' as a result of the reduction.⁴⁶³ Both were wary of increasing to £1 less than BA for the sake of it.⁴⁶⁴ *[VAA manager (revenue management)]* joined the discussion on 7 December, agreeing with *[VAA senior manager A]* and *[VAA senior manager E]* as regards increasing to just under the amount of BA's PFS and confirming that

pp 215-216. *[BA senior manager A]* does not recall specifically the content of this message (Document 1150, p46; Document 1788, p28).

⁴⁶⁰ Document 3239, pp 196-197: call from *[VAA senior manager A]* to *[BA senior manager A]* at 11:00 (35 sec); call from *[BA senior manager A]* to *[VAA senior manager A]* at 11:08 (5 min, 20 sec). See [...] first interview: Document 1150, p46; [...] second interview: Document 1788, p28; see also [...] first interview: Document 1144, pp 112-114.

⁴⁶¹ [...] second interview: Document 1788, p28. An email summarising a PFS review group meeting on 29 November 2005 provides greater detail on the commercial considerations feeding into BA's decision not to reduce the PFS at that time and its medium to long-term potential strategies (Document 3067).

⁴⁶² Document 0851 (emails between *[VAA senior manager B]*, *[VAA senior manager A]* and *[VAA senior manager E]* on 06/12/2005).

⁴⁶³ Document 0851 (emails between *[VAA senior manager B]*, *[VAA senior manager A]* and *[VAA senior manager E]* on 06/12/2005). *[VAA senior manager A]* had not been in favour of the reduction in PFS which took place in November because he did not consider it commercially sensible, but at that time, he was in Japan and the decision to reduce was taken in his absence (see [...] diary entry: Document 3180a, pp 55, 57; [...] witness statement: Document 3207, pp 13-14).

⁴⁶⁴ Document 0851 (emails between *[VAA senior manager B]*, *[VAA senior manager A]* and *[VAA senior manager E]* on 06/12/2005). *[VAA senior manager C]* was of a similar view: As he stated: '*given that a £5 differential had not made a difference, I took the view that this was unwise as it would not stimulate demand and would simply cause irritation and confusion in the market*'. [...] witness statement: Document 3208, p17).

there was no noticeable increase in demand as a result of VAA's PFS reduction.⁴⁶⁵

287. While *[VAA press officer 1]* began preparing a draft line to take, *[VAA senior manager B]* discussed the matter with *[VAA senior manager F]* and *[VAA senior manager D]* and, subject to views from their US colleagues that the reduction had had a significant positive effect, agreed that once fuel reached US\$60 per barrel, the PFS would be increased back to BA's level (£30).⁴⁶⁶
288. *[VAA senior manager A]* and *[VAA senior manager C]* responded to *[VAA senior manager B]*, expressing agreement with this proposal (which *[VAA senior manager D]* also supported).⁴⁶⁷ *[VAA senior manager C]* suggested that VAA should '*let [the fuel price] settle*' above US\$60 per barrel for a few days, otherwise VAA would '*look a right bunch*', since the reduction had only been in place for a couple of weeks at that point.⁴⁶⁸ *[VAA senior manager E]* forwarded *[VAA senior manager C]*'s message to *[VAA press officer 1]* in case it impacted on the wording of any line to take.⁴⁶⁹
289. The position was settled over the coming days, with discussions between *[VAA senior manager B]*, *[VAA senior manager E]*, *[VAA senior manager A]* and *[VAA senior manager C]* regarding the timing of an announcement and requesting *[VAA manager (finance)]* to update them on the price of fuel.⁴⁷⁰ By 19 December 2005, the price of fuel had not remained steadily over US\$60 and so no action was taken.⁴⁷¹

iii. January 2006

290. The price of fuel exceeded US\$60 per barrel on Tuesday 3 January and remained there until 5 January, according to an update by *[VAA manager (finance)]*.⁴⁷² As a result, *[VAA senior manager B]* proposed putting the PFS back up to £30 the following day if the price remained over US\$60 per barrel; *[VAA senior manager A]* agreed.⁴⁷³

⁴⁶⁵ Document 0916 (emails between *[VAA senior manager A]*, *[VAA senior manager E]*, *[VAA senior manager B]* and *[VAA manager (revenue management)]* on 06-07/12/2005).

⁴⁶⁶ Document 2850 (email from *[VAA press officer 1]* to *[VAA senior manager B]* on 07/12/2005); Document 2770 (email from *[VAA press officer 1]* to *[VAA senior manager B]* on 07/12/2005); Document 0916 (emails between *[VAA senior manager A]*, *[VAA senior manager E]*, *[VAA senior manager B]* and *[VAA manager (revenue management)]* on 06-07/12/2005).

⁴⁶⁷ [...] second interview: Document 1712, pp 63-64.

⁴⁶⁸ Document 0917 (emails between *[VAA senior manager A]*, *[VAA senior manager E]*, *[VAA senior manager B]*, *[VAA manager (revenue management)]* and *[VAA senior manager C]* on 06-07/12/2005); [...] second interview: Document 1739, p149; [...] first interview: Document 1142, pp 94-95.

⁴⁶⁹ Document 2700 (email from *[VAA senior manager E]* to *[VAA press officer 1]* on 07/12/2005).

⁴⁷⁰ Document 0919 (emails between *[VAA senior manager A]*, *[VAA senior manager E]*, *[VAA senior manager B]*, *[VAA manager (revenue management)]* and *[VAA senior manager C]* on 06-09/12/2005); see also [...] first interview: Document 1143, pp 54-55; Document 3073 (email from *[VAA senior manager B]* to various on 19/12/2005).

⁴⁷¹ Document 3073 (email from *[VAA senior manager B]* to various on 19/12/2005).

⁴⁷² Document 2660 (email from *[VAA manager (finance)]* to *[VAA senior manager B]* and *[VAA senior manager A]* on 05/01/2006).

⁴⁷³ Document 0920 (emails between *[VAA senior manager B]*, *[VAA senior manager A]*, *[VAA manager (finance)]* and others on 05/01/2006).

291. On 6 January 2006, *[VAA press officer 2]* noted in an email to *[VAA senior manager C]* (sent at 12:14) that the fuel price was still above US\$60 per barrel and asked *[VAA senior manager C]* to approve a statement to the press announcing an increase in VAA's PFS to £30.⁴⁷⁴ At 13:14, *[VAA senior manager C]* telephoned *[VAA senior manager A]*, during which call he believes that he may have agreed with *[VAA senior manager A]* to increase the PFS.⁴⁷⁵ Immediately thereafter, *[VAA senior manager C]* called *[VAA press officer 2]*, '*probably just about making sure that ... we were ready with a line to take*' and *[VAA press officer 2]* circulated the approved line to take at 13:21.⁴⁷⁶
292. Fifteen minutes after speaking to *[VAA senior manager C]*, '*because of the practice that had built up since August 2004*', *[VAA senior manager A]* called *[BA senior manager A]* and informed him that VAA had decided to increase its PFS to £30.⁴⁷⁷
293. At 15:46, VAA announced an increase in its PFS to £30 via an email to the Press Association, with an effective date of 9 January 2006.⁴⁷⁸
294. That afternoon *[BA employee (sales)]* received a copy of the announcement via the trade and forwarded it to *[BA senior manager A]* and *[BA senior manager D]* via email.⁴⁷⁹ *[BA senior manager A]* responded that '*[VAA senior manager A] called me at lunchtime to let me know that they would announce tonight. He was happy that he had "had his way". It's great news...*'.⁴⁸⁰

⁴⁷⁴ Document 0921 (email from *[VAA press officer 2]* to *[a VAA employee]* on 06/01/2006).

⁴⁷⁵ Document 3223, p10 of 12: call from *[VAA senior manager C]* to *[VAA senior manager A]* at 13:14. [...] second interview: Document 1739, p150.

⁴⁷⁶ [...] second interview: Document 1739, pp 150-151; Document 2804 (email from *[VAA press officer 2]* to *[a VAA press officer]* on 06/01/2006).

⁴⁷⁷ Document 3232, p27: call from *[VAA senior manager A]* to *[BA senior manager A]* at 13:30 (3 min, 57 sec). [...] witness statement: Document 3207, p15; [...] first interview: Document 1144, pp 116-117. See also [...] first interview: Document 1150, pp 49-50; [...] second interview: Document 1788, p29.

⁴⁷⁸ Document 0835 (email *[VAA press officer 2]* to Press Association on 06/01/2006). *[BA manager (public relations)]* recalls that *[VAA senior manager B]* called him just prior to the announcement to inform him it was going out and that he updated *[BA senior manager B]* to this effect by text message; [...] witness statement: Document 3201, p6. However, *[VAA senior manager B]* does not recall making contact and states that since '*BA were already at £30 and so there was no reason to tell them*' [...] witness statement: Document 3203, p24. See also, [...] second interview: Document 1639, p98). *[BA senior manager B]* does not appear to recall the event: [...] second interview: Document 1684, p129. The OFT has not obtained telephone records that show such contact.

⁴⁷⁹ Document 1212; [...] witness statement: Document 3193, p5; [...] first interview: Document 1150, p50; [...] second interview: Document 1788, p29.

⁴⁸⁰ Document 1212 (email from *[BA senior manager A]* to *[BA employee (sales)]* and *[BA senior manager D]* on 06/01/2006); [...] first interview: Document 1150, p50; [...] second interview: Document 1788, p29.

IV. LEGAL ANALYSIS

A. Introduction

295. The legal provisions prohibiting agreements and concerted practices which prevent, restrict or distort competition are contained in the Chapter I prohibition and Article 101. Both provisions are relevant to this case, by reason of *Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*⁴⁸¹ (the 'Modernisation Regulation').⁴⁸²
296. An overview of both provisions is provided in Section B of this Part.
297. Section C contains an examination of the law on the burden and standard of proof.
298. Sections D to J then contain a detailed examination of the key concepts contained within each of the Chapter I prohibition and Article 101, and an application of these to the facts of this case.
299. Section K summarises the OFT's conclusions on the application of the Chapter I prohibition and Article 101.

B. Chapter I prohibition and Article 101

i. The Chapter I prohibition

300. The Chapter I prohibition prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices 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 they are excluded or exempt in accordance with the provisions of Part I of the Act.⁴⁸³ The Chapter I prohibition applies in particular to agreements, decisions or practices which directly or indirectly fix selling prices or any other trading conditions.⁴⁸⁴
301. In order to find an infringement of the Chapter I prohibition, the OFT must establish that the parties entered into an agreement or engaged in a decision or a concerted practice which may affect trade within the UK and which had as its object or effect the appreciable prevention, restriction or distortion of competition.

ii. Consistency with European Union law

302. Section 60 of the Act provides that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions relating to UK competition law should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law.

⁴⁸¹ Now Articles 101 and 102 of the TFEU respectively.

⁴⁸² [2003] OJ L1/1.

⁴⁸³ The Chapter I prohibition came into force on 1 March 2000.

⁴⁸⁴ Section 2(2)(a) of the Act.

303. Section 60 also provides that the OFT must act (so far as is compatible with the provisions of Part I of the Act) with a view to securing consistency with the principles laid down by the TFEU, CJEU and any relevant decision of the CJEU.⁴⁸⁵ The OFT must, in addition, have regard to any relevant decision or statement of the Commission.
304. The provision in EU competition law which corresponds closely to the Chapter I prohibition is Article 101, on which the Chapter I prohibition is modelled.
- iii. Article 101
305. Article 101 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.
306. Following the entry into force of the Modernisation Regulation on 1 May 2004,⁴⁸⁶ the OFT is required, when applying national competition law to agreements and concerted practices between undertakings which may affect trade between Member States to an appreciable extent, also to apply Article 101.⁴⁸⁷
307. Since the agreement and/or concerted practice particularised in this Decision occurred after 1 May 2004, the OFT considers that it is under an obligation to apply Article 101 if the parties' conduct 'may affect trade between Member States', within the terms of Article 101.
308. The OFT sets out the principles relevant to the determination of this question and applies them to the facts of this case at section I below. The OFT considers that the agreement and/or concerted practice between BA and VAA fulfils this criterion and, thus, that Article 101 is applicable in the present case.

C. Law on Burden of Proof and Standard of Proof

i. Burden of proof

309. The burden of proving an infringement of the Chapter I prohibition lies upon the OFT. The CAT held in *Napp* that:

'[a]s regards the burden of proof, the Director⁴⁸⁸ accepts that it is incumbent upon him to establish the infringement, and that the persuasive burden of proof remains on him throughout ... In our view it follows from Article 6(2) [of the European Convention on Human Rights] that the burden of proof rests throughout on the Director to prove the infringements alleged'.⁴⁸⁹

⁴⁸⁵ See paragraph 65 and fn66 above.

⁴⁸⁶ Modernisation Regulation, Article 45.

⁴⁸⁷ Modernisation Regulation, Article 3.

⁴⁸⁸ References to the 'Director' are to the Director General of Fair Trading. From 1 April 2003, Section 2(1) of the EA02 transferred the functions of the Director General of Fair Trading to the OFT.

⁴⁸⁹ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, [2002] CAT 1 ('Napp'), paragraphs 95 and 100. The CAT has confirmed this approach in *JJB/Allsports v Office of Fair Trading* [2004] CAT 17 ('JJB/Allsports'), paragraph 164.

310. However, this burden does not preclude the OFT from relying, where appropriate, on evidential presumptions. In *Napp* the CAT went on to say:

*'[t]hat approach does not in our view preclude the Director, in discharging the burden of proof, from relying, in certain circumstances, from [sic] inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example ... that an undertaking's presence at a meeting with manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged'.*⁴⁹⁰

ii. Standard of proof

Legal standard

311. The applicable standard of proof is the civil standard. The OFT is therefore required to demonstrate that an infringement has occurred on the balance of probabilities.
312. The question of the standard of proof in CA98 cases has most recently been considered in the appeals arising out of the OFT's decision in *Construction*.⁴⁹¹ In a number of judgments on those appeals, the CAT stated the following:

*'There has, in recent years, been a great deal of debate as to whether, in serious cases, there is a "heightened standard" of civil proof. We consider this debate has been laid to rest in a series of decisions of the House of Lords, in particular *Re H (Minors)* [1986] AC 563 at 586; *Re D (Northern Ireland)* [2008] 1 WLR 1499 at paragraph [28]; *Re B* [2009] 1 AC 11 at paragraph [13]'.*⁴⁹²

313. In *Re D (Northern Ireland)*, Lord Carswell said that while situations such as the inherent unlikelihood of the occurrence taking place or the seriousness of the allegations may call for '*heightened examination*', it is nonetheless the case that:

'[t]hese are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established'.⁴⁹³

314. In *Re B*, in a judgment delivered on the same day, the House of Lords rejected the idea that the seriousness of the allegation necessarily renders the allegation

⁴⁹⁰ *Napp* (fn489), paragraph 110.

⁴⁹¹ Case CE/4327-04 *Investigation into bid-rigging in the construction sector*, decision of 22 September 2009.

⁴⁹² *GMI Construction v OFT* [2011] CAT 12, paragraph 15; *AH Willis and Sons Ltd v OFT* [2011] CAT 13 ('*AH Willis*'), paragraph 47. See also *North Midland Construction v OFT* [2011] CAT 14, paragraph 16, where in an almost identical passage, the CAT, in addition to the cases listed above, made reference to the *Secretary of State for Home Department v Rehman* [2003] 1 AC 153 at paragraph 55 in support of this point.

⁴⁹³ *Re D (Secretary of State for Northern Ireland intervening)* [2008] UKHL 33, [2008] 1 WLR 1499 ('*Re D (Northern Ireland)*'), paragraph 28.

less probable. Accordingly, there should be no general presumption that serious conduct has not occurred. Rather, regard should be had to any surrounding circumstances which might increase, or decrease, the probability that an infringement of the Act occurred.⁴⁹⁴ Lord Hoffman confirmed that:

*'there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not'.*⁴⁹⁵

Evidential weight

315. In considering whether the evidence obtained demonstrates an infringement of the Chapter I prohibition and/or Article 101, the OFT will assess the extent and weight of that evidence.
316. It is well established that, in cases involving infringements of the Chapter I prohibition and/or Article 101, the evidence available may be limited. As the Court of Justice stated in *Aalborg Portland*:

'55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.

56. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.

*57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules'.*⁴⁹⁶

317. In a number of recent judgments, the CJEU has reiterated the principles set out in *Aalborg Portland* and confirmed that while '*the Commission has to provide sufficiently precise and consistent evidence*' to support a finding that an infringement took place, '*it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement; it is sufficient if the body of evidence relied on by the institution, viewed as whole, meets that requirement'*.⁴⁹⁷

⁴⁹⁴ *Re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35, [2009] 1 AC 11 ('*Re B*'), paragraphs 14 and 72.

⁴⁹⁵ *Re B* (fn494), paragraph 13. See also *Re D (Northern Ireland)* (fn493), paragraph 28.

⁴⁹⁶ Joined Cases C-204/00P etc *Aalborg Portland A/S and Others v Commission of the European Communities* [2004] ECR I-123 ('*Aalborg Portland*'). See also Joined Cases T-44/02OP etc *Dresdner Bank AG and Others v Commission of the European Communities* [2006] ECR II-3567, paragraphs 64 to 65.

⁴⁹⁷ Joined Cases T-109/02, T-118/02, T-122/02, T-125/02 and T-126/02, T-128/02 and T-129/02, T-132/02 and T-136/02 *Bolloré and Others v Commission* [2007] ECR II-947 ('*Bolloré*'), paragraphs 257 to 258, citing *Volkswagen* (fn59), paragraph 43 and Joined Cases C-238/99 P, C-244/99 P,

318. The General Court has also confirmed that there is no principle that precludes reliance on a single item of documentary evidence, provided that there are no doubts as to its probative value and that it definitely attests to the existence of the infringement in question.⁴⁹⁸
319. The question of evidence obtained from an undertaking which has made an application for leniency has been specifically considered by the CJEU and the following principles emerge from the case law:
- Admissions by a leniency applicant do not, by their nature, lack evidential value; '*the mere fact that the information was submitted by an undertaking which made an application for leniency does not call in question its probative value*'.⁴⁹⁹
 - Reliance may be placed, as against an undertaking, on statements made by other incriminated undertakings, including leniency applicants.⁵⁰⁰ However, where the accuracy of a statement by a leniency applicant is contested by several other undertakings who are similarly accused, it cannot be regarded as constituting adequate proof as against those other undertakings unless it is supported by other evidence.⁵⁰¹
 - In line with the principle outlined at paragraph 318 above, a statement by a leniency applicant in itself can be sufficient proof if it is particularly reliable. In particular, if a body of consistent evidence corroborates the existence and certain specific aspects of the collusion referred to in a statement by a leniency applicant, that statement may *in itself* be sufficient to evidence *other* aspects of the collusion.⁵⁰²
320. While the above principles are of particular relevance in assessing the weight to attach to statements made by or on behalf of a leniency applicant,⁵⁰³ as with

C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375 ('*Limburgse Vinyl*'), paragraphs 513 to 520. See also Case T-191/06 *FMC Foret v Commission*, judgment of 16 June 2011 ('*FMC Foret*'), paragraphs 105 to 108.

⁴⁹⁸ *FMC Foret* (fn497), paragraph 122, citing Joined Cases T-25/95 etc *Cimenteries CBR SA and Others v Commission* [2000] ECR II-491 ('*Cimenteries*'), paragraph 1838.

⁴⁹⁹ *FMC Foret* (fn497) paragraph 115. In particular, although statements of admission may be treated with caution (in case they downplay the contribution of the undertaking making the admission), the leniency process '*does not necessarily create an incentive to submit distorted evidence as to the other participants in a cartel*' since this would put the applicant's cooperation in question and risk the loss of its leniency discount (*FMC Foret* (fn497), paragraph 117, citing Case T-120/04 *Peroxidos Organicos v Commission* [2006] ECR II-4441, paragraph 70 and Case T-54/03 *Lafarge v Commission* [2008] ECR II-120 ('*Lafarge*'), paragraph 58). See also Case T-133/07 *Mitsubishi Electric Corp. v Commission*, judgement of 12/07/2011 (not yet published) ('*Mitsubishi*'), paragraph 107, as regards statements made by employees of a leniency applicant.

⁵⁰⁰ *FMC Foret* (fn497), paragraph 116, citing *Limburgse Vinyl* (fn497), paragraph 512.

⁵⁰¹ *FMC Foret* (fn497), paragraph 120, citing Joined cases T-67/00, T-68/00, T-71/00, T-78/00 *JFE Engineering & others v. Commission* [2004] ECR II-2501 ('*JFE Engineering*'), paragraph 219; Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 285; *Bolloré* (fn497) paragraph 167; *Lafarge* (fn499) paragraph 293; Case T-337/94 *Enso-Gutzeit v Commission* [1998] ECR II-1571 paragraph 91. Other evidence can take many forms, including contemporaneous documentary evidence (whether originating from the same undertaking or another), statements of other undertakings alleged to have participated in the cartel and the evidence of employees of the alleged participants (see *FMC Foret* (fn497), paragraphs 183 to 186 and 232; *Bolloré* (fn497), paragraphs 168 to 184).

⁵⁰² *FMC Foret* (fn497), paragraph 120, referring to *JFE Engineering* (fn501), paragraphs 220 and 334.

⁵⁰³ See, for example, *JFE Engineering* (fn501), paragraph 205 and on appeal Cases C-403/04 and C-405/04P *Sumitomo Metal Industries Ltd and Nippon Steel Corp. v Commission* [2007] ECR I-00729,

any evidence obtained in an investigation, '*the sole criterion relevant in evaluating the evidence adduced is its reliability*', which must be understood in light of the '*prevailing principle of Community law [of] the unfettered evaluation of evidence*'.⁵⁰⁴

321. As regards the Chapter I prohibition, the CAT has taken a similar approach. In *Claymore Dairies*, it stated that:

*'In our view, there is no rule of law that, in order to establish a Chapter I infringement, the OFT has to rely on written or documentary evidence. The oral evidence of a credible witness, if believed, may in itself be sufficient to prove an infringement, depending on the circumstances of a particular case. Of course, if the OFT is relying primarily on a witness rather than on documents, it will no doubt look for support in the surrounding circumstances, for example, the dates and timing of price increases. It will no doubt ask itself whether there is reason to believe that the witness may be untruthful or mistaken but, as at present advised, we do not think there is any technical rule that precludes the OFT from accepting an oral statement of a witness at face value if it thinks it right to do so'.*⁵⁰⁵

322. Following on from this, the CAT in *JJB/Allsports*, referring to the principles outlined in *Aalborg Portland*, noted that:

*'[c]artels are by their nature hidden and secret; little or nothing may be committed to writing. In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard: see *Claymore Dairies* at [3] to [10] ... '*⁵⁰⁶

323. Most recently, in *Quarmby*, the CAT (drawing on *JJB/Allsports*) noted that circumstantial evidence may be taken into account and held that:

*'Ultimately, the totality of evidence, viewed as a whole, must be sufficient to convince the Tribunal in the circumstances of the particular case ... '*⁵⁰⁷

324. As regards evidence obtained in the context of a leniency application, in *Quarmby*, a claim that evidence given by a witness '*was "tainted" because it was given in the context of [a] leniency application*' was dismissed by the CAT as '*unsubstantiated*'.⁵⁰⁸ In particular, the CAT noted that the undertaking providing the underlying evidence to the OFT and the witness commenting on that evidence were under a duty of continuous and complete cooperation (as a

paragraphs 50 to 51, 70 to 72 and 103 for a discussion of evidence given on behalf of a leniency applicant. See also *Mitsubishi* (fn499), paragraphs 87 to 89.

⁵⁰⁴ *Mitsubishi* (fn499), paragraphs 81 and 85, citing Case T-50/00 *Dalmine v Commission* [2004] ECR II2395, paragraph 72.

⁵⁰⁵ *Claymore Dairies v OFT* [2003] CAT 18, paragraph 8.

⁵⁰⁶ *JJB/Allsports* (fn489), paragraph 206.

⁵⁰⁷ *Quarmby v OFT* [2011] CAT 11 ('*Quarmby*'), paragraph 86. See also *Durkan* (fn28) paragraphs 95 to 96.

⁵⁰⁸ *Quarmby* (fn507), paragraph 114.

condition of leniency) and were aware of the criminal sanctions that they faced if they provided false or misleading information to the OFT.⁵⁰⁹

325. The OFT has had regard to the above principles in the following sections, where it applies the case law on the Chapter I prohibition and Article 101 to the facts in this case.

D. Undertakings

i. Principles

326. The Chapter I prohibition and Article 101 apply to agreements or concerted practices between 'undertakings'.
327. The term 'undertaking' is not defined in the Act or in the TFEU. It is a wide term that the Court of Justice has held to cover '*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*'.⁵¹⁰
328. The concept of an 'undertaking' is used to designate an economic unit. As such it is distinct from that of legal personality and may consist of several persons, natural or legal.⁵¹¹ In particular, a subsidiary which has no real freedom to determine its conduct on the market and which does not enjoy economic independence will form part of the same undertaking as its parent company even though each has its own legal personality.⁵¹²

ii. Application to this case

329. BA and VAA (described above at paragraphs 6 to 21) are clearly engaged in economic activity, and therefore constitute undertakings for the purposes of the Chapter I prohibition and Article 101.

E. Agreements or concerted practices between undertakings

i. Principles

Agreement or concerted practice

330. The Chapter I prohibition and Article 101 apply to 'agreements' and/or 'concerted practices'.⁵¹³

⁵⁰⁹ *Quarmby* (fn507), paragraph 114. Similarly, in *A.H. Willis* (fn492) while the CAT did not attach weight to documents that were created as part of a leniency application to explain/clarify the underlying evidence, it plainly considered that evidential weight can attach to the underlying documents and witness accounts (paragraph 49).

⁵¹⁰ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, paragraph 21.

⁵¹¹ Case 170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas* [1984] ECR 2999, paragraph 11.

⁵¹² Case T-102/92 *Viho Europe BV v Commission of the European Communities* [1995] ECR II-17, paragraphs 47 to 51. Confirmed on appeal in Case C-73/95P *Viho Europe BV v Commission of the European Communities* [1996] ECR I-5457, paragraph 16. See also OFT Guidance 407, *Enforcement: Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments* (December 2004), paragraph 5.41.

⁵¹³ Section 2(1) of the Act and Article 101(1) of the TFEU.

331. The CJEU and the CAT have confirmed that it is not necessary, for the purposes of finding an infringement, to characterise conduct exclusively as an agreement or as a concerted practice.⁵¹⁴ The concepts are not mutually exclusive and there is no rigid dividing line between the two. On the contrary, they are intended '*to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves*'.⁵¹⁵
332. As the CAT has confirmed in its judgments in both *JJB/AllSports* and *Argos/Littlewoods (Liability)*:

*'[i]t is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other'.*⁵¹⁶

333. This position has been upheld by the Court of Appeal.⁵¹⁷

Agreements

334. An agreement does not have to be a formal written agreement to be caught by the Chapter I prohibition and/or Article 101.⁵¹⁸ Nor does an agreement have to be legally binding or contain any enforcement mechanisms.⁵¹⁹ An agreement may be express or it may be implied from the conduct of the parties.⁵²⁰ It may also consist of an isolated act, a series of acts or a course of conduct.⁵²¹
335. The key question 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'*.⁵²²

⁵¹⁴ Case T-9/99 *HFB Holding für Fernwärm 技术 Beteiligungsgesellschaft mbH & Co KG and Others v Commission of the European Communities* [2002] ECR II-1487 ('*HFB Holding*'), paragraph 189; Case T-7/89 *SA Hercules Chemicals NV v Commission of the European Communities* [1991] ECR II-1711 ('*Hercules (CFI)*'), paragraph 264. See also Joined Cases T-305/94 etc *Limburgse Vinyl Maatschappij NV and Others v Commission of the European Communities* [1999] ECR II-931 ('*PVC II*'), paragraphs 695 to 698; and Case C-49/92P *Commission of the European Communities v Anic Partecipazioni SpA* [1999] ECR I-4125 ('*Anic*'), paragraph 132.

⁵¹⁵ *Anic* (fn514), paragraph 131. Followed in *HFB Holding* (fn514), paragraph 190. See also *Argos, Littlewoods and JJB (EWCA)* (fn61), paragraph 21(iii); *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4 ('*Apex Asphalt*'), paragraph 206(ii); and followed in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11 ('*Makers*'), paragraph 103(ii).

⁵¹⁶ *JJB/Allsports* (fn489), paragraph 644; and *Argos Ltd and Littlewoods Ltd v. OFT (Liability)* [2004] CAT 24 ('*Argos/Littlewoods (Liability)*'), paragraph 665.

⁵¹⁷ *Argos, Littlewoods and JJB (EWCA)* (fn61), paragraph 21.

⁵¹⁸ See also OFT Guidance 401, *Agreements and concerted practices* (December 2004) (the '*Agreements and Concerted Practices Guidance*'), paragraph 2.7.

⁵¹⁹ Commission Decision (EC) 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 – *PVC*) [1994] OJ L239/14, paragraph 30.

⁵²⁰ For example, see Case 28/77 *Tepea BV v. Commission* [1978] ECR 1491 and, more generally, Commission Decision (EC) 2003/6/EC of 13 December 2000 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/33.133-C – *Soda ash – Solvay*) [2003] OJ L10/10 ('*Soda Ash/Solvay*'), paragraphs 154 to 160, 162 to 164, 169, 170 and 180.

⁵²¹ *Anic* (fn514), paragraph 81.

⁵²² Case T-41/96 *Bayer AG v Commission of the European Communities* [2000] ECR II-3383 ('*Bayer (CFI)*'), paragraphs 67 to 69. Upheld on appeal in Joined Cases C-2 and 3/01P *Bundesverband der Arzneimittelimporteure eV and Commission of the European Communities v Bayer AG* [2004] ECR I-23. See also

336. The intention of the parties must be to conduct their activity on the market in a specific way,⁵²³ for example, by adhering to a common plan that limits or is likely to limit their individual commercial freedom by determining lines of mutual action or abstention from action in the market.⁵²⁴

Concerted practices

337. An infringement through concerted practice does not require an actual agreement (whether express or implied) to have been reached. As the Court of Justice held in *Dyestuffs*, a concerted practice is:

*'a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'.*⁵²⁵

338. The concept of a concerted practice must be understood in the light of the principle that each economic operator must determine independently its policy on the market. The Court of Justice explained this in its judgment in *Suiker Unie* in the following terms:

*'[t]he criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells'.*⁵²⁶

339. In its judgment in *Anic*, the Court of Justice explained the requirement of independence as follows:

'[a]ccording to [the Court's] case-law, although [the] requirement of independence does not deprive economic operators of the right to adapt

JJB/Allsports (fn489), paragraphs 156 and 637; Argos/Littlewoods (*Liability*) (fn516), paragraphs 151 and 658; Argos, Littlewoods and JJB (EWCA) (fn61), paragraph 21(iv).

⁵²³ Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck SARL and Others v Commission of the European Communities* [1980] ECR 3125 ('van Landewyck'), paragraph 86; *Hercules (CFL)* (fn514), paragraph 256; *PVC II* (fn514), paragraph 715; *Bayer (CFL)* (fn522), paragraph 67. See also JJB/Allsports (fn489), paragraphs 156 and 637; Argos/Littlewoods (*Liability*) (fn516), paragraphs 151 and 658.

⁵²⁴ For example, Commission Decision (EC) 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 – *Polypropylene*) [1986] OJ L230/1, paragraph 81.

⁵²⁵ *Dyestuffs* (fn28), paragraph 64. Followed in Joined Cases 40-73 etc *Coöperatieve Vereniging 'Suiker Unie' UA and Others v Commission of the European Communities* [1975] ECR 1663 ('Suiker Unie'), paragraph 26; Joined Cases C-89-85 etc *A. Ahlström Osakeyhtiö and Others v Commission of the European Communities* [1993] ECR I-1307, paragraph 63; *Anic* (fn514), paragraph 115; Case C-199/92P *Hüls AG v Commission of the European Communities* [1999] ECR I-4287 ('Hüls'), paragraph 158. See also JJB/Allsports (fn489), paragraph 151; Argos/Littlewoods (*Liability*) (fn516), paragraph 146; Argos, Littlewoods and JJB (EWCA) (fn61), paragraph 21(i); *Apex Asphalt* (fn515), paragraphs 196 and 206(iii) (followed in *Makers* (fn515), paragraphs 101 and 103(iii)).

⁵²⁶ *Suiker Unie* (fn525), paragraph 173. Followed in *Anic* (fn514), paragraph 116; *Hüls* (fn525), paragraph 159. See also *Apex Asphalt* (fn515), paragraphs 198 and 206(iv); *Makers* (fn515), paragraphs 102 and 103(iv).

themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market'.⁵²⁷

340. As stated by the Court of Justice in *T-Mobile Netherlands*:

'the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted'.⁵²⁸

341. Therefore, in order to prove concertation, it is not necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have expressly agreed a particular course of conduct on the market.⁵²⁹ It is sufficient that the exchange of information should have removed or reduced uncertainty as to the conduct on the market to be expected on its part.
342. Moreover, in *Cimenteries* the General Court held that reciprocal contacts are established '*where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it ... [i]t is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market'*.⁵³⁰
343. Thus, the mere receipt of information concerning competitors may be sufficient to give rise to concertation, as is reflected in the following statement by the CAT in *JJB/Allsports*:

'Cimenteries (at paragraphs 1849 and 1852) and Tate & Lyle (at paragraphs 54 to 60) ... show that even the unilateral disclosure of future pricing

⁵²⁷ *Anic* (fn514), paragraph 117; followed in *Hüls* (fn525), paragraphs 159 to 160; *HFB Holding* (fn515), paragraph 212. See *Apex Asphalt* (fn515), paragraph 206(v) (followed in *Makers* (fn515), paragraph 103(v)).

⁵²⁸ Case C-8/08 *T-Mobile Netherlands v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 ('*T-Mobile Netherlands*'), paragraph 35, citing Case C-7/95P *John Deere Ltd v Commission of the European Communities* [1998] ECR-3111, paragraph 90; and Case C-194/99P *Thyssen Stahl AG v Commission of the European Communities* [2003] ECR I-10821 ('*Thyssen Stahl*'), paragraph 81. See also *JJB/Allsports* (fn489), paragraph 158; *Argos/Littlewoods (Liability)* (fn516), paragraph 154, both citing *Cimenteries* (fn498), paragraph 1852; *Apex Asphalt* (fn515), paragraph 206(vi) (followed in *Makers* (fn515), paragraph 103(vi)).

⁵²⁹ *Cimenteries* (fn498), paragraph 1852.

⁵³⁰ *Cimenteries* (fn498), paragraph 1849, 1852. See also *Apex Asphalt* (fn515), paragraphs 206(vii) and 206(viii) (followed in *Makers* (fn515), paragraphs 103(vii) and 103(viii)).

intentions can constitute a concerted practice if the effect of disclosure is in fact to reduce uncertainty in the marketplace'.⁵³¹

344. An undertaking which receives information by participating in an anti-competitive arrangement without manifestly opposing that arrangement will be taken to have participated in a concerted practice unless that undertaking puts forward evidence to establish that it had indicated its opposition to the anti-competitive arrangement to its competitors.⁵³²
345. According to the case law of the Court of Justice, the concept of a concerted practice requires, besides undertakings concerting together, conduct on the market pursuant to those collusive practices and a relationship of cause and effect between the two.⁵³³
346. Where an undertaking participating in concerting arrangements remains active on the market, there is a presumption that it will take account of the information exchanged with its competitors. In *Anic* the Court of Justice held that:

*'subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here'.*⁵³⁴

347. In *T-Mobile Netherlands* the Court of Justice held that this presumption of a causal connection applies even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion.⁵³⁵
348. Furthermore, although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily require that that conduct must produce the concrete effect of restricting, preventing or distorting competition.⁵³⁶ As the Court of Justice observed in *Hüls*, a concerted practice which has as its object the prevention, restriction or distortion of competition will infringe competition law even where there is no effect on the market.⁵³⁷

⁵³¹ *JJB/Allsports* (fn489), paragraph 658. See Joined Cases T202/98 etc *Tate & Lyle and Others v Commission* [2001] ECR II-2035 ('*Tate & Lyle*'), paragraph 58, citing Case T-1/89 *Rhône-Poulenc SA v Commission of the European Communities* [1991] ECR II-867 ('*Rhône-Poulenc*'). See also *Apex Asphalt* (fn515), paragraph 200; *JJB/Allsports* (fn489), paragraph 159; *Argos/Littlewoods (Liability)* (fn516), paragraph 155.

⁵³² *Aalborg Portland* (fn496), paragraph 81, citing *Hüls* (fn525), paragraph 155; *Anic* (fn514), paragraph 96.

⁵³³ *Anic* (fn514), paragraph 118; *Hüls* (fn525), paragraph 161. See also *Apex Asphalt* (fn515), paragraph 206(ix); *Makers* (fn515), paragraph 103(ix).

⁵³⁴ *Anic* (fn514), paragraph 121. Followed in *Hüls* (fn525), paragraph 162; *Cimenteries* (fn498), paragraphs 1865 and 1910. See also *Apex Asphalt* (fn515), paragraph 206(x); *Makers* (fn515), paragraph 103(x).

⁵³⁵ *T-Mobile Netherlands* (fn528), paragraphs 58 to 59.

⁵³⁶ See *Anic* (fn514), paragraph 124. See also *Apex Asphalt* (fn515), paragraph 206(xi); *Makers* (fn515), paragraph 103(xi).

⁵³⁷ *Hüls* (fn525), paragraphs 163 to 164. See *Anic* (fn514), paragraph 123. See also *Apex Asphalt* (fn515), paragraph 206(xii); *Makers* (fn515), paragraph 103(xii).

349. The case law of the CJEU set out above was considered by the CAT and summarised its judgement in *Apex Asphalt* and referred to and followed in its judgement in *Makers*.⁵³⁸

ii. Application to this case

350. The evidence obtained by the OFT shows that, between August 2004 and January 2006, BA and VAA engaged in an agreement and/or concerted practice relating to the PFS.
351. During the Relevant Period, BA and VAA exchanged commercially sensitive information as to their respective future intentions regarding increases to the amount of the PFS and the timing of when they would announce these price increases.
352. Through these repeated exchanges of information prior to each change in PFS amount (except October 2004, when contact by VAA was attempted but unsuccessful)⁵³⁹ the Parties knowingly substituted practical cooperation as regards their commercial conduct in relation to the PFS for the risks of competition.
353. For its part, BA disclosed to VAA the course of conduct which it had decided to adopt as regards the PFS and in so doing both sought and managed to influence the conduct of VAA. Through its actions, BA reduced the degree of uncertainty that would normally prevail in the marketplace by eliminating the uncertainty that VAA would otherwise have had over BA's expected conduct. The evidence shows that:
- In August 2004, BA informed VAA of the amount by which it intended to increase the PFS and confirmed the timing of that announcement (which had been hinted at in the press).⁵⁴⁰ Upon receipt of that information, VAA provided comfort to BA that it would adopt the same course of action and it did, in fact, increase its PFS by the same amount (£6 per sector) even

⁵³⁸ *Apex Asphalt* (fn515), paragraph 206; *Makers* (fn515), paragraph 103.

⁵³⁹ The OFT considers that, although the attempt by VAA to make contact with BA prior to increasing its PFS did not contribute to the coordination of the parties' commercial conduct (as it was unsuccessful), it nonetheless demonstrates VAA's intention to engage in such coordination at that time and the continuation of the arrangement between the Parties.

⁵⁴⁰ See paragraphs 149 to 152 and accompanying footnotes. The provision of such information by BA to VAA is confirmed by both *[BA senior manager B]* and *[VAA senior manager B]*. The OFT considers that the evidence of both *[BA senior manager B]* and *[VAA senior manager B]* in relation to the events of August 2004 is credible. Both gave consistent accounts of the substance of their discussions at that time. Their accounts are supported by contemporaneous documentation in the form of a handwritten note by *[VAA senior manager B]*. They are also supported by the evidence of others (namely *[VAA senior manager C]*, *[VAA senior manager D]* and *[VAA senior manager A]*: see paragraph 153 and accompanying footnotes). Additionally, the evidence of both *[BA senior manager B]* and *[VAA senior manager B]* as to the information provided by BA to VAA in August 2004 remained consistent throughout their interviews with the OFT. For *[VAA senior manager B]*, it is also consistent with the summary information and fragmentary transcript the OFT has obtained regarding his earlier interviews with the legal representatives of VAA (see [...] internal interview summary: Document 3037, pp 2-10; [...] fragmentary interview transcript: Document 3097, pp 11-21, 36-45, 56-64; see also his initial recollections in Document 3038, p6.) For *[BA senior manager B]*, although his initial recollection appears to have been solely that he received information (Document 3274), the summaries of his following interviews are consistent with the account given to the OFT (Document 3275, p1; Document 3276, p1).

though it had internally been contemplating a smaller increase (£5 per sector).⁵⁴¹

- In March 2005, BA informed VAA of the timing of its decision-making as regards the PFS and subsequently, upon receipt of information regarding the amount by which VAA planned to increase its PFS level (£5 per sector), informed VAA that it would be 'better' to increase to £6 per sector (the amount by which it had, by then, decided to increase its own PFS).⁵⁴² VAA increased its PFS level to the amount suggested by BA (£6 per sector) and announced its increase the same day as the information exchange.⁵⁴³ The following day, BA announced an increase in its PFS amount to the same level.⁵⁴⁴
- In June 2005, having been forced by events to bring forward the announcement of its planned PFS increase, BA informed VAA late in the evening of 23 June of its intention to increase the PFS by £8 per sector and to announce the increase the following morning.⁵⁴⁵ VAA did not query the amount of the increase (even though it was significant).⁵⁴⁶ BA announced an

⁵⁴¹ See paragraphs 150 to 159 and accompanying footnotes.

⁵⁴² See paragraphs 179 to 180 and 192 to 194 and accompanying footnotes. The provision of such information by BA to VAA is confirmed by both */BA senior manager B/* and */VAA senior manager B/*. The OFT considers that the evidence of both */BA senior manager B/* and */VAA senior manager B/* in relation to the events of March 2005 is credible. Both gave consistent accounts of the substance of their discussions at that time. Their accounts are supported, in respect of the initial information regarding timing, by a contemporaneous handwritten note of */VAA senior manager B/*. Their accounts of the substance of their discussions are also supported by the evidence of others (namely */VAA senior manager C/*, */VAA senior manager D/* and */VAA senior manager A/*: see paragraphs 196 to 197 and accompanying footnotes). Additionally, the evidence of both */BA senior manager B/* and */VAA senior manager B/* as to the information provided by BA to VAA in March 2005 remained consistent throughout their interviews with the OFT. For */VAA senior manager B/*, it is also consistent with the summary information and fragmentary transcript the OFT has obtained regarding his earlier interviews with the legal representatives of VAA (Document 3038, pp 9-10; Document 3097, pp 76-94; Document 3037, pp 12-14). For */BA senior manager B/*, it is also consistent with the summary information the OFT has obtained regarding his earlier interviews with the legal representatives of BA (see Document 3276, p1; Document 3277, p1. The OFT also notes that the summary of */BA senior manager B/*'s initial interview, while it discussed only the initial contact in any detail, noted that there were another two or three occasions of contact (Document 3274)).

⁵⁴³ See paragraph 204 above. For the reasons set out at paragraphs 202 and 203, and detailed in Appendix B, the OFT considers that VAA had not decided to increase by £6 per sector prior to the discussion between */VAA senior manager B/* and */BA senior manager B/* at 14:16 on 21 March 2005.

⁵⁴⁴ See paragraph 207.

⁵⁴⁵ See paragraphs 214 to 218 and accompanying footnotes. The exchange of information is confirmed by both */BA senior manager B/* and */VAA senior manager B/*. The OFT considers that the evidence of both */BA senior manager B/* and */VAA senior manager B/* in relation to the events of June 2005 is credible. Both gave consistent accounts of the substance of their discussions at that time. Their accounts are supported by the evidence of others (namely */VAA senior manager C/*, */VAA senior manager D/* and */VAA senior manager A/*: see paragraph 220 and accompanying footnotes). Additionally, the evidence of both */BA senior manager B/* and */VAA senior manager B/* as to information provided by BA to VAA in June 2005 remained consistent throughout their interviews with the OFT. For */BA senior manager B/*, it is consistent with the summary information regarding his earlier interviews with the legal representatives of BA (See Document 3276. The remaining interview summaries do not discuss the events of June 2005 specifically). For */VAA senior manager B/*, it is consistent with the summary information the OFT has obtained regarding his earlier interviews with the legal representatives of VAA (Document 3038, p10; Document 3037, pp 14-15).

⁵⁴⁶ See paragraph 219 above and fn545 above.

increase the following morning in the amount of £8 per sector and VAA announced a matching increase that afternoon.⁵⁴⁷

354. For its part, VAA disclosed to BA the course of conduct which it intended to adopt and in so doing sought to influence the conduct of BA. Through its actions, VAA reduced the degree of uncertainty that would normally prevail in the marketplace, by reducing the uncertainty that BA would otherwise have had over VAA's expected conduct. In addition, through the contacts with BA, VAA attempted to obtain some comfort as to BA's expected conduct. The evidence shows that:

- In March 2005, the contact between the Parties was initiated by VAA, which considered that, while it would be an appropriate time to increase the PFS, it needed some comfort that BA would also increase its PFS and would do so by an equal amount.⁵⁴⁸ Through the exchanges of information on 18 March and 21 March, VAA did receive such comfort and, on this occasion, led the increase in PFS amount (by an amount greater than it had planned internally).⁵⁴⁹
- In September 2005, VAA informed BA of its plan to lead an increase in the PFS (to £30 per sector) and received comfort that BA agreed, or at least did not disagree, with VAA's proposed action.⁵⁵⁰ Having obtained some comfort that BA was likely to follow VAA's increase such that it would not have to be withdrawn later, VAA increased its PFS to £30 per sector.⁵⁵¹ The following day, BA informed VAA that it would match the increase, which it did two days after VAA's increase.⁵⁵²

⁵⁴⁷ See paragraphs 223 and 231 to 233.

⁵⁴⁸ See paragraphs 174 to 175 and 179 above.

⁵⁴⁹ See paragraphs 179 to 205 above. See also fn542 above.

⁵⁵⁰ See paragraphs 252 and 258 to 259 and accompanying footnotes. The initial provision of information (on 5 September) that VAA would lead the increase is confirmed by */BA senior manager A/* and */VAA senior manager A/*. The OFT considers that their evidence in relation to the events of 5 September 2005 is credible. */BA senior manager A/*'s recollections are detailed as to the circumstances in which the contact took place, are consistent throughout his interviews with the OFT and are not inconsistent with his earlier interviews to BA's legal representatives, albeit not with his initial prepared statement (see Document 3278), (See Document 3279, p2; Document 3280, p3). */VAA senior manager A/*'s recollections, although not detailed, are consistent with those of */BA senior manager A/* and remained so throughout his interviews with the OFT. The confirmation of VAA's intentions (on 6 September) is shown by the text message from */VAA senior manager A/* to */BA senior manager A/* (see paragraph 258) and a call from */VAA senior manager B/* to */BA senior manager B/* (see paragraph 258). The OFT considers that the evidence of */VAA senior manager B/* in this respect, although not detailed, is probative and credible. It is consistent with the summary provided of his earlier recollections in interview with VAA's legal representatives (Document 3038, p9; Document 3037, pp 18-19) and is given support by */BA senior manager B/*. In addition, the OFT places weight on the timing of the call and lack of alternative reason for that call.

⁵⁵¹ See paragraphs 256 and 257 above.

⁵⁵² See paragraphs 262 and 264 and accompanying footnotes. BA's provision to VAA of the information that it would match the VAA increase is confirmed primarily by */BA senior manager A/* and */VAA senior manager A/*, both of whom recall that such information was provided by */BA senior manager A/* to */VAA senior manager A/* in their conversation on that afternoon. The OFT considers that the evidence of */BA senior manager A/* and */VAA senior manager A/* on this matter is credible. Both gave consistent accounts of their contact. */BA senior manager A/*'s recollections are detailed as to the circumstances in which the contact took place and supported by a third party (*a BA employee*). */BA senior manager A/*'s recollections are also consistent with his earlier recollection in interview with BA's legal representatives (Document 3279, p2; Document 3280, p3). There is also evidence to suggest that confirmation of the information provided by BA to VAA was given by */BA senior manager B/* to */VAA senior manager B/*

- In November 2005, VAA informed BA of its decision to reduce the PFS by an amount of £5 per sector a short time before this was publicly announced, with the aim of obtaining comfort from BA that VAA was '*doing the right thing*'.⁵⁵³ This gave BA the opportunity to consider in advance whether it would react in the marketplace (although VAA did proceed with the reduction in the absence of confirmation that BA would put in place a matching decrease).⁵⁵⁴
 - Even in January 2006, when there was no need for BA to react to VAA's decision to increase the PFS back to £30 (since BA had remained at that level), VAA nonetheless gave BA advance notice of its intended action '*because of the practice that had built up since August 2004*', continuing to provide certainty for BA over VAA's possible market conduct.⁵⁵⁵
355. The evidence obtained by the OFT shows that, in each instance where one Party informed the other of an intention to increase the PFS, the recipient Party assented to the provision of this information and provided at least some degree of comfort to the other Party that it was in accord and/or would likely follow the same course of action.⁵⁵⁶
356. The OFT is entitled to presume that, since both Parties remained active on the market, each took into account the information exchanged between them (see paragraph 346 above). The Parties have not adduced evidence that rebuts this presumption. Moreover, in the case of VAA, the evidence shows that, following

(paragraph 263). However, although the telephone records are suggestive of this, the recollections of both */BA senior manager B/* and */VAA senior manager B/* are uncertain and lacking in detail. Nonetheless, regardless of whether this second channel of communication was utilised, the OFT finds that the already-described evidence shows that the exchange of information took place as set out above.

⁵⁵³ See paragraphs 275 to 277 above and accompanying footnotes. The context and content of the information exchange is evidenced by */VAA senior manager B/* and */BA manager (public relations)/*. The OFT considers that their evidence on this matter is credible. Both gave consistent accounts of their contact. The evidence of both */VAA senior manager B/* and */BA manager (public relations)/* as to the information provided by VAA remained consistent throughout their interviews with the OFT. The content is also supported by a contemporaneous handwritten note by */BA manager (public relations)/*.

⁵⁵⁴ It is unclear to what extent the internal deliberations within BA following the information exchange had progressed before the VAA decrease was publicly announced. However, the evidence is clear that these deliberations had at least commenced before the public announcement of VAA's reduction (see paragraphs 278 to 279). As to the absence of confirmation that BA would match, as noted above at fn451 and fn456, */BA senior manager A/* did not reach */VAA senior manager A/* (who was in Japan at the time) and */BA senior manager B/* cannot recall any detail regarding his call with */VAA senior manager B/*. The OFT does not place any reliance on the calls from */BA senior manager B/* to */VAA senior manager B/* and */BA senior manager A/* to */VAA senior manager A/* between the time that BA was informed of VAA's proposed action and the time that the increase was announced publicly.

⁵⁵⁵ See paragraphs 292 to 294 above and accompanying footnotes. The information provided by VAA to BA is evidenced by */VAA senior manager A/* and */BA senior manager A/*. The OFT considers that their evidence on this matter is credible. Both gave consistent accounts of their contact. The content is also supported by an email sent by */BA senior manager A/* later that same day.

⁵⁵⁶ */VAA senior manager B/* recalls providing */BA senior manager B/* with comfort that VAA would adopt the same increases in PFS level as BA on the occasions of the August 2004, March 2005 and June 2005 increases (see paragraphs 150, 194 and 219 above). For the reasons set out in fn540, fn542 and fn545 above, the OFT considers that the evidence of */VAA senior manager B/* in relation to these PFS increases is credible. Additionally, on the occasion of the September 2005 PFS increase, */VAA senior manager B/* does '*not recall /BA senior manager B/ sounding surprised or suggesting a different figure*', which the OFT considers amounts to assent on the part of BA to receiving the information from VAA that it was planning to increase its PFS to £30 per sector (see paragraph 258). Again, as set out in fn550 above, the OFT considers that the evidence of */VAA senior manager B/* in this instance is credible.

the receipt of information from BA in August 2004, March 2005, and June 2005, VAA's senior management involved in the setting and communication of the PFS (*/VAA senior manager A*, */VAA senior manager C*, */VAA senior manager B*) and, to a lesser degree */VAA senior manager D*) discussed whether and how to adopt the same course as BA and have confirmed that these discussions took into account the information obtained from BA.⁵⁵⁷ These discussions took place before the information came into the public domain.⁵⁵⁸ On the occasions of August 2004 and March 2005, VAA increased its PFS by a higher amount than had been explicitly considered internally prior to the contacts with BA.⁵⁵⁹ In June 2005, VAA increased by the same amount as BA despite its reservations about the size of the increase and its view that a lower amount would have been '*the logical place to go*'.⁵⁶⁰ As regards BA, discussions regarding whether to change the PFS in November 2005 were put in motion as soon as the information was received from VAA and before it came into the public domain, albeit that the discussions continued for a time after the information became public.⁵⁶¹

357. For the reasons set out below in section F, the OFT considers that the exchange of information between the Parties had, as its object, the prevention, restriction or distortion of competition.
358. On the basis of the above, the OFT considers that the Parties engaged at least in a concerted practice between August 2004 and January 2006 relating to the PFS. Further, although no formal agreement was reached, the OFT considers that the adherence of the Parties to the above course of conduct through which they provided advance notice to each other of their intended commercial actions as regards the PFS amounted to an agreement to coordinate their commercial conduct in relation to the PFS. In particular, a shared understanding evolved between the Parties that they would contact each other before announcing any change to their respective PFS amounts.⁵⁶² The OFT does not need to reach a firm conclusion as to whether the conduct amounted to an agreement or a concerted practice, however.

⁵⁵⁷ See paragraphs 153 to 154, 196 to 197, 202, 220 to 221 and 226 above.

⁵⁵⁸ See paragraphs 153 to 154, 196 to 197, 220 to 221 above.

⁵⁵⁹ See paragraphs 154 and 202 above.

⁵⁶⁰ See paragraphs 210 and 226 above.

⁵⁶¹ See paragraphs 278 to 279 above. As regards the other two instances in which VAA passed information to BA: (i) in September 2005, there is no evidence that the information was taken into account by BA before it came into the public domain and (ii) in January 2006, there was no need for the information to be discussed within BA, since BA's PFS was already at the level of £30 per sector at that time.

⁵⁶² This evolving understanding would appear to have been reached by the time of the June 2005 increase, when BA gave notice to VAA of its impending announcement late in the evening of 23 June 2005 (see paragraphs 218 and 219 above) and at least by September 2005 increase, when */VAA senior manager C* '*would have assumed that contact may have occurred*' (see paragraph 248 above).

F. Prevention, restriction or distortion of competition

i. Principles

No need to prove anti-competitive effect where anti-competitive object established

359. In the context of Article 101, the Court of Justice has held that, '*there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition*'.⁵⁶³ The Court of Justice has also held that this is equally the case where the conduct in question concerns a concerted practice.⁵⁶⁴
360. The CAT has held that the above applies in the context of the Chapter I prohibition.⁵⁶⁵
361. In light of the OFT's proposed finding (at paragraph 380 below) that the agreement and/or concerted practice described in this Decision had as its object the prevention, restriction or distortion of competition, the OFT sets out below details of the law on anti-competitive object, but not effect.

The law on anti-competitive object

362. The 'object' of an agreement and/or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it, but rather is determined by an objective analysis of its aims.⁵⁶⁶
363. Certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.⁵⁶⁷ Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of the Chapter I prohibition and Article 101, even if the agreement or concerted practice also had other objectives.⁵⁶⁸

Exchanges of information on price or other commercial/strategic matters

364. Article 101 and the Chapter I prohibition both apply, in particular, to agreements or concerted practices which '*directly or indirectly fix purchase or selling prices*'.⁵⁶⁹ The OFT considers that agreements and concerted practices which fix

⁵⁶³ Joined Cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 299, p342. Applied in Case C-277/87 *Sandoz prodotti farmaceutici SpA v Commission of the European Communities* [1990] ECR I-45; *Anic* (fn514), paragraph 99; *Cimenteries* (fn498), paragraph 837; Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637 ('*BIDS and Barry Brothers*'), paragraph 16; and *T-Mobile Netherlands* (fn528), paragraph 29.

⁵⁶⁴ See *Anic* (fn514), paragraph 123; *T-Mobile Netherlands* (fn528), paragraphs 28 to 30.

⁵⁶⁵ *Argos/Littlewoods (Liability)* (fn516), paragraph 357.

⁵⁶⁶ Joined Cases 29 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities* [1984] ECR 1679, paragraphs 25 and 26.

⁵⁶⁷ *BIDS and Barry Brothers* (fn563), paragraph 17; *T-Mobile Netherlands* (fn528), paragraph 29.

⁵⁶⁸ For example, Joined Cases 96/82 etc *NV IAZ International Belgium and Others v Commission of the European Communities* [1983] ECR 3369, paragraphs 22 to 25.

⁵⁶⁹ Article 101(1)(a) of the TFEU and section 2(2)(a) of the Act.

prices have as their obvious object the prevention, restriction or distortion of competition.⁵⁷⁰ Furthermore, the concept of price fixing includes fixing a component of the price, such as a surcharge.⁵⁷¹

365. It is also settled law that the coordination of pricing conduct or pricing policies, for example through the exchange of confidential, commercially sensitive pricing information, amounts to an 'object' infringement of the competition rules.
366. Disclosure of pricing information eliminates uncertainty and replaces '*the risks of competition and the hazards of competitors' spontaneous reactions by cooperation*'.⁵⁷² The sharing of such information reduces uncertainties inherent in the competitive process and facilitates the coordination of the parties' conduct on the market.⁵⁷³ The Commission has explicitly stated that '*it is contrary to the provisions of Article [101] ... for a producer to communicate to his competitors the essential elements of his price policy*'.⁵⁷⁴
367. In *Tate & Lyle*, the General Court, drawing on *Rhône-Poulenc*, held that an exchange of information regarding future pricing allowed the parties to '*create a climate of mutual certainty as to their future pricing policies*' and amounted to a restriction of Article 101 by object.⁵⁷⁵
368. In its more recent *Bananas* decision,⁵⁷⁶ the Commission referred to *Tate & Lyle*, noting that '*according to case-law conduct whereby an undertaking discloses to its competitors the conduct which it intends or contemplates to adopt in the market concerning its pricing policy is considered as conduct concerning price fixing*'.⁵⁷⁷ In that case, the collusion involved communications, which took place between parties before they set their weekly quotation prices, covering price setting factors, price trends and/or indications of quotation prices. The Commission concluded that '*[b]y these practices the parties coordinated the setting of their quotation prices instead of deciding on them independently*.

⁵⁷⁰ *Agreements and Concerted Practices Guidance* (fn518), paragraphs 3.4 to 3.8. For example, Case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair* [1985] ECR 391, paragraph 22; Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919, paragraph 15. See also Case T-14/89 *Montedipe SpA v Commission of the European Communities* [1992] ECR II-1155, paragraphs 246 to 265; Case T-148/89 *Tréfilunion SA v Commission of the European Communities* [1995] ECR II-1063, paragraphs 101 and 109.

⁵⁷¹ See the judgment of the Court of First Instance in Cases T-45/98 etc *Krupp Thyssen a.O v Commission* [2001] ECR II-3757, paragraph 157; also Commission Decision (EC) 97/84/EC of 30 October 1996 in Case IV/34.503 *Ferry Operators – Currency surcharges* OJ 1997 L 26/23 ('*Ferry Operators – Currency surcharges*'), paragraphs 55 to 58; Commission Decision of 9 November 2010 in COMP IV/39.258 *Airfreight* (not yet published, see Commission Press Release IP/10/1487, dated 9 November 2010) ('*Airfreight*'), where 11 air cargo carriers were fined for coordinating surcharges for fuel and security.

⁵⁷² *Dyestuffs* (fn28), paragraph 119.

⁵⁷³ See OFT Guidance 408, *Trade associations, professions and self-regulating bodies* (December 2004), paragraph 3.10. Generally, *Thyssen Stahl* (fn528), paragraph 81.

⁵⁷⁴ Commission Decision (EC) 74/292/EEC of 15 May 1974 relating to proceedings under Article 85 of the EEC Treaty (IV/400 – *Agreements between manufacturers of glass containers*) [1974] OJ L160/1, paragraph 43.

⁵⁷⁵ *Tate & Lyle* (fn531), paragraphs 58 and 60. See also *Rhône-Poulenc* (fn531), paragraph 122 to 123.

⁵⁷⁶ Commission Decision of 15 October 2008 relating to a proceeding under Article 81 of the EC Treaty in Case COMP/39188 – *Bananas* ('*Bananas*').

⁵⁷⁷ *Bananas* (fn576), paragraph 292.

'These arrangements have as their object the restriction of competition within the meaning of Article [101]'.⁵⁷⁸

369. This will be even more so where competitors also share non-pricing information which they would otherwise keep secret as confidential business information, as such sharing of information is likely further to increase transparency in the market about the undertakings' competitive behaviour and thereby substitute practical cooperation for the risks of competition.⁵⁷⁹

370. Finally, regardless of whether the subject matter of the information exchange would, in any event, change as a result of market conditions, an exchange of information which is capable of removing uncertainties as regards '*the timing, extent and details of the modifications to be adopted ... must be regarded as pursuing an anti-competitive object*'.⁵⁸⁰

ii. Application to this case

371. The evidence obtained by the OFT shows that the conduct of the Parties had, as its object, the prevention, restriction or distortion of competition.

372. The conduct engaged in between BA and VAA (described above in Part III) related to the PFS, a surcharge imposed on flights ex-UK during the Relevant Period and therefore directly involved a component of the total price charged to consumers.⁵⁸¹

373. As set out above in Section E of this Part, the exchange of information between the Parties reduced uncertainty between them regarding the price of the PFS that would be charged and the timing at which that price would be announced on the market. The conduct therefore created a climate of mutual certainty as to the Parties' intended pricing plans, and allowed the coordination of that pricing.

374. Further, on the occasions of August 2004 and March 2005, the conduct resulted in the Parties setting the price for the PFS at a level higher than had been planned by VAA prior to its contacts with BA.⁵⁸²

375. Additionally, the OFT considers that the provision by BA and VAA of advance notice to each other regarding their intentions as to PFS announcements further

⁵⁷⁸ *Bananas* (fn576), paragraph 263.

⁵⁷⁹ For example, *Hercules (CFI)* (fn514), paragraphs 259 to 260 (as well as pricing information, the information exchanged included sales volume restrictions, profitability thresholds, customer identities). See also Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and Others v Commission of the European Communities* [1995] ECR II-289, paragraphs 121 and 123 (information exchanged included product costs, product characteristics and tender breakdowns); République Française Conseil de la concurrence Décision n° 05-D-64 de 25 Novembre 2005 relative à des pratiques mises en œuvre sur le marché des palaces parisiens (the 'Parisian Luxury Hotels case'), paragraphs 200 to 264, upheld on appeal in République Française Cour d'appel de Paris, 1ère Chambre - Section H, 26 September 2006, n° RG 2005/24285, pages 8 and 9 (information exchanged included occupancy rates, average room prices and marketing strategies).

⁵⁸⁰ *T-Mobile Netherlands* (fn528), paragraphs 40 to 41.

⁵⁸¹ The PFS was charged on all routes except those listed above at paragraphs 53 and 54.

⁵⁸² The OFT also notes that while there is no record of the amount to which VAA thought the PFS could be increased in June 2005, £20 appears to have been the '*target*' or '*logical*' figure for VAA (see paragraph 210). In the event, VAA increased its PFS to £24, in line with BA.

increased transparency between them and substituted practical cooperation for the risks of competition.

376. An undertaking's intention to announce and justify an increase in price to consumers is commercially sensitive information that one would expect otherwise to be kept secret. This is particularly the case in the context of the PFS, where the media interest in and scrutiny of the PFS was significant and where, for BA, this information was considered market-sensitive such that it required release through the RNS. As set out above, by providing each other with advance notice (even of a relatively short duration), the Parties obtained for themselves some comfort that both would face a similar media/consumer reaction.
377. The importance of the media/consumer reaction to each Party's commercial 'bottom line' has been described above in Part III, section E. The OFT considers that this is further demonstrated by the fact that the conduct was carried out by senior management within both Parties:

Involvement of senior management within VAA

- The contacts with BA were carried out directly by *[VAA senior manager A]* and *[VAA senior manager B]*. This, in itself, is indicative of the commercial importance of the information exchange to VAA.
- In addition, the information obtained through those contacts was passed to and discussed by *[VAA senior manager C]* and *[VAA senior manager D]* (see paragraph 356).
- The evidence also shows that *[VAA senior manager B]* considered he should contact *[BA senior manager B]* under the instruction of *[VAA senior manager C]*, a possibility that *[VAA senior manager C]* acknowledged (see fn263).

Involvement of senior management within BA

- The contacts with VAA were carried out directly by *[BA senior manager A]* and *[BA senior manager B]*. This, in itself, is indicative of the commercial importance of the information exchange to BA.
- In addition, the OFT considers that, on balance, the evidence shows that the information exchange was carried out with the knowledge of [...] *[BA senior manager D]*. The evidence of *[BA senior manager B]* in this respect [...] remained consistent throughout his interviews with the OFT and is consistent with his earlier interviews with BA's legal representatives.⁵⁸³ The OFT considers that *[BA senior manager B]*'s recollections of [...] are credible and supported by the available circumstantial evidence, in particular telephone records.⁵⁸⁴ Additionally, *[BA senior manager A]*'s recollections of [...] are detailed and supported by the available circumstantial evidence, in

⁵⁸³ As regards *[BA senior manager B]*'s recollections in interview with the OFT, see fn183, fn243 and fn324 above. For *[BA senior manager B]*'s recollections in earlier interviews with BA's legal representatives, see Document 3274, p2; Document 3275, pp 1-3; Document 3276, p1; Document 3277, p1.

⁵⁸⁴ See fn183, fn184 (August 2004); fn243, fn267, fn268 and fn272 (March 2005); fn322 and fn324 (June 2005); fn407 and fn408 (September 2005).

particular telephone records.⁵⁸⁵ Finally, the recollections of other witnesses and, on one occasion, contemporaneous documentation, provide further evidence of */BA senior manager D*'s knowledge of the information exchange.⁵⁸⁶

- The OFT considers that the evidence also shows that the information received from VAA was passed, on two occasions, to */BA senior manager C*.⁵⁸⁷ It is unclear, however, from the evidence whether */BA senior manager C* was aware that the information had not yet been made public at the time it was passed to him.⁵⁸⁸

378. During the course of the investigation, it was suggested to the OFT that '*VAA would have increased its PFS in response to BA's increase, regardless of the pre-notification*'.⁵⁸⁹ However, the OFT considers on the basis of the available evidence that this cannot be assumed:

- Internal correspondence within VAA shows that VAA would not necessarily maintain the same PFS level as BA on routes where other carriers differed to BA.⁵⁹⁰
- Internal correspondence within BA in October 2004 shows that BA did not take it for granted that VAA would match its PFS increase.⁵⁹¹
- Importantly, in November 2005, VAA reduced its PFS and saw a reputational and commercial advantage in being the first to do so because of the importance to VAA of being perceived '*to be great value for money and*

⁵⁸⁵ See paragraphs 199, 250 to 251 and accompanying footnotes above. The OFT notes that the summaries provided of */BA senior manager A*'s internal interviews with BA's legal representatives are less clear and consistent than his recollections in interview with the OFT (see Documents 3279 and 3280). Nonetheless, when considered in conjunction with */BA senior manager B*'s evidence and all the available circumstantial evidence, the OFT considers, on balance, that */BA senior manager A*'s recollections in interview with the OFT are probative of */BA senior manager D*'s role.

⁵⁸⁶ See paragraphs 278, 279 and 294 and accompanying footnotes above. Document 1212 (email from */BA senior manager A* to */BA senior manager D* and */BA employee (sales)* on 06/01/2006) provides direct evidence of */BA senior manager D*'s knowledge of the information exchange.

⁵⁸⁷ In September 2005, */BA senior manager A*'s recollection (supported by the circumstantial telephone evidence) is that he updated */BA senior manager C* on VAA's position by telephone message immediately after his contacts with */VAA senior manager A* (see paragraph 252 and accompanying footnotes above). The evidence in relation to the November 2005 contacts shows that */BA senior manager D* immediately called a meeting to discuss the information with */BA senior manager C* and others prior to the public announcement from VAA (see paragraphs 278 to 279 above).

⁵⁸⁸ As regards September 2005, there is no record of the actual messages and thus the terms in which the update was given to */BA senior manager C*. In November 2005, although the confidential nature of the information ought to have become apparent during the course of the meeting, when the VAA public announcement was brought in, it is unclear from the evidence whether */BA senior manager C* would have been aware prior to that point that the information was not public.

⁵⁸⁹ BA submission to OFT (Document 3282, p72 (paragraph 18)). The paragraph discusses three specific instances, August 2004, June 2005 and September 2005. The OFT notes that in September 2005 VAA increased its PFS before BA, so the question of VAA matching BA does not arise in that instance.

⁵⁹⁰ See Document 0867 (email from */VAA senior manager A* to */VAA senior manager B* on 03/06/2005); Document 0891 (email from */a VAA employee* to */VAA manager (revenue management)* and others on 19/08/2005); Document 0893 (email */between VAA employees* on 24/08/2005); Document 3176 (handwritten note of */VAA manager (revenue management)*).

⁵⁹¹ See fn205 above.

the honest underdog player'.⁵⁹² It maintained this £5 per sector differential with BA until January 2006.

379. In any event, irrespective of any possibility that VAA would have matched BA, for the reasons set out at paragraph 370 above, the fact that the conduct of the Parties was capable of removing uncertainties as regards '*the timing, extent and details of the modifications to be adopted*' means that the conduct '*must be regarded as pursuing an anti-competitive object*'.⁵⁹³ The OFT considers that this is equally the case as regards the instances in which VAA provided advance notice to BA of its intended 'modifications' to the PFS. Moreover, as set out at paragraph 354 above, in relation to the PFS increases in March 2005 and September 2005 where VAA increased its PFS in advance of BA, it did so having received comfort through its contacts with BA that BA would match.
380. For the above reasons, the OFT considers that the exchange of pricing and other commercially sensitive information between the Parties and coordination of pricing in relation to PFS had as its object the prevention, restriction or distortion of competition between the Parties.
381. The OFT is not therefore required to consider the extent to which the conduct had an effect on competition on the market.

G. Single continuous infringement

i. Principles

382. Where two or more undertakings engage in a series of anti-competitive actions in pursuit of a common objective or objectives, it is not necessary to divide the conduct by treating it as consisting of a number of separate infringements where there is sufficient consensus to adhere to a plan limiting the commercial freedom of the parties.⁵⁹⁴ Nor is the characterisation of a complex cartel as a single and continuous infringement affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute infringements.⁵⁹⁵
383. Agreements and/or concerted practices may also constitute a single continuous infringement notwithstanding that they vary in intensity and effectiveness, or even if the arrangement in question is suspended during a short period.⁵⁹⁶
384. The parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The mere fact that a party does not abide fully by an agreement or concerted practice which is manifestly anti-competitive does not relieve that party of responsibility for it.⁵⁹⁷ Equally, the fact that a party

⁵⁹² See [...] first interview: Document 1143, p45.

⁵⁹³ See paragraph 370 above.

⁵⁹⁴ See *Rhône-Poulenc* (fn531), paragraph 126.

⁵⁹⁵ See *Anic* (fn514), paragraphs 111 to 114; See also Commission Decision (EC) 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/E-2/37.857 – *Organic peroxides*) [2005] OJ L110/44, paragraphs 7 and 8.

⁵⁹⁶ Case T-23/99 *LR AF 1998 A/S, formerly Løgstør Rør A/S v Commission of the European Communities* [2002] ECR II-1705, paragraphs 106 to 109.

⁵⁹⁷ For example, Case T-141/89 *Tréfileurope Sales SARL v Commission of the European Communities* [1995] ECR II-791, paragraphs 53 to 60.

may come to recognise that in practice it can 'cheat' on the agreement or concerted practice at certain times does not preclude a finding that there was a continuing single overall infringement.⁵⁹⁸

ii. Application to this case

385. The OFT finds that the evidence set out above and considered as a whole demonstrates that between August 2004 and January 2006, the Parties committed a single infringement comprising the coordination of their respective pricing in relation to PFS through the exchange of pricing and other commercially sensitive information.
386. The evidence shows that this Infringement began on 6 August 2004, when BA informed VAA of its intended amount of PFS increase and VAA, as a result, increased its PFS to that same amount. The evidence also shows that the Infringement subsisted until 6 January 2006, when, as a result of the '*practice that had developed*' between the Parties, VAA gave BA advance warning of its intention to bring its PFS back into line with BA's PFS.
387. The contacts between the Parties on the various occasions during this period served the same common goal, namely the coordination of the Parties' pricing in relation to their respective PFSs (see above sections E and F of this Part). The contacts were regular and followed the same pattern throughout the Relevant Period (namely, they took place prior to the announcement by either of the Parties of a change in PFS level). As the OFT has found above at paragraph 358, by adhering to their course of conduct, the Parties evolved a common understanding that any announcement of a change to the PFS level would be preceded by contact between them. The OFT therefore considers that the conduct of the Parties during the Relevant Period amounted to a single and continuous infringement.
388. The evidence set out and considered above demonstrates that, during the Relevant Period, the contacts between the Parties and the result of that conduct varied in intensity. It also shows that, on one occasion, the attempt by VAA to make contact with BA was unsuccessful (October 2004).⁵⁹⁹ For the reasons set out above at paragraphs 382 to 384, the OFT does not consider that these factors preclude a finding that there was a continuing single overall infringement.

H. Appreciable effect on competition

i. Principles

389. An agreement will fall outside the Chapter I prohibition and Article 101 if its impact on competition is not appreciable. As the Court of Justice held in *Völk*:

⁵⁹⁸ Case 246/86 *SC Belasco and Others v Commission of the European Communities* [1989] ECR 2117, paragraphs 10 to 16; *Bananas* (fn576), paragraphs 324, citing Case T-308/94 *Cascades v Commission* [1998] ECR II-925, paragraph 230; Case T-59/02 *Archer Daniels Midland Co v. Commission* [2006] ECR II-3627, paragraph 189; Joined Cases 96/82 etc. *IAZ and Others v Commission* [1983] ECR 3369, paragraph 25.

⁵⁹⁹ See paragraphs 160 to 173 above.

*'an agreement falls outside the prohibition in Article [101(1)] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question'.*⁶⁰⁰

390. An agreement and/or concerted practice will generally have no appreciable effect on competition if the aggregate market share of the parties to the agreement or concerted practice does not exceed ten per cent of the relevant market where the agreement and/or concerted practice is in existence between competing undertakings.⁶⁰¹ This reflects the Commission's practice as set out in its Notice on Agreements of Minor Importance.⁶⁰²
391. Nonetheless, where an agreement and/or concerted practice has as its object the direct or indirect fixing or coordination of prices, or the sharing of markets, it will be capable of having an appreciable effect even where the parties' combined market share falls below the ten per cent threshold. Again, this reflects the practice of the Commission.⁶⁰³

ii. Application to this case

392. Given that the overall agreement and/or concerted practice between BA and VAA has as its object the coordination of pricing it is considered by the OFT to have an appreciable effect on competition.
393. In any event, the combined market share of BA and VAA on the Affected Markets ranged from 47 per cent to 100 per cent, considerably more than the ten per cent threshold for appreciability in non price-coordination cases (see paragraphs 84 to 87 above).

I. Effect on trade

i. Principles

394. It is necessary for the purposes of the Chapter I prohibition that the agreement and/or concerted practice may affect trade '*within the United Kingdom*'. Likewise, it is necessary for the purposes of Article 101 that the agreement and/or concerted practice may affect trade '*between Member States*'.

Effect on trade within the United Kingdom

395. By virtue of section 2(1)(a) of the Act, the Chapter I prohibition applies only to agreements or concerted practices which '*may affect trade within the United Kingdom*'. For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.

⁶⁰⁰ Case 5-69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295 ('Völk'), paragraphs 5/7.

⁶⁰¹ Competing undertakings are undertakings which are actual or potential competitors on any of the markets concerned.

⁶⁰² See Commission Notice (EC) on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) [2001] OJ C368/13 (the '*Notice on Agreements of Minor Importance*'), paragraph 7(a).

⁶⁰³ *Notice on Agreements of Minor Importance* (fn602), paragraph 11, together with the Commission's decision in *Bananas* (fn576), paragraph 292.

396. By their very nature, agreements and concerted practices to fix or coordinate prices and commercial policies are likely to affect trade. It should be noted that, in order to infringe the Chapter I prohibition, an agreement and/or concerted practice does not actually have to affect trade as long as it is capable of affecting trade. Moreover, the test is not read as importing a requirement that the effect on trade should be appreciable.⁶⁰⁴

Effect on trade between Member States

397. As noted above, Article 101 prohibits only those agreements and/or concerted practices which '*may affect trade between Member States*'.

398. According to the settled case law of the Court of Justice, in order for an agreement or concerted practice to satisfy the '*effect on trade*' criterion,

*'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'.*⁶⁰⁵

399. In this context, the concept of '*trade*' has a wide scope and is not limited to exchanges of goods and services across borders.⁶⁰⁶ The '*pattern of trade*' will be affected for example by an agreement fixing price levels between the major suppliers of a service and thereby '*deflecting demand*' for that service amongst the undertakings involved and other undertakings.⁶⁰⁷ Furthermore, trade between Member States may be affected notwithstanding that the relevant market may be national or sub-national in scope.⁶⁰⁸

400. The agreement or concerted practice must affect trade between Member States to an appreciable extent.⁶⁰⁹ This is a jurisdictional requirement demarcating the boundary between EC competition law and national competition law.⁶¹⁰ Appreciability can be assessed by reference to the market position and importance of the undertakings concerned, and it will be absent where the effect

⁶⁰⁴ *Aberdeen Journals Limited v The Office of Fair Trading* [2003] CAT 11 ('*Aberdeen Journals*'), paragraphs 459 to 460.

⁶⁰⁵ First stated in Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECR 235, p249. See further, for example, *van Landewyck* (fn523), paragraph 170; Case 126/80 *Maria Salonia v Giorgio Poidomani and Franca Baglieri, née Giglio* [1981] ECR 1563, paragraph 12; Case 42/84 *Remia BV and Others v Commission of the European Communities* [1985] ECR 2545, paragraph 22. See also Commission Notice (EC) Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81 (the '*Effect on Trade Notice*'), paragraph 24.

⁶⁰⁶ Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG* [1981] ECR 2021, paragraph 18; and see *Effect on Trade Notice* (fn605), paragraph 19.

⁶⁰⁷ See Commission Decision (EC) 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34466 – *Greek Ferries*) [1999] OJ L109/24, paragraph 143; endorsed on appeal in Case T-61/99 *Adriatica di Navigazione SpA v Commission of the European Communities* [2003] ECR II-5349, paragraphs 28 and 29. See *Ferry Operators – Currency surcharges* (fn571), paragraph 61.

⁶⁰⁸ *Effect on Trade Notice* (fn605), paragraph 22.

⁶⁰⁹ *Völk* (fn600), paragraphs 5/7; Case 22-71 *Béguelin Import Co v S.A.G.L. Import Export* [1971] ECR 949, paragraph 16.

⁶¹⁰ Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission of the European Communities* [1979] ECR 1869, paragraph 17. See also *Aberdeen Journals* (fn604), paragraph 459; *Effect on Trade Notice* (fn605), paragraph 44.

on the market is insignificant because of the undertakings' weak position on the market.⁶¹¹

ii. Application to this case

401. The OFT considers that, by its very nature, an agreement or concerted practice between competitors to exchange pricing and other commercially sensitive information and to coordinate pricing in relation to the PFS is likely to affect trade within the UK.⁶¹²
402. The agreement and/or concerted practice referred to in this Decision operated in the UK and was at the very least capable of altering the structure of competition within the UK by reducing competition between the two main longhaul competitors operating flights ex-UK.
403. The OFT therefore considers that the requirement, within the meaning of the Chapter I prohibition, that an agreement and/or concerted practice may have an effect on trade within the UK is satisfied in this case.
404. As regards an effect on trade between Member States, BA and VAA compete with undertakings established in other Member States. The OFT considers that the conduct of the Parties in coordinating their pricing as regards PFS will have potentially deflected demand between the Parties and their competitors in other Member States and thus their conduct by its nature at least had the potential to affect the pattern of trade between Member States.
405. For these reasons the OFT considers that the conduct of the Parties was by its nature capable of affecting trade between Member States within the meaning of Article 101 and in accordance with the Commission's Effect on Trade Notice. Furthermore, given BA's and VAA's respective market shares in the Affected Markets, the OFT considers that that effect on trade between Member States satisfies the requirement of appreciability.

J. Exclusion or exemption

406. The Parties have not sought to prove that the arrangements entered are exempted from the Chapter I prohibition by operation of section 9 of the Act, or from Article 101 by the operation of Article 101(3) of the TFEU. Notwithstanding that the burden of proving that the conditions for exemption under section 9 of the Act or Article 101(3) of the TFEU would rest with the Parties, the OFT considers it most unlikely that the conditions would be met in this case. In particular, it is hard, if not impossible, to see how the coordination of the Parties' pricing in relation to PFS could be said to have contributed to improving the production or distribution of goods, promoting technical or economic progress or how consumers could be said to have benefitted. In the circumstances, it is not necessary for the OFT to consider whether any of the remaining requirements for exemption under those provisions would have been met.

⁶¹¹ *Völk* (fn600), paragraphs 5/7; Case T-77/92 *Parker Pen Ltd v Commission of the European Communities* [1994] ECR II-549, paragraph 40. See also *Effect on Trade Notice* (fn605), paragraph 44.

⁶¹² See paragraph 396.

407. There is also no block exemption order under section 6 of the Act that would exempt the conduct of the Parties from the Chapter I prohibition. Nor is there any applicable EU Council or Commission Regulation by virtue of which the conduct of the Parties would be exempt from Article 101 or would benefit from a parallel exemption from the Chapter I prohibition under section 10 of the Act.
408. Finally, none of the exclusions from the Chapter I prohibition provided for by section 3 of the Act applies.

K. Conclusion on the application of the Chapter I prohibition and Article 101

409. The OFT has carefully considered the evidence relating to the conduct described in Part III.
410. It has reached the conclusion that the Parties infringed Article 101 and/or the Chapter I prohibition by participating between August 2004 and January 2006 in an agreement and/or concerted practice by which they coordinated their pricing in relation to their respective PFSs through the exchange of pricing and other commercially sensitive information regarding the PFS, with the object of preventing, restricting or distorting competition.

V. THE OFT'S ACTION

411. This Part sets out the enforcement action which the OFT is taking and its reasons for taking that action.
- A. The OFT's decision**
412. The OFT finds for the reasons set out in Part IV above and on the basis of the evidence set out in Part III above that BA and VAA infringed Article 101 and/or the Chapter I prohibition by participating between August 2004 and January 2006 in an agreement and/or concerted practice by which they coordinated their pricing in relation to their respective passenger fuel surcharges for long-haul flights (PFS) through the exchange of pricing and other commercially sensitive information regarding the PFS, with the object of preventing, restricting or distorting competition.
- B. Directions**
413. Section 32(1) of the Act provides that if the OFT has made a decision that an agreement and/or concerted practice infringes the Chapter I prohibition and/or the prohibition in Article 101, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. As the OFT considers that the Infringement has already come to an end it is not issuing directions in this case.
- C. Penalties**
- i. Introduction
414. Section 36(1) of the Act provides that on making a decision that an agreement and/or concerted practice has infringed the Chapter I prohibition and/or the prohibition in Article 101, the OFT may require the undertakings concerned to pay to it a penalty in respect of the infringement. For the avoidance of doubt, the OFT notes that for the purposes of imposing a penalty on the undertakings concerned, it is immaterial whether the infringement was by its nature capable of affecting trade between Member States within the meaning of Article 101. The OFT considers therefore that the imposition of a penalty in full would be sustainable for breach of the Chapter I prohibition alone.
- ii. Statutory cap on penalties
415. No penalty which has been fixed by the OFT may exceed 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).⁶¹³
- iii. Small agreements
416. Section 39(3) of the Act provides that a party to a small agreement is immune from the effect of section 36(1). This is defined, pursuant to section 39(1) and

⁶¹³ Section 36(8) of the Act and SI 2000/309.

the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (as amended), as an agreement between undertakings, the combined applicable turnover of which for the business year ending in the calendar year preceding the one during which the infringement occurred, does not exceed £20 million. Since the combined applicable turnover of the Parties exceeds that amount, the agreement and/or concerted practice cannot benefit from immunity from penalties under that section.

iv. Intention/negligence

417. The OFT may impose a penalty on an undertaking that has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently,⁶¹⁴ although the OFT is not obliged to specify whether it considers the infringement to be intentional or merely negligent.⁶¹⁵

418. The Court of Justice has stated that:

'that condition [that an infringement be 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 (see Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission [1983] ECR 3369, paragraph 45, and Nederlandsche Banden-Industrie-Michelin v Commission, paragraph 107)'.⁶¹⁶

419. Similarly, the CAT has stated that:

'an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition ... It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition'.⁶¹⁷ and

'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 ...'.⁶¹⁸

420. The OFT considers that serious infringements of the Chapter I prohibition which have as their object the prevention, restriction or distortion of competition are, by their very nature, committed intentionally.⁶¹⁹ Ignorance of the law is no bar to a finding of intentional infringement. In any event, the OFT considers the Parties

⁶¹⁴ Section 36(3) of the Act.

⁶¹⁵ *Napp* (fn489), paragraphs 453 to 455; see also *Argos and Littlewoods (penalty)* (fn61), paragraph 221.

⁶¹⁶ Case C-280/08P *Deutsche Telekom v Commission and others*, 14 October 2010 (not yet published), paragraph 124.

⁶¹⁷ *Napp* (fn489), paragraph 456; see also *Argos and Littlewoods (penalty)* (fn61), paragraph 221 ('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').

⁶¹⁸ *Napp* (fn489), paragraph 457.

⁶¹⁹ See OFT Guideline 407, *Enforcement*, December 2004, paragraphs 5.9 to 5.11.

to be highly-sophisticated organisations, which have, or ought to have, an in-depth awareness of the competition rules.

421. The Parties entered into an agreement and/or concerted practice with the object of coordinating the pricing of their respective PFSs in the Affected Markets. The OFT considers that the very nature of this agreement and/or concerted practice means that the Parties could not have been unaware that the agreement and/or concerted practice in which they participated had the object of preventing, restricting or distorting competition.
422. Although the OFT is not obliged to specify whether the infringement was committed intentionally or negligently, the OFT is satisfied that the Parties' Infringement of Article 101 and/or the Chapter I prohibition was intentional, as the restrictive nature of the Infringement was obvious and its anti-competitive consequences were plainly foreseeable. Therefore, neither Party could have been unaware that its conduct had the object or would have had the effect of restricting competition. As the Parties ought to have known that the conduct would result in a restriction of competition, the OFT considers that, in any event, at the very least the Infringement was committed negligently.

v. VAA's application for immunity

423. An undertaking will benefit from total immunity from financial penalties if it is the first to provide the OFT with evidence of cartel activity in a market before the OFT has commenced an investigation of the cartel activity and has complied with certain other conditions.⁶²⁰
424. As set out in paragraph 22 above, VAA applied to the OFT for immunity under the OFT's leniency policy and was the first to do so in circumstances where there was no prior OFT investigation. As the relevant conditions as set out in the immunity agreement between VAA and the OFT have been met, VAA benefits from total immunity from financial penalties.
425. The OFT has not calculated the penalty that would otherwise be imposed on VAA had it not benefitted from such immunity. The OFT does not consider that it needs to determine VAA's penalty since it will not, as a successful immunity applicant, be required to pay a penalty to the OFT under section 36 of the Act.

vi. Calculation of BA's penalty

426. On 31 July 2007, the OFT and BA signed an ERA in which BA admitted it had infringed competition law by participating in the Infringement and agreed to pay a penalty of £121.5 million (see paragraph 39 above). Following issue of the Statement of Objections in November 2011, the OFT reassessed whether the level of penalty set out in the original ERA remained appropriate. In carrying out this assessment, the OFT had regard amongst other things to submissions made by BA regarding the level of penalty⁶²¹ and to developments in the case law of the CAT since 2007 regarding penalty calculations under the Act. The OFT and BA subsequently reached an agreement amending the ERA as regards the level

⁶²⁰ *Penalty Guidance* (fn2), paragraph 3.9.

⁶²¹ BA provided submissions on the level of penalty on 16 December 2011 (Document 3557).

of penalty.⁶²² The revised penalty agreed by the OFT and BA is £58.5 million. This includes a reduction of penalty under the OFT's leniency policy, together with a further reduction to reflect BA's exceptional additional procedural cooperation as set out in the original ERA.

427. In agreeing the amount of penalty, the OFT had regard to its Penalty Guidance in force at the time of the early resolution. The OFT's Penalty Guidance sets out five steps for determining the penalty.⁶²³
428. The OFT has based its penalty calculations on the consolidated turnover of BA. The consolidated turnover of BA includes the turnover of all wholly and majority-owned subsidiaries over which BA exercises control.⁶²⁴

Step one – starting point

429. Under the Penalty Guidance, the starting point for determining the level of penalty is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertakings.⁶²⁵ The 'relevant turnover' is the turnover of the undertaking in the relevant markets affected by the infringement in the last business year.⁶²⁶
430. In a number of recent judgments of the CAT in the *Construction* appeals, the CAT has held that the correct interpretation of the term 'last business year' in the Penalty Guidance is the undertaking's business year preceding the date on which the infringement ended.⁶²⁷ In the case of the penalty for BA, the 'last business year' is the financial year 2004/05, as the Infringement ended during the financial year 2005/06.⁶²⁸
431. The starting point may not exceed 10 per cent of each undertaking's relevant turnover.⁶²⁹
432. Whilst the OFT is not obliged to formulate the starting point as a percentage rate of the undertaking's relevant turnover, the OFT has done so in this case as an appropriate way of having regard both to the seriousness of the Infringement and BA's relevant turnover.
433. The actual percentage which is applied to the relevant turnover depends upon the nature of the infringement. The more serious and widespread the infringement, the higher the appropriate percentage rate.⁶³⁰ When making this assessment, the OFT will consider a number of factors, including the nature of the product or services, the structure of the market, the market shares of the

⁶²² Letter of agreement between the OFT and BA dated 17 April 2012 (Document 3590).

⁶²³ *Penalty Guidance* (fn2), paragraphs 2.1 to 2.20.

⁶²⁴ See paragraph 9 for an explanation of the role of IAG, now BA's parent company.

⁶²⁵ *Penalty Guidance* (fn2), paragraph 2.3.

⁶²⁶ *Penalty Guidance* (fn2), paragraph 2.7.

⁶²⁷ See for example *Kier Group v OFT* [2011] CAT 3 ('*Kier Group*'), paragraph 137.

⁶²⁸ The final information exchange between the Parties took place in January 2006.

⁶²⁹ *Penalty Guidance* (fn2), paragraph 2.8.

⁶³⁰ *Penalty Guidance* (fn2), paragraph 2.4.

undertakings involved in the infringement, entry conditions and the effect on competitors and third parties.⁶³¹

434. The OFT notes the following factors in assessing the seriousness of the Infringement described in this Decision:
- cartel conduct is regarded to be among the most serious infringements of the Chapter I prohibition and/or Article 101;
 - in this case, the agreement and/or concerted practice related to the coordination of the Parties' pricing in relation to their respective PFSs through the exchange of pricing and other commercially sensitive information regarding the PFS; and
 - the Parties were the two main carriers operating on the routes that form the Affected Markets in this case.
435. On the other hand, the OFT notes that:
- the intensity of the contacts between the Parties varied during the course of the Infringement;
 - the coordination between the Parties concerned the PFS only and therefore involved only an element of the overall ticket price; and
 - on all of the routes that form the Affected Markets in this case, the Parties faced competition, either from scheduled carriers or from charter carriers (on principal holiday routes).⁶³²
436. Taking these factors into account, the penalty agreed with BA for the Infringement is based on a starting point of 8.5 per cent. This is below the maximum ten per cent starting point under the Penalty Guidance.⁶³³

Step two – adjustment for duration

437. At step two of the Penalty Guidance, the starting point may be adjusted to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringements.⁶³⁴ Part years may be treated as full years for these purposes.⁶³⁵
438. The OFT has concluded that the Infringement lasted for 17 months. The OFT therefore applies a multiplier of 1.5 to the penalty at this step in the calculation.

⁶³¹ *Penalty Guidance* (fn2), paragraph 2.5. The damage caused to consumers whether directly or indirectly will also be an important consideration.

⁶³² See table of competitors on affected routes, submitted by BA on 15 February 2012 (document 3568).

⁶³³ The turnover figure to which the starting percentage is applied is also based on a conservative definition of the relevant market that is favourable to the Parties (see paragraph 63 above).

⁶³⁴ *Penalty Guidance* (fn2), paragraph 2.10.

⁶³⁵ *Penalty Guidance* (fn2), paragraph 2.10.

Step three – adjustment for other factors

439. At step three of the Penalty Guidance, the penalty may be adjusted as appropriate to achieve the OFT's policy objectives.⁶³⁶ These objectives were set out in paragraph 63 above.
440. In particular, the OFT will consider whether, in light of the level of penalty after steps one and two, any adjustment to the penalty is necessary, either to deter the infringing undertaking from engaging in such behaviour in the future, and/or to deter other undertakings which might be considering activities which are contrary to the Chapter I prohibition and/or Article 101.
441. The OFT has also given consideration to recent findings of the CAT that the OFT ought to '*take a step back and ask itself whether in all the circumstances a penalty at the proposed level is necessary and proportionate in order both to punish the particular undertaking for the specific infringement and to deter it and other companies from further breaches of that kind*'.⁶³⁷
442. The OFT has therefore considered the necessity and proportionality of the proposed penalty in all the circumstances of this case. In doing so, the OFT has had regard to a range of factors relating to BA's financial position for the last financial year and two previous years.⁶³⁸ The OFT has also had regard to the fact that the Infringement concerned a fuel surcharge for air passenger services on long haul routes to and from the UK, with the result that part of the harm resulting from the Infringement is likely to fall outside the UK⁶³⁹ [...]⁶⁴⁰ and that the US antitrust authorities have imposed a significant fine on the Parties in respect of the US impact of the conduct.⁶⁴¹
443. Given that BA suffered losses in 2008/09 and 2009/10, without an adjustment, the penalty (taking into account the imposition of an uplift for aggravating factors at paragraph 447 below) would exceed BA's profit over the three financial years to end-December 2010. However, the penalty would not exceed the profit that BA made in the last financial year to end-December 2010⁶⁴² and would constitute a relatively modest proportion of other indicators of BA's financial position (passenger revenue, net assets and net cash inflow).⁶⁴³ In view

⁶³⁶ *Penalty Guidance* (fn2), paragraph 2.11.

⁶³⁷ *Kier Group* (fn627), paragraph 166. See also *Renew Holdings and others v. OFT* [2011] CAT 9, paragraph 35.

⁶³⁸ For a discussion of possible factors to take into account in such a cross-check, see, for example, *Kier Group* (fn627), paragraphs 170 to 172.

⁶³⁹ The OFT notes that in its recent decision in the *Airfreight* case, which involved cartel activities relating to a fuel surcharge for international air cargo services, the European Commission reduced the basic amount of the fine to take account of the fact that part of the harm resulting from the cartel was likely to fall outside the EEA (see *Airfreight* (fn571)).

⁶⁴⁰ See turnover figures provided by BA to OFT on 5 December 2011, calculated on the basis of worldwide and UK point of sales revenues (Document 3541).

⁶⁴¹ See plea agreement in *US v. British Airways* (www.justice.gov/atr/cases/f225500/225523.htm).

⁶⁴² Over the two year and nine month period to end-December 2010, BA suffered an overall loss and the penalty would be arithmetically equivalent to approximately one-quarter of the total loss for the three year period. More recently, in the nine months to end-December 2010, BA earned a profit and the penalty would amount to 85 per cent of BA's profit after tax. These calculations are made using data from BA's published accounts.

⁶⁴³ For the year to end-December 2010, the penalty would amount to 2.5 per cent of overall passenger revenue, six per cent of net assets (since no dividends were paid during this period, the standard practice

of this, together with the fact that the Infringement would have had an impact on customers outside the UK as well as UK customers and that BA has already been fined by the US authorities, the OFT considers that, in the round, a reduction of a third in the penalty at step three would be appropriate. The OFT is satisfied that the resulting penalty is necessary and proportionate to achieve the twin policy objectives in all the circumstances of the case.

Step four – adjustment for aggravating and mitigating factors

444. At step four of the Penalty Guidance, the penalty may then be adjusted to take account of any aggravating and/or mitigating factors.⁶⁴⁴
445. Aggravating factors can include the involvement of senior management in the infringement, repeated infringements by the same undertaking or other undertakings in the same group, and the intentional, rather than negligent commission of the infringement. These factors are not exhaustive.
446. Mitigating factors can include adequate steps having been taken to ensure compliance with Articles 101 and 102 and the Chapter I and Chapter II prohibitions, and cooperation by a party which enables the enforcement process to be concluded more effectively and/or speedily, although undertakings benefiting from the leniency programme would not normally receive additional reductions in financial penalties under this head to reflect general cooperation.⁶⁴⁵ These factors are also not exhaustive.
447. The penalty agreed with BA includes an uplift of 20 per cent to take account of the involvement of senior management in the Infringement. An uplift of this amount is appropriate given the seniority of the persons involved in the Infringement within BA. As set out above at paragraph 377 above, the Infringement was carried out by *[BA senior manager B]* and *[BA senior manager A]* and with the knowledge of [...] *[BA senior manager D]* [...] member of the BA Board [...].⁶⁴⁶ [...].⁶⁴⁷
448. The penalty agreed with BA does not include a reduction for mitigating factors.

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

449. At step five of the Penalty Guidance, the final amount of the penalty calculated according to the method set out above may not exceed 10 per cent of the

of adding back dividends paid to this figure does not apply) and 19 per cent of net cash inflow. Similarly, for the two year and nine month period to end-December 2010, the penalty would amount to 0.7 per cent of overall passenger revenue and 7.3 per cent of net cash inflow.

⁶⁴⁴ *Penalty Guidance* (fn2), paragraph 2.14.

⁶⁴⁵ *Penalty Guidance* (fn2), paragraph 2.16 and footnote 19.

⁶⁴⁶ [...].

⁶⁴⁷ Since the evidence does not show that *[BA senior manager C]* was aware in either instance where the information from VAA was passed to him that such information was confidential at that time (see paragraph 377 above), the OFT does not rely on the passing of information to *[BA senior manager C]* in determining the amount of uplift for senior management involvement.

worldwide turnover of the undertaking in its last business year.⁶⁴⁸ In addition, if a penalty or fine has been imposed by the Commission or by a court or other body in another Member State in respect of an agreement or conduct, the OFT must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct.⁶⁴⁹

450. The OFT has assessed BA's penalty against the tests set out in the preceding paragraph (as applicable). This assessment has not necessitated any reductions at step five of the penalty calculation.
- vii. Application of OFT's leniency policy and early resolution policy
451. Under the OFT's leniency policy, undertakings which provide evidence of cartel activity before a statement of objections has been issued, but are not the first to come forward and subject to other conditions, may be granted a reduction of up to 50 per cent in the amount of a financial penalty which would otherwise be imposed.⁶⁵⁰
452. BA applied for leniency and entered into a leniency agreement in July 2007 (see paragraph 23 above). Under the terms of the original leniency agreement, BA was granted a discount in the amount of 15 per cent to reflect the value added to the OFT's investigation by the information and cooperation provided by BA.⁶⁵¹ This discount was increased to 25 per cent in April 2012 to reflect the fact that the overall value added to the OFT's investigation by BA was greater than anticipated at the time the original leniency agreement was concluded, in particular as regards the extent of the cooperation required as a result of the parallel criminal proceedings.⁶⁵²
453. As part of the early resolution the OFT has separately granted BA a discount of 20 per cent to reflect the key terms of the agreement described above at paragraph 39.
454. Having regard to the steps for determining the level of financial penalty under the Penalty Guidance and following the application of the OFT's leniency policy and the ERA, the agreed penalty to be imposed upon BA for the Infringement described in this Decision is £58.5 million.
- viii. Payment of penalty
455. The OFT therefore requires BA to pay the penalty as set out in the table below.

⁶⁴⁸ *Penalty Guidance* (fn2), paragraph 2.17. 'Last business year' in this context means the business year preceding the date on which the decision of the OFT is taken; see Section 36(8) of the Act and SI 2000/309.

⁶⁴⁹ *Penalty Guidance* (fn2), paragraph 2.20.

⁶⁵⁰ *Penalty Guidance* (fn2), paragraph 3.13.

⁶⁵¹ See OFT Guidance 803, *Leniency and no-action* (December 2008), paragraphs 5.5 to 5.6.

⁶⁵² This included the preservation and production of documents and information to the requisite legal standard in the parallel criminal proceedings, the provision of substantial telephone records and assistance with the OFT's analysis of these records, and arranging for the OFT to interview a significant number of current and former BA employees. The extent of BA's cooperation is described more fully in a letter from BA to the OFT dated 3 February 2012 (Document 3577).

456. The penalty will become due to the OFT in its entirety on 22 June 2012 and must be paid to the OFT by close of banking business on that date.⁶⁵³ If the penalty is not paid and either an appeal against the imposition or amount of that penalty has not been made or such an appeal has been made and determined in the OFT's favour, the OFT may commence proceedings to recover the amount as a civil debt.

BA penalty calculation

Penalty Component	Description	Amount
STEP 1	Relevant turnover for financial year 2004/05	£[...]
	Starting point (8.5%)	
	Penalty after Step 1	£[...]
STEP 2	Duration multiplier (x1.5)	
	Penalty after Step 2	£[...]
STEP 3	Adjustment (-33%)	
	Penalty after Step 3	£[...]
STEP 4	Aggravating factors (senior management involvement (+ 20%))	
	Mitigating factors (-0%)	
	Penalty after Step 4	£[...]
STEP 5	No adjustment	-
	Penalty after Step 5	£[...]
Leniency	Leniency discount (25%)	
Early Resolution	Early Resolution discount (20%)	
	FINAL PENALTY	£58.5 million



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Senior Director, Cartels and Criminal Enforcement Group

19 April 2012

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⁶⁵³ Details on how to pay will be set out in the letter accompanying this Decision.

APPENDIX A: LIST OF INDIVIDUALS MENTIONED IN THIS DECISION

[...]

APPENDIX B: DRAFT EMAIL CREATED AT 13:56 ON 21 MARCH 2005

1. During the course of the OFT's parallel criminal proceedings under the EA02, a draft email created by *[VAA press officer 1]* on 21 March 2005 came to light ('the draft email').¹ This draft email contains a copy of previous 'lines to take' on the PFS and states '*This week – third increase; Oil Price = \$58 a barrel; Increase by £6 per sector in relation to \$58 increase in oil per barrel*'.
2. The draft was forwarded by *[VAA press officer 1]* to *[VAA senior manager B]* on 24 June 2005 and the header information relating to the original section of the forwarded email showed a date/time of 21/03/2005 at 13:56.²
3. BA has submitted that the draft email shows that VAA had already decided to increase its PFS by £6 before the conversation between *[VAA senior manager B]* and *[BA senior manager B]* at 14:16 on that date.³
4. As set out at paragraph 216 of the Decision, the OFT has reviewed the evidence pertaining to the draft email and considers that it does not establish that VAA's decision as to the PFS amount had been made by 13:56 on 21 March 2005. The OFT considers, on the contrary, that the draft email remained open for editing during the course of the afternoon and that *[VAA press officer 1]* likely updated and resaved the draft as she received further information during that time.
 - i. Analysis of the draft email
5. In order for the draft email to show that VAA's pricing decision was already made prior to the conversation between *[VAA senior manager B]* and *[BA senior manager B]*, either of the following conditions would need to be satisfied:
 - (a) the draft email was sent at 13:56 on 21/03/2005, establishing that the content of that draft was finalised by that time; or
 - (b) if the draft email was not sent at 13:56 on 21/03/2005, some other evidence establishes that the content had already been finalised by that time.
6. In assessing whether either of these conditions is satisfied, the OFT has taken into account (i) the location of the draft email in *[VAA press officer 1]*'s email system; (ii) forensic examination of the metadata underlying the draft email;⁴ and (iii) the evidence obtained through interview with *[VAA press officer 1]*.
7. The OFT considers that the draft email cannot be regarded as evidence that VAA's decision to increase its PFS amount by £6 had been made by 13:56 on 21 March 2005, for the reasons set out below.

¹ Document 2681 (*[VAA press officer 1]* draft email).

² Document 2924 (*[VAA press officer 1]* draft email: version forwarded to *[VAA senior manager B]* on 24/06/2005).

³ Document 3282, pp 33, 35.

⁴ The OFT engaged CCL-Forensics Ltd (digital forensic analysts) to conduct an analysis of the metadata underlying the draft email. CCL-Forensics Ltd provided a Report and Addendum Report to the OFT setting out the findings. The page references in the footnotes below refer to the page number of the PDF copies of these reports, rather than the page number in the original documents.

The draft email was located in [VAA press officer 1]'s 'drafts' folder not 'sent' folder

8. The draft was resident in and extracted from [VAA press officer 1]'s 'drafts' email folder. [VAA press officer 1] organised her email mailbox into a large number of folders, including a specific 'fuel surcharge' email folder and a 'line to take' email folder.⁵ The draft email, however, was located in her 'drafts' folder, which according to [VAA press officer 1], is where she retained documents she '*was working on and things that [she] wanted to keep for future reference*'.⁶ Documents of this nature would be kept in that folder and [VAA press officer 1] '*would go back into that folder later to look at [them]*'.⁷ [VAA press officer 1] considered that she would have saved the draft email '*into [her] Drafts folder as a useful 'timeline' document for future reference*'.⁸

The draft email was not sent at 13:56

9. The evidence shows that the draft email was not sent at 13:56 on 21 March 2005.
10. Forensic examination shows that 13:56 is the time the draft email was initially opened (i.e. created).⁹ No evidence was found to support the assertion that the draft email was sent or forwarded in its current form at any time on 21 March 2005.¹⁰ In particular:
 - When a draft email is forwarded, the new (forwarded) message is placed in the 'sent' folder of the mailbox. No such message was found in [VAA press officer 1]'s 'sent' folder for 21/03/2005.¹¹
 - The email system used by VAA in 2005 was Lotus Notes. Lotus Notes attaches a 'PostedDate' field to an email document when it is sent or forwarded. No such field was found for the draft email.¹²

⁵ Report prepared for OFT by CCL-Forensics: Document 3425, pp 8-9; Addendum report prepared for OFT by CCL-Forensics: Document 3424, pp 11-12. See also [...] second interview: Document 3289, p10, where [VAA press officer 1] stated that, although she was a '*bit of a basic person when it comes to IT'* she did organise her email files into specific folders '*because of the nature of [the] work and the fact that you do need to look at ... history and past work that you have done*'.

⁶ See [...] second witness statement: Document 3428, p2.

⁷ See [...] second witness statement: Document 3428, p3.

⁸ [...] second witness statement: Document 3428, p4.

⁹ The fact that 13:56 is the time at which the draft was initially opened is established by the metadata attribute: 'created (initially)' which is automatically generated by the system (see further paragraph 1.12 below). Additionally, forensic testing has shown that when a message is forwarded (as happened with the draft on 24/06/2005) the body of the new message contains a date and time associated with the original message and this matches the document's 'created (initially)' date and time. See Report prepared for OFT by CCL-Forensics: Document 3425, pp 22-24; Addendum report prepared for OFT by CCL-Forensics: Document 3424, pp 20-21. See also Herbert Smith's letter of 09/07/2010 setting out FTI Consulting's report on the draft email: Document 2604, p6.

¹⁰ Addendum report prepared for OFT by CCL-Forensics: Document 3424, p18.

¹¹ Report prepared for OFT by CCL-Forensics: Document 3425, p20; Addendum report prepared for OFT by CCL-Forensics: Document 3424, p18.

¹² Report prepared for OFT by CCL-Forensics: Document 3425, p19; Addendum report prepared for OFT by CCL-Forensics: Document 3424, p18.

- *[VAA press officer 1]* is part of the '#Public Relations' distribution list, to which the draft email is addressed. As a result, if the draft email had been sent, she would have received a copy. No such copy was found during testing.¹³

The draft email was open for editing and was resaved after 13:56

11. The evidence obtained by the OFT demonstrates that the draft email was open for editing during the course of the afternoon and that it was resaved on a number of occasions during that time before being saved for the last time at 18:06.
12. Email messages within Lotus Notes contain date and time metadata attributes – these are under the control of the Lotus Notes environment and cannot be edited by the user, absent special designer software.¹⁴ The following table sets out the metadata underlying the draft email, which was obtained from a forensic image of *[VAA press officer 1]*'s computer.¹⁵

Created (initially)	21/03/2005	13:56:51
Modified (initially)	21/03/2005	18:06:32
\$Revisions	21/03/2005	03:15:30 PM GMT
	21/03/2005	03:15:31 PM GMT
	21/03/2005	05:52:34 PM GMT
	21/03/2005	05:52:34 PM GMT
	21/03/2005	06:06:32 PM GMT
Added (in this file)	24/03/2005	15:26:06
Modified (in this file)	24/03/2005	15:26:06

13. The metadata attributes show that the history of the draft email was as follows: the draft email was initially opened (created) at 13:56. It remained open and was saved at 15:15 that afternoon. It was saved again at 17:52 and was finally saved at 18:06.

¹³ Addendum report prepared for OFT by CCL-Forensics: Document 3424, p18

¹⁴ Report prepared for OFT by CCL-Forensics: Document 3425, p6. The OFT notes that *[VAA press officer 1]* described herself as a '*basic user from an IT perspective*' [...] second witness statement: Document 3428, p2).

¹⁵ A separate version of the draft email was taken from the backup tapes of VAA's email server and was reviewed (see Herbert Smith's letter of 31/08/2011: Document 3299, p2). The metadata attributes of both versions were the same, with the exception of two attributes: Added (in this file) and Modified (in this file). These attributes relate to synchronisation of emails from the database on which they were initially created and the database in which they were stored – this is done through a replication process (see Addendum report prepared for OFT by CCL-Forensics: Document 3424, p17; Herbert Smith's letter of 04/07/2011 setting out FTI Consulting's response to OFT questions: Document 3300, p2). The forensic image attributes were dated 24/03/2005 and the backup image attributes were dated 21/03/2005. The Lotus Notes replication log shows that a replication process occurred on 24/03/2005 at 15:25, which would account for the difference in these attributes between the two emails (see Addendum report prepared for OFT by CCL-Forensics: Document 3424, pp 16-17).

14. While the metadata cannot reproduce, identify or confirm if any edits were made prior to or at the times at which the draft was saved, it nonetheless shows that the document was open for editing during the course of the afternoon of 21 March 2005 and that it was resaved on three occasions that afternoon.
 15. According to *[VAA press officer 1]*, her '*general practice was to save the document I was working on when I received new information*'.¹⁶ *[VAA press officer 1]* has confirmed that, as regards the draft email, while she cannot recall '*how often I updated that document on the day ... I would have amended it as I received fresh information*'.¹⁷
 16. On the basis of the above, the OFT considers it likely that *[VAA press officer 1]* updated the draft email during the afternoon as she was given new information regarding VAA's decision.
- ii. Conclusion
17. The evidence obtained by the OFT shows that the draft email was not sent at 13:56 on 21 March 2005. The evidence further shows that the draft email was open for editing and was resaved on a number of occasions later that afternoon; that *[VAA press officer 1]*'s practice was to save documents she was working on as she amended them and that, while she cannot recall the details, she would have amended the draft email as she received fresh information. The OFT considers that it is likely *[VAA press officer 1]* updated the draft email during the course of the afternoon of 21 March 2005.
 18. On the basis of the above, the OFT considers that the evidence does not establish that the content of the draft email was finalised by 13:56 on 21 March 2005. On the contrary, although the evidence cannot identify what amendments would have been made, the evidence indicates that the information in the draft email was likely amended after that time.
 19. As a result, the OFT considers, on balance, that the draft email cannot be considered as evidence that VAA had already decided to increase its PFS by £6 before the conversation between *[VAA senior manager B]* and *[BA senior manager B]* at 14:16 on 21 March 2005.

¹⁶ [...] second witness statement: Document 3428, p4.

¹⁷ [...] second witness statement: Document 3428, p4. *[VAA press officer 1]*'s recollections are consistent with the evidence she gave to the US Department of Justice in September 2010, as set out in a summary note prepared by VAA's US legal representatives (Document 3165, p9). In particular, *[VAA press officer 1]* noted in that interview that amending a draft throughout the day '*would have been customary as [lines to take] often evolve of the course of a day*' (Document 3165, p9).