ADVOKATFIRMAET
HARRIS
90 år i 2014

Samferdselsdepartementet
v/ Statsråd Ketil Solvik Olsen
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Bergen, 14. mars 2014
Vår ref: 63794/CHI
Ans. adv. Tor Lars Onarheim
Sekretær: Rita Høysæter

AVINORS FORRETNINGSNEKTELSER OVERFOR FLYBUSSBERGEN.NO

1. INNLEDNING

Advokatfirmaet Harris er bedt om å bistå flybussbergen.no AS (flybussbergen.no) i forbindelse med at flybussbergen.no er utestengt fra å tilby flybusstjenester til forbrukere fra holdeplasser ved ankomsthallen på Flesland.

Dette brevet er utformet i samarbeid med professor Tore Lunde ved Det juridiske fakultet, Universitetet i Bergen.

Det vises til tidligere korrespondanse tilknyttet Avinors lovstridige opptreden overfor flybussbergen.no. I det følgende vil vi gi utfyllende merknader som viser at Avinor har utsatt flybussbergen.no for en lovstridig forretningsnektelse.

Avinor som driver av Bergen lufthavn Flesland (Flesland) kontrollerer tilgang til flyplassen, herunder blant annet allokering av områder for parkering av privatbiler, drosjer og flybusser. Det er ingen alternative leverandører av tilgang til Flesland.

Det er satt av to holdeplasser ved utgangen av ankomsthallen ved Flesland til flybusser som tilbyr transport til Bergen. Tilsvarende er det to holdeplasser for avstigning nær inngangen til terminalen. Avinor har inngått en avtale hvor Tide flybusser er gitt eksklusiv rett til å benytte disse holdeplassene til å tilby slike tjenester til forbrukerne. Flybussbergen.no er nektet tilgang til holdeplassområdet av Avinor, og som en følge av dette har Tide flybusser fått et monopol på å tilby flybusstjenester til forbrukerne fra holdeplassene.

For å kunne tilby flybusstjenester i konkurranse med Tide er flybussbergen.no absolutt avhengig av tilgang til det samme holdeplassområdet ved ankomsthallen som benyttes av Tide. Tilgang til slike fasiliteter for flybussbergen.no vil gi forbrukerne et bredere og

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bedre kollektivtilbud. En slik adgang vil innfri de målsetninger som er satt i fagrapportene Avinor har fått utredet for flyplassen.[1]

Avinor har som dominerende foretak/monopolvirksomhet et særskilt ansvar for å sikre en konkurranse i markedet for flybusstjenester.

Det gjøres gjeldende at forretningsnektelsen overfor flybussbergen.no er i strid med konkurranseloven § 11. Forretningsnektelsen hindrer muligheten for konkurranse om å tilby flybusstjenester ved holdeplassene ved ankomsthallen på Flesland. Den gjennomførte tildeling til kun én aktør vil kunne lede til et dårligere tilbud til forbrukerne og høyere priser på tjenestene.

Det gjøres videre gjeldende at den eksklusivitetsavtalen som Avinor har inngått med Tide, innebærer et ulovlig vertikalt konkurransebegrensende samarbeid i strid med konkurranseloven § 10.

Nedenfor gjøres en nærmere gjennomgang av grunnlaget.

Innledningsvis finner vi grunn til å understreke at nyere rettsutvikling internasjonalt klart viser at en dominerende aktør som i dette tilfelle Avinor, ikke står fritt til å gjennomføre en anbudskonkurranse som foretatt i dette tilfelle. Vi viser her særlig til dommen fra High Court of Justice Chancery Division avsagt 28. januar 2014, som har direkte relevans for norsk rett og den foreliggende sak.

Det bemerkes også innledningsvis at forholdet til konkurranseloven nærmest er fraværende i behandlingen fra Oslo byfogdembetes kjennelse av 24. januar 2014. Forholdet er behandlet i så liten grad at kjennelsen ikke er egnet til å kaste lys over anvendelsen av konkurranseloven i saken.

2. KONKURRANSELOVENS ANVENDELSE

Avinor er å anse som et foretak i konkurranselovens forstand. Selskapet inngår avtaler om tilgang til flyplassområdet, og nekter å gi tilgang, som et ledd i forretningsvirksomhet. Avinor er derfor underlagt konkurranselovens alminnelige bestemmelser når selskapet håndterer slike avtaler, herunder de sentrale bestemmelsene som forbyr konkurransebegrensende samarbeid og misbruk av dominerende stilling, jf. konkurranseloven §§ 10 og 11. Som dominerende aktør har imidlertid Avinor en særskilt forpliktelse til å unngå at konkurransen blir begrenset. Dette vil bli utdypet nedenfor.

Den utlyste anbudskonkurranse i oktober 2013 ble avholdt for salg av rettighetene til å benytte flybussholdeplassene Avinor har tilgjengelig ved ankomst-/avgangshallen på Flesland. Det bemerkes at den gjennomførte konkurransen ikke var en tradisjonell anskaffelse av varer eller tjenester, men i realiteten en *auksjon* hvor betalingsvillighet for å benytte holdeplassene til

[1] Se vedlegg 3 og 4 til brev fra flybussbergen.no av 6. februar 2014.

Avinor var sentralt for tildeling av holdeplass. Denne særegenheten ved anbudskonkurransen innebærer en skjerpet plikt for Avinor til å påse at konkurransen i flybussmarkedet ikke blir begrenset som følge av anbudskonkurransen.

Avinors beslutning om å gjennomføre en anbudskonkurranse, selve gjennomføringen av konkurransen og Avinors etterfølgende kontraktstildeling til Tide, utgjør både enkeltvis og samlet en rettsstridig forretningsnektelse overfor flybussbergen.no i strid med konkurranseloven § 11.

Det er i konkurranseretten vel etablert at en dominerende aktør, og særlig en tilnærmet monopolist, som Avinor, har et særlig ansvar for ikke å skade konkurransen i markedet. Se eksempelvis EU-domstolens sak 322/81, *Michelin v EC Commission,* [1983] ECR 3461. Et typisk eksempel er hvor selskapet er monopolist på et råstoff, noe som kan sammenliknes med Avinors monopol på tilgang til Bergen Lufthavn Flesland. Slike selskaper kan ikke uten videre nekte leveranser til andre selskap som ønsker dette, se eksempelvis EU-domstolens forende saker 6 & 7/73, *Istituto Chemioterpaico Italian & Comerial Solvents Corp v. EC Commission,* [1974] ECR 223. Se også Kommisjonens avgjørelse i sak mellom *British Midland v. Aer Lingus,* (IV/33.544) OJ 1992 L96/34. Prinsippet om at en dominerende aktør har et særlig ansvar for å sikre en restkonkurranse er også lagt til grunn av Norges Høyesterett, se særlig Rt. 2011 s. 910 (TINE), se særlig avsnittene 69, 75 og 76 (flertall), og avsnittene 89 og 104 (mindretall).

Etter konkurranseloven § 1 annet ledd skal det særlig legges vekt på hensynet til forbrukerne ved lovens anvendelse. Den gjennomførte konkurransen, med utestenging av flybussbergen.no og påfølgende eneleverandøravtale med Tide som resultat, vil medføre et dårligere tilbud til forbrukerne, i strid med konkurranselovens formål. Motsatt av sin plikt som monopolist har Avinor i stedet for å sikre en restkonkurranse i markedet for flybusstjenester, tvert i mot inngått en avtale som gir en aktør monopol i lengre tid på å tilby slike tjenester til forbrukerne. Eneleverandøravtalen inviterer til å utnytte markedsmakt overfor forbrukerne i denne perioden.

Resultatet av konkurransen står i sterk motstrid med klare politiske signaler om ønske om mer kollektivtransport til flyplassene, herunder Stortingets forutsetninger og påpekning av holdeplasstiltak (se bilag 17 til brevet av 6. februar 2014), og Samferdselsdepartementets kollektivstrategi (jf. bilag 2 samme brev).

Det bemerkes også at selv om flybuss og parkering av privatbil på flyplassen er i ulike markeder, vil det med en begrenset konkurranse i flybussmarkedet kunne skje en viss vridning av konkurransen, hvor privatbil favoriseres på bekostning av buss. Avinor er ikke en nøytral aktør i så måte, fordi selskapet har klare kommersielle interesser knyttet til parkeringsplasser for privatbiler ved flyplassen.

Avinor har svært gode inntekter fra drift av disse parkeringsplassene til privatbiler, og har dermed en egeninteresse i å sike at ikke prisforskjellen mellom de to produktene blir så stor at privatbilister velger kollektivtransport i form av flybuss.

3. TILGANG TIL HOLDEPLASSER VED ANKOMSTHALLEN FOR FLYBUSSER ER UUNNVÆRLIG (ABSOLUTT NØDVENDIG/INDISPENSABLE) FOR Å KONKURRERE OM PASSASJERENE

Flybussbergen.no anfører at tilgang til holdeplasser ved ankomsthallen på Flesland er en uunnværlig/absolutt nødvendig innsatsfaktor for å kunne konkurrere i markedet for flybusstransport til passasjerene. Uten slik tilgang vil flybussbergen.no reelt sett være utestengt fra å tilby tjenester i konkurranse med Tides flybusser.

Det er ikke mulig å etablere en alternativ holdeplass for å tilby flybusstjenester til passasjerene som forlater ankomsthallen ved Flesland, jf. EU-domstolens sak C7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791.

Flybussbergen.no vil uavhengig av tilgang til ressurser i form av økonomi, busser eller annet, aldri kunne etablere et alternativ til holdeplasser ved ankomsthallen på Flesland. Passasjerene (forbrukerne) fratas derved muligheten for alternative tilbydere av flybusstjenester ved ankomsthallen.

Avinor som driver av Flesland er monopolist på tilgang til flyplassen, herunder holdeplasser for flybusser som omtalt ovenfor. Det finnes ikke alternative tilbydere av tilgang, og alternative plasseringer av busser vil ikke være mulig for å konkurrere med Tides flybusser i markedet for flybusstjenester fra holdeplasser ved ankomsthallen på Flesland.

Avinor har også fjernet all informasjon om tilbud av tjenester fra flybussbergen.no på sine hjemmesider. På hjemmesidene til Avinor kommer det frem at Tide er den eneste tilbyderen av flybusstjenester fra Flesland.[2]

Et busstilbud plassert eksempelvis utenfor Avinors område, eller på et område tildelt av Avinor i større avstand til utgangen fra ankomsthallen, vil ikke utgjøre et substitutt eller være i det samme markedet som holdeplasser ved ankomsthallen.

Tilsvarende standpunkt fremheves også i den engelske High Court of Justice Chancery Division i avgjørelse av 28. januar 2014.[3]

Avgjørelsen tolker TFEU (Treaty on the functioning of the European Union) artikkel 102 som tilsvarer Roma-traktatens artikkel 82. Artikkelen hjemler forbudet mot misbruk av en dominerende stilling. Det er denne artikkelen som er oversatt og gjennomført i norsk rett gjennom konkurranseloven § 11. Avgjørelsen er således svært relevant for forståelsen den

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[2] Skjermdump fra hjemmesiden til Avinor – Bergen Lufthavn Flesland.

[3] Avgjørelse av Justice Rose i sak mellom Arriva The Shires Ltd. V. London Luton Airport Operations Ltd. den 28. januar 2014.

likelydende bestemmelsen i konkurranseloven § 11. Faktum i avgjørelsen fra High Court er også svært likt de faktiske forhold i nærværende sak.

Avgjørelsen fra High Court behandler et spørsmål om det skal gis en midlertidig forføyning til et busselskap (Arriva The Shires Ltd., heretter ATS) etter at driveren av flyplassen i Luton (London Luton Airport Operations Ltd., heretter LLAO) hadde gjennomført en anbudskonkurranse og tildelt en eksklusiv rett til å operere en flybussvirksomhet fra holdeplassene tilknyttet terminalområdet. I den vedlagte avgjørelsen ble det funnet at LLAOs tildeling av eksklusive rettigheter til en aktør, National Express, til å tilby flybusstjenester fra terminalen ved Luton flyplass, og nektelsen av tilgang til ATS, utgjorde et misbruk av en dominerende stilling.

Det var i saken ikke forsøkt bestridt at LLAO som driver av flyplassen, og med en eksklusiv rett til å gi eller nekte tilgang til flyplassen, var en dominerende aktør.

I premiss 41 i avgjørelsen trekkes det frem at tilgang til bussholdeplassene er absolutt nødvendig for å tilby tjenester i transportmarkedet på flyplassen. Videre fremkommer at utestengelse hemmer konkurransen i markedet for tilbud av flybusstjenester til forbrukerne.

4. DEN GJENNOMFØRTE KONKURRANSEN ER I STRID MED KONKURRANSELOVEN § 11

Flybussbergen.no anfører at Avinors gjennomføring av konkurransen i seg selv er i strid med konkurranseloven § 11.

Flybussbergen.no har registrert at Avinor mener regelverket for offentlige anskaffelser ikke kommer til anvendelse, noe som også er lagt til grunn i Oslo byfogdembetes kjennelse. Uavhengig av regelverkets anvendelse plikter Avinor som monopolist å sikre at ikke konkurransen i det etterfølgende markedet for tilbud av flybusstjenester fra holdeplasser ved ankomsthallen hindres, begrenses eller vris.

Avinor har gjennomført en auksjon hvor aktører tilbyr betaling for tilgang til flybussholdeplassene. I den forbindelse har Avinor i forbindelse med sin avvisning vektlagt momenter uten tilknytning til og uten betydning for flybussbergen.no sin evne til å tilby tjenester til forbrukerne. De kriterier som har blitt fremhevet som grunnlag for å avvise flybussbergen.no fra konkurransen, fremstår som formal-argumenter uten noen reell berettiget begrunnelse.

Hensikten med auksjonen var, slik konkurransegrunnlaget er formulert, å sikre forbrukere et tilbud på flybusstjenester som er konkurransedyktig på pris. Det vises til konkurransegrunnlagets punkt 1.3.2 hvor det heter:

> *«Lufthavnene skal tilby et vare- og tjenestetilbud som tilfredsstiller kundenes behov. Tilbudene skal være attraktive for kundene ved å holde et høyt kvalitets- og servicenivå, og være konkurransedyktige på pris.»*

Den gjennomførte konkurransen innebærer tvert i mot at forbrukernes mulighet for å oppnå et høyt kvalitets- og servicenivå samt konkurransedyktige priser blir vesentlig svekket.

Flybussbergen.no tilbød ved inngivelse av bud i auksjonen flybusstjenester med bruk av totalt 8 busser. Det ble også fremlagt en garanti for de tjenester som skulle tilbys. Flybussbergen.no har lenge operert under vanskelige rammevilkår som følge av Avinors gjentatte forretningsnektelser og utestengelse i strid med konkurranseloven, også i tiden før anbudskonkurransen.

Det faller på sin egen urimelighet når Avinor anfører at den tilbudte garanti ikke gir sikkerhet for leveranser. Flybussbergen.no har i den perioden Avinor opphørte med sin lovstridige nektelse operert et tilbud på flybuss fra Flesland til en rekke destinasjoner i og rundt Bergen sentrum, med positivt økonomisk resultat. En fortsatt tilgang ville nettopp sikret grunnlaget for videre positiv drift, og den garanti som var fremlagt, ville sikre Avinor oppgjør som forutsatt.

Hele forutsetningen for inngivelse av et bud i den gjennomførte auksjon var nettopp å sikre et videre grunnlag for drift. Utestengelsen fra holdeplassene ved hovedterminalen på Flesland medførte at flybussbergen.no mistet sitt inntektsgrunnlag og med det grunnlaget for drift.

Argumentet om usikker økonomi fremstår som en feilslutning i lys av at flybussbergen.no tilbød det økonomisk beste tilbudet for tilgang til en holdeplass. Dette fremhever Avinor selv i sitt skriv til departementet av 18. februar 2014. Flybussbergen.no ville aldri lagt inn et bud under forutsetning av at virksomheten ikke ville være lønnsom.

Flybussbergen.no viser også til den forhistorien som Avinor har hatt med motarbeidelse av selskapet. Det er påvist at Avinor har nektet flybussbergen.no tilgang til holdeplasser ved ankomsthallen på Flesland, og med det sikret monopolet til Tide på å tilby flybusstjenester fra holdeplassene ved ankomsthallen. Det vises til den utfyllende redegjørelse som ble gitt på side 2 i brevet til Samferdselsdepartementet av 6. februar 2014. Utestengelsen og den tildelte enerett til Tide var, som det redegjøres for nedenfor, i strid med både konkurranseloven §§ 10 og 11.

Avinors henvisning til manglende betaling for tilgang fra flybussbergen.no understreker også dette ønske om å motarbeide flybussbergen.no. Det var Avinors egne lovstridige og avtalestridige handlinger som lå til grunn for manglende betaling, *ikke* manglende økonomisk evne eller vilje til å gjøre opp for seg.

Tide og Avinor har tidligere hatt et samrøre hvor lufthavnsjefen hos Avinor også har vært styremedlem hos Tide Reiser. Fra etableringen av flybussbergen.no har Avinor aktivt søkt å beskytte eneretten til Tide på tilbud av flybusstjenester fra holdeplasser ved ankomsthallen. I den situasjonen var lufthavnsjefen, og med ham Avinor som et hele, inhabile ved tildelinger til Tide, det vises til bilag 5 i brevet av 6. februar 2014.

Avinor har også valgt å ignorere kritikk mot sine konkurransebegrensende handlinger fra blant annet Konkurransetilsynet. Det vises til kronikk i Dagens Næringsliv av 17. juli 2013 fra konkurransedirektør Christine Meyer, bilag 9 til brevet av 6. februar 2014.

Konkurransedirektøren fremhever nettopp behovet for tilgang til infrastrukturen som nødvendig for å sikre konkurranse til beste for forbrukerne.

Som det fremkommer av bilag 17 og 18 til brevet av 6. februar 2014 forskjellsbehandler Avinor flyplassen i Bergen med flyplassen i Bodø både hva gjelder tilgang for flybussaktører, men også hva gjelder krav om vederlag, uten saklig grunnlag. Den begrensning som skjer ved å tildele en operatør en eksklusiv rett til å operere fra holdeplassene ved ankomsthallen på Flesland, er også i strid med den politiske føring som er gitt av Regjeringen i eiermelding St.meld.nr.15 (2006-2007). Regjeringen ønsker at Avinor skal legge til rette for en høy kollektivandel i tilbringertransporten til sine flyplasser. Avinors hindring av konkurransen i markedet går på tvers av denne politiske målsetningen.

Avinors motarbeidelse av flybussbergen.no har også gitt seg utslag i form av forskjellsbehandling av Tide og flybussbergen.no i den tid begge selskapene hadde «lik» tilgang til holdeplasser. Mens Tide var sikret belysning og fri sikt mot sin holdeplass ble flybussbergen.no sitt holdeplassområde ikke gitt tilstrekkelig belysning og tildekket. Det vises til brev fra flybussbergen.no til Avinor om dette.[4]

De ulike handlingene viser klart at Avinor har hatt som intensjon og siden gjennomført sitt ønske om å utelukke flybussbergen.no fra den gjennomførte auksjon. Således har Avinor konstruert en formal-begrunnelse for å avvise flybussbergen.no fra den gjennomførte auksjonen og tildele en eksklusiv rett til Tide buss.

5. DEN TILDELTE ENERETTEN TIL TIDE ER I STRID MED BÅDE KONKURRANSELOVEN §§ 10 OG 11

Uansett og uavhengig av om den gjennomførte konkurransen var i strid med konkurranseloven §§ 10 og 11, er den etterfølgende tildelingen av en enerett til Tide i strid med konkurranseloven begge bestemmelsene.

Vi behandler først forholdet til § 11.

Innledningsvis presiseres det at Avinors egen manglende tilstedeværelse i markedet for flybussvirksomhet ikke er til hinder for anvendelsen av konkurranseloven. Se blant annet uttalelsene i *Luton Airport* premiss 94 flg. med videre henvisninger, blant annet til Førsteinstans avgjørelse i T-128/98 *Aérports de Paris v Kommissionen* [2000] ECR II-3929.

I sistnevnte avgjørelse skriver førsteinstans følgende i premiss 173:

«Det bemærkes herved, at misbrugsbegrepet har et objektivt indhold og ikke indebærer en skadeshensigt. Den omstændighed, at ADP ikke har nogen interesse i at fordreje konkurrencen på et marked, hvor selskabet ikke opererer, eller at det skulle have bestræbt sig på at bevare den

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[4] Brev fra flybussbergen.no av 26.12.2013.

– såfremt dette kan godtgøres – er således under alle omstændigheder uden relevans. Sagen drejer sig ikke om, at der kom en anden tjenesteyder ind på markedet for ground handling-ydelser, men om, at de vilkår, der gjaldt for forskellige ydere af disse tjenester, på tidspunktet for vedtagelsen af den anfægtede beslutning af Kommissionen blev anset for objektivt diskriminerende. Der blev endvidere taget stilling til den nedsættelse af afgiftstaksten, der blev indrømmet AFS, idet Kommissionen fandt, at der skete diskrimination ved den nye nedsatte takst.»

Avgjørende for om Avinors handlinger er i strid med konkurranseloven § 11, er følgelig om en tildeling av retten til å drive virksomhet fra flybussholdeplassene ved utgangen fra ankomsthallen, objektivt er *egnet* til å begrense konkurransen.

I den kontrakten som er inngått mellom Avinor og Tide fremkommer i punkt 3:

> *«Tide buss gis rett til å utnytte to oppstillingsplasser for buss med tilknyttede avstigningsplasser, beliggende ved hovedterminalen på Bergen lufthavn Flesland, som avmerket på tegninger vedlagt konkurransegrunnlaget (vedlegg 1).*
>
> *Oppstillingsplassene kan kun benyttes i forbindelse med Tide Buss sin utøvelse av flybussvirksomhet*
>
> *Med flybussvirksomhet menes tilbringervirksomhet (persontransport inklusive passasjerenes bagasje) med kjøretøy registrert som buss til Bergen lufthavn Flesland («Flybussvirksomhet»).*
>
> *Avtalen tilkjenner ikke Tide Buss noen enerett til å drive Flybussvirksomhet på Bergen lufthavn Flesland.»*

Det anføres at denne bestemmelsen i realiteten tildeler Tide Buss en enerett til å drive flybussvirksomhet fra ankomsthallen på Flesland. Setningen som slår fast at Tide Buss ikke er tildelt noen enerett er innholdsløs, og i strid med realiteten i avtalen, særlig sammenholdt med punkt 3 annet avsnitt. Setningen fremstår som et forsøk på å kamuflere den eksklusiviteten som i realiteten er tildelt.

Auksjonen gjaldt for de to holdeplassene som er avsatt til slik virksomhet. Det finnes ikke alternative holdeplasser ved ankomsthallen på Flesland. Tildelingen innebærer at Tide Buss de facto gis en enerett på å tilby flybusstjenester. Så lenge Avinor selv hevder at kapasiteten er begrenset, blir det helt meningsløst og uriktig å anføre at det ikke er tildelt noen enerett alene av den grunn at det står i avtalen.

At det er tildelt en enerett underbygges også av e-post sendt på vegne av Avinor fra advokat Grethe Gullhaug 27. januar 2014, hvor flybussbergen.no forvises fra å tilby flybusstjenester fra

«selve flyplassområdet».[5] At Avinor har fjernet all informasjon om flybussbergen.no fra sine hjemmesider og kun opplyser om Tides flybusstjenester viser også dette med all tydelighet.

All konkurranse om å tilby flybusstjenester til passasjerer ved ankomsthallen på Bergen Lufthavn Flesland er i realiteten utelukket som en følge av tildelingen. Det vil ikke være mulig å etablere eller tilby noe konkurrerende tilbud.

Det anføres at dette forhold medfører at den inngåtte avtale er i strid med konkurranseloven § 11. Ved å tildele en slik eksklusiv rett til å drive flybussvirksomhet svekkes/vris konkurransen i markedet for flybusstjenester til forbrukere. I *Luton Airport* saken ble disse forhold vektlagt ved avgjørelsen av at den inngåtte eksklusivkontrakt utgjorde et misbruk av en dominerende stilling.[6]

Forholdet til konkurranseloven § 10.

Den avtale som er inngått ved tildeling av en eksklusiv rett for Tide til å tilby flybusstjenester ved ankomsthallen på Flesland er i sin virkning en avtale som begrenser konkurransen i strid med konkurranseloven § 10. Avinor som en dominerende aktør/monopolist har påtatt seg en eksklusiv leveringsforpliktelse av holdeplasser ved ankomsthallen på Flesland til Tide. Gjennom avtalen sikres også Tide en dominerende stilling/monopolsituasjon i nedstrømsmarkedet for flybusstjenester til passasjerer fra Flesland.

Den eksklusive forpliktelsen medfører en begrensning av konkurransen i markedet i strid med konkurranseloven § 10.

En illustrerende avgjørelse er Kommisjonens avgjørelse tilknyttet fellessalg av medierettighetene til Premier League i England.[7] Kommisjonen fant at fellessalget av medierettighetene utgjorde et konkurransebegrensende samarbeid, og at det planlagte fellessalget til én aktør ville begrense konkurransen i det tilgrensende nedstrøms markedet for å tilby medietjenester til forbrukerne. Fellesorganisasjonen for klubbene forpliktet seg etter dette til å tilby medierettighetene i flere balanserte pakker til markedet slik at ikke en enkeltaktør sikret seg alle rettighetene. Dette ble tilbudt for å ivareta konkurransen nedstrøms og vektlagt tungt av Kommisjonen.

Kommisjonen har også behandlet forholdet til slike eksklusive leveringsforpliktelser i sine retningslinjer for vertikale begrensninger, se Retningslinjer for vertikale begrensninger (2010/C 130/01) Den Europæiske Unions Tidende C130/41.[8] Det henvises særlig til retningslinjenes avsnitt 194 hvor det fremheves:

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[5] E-post advokat Gullhaug av 27. januar 2014.

[6] *Luton Airport* i premiss 102 følgende.

[7] Kommisjonens avgjørelse av 22. mars 2006 sak COMP/C-2/38.173.

[8] Kommisjonens retningslinjer for vertikale begrensninger 2010 dansk tekst.

> *«Det vigtigste konkurrenceproblem, der kan opstå i forbindelse med eksklusiv levering, er risikoen for markedsafskærmning over for andre købere. Hvad angår de mulige virkninger af eksklusiv levering, er der er mange fællestræk med eneforhandling, især når eneforhandleren bliver den eneste køber på et helt marked (se afsnit 2.2., især punkt 156)). Det er klart, at køberens markedsandel på indkøbsmarkedet i det foregående omsætningsled er vigtig for vurderingen af, om køberen kan »gennemtvinge« eksklusiv levering, som afskærer andre købere fra at få adgang til leverancer. Men det er køberens position på det efterfølgende marked, der er afgørende for, om der kan opstå et konkurrenceproblem. Hvis køberen ikke har nogen markedsstyrke på det efter følgende marked, kan der ikke forventes nogen mærkbare negative virkninger for forbrugerne. Der kan dog opstå negative virkninger, når køberen såvel på det efterfølgende leveringsmarked som på det forudgående indkøbs marked har en markedsandel på over 30 %. Hvis køberens markedsandel på det foregående marked ikke over stiger 30 %, kan der stadig forekomme betydelige afskærmningsvirkninger, især hvis køberens markeds andel på det efterfølgende marked overstiger 30 %, og den eksklusive leveringsforpligtelse tager sigte på en bestemt brug af aftalevarerne.* ***Hvis en virksomhed indtager en dominerende stilling på det efterfølgende marked, kan enhver forpligtelse til kun eller hovedsagelig at levere produkterne til den dominerende køber let have betydelige konkurrencebegrænsende virkninger.*** (Vår utheving.)»

Avtalen innebærer at det ikke blir konkurranse i markedet for flybusstjenester til passasjerene ved ankomsthallen på Flesland. Den konkurransebegrensende virkning er utvilsom.

Forhold tilknyttet både konkurranseloven §§ 10 og 11.

I nærværende sak kunne Avinor ha auksjonert ut de to holdeplassene til *to ulike* aktører for å sikre konkurransen i nedstrømsmarkedet. Avinor har i stedet valgt å tildele begge de to holdeplassene til *en* aktør, og har således avskåret konkurranse i markedet nedstrøms. Motsatt av å arbeide for å sikre en restkonkurranse i nedstrømsmarkedet, innebærer Avinors tildeling at konkurransen i markedet nedstrøms uteblir.

En annen konkurransebegrensende virkning for forbrukerne av den eksklusive tildelingen kommer i form av et redusert rutetilbud. Flybussbergen.no har i tillegg til konsesjon for drift av flybussrute til Bergen sentrum også konsesjon for drift av tre ruter med holdeplasser utenfor sentrum. Disse kundene vil nå enten måtte benytte alternative transportmidler, eller Tides flybuss til sentrum for så å bytte der.

Tide har etter den eksklusive tildelingen søkt om konsesjon på to ruter som flybussbergen.no har konsesjon på. Avinors eksklusive tildeling innebærer således en ytterligere vridning av konkurransen nedstrøms i flybussmarkedet i favør av den dominerende aktøren Tide.[9]

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[9] Oversendelsesbrev fra Hordaland Fylkeskommune av 4. februar 2014.

Avinor skriver i sin redegjørelse til Samferdselsdepartementet 24. februar 2014 at "[d]et har på ingen måte vært Avinors hensikt eller mål å utelukke verken Flybussbergen.no AS eller andre fra konkurransen eller markedet, eller å begrense konkurransesituasjonen for flybuss på Bergen lufthavn". Som redegjort for foran, er vi av en helt annen oppfatning, men vi finner til dette punkt her grunn til å understreke at Avinors subjektive hensikt eller mål rettslig sett er av marginal betydning i vurderingen av brudd på §§ 10 eller 11. Det avgjørende vurderingstemaet er hvorvidt utestengelsen eller eksklusivitetsavtalen *er egnet til* å ha en *konkurransebegrensende virkning*, hvilket er åpenbart i denne saken. Vi viser i denne forbindelse særlig til Høyesteretts prinsipielle uttalelser i Rt-2012-1942, i avsnitt 65: *"Oppsummeringsvis er kravet at samarbeidet er egnet til å være konkurransebegrensende. Hva som var partenes mål, ønsker eller hensikt med samarbeidet er ikke avgjørende."* Dette vil også gjelde tilsvarende for vurderingen under både §§ 10 og 11.

Kontrakten er inngått med tre års varighet, og utelukker således enhver konkurranse i tre år fremover. Den konkurransebegrensende virkningen, som Høyesterett poengterer som avgjørende, er således helt på det rene.

Til forskjell og ytterligere som et uttrykk for begrensningen i konkurransen som tildelingen innebærer, vises til at det i *Luton Airport* var en mindre aktør som opererte i konkurranse med den tildelte eksklusivitet. Et selskap som opererte med busser med inntil 13 seter, fikk tilby flybusstjenester fra de samme holdeplasser som den eksklusive operatøren. I nærværende sak finnes det ikke noe slikt tilsvarende konkurrerende tilbud.

Det vises til redegjørelsen ovenfor om den absolutte nødvendigheten/uunnværligheten av tilgang til de holdeplasser som er omfattet av auksjonen. Det er ikke mulig å hindre at konkurransen overfor forbrukerne blir hindret, ved bruk av alternative plasseringer utenfor flyplassens område eller i større avstand fra ankomst-/avgangshallen

Tilsvarende forhold ble fremhevet i *Luton Airport* i premiss 110 følgende. High Court fant at muligheten for å tilby flybusstjenester fra en annen lokasjon utenfor terminalområdet på Luton flyplass ikke var egnet til å forhindre at konkurransen ble skadet av den eksklusive tildeling.

Flybussbergen.no påpeker at det ikke finnes alternative transportmidler utover drosje eller privat bil til Bergen sentrum fra ankomsthallen ved Flesland. Disse to alternativene er i andre markeder enn bruk av flybuss, det vises blant annet til den markante prisforskjellen på flybuss og drosje fra Flesland til Bergen sentrum. Konkurransen er således svært begrenset i markedet for transporttjenester til forbrukerne, og blir som en følge av utestengingen av flybussbergen.no ytterligere forverret.

Det bemerkes også at Avinor oppebærer store inntekter fra drift av parkeringsanlegget for private biler på Flesland. Selv om flybussvirksomhet og privat transport er ulike markeder, vil det kunne utøves et visst press på parkeringsprisene dersom forskjellene blir tilstrekkelig store. Avinor har gjennom dette et insentiv til å holde prisene på flybusstjenester så høye som mulig. Ved å holde prisene på flybusstjenester høye, vil Avinor utover den inntekt selskapet er sikret av Tide Buss som operatør, også oppnå at det mulige presset som flybusstjenester kunne utøve mot inntektene fra parkeringsanlegget, blir marginal.

Til sist fremheves at avtalen som er inngått, på ingen måte hensyntar forbrukernes interesser. Tvert i mot har den inngåtte avtalen ingen bestemmelser som sikrer en maksimal billettpris til sluttkundene. Det er heller ingen andre bestemmelser som hindrer eller begrenser Tides adgang til å utnytte sin stilling overfor forbrukerne. Avtalen innbyr således Tide til å utnytte den tildelte markedsmakt overfor forbrukerne. Dette forhold må tillegges vekt, jf. konkurranseloven § 1, annet ledd.

Flybussbergen.no er etter dette av den oppfatning at nektelsen og den påfølgende eksklusive tildeling av holdeplasser for flybussvirksomhet til Tide er i strid med både konkurranseloven §§ 10 og 11.

6. DET FORELIGGER INGEN LEGITIM BEGRUNNELSE FOR UTESTENGELSE

Det foreligger ingen objektive rettferdiggjørende begrunnelser for forretningsnektelsen.

Avinor har satt av to holdeplasser til flybussvirksomhet, og kan ikke høres med at disse må opereres av kun én aktør. Flybussbergen.no bestrider at det er reelle kapasitetsbegrensninger ved ankomsthallen på Flesland, utover de som er skapt av Avinor selv, ved å tildele all tilgjengelig kapasitet til én aktør.

Det at flybussbergen.no har operert en konkurrerende tjeneste fra det samme holdeplassområdet helt siden 25.4.2012, viser klart at det er tilstrekkelig kapasitet tilgjengelig for minst to aktører ved holdeplassene. Kapasitetsargumentet til Avinor har således ikke tilstrekkelig grunnlag i de faktiske forhold. Avinor har også tidligere begrenset kapasiteten, til fordel for Tide, ved at det i april 2012 ble foretatt en reduksjon fra to til én oppstillingsplass, til fordel for Tide.

Avinor kan heller ikke høres med at gjennomføringen av en anbudskonkurranse innebærer at hensynet til konkurransen er tilstrekkelig ivaretatt. Som fremhevet ovenfor er *resultatet* av anbudskonkurransen at konkurransen i markedet reduseres til skade for forbrukerne. Dette utfallet av konkurransen viser med all tydelighet at Avinor ikke har oppfylt sin forpliktelse som dominerende aktør til å ivareta restkonkurransen.

Det vises også til at inngåelsen av rammeavtaler ikke kan brukes til å begrense konkurransen slik Avinor her gjør, se Sune Poulsen m.fl. *Udbudsrett,* 2. utgave 2012 side 403. Ved å gjennomføre en anbudskonkurranse slik Avinor gjør, for så å tildele en eksklusiv avtale, blir konkurransen i markedet redusert til skade for forbrukere.

At Avinor ikke har hatt noen legitim begrunnelse for sin utestenging av flybussbergen.no underbygges også av hvordan Avinor aktivt har motarbeidet selskapet fra etableringen i 2011. Det vises igjen til brev av 6. februar 2014 og redegjørelsen ovenfor hvor det er gitt en utfyllende beskrivelse av disse forholdene. I lys av handlingene som beskrives, fremkommer at Avinor har hatt et ønske om å nekte flybussbergen.no tilgang til holdeplasser ved ankomsthallen på Flesland.

7. UTESTENGELSEN ER EN ANSVARSBETINGENDE HANDLING

Avinors utestenging av flybussbergen.no fra holdeplasser ved hovedterminalen ved Bergen Lufthavn Flesland er i strid med konkurranselovens §§ 10 og 11. De lovstridige handlingene har påført flybussbergen.no et omfattende tap.

Som en direkte konsekvens av utestengingen er flybussbergen.no i stor fare for å måtte innstille sin drift.

Flybussbergen.no har drevet lønnsom virksomhet i den perioden hvor de ikke har vært utestengt fra flybussholdeplassene. Som en følge av utestengelsen påføres flybussbergen.no daglig tapt omsetning i størrelsesorden 120 000 – 150 000 kroner.

Det foreligger både ansvarsgrunnlag, et tap og en adekvat årsakssammenheng mellom den lovstridige utestengelsen og det oppståtte tap.

8. AVSLUTNING OG ANMODNING OM OMGJØRING AV DEN LOVSTRIDIGE UTESTENGELSE

Flybussbergen.no er av den oppfatning at forretningsnektelsen som selskapet har vært og er utsatt for fra Avinor, er i strid med konkurranseloven. Videre er nektelsen i klar strid med de politiske ønsker og signaler som har vært fremmet.

Det er et ønske om bedre konkurranse mot sluttbrukerne med et bredere og bedre kollektivtilbud fra Flesland. Avinor handler ikke bare lovstridig, men også i strid med disse politiske målsetningene. Til alt overmål er Avinors utestenging i strid med de masterplaner som selskapet selv har fått utarbeidet.

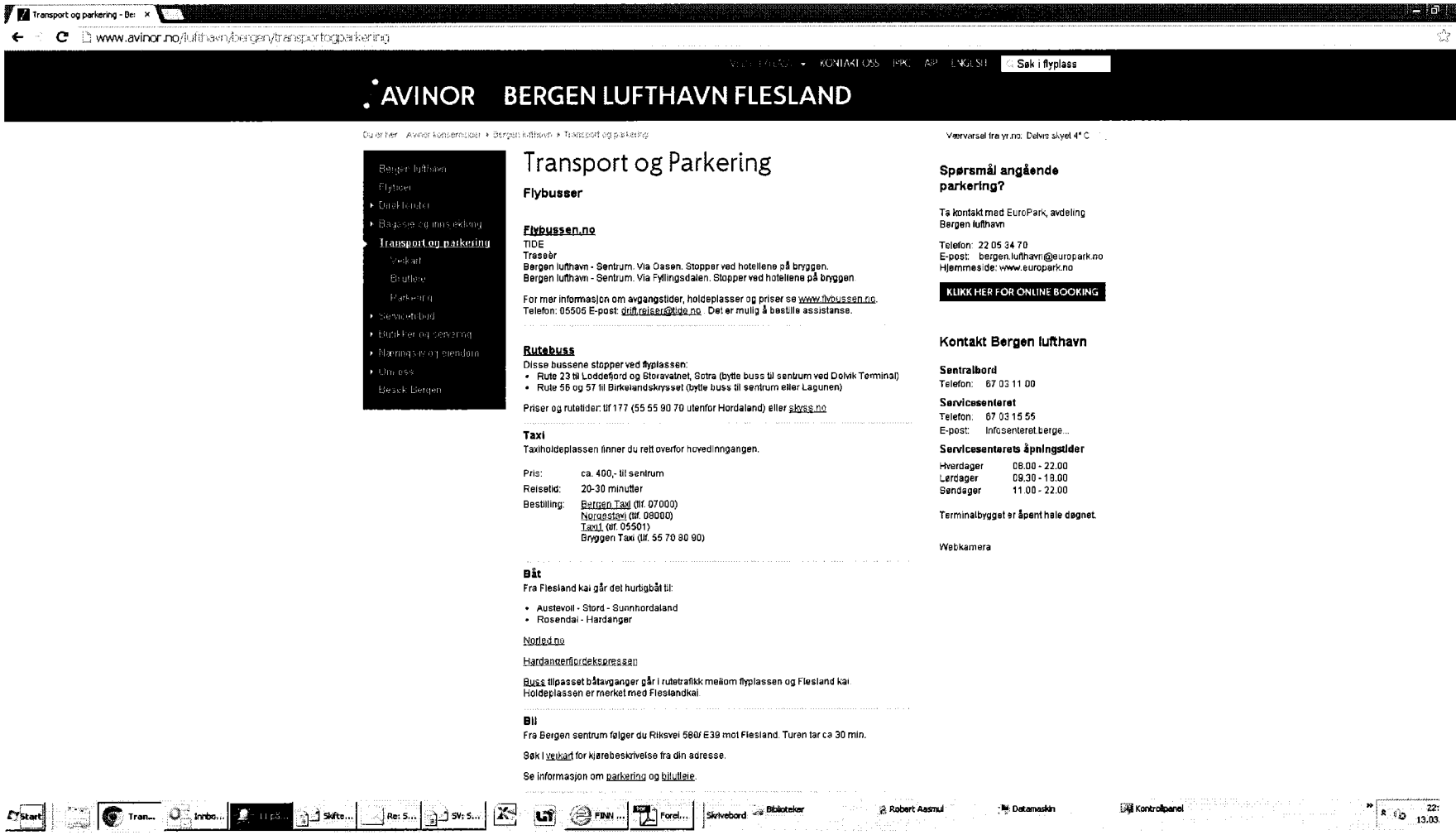
Flybussbergen.no henstiller med dette til Samferdselsdepartementet om å omgjøre den lovstridige utestengelsen og åpne for konkurranse på Flesland.

Flybussbergen.no forbeholder seg også retten til å fremme søksmål til dekning av de tap selskapet er påført gjennom Avinors ansvarsbetingende handlinger.

Med vennlig hilsen
Advokatfirmaet Harris

Claus Holm Isaksen
advokat

Vedlegg


Transport og parkering - Be
www.avinor.no/lufthavn/bergen/transportogparkering
KONTAKT OSS
ENGLISH
Søk i flyplass
AVINOR BERGEN LUFTHAVN FLESLAND
Du er her: Avinor lufthavnene › Bergen lufthavn › Transport og parkering
Værvarsel fra yr.no: Delvis skyet 4° C
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Flytider
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Næringsliv og eiendom
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Besøk Bergen
Transport og Parkering
Flybusser
Flybussen.no
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Traseèr
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Bergen lufthavn - Sentrum. Via Fyllingsdalen. Stopper ved hotellene på bryggen.
For mer informasjon om avgangstider, holdeplasser og priser se www.flybussen.no.
Telefon: 05505 E-post: drift.reiser@tide.no . Det er mulig å bestille assistanse.
Rutebuss
Disse bussene stopper ved flyplassen:
Rute 23 til Loddefjord og Storavatnet, Sotra (bytte buss til sentrum ved Dolvik Terminal)
Rute 56 og 57 til Birkelandskrysset (bytte buss til sentrum eller Lagunen)
Priser og rutetider: tlf 177 (55 55 90 70 utenfor Hordaland) eller skyss.no
Taxi
Taxiholdeplassen finner du rett overfor hovedinngangen.
Pris: ca. 400,- til sentrum
Reisetid: 20-30 minutter
Bestilling: Bergen Taxi (tlf. 07000)
Norgestaxi (tlf. 08000)
Taxi1 (tlf. 05501)
Bryggen Taxi (tlf. 55 70 80 90)
Båt
Fra Flesland kai går det hurtigbåt til:
Austevoll - Stord - Sunnhordaland
Rosendal - Hardanger
Norled.no
Hardangerfjordekspressen
Buss tilpasset båtavganger går i rutetrafikk mellom flyplassen og Flesland kai.
Holdeplassen er merket med Fleslandkai.
Bil
Fra Bergen sentrum følger du Riksvei 580/ E39 mot Flesland. Turen tar ca 30 min.
Søk i veikart for kjørebeskrivelse fra din adresse.
Se informasjon om parkering og bilutleie.
Spørsmål angående parkering?
Ta kontakt med EuroPark, avdeling Bergen lufthavn
Telefon: 22 05 34 70
E-post: bergen.lufthavn@europark.no
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Servicesenteret
Telefon: 67 03 15 55
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Servicesenterets åpningstider
Hverdager 08.00 - 22.00
Lørdager 09.30 - 18.00
Søndager 11.00 - 22.00
Terminalbygget er åpent hele døgnet.
Webkamera
Start
Tran...
Innbo...
Skifte...
Re: S...
SV: S...
FINN ...
Forel...
Skrivebord
Biblioteker
Robert Aasmul
Datamaskin
Kontrollpanel
13.03.

VEDLEGG 1

VEDLEGG 2

Neutral Citation Number: [2014] EWHC 64 (Ch)

Case No: HC13D01784

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2014

Before :

MRS JUSTICE ROSE

Between :

Arriva The Shires Ltd — **Claimant**

- and –

London Luton Airport Operations Ltd — **Defendant**

Paul Harris Q.C., Ben Rayment & Michael Armitage (instructed by Bond Dickinson LLP) for the Claimant
Tim Ward Q.C. & Colin West (instructed by King & Wood Mallesons LLP) for the Defendant

Hearing dates: 30 & 31 October and 4, 5, 6, 7, 8, 11, 12, 14 & 15 November 2013

Judgment

Mrs Justice Rose :

I. INTRODUCTION

1. The Claimants ('ATS') are a well-known bus and coach operator that trade under the name 'Green Line'. The Defendants ('Luton Operations' or 'LLAO') operate Luton Airport ('the Airport') under a concession agreement granted to them by Luton Borough Council.

2. ATS used to operate the coach service[1] carrying passengers between the Airport and London Victoria pursuant to a concession agreement with Luton Operations. The service, called the 757 service, ran from the bus station just outside the Airport terminal building ('the Bus Station') and carried over a million passengers a year. The service was operated by ATS for 30 years with the arrangement between them and Luton Operations rolling forward from time to time. At the start of 2013, the contract then extant was coming up for renewal since according to its terms it would expire on 30 April 2013. Instead of rolling the contract forward with ATS as previously, Luton Operations decided to invite various coach operators to bid for the right to operate the route. ATS submitted their proposals for the route but the new contract was won by ATS' competitor National Express. National Express now operate the route, which they call the A1 service, under an agreement with Luton Operations ('the New Concession'). The New Concession:

   i) grants National Express the exclusive right to run a coach service between the Airport and much of central London for the next seven years, subject to an exception for a service operated by easyBus using smaller vehicles;

   ii) requires National Express to pay Luton Operations an annual concession fee calculated as a percentage of the revenue earned by National Express on the route;

   iii) provides that that concession fee will be not less than a guaranteed annual minimum payment in each of the seven years covered by the contract; and

   iv) grants National Express the right of first refusal over the operation of other services on routes between the Airport and other destinations in London.

3. ATS argue that Luton Operations hold a dominant position in the market for the grant of rights to use the Airport land and infrastructure to operate bus services from the Airport and that they have abused that dominant position contrary to section 18 of the Competition Act 1998. Section 18 of the Competition Act 1998 provides:

> **"18 Abuse of dominant position**
>
> (1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

[1] In these proceedings and in this judgment the terms 'bus' and 'coach' have in the main been used interchangeably.

> (2) Conduct may, in particular, constitute such an abuse if it consists in—
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
>
> (3) In this section—
>
> "dominant position" means a dominant position within the United Kingdom; and
>
> "the United Kingdom" means the United Kingdom or any part of it.
>
> (4) The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter II prohibition"."

4. It is not contested that if an abuse by Luton Operations is established as alleged by ATS, then that conduct has the necessary effect on trade within the United Kingdom for the purposes of the Chapter II prohibition.

5. Section 60 of the Competition Act 1998 provides, broadly, that when applying the Chapter II prohibition, I must apply the principles and decisions that are applied by the Court of Justice of the European Union in interpreting Article 102 of the Treaty on the Functioning of the European Union ('TFEU').

6. In June 2013 there was an interlocutory hearing before Roth J when ATS sought an injunction to allow them to continue operating the 757 service from the Airport pending trial. Roth J refused to grant that injunction but he ordered that the trial of liability be expedited and that the issues to be covered at the trial should be agreed between the parties. A letter from Luton Operations' solicitors to ATS' solicitors dated 28 June 2013 recorded their agreement that:

   i) the trial would proceed on the assumption that Luton Operations hold a dominant position because they hold a 100 per cent share in the relevant market, namely the market for the supply of facilities at the Bus Station;

   ii) the parts of the claim relating to an advertising hoarding in the arrivals hall of the Airport and some other matters would not be dealt with at the trial; and

iii) all issues relating to quantum of loss would be reserved to a further date in the event that ATS established that there had been an infringement of the Chapter II prohibition.

7. ATS' allegations of abusive conduct are of two kinds. The first relate to the way in which Luton Operations went about awarding the New Concession. ATS allege that the tender procedure was unfair and discriminated against ATS by not giving them an equal opportunity to put forward their best terms. It is alleged that Luton Operations had decided, before ATS was even told of the intention to put the contract out to tender, that they did not want ATS to win the contract.

8. The second kind of abuse alleged relates to the terms of the New Concession as granted. ATS say that the grant of exclusivity, in particular for seven years, amounts to an abuse. It is important to bear in mind that this is not the kind of exclusivity that is commonly condemned by competition authorities when it is included in agreements between a dominant undertaking and its customers. The Court of Justice has held in cases from Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 to Case C-549/10P *Tomra Systems ASA v Commission* (judgment of 19 April 2012) that exclusive agreements are abusive when entered into by dominant undertakings. However, in those contracts it is the buyer who undertakes to purchase the goods or services he needs exclusively from the dominant undertaking. That customer is then foreclosed as a potential route to market for the competitors of the supplying dominant undertaking. Here the situation is the other way round. It is Luton Operations, the dominant undertaking, who are limiting their own ability to supply their facilities to competitors of their downstream customer, National Express.

9. In addition to objecting to the grant of the seven year exclusivity, ATS say that the New Concession is abusive because it discriminates in favour of easyBus by providing that easyBus' service can continue as an exception to the exclusivity. This exception, it is said, places ATS at a competitive disadvantage. ATS also challenge the right of first refusal granted to National Express in respect of other routes from the Bus Station.

10. Luton Operations say that the tender process was entirely fair and that National Express won it because their bid was far better than ATS' proposals. They say that the exclusivity conferred in the contract is not abusive because there is no distortion of competition in the downstream market. Luton Operations also argue that the grant of exclusivity in the New Concession is objectively justified because the Bus Station and the other areas from which ATS suggests it could run its 757 service are fully occupied and there is no room for ATS' Airport-Victoria service in the bays or in the other areas. Even if there were room for two London services at the Bus Station (or three including the easyBus service), Luton Operations argue that they are under no obligation, even assuming that they are dominant, to allocate that space to ATS to duplicate an existing route.

11. The issue of whether the Bus Station is currently fully occupied was hotly disputed at the trial and I describe below the expert traffic management evidence that was adduced by the parties. After opening submissions had been made at the trial, I visited the Airport to see the Bus Station, the terminal buildings, the drop off zones and the car parks. I also visited the bus station next to Luton railway station in central

Luton ('the Rail Interchange') to travel from there to the Airport on the service currently provided by ATS. I am grateful to the parties for organising that visit.

Luton Airport and the Bus Station

12. Luton Airport was opened in July 1938 as one of a series of municipal airports being developed at that time. In the 1950s and 1960s it expanded to accommodate the growing package holidays business in the United Kingdom. It has since become the base for 'no frills' airlines flying to Europe, particularly in recent years to destinations in Eastern Europe. In 1998 when Luton Operations took over the operation of the Airport, the number of passengers using the Airport per year was 3.4 million. By 2011 this had grown to 9.6 million. The Airport is now the fifth largest airport in the UK. Until 27 November 2013 Luton Operations was owned by TBI Limited, a British airport owner and operator which is part of the Spanish conglomerate group Abertis Infraestructuras SA. Since then the company has been sold to the Ardian and AENA Group.

13. There are various means of getting to and from the Airport. About 46 per cent of passengers arrive by private car. Private cars can drop off passengers in two drop off zones which are located a few metres away from the terminal building. Cars are usually directed into the smaller, closer drop off zone, called DOZ1. If DOZ1 is too crowded then cars are directed by a marshal to the larger DOZ2 which is slightly further away. Cars which are left empty by their owners in the drop off zones are rapidly towed away. Next to DOZ1 is an area where people who have paid to have their car valet parked can leave the car when they depart on their flight and collect the car when they arrive back. There are also short term, medium term and long term car parks. The short term car park is in easy walking distance from the terminal building. There are shuttle buses which take passengers between the medium and long term car parks and the terminal building.

14. About 16 per cent of passengers arrive at the airport by train. Trains do not run right to the Airport. The closest railway station is Luton Airport Parkway Station and there is a six minute shuttle bus ride to take passengers between Luton Airport Parkway and the Airport itself. There is also the central Luton railway station with buses running from the Rail Interchange to the Airport.

15. The Bus Station is right next to the terminal building, only a few paces away from the entrances to both the arrivals and departures halls. It has 11 bays in four lanes. A drawing of the Bus Station is attached to this judgment. The shaded area round the top and the top right hand corner of the drawing is the terminal building.

16. In the arrivals hall at the Airport there is an Onward Travel Centre comprising various booths each occupied by a company offering services to take passengers on their onward journey, including coach companies and car rentals. The Onward Travel Centre is open 24 hours a day, seven days a week.

17. Luton Borough Council is currently considering an application for planning permission for a substantial redevelopment of the Airport – a project referred to by Luton Operations as 'Project Curium'. Project Curium proposes the redesign of the whole Airport terminal area. According to the master plan published for consultation in September 2012, the aim is to enable the Airport to accommodate 18 million

passengers per year by 2031. There will be changes to many aspects of the Airport layout including aircraft taxiway extensions, the rationalisation of aircraft parking and the construction of a multi-story car park. For our purposes the most important element of the plans is a complete rebuilding of the Bus Station. The Bus Station will move from its current location and will be reconfigured to a fan-shaped bay pattern with space for 18 coaches. It is expected that it will operate on the basis of 'dynamic stand allocation' which means that services will not always drop off and pick up at the same stand as is intended to happen at the moment, but will use whatever stand is available.

18. At the hearing there was some debate over how likely it was that planning permission would be granted and as to the likely timescale for the redevelopment if permission is granted. The parties kept me informed of progress after the trial concluded and the position as I hand down this judgment is that:

    i) A meeting of the Development Control Committee of Luton Borough Council was held on 20 December 2013 at which the Council resolved to approve Luton Operations' planning application for Project Curium subject to (a) a number of conditions; (b) any calling in of the application by the Secretary of State; and (c) the conclusion of a section 106 agreement.[2]

    ii) There have been requests for the Secretary of State to call in the application from three local Members of Parliament and two neighbouring councils but it is not known how the Secretary of State will respond.

    iii) It has been conceded by Luton Operations in the light of this that it is likely that the capacity constraints relied on as objective justification for the New Concession will have ended by 30 September 2017. ATS pointed to documents disclosed during the proceedings which indicated that the redevelopment of the Bus Station would be carried out as one of the early parts of the redevelopment project and might in fact be completed by the end of 2014.

Coach services operating from the Bus Station

19. ATS' evidence was that many passengers using Luton Airport are travelling with budget airlines and are therefore likely to be interested in using the cheapest mode of transport to or from central London. Many passengers fly into the Airport without having made arrangements for their onward journey so their decision how to get to central London is influenced by advertising seen during their journey or in the arrivals hall; by the availability of information and staff to help them at the Onward Travel Centre and by the reassurance of seeing a coach right outside the terminal which will take them directly to central London.

20. As regards the service to London Victoria, ATS' 757 service used to run from the Bus Station every day of the year on a 24 hour per day basis offering a departure at least every 30 minutes, with greater frequency at peak times. The service ran to the Green

[2] That is, an agreement between the Council and Luton Operations pursuant to section 106 of the Town and Country Planning Act 1990 whereby Luton Operations will undertake to pay certain sums or carry out additional work as part of the grant of planning permission.

Line coach station on Buckingham Palace Road/Bulleid Way about 200 metres from Victoria Coach Station itself. In the 12 months up to 31 March 2013 in total 1,099,903 passengers used the 757 service, about 415,000 travelling between the Airport and Victoria station and about 122,000 travelling from Victoria to the Airport, with the balance travelling to or from other stops on the route. The new National Express A1 service to Victoria also operates every day of the year at varying frequencies but it goes to Victoria Coach Station itself.

21. easyBus operated a regular, frequent service between the Bus Station and central London from August 2004 until May 2007. This service terminated at Baker Street station. In April 2012, easyBus started a service between the Bus Station and Earl's Court Underground station in West London. The concession granted by Luton Operations to easyBus to operate this service expires on 31 October 2015. The easyBus service uses minibuses which are much shorter than the usual coaches and can seat up to 13 passengers. On 1 May 2013, the destination of the easyBus service changed from Earl's Court to Baker Street. By clause 2.3 of the easyBus concession, easyBus is prevented from providing a service that stops within 500 metres of any central London stop served by the 757 service. Central London is defined for those purposes as within Zone 1 of the London Underground.

22. ATS has run, or currently runs, local bus services between the Bus Station and the nearby towns of Watford, Aylesbury, Dunstable and Stevenage. Other local bus services using bays 8 and 9 in the Bus Station run to St Albans, Leighton Buzzard, Harpenden and Milton Keynes. The coach operator Stagecoach operates a bus called Route 99. This travels from the Airport to the Rail Interchange, through Luton town centre and on to Milton Keynes. Luton Operations does not charge an access fee to the Bus Station for these local bus services. ATS contend that another of their routes – the 755 – is dependent on the continued existence of the 757 route. The 755 runs between Luton town centre and central London. It is aimed at commuters and so runs two services into London in the early morning and two back to Luton in the evening. Passengers who have a ticket for the 755 service may also use it on the 757 service and the same coaches are used to run both services. ATS say that it would not be economically viable to run the 755 service if the 757 service did not operate because it is not commercially realistic to have two coaches devoted to four journeys a day.

23. In addition to the Victoria service which is the subject of this dispute, National Express also operate regional buses offering the following services stopping off at bays 4, 5 or 6 in the Bus Station:

- Service 230 Derby to Gatwick Airport
- Service 240 Bradford to Heathrow Airport
- Service 420 Wolverhampton to London
- Service 422 Burnley to London
- Service 707 Northampton to Gatwick Airport
- Service 737 Oxford to Stansted Airport

- Service 767 Nottingham to Stansted Airport
- Service 777 Birmingham to Stansted Airport
- Service 787 Cambridge to Heathrow Airport

The Old and New Concessions for the Airport – Victoria route

24. The agreement that governed the operation of the 757 service as at 30 April 2013 was dated 28 July 2008 ('the Old Concession'). Prior to the Old Concession, there was a written concession agreement covering the period 2004 to 2008 but it is not clear whether there was a formal contract governing the 757 Service before then. The fee arrangement under the Old Concession was that for the first two years, ATS paid Luton Operations a commission of 2 per cent of turnover and thereafter a commission of 2.5 per cent. Turnover was defined as the revenue derived by ATS from the operation of the route excluding VAT. There was a minimum amount that had to be paid each year. In the first and second years, this minimum was £75,000 per year, thereafter the minimum was £100,000 adjusted annually by the Retail Prices Index. There was also a service charge of £975 per year (increased annually by RPI) as a contribution towards the upkeep of the Onward Travel Centre.

25. The Old Concession did not confer any exclusivity as regards operation of the services into London. Indeed, the Old Concession provided that ATS was under no obligation to provide any coach service but that if it did so, it had to run it to a high standard as an important means of attracting passengers to the airport by public transport: see clause 6.1.2. It also had to adhere to set operating standards in terms of punctuality and quality of service. The Old Concession also provided (referring to Luton Operations as 'LLAO'):

> "6.5 The Operator will not price fares payable for the use of a Coach Service uncompetitively so as to discourage its use by passengers and will support LLAO's policy of encouraging travel to and from the Airport by public transport.
>
> 6.6 Subject to security considerations LLAO will, free of charge permit the Coach Service to use the interchange for the loading and unloading of Coaches, and for Coaches waiting to enter service imminently, but not otherwise for parking. In particular, LLAO will not permit the parking of vehicles at the Airport on layover or out of service."

26. Tickets for the 757 coach service were sold by ATS from the Onward Travel Centre, on board the bus and over the internet. ATS also had arrangements with other coach operators to sell tickets on the 757 service. These arrangements existed with the coach operators National Express, easyBus, Terravision and P-Air Magyararorsjag as well as with Groundline, a holiday company. Sales by these other companies accounted for about 30 percent of ATS' sales on the route. Thus there was an agreement between National Express and ATS dated 26 July 2011 and terminable on 90 days notice under which National Express could sell coach tickets to London and those tickets were valid for travel on the ATS 757 service. Under the contract, National Express retained 22 per cent of the sale price of the tickets and the balance

was paid to ATS. This contract did not, on its face, preclude National Express from operating a rival service to London. However, I note that in May 2013, ATS' solicitors wrote a letter before action to National Express asserting that it was an implied term of the contract that National Express would use reasonable endeavours to sell tickets on the 757 service and that it would not operate a rival service during the currency of the contract (that is for 90 days assuming National Express terminated the agreement before commencing its rival service). National Express has vigorously disputed the existence of any such implied terms.

27. So far as easyBus was concerned, under the relevant contract ATS was obliged to provide easyBus with 18 seats on each bus on the 757 service. In return for this, easyBus paid ATS a fixed fee of about £19.50 per departure. These seats were in addition to easyBus' own service to London. As a result of this agreement with easyBus, the 757 coaches were painted partly with Green Line branding and partly with easyBus branding.

28. The 757 service was the most significant revenue earner of all the Green Line services. In the year to 1 May 2013, the 757 service generated about £7,445,000. It was a very profitable route. ATS' evidence was that the 757 service, together with the 755 service, has historically accounted for about 8 per cent of its annual turnover but about 32 per cent of the company's annual profit. On turnover of £7,455,000, ATS earned an operating profit of £3,409,000 representing a profit margin of 46 per cent.

29. Since they lost the direct concession in May 2013, ATS have continued to run the 757 service. Initially they ran the service from a car park away from the Airport but since 1 July 2013 they have operated a service whereby the 757 coaches run between the Rail Interchange and Victoria. When passengers from Victoria arrive at the Rail Interchange, those who want to travel on to the Airport board one of ATS' regular local bus services. That service runs from Parkside in Houghton Regis through Dunstable, to the Rail Interchange and then to the Bus Station. Since mid 2013 the bus has travelled between Houghton Regis and the Rail Interchange using a guided busway. This is a disused railway track route which has been adapted to accommodate buses which are steered along the route without the intervention of the driver. There is no other traffic on the busway so journey times are fast and predictable. Passengers flying into the Airport who want to use the 757 service for their onward journey to London will travel on a local ATS bus service from the Airport to the Rail Interchange and then transfer onto the 757 coach for the onward journey to Victoria. ATS say that because of the inconvenience for passengers of having to change at the Rail Interchange, the price of the ticket to or from London has to be reduced to make it attractive. Thus, whereas the previous 757 return fare from Victoria to the Airport was £19 it is now £15.

30. The New Concession agreement between National Express and Luton Operations is dated 19 March 2013 and runs from 1 May 2013 until 30 April 2020. It was granted to National Express following the approval of the executive committee of TBI Limited which was the parent company of Luton Operations ('ExCo'). TBI's approval was required for some activities that Luton Operations wished to carry out and these included the grant of concessions with a value above £250,000. ExCo was the decision making body which approved those contracts and it approved the grant of the New Concession at a meeting on 18 March 2013.

31. The New Concession defines the concession as the right to operate the coach service from Luton Airport to London Victoria serving only the 'Authorised Stops', which are the Airport, Golders Green bus station, Finchley Road Underground station, Baker Street Underground station, Marble Arch and Victoria Coach station.

32. As regards the fees payable by National Express to Luton Operations, the New Concession provides as follows.

    i) There is a fee payable calculated as a percentage of turnover, being 20 per cent on the first £10 million turnover and a rising scale of percentage fees for each additional £1 million of turnover up to 25 per cent on any turnover in excess of £14 million.

    ii) There is a minimum guaranteed sum of £1.4 million in the first accounting period, rising by £100,000 per year throughout the seven year life of the contract. The minimum guaranteed sum is paid in monthly instalments.

    iii) The obligation to pay the minimum guaranteed sum is subject to a proviso that if the number of passengers in an accounting period is fewer than 9,600,000, the minimum guaranteed sum for that accounting period will be reduced by the same number of percentage points in excess of 10 as the percentage fall in the number of passengers. So, for example, an 11 per cent fall in the number of passengers in a given year compared to 9.6 million would result in a reduction of 1 per cent in the minimum guaranteed sum for that accounting period.

    iv) Turnover is defined as the amount of gross revenue generated by the concession 'no matter where, how or by whom tickets are sold'.

    v) Clause 8.4 provides that Luton Operations will allocate £260,000 per accounting year out of the minimum guaranteed sum for the purpose of constructing a canopy over the bus station to protect waiting bus passengers from the rain. I will consider the relevance of this provision later.

    vi) National Express also pay Luton Operations a 'Facilities Charge' for the electricity, telephone, wi-fi, rubbish removal and other services provided to the sales unit in the Onward Travel Centre.

33. Clause 2.4 of the New Concession sets out the scope of the exclusivity granted to National Express. It provides:

> "2.4 Having regard to:
>
> 2.4.1. the need of LLAO to encourage the use of public transport to and from the Airport from as wide a range of destinations as possible; and
>
> 2.4.2 the limited capacity of the CTA [*sc.* the central terminal area]
>
> LLAO confirms that for the duration of this Agreement it will not grant another concession for the operation of:

2.4.3 a coach service between Airport and any of the Authorised Stops: or

2.4.4. a coach service stopping in Finchley Road London or Edgware Road London; or

2.4.5 a coach service to Central London (meaning to any destination within Zone 1 of the London Underground)

except

2.4.6 services operated by easyBus with a maximum capacity of 19 seats per vehicle; and

2.4.7. a service between the Airport and Liverpool Street or any other destination in Central London east of St Pauls Cathedral commencing on or after 1 May 2014.

Right of first refusal for new London services

2.5 LLAO grants to the Concessionaire a right of first refusal to operate any new coach service that LLAO wishes to authorise (New Service) between the Airport and any destination within Zones 1 to 5 (inclusive) of the London Underground, other than any service to be operated by easyBus with a maximum capacity of 19 seats per vehicle.

2.6 LLAO will give written notice to the Concessionaire of its intention to authorise a New Service, and the Concessionaire will notify LLAO in writing within two months thereafter whether or not it wishes to operate the New Service.

2.7 If the Concessionaire wishes to operate the New Service, it is agreed that:

2.7.1 it will do so within the Concession and (thereafter) on the terms of this Agreement including the Concession Fee and [minimum guaranteed sum]; and

2.7.2 the definition of "Coach Service" will be amended so as to include the New Service, the definition of Authorised Stops will be amended as necessary and any other necessary consequential amendments to the wording of this Agreement will be made; and

2.7.3 the Concessionaire will start to operate the New Service within two months of its notification to LLAO that it wishes to operate the New Service, or on such other date as LLAO may agree to.

> 2.7.4 If the Concessionaire does not wish to operate the New Service, or if it fails to respond by clause 2.6, LLAO is free to offer the New Service to other operators to the exclusion of the Concessionaire subject to the provisions of clause 2.4, on whatever terms it thinks fit and without liability to the Concessionaire, and the terms of this Concession will remain unchanged. However, if LLAO has not awarded the concession for the New Service within 12 months of the date of the notice it gave under clause 2.6, and if that notice was given before 31 October 2017, LLAO will not then award the concession for the New Service without again giving the Concessionaire a right of first refusal on the terms of these clauses.
>
> 2.8 For the purposes of clause 2.7.4, the New Service is defined by its ultimate destination; intermediate stops are irrelevant."

34. Schedule 1 to the New Concession lists the operational standards applicable to the coach service, including that no coaches used on the route must be more than seven years old; all coaches must be washed before entering service and be of smart appearance inside and out; that the timetable must be agreed with Luton Operations; and that staff must be clean and tidy, polite and helpful.

The factual witnesses at trial

35. The main factual witness for ATS was Paul Adcock. Mr Adcock is the Area Managing Director of ATS. He gave evidence generally about coach services at the Bus Station and also direct evidence about the tender process. I found him an honest and credible witness who was frank about his responsibility for some of the tensions that developed between ATS and Luton Operations over the alleged under-reporting of revenues, as I will describe later.

36. Other ATS witness were called to deal with particular matters:

    i) Mohammed Hanif is the Depot Traffic Manager for ATS at the Airport and reports indirectly to Mr Adcock. His evidence related primarily to the dispute about what was said at the meeting of 6 December 2012 he attended with Mr Adcock;

    ii) Kevin Hawkins is the Commercial Director of ATS He attended a meeting with Kevin Midgley of Luton Operations on 16 January 2013. He was also involved in the preparation of the proposal submitted by ATS for the Airport-Victoria route. He also recorded what Mr Adcock had told him had happened at the meeting of 6 December 2012, although he was not at that meeting himself.

    iii) Clive King is the Business Development Manager for ATS. His evidence dealt with a remark that was made to him by a person who had been involved

in the bid for the Airport–Victoria concession submitted by another coach operator, Terravision.

iv) Jonathan Sweet is the Regional Risk Manager for ATS. He commented on the evidence of Simon Bown for Luton Operations about the potential effect on health and safety issues of using Bays 4 to 9 of the Bus Station to accommodate the 757 service.

v) Heath Williams is the Regional Managing Director for Arriva plc. Mr Adcock reports to him. His evidence also recorded what Mr Adcock had told him about what had happened at the 6 December 2012 meeting. In his witness statement he also contested Luton Operations' submission that exclusive concessions for the route to central London were usual in the industry.

37. I found all these witnesses to be truthful and doing their best to assist me.

38. For Luton Operations the main witnesses were Rupert Lawrie and Kevin Midgley. Mr Lawrie is the Commercial Director of Luton Operations. He joined Luton Operations' commercial team in April 2011 and he is responsible for all non-aviation commercial contracts, that is about 90 contracts including restaurants and retailers operating in the terminal buildings as well as the land transport operators. Before joining Luton Operations he worked for 12 years for Starbucks Coffee Company. My assessment of Mr Lawrie is that he is used to a much more bracing business environment than Mr Adcock and Mr Hanif have ever experienced. I was struck by a series of emails included in the trial bundles passing between Mr Lawrie and easyBus during the negotiations between May and September 2011 that led to the easyBus concession. Mr Lawrie stepped in to progress the negotiations shortly after he arrived in post at Luton Operations. He notes in an email to easyBus that discussions about the renewal of the easyBus concession had been going on for six months without resolution. There followed a courteous but forceful negotiation in which Mr Lawrie certainly held his own, at one point regretfully concluding that since they had been unable to reach agreement, easyBus had seven days to arrange for the removal of all easyBus branding and terminal signage from the Bus Station and arrivals hall and to leave the Airport. This exchange indicates to me that Mr Lawrie is a tough negotiator who is not averse to calling the other side's bluff by threatening to walk away from a deal if that will help him conclude the terms he wants.

39. Kevin Midgley is head of car parks and ground transport at the Airport. He was at the 6 December 2012 meeting and the 16 January 2013 meeting. His evidence covered those matters and more general evidence about the Bus Station.

40. Other witnesses for Luton Operations were:

i) Robert Bullock who is the Business Development Director of the parent company of Luton Operations. He is a member of ExCo, the committee which considered and approved Mr Lawrie's recommendation to award the New Concession to National Express in March 2013.

ii) Simon May who works for Luton Operations as the Commercial Manager of the Airport. He was brought in to conduct the post-bid negotiations with

National Express to discuss and finalise the terms of the New Concession so that it could be presented to ExCo for approval.

iii) Simon Bown who is employed by Luton Operations as Senior Manager for Health, Safety and Environment at the Airport. His evidence dealt with the pedestrian safety issues said to arise from the proposal that the 757 service could operate from one of the middle bays in the Bus Station.

The expert witnesses at trial

41. ATS provided a report from an economist specialising in the field of competition policy, Dr Gunnar Niels. Dr Niels is a director of Oxera Consulting Ltd. He has a Masters degree and a PhD in Economics from Erasmus University, Rotterdam and is the co-author of the text book *Economics for Competition Lawyers*. He has given expert evidence in many competition cases in court or before the competition authorities and has been involved in cases in the bus and aviation sectors in the past. He was asked to give an opinion on the relevant economic principles when assessing the effects of a refusal to grant access to a bus station; how important access to the bus station is for operators of coach services; whether the downstream market includes rail as well as coaches and whether Luton Operations' actions distort competition in the downstream market. Dr Niels was a clear and helpful witness and I found both his report and his oral evidence most useful in clarifying the proper approach to the issues in the case.

42. Scott Witchalls was the traffic management expert for ATS. He holds an MSc in Transportation Planning and Engineering from Southampton University and is a Chartered Member of the Institute of Logistics and Transport, a Member of the Chartered Institution of Highways & Transportation and a Member of the Transport Planning Society. He has nearly 30 years' experience in the field of transportation planning and engineering. He is a partner in the consultancy firm Peter Brett Associates which advises public and private sector clients with respect to the planning, design and construction of infrastructure and land development projects in the United Kingdom and Europe.

43. A traffic survey company called Sky High plc, carried out observation surveys of the Bus Station's operation and use by means of CCTV on Friday 9 August 2013 between 0400 and 0900 hours ('the survey period'). Mr Witchalls' evidence was that the data gathered are 'reflective of one of the busiest days of the year at the Airport and are appropriate for drawing conclusions regarding operations and capacity in a busy peak period'. I shall refer to the data as the Sky High Survey. Mr Witchalls also visited the Airport and members of his team travelled on the ATS 757 service (as it now operates) and on the National Express A1 service. His report provided a great deal of information about traffic movements in the Bus Station, supported by many charts showing the occupancy of the different bays, minute by minute, and the alighting and disembarking of passengers on each bus over the survey period.

44. Luton Operations instructed Johnny Ojeil as their traffic management expert. Mr Ojeil is a director of Ove Arup and Partners. He holds an MSc (Eng) degree from Birmingham University, a post-graduate diploma in traffic engineering from Birmingham City University and an HND in civil engineering studies. He is a fellow of the Chartered Institution of Highways & Transportation, a member of the

Chartered Institute of Logistics and Transportation and a Senior Honorary Lecturer at Birmingham University. He also visited the Airport on a number of occasions. His Report used the data provided by the Sky High Survey.

Abuse of a dominant position generally

45. The special responsibility of a dominant undertaking not to abuse its dominant position has been stressed many times by the Court of Justice of the European Union. In Case T-301/04 *Clearstream Banking AG and Clearstream International v European Commission* [2009] ECR II-3155, the General Court was considering the allegation that the dominant provider of clearing and settlement services for securities transactions had abused its position by refusing to provide those services to Euroclear Bank. The Court set out what has become the classic description of abusive conduct:

> "140. According to settled case-law, the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition ....
>
> 141 Accordingly, the conduct of an undertaking in a dominant position may be regarded as an abuse within the meaning of Article [102 TFEU] even in the absence of any fault ...."

46. The Court noted that Euroclear was both a would-be customer of Clearstream and an actual competitor. However, the Court held that there was no need to prove an intention to damage Eurobank as a competitor in order to show that the refusal to supply was abusive. Further the Court said, as regards the requirement that the dominant firm's conduct has the 'effect' of hindering competition:

> "144. The effect referred to ... does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article [102 TFEU], it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect."

47. I note at this point that one of the justifications put forward by Clearstream for refusing to supply services was that Euroclear Bank's related French company (which was not dominant) had refused to grant Clearstream access to its facilities. The General Court held that this would not provide a justification for Clearstream's retaliation because a dominant undertaking cannot act in the same way as a non-dominant undertaking. On this point, the Court said (omitting citations of other case law):

> "132. In that regard, it should be recalled that, according to settled case-law on the application of Article [102 TFEU], whilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, it has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market .... Similarly, whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it ....
>
> 133. It therefore follows from the nature of the obligations imposed by Article [102 TFEU] that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings ....
>
> 134. Consequently, the applicants may not invoke the rejection of [Clearstream's] request for access to Euroclear France in respect of all the French securities or the renegotiation of contractual relations with EB in order to justify their conduct. As an undertaking in a dominant position, [Clearstream] had a particular responsibility not to allow its conduct to impair genuine undistorted competition on the common market."

48. A dominant undertaking can abuse its position either by distorting competition on the market on which it operates itself (the upstream market) or by distorting competition on the market on which its customers compete with each other (the downstream market). In Case C-95/04P *British Airways plc v Commission* [2007] ECR I-2331, the Court of Justice said:

> "143. The specific prohibition of discrimination in subparagraph (c) of the second paragraph of Article [102 TFEU] forms part of the system for ensuring ... that competition is not distorted in the internal market. The commercial behaviour of the undertaking in a dominant position may not distort competition on an upstream or a downstream market, in other words between suppliers or customers of that undertaking. Co-contractors of that undertaking must not be favoured or disfavoured in the area of the competition which they practise amongst themselves.
>
> 144. Therefore, in order for the conditions for applying subparagraph (c) of the second paragraph of Article [102 TFEU] to be met, there must be a finding not only that the

> behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others (see, to that effect, *Suiker Unie*, paragraphs 523 and 524).
>
> 145 In that respect, there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as being abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually."

II. ALLEGED ABUSES ARISING FROM THE TENDER PROCESS

49. It is important to bear in mind here that although what happened was referred to throughout the trial as a tender it was different from a normal tender. Usually a company putting a contract out to tender is looking for someone to supply it with goods and services for which it will pay the price proposed by the bidder. That is considered a good way to arrive at a competitive outcome because the tender process encourages bidders to offer their *lowest* possible price. Here, Luton Operations was not going to pay for goods or services it sought by tender but was going to be paid. This was more akin to an auction than a tender because Luton Operations was offering to grant rights to the *highest* bidder. I will continue to refer to it as a tender but it must be borne in mind that there is no necessary read across from what is said in this judgment to the ability of a dominant undertaking to choose which contractor to carry out work for it by means of a tender which seeks the cheapest or best value bid.

50. One of the points made by ATS in alleging abuse by Luton Operations is that there was no justification for holding a tender at all. I regard this point as in essence an attack on the grant of exclusivity and the duration of the exclusivity since there could be no objection to the holding of an auction if the result did not rule out future market entry. Neither side was able to refer me to a case in which it has been held that the way in which a tender was conducted amounted to an abuse of dominance. For present purposes I am prepared to assume that, since the categories of abusive conduct are not closed, it is possible for a tender to be conducted by a dominant firm in such an unfair manner that it amounts to an abuse of its dominant position.

51. Luton Operations unsurprisingly stressed the fact that the winning bid from National Express was so far ahead of ATS' offer that the way the tender was conducted could not have made any difference to the outcome – ATS would have lost the concession even if the tender process had been conducted with scrupulous even-handedness. Although this point was made by Mr Ward QC, appearing for Luton Operations, in his opening submissions, it was only during closing submissions that its legal

significance was debated. In my judgment, this is a point that goes to the question of whether the alleged abuse caused any loss to ATS. Although the trial before me was limited to liability only, liability in a private action based on an infringement of the Chapter II prohibition requires the claimant to show at least some minimal loss resulting from the abuse. The cause of action here is the tort of breach of statutory duty and for that tort to be complete there must be some loss caused to the claimant. Usually there is no difficulty in the parties accepting that if there is an infringement then there is at least some loss suffered, albeit that the precise quantification may raise complex issues. But as regards this aspect of the abuse, there is a dispute that the abuse caused *any* loss. This point was considered by the then Chancellor in *The Leaflet Company Ltd v Royal Mail Group Ltd* [2008] EWHC 3514 (Ch) when he was considering whether to order a split trial of liability and quantum and whether it was necessary to include in the liability trial the paragraph in the particulars of claim that contained the allegation that the abuse had caused loss and damage. The result the Chancellor clearly wanted to achieve was to include in the trial of liability only proof of the minimum damage required to complete the cause of action and to leave all questions of damage over and above that to the second trial. However, he decided to leave all consideration of damage to the second trial. He noted that although this would defer the final conclusion of the completion of the cause of action to the second trial, this would not lead to injustice since the determination of the other elements of liability were likely to determine that issue also. In the present case, although the agreement of the parties as to the matters to be dealt with at this trial also excluded the paragraph in the Re-Amended Particular of Claim alleging loss and damage, the issue of whether the alleged inadequacies of the tender process had *any* effect on the outcome was covered in evidence and submissions. I am prepared therefore to treat it as included in the issue of liability rather than quantum.

(i) Did Luton Operations unfairly rule ATS out of the running?

52. ATS say that Mr Lawrie and Mr Midgley, who were in charge of the tender process for Luton Operations, ruled ATS out of the running for the New Concession right from the start because they were disaffected with how ATS had operated the service. ATS say that although Luton Operations appeared to relent after this matter was resolved and did in fact invite ATS to take part in the tender, this was only a pretence.

The website hyperlink incident

53. The first potential cause of tension between ATS and Luton Operations arose from an argument over the removal of a hyperlink enabling customers to jump from the Luton Operations website to the ATS website. ATS' and other suppliers' hyperlinks had been in place on the Luton Operations website for many years and no fee had been charged to them for this facility. When Mr Lawrie arrived in post, he decided that the presence of these links amounted to advertising and that Luton Operations should be making money from them. He therefore directed that all the links should be removed from the website. He accepted in evidence that the links had been removed without Luton Operations telling anyone at ATS or the other companies that this was going to happen. On 17 September 2012, Linsey Frostick, the ATS Regional Marketing Manager sent an email to Louise Ross at Luton Operations saying that she could not find anywhere the hyperlink that links people to any of the Green Line, National Express or easyBus websites. Ms Ross forwarded Ms Frostick's email to Mr Lawrie saying:

> "Remember you asked me to take off the links to websites as far as coach and bus companies are concerned? Well I think we've been rumbled... Would you like to reply to Linsey at Arriva?"

54. Mr Lawrie then spoke to Ms Frostick and explained to her that the link would be restored only if ATS were prepared to pay for it. As Mr Lawrie put it in cross-examination at the trial "We'd always want to commercialise everything on the website. Not with ATS alone; it would be anybody that advertises on the Airport website, we'll always look to drive commercial revenues from that". When Ms Frostick referred to this conversation in an internal ATS email sent the next day, she wrote that she 'had a bit of a heated conversation with the Commercial Director yesterday regarding our presence on their website'. Mr Lawrie said in evidence that he did not recall the conversation being heated. He denied that he took umbrage or annoyance from the call when Mr Harris QC, appearing for ATS, put that to him.

55. I regard this small incident as significant although not for the reasons Mr Harris suggested. I accept that Mr Lawrie was not offended or annoyed by the conversation. This did not have any effect on his attitude to ATS as a prospective bidder in the tender. However, this is an instance where there is a mismatch between his perception of an interaction with ATS and the perception of the ATS employee. A conversation that Ms Frostick regarded as 'heated' was not so regarded by Mr Lawrie – in other words, a conversation that was unusually abrasive for Ms Frostick was just a normal business conversation for Mr Lawrie.

56. The incident is also telling for what it says about Mr Lawrie's intention to 'commercialise everything' that Luton Operations does. He did not ask Ms Ross to ring up ATS and the other suppliers to suggest that they should in future pay for maintaining their longstanding hyperlink on the Luton Operations website. He told her to remove the links, without informing the companies and then tell them, when they noticed this, that they must pay to reinstate the link. This, to my mind, shows that Mr Lawrie wanted to send a message to ATS and the other suppliers that his arrival at Luton Operations meant that commercial relations would be conducted in a very different manner from what had happened hitherto.

The internet sales dispute

57. A more significant dispute then arose about how ATS accounted for revenue from internet sales when calculating commission payments due to Luton Operations. Under the Old Concession, the revenue on which commission was calculated was defined as including:

> "1.23.3 all amounts received or receivable from orders obtained or solicited at any place beyond the Airport (including by telephone or internet) but with collection at the Airport"

58. Clause 8.10 of the Old Concession provided that Luton Operations could appoint an accountant to audit the records of ATS' revenue. If the result was that the revenue on which commission was payable had been understated by more than 1 per cent, or if other 'material non-conformities' were uncovered, then the cost of the audit would be borne by ATS.

59. Mr Lawrie's evidence was that his initial query in the summer of 2012 about how much of ATS' revenue came from different modes of ticket sale was prompted by 'commercial curiosity' on his part when he saw flight attendants selling tickets for the ATS 757 service onboard an easyJet flight. In early September 2012 he asked Terrie George in the Luton Operations accounts department to find out from ATS the breakdown of their sales, showing what percentage were made in-flight and over the internet. Ms George sent a request to Michelle Ryan at ATS asking for this information.

60. Unfortunately ATS' response to this request for information was badly handled, as Mr Adcock has frankly accepted. The company adopted a defensive stance, querying why the information was needed and taking weeks to respond to apparently simple requests. The information provided was incomplete and unclear. It is not surprising that Luton Operations came to the conclusion that ATS had something to hide. The problem was in part that Mr Adcock did not understand the data that was generated by the Arriva accounts department and which he forwarded to Mr Lawrie. He wrongly told Luton Operations that the revenue data reported to them over the years and used to calculate the commission payments had **not** included tickets sold over the internet. When he was asked why these sales had been omitted, he wrongly told Mr Lawrie that it was because the Old Concession did not require commission to be paid on ticket sales over the internet.

61. In fact it is now accepted on all sides that the revenue reported under the Old Concession did include sales of tickets over the internet. These did not appear in a separate column in the reports because the web customer prints off a voucher rather than a ticket and is given a ticket by the driver when he or she boards the coach. The on-board sales figures therefore include internet sales revenue and commission has always been paid on it.

62. The correspondence on this issue in the run up to the 6 December 2012 meeting shows Mr Lawrie being polite but insistent in trying to get to the bottom of whether there had been significant under reporting of revenue by ATS. A figure of £20 million of likely undeclared revenue was proposed by Luton Operations, based on Mr Lawrie's understanding of the usual proportion of internet ticket sales for coach services elsewhere. ATS appointed its own auditors to look into the matter. Luton Operations also sent in their auditors to investigate.

63. The meeting held on 6 December 2012 was aimed at getting to the bottom of the commission on internet sales. It was attended by Mr Adcock and Mr Hanif from ATS and Mr Lawrie and Mr Midgley from Luton Operations. Neither Mr Hanif or Mr Adcock had met either of Mr Lawrie or Mr Midgley before this meeting. Mr Hanif went to the meeting because he was the person who could explain how the internet sales worked. Unfortunately he had not explained the on-board sale point to Mr Adcock before they went into the meeting and Mr Adcock's understanding, gathered from a different colleague, was still mistaken. Not surprisingly given those circumstances, the meeting did not improve matters.

64. Mr Adcock's evidence was that he and Mr Hanif received a very hostile reception at the meeting of 6 December 2012. He went into the meeting believing that the subject for discussion was the supposed missing £20 million of internet sales revenue. The first item that was raised by Mr Lawrie, however, was the spillage of cooling fluids

from the coaches at the Bus Station. Mr Adcock said that he and Mr Hanif were being 'told off' about the spillages and this was 'not the normal nice meet and greet start of a meeting'. His evidence then was as follows:

> "Q. You recognise that the Airport's witnesses do not agree with your account as to how hostile or difficult the meeting was?
>
> A. Well, you know, I have been in business now 20 years and I have told my colleagues when I got back to the depot, and I have told many a colleague since, that that was the worst meeting I have ever had in my working career. You know, it is not the sort of business meeting, especially when we deal with local authorities and people like that, that we are used to at Arriva."

65. Mr Lawrie said in his witness statement that when he read Mr Adcock's witness statement describing the meeting, he 'was astonished to learn that he seems to believe that we were ill-disposed towards ATS'. He says that he cannot see how Mr Adcock and Mr Hanif got the impression that they had received a hostile reception. He describes the initial discussion about the spillages of cooling fluids as 'amicable'. His evidence was that the only time the atmosphere at the meeting was anything other than friendly and cordial was when Mr Lawrie had referred to the fact that the Old Concession was due to terminate on 30 April 2013. Mr Adcock, Mr Lawrie says, got agitated and said that the contract did not terminate, it rolled over.

66. Apart from the disagreement about the tone of the meeting, there are two more specific disputes about what was said or not said then. Mr Adcock and Mr Hanif say that at one point Mr Lawrie was showing them the plans for the redevelopment of the Bus Station. Mr Adcock commented that ATS would expect to renew the coach fleet it used on the 757 service. Mr Lawrie's response according to Mr Adcock was to say that Arriva 'did not feature' in Luton Operations future plans. Mr Adcock says that he recollects this clearly because he was very shocked. Mr Hanif also remembered Mr Lawrie saying this. When Mr Hanif and Mr Adcock left the meeting, they say, they agreed that, in the light of what had just happened, they did not expect that ATS would be present in the Bus Station after 30 April 2013.

67. Mr Lawrie denies that he made that comment and Mr Midgley is also clear in his recollection that the comment was not made.

68. The other specific dispute is that Mr Lawrie and Mr Midgley say that they told Mr Adcock and Mr Hanif at the 6 December 2012 meeting that the operation of the route would be put out to tender to choose the new concessionaire. Mr Adcock and Mr Hanif say that nothing was said about a tender – the first they heard about the tender exercise was at a later meeting on 16 January 2013. Mr Adcock agrees that Mr Lawrie said that the concession would not be rolled over but he is clear that there was no mention on 6 December 2012 of holding a tender exercise.

69. As to what happened at the 6 December 2012 meeting, I prefer the evidence of Mr Adcock and Mr Hanif to that of Mr Lawrie and Mr Midgley. I find that Mr Lawrie did say that ATS did not feature as part of Luton Operations' future plans and that

there was no mention of the proposed tender for the concession. Mr Adcock's version of events is fully supported by the contemporaneous emails written immediately after the meeting and by the way he reported the meeting to his superiors at the time. Mr Adcock said that as soon as he got back to his office after the meeting, he called his boss, Heath Williams, and told him what had happened. Mr Williams' evidence was that Mr Adcock told him that the meeting had been very hostile with Mr Lawrie saying that he believed ATS had under-reported revenues by £20 million. Mr Williams also says that Mr Adcock told him about Mr Lawrie's remark about ATS not featuring in future plans. Mr Adcock did not mention anything to Mr Heath about a tender for the concession. Mr Hawkins, who attended the meeting with Kevin Midgley on 16 January 2013, also records in his evidence that when Mr Adcock was bringing him up to speed before that meeting, Mr Adcock told him about Mr Lawrie's remark at the earlier meeting. Further, on 7 December 2012 Mr Adcock wrote to his junior colleagues at ATS saying:

> "Hanif and I had a very difficult meeting with Luton Airport yesterday, it is clear that there are considerable negative feelings towards Green Line/Arriva currently.
>
> As you are aware our concession to operate from the Airport expires in April 2013. It is vitally important that this concession becomes renewed.
>
> We therefore need to ensure we don't do anything to antagonize them between now and the renewal which means we need to follow their rule book to the letter..."

Mr Hanif forwarded the email to his subordinates describing Luton Operations as having been 'not very co-operative' at the meeting and saying that it was vital that they did as suggested by Mr Adcock.

70. Mr Lawrie's explanation of the other evidence supporting Mr Adcock's version of events was that Mr Adcock reacted badly to the information that the contract was not going to be rolled over as it had been in the past. That seems to me implausible. I find that Mr Lawrie came across as tough and unfriendly at the meeting but that this did not take the meeting out of the ordinary as far as he is concerned. It was part and parcel of his robust attitude towards shaking up the relationship between Luton Operations and its customer and driving commercial revenues, as he put it, from all aspects of the operation of the Airport. His remark about ATS not featuring in the Airport's plan may have been an 'off the cuff' comment to which he did not attach much importance and hence forgot about it as soon as it was said. But Mr Adcock and Mr Hanif were not used to meetings being conducted in that manner and they were surprised and upset by the way they were spoken to.

71. I also find that no mention was made of a tender exercise at that point. The main focus of the meeting was on the missing internet revenue. Mr Lawrie and Mr Midgley believed – since this was what Mr Adcock had told them – that internet sales had not been reported to them and commission had not been paid. They believed that this might have resulted in underpayment of a very significant sum and that ATS were trying to conceal this fact. At the meeting the picture became more and more confused as Luton Operations were being told different things by Mr Adcock and Mr

Hanif and the information about the break down of sales was still not provided. It would have been odd to combine a discussion about sending in auditors to uncover substantial unreported revenue with a discussion about ATS' participation in a future tender for the concession. When Mr Midgley wrote to Mr Adcock on 8 January 2013 suggesting a meeting to discuss the future of transport provision at the Bus Station, he did not mention a tender. He said simply that it would be worthwhile for them to meet 'to have a conversation about what the shape of our onward travel proposition should look like post April and whether Green Line want to be considered as part of this going forward'. If the tender exercise had been mentioned at the meeting on 6 December 2012, Mr Midgley would have referred to it in that email.

72. After the 6 December 2012 meeting, Mr Adcock said that he and his colleagues came to the view that the attitude adopted by Mr Lawrie and Mr Midgley at the meeting may have been a negotiating stance on the part of Luton Operations. He thought that Luton Operations were convinced that there had been significant under reporting of revenue and that the wisest course for ATS would be to let the auditors do their work so that matters could calm down once the revenue position had been resolved. He still hoped that the Old Concession might be renewed once it became clear that there was no missing money. The results of the two audits carried out were that there were some discrepancies in the revenue reported but that the underpayment was not more than about £16,000.

73. What is the significance of this debacle to the issues in the case? I find that there was still some lingering bad feeling within Luton Operations against ATS about the internet sales misunderstandings. This is not surprising since the way the matter was handled by ATS did not inspire confidence. Mr Lawrie and Mr Midgley have downplayed their irritation with ATS over this in their evidence in these proceedings. I find that it remained as an adverse mark against ATS so far as Luton Operations were concerned even after the audits had been completed. This is illustrated by an email sent in February 2013 from Mr May to Marcelo Levit, a member of ExCo, before the ExCo meeting at which approval would be sought to giving the New Concession to National Express. Mr May referred in that email to 'some concerns' that they had had both about the accuracy of ATS' revenue declarations and about what he described as ATS' use of 'agents' to avoid paying a part of their concession fees. What this second supposed concern about agents was, Mr May could not really explain in the witness box. He accepted in evidence that the concerns he mentioned about ATS' revenue declaration had been shown by the date of this email to be largely unfounded. I consider this shows that there were still negative feelings about ATS within Luton Operations at the time of the tender.

74. There is in addition some evidence that Luton Operations were unhappy with some aspects of the service provided by ATS for example about long passenger queues forming, staff who were not sufficiently helpful or diligent. It is not clear whether these complaints were ever made to the ATS management but it appears they were still known among the Luton Operations management.

75. The key question is whether the problems with the revenue reporting, or any other problems, so coloured Luton Operations' view of ATS that ATS was effectively ruled out as a future operator of the Airport–Victoria route after 30 April 2013. I do not find that they did. ATS were invited to take part in the tender exercise and I find that that was a genuine, if rather begrudging invitation. Mr Harris suggested that the

reason for the pretence of inviting them was that the ExCo members would expect to see a bid from the incumbent operator when invited to endorse the recommendation of National Express. I do not accept that as a plausible explanation of why ATS were invited to bid. Mr Bullock, the member of ExCo who gave evidence at the trial, denied that he would have found it surprising if there had been no bid from the incumbent provider presented on the papers for the March 2013 ExCo meeting. He said that ExCo would not expect to see mention of every bid that had been made if some had not made it through to the final stages. It was also possible that the incumbent would not be interested in re-tendering. I accept that evidence, particularly as the ExCo papers made clear that the fees now being offered were much greater than the fees payable under the Old Concession. I also accept Mr Lawrie's evidence that it would not have made commercial sense to rule the incumbent out of the bidding process at an early stage. He did not know whether any other operators were going to be interested in operating the route at the level of commission he was seeking.

76. I have borne in mind Mr King's evidence about a discussion he had with someone on behalf of Terravision. Because of the previous warm business relationship between Terravision and ATS, Terravision would have been reluctant to bid for the Airport–Victoria route if they thought they would be bidding against ATS. However they were, Mr King was told, assured by Luton Operations that ATS were not going to be operating the route in future. Terravision may well have been told this in order to encourage them to bid but it does not, in my judgment, establish that the invitation to ATS to take part in the tender process was a sham.

77. Therefore, although I find that Mr Lawrie did make the remark about ATS not featuring in the Airport's future plans at the meeting of 6 December 2012, I do not consider that he had in truth formed either at that stage or later a settled view that ATS should not be the concessionaires after 30 April 2013. Clearly if it had turned out that there had been substantial under-reporting of internet revenue then the position might have been different. But once that had been resolved, although there may have been lingering doubts about ATS's competence, I find that the offer to them to take part in the tender was genuine and not a pretence.

(ii) Were ATS unfairly disadvantaged when devising their bid?

78. I have accepted Mr Adcock's evidence that the first time that ATS learned that there would be a tender for the operation of the Airport–Victoria route once the Old Concession expired was at the meeting with Mr Midgley on 16 January 2013. That meeting was attended by Mr Adcock and Mr Hawkins for ATS and Mr Midgley for Luton Operations and was held in a coffee shop in the Airport terminal building. It is common ground that at that meeting Mr Midgley told them that Luton Operations was looking for a commission fee of at least 12.5 per cent of revenue and that commission must be paid on all ticket sales however they had been made. Mr Midgley also made clear that Luton Operations wanted the certainty of a minimum guaranteed sum that would be paid by the coach operator regardless of the revenue actually generated in a given year.

79. Shortly after that meeting, Mr Midgley emailed Mr Hawkins and Mr Adcock attaching the published master plan for the Project Curium development of the new Bus Station, including an indication of the forecast passenger growth. The email

asked for 'written confirmation of interest with key financials in detail by 25th January' and set out six matters that the proposal should cover. These were (i) the concession fee of at least 12.5 per cent of turnover payable on all ticket sales however generated; (ii) the contract term which he said could be extended in return for 'enhanced concession fees'; (iii) the minimum guaranteed sum; (iv) details of the service to be provided; (v) proposed changes to infrastructure at the Bus Station and (vi) a summary of how ATS can improve matters over current provision. Mr Adcock wrote back on 23 January confirming ATS' intention to submit proposals for the concession. He asked whether there was any particular emphasis on key elements of the criteria Mr Midgley had mentioned. He also asked for an extension of the deadline for submitting the ATS proposal. Mr Midgley replied that the key factors would be the concession fee coupled to the minimum guaranteed sum. If two operators offered similar financial proposals, then they would select based on other criteria. He said "We have an aspiration to improve the service but not at a cost in terms of airport income. Integrity of reporting and inclusion of all revenues are also critical". He gave ATS until 1 February to submit their proposal.

80. Mr Harris criticised various aspects of the process before proposals were submitted as discriminating against ATS and disadvantaging them as compared to their rivals. He complained that more information had been provided to the other bidders and that the other bidders had been told about the proposed tender before ATS was told on 16 January 2013 and so had longer to prepare. I have considered these and the other points raised by ATS and concluded that they did not, either individually or together, put ATS at any disadvantage vis à vis the other bidders. ATS had the very substantial advantage of being the incumbent service provider and so having much more information and experience about running the route than the other bidders. I reject the submission that they were discriminated against in any material way in the period before the tenders were submitted.

81. ATS' main complaint about the progress of this stage of the tender was that it was not made clear to them that they were expected to put in their 'best and final offer' by 1 February 2013. ATS say that what they proposed was really an opening gambit on their part and they expected that it would be followed by negotiations with Luton Operations during which they would be able to improve their offer in order to win the tender. What happened instead was that ATS were not invited to have any substantive discussions with Luton Operations between the date when they submitted their proposal and the 20 March 2013 when they were informed that they had been unsuccessful. In contrast, National Express were invited to negotiate further with Luton Operations and did improve their bid before it was approved by ExCo.

82. There is no evidence before me that the content of ATS' bid was influenced by an expectation that they would have a chance to improve it in later discussions. Mr Adcock accepted in evidence that Mr Midgley had not said anything to create an expectation of a two stage bidding process. It is true that the proposal submitted by ATS refers at various points to a desire to discuss aspects of the bid with Luton Operations. The covering email sending the proposal to Mr Midgley also said that ATS would be happy to have such discussions. In the proposal, after setting out the key financial terms, ATS said:

> "In view of the number of variables present to achieve this, I would welcome a further discussion with you as soon as

> possible to develop the proposal further and to bring more clarity to the minimum guarantee that we would be able to provide you."

83. This did not, in my view, indicate to Luton Operations that this was intended only as a starting point for negotiations. Rather, the evidence I have already cited about Mr Adcock's response to the 6 December 2012 meeting shows that he and his colleagues in ATS were well aware that they needed to put their best foot forward if they were to have any chance of renewing the contract. After Mr Adcock received Mr Midgley's email of 16 January setting out the six criteria, he wrote internally to his colleagues that the requested 12.5 per cent fee may be a bluff but that 'either way it is a game of high stakes poker for the next few weeks...". ATS must have realised that to put in a bid that was not their best offer would be a very risky strategy indeed given the bad feeling still present in their relationship with Luton Operations.

84. There is nothing in the internal ATS discussions either to indicate that the proposal submitted was only a starting position and that they would be prepared to improve significantly if asked. Mr Harris said one would only expect to see such discussions taking place internally once the preferred bidder stage had been reached. I disagree; a more logical commercial approach would be for a business to work out the most it could afford to offer and work back from that to decide whether tactically the bid should be lower to allow some leeway for negotiation. ATS point to a slide used in a presentation given in a different context in which they refer to the fees payable for the route as likely to amount to £1 million. I do not accept that this evidences ATS' intention to improve their bid, rather than being a rough estimation of the figures that they in fact included in their bid.

85. I therefore reject the submission that ATS were unfairly treated in their preparation of their proposal.

(iii) Was the process for identifying the winner fair?

86. Luton Operations received bids from ATS, National Express and Terravision:

i) ATS submitted their proposal on 1 February 2013. This proposal expressly assumed an exclusive arrangement such that no other bus or coach service to London would be permitted to operate from the Airport (except the Earl's Court route then operating). The proposal stated that in view of the increased investment by ATS, they would need a minimum 10 year term though some of the elements in the agreement could be reviewable after the initial five year period. ATS offered 12.5 per cent commission on all revenues with the exception of income generated through the easyBus arrangements. They proposed a mechanism for calculating an annual minimum guaranteed sum with an initial guarantee for the first year based on 85 per cent of all revenues accrued on the route, again with the exception of income generated through the arrangement with easyBus. This minimum guaranteed sum would then be indexed annually by the percentage rise or fall of annual air passenger footfall through the Airport. In the proposal they set out a table as an illustration of how much the minimum guaranteed sum would be if footfall rose in line with Luton Operations' published plans and forecasts. The payment profile would be about £700,000 for the first year rising to £1.26 million in the 10th year.

ii) Terravision submitted their proposal on 25 January 2013. They offered a royalty of 15 per cent on all ticket sales over a seven year period. This was expressed to be on the premise that Terravision would be the exclusive provider on the Airport–Victoria route. The minimum guaranteed sum was about £700,000 for the remainder of 2013 and then an amount just over £1 million in 2014 rising to about £1.3 million in 2019, making a total over the contract period of £8.5 million.

iii) National Express submitted their proposal on 6 February 2013. They offered Luton Operations commission of 20 per cent on revenue up to £10 million and a slightly higher percentage on revenue over that amount. This would be payable on the Airport-Victoria route on all revenue arriving or departing from the Airport irrespective of the channel by which the ticket was purchased. Further, National Express offered a commission (at a lower rate) on tickets on other routes in their network sold from the Onward Travel Centre and ticket machines in the terminal building. National Express proposed a five year term with an exclusivity covering all locations within a five mile radius of the entire route. They also wanted to be given first refusal on setting up services from the Airport to alternative London destinations. The minimum guaranteed sum offered was £1.5 million in year 1 and for years 2 to 5 it would be based on 80 per cent of the commission paid in the prior year.

87. Once all the bids had been received, Mr Midgley drew up a scoring matrix. On the financial aspects, National Express scored 61, Terravision 58 and ATS 24. ATS were marked 'not acceptable' on three criteria including that their proposal did not include all revenue. On the qualitative criteria such as service frequency and marketing programme, National Express scored 90, Terravision 76 and ATS 72.

88. ATS complained about various of the scores given to the parties on different elements. But ATS cannot escape the fact that their bid was significantly worse than the other two bids. They offered the lowest commission, they did not include all revenue, they wanted the longest exclusivity period and their illustrative minimum guaranteed sum was lower than that offered by the others.

89. Mr Harris argued that it was not possible for me to assess the relative merits of the bids because I could not know what ATS would have been prepared to offer if they had entered into discussions with Mr May on behalf of Luton Operations in the way that National Express were invited to do. I do not accept that. There was no evidence either before the court or in the contemporaneous documents to suggest that ATS would have been prepared to match the National Express bid or to explain, if they were so prepared, why they put in such a low and non-compliant proposal. The changes that were made by National Express between the proposal submitted on 6 February 2013 and the final concession were not of the order of magnitude that, if similar changes had been made to the ATS bid, that ATS bid would have been the best on offer.

90. There were aspects of the post-tender process that were perhaps less than fair. It appears, for example, that Luton Operations penalised ATS when assessing the bids because it did not offer a fixed amount for the minimum guaranteed sum but a percentage based on passenger footfall after the first year. However, National Express' bid was structured in the same way; a fixed (much higher) amount in the

first year and then a percentage of the previous year's revenue. During the negotiations with Mr May, this was changed to a fixed amount for each year (subject to the proviso set out at paragraph 32(iii) above) but the term of the contract was extended to 7 years. Mr Harris also said that it was unfair that National Express were offered the opportunity to contribute towards the installation of a canopy over the bus station. On this point I accept Mr Lawrie's evidence that this was simply an accounting matter for Luton Operations, and would have been arranged with whoever had been the winning bidder. It was his attempt to ensure that some of the commission was hypothecated in this way, so that provision of the canopy could not be trimmed out of the budget for the Project Curium development plans if future money constraints arose.

91. I find also that the way the matter was presented to ExCo was not unfair to ATS. ExCo was not being asked to choose among the different bids. They were being asked to approve the recommendation that the concession be granted to National Express.

(iv) Conclusion on the tender process

92. Luton Operations accepted that the process they adopted was informal. There may well have been some lingering reluctance on the part of Luton Operations to grant the concession to ATS because of the previous problems. But they were given ample justification for changing to a new supplier by the content of ATS' bid. I find that even if the tender process had treated ATS entirely on a par with the other bidders, it was inevitable that they would lose the concession to a much more lucrative offer by National Express.

93. I therefore find both that there was nothing so seriously amiss with the tender as to amount to an abuse of a dominant position and also that any defects in the tender process did not cause any loss to ATS because their bid was substantially less favourable to Luton Operations than the other two bids received. This allegation of abuse of dominance therefore fails.

III. ALLEGED ABUSES ARISING FROM THE TERMS OF THE NEW CONCESSION

94. I have set out the terms of the New Concession earlier: see paragraphs 31 to 34 above. ATS' challenge is to the exclusivity clause in relation to the Airport–Victoria route, the duration of that exclusivity, the grant of a right of first refusal and the exception relating to easyBus. ATS do not allege that the fee set in the New Concession is of itself abusive.

(i) The relevance of Luton Operations' lack of involvement in the downstream market

95. Luton Operations submitted that this case does not fit into any of the established categories of exclusionary abusive behaviour so far identified by the European Commission or the Luxembourg Courts. The cases on exclusionary abuses, they argued, fall into two categories. The first is where the dominant undertaking is competing on the downstream market and is acting to foreclose that market to its own advantage. The early refusal to supply case of Cases 6&7 *Commercial Solvents v Commission* [1974] ECR 223 is the classic example of that. A more recent domestic

example is *Purple Parking & Ors v Heathrow Airport Ltd* [2011] EWHC 987 (Ch) ('*Purple Parking*'). The other category of cases is those where the dominant undertaking distorts competition between itself and its competitors on the upstream market by entering into contracts with its customers whereby those customers will buy their supplies exclusively from the dominant undertaking. A clear recent example of those kinds of cases is Case C-549/10P *Tomra Systems ASA v Commission* (judgment of 19 April 2012). Mr Ward submitted that in both those categories of case it is clear why the behaviour is condemned. In the *Purple Parking* kind of case, the dominant firm is using its dominance in the upstream market to improve its own market position in the downstream market and in the *Tomra* type case it is strengthening its dominant position in the upstream market by foreclosing outlets on the downstream market to its upstream competitors. In the instant case, Mr Ward says, there is a complete absence of a competing downstream interest because Luton Operations does not, itself, operate any coach services or have any shareholding interest in any company that is operating a coach service.

96. Clearly this case does not fall into the second category of cases – the exclusivity granted to National Express does not strengthen Luton Operations' dominance in the relevant market. As to whether it falls into the first category, it is true that most of the cases where exclusionary conduct is found to be abusive are cases where the dominant undertaking is using its dominance in one market to improve its own market position in a neighbouring or downstream market: see for example Case T-83/91 *Tetra Pak International v Commission (Tetra Pak II)* [1994] ECR II-755, Case 311/84 *CBEM v CLT and IPB (Télémarketing)* [1985] ECR 3261 and *Purple Parking* in the domestic sphere. However, Mr Harris pointed to other cases where this element was not present. He relies primarily on Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929. In that case ADP, which operated Orly Airport in Paris, argued that its conduct in charging different fees to different ground-handling concessionaires was not abusive. Since ADP was not present on the downstream market for ground-handling services, it had no interest in distorting competition on that market. Indeed, ADP argued that by introducing a second concessionaire to compete with the formerly exclusive concessionaire, it was increasing competition on the downstream market. The General Court rejected that argument, holding:

> "173. In that regard, it should be recalled that the concept of abuse is an objective concept and implies no intention to cause harm. Accordingly, the fact that ADP has no interest in distorting competition on a market on which it is not present, and indeed that it endeavoured to maintain competition, even if proved, is in any event irrelevant. It is not the arrival on the market in groundhandling services of another supplier that is in issue, but the fact that at the time of the adoption of the contested decision, the conditions applicable to the various suppliers of those services were considered by the Commission to be objectively discriminatory."

97. Mr Harris also relied on the decision of Roth J in *SEL-Imperial Ltd v The British Standards Institution* [2010] EWHC 854 (Ch). There the dominant defendant was a not-for-profit, standard setting body which was alleged to have abused its dominant position by defining too broadly the class of components that a repairer had to acquire

from the original equipment manufacturer, to the detriment of competing component manufacturers. On an application to strike out the claim, the BSI argued that as a neutral standard setting and certification body, it derived no commercial or economic benefit from the conduct complained of. Even if its conduct did have the effect of distorting competition in the market for the supply of spare components, BSI submitted that this could not amount to an abuse on its part. Roth J held that on the present state of the law, it was not clear whether it was necessary to show that the dominant undertaking derived a competitive advantage from its conduct in order for that conduct to be an abuse: see paragraphs 60 onwards of *Sel-Imperial* and the European case law cited there.

98. Finally, both parties refer to three interim measures cases decided by the European Commission concerning access by ferry operators to ports. Since these were not final decisions, the Commission did not have to reach a conclusion as to the existence of an abuse, but had only to decide whether there was a reasonably strong presumption of abuse. In the early interim measures case of *Sealink/B&I – Holyhead* (Case IV/34.174), decision of 11 June 1992 the Commission described the alleged abuse as occurring where a dominant undertaking which both owns or controls *and itself uses* an essential facility grants access to its competitors only on terms less favourable than those which it gives its own services (see paragraph 41 of the decision). It was clear there that the presence of the port owner on the downstream market for ferry services was a key aspect of the case. Similar wording was used in the interim measures case *Sea Containers v Stena Sealink* (Case IV/34.689) OJ 1994 L15/8, paragraph 66. However, in the later case of *Irish Continental Group v CCI Morlaix* (Case IV/35.388) decision of 16 May 1995, the port authority undertaking did not itself operate ferry services although it had a 5 per cent shareholding in the ferry operator Brittany Ferries. The Commission there held that CCI Morlaix's refusal, without objective reason, to grant access to the port to an enterprise wishing to compete with an enterprise which is active on a downstream market constituted an abuse 'even regardless of any economic interest held by CCI Morlaix in the BAI'.

Discussion

99. In my judgment, the ruling of the General Court in *Aéroports de Paris* shows that it is not necessary for there to be some commercial benefit to be gained by the dominant undertaking from its conduct before that conduct can be condemned as abusive. Mr Ward sought to distinguish that case from the instant dispute on the basis that *ADP* was a foreclosure case based on discriminatory pricing case rather than on a refusal to supply. The Court did not draw that distinction but regarded the proposition that presence on the downstream market was not required as flowing from the well-established and generally applicable principle that no intention to cause harm need be shown in order for conduct to be abusive. The complete absence of any commercial gain on the part of the dominant undertaking may well be highly relevant in a particular case, for example on the issue of objective justification. If a dominant undertaking can show that it has nothing to gain from refusing to supply a customer, that would support its contention that, as a matter of fact, the refusal was based on an entirely legitimate objective justification – why else would it forego the sale? I do not accept, however, that as a matter of law, a foreclosure of the downstream market distorting competition among competitors on that market should be an abuse only if it generates an economic gain on the part of the dominant undertaking. That is

inconsistent with the case law which emphasises the objective nature of abuses and which establishes that motivation and intention are generally not relevant to the question of infringement (otherwise than in some clearly established instances such as predatory pricing).

100. Even if I am wrong on that point, I reject the contention that the economic or commercial interest on the part of the dominant undertaking must derive from it being active itself on the downstream market. I can see no legal or economic justification for such a requirement. Indeed, this case shows how arbitrary such a requirement would be. Here although Luton Operations do not themselves operate coach services, they derive an important commercial and economic benefit from the terms of the New Concession. They are paid a fee based on a percentage of the revenue earned by the undertaking to which they have granted exclusive rights and a substantial minimum guaranteed sum, the setting of which is related to the expected revenue to be generated for the concessionaire. They therefore share in the revenue generated in the downstream market, without bearing the risks that would be associated with setting up their own rival service. They also benefit if the protection from competition conferred on National Express by the grant of exclusivity results in National Express being able to charge customers higher prices than would otherwise prevail. I agree with the statement of Dr Niels in his report that the New Concession gives Luton Operations a stake in the downstream market such that they have sufficient incentive to favour one downstream operator over another. That constitutes a commercial and economic interest in the state of competition on the downstream market: Luton Operations are not a neutral or indifferent upstream provider of facilities.

101. In my judgment, the fact that Luton Operations are not coach operators themselves does not prevent any distortion of the downstream market arising from their conduct from being an abuse.

(ii) Distortion of competition created by the New Concession

102. ATS' challenge to the New Concession focused on the grant of the exclusive right to operate the route to Central London for seven years. ATS say that they and any operator other than easyBus are entirely excluded from being able to operate their 757 service on the route or on any other route into central London west of St Paul's Cathedral,[3] for the duration of the New Concession, unless the new route option in clause 2.5 is triggered and National Express decides it does not want to operate the route. The Luton Operations witnesses were frank in their evidence that the extension from five years in the original National Express bid to seven years in the New Concession arose as part of the bargaining process after National Express had been identified as the best bidder. National Express were prepared to pay Luton Operations more for the extended exclusivity period.

103. The effect on competition in a downstream market of an exclusive grant of valuable rights to competitors in that market has been examined by the European Commission in a different context. ATS helpfully referred me to the European Commission's decisions in relation to the grant of rights to broadcast football matches, particularly

[3] I note that it is not entirely clear to me how clause 2.4.7 and 2.5 of the New Concession apply, that is whether post 1 May 2014, a proposed new route to Liverpool Street or east of St Paul's Cathedral must first be offered to National Express.

Joint selling of the media rights to the FA Premier league (Case 38173) decision of 22 March 2006 ('*FAPL*'). That decision followed an investigation by the European Commission into arrangements whereby, broadly speaking, football clubs joined together to sell to television broadcasters the rights to broadcast football matches. The case was brought under what is now Article 101 TFEU, focussing on the arrangements whereby the different football clubs agreed with each other to market their rights as a package rather than negotiating individually with the broadcasters. There was accordingly in those cases a restriction of competition on the upstream market. However, the decision also considers the effect of the joint selling arrangements on competition between the television broadcasters on the downstream market, in particular as regards the grant of exclusive rights to the various packages sold.

104. In *FAPL*, the Commission stated that its preliminary view was that the markets for the acquisition of media rights are all closely linked to the downstream markets on which those rights were used to provide media services to consumers. A restriction in the upstream markets was likely to affect downstream markets as well, particularly the TV markets where free-TV broadcasters compete for advertising and pay-TV broadcasters compete for subscribers. The Commission went on:

> "26. One example of such a foreclosure problem is in the exclusive sale of large packages of media right. The FAPL has so far sold exclusive live TV rights in packages that were comparatively large in relation to that which would be sold by an individual club and to the demand from many broadcasters on the market. This is likely to create barriers to entry on downstream television markets in the United Kingdom leading to access foreclosure in these markets. Advertising-funded TV and pay-TV are the most commercially important of the markets affected by the arrangements.
>
> "27. Given the importance of football for pay TV and free TV services, a restriction of competition on an upstream market for the acquisition of media rights is likely to have significant effects on the corresponding downstream markets.
>
> 28. Other concerns could arise through the sale of all the Premier League live TV rights to a single buyer, given the likelihood that this would also lead to foreclosure on the downstream television markets, and through the existence of output restrictions in respect of various classes of rights"

105. Among the commitments accepted by the Commission to bring its investigation into the Premier League to a close was a commitment that TV rights would be sold in a number of balanced packages designed to create the conditions for competition; no one buyer would be able to buy all of the rights; the duration of the agreements would not exceed three years and the rights would be sold in a transparent and non-discriminatory tendering procedure.

106. In my judgment the effect of the exclusive grant of rights in the New Concession is similar to the effect of the grant of rights in the *FAPL* case. The Commission's

analysis of the effect on the downstream market of the grant of long term, exclusive rights covering a large package of the rights available to be licensed is applicable whether that situation comes about because a number of upstream undertakings are granting their rights collectively or because there is only one upstream undertaking able to grant the rights. The grant of exclusivity for a long period to a single downstream provider of rights has a distortive effect on competition where competitors cannot enter the downstream market to compete with the undertaking to whom the rights have been granted. Here of course, there is no possibility of another upstream competitor of Luton Operations providing National Express' rivals with rights to the Bus Station. Luton Operations has complete control over access to the whole terminal area and has granted that access exclusively to National Express so far as the Airport – Victoria route is concerned. The grant of exclusivity creates serious barriers to entry on the downstream coach services market by preventing any operator other than National Express (and easyBus to an extent) from providing direct services to London.

107. A number of arguments were put forward by Luton Operations seeking to show that the exclusive grant of rights does not have a distortive effect on competition in this case.

108. **Competition with rail services** First, they say that coach operators compete with rail services for the business of passengers wishing to travel between the Airport and central London by public transport. Rail services provide a competitive constraint on the prices and quality of service offered by National Express so that there is no need for more direct competition from another operator on the route. On their pleaded cases, the parties differed as to whether the downstream market should be limited to bus services or whether it should include rail services. Mr Adcock in his evidence accepted that he had to have regard to rail ticket prices to central London when pricing the 757 tickets. Dr Niels was cross-examined as to whether this evidence contradicted his opinion that rail services should not be included in the downstream market. His response was that precise market definition was not overly relevant here. He said that if it was suggested that because coach and rail were in the same relevant market then that meant that the interests of coach customers are protected because of the constraint imposed by rail, then he disagreed with that suggestion. He said that there are a sufficient number of passengers who do not regard rail as a good substitute and who would benefit from head to head competition between coach operators, regardless of whether rail is in or out of the market.

109. I agree with Dr Niels' analysis. I do not consider that it is necessary to arrive at a definite view as to the scope of the downstream market in order to decide whether the New Concession can affect competition between providers of travel services from the Airport to London. It is clear from the level of profitability that was enjoyed by ATS prior to 1 May 2013 that the competitive constraint imposed by rail services is not sufficient to push coach ticket prices down towards cost, even if rail services do form part of same downstream market. The constraint that rail services provide is certainly not sufficient to mean that the grant of exclusivity in the New Concession can have no distortive effect on the downstream market.

110. **Continued operation of the 757 service from the Rail Interchange** Luton Operations also argued that there was no distortion because ATS were able to operate the 757 service to London even though they lost the concession. As I described

earlier, since 1 July 2013, ATS has operated the 757 service between the Rail Interchange and London. The journey leg between the Rail Interchange and the Airport is made on ATS' local bus service. ATS referred to the disadvantage that they suffer because their passengers can no longer travel direct and non-stop as 'the Interchange penalty'. There was plenty of evidence to support the intuitive conclusion that a coach service on which the passengers have to travel via the Rail Interchange and transfer themselves and their luggage onto another bus, with several minutes waiting time for the onward journey to commence, is less attractive than a service which runs directly between the Bus Station without the need for a transfer and the attendant delay. Mr Adcock's evidence, which I accept, is that direct access to the Bus Station is key for coach operators in order to provide a competitive and attractive service to passengers. Mr Adcock also points out that National Express and easyBus advertise their services as being 'door to door' saying on their advertising material:

> "We're the only coach provider that takes you right to the airport door in the quickest time. Plus, unlike other services there are no changes or shuttle buses to disrupt your journey"

111. Dr Niels describes ATS' post-1 May 2013 service in his report as 'sub-optimal' for passengers. He refers to evidence of a substantial reduction in passenger revenues since 1 May. As compared with April 2013 (when it operated the 757 from the Bus Station) ATS' revenues declined by 47 – 49 per cent in May – June and there was a drop of 65 per cent in July when it started operating via the Rail Interchange. Further, he calculated that in the period between May and July 2013, passenger numbers dropped by between 48 per cent and 57 per cent as compared with the same period in 2012. Dr Niels accepted that part of the drop in revenue could be attributed to the fact that the service was now competing directly with the A1 service so that there are now two coach services going to London Victoria rather than just one. He accepted that he could not split out how much of the reduction in passenger numbers was attributable to this fact and how much to the Interchange penalty. I do not consider that this matters for the purposes of determining whether there is a distortion of competition in the downstream market. In *British Midland v. Aer Lingus* (IV/33.544) OJ 1992 L96/34 the European Commission was considering the decision of Aer Lingus to withdraw interlining services from British Midland when British Midland started operating a Heathrow to Dublin flight in competition with Aer Lingus' service. The Commission held that Aer Lingus was dominant on the relevant market and that its conduct was an abuse and imposed a fine. The Commission noted that refusal to interline is not normal competitive behaviour as between airlines. Aer Lingus' argument that it would suffer from interlining with British Midland by losing market share to the new entrant was rejected as an illegitimate justification (see recital (25)). The Commission held:

> "Whether a duty to interline arises depends on the effects on competition of the refusal to interline; it would exist in particular when the refusal or withdrawal of interline facilities by a dominant airline is objectively likely to have a significant impact on the other airline's ability to start a new service or sustain an existing service on account of its effects on the other airline's costs and revenue in respect of the service in question,

> and when the dominant airline cannot give any objective commercial reason for its refusal (such as concerns about creditworthiness) other than its wish to avoid helping this particular competitor. ..."

112. The Commission also found that a new entrant without interlining facilities is likely to be considered in this respect as a 'second-rate airline' by travel agents and travellers and that this will make it more difficult for the airline to obtain the commercial standing needed to operate profitably.

113. The Commission recognised that Aer Lingus' conduct had not forced British Midland from the market and that the new entrant had succeeded in building up a reasonable schedule and winning a significant market share. The Commission held that this was no defence:

> "The fact that British Midland has been able to continue operations notwithstanding the handicap imposed on it by Aer Lingus, is due in the first place to British Midland's determination to succeed in the face of unusual difficulties; it does not mean that the refusal had no effect on competition. There is no doubt that at the time the practice was implemented, the refusal to interline was intended and was likely to hinder the development of competition. The lawfulness of the refusal at the time when it occurred cannot depend on whether the competitor was later willing and able to remain on the route in spite of the disadvantages imposed on it."

114. More recently in Case C-549/10P *Tomra Systems v Commission*, judgment of 19 April 2012, the Court of Justice rejected an argument put forward by the dominant Tomra that its conduct in foreclosing the downstream market was not abusive because the part of the market left free from constraint was sufficient to accommodate a limited number of competitors. The Court held (at paragraph 47):

> "The General Court was correct to hold that the determination of a precise threshold of foreclosure of the market beyond which the practices at issue had to be regarded as abusive was not required for the purposes of applying Article 102 TFEU and, secondly, in the light of the findings made in paragraph 243 of the judgment under appeal [*that is that two fifths of the market was foreclosed]* it was, in any event, in the present case, proved to the requisite legal standard that the market had been closed to competition by the practices at issue."

115. I therefore find even though ATS has been able to operate the 757 service from the Rail Interchange, the exclusivity in the New Concession still distorts competition in the downstream market.

116. **Exclusivity was the choice of the bidders not Luton Operations** Luton Operations argued that they had not imposed exclusivity on National Express. All three bidders had put in bids which were predicated on the grant of exclusivity for several years.

That is not of itself an answer to an allegation of abuse. The Court of Justice has held that it is irrelevant that the contractual obligation under challenge is willingly accepted or even requested by the customer since the abuse consists of the further weakening of the structure of the market: see paragraph 120 of Case 85/76 *Hoffmann La-Roche v Commission* [1979] ECR 461.

117. **Counterfactual is a single operator on the route.** An allied point put forward by Luton Operations was that under the Old Concession, potential competitors to ATS such as easyBus, Terravision and P-Air Magyarország chose to sell tickets for the ATS 757 service rather than operate their own rival coach services to London Victoria: see paragraphs 26 and 27 above. I do not accept, if this is what is suggested, that the Airport to Victoria route is a natural monopoly or that in the absence of the New Concession, the counterfactual must be a single operator on the route. Dr Niels considers the relevant counterfactual in section 5 of his report. He compares the New Concession with what he calls 'head to head competition' where National Express and ATS and other operators are granted access to the Bus Station and hence can compete on an equal footing. He notes that this was not the situation that prevailed prior to 1 May 2013 and so goes on to consider whether there is enough traffic on the route to support more than one provider. He concludes from the fact that the average profit margin over the period May 2008 to April 2013 was 43 per cent that it is not a 'thin' route capable of supporting only one operator. It cannot be determined *a priori* by Luton Operations or anyone else that the optimal number of operators on the route is one. His second answer is that even if there is only room on the route for one operator, then it is best for market forces to determine who that operator should be rather than to choose on the basis of who is prepared to pay the highest fee for the concession to the dominant company. Dr Niels' view is that in principle a well-run competitive tender for an exclusive concession can mimic the competitive process during which competing service providers fall by the wayside leaving the best operator serving the route. For this to be the case, the tender process must be aimed at identifying the bid which offers the best terms to consumers rather than on who offers the highest fee to the entity awarding the concession. That is not what happened here. Mr Midgley's email of 23 January 2013 in response to Mr Adcock's query about the relative importance of the different elements to be included in the tender stressed that it was the size of the fee and the minimum guaranteed sum that mattered – other criteria relating to the quality of the service offered to consumers would only be relevant in effect as a tie breaker.

118. I accept Dr Niels' analysis on these points. The fact that potential competitors chose, prior to 1 May 2013, to sell tickets on the 757 rather than try to persuade Luton Operations to grant them a competing concession does not persuade me that the only counterfactual to the New Concession is a single provider on this route. This does not establish that there is therefore no distortion of competition arising from the grant of contractual exclusivity.

119. **Amortisation of coaches used on the route.** There was some reference in the evidence to the amortisation of the capital expenditure on new buses for the routes. Mr Midgley's evidence was that seven years struck him as a reasonable period for exclusivity because he knew from his background knowledge of the industry that bus companies tend to amortise their coaches over a seven year period. This is supported by the fact that the Schedule of service standards in the New Concession states that

the coaches used must not be more than seven years old. Mr Midgely accepted that this was not the reason put forward by National Express for wanting seven years of exclusivity and it was not raised at the meeting at which the terms of the New Concession were negotiated. I do not accept that this amortisation point justifies seven years of exclusivity on this route. All the bidders are large companies operating many routes other than the Airport – Victoria route. There is no reason to suppose that the buses would have to lie idle if the operator was no longer able to run coaches on this particular route – the vehicles could simply be used somewhere else in the business. None of the other bus routes operates on an exclusive basis.

(iii) Factors increasing the distortive effect of the New Concession

120. There are three aggravating factors which, in my judgment, materially increase the anti-competitive and distortive effects of the exclusivity granted in the New Concession: the fact that the exclusivity period extends beyond the implementation of Project Curium; the exception granted to easyBus and the right of first refusal granted to National Express.

The extension of the exclusivity to the new Bus Station

121. ATS emphasised that it was particularly strange in the circumstances of this case that the period of exclusivity extends well beyond the period when it is expected that the new development of the Bus Station will have substantially expanded capacity, that is beyond 30 September 2017 at the latest. I agree that it is surprising that Luton Operations entered into an agreement which so greatly hinders its ability to take advantage of the opportunities for expanding and developing services to London from the Airport that will be created by the implementation of Project Curium. In the absence of the New Concession, one would expect to see the new Bus Station prompting coach operators to put forward proposals for better, more diverse services than are currently operated. The chances of that happening are now very limited, given the promise by Luton Operations not to grant any concessions for a new coach service to any of the Authorised Stops, or to Finchley Road or Edgware Road or any central London destination west of St Paul's Cathedral for seven years. The reason why Luton Operations is prepared to tie its hands in this way is because National Express required this degree of exclusivity before being prepared to commit to paying the substantial increase in concession fees and the large minimum guaranteed sum that Luton Operations demanded in return for the use of the facilities in the supply of which Luton Operations is dominant. The grant of this long period of exclusivity shields National Express from the pressures of actual and potential competition from other bus operators wanting to serve central London routes not only currently but in the future. These obligations give rise to a serious distortion of what would otherwise be likely to happen to competition between downstream operators once the new Bus Station is finished.

The grant of first refusal

122. The Luton Operations witnesses accepted that the commercial justification for the grant of first refusal was to prevent the National Express service being challenged by passengers being able to get to central London via competing coach services. National Express did not want their passenger numbers being 'cannibalised' by competing services because that would undermine the basis on which they were

prepared to pay the minimum guaranteed sum they committed themselves to under the New Concession.

123. I agree with ATS that this is not a legitimate justification for the inclusion of this clause and that this right of first refusal distorts competition in the downstream market – indeed that is its intention. The position might be different if National Express were starting the Airport - Victoria service from scratch. Here they are taking over an established customer base; they are under no obligation to buy new buses for the route since the Operating Standards say only that the buses must not be more than a year old on 1 May 2013. There was no real uncertainty about the level of continuing demand for the service; the infrastructure and marketing for the route were effectively already in place. There was no justification here for protecting National Express from the erosion of their customer base if a rival service was introduced to another London route and some passengers found it more convenient to travel to that destination rather than to Victoria.

Discrimination in favour of easyBus

124. Section 18(1)(c) of the Competition Act 1998 provides that a dominant undertaking commits an abuse if it applies dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage.

125. There is no doubt that ATS and easyBus have been treated differently here. The easyBus service has been carved out of the New Concession exclusivity so that easyBus can continue to provide its service. There was no such carve out for ATS' 757 service so it has had to leave the Bus Station. easyBus has also been carved out of the right of first refusal so that if easyBus wants to provide a competing service to another London destination, that does not have to be offered first to National Express. The question is whether the arrangements between Luton Operations and easyBus and those between Luton Operations and ATS are equivalent transactions, or whether there is a relevant difference between easyBus and ATS which justifies this difference in treatment.

126. At the time that the tender was held, I accept that easyBus was in a significantly different position from ATS because easyBus and Luton Operations were parties to an extant concession agreement which still had two and a half years to run. The ATS Old Concession had expired so Luton Operations was under no contractual duty to continue to provide access. That provides a material distinction between them as regards the continuation of the existing easyBus concession. There would be no unlawful discrimination if the difference in treatment was aimed at preventing Luton Operations from being in breach of its agreement with easyBus.

127. One must therefore consider both the position of the two operators after October 2015. I have already set out the terms of the exclusivity clause (see paragraph 33 above. It lasts throughout the seven year period of the contract from now until 30 April 2020; it is not limited to the current easyBus route between the Airport and Earl's Court but could operate between the Airport and any of the Authorised Stops or anywhere within Zone 1 of the London Underground. The clause permits Luton Operations to grant another concession to run a 19 seat bus service at any time provided that the concessionaire is easyBus. As drafted, therefore, the clause allows easyBus to compete with National Express on any route at any time provided that it is

limited to a 19 seat coach. Other competitors are restricted to a possible route to Liverpool Street or elsewhere in east London after mid 2014. This carve out goes much further than is justified by the need to avoid a conflict between Luton Operations' obligations under the New Concession with those under its existing contractual arrangement with easyBus.

128. No explanation has been put forward by Luton Operations as to why easyBus should be in this favoured position. This is discriminatory since it favours easyBus for no apparent reason and puts other coach operators at an obvious competitive disadvantage in the downstream market. If there is to be a competing minibus service into central London now or in the future, there is no reason why it should be an easyBus service rather than a service operated by any other competitor.

129. I make the same finding in respect of the carve out in clause 2.5 of the New Concession with regard to the right of first refusal. easyBus is the only company that can be offered a concession to operate a coach service to a different London destination without that option first being offered to National Express. This is nothing to do with the need to avoid a conflict between the New Concession and Luton Operations' existing obligations to easyBus. This clause discriminates in favour of easyBus and places ATS and the other coach operators at a competitive disadvantage for no apparent reason.

130. I therefore find that the New Concession has a seriously distortive effect on competition between coach operators at the Bus Station.

IV. OBJECTIVE JUSTIFICATION

131. I turn now to the issue of whether there is an objective justification for the exclusivity granted in the New Concession. It is accepted that the burden of proving that there is no objective justification for the alleged abusive conduct lies on ATS, now that the defence has been raised by Luton Operations. In Case T-201/04 *Microsoft Corporation v Commission* [2007] ECR II-3601, the General Court stated that it is for the dominant undertaking to raise any plea of objective justification and to support that plea with arguments and evidence. It then falls to the person alleging abuse to show that the arguments and evidence relied on by the dominant undertaking cannot prevail and accordingly that the justification put forward cannot be accepted.

(i) The test to be applied

132. ATS argue that in order to show objective justification for conduct that would otherwise be an abuse, a dominant undertaking must show a 'high degree of necessity' or an 'overriding need' for that conduct. They must also show that the conduct is proportionate in that there is no other, less restrictive, means of meeting the concern relied on. Luton Operations pointed to two interlocutory decisions where the High Court appears to have expressed the test in much less stringent terms. In *Getmapping plc v Ordnance Survey* [2002] EWHC 1089 (Ch) Laddie J considered whether Ordnance Survey's refusal to make more than one kind of digital image available on its website was capable of being objectively justified. Ordnance Survey had argued that having two images of the same terrain, corrected for distortion by two different methods, might confuse customers. Laddie J noted that it had not been suggested 'that this choice was irrational or even unreasonable': see paragraph 55 of

his judgment. He therefore held that a suggestion that Ordnance Survey's decision was incapable of objective justification was not credible and he refused to grant the mandatory relief sought. In *The Wireless Group v Radio Joint Audience Research Ltd* [2004] EWHC 2925 (Ch) Lloyd J struck out a claim for abuse of dominance. The alleged abuse arose in the context of RAJAR moving to the use of audiometers for measuring the size of programme audiences rather than relying on viewer diaries. The pleaded case was that RAJAR's conduct was 'wholly unreasonable, irrational and/or arbitrary' and inconsistent with common sense. Lloyd J held that the evidence showed that RAJAR's decision was a business decision to the effect that the two kinds of audiometers on offer required further evaluation before a choice could be made in favour of either. He described this as 'a rational commercial approach'. Lloyd J referred to the decision of Laddie J in the *Getmapping* case:

> "Clearly it applied the test to different facts, but just as the conduct which can constitute abuse is not to be limited to any particular categories of action, so the question whether the conduct in question is capable of being objectively justified must be applied differently in relation to different facts. Of course the courts must be careful not to allow the idea of objective justification to permit what are really anti–competitive practices (as in the *Atlantic Container Line* case) but subject to that the court must allow undertakings to take business decisions on normal commercial bases and in a normal way. I find Laddie J's application of the principle helpful in approaching the very different facts of the present case."

133. I respectfully agree with Lloyd J's statement that the test for whether the conduct in question is capable of being objectively justified must be applied differently in relation to different facts. Those decisions were not purporting to decide that conduct will always be objectively justified provided it is not 'irrational or arbitrary' or provided that it can be described as a normal business decision. As ATS point out, such an approach would be self-defeating since anti-competitive behaviour usually is entirely rational from a commercial point of view, and abusive conduct usually promotes the business interests of the dominant undertaking engaging in it. That is why we need laws and enforcement agencies to prevent it. Such a test may have been appropriate in the circumstances of those cases but it is not the appropriate test here.

134. The appropriate test for objective justification was considered by Mann J in *Purple Parking*. He drew two important conclusions from the case law. The first was in relation to the role that subjective views play in this area. He held that it was open to the claimant to show that even if the conduct of the dominant company *could* be objectively justified, if the undertaking's motivation was in fact to suppress competition, then the plea of objective justification was not open to it. He also considered that the claimant could test whether there is an objective justification by seeing whether the evidence shows that that justification was indeed the basis on which the dominant company acted. Were it to appear that the justifications relied were not really why it had engaged in the allegedly abusive conduct, that could shed light on the strength of the justification now relied on (see paragraph 183 of Mann J's judgment). His second conclusion was as to the standard of proof as to which he

referred to the decision of the European Commission in *Flughafen Frankfurt/Main AG* (34.801) OJ 1998 L72/30 ('*Flughafen*'). Mann J said (at paragraph 234) that the law 'requires a high degree of necessity if objective justification is relied on to justify what would otherwise be forbidden anti-competitive conduct'. He continued:

> "235. The factor or factors relied on must therefore be justified in that sense – not merely that it is a solution to the relevant problem, but that it is the solution to the problem. If there are other solutions then the conduct is not justified. In paragraph 88 [of *Flughafen*] the Commission determined that:
>
> > "... FAG's decision not to authorise self-handling and not to admit independent handlers is not the result of an overriding need, but was a matter of choice of FAG, which did not take the measures which would have obviated the constraints imposed by the lack of space at the airport."
>
> 236 [Purple Parking] relied on this paragraph, and in particular the strong phrase "overriding need". For my part I would have thought that seems to put the matter a little high, but the essence is that there is no justification if there is another solution. ..."

135. Luton Operations raise a number of issues as providing objective justification for the grant of exclusivity in the New Concession. The main one is that the Bus Station is congested and there is no room for an additional Airport-Victoria service. In the light of this congestion, there is no distortion of competition in the downstream market arising from the grant of exclusivity. Further, Luton Operations say even if there is space in the Bus Station, they are entitled to reserve that space for another service to a different destination rather than grant a concession for a duplicate service to London Victoria.

(ii) Congestion at the Bus Station

136. Evidence on congestion is in two parts. The first part is whether the 757 service could be accommodated in the Bus Station itself, either by using Bay 7 or another middle bay, or by operating the Bus Station more efficiently or by freeing up the deliveries bay by restricting the times at which deliveries can be made or by redirecting delivery lorries to other areas. The second part is ATS' contention that even if the Bus Station is full, there are other places on the land close by to the terminal building ('the CTA') where a bus stop could easily be accommodated, such as Drop Off Zone 2, or the short term car park ('STCP').

Is there space for the 757 service in the Bus Station?

137. There was a great deal of evidence at the trial about the use of the Bus Station. I have already referred to the reports of Mr Witchalls and Mr Ojeil and the material produced by the Sky High Survey on which those reports were in part based. The following facts emerged clearly from that evidence.

138. First, the way that the coaches use the space and bays available at the Bus Station currently bears little relation to what is supposed to happen according to the timetable. Mr Witchalls produced a series of charts, based on his observation of the Bus Station during the survey period, comparing for each minute between 4 am and 9 am which buses are supposed to be in which bays 1 to 11 according to the coach timetable and which buses are actually occupying which bays (including the delivery bay which is not supposed to be occupied by buses at all). He also then produced a table showing how many minutes are available for use at the Bus Station both according to the timetable and on the basis of actual observation. These charts show that for each hour, much greater use is made of all the bus bays than should be, according to the timetable. This is particularly marked between 6 and 7 am. The charts show that (i) coaches stay much longer in the bay than they are scheduled to do according to the timetable; (ii) there are more National Express A1 coaches present in the Bus Station for long periods than is scheduled; and (iii) buses use the delivery bay reasonably often. This means that the number of empty minutes available in fact (based on observation of the survey data) is much lower than the number apparently available from the timetable.

139. Does this evidence show that the Bus Station is in fact more congested than would appear from looking at the timetable? In my judgment it does not. What it shows is that because there is space at the Bus Station, the buses tend to sit around there for longer than they need to. This was demonstrated also by a table that Mr Witchalls produced showing the average and maximum dwell times of buses in the different bays over the survey period. This showed that in seven of the 11 bays, the maximum dwell time over the survey period was over 20 minutes although the average times were much shorter than that.

140. The extra dwell time spent by the coaches in the Bus Station is not the result of late running of coaches. The coach operators are expected to construct their timetables on the basis of a realistic assessment as to how long the journey will take. So the time allowed in the timetable for a particular journey will be much longer at peak times compared with off peak to take account of expected heavy traffic. Of course there are always unexpected disruptions to the timetable but in fact, if a coach is running late, it is likely to stop for as short a time as possible to disembark and take on passengers and so its presence at the Bus Station will be reduced. So late running is likely to reduce rather than increase the time spent by a bus at the Bus Station. The greater actual presence of coaches in the Bus Station appears instead to be caused by coaches arriving either early or at their scheduled time and waiting around in the Bus Station until it is time for them to leave – indeed part of the footage of the survey period (which is during the peak time of the year and of the week at the Bus Station) showed a bus driver leaving a National Express coach parked and out of service at a bay for about 30 minutes. Coaches are supposed to spend any layover time in a designated layover area away from the Bus Station rather than waiting in the Bus Station. I visited the layover area for National Express on my visit to the Airport. If I may be forgiven the colloquialism, the area and the facilities currently provided for the drivers there can best be described as very grotty (though I understand that steps are underway to improve these shortly). I am not surprised that bus drivers prefer to spend any spare time they have (whether scheduled or unplanned) at the Bus Station and in the terminal building rather than in the layover area.

141. The information provided by Mr Witchalls indicates to me that coaches obey their own version of Parkinson's Law: their dwell time at the Bus Station expands to fill the bays available to them. It could therefore correspondingly contract to allow another bus service in. If another service were introduced it could certainly be accommodated in the Bus Station even as it currently operates.

142. The lack of congestion is also apparent from the fact that Luton Operations have no real system in place for enforcing the timetable or chivvying coaches out of the Bus Station if they overstay the time allotted to them by the timetable without good reason. Mr Midgley's evidence was that if he looks out of his office window and he sees a coach parked up in a bus bay inappropriately, or if he notices this on walking past the Bus Station on his way to a meeting, he will telephone the relevant operator to complain. Mr Lawrie confirmed that no one was specifically tasked with enforcing the scheduled dwell times in the Bus Station and this was 'not managed on a day to day basis'. This contrasts with the stationing of a monitoring vehicle at the entrance to the Bus Station, constantly taking photographs of passenger cars unlawfully using the Bus Station to drop passengers at the terminal building and with the stringent marshalling and towing arrangements at the drop off zones. I accept Mr Witchalls' conclusion that if the operation of the Bus Station was tightened up even moderately there would be plenty of space for a new service. One cannot expect long distance coaches to stick to their timetables to the minute. But the contrast between what is supposed to happen according to the timetable and what is allowed to happen as shown by the Sky High Survey is striking.

143. Luton Operations put forward another argument on the issue of congestion. In so far as ATS' proposal involved using one of the central bays, such as bay 7, for the 757 service, the pavement area where passengers would alight or embark was too narrow for them to do so safely. The pavement area associated with those central bays is narrower than the area associated with the outer bays, including the bays 10 and 11 previously used by the 757 service and now used by the National Express A1 service.

144. On this point there was a disagreement between Mr Witchalls and Mr Ojeil about the assumptions one should make when considering whether passenger numbers for the service were likely to cause problems on the narrower, central pavement areas. Mr Ojeil insisted that one should plan on the basis of the 'worst case scenario', that being, so far as safety is concerned, a full bus with 63 passengers ready to alight from the bus, collect their luggage and make their way to the terminal building and another 63 passengers waiting to board for London, needing to stow their luggage. Mr Witchalls said that that was unrealistic and that even at a peak time observed by the Sky High Survey the coaches were not full up. Mr Witchalls' report included a table showing passenger numbers boarding and alighting by bay over the survey period. This showed that in bays 10 and 11 (where the A1 service currently operates) the maximum number of passengers alighting from the coach at any one time was 16 for Bay 10 and 27 for Bay 11 and the maximum number boarding was 27 for Bay 10 and 49 for Bay 11. The average numbers of passengers in those bays over the survey period was far lower.

145. On this point I prefer the approach of Mr Witchalls. He considers that it would be prudent to consider a very busy period perhaps with a full bus alighting and half a bus boarding. If this was considered too many for the existing bay island, Mr Witchalls' opinion is that the passengers could be marshalled at the side of the bus station at peak

times so that the alighting passengers could disperse quickly before the boarding passengers made their way onto the bus. This seems to me to be a common sense approach to the issue. I do not accept, therefore, that the configuration of the central bays rules out their suitability for a high demand, coach service.

146. Luton Operations also relied on the evidence of Mr Bown suggesting that there were health and safety issues with having more passengers using the central bays. Mr Bown states that he has serious concerns about 'the potentially increased risk of a fatal accident occurring if the 757 is run from one of the Middle Bays'. I do not accept that this concern is justified. First it is also based on the assumption that there are 126 people wishing to alight from and board the bus. Secondly, it is based in part on an assumption that the luggage hold doors on the coach swing out on opening and so reduce the space available. In fact it is accepted by Luton Operations that the luggage hold doors swing upwards not outwards and so do not take up significantly more space when opened than they do when closed. Thirdly, Mr Bown notes that using these bays would involve the passengers walking across a zebra crossing rather than having direct access to the terminal building. However, Mr Witchalls' evidence is that the zebra crossings here are designed to provide safe access for a substantial number of pedestrians. Vehicles in the Bus Station are moving slowly and are aware that there are likely to be people milling about. Although I accept that using the middle bays for the London Victoria service may result in far more passengers alighting from and boarding coaches than is currently the case with the regional buses, I reject the suggestion that this creates any serious health and safety concern.

147. I therefore conclude that the objective justification based on congestion at the Bus Station and on health and safety grounds has not been established. The Sky High Survey, as analysed by Mr Witchalls, shows that there is currently room in the Bus Station for another service and that if the use made by the existing coach services of the Bus Station bays were managed more efficiently, there would be more room still.

148. I referred earlier to Mann J's conclusion in *Purple Parking* that the assertion that there is an objective justification can be tested by seeing whether that justification was the basis on which the dominant firm acted. I note that clause 2.4 of the New Concession (set out at paragraph 33 above) refers to the 'limited capacity' of the Bus Station as the reason for the grant of exclusivity set out in that clause. However, any suggestion that congestion is really the reason for the grant of exclusivity is fatally undermined by the fact that the exclusivity extends significantly into the time when the Bus Station has been redeveloped and when, Luton Operations accepts, there will be no congestion problems. In the clause itself this was assumed to be mid 2014, which is why clause 2.4.7 contemplates a new service to a destination east of St Paul's Cathedral after that date. That has proved to be optimistic but it shows that at the time the contract was concluded, there was no genuine link between space at the Bus Station and the grant of exclusivity. The evidence is clear that the reason for the grant of exclusivity was Luton Operations' belief that that would maximise the share of revenue and the minimum guaranteed sum that the coach operator would be prepared to pay Luton Operations for the right to operate the route.

149. My findings that there is space for the 757 service in the Bus Station mean that I do not need to consider the interesting point raised by Luton Operations concerning the application of *Passmore v Morland* [1999] 1 CMLR 1129. This argument was to the effect that if, as Luton Operations argued there was an objective justification based on

congestion at least until 2017, the New Concession would only become abusive at that point so that ATS' complaint was premature.

Use of areas in the CTA but outside the Bus Station

150. **Drop off zone 2 ('DOZ2').** DOZ2, as the name suggests, is used when DOZ1 is full up. DOZ1 comprises three aisles with 36 bays very close to the terminal building. If the bays are full there is a larger DOZ2 which is slightly further away and comprises four aisles with room for 42 cars. Mr Witchalls produced bar charts showing the minute by minute use of the two DOZs over the survey period. They showed that DOZ1 was busy for almost all the time and operating at close to capacity for several periods. DOZ2 was much less busy. There were never more than 25 cars in the 42 bays and for significant periods there were zero to five cars in DOZ2. There is often a marshal at the entrance to the two DOZs closing off DOZ1 when it is full and directing traffic to DOZ2.

151. Both experts agreed that based on the survey analysis, DOZ2 had reserve capacity. Mr Witchalls put forward two proposals. The first option involved accommodating bus stands in the southernmost lane of DOZ2. The second option involved accommodating the buses on one side of the exit road of DOZ2. Under option 2, there would be some disruption to the use of Bay 12 and the mini bus bay currently situated there. Bay 12 is currently used by airport car parking providers (ferrying passengers to and from the medium or long term car park), hotel shuttle buses and charter coaches delivering or collecting tour groups. Access to the stand is controlled by an automatic number plate recognition ('ANPR') barrier so that frequent users are on a register of numbers that are allowed through the barrier and ad hoc users must arrange to pass through the barrier when they arrive at the Airport.

152. There was a dispute between the experts as to whether changes to the layout and existing kerbs and pavements of DOZ2 or Bay 12 would need to be made if it were to be used for long coaches. Mr Ojeil carried out a 'swept path' analysis showing how coaches would manoeuvre through the space. This indicated, he said, that some pavements would have to be moved and traffic islands rebuilt. Mr Witchalls' evidence was that either no changes were really needed or that all that was needed was to move a wire fence a few centimetres to make more room.

153. **The STCP option.** Just beyond the drop off zones in the CTA is the STCP. Mr Witchalls suggests in his report that the Sky High Survey shows that arrivals to the STCP even at peak times did not cause any problems of queuing. The maximum observed flow was 234 vehicles and this was comfortably accommodated. He accepts that the 757 coaches could not easily enter the car park through the existing barriers so that one barrier would need to be removed. His assessment of the volume of traffic suggests that this would not result in queuing at the remaining barriers. He suggests further reconfiguration of the car entry and exit routes and states that his proposal would lead to the loss of about 12 spaces in the STCP. His conclusion in his first report is that although these issues are not insurmountable, he does not believe that the scale of alterations would be appropriate given that there are other more readily implementable solutions that he proposes.

Discussion

154. On this aspect of the case I find that the potential for use of other areas of the CTA outside the Bus Station would not be sufficient to resolve congestion issues if I had found that there was a congestion problem in the Bus Station itself.

155. So far as DOZ2 is concerned, the evidence shows that this zone is well used even though it was not full to capacity even during the survey period. Luton Operations are entitled, in my judgment, to keep some spare capacity there to ensure that there is no overcrowding and that these important facilities are always available and properly used. I record here also that on during my visit to the Airport during the trial, most of DOZ1 was coned off and unavailable because the exit barriers had broken down. Substantial road works to dig out the operating machinery to repair or replace it were underway. This meant that even at late morning in early November, DOZ2 was in use and a marshal was present to direct traffic when the single aisle in DOZ1 was full. If DOZ1 had been out of commission like that at the height of the summer I can see that DOZ2 might well have been fully used.

156. I do not accept therefore that DOZ2 provides space for the 757 service.

157. So far as the possible transfer of shuttles currently using Bay 12 to free up space in the Bus Station is concerned, the Sky High Survey showed that Bay 12 and the minibus bay were well used during the survey period with 63 arrivals and 62 departures and a total of 744 passengers alighting and boarding.

158. Luton Operations submitted that even a dominant firm is under no obligation to undertake work to accommodate a new customer or to make changes to its facilities that will affect third parties, such as the car park shuttle services that would need to be moved from the Bus Station bays 1A 2 and 3 to Bay 12 near DOZ2. ATS countered this argument by relying on the *Flughafen* decision as showing that a dominant firm does have such a duty.

159. I do not accept that *Flughafen* is authority for the proposition that Luton Operations must make room for a particular coach operator beyond the area of the airport which is generally made available for coach operators. In that case, the European Commission was considering the conduct of the airport operator, Flughafen AG, in reserving for itself all provision of ground handling services at the airport, refusing either to allow airlines to self-handle or to allow third party handlers. Flughafen AG's justification for this situation was lack of space on the ramp for parking the handling equipment of more than one handler. The Commission accepted that the admission of other handlers would increase the overall space needed for the provision of handling services because of diseconomies of scale and scope: (recitals 30 and 31). However, in its legal assessment, the Commission held that this conduct fell within the scope of the abusive conduct condemned in Case 311/84 *CBEM v CLT and IPB (Télémarketing)* [1985] ECR 3261 whereby an undertaking holding a dominant position reserves to itself an ancillary activity which might be carried out by a third party. The Commission rejected the arguments based on congestion. It held that there was enough parking space for third party equipment on the apron at the airport to admit competition. In arriving at that conclusion the Commission noted that more space could be made available by closing a number of stands without reducing airport capacity and that more space could have been created when Flughafen had re-

designed the airport layout at an earlier stage in response to certain users exiting the airport. This meant that the airport's decision not to authorise competing handlers was 'not the result of an overriding need, but was a matter of choice' because the airport 'did not take the measures which would have obviated the constraints imposed by the lack of space of the airport': see recital (88).

160. The *Flughafen* case is distinguishable from the present case. That was a case of a dominant undertaking extending its dominant position into the downstream market – indeed Flughafen AG retained a monopoly in the downstream market for groundhandling because of its control over access to the facilities in the upstream market. Here, although Luton Operations' conduct has, as I have found, given rise to a distortion in the downstream market, this is not a case where capacity has been reserved by it to acquire or maintain a dominant position in the downstream market or to bolster its market position in the upstream market. The instant case is a different kind of abuse from the abuse condemned in *Flughafen* and the obligations placed on the dominant undertaking to avoid committing that abuse are therefore also different. Although I do not consider that that difference is relevant on the question I considered earlier (as to whether involvement in the downstream market is an essential element of the refusal to supply abuse) I consider that it is relevant to considering the scope of the dominant undertaking's obligations to accommodate downstream competitors.

161. Secondly it does not appear that the changes that the Commission suggested could have been made by Flughafen AG would have required substantial work to be done to the facilities or would have caused disruption to other airport users. Rather they involved making use of areas that had become free for one use rather than another. The only person disturbed by the changes described by the Commission to allow competing handlers access would have been Flughafen AG itself. I do not regard *Flughafen* as authority for the wide proposition advanced by ATS that a dominant undertaking in control of access to facilities must accede to requests for more space by one service provider if that would disrupt services provided by a different business. If Luton Operations is required to carve up DOZ2 for other providers, I do not see how Luton Operations would be expected to juggle competing requests for space there from other coach companies, valet parking companies, car washing companies, coffee stall franchises or anyone else who would like to set up a business serving the passengers arriving at the Airport.

162. I therefore reject ATS' submissions as regards the potential use of other areas of the CTA for accommodating the 757 service if I am wrong on the issue of congestion at the Bus Station itself.

(iii) Are Luton Operations entitled to reserve space for a different service?

163. Luton Operations submit that even if there is space in the Bus Station for ATS to operate the 757 service, they are entitled to refuse to allow a service which duplicates an existing service to London Victoria and to keep that space open in case another service to a new destination is proposed. This, they submit, provides an objective justification for the grant of exclusivity.

164. It is clear from the terms of the New Concession itself and the evidence before me that this justification was not a factor that was in the minds of those at Luton Operations who dealt with the tender process. Indeed, the New Concession, by

granting a right of first refusal on any new route into London to National Express, is likely to discourage other operators from coming to Luton Operations with ideas for new London destinations. Why would a rival operator explore the feasibility of running a service to a new London destination and present it to Luton Operations if any benefit of such work will be handed over to National Express? As regards destinations outside London, at the same time as carrying out the tender process for the London Victoria route, Luton Operations invited the bidders (other than ATS) to tender for new regional routes to be operated from the middle bays in the Bus Station. None of them expressed any interest in doing so. Although ATS argued that they had been discriminated against by not being offered this opportunity, there was no evidence to suggest that they would have wanted to operate a new regional route if they had been invited to do so. Finally on this point, the timetable I have already described show that there are several duplicated destinations operating from the Bus Station. This element of objective justification is not made out on the facts of this case.

(iv) Conclusions on objective justification

165. I find that there is no objective justification for the restriction of competition created by the terms of the New Concession:

i) concerns about congestion at the Bus Station were not the reason why the New Concession granted exclusivity to National Express. Exclusivity was granted (together with the right of first refusal) with the intention of protecting National Express from competition in the downstream market in the expectation that this would maximise the fees that National Express was prepared to pay Luton Operations for the use of the rights.

ii) The 757 service could be accommodated at the Bus Station without disruption to other coach services; without requiring adjustments to be made to the facilities and without increasing risks to the health or safety of passengers.

iii) Luton Operations are not under any obligation to convert parts of the Central Terminal Area currently being used for other services into additional coach stop facilities.

iv) The suggestion that Luton Operations are keeping space available at the Bus Station to accommodate services to different destinations if such services are proposed at some point in the future is not made out on the facts.

V. OVERALL CONCLUSION AND NEXT STEPS

166. In summary my conclusions, on the assumption that Luton Operations are dominant for the purposes of the Chapter II prohibition, are as follows:

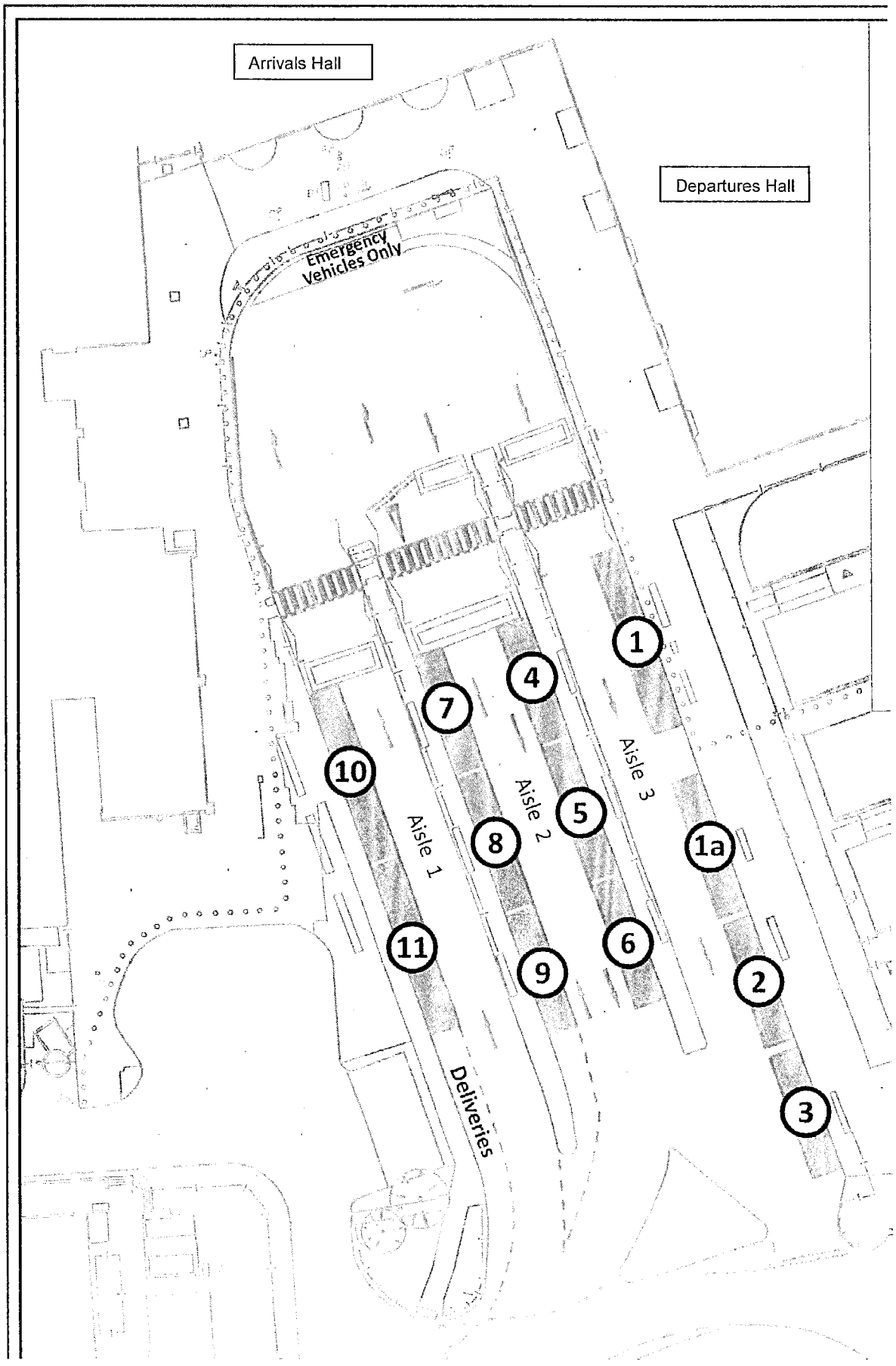
i) Luton Operations did not abuse that dominant position in the way in which they conducted the tender for awarding the New Concession;

ii) By entering into the New Concession agreement with National Express, Luton Operations did abuse their dominant position because those terms, by granting a seven year exclusivity period to National Express, giving National Express a

right of first refusal on services to new destinations in London and discriminating in favour of easyBus seriously distort competition between coach operators wanting to provide services from the Bus Station and there is no objective justification for that distortion of competition.

167. This judgment necessarily leaves a number of issues unresolved. The most obvious ones are whether Luton Operations are in fact dominant; the terms of any injunction to be granted; the quantification of any damages suffered by ATS and whether any other relief is appropriate. Since I have not heard argument on any of those matters, they will need to be addressed at a later date.

DRAWING OF LUTON AIRPORT BUS STATION



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Godvik, 26.12.2012

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Ulike holdeplass vilkår – manglende belysning og skilting

Flybussbergen deltok i trekning av ny holdeplass 13.9.2013. Flybussbergen fikk den fremste holdeplassen, plass 1. Flybussbergen opplevde dessverre at tiltredelsen ble utsatt av Avinor i 8 uker og selskapet fikk ikke ta i bruk plass 1 før så sent som den 12.12.2013.

Dette har skadet Flybussbergen sin inntjeningsevne.

I mellomtiden har Avinor tilrettelagt god infrastruktur og svært god belysning på flybusstoppet til Tide, men dessverre ikke på plass 1 for Flybussbergen. Videre er det også slik at Flybussbergen på nytt er bortgjemt ved at Avinor nå har hengt opp store bannere midt i siktsonen mot plass 1. God sikt og ikke minst belysning er viktige elementer for at kundene enkelt skal finne vei til bussene. Dette er elementær markedslære.

Manglende belysning og fri siktsone mot plass1 skader Flybussbergen sin inntjeningsevne ytterligere.

Vedlagt er bilder som illustrerer forskjellen mellom plass 1 og 2.
Som en kan se er det laget lysmaster på plass 1, men ingen på plass 2.(Kun lys ut mort kjørebanen)

- Det anmodes om en kort forklaring på hvorfor belysning og derved vilkårene er annerledes for plass 1 og 2.
- Flybussbergen anmoder videre Avinor om straks å etablere belysning på plass 1, tilsvarende som for plass 2.
- Videre bes det om tilbakemelding på om Avinor ønsker å motsette seg at Flybussbergen etablerer en enkel/mobil midlertidig belysning og bedre skilting på plass 1, slik at sjåfører og passasjerer blir ivaretatt på en sikker og kundevennlig måte på holdeplassen inntil Avinor har etablert en permanent og likeverdig løsning.

Med vennlig hilsen
Flybussbergen.no as

Sign.: Robert Aasmul

Robert Aasmul
Daglig leder

Den 27. jan. 2014 kl. 07:04 skrev "Grethe Gullhaug / Kluge" <Grethe.Gullhaug@kluge.no>:

Advokat Hennø,
Jeg viser til min e-post lørdag, se under. Her ber jeg om at FBB stiller tidligere holdeplass til disposisjon fra i dag tidlig. Avinor legger til grunn at dette blir respektert. De holdeplasser Avinor har disponible til flybussvirksomhet på Bergen Lufthavn Flesland er som du er kjent med de holdeplasser som var omfattet av den nylig avholdte konkurransen.

I uttalelse til Bt lørdag 25. januar sier Robert Aasmul at FBB vil fortsette å kjøre flybuss også i tiden fremover. Det samme gjentas i intervju til Bt i dag. Avinor tar denne avgjørelsen om fortsatt flybussvirksomhet til etterretning. Fra Avinors side er det samtidig grunn til å understreke at FBB ikke vil kunne disponere selve flyplassområdet til denne virksomheten.

Vi ber om å få skriftlig bekreftet fra deg i løpet av formiddagen i dag at FBB er innforstått med dette, det vil si at FBB ikke lenger på noen måte kan benytte seg av området inne på Bergen Lufthavn Flesland.

Med vennlig hilsen Grethe Gullhaug, advokat/partner

Fra: Grethe Gullhaug / Kluge <Grethe.Gullhaug@kluge.no>

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HORDALAND FYLKESKOMMUNE | SAMFERDSELSAVDELINGA
Forvaltningseksjonen - SAMF AVD

Flybussbergen.no AS
Postboks 2420 Drotningsvik
5828 BERGEN

Dato: 04.02.2014
Dykkar ref.:
Vår ref.: 2014/11298-1

Søknad frå Tide Buss AS om ruteløyve for strekningane Åsane terminal - Bergen lufthamn og Haukeland universitetssjukehus - Bergen sentrum - høyring

Vi har i vedlagte brev av 28.01.14 frå Tide Buss AS motteke søknad om ruteløyve for «flybuss» på strekningane Åsane terminal – Fløyfjellstunnelen – Bergen lufthamn og Haukeland universitetssjukehus – Bergen sentrum – Bergen lufthamn.

Ei eventuell fråsegn i høve saka må vere motteken seinast 28. februar 2014.

Rolf Rosenlund
Seksjonsleiar

Tor Harald Rødseth
Seniorrådgjevar

Brevet er godkjent elektronisk og har derfor inga underskrift.

Vedlegg: Kopi av brev av 28.01.14 frå Tide Buss AS

tide

TIDE BUSS AS

Telefon : 05505
Telefax 55 23 88 79
Org. nr. : 910 500 805
Adresse : PB 6300
5893 Bergen
Dato 28.01.14

Hordaland Fylkeskommune
Samferdselsavdelingen
Postboks 7900
N 5020 BERGEN

SØKNAD OM LØYVE FOR FLYBUSS TIL OG FRA HAUKELAND SYKEHUS SAMT FLYBUSS MELLOM ÅSANE TERMINAL.

Tide Buss vil med dette søke om løyve til opprette flybussrute mellom Haukeland sykehus og Bergen busstasjon med korrespondanse til og fra eksisterende flybuss, samt flybussrute mellom Åsane terminal og Bergen Lufthavn Flesland.

Bakgrunn til søknaden.
Tide har vunnet utlyst konkurranse om å betjene to holdeplasser på Bergen lufthavn Flesland. Som en del av avtalen med Avinor har vi forpliktet oss til å gi et flybusstilbud til Åsane terminal og Haukeland sykehus under forutsetning av at vi får løyve til å starte kjøringen.

Rutetrase Haukeland
Haukeland Hotell via Møllendalsbakken, Møllendalsveien, Gamle Nygårdsbro og ned til Bergen busstasjon i korrespondanse med flybussen fra Bergen sentrum. Retur etter korrespondanse med flybussen fra Bergen Lufthavn Flesland til Bergen sentrum med trase via nye Nygårsdbro og Møllendalsveien .

Frekvens Haukeland.
Ruten vil i utgangspunktet ha timesfrekvens med faste "stive" avgangstider. Dette betyr at våre kunder vil ha et klokkeslett å forholde seg til.

Mandag – fredag.
Første tur fra Haukeland 07:15 og siste tur kl 20:15.
Første tur fra Bergen ca 07:40 og siste tur ca kl 19:40

Rutetrase Åsane terminal
Åsane terminal, Motorveien til Eidsvåg og Norges Handelshøyskole, Fløyfjellstunnellen, Puddefjordsbroen, Oasen, ringveg vest og videre til Bergen Lufthavn, Flesland.

Frekvens Åsane terminal.
Ruten vil i utgangspunktet ha timesfrekvens med faste "stive" avgangstider. Dette betyr at våre kunder vil ha et klokkeslett å forholde seg til på traseen f.eks. fem minutter over hver hele time. T

Mandag – fredag vil ruten kjøre fra Åsane terminal 03:10, 04:30, 05:00, 06:00, 06:30, 07:00, 07:30, 08:00 og deretter hver time fremover til og med kl 19:00. Fra Flesland vil den gå fra kl 08:00 og hver time fremover til og med kl 20:00. De to første avgangene fra Åsane vil gå om