

# TRAVEL AGENTS' SERVICE FEES

## FINAL REPORT

*30<sup>th</sup> JULY 2010*



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## I. Summary

1.1 By virtue of the powers conferred upon the Executive Director of the Competition Commission of Mauritius (CCM), under Section 51 of the Competition Act (The Act), the CCM launched an Investigation on the 21<sup>st</sup> of December 2009 into the possible existence of a collusive agreement by Travel Agents in Mauritius to fix the service fee they charge.

1.2 This report is in pursuance with Section 51(2) of The Act, which stipulates that “upon completion of an investigation, the Executive Director shall submit his report on the investigation to the Commission.”

1.3 The CCM produced a Statement of Issues on Travel Agents' Service Fees on 05<sup>th</sup> March 2010, after which information gathering and data analysis continued.

1.4 A Provisional Report was issued on 15<sup>th</sup> June 2010 and sent to relevant parties in accordance with provisions of Section 14 of the CCM Guidelines on Rules of Procedures.

1.5 The parties were given the opportunity to comment on both the Statement of Issues and the Provisional Report. Comments received from the parties are in Section 4 of this report.

1.6 From the information gathered during the Investigation, it appears that there is a collusive agreement between the Mauritius Association of IATA Travel Agents (MAITA) and Air Mauritius Ltd. (Air Mauritius), to fix the service fee level to be charged to clients on tickets issued in Mauritius for travel on Air Mauritius flights.

1.7 There is evidence of communication between MAITA and Air Mauritius to fix the level of service fee. Such communications on price coordination are considered collusive, in breach of Section 41 of the Act.

1.8 Even though these communications took place prior to the establishment of the Act, we find that a collusive agreement between MAITA and Air Mauritius has continued to exist after the introduction of the Act and has continuing effects on the market. This continued conduct or concerted practice is considered to be a breach of Section 41 of the Act.

1.9 The Act provides that the Commission may give appropriate directions to enterprise(s) to cease them from being a party to the agreement. In relation to collusive agreements, the Commission can also impose financial penalties on the enterprise(s).

1.10 This Final Report is intended to set out the findings of the investigation and to give an explanation of the reasons for the findings.

1.11 It is up to the Commissioners to decide whether any breach of the Act has been committed and to determine any penalties and/or directions.

## 2. Background

### *The Allegation*

2.1 The allegation concerns the possible existence of a collusive agreement amongst travel agents to fix the levels of their service fees. The service fee is the price charged by Travel Agents for the reservation, booking and ticket issuing service they offer.

### *Key Players in the Travel Agency Sector*

2.2 Travel Agents are companies providing various services to customers including the services of booking, reservation and issuing of tickets for travel in various airline companies.

2.3 Airline companies are those companies that provide air transportation facilities. In Mauritius, the “national” carrier is Air Mauritius.

2.4 Air Mauritius, in addition to being an Airline company, also issues its own tickets, thus acting as a Travel Agent.

2.5 The International Air Transport Association (IATA) is one of the major international players in the airline industry. The mission of IATA is to “represent, lead and serve the airline industry.”<sup>1</sup> Airline companies can be member of IATA and Travel Agents can get accreditation<sup>2</sup> from IATA. IATA also offers a system known as the Billing and Settlement Plan, which is “a system to facilitate selling, reporting and remitting procedures”<sup>3</sup> of Travel Agents who are accredited by the IATA. IATA acts as a hub for airline companies and travel agents.

2.6 Although there are about 150 travel agents in Mauritius, only some 44 are accredited by the IATA. Moreover, only travel agents who are accredited by the IATA can issue tickets for Air Mauritius seats. Non-IATA travel agents must buy tickets on behalf of consumers from IATA accredited Travel Agents (IATA Travel Agents).

2.7 In the local context, there is the Mauritius Association of IATA Travel Agents (MAITA), which is an association that groups 25 IATA Travel Agents in Mauritius.

2.8 In this Investigation, Travel Agents in Mauritius have been grouped in four categories, namely, Air Mauritius, MAITA members Travel Agents, Non-MAITA IATA Travel Agents and

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<sup>1</sup> Source:- IATA Website, <http://www.iata.org/about/Pages/mission.aspx>

<sup>2</sup> In this report when we refer to IATA travel agents or IATA member travel agents we mean IATA Accredited travel agents

<sup>3</sup> Source:- IATA Website, [http://www.iata.org/ps/financial\\_services/bsp/Pages/index.aspx](http://www.iata.org/ps/financial_services/bsp/Pages/index.aspx)

Non-IATA Travel Agents. Non-IATA agents are out of the scope of this Investigation since they do not issue tickets.

## History of Service Fee

2.9 Airline companies used to provide Travel Agents a commission on the tickets they sold for their airline. The commission was a percentage of the fare price. However, internationally there has been a general trend for airline companies to remove that commission based system to move to a service fee system, whereby Travel Agents charge their own price for their service.

2.10 In the year 2008, Air Mauritius cancelled its commission system and the Service Fee system was implemented. The service fee can normally be determined by agents and they can decide on their own service fee level.

2.11 Tickets for Air Mauritius seats are sold by Travel Agents and Air Mauritius itself (acting, in effect, as its own travel agent).

2.12 A typical air ticket's price will consist of the fare (the amount paid to the airline), taxes, service fee and VAT on the service fee.

2.13 When the service fee was introduced, there was an article in the press which read as follows:

- (a) "Air Mauritius en recommande les taux qui variant de Rs. 350 a Rs. 4,000, en fonction de la destination. Loin d'être une obligation, ce service fee permet aux agences de voyages d'appliquer librement un taux plus bas ou plus eleve. Cependant, La Mauritius Association of IATA Travel Agencies (MAITA) recommande que les taux affiches par Air Mauritius soient appliques de facons uniforme." (Source:- L'Express – 07/April/2008 – "Billets d'avion: Flou sur les nouveaux frais.")

2.14 During the introduction of the service fee a communiqué was made by Air Mauritius, in February 2008, to all IATA Travel Agents in Mauritius, whereby the service fee, as will be charged by Air Mauritius as a travel agent, was displayed.

2.15 A "grid" of the Service fee as to be applied from Air Mauritius was available from its website until July 2010 at [http://www.airmauritius.com/news%5Cservice\\_fee.pdf](http://www.airmauritius.com/news%5Cservice_fee.pdf). We understand this grid was removed following production of the CCM Provisional Findings.

## Competition Policy Issues

2.16 Concerted practices to fix prices among companies who should be in competition will prevent effective competition. This may mean that many consumers will be paying a price which is higher than would be the case had there been proper competition.

## The Competition Act 2007 and CCM Guidelines

2.17 Sections 41 to 43 of the Competition Act 2007 (the Act), prohibit collusive agreements between enterprises.

2.18 Section 41 of the Act prohibits “agreements or a provision of such agreement between enterprises that supply goods or services of the same description, or acquire goods or services of the same description, which have the object or effect of significantly preventing, restricting or distorting competition.” Thus the above allegation at paragraph 2.1 may be a breach of Section 41 of the Act.

2.19 The definition of ‘agreement’ in the Act is a wide one and includes concerted practice which is defined as “a practice involving contacts or communications between competitors falling short of an actual agreement but which nonetheless restricts competition between them.” Indeed, for an agreement to exist, “all that is required is that parties arrive at a consensus, an understanding, on the actions each party will, or will not take.”<sup>4</sup>

2.20 This wide definition of ‘agreement’ is important in this case. If, for example, one industry participant announced its own pricing structure and a significant number of other industry participants followed, that could constitute a concerted practice within the meaning of the Act.

2.21 “The CCM sets a very high priority on enforcement of the prohibition on collusive agreements<sup>5</sup>.”

2.22 “Price-fixing might also take the form of an agreement to restrict price competition, for instance, competition might be restricted despite the ability to grant discounts or special deals on a published list price or ruling price<sup>6</sup>.”

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<sup>4</sup> Section 1.9 of the CCM 3 – *Guidelines on Collusive Agreements*

<sup>5</sup> Section 1.1 of the CCM 3 - *Guidelines on Collusive Agreements*

<sup>6</sup> Section 2.4 of the CCM 3 - *Guidelines on Collusive Agreements*

2.23 “The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not party to the agreement<sup>7</sup>.”

2.24 “Recommendations of a trade association in relation to price, or collective price-fixing or price coordination of any product might be considered to be price fixing, regardless of the form it takes<sup>8</sup>.”

2.25 Price-fixing agreements need not be followed completely in order to constitute a breach of the Act. It is enough that they have the object or effect of distorting competition, for example by influencing the prices charged.

### **Experience of other Competition Authorities<sup>9</sup>**

2.26 Prohibition of collusive price-fixing is an almost universal feature of competition law worldwide. Details vary. For example, unlike Mauritius many jurisdictions provide for criminal sanctions, including imprisonment, against individual executives who conclude or follow price-fixing agreements. However, overall the approach to detecting and assessing price-fixing agreements is much the same: such agreements are prohibited, with few if any exceptions.

2.27 Trade associations have frequently been implicated in price-fixing agreements. We provide some illustrative examples below, from other jurisdictions.

2.28 There has been a similar case in Singapore<sup>10</sup>, whereby the Institute of Estate Agents (IEA) sought guidance as to whether its published “Fees Guidelines” was likely to restrict competition. The Competition Commission of Singapore decided that although the price recommendation was not binding, it did provide a “focal point for prices to converge.” Hence the Competition Commission of Singapore advised the IEA to remove its recommendation on fee and fee structure.

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<sup>7</sup> Section 1.10 of the CCM 3 - *Guidelines on Collusive Agreements*

<sup>8</sup> Section 2.5 of the CCM 3 - *Guidelines on Collusive Agreements*

<sup>9</sup> The cases cited in this section are provided as guidance only and should in no circumstances be construed as being precedents on which the CCM will base itself. The CCM follows the Competition Act 2007 and CCM guidelines and considers each case on its specific facts and merits before formulating any conclusions in its final report.

<sup>10</sup> [http://app.casebank.ccs.gov.sg/case\\_advices.aspx](http://app.casebank.ccs.gov.sg/case_advices.aspx)

2.29 In 2001, the European Commission<sup>11</sup> found that Daimler-Benz had breached Article 81 (prohibiting cartels), referring to an agreement between Mercedes-Benz Belgium and the Belgian Mercedes-Benz dealers' association, which limited discounts on vehicles. The decision was not binding on the dealers' association members, but was only a recommendation. However, the Commission decided that as the decision was implemented, this did not mean that members were not in breach, and the courts upheld that view.

2.30 In 2004, the European Commission<sup>12</sup> found producers and trade associations in the cement sector to have infringed Article 81 by anti-competitive agreements and concerted practices. The companies appealed against the decision, and the Court of First Instance and European Court of Justice, both of which upheld the Commission's decision in this respect.

### ***The Investigation – CCM/INV/004***

2.31 After an initial enquiry into the allegation as set out in paragraph 2.1, the Executive Director launched an Investigation into the possible existence of a collusive agreement amongst travel agents in December 2009, in accordance with Section 51 of the Act.

2.32 The investigation was referred as CCM/INV/004, Investigation of Travel Agents' Service Fees.

2.33 Main parties to the investigation were informed and a press release was issued. At that stage, Information gathering and interviews with parties were initiated.

2.34 After the preliminary information gathering and interviewing, the CCM produced a Statement of Issues in March 2010, which was sent to the main parties to the Investigation. The Parties were given the opportunity to comment on the Statement of Issues. The CCM continued its information gathering and data analysis after the production of the Statement of Issues. Air Mauritius and two Travel Agents responded. MAITA decided not to respond at that time.

2.35 A Provisional Report was sent to MAITA and Air Mauritius on 15<sup>th</sup> June 2010, to which they responded.

2.36 The findings of the Executive Director and Investigative Team of the CCM, for this investigation, are explained in this report.

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<sup>11</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:257:0001:0047:en:PDF>

<sup>12</sup> [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=394D0815](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=394D0815)

### 3. Outcome of the Investigation

3.1 The CCM has conducted this investigation through:

- (a) Interviews with MAITA, Travel Agents, Air Mauritius and other relevant parties.
- (b) Information requests to MAITA, Air Mauritius and some Travel Agents, relating to the agreement.
- (c) Information from other key players in the sector.
- (d) Data requests to travel agents, relating to service fees and other charges for tickets sold in a six week period at the end of 2009.
- (e) Analysis of the data provided to the CCM.
- (f) Consideration of responses of parties.
- (g) Research in media and other sources.

#### **Evidence of the Agreement**

3.2 Evidence shows that MAITA and Air Mauritius jointly negotiated on the Service Fee they must set. For instance, minutes of meeting held between Air Mauritius and MAITA, on 2<sup>nd</sup> May 2007, (ANNEX III - MK Annex 1-8), state that "Following MK proposals for service fee grid that will be applicable as from 01 April 2008, MAITA was called for their feedback. MAITA not agreeable to price range offered by MK but however agrees to routes groupings as proposed by MK."

3.3 This appears to be a negotiation towards an agreement between both parties on the way they are going to categorize the market, which is in terms of haul (haul is the trip distance). This was later used as a determinant of the service fee to be charged.

3.4 This agreement set up two factors for determining the level of service fee. The first factor is the haulage. Trips are classified in three categories according to haulage which are short haul, medium haul and long haul.

3.5 The second factor is the ticket class. There are two major classes, namely the "Economy" class and the "Business" Class.

3.6 Using the sub elements across these two factors, six major classification of the destinations were made as in the diagram below:

**Table 1 - Service fee classification**

		<b>Class Category</b>	
		<b>Economy Class</b>	<b>Business Class</b>
<b>Haulage</b>	<b>Short Haul</b>	Short Haul Economy Class	Short Haul Business Class
	<b>Medium Haul</b>	Medium Haul Economy Class	Medium Haul Business Class
	<b>Long Haul</b>	Long Haul Economy Class	Long Haul Business Class

3.7 From other documents, a mail circulated within MAITA in July 2007 (Annex II - Document M1-69) and minutes of a meeting held between MAITA and Air Mauritius, dated 06<sup>th</sup> July 2007 (Annex III – MK Annex 1- 6), the following can be read:

- (a) “MK advised that it has accepted MAITA's proposals for service fee in Economy class as follows:  
 Long Haul - Rs. 2000  
 Medium Haul - Rs. 1000  
 Small Haul - Rs. 350.
- (b) Following discussions, MAITA revised its proposals for travel in business class as follows:  
 Long haul - Rs. 4000  
 Medium haul - Rs. 2500  
 Small haul - Rs. 1000
- (c) MK will consider and revert by next week to MAITA about final proposals for service fee in both classes”

3.8 From minutes of meetings (M1-19, MK Annex 1-8 & MK Annex 1-6) provided by the parties it appears that Air Mauritius initially proposed a range of service fees. However after

the joint negotiation with MAITA a higher level of service fee emerged, as depicted below for Economy class:

**Table 2 - Service fee negotiation**

Category	Initial service fee proposed by Air Mauritius	Service Fee after joint negotiation	% Increase in service fee after agreement
Short haul	Rs. 200 - 250	Rs. 350	40% - 75%
Medium haul	Rs. 750	Rs. 1000	33%
Long haul	Rs. 1250	Rs. 2000	60%

3.9 A circular was sent by Air Mauritius to all IATA travel agents, dated 26<sup>th</sup> February 2008, stipulating the service fee it will charge and whereby it “recommended agents to align themselves” to that service fee (Annex 1). The service fee that appeared in that circular is the same as agreed between MAITA and Air Mauritius as in the above paragraph.

3.10 In a General Meeting of the Association, held by MAITA on the 20<sup>th</sup> August 2008, the Chairman of the latter suggested its members not to give service fees as discount because this would weaken their position to further negotiate service fees with Air Mauritius (Annex II – M1 10).

3.11 There is more evidence of such communications in between MAITA and Air Mauritius, a summary of which is attached in Annex II and Annex III.

3.12 As noted in paragraph 3.9, Air Mauritius did send a circular to all IATA travel agents, including Non-MAITA IATA travel agents in Mauritius. There has been no evidence of communication on the part of Non-MAITA IATA travel agents with Air Mauritius to fix the service fee level.

3.13 These communications, between MAITA and Air Mauritius, took place prior to the Act coming into force. Thus, at the time these agreements were made, no breach of the Act was committed.

3.14 However, if this agreement continued to exist after the Act came into operation it may constitute a breach of the Act. To assess this question, we examined prices in the market

after the Act came into effect to know whether prices in the market still reflect service fees agreed during this process.

### **Effects of the Agreement**

3.15 If this agreement is still in effect, we might expect to find greater clustering at or around the agreed service fee levels than might be expected if all travel agents were simply acting independently, with no common understanding resulting from the negotiations.

3.16 Sales Data was requested from 46 IATA Travel agents and Air Mauritius for analysis. Data was requested on tickets issued from 26<sup>th</sup> November 2009 to 31<sup>st</sup> December 2009 for the destinations; Johannesburg (medium haul), London (Long haul) and Rodrigues (Short haul). Data pertaining to the ticket class, destination, service fee charged, Airline and taxes was requested.

3.17 The data were cleaned to remove data that were incomplete, incomprehensive or not within the scope of the data analysis. For instance if the ticket number and the class, airline or destination was not available the ticket was removed from the data to be analysed. Tickets that were cancelled or did not have a “fare” were removed.

3.18 The table below summarizes the data used in analysis.

**Table 3 - Summary of Data Used for Analysis**

	No. of Tickets Analyzed		
	<i>Johannesburg</i>	<i>London</i>	<i>Rodrigues</i>
<i>Business Class</i>	46	56	
<i>Economy Class</i>	325	541	2754
<b>Total</b>	<b>371</b>	<b>597</b>	<b>2754</b>
<b>Grand Total</b>	<b>3722</b>		

### **Data Analysis for Air Mauritius – as a Travel Agent**

3.19 Air Mauritius, as set out in its circular, attached in Annex 1, published its price list for service fee at the “agreed” price. Indeed, it can be seen in [Table 4](#) & [Table 5](#) below, that more than 65% of the service fee charged by Air Mauritius clusters around the agreed price for all three destinations in both Economy and Business class.

3.20 Also note a clustering for Rodrigues at Rs. 235. A promotional package was offered during that period, after incentives had been given by the government. Some agents mentioned that the price of the “Packaged Rodrigues” was Rs. 270, therefore Rs. 235 excluding VAT. This clustering at Rs. 235 may be explained by that promotional package.

3.21 During a meeting with representatives of Air Mauritius, the latter agreed that they charge the price as displayed in the grid in Annex 1 on their counter. They also said that Air Mauritius offers online booking facilities whereby they charge a discounted promotional service fee.

3.22 Thus, for Air Mauritius, it can be said that they charge a price around the agreed service fee level for on-counter ticket issues.

**Table 4 - Service Fee (Rs.) charged by Air Mauritius (Directly) in Economy Class**

Service Fee (Rs.)	Johannesburg	London	Rodrigues
0	0.00%	2.19%	0.00%
117	0.00%	0.00%	0.22%
147	0.00%	0.00%	0.87%
157	0.00%	0.00%	0.33%
174	0.00%	0.00%	0.77%
176	0.00%	0.00%	3.83%
178	0.00%	0.00%	0.11%
235	0.00%	0.00%	21.75%
352	0.00%	0.00%	68.31%
400	11.22%	8.76%	3.39%
485	0.00%	1.46%	0.00%
500	16.33%	0.00%	0.00%
522	4.08%	0.00%	0.00%
1000	68.37%	10.22%	0.00%
1043	0.00%	5.11%	0.00%
1117	0.00%	0.00%	0.33%
1130	0.00%	0.73%	0.00%
1176	0.00%	0.00%	0.11%
2000	0.00%	71.53%	0.00%

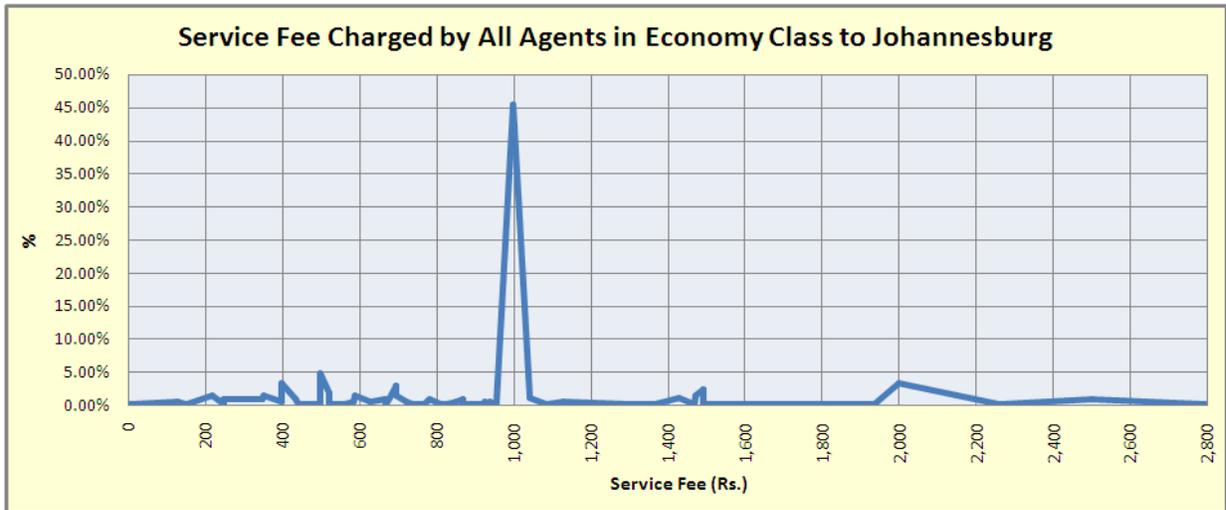
**Table 5 - Service fee (Rs.) charged by Air Mauritius (Directly) in Business Class**

Service Fee (Rs.)	Johannesburg	London
0	8.33%	0.00%
400	0.00%	22.22%
1250	8.33%	0.00%
2000	0.00%	11.11%
2500	75.00%	0.00%
4000	8.33%	66.67%

**Analysis of Data for all Travel Agents Surveyed**

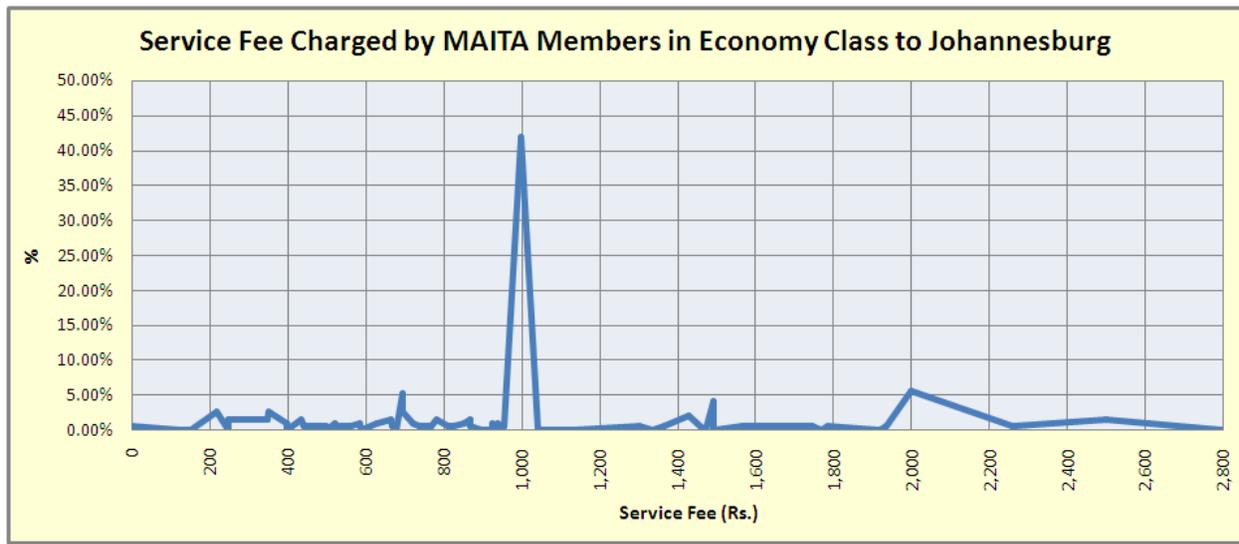
**Data Analysis for Johannesburg**

**Figure A - Service fee (Rs.) by tickets for Johannesburg - Economy Class - All Agents**



3.23 As depicted in Figure A above, for travel to Johannesburg in Economy Class, there is a clustering of service fee at Rs. 1000. In fact the agreement proposed a price of Rs. 1000 for Johannesburg in Economy Class. Thus, it can be seen that more that 45% of service fee in that market segment falls under the “agreed” price. This data includes tickets issued by Air Mauritius directly.

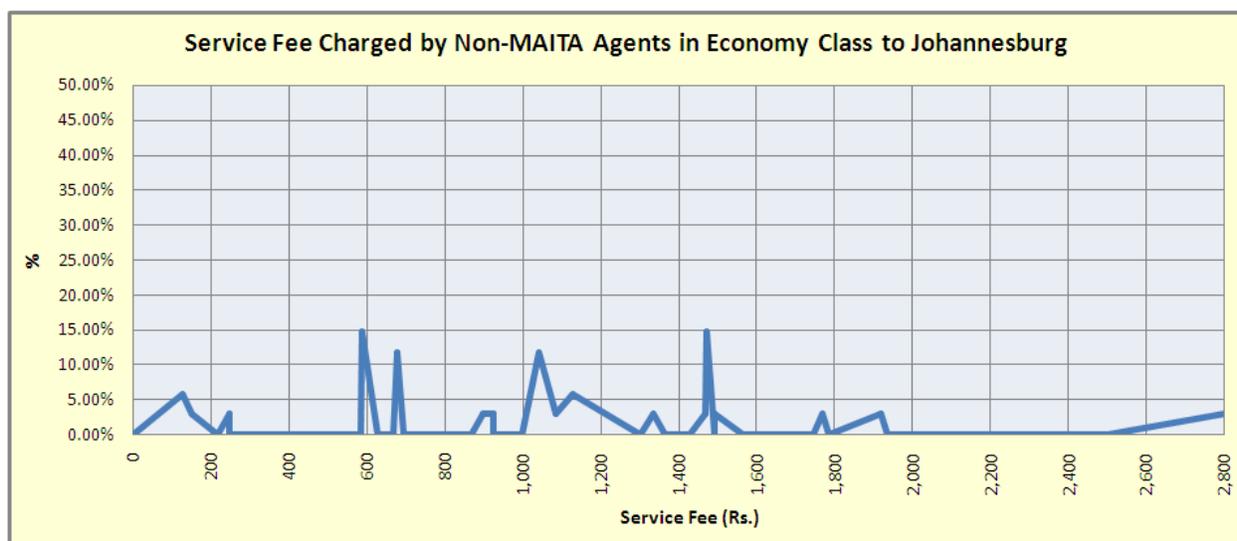
**Figure B - Service fee (Rs.) by tickets for Johannesburg - Economy Class - MAITA only**



3.24 [Figure B](#) above shows that this trend of clustering, at the price as negotiated by MAITA and Air Mauritius, is reflected in the Service Fee level charged by MAITA (excluding Air Mauritius and non-MAITA travel agents). In other words, there is a clustering of nearly 45% at the price of Rs. 1000 for tickets issued for Johannesburg in Economy class from Air Mauritius flights by MAITA member travel agents.

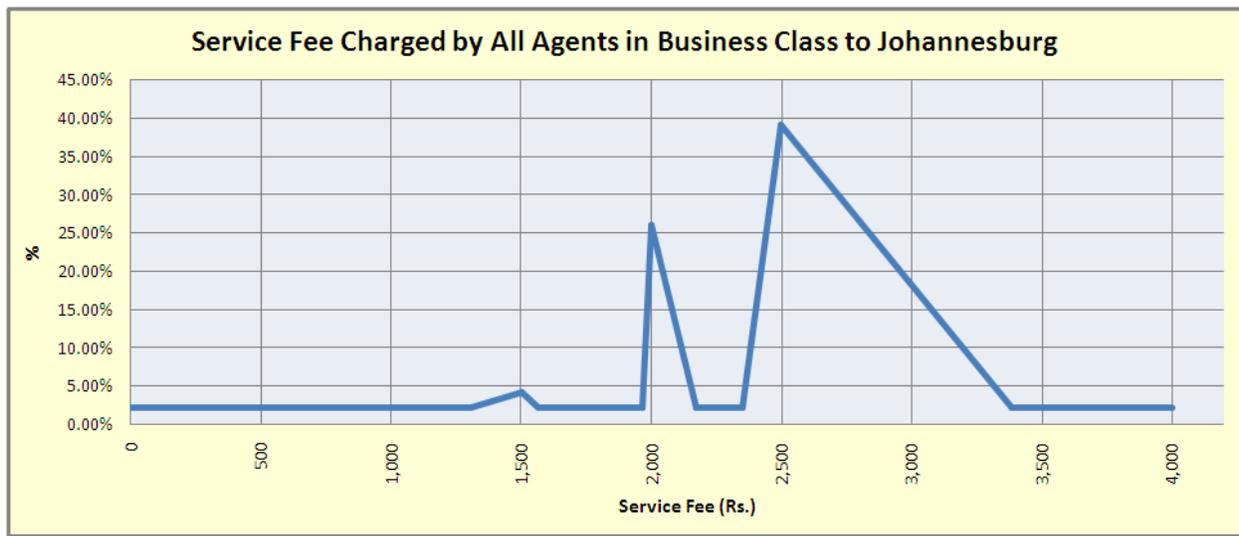
3.25 Less clustering is reflected in the analysis for non-MAITA IATA travel agents for tickets issued to Johannesburg in Economy Class. This is illustrated in [Figure C](#) below. However only 34 tickets were available for analysis in that category.

**Figure C - Service fee (Rs.) by tickets for Johannesburg - Economy Class - Non-MAITA**

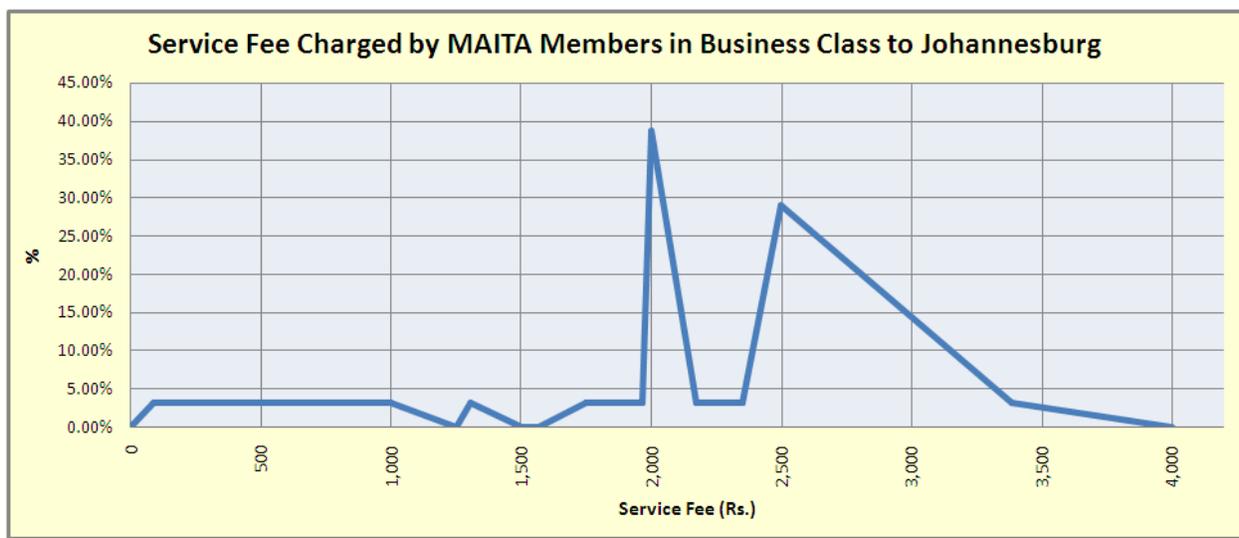


3.26 [Figure D](#) and [Figure E](#) illustrate the service fee charged by all travel agents, and by MAITA members only respectively in Business Class to Johannesburg. Only 46 tickets were available for analysis in this category. Note the clustering at Rs. 2000 and Rs. 2500, both in general and specific to MAITA only. Rs. 2500 was the “agreed” price within that category.

**Figure D - Service fee (Rs.) charged for Johannesburg - Business Class all Agents**



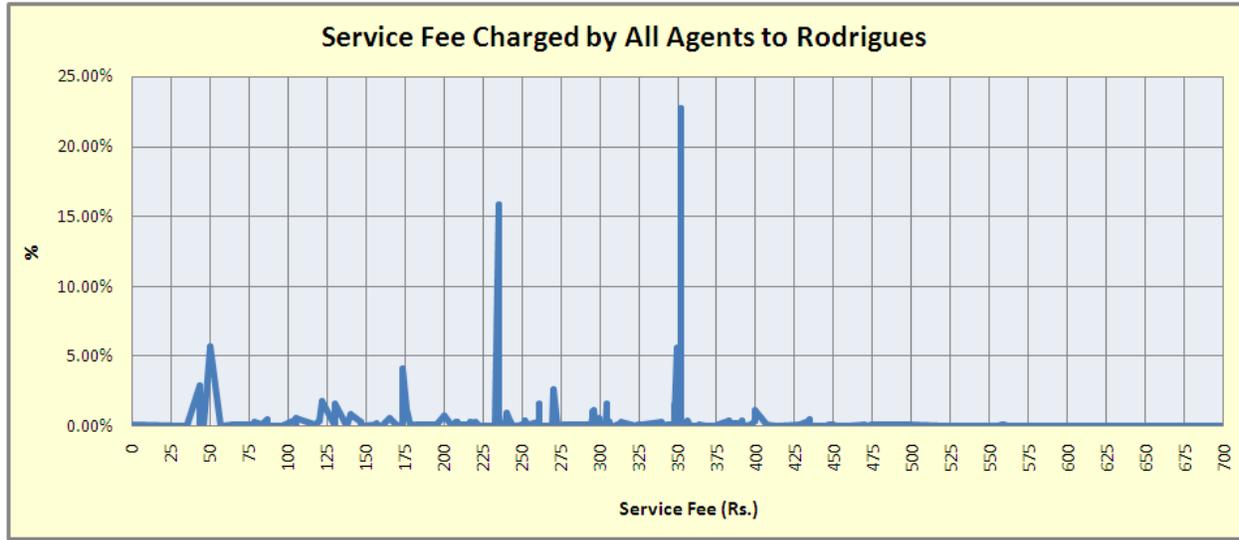
**Figure E - Service fee (Rs.) charged for Johannesburg - Business Class - MAITA Members only**



**Data Analysis for Rodrigues**

3.27 Figure F below shows the service fee charged for tickets sold by all IATA Travel Agents in Mauritius to Rodrigues. Rodrigues is categorized as short haul and with only Economy class, which implies a recommended price of Rs. 350.

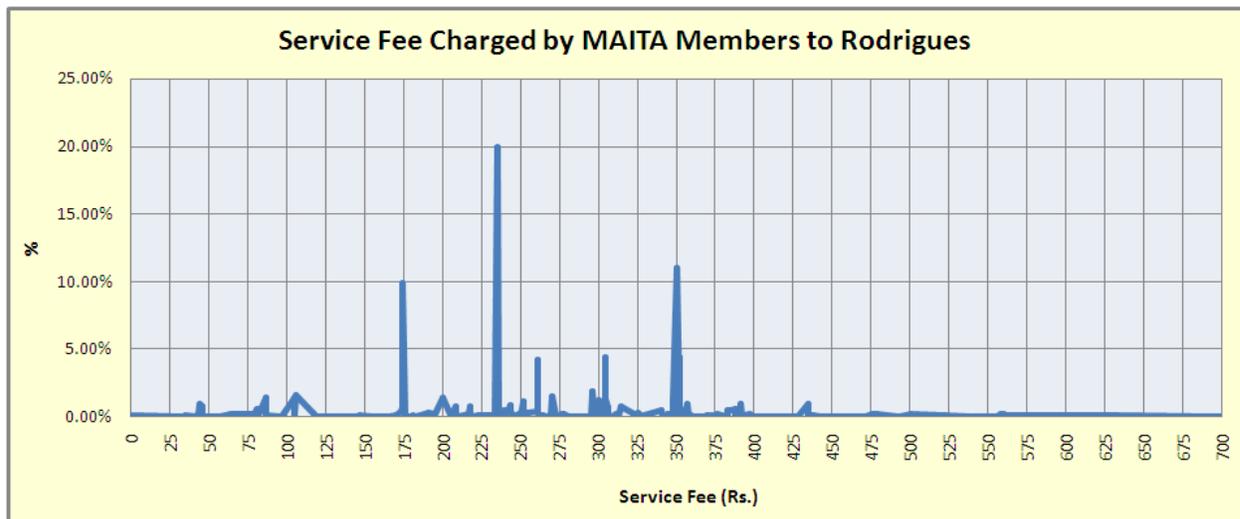
**Figure F - Service Fee (Rs.) charged by tickets for Rodrigues - All Agents**



3.28 As shown in Figure F, the service fee charged tend to cluster around the point of Rs. 350, which is the price specified in the agreement.

3.29 Considering tickets issued by MAITA only (excluding Air Mauritius and non-MAITA travel agents), as shown in Figure G below, the clustering seems to be more at around Rs. 350, the agreed price, and Rs. 235, which can be “packaged Rodrigues” price. The peak at Rs. 174 is a promotional package offered by a particular agency who sold 100 tickets at that price.

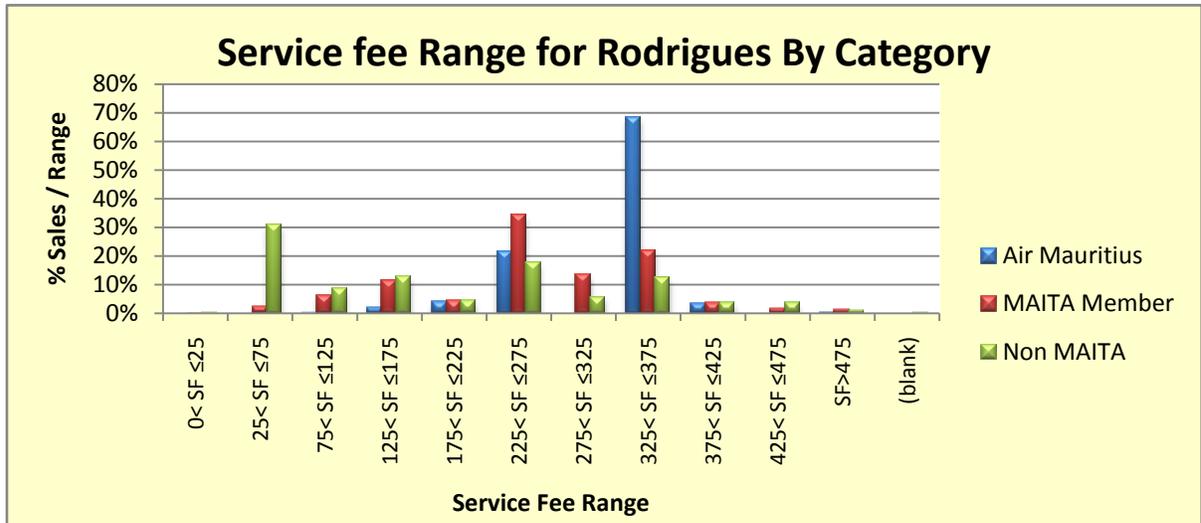
**Figure G - Service Fee (Rs.) by tickets for Rodrigues - MAITA only**



3.30 Figure H shows the percentage of tickets sold within distinct service fee ranges by Air Mauritius, MAITA and non-MAITA travel agents. Clustering at the promotional package price of Rs. 235 seems higher for MAITA travel agents.

3.31 In brief, for Rodrigues, there seems to be some clustering across two points, which are the price of Rs. 350 as set in the agreement and Rs. 235, which can be promotional “Packaged Rodrigues” price.

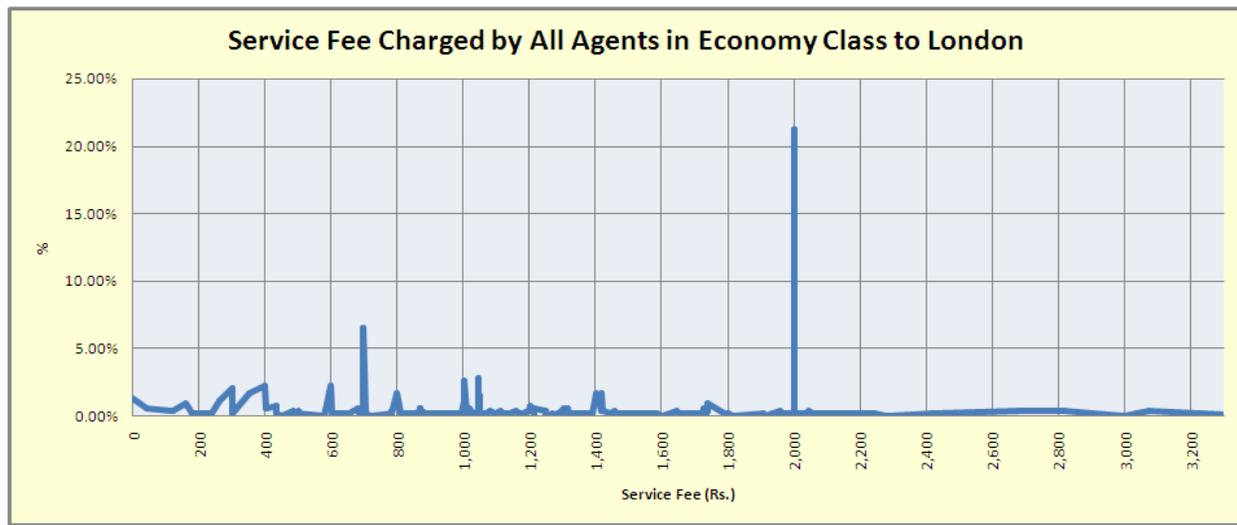
**Figure H - Service fee range for Rodrigues by Category**



**Data Analysis for London**

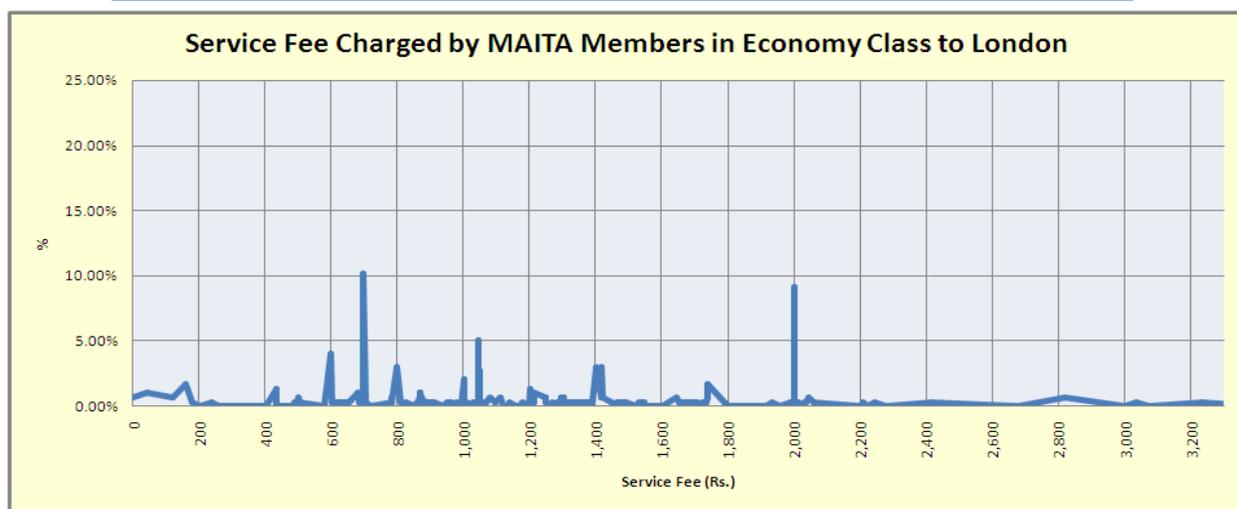
3.32 Figure I highlight the service fee charged for tickets issued for London in Economy class, including Air Mauritius. For this destination, there exist variations in the price. However, there is a peak at the price of Rs. 2000, which is the price as set in the agreement. However, this peak represents around 22% of tickets issued for that category.

**Figure I - Service fee (Rs.) by tickets for London - Economy Class - All Agents**



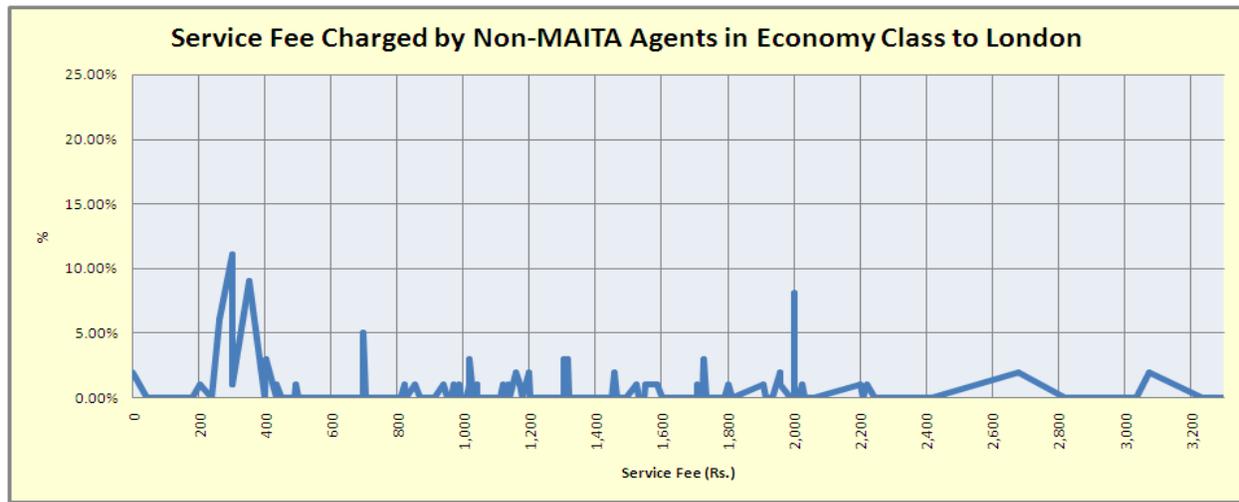
3.33 Although there are two peaks in price set in Economy class to London by MAITA members, the extent of that clustering is low (slightly less than 10% at the “agreed” price). This is illustrated in Figure J below. The peak at Rs. 700 principally reflects the price of one particular travel agent, which issued 32 tickets at that price on the 303 tickets analysed within that category (Economy Class to London within MAITA Travel Agents).

**Figure J - Service fee (Rs.) by tickets for London - Economy Class - MAITA Only**



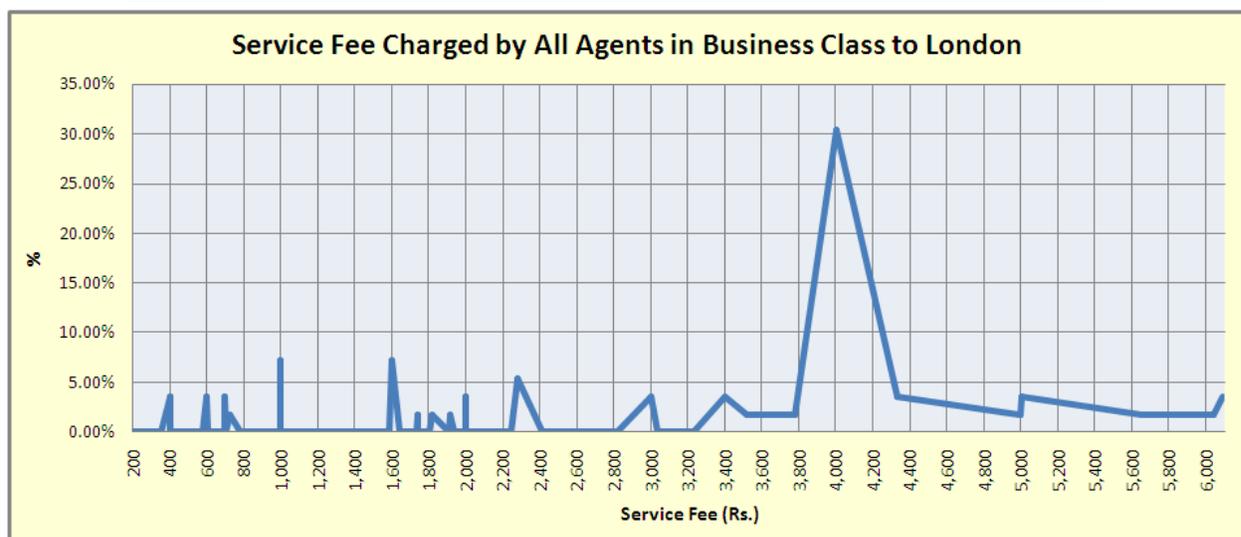
3.34 The data analysis for Non-MAITA IATA travel agents is less conclusive. As depicted in [Figure K](#), the statistical mode for service fee charged within that category by Non-MAITA IATA travel agents is at Rs. 300 which is much lower than the recommended price by Air Mauritius.

**Figure K - Service fee (Rs.) by tickets for London – Economy Class – Non-MAITA**

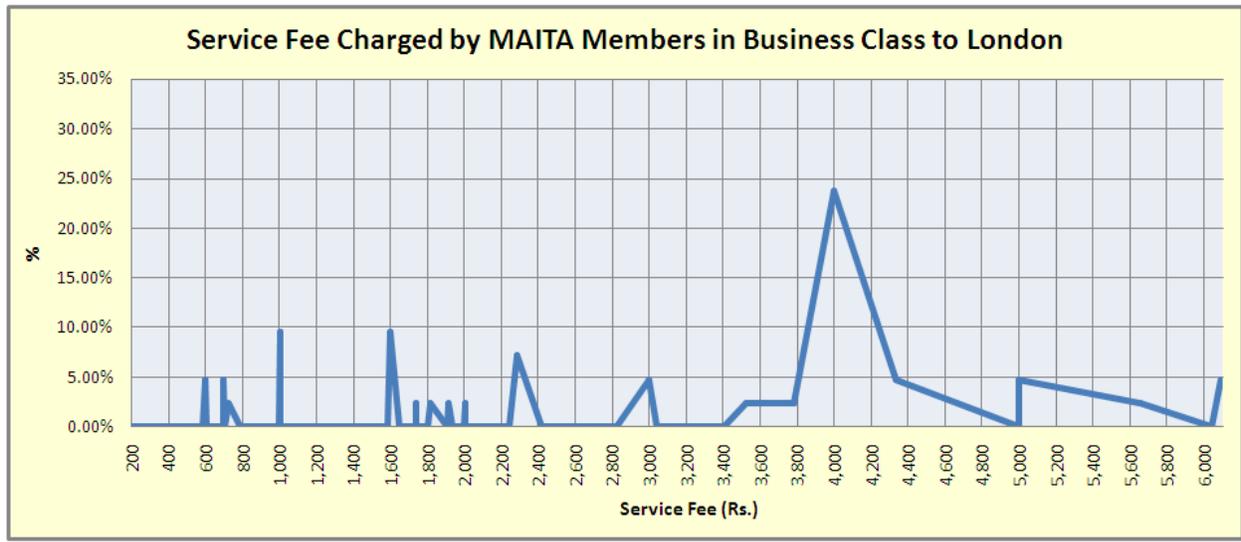


3.35 There is more clustering for Business class tickets. Around 30% of tickets issued, including those issued by Air Mauritius, are at the agreed service fee of Rs. 4000 in that segment. For MAITA member travel agents, the clustering at the agreed price is more than 20%. These data are illustrated in [Figure L](#) and [Figure M](#). However, only 56 tickets were available for analysis in that category.

**Figure L - Service fee (Rs.) Charged to London in Business Class - All Agents**



**Figure M - Service fee (Rs.) Charged to London in Business Class - MAITA Members**



### Data Analysis Conclusion

3.36 [Table 6](#) below, shows the statistical mode service fee charged by Air Mauritius, MAITA Travel Agents and Non-MAITA IATA travel agents in various destinations and classes against the agreed service fee level. It can be seen that the statistical mode value for Air Mauritius is the same as the agreed list<sup>13</sup>.

3.37 The mode value of service fee charged by MAITA Travel Agents is also the same as the agreed service fee, except for Rodrigues and in Business class for Johannesburg. However, even though the mode price is not the same as the 'grid,' for Rodrigues, it is the same as 22% of the tickets issued by Air Mauritius. As mentioned previously there was a promotional package to Rodrigues whereby this discounted service fee was applied. The agreed price is the second most common service fee value charged by MAITA travel agents, that is Rs. 2500 for business class to Johannesburg.

**Table 6 - Statistical Mode of Service fee (Rs.) charged**

Statistical Mode of Service Fee (Rs.)					
	Economy			Business	
	Johannesburg	London	Rodrigues	Johannesburg	London
"Agreed" Service Fee	1000	2000	350	2500	4000
Air Mauritius Mode	1000	2000	352	2500	4000
MAITA Travel Agents Mode	1000	2000	235	2000	4000
Non-MAITA IATA Travel Agents Mode	590	300	50	N/A	N/A

3.38 The Mode service fee as charged by Non-MAITA IATA travel agents differs from the agreed service fee.

<sup>13</sup> The Rs. 2 difference for Rodrigues is likely to be a rounding issue relating to VAT, and not significant.

## 4. Findings and Responses of Parties

### Findings

4.1 Evidence in minutes of meetings between Air Mauritius and MAITA clearly show that there was negotiation and communication between MAITA and Air Mauritius, before the Act came into force, as set out in the section “Evidence of the Agreement,” with an object to fix the level of service fee.

4.2 Air Mauritius put it to us that the discussions with MAITA were merely for information, and cannot be characterized as ‘negotiation’. The minutes of meetings reproduced at Annex II and Annex III seem to us to prove the contrary. Air Mauritius and MAITA are making proposals and counter-proposals. This was obviously a negotiation to fix prices, although there was no requirement to stick to those levels; it was more of an understanding. An agreement – within the meaning of the Act – with the object of restricting, preventing or distorting competition therefore clearly existed before the Act came into effect in November 2009. Because this occurred before the Act came into effect, this in itself does not constitute a breach.

4.3 The CCM has not seen any evidence that this understanding ceased to have force after the Act<sup>14</sup> came into effect. There does not appear to have been any explicit communication with the object of restricting, preventing or distorting competition since that date. Attention therefore focuses on whether an agreement, an understanding, exists with the effect of restricting, preventing or distorting competition.

4.4 There is strong evidence that this agreement has affected the service fee structure as set in the market and continues to do so. Not all travel agents follow the Air Mauritius ‘grid’ for setting service fees. However, many do, leading to the clustering around that price illustrated earlier in this report.

4.5 Several parties have commented that similar prices can emerge as a result of competition. Evidence of communication is required to tell the difference between parallel pricing resulting from competition and collusion. However, in this case there is no doubt that communication occurred even though it occurred before the Act came into effect and thereby does not itself constitute a breach. To suggest that the similarity of prices in the

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<sup>14</sup> The parties were asked through an Information Request Order to provide the CCM with all documents in relation to service fee

market might have resulted from a normal process of competition, when they were manifestly negotiated between Air Mauritius and MAITA, seems unsustainable.

4.6 Furthermore, it is normal for the process of competition to drive prices down to a common level. The agreed service fees are invariably towards the upper end of the range of service fees. It is not obvious how a process of competition would result in fees clustering at this higher level.

4.7 Air Mauritius has argued that it is entitled to set its own service fee and needs to publicise that fact for customers to make an informed choice. It has stated that it has not engaged in any collusive communication with MAITA since the Act came into effect. However, the service fees set by Air Mauritius today are not independently determined by the company itself but are the result of the prior negotiation with MAITA. As the minutes of meetings demonstrate, the agreed service fee currently being charged by Air Mauritius is 30-75% higher than it had originally proposed. The obvious conclusion from these minutes is that prices charged by Air Mauritius in the market today are at the levels they are because of the agreement with MAITA, and the fact that they continue at that level implies a continued understanding with MAITA, even without further explicit communication.

4.8 We do not know what price level would result from a competitive process. However, as a first approximation, it seems reasonable to regard Air Mauritius's initial proposal on service fees as the price it would set in the absence of any collusive agreement with travel agents. It therefore seems likely that the agreement resulted in higher prices for Mauritian consumers.

4.9 Thus we conclude that service fees in the market today are substantially higher on average than they otherwise would be because they are determined at least in part by an agreement between Air Mauritius and MAITA. As that agreement continues to affect prices, it continues to be in effect. We conclude that MAITA and Air Mauritius (acting as a Travel Agent), are in breach of Section 41 of the Act.

## Response to Statement of Issues

4.10 We have held meetings with parties to this investigation and parties were also given the opportunity to comment on the Statement of Issues. Moreover, in early May 2010 the parties to the Investigation were invited to provide any statement they wished to. Below is a summary of the responses provided by various parties and the views they communicated to the CCM.

### Air Mauritius

4.11 Air Mauritius<sup>15</sup>, stated that MAITA had been involved in discussing service fees only for information, characterizing it as “a consultation to get the support of travel agents”, rather than an agreement. It also noted that it “preferred to adopt a strategy to involve the travel agents in the introduction of the service fee,” noting that similar consultation had happened in India and South Africa.

4.12 Air Mauritius also noted that not all service fees are aligned with the grid, stating that, “after 6 months from the introduction of the service fee that grid was not being fully adhered to.” However Air Mauritius added that the grid “is still valid in the sense that the service fee as per the grid is used on Air Mauritius counter...over which discounts are offered by Air Mauritius based on various situations.” “Air Mauritius stated that the news release (dated 14<sup>th</sup> March 2008) announcing the introduction of the Service Fee was only accessible on its website in its archives section and was not automatically accessible (e.g. through an automatic pop-out). The news release could only be retrieved in its original format of March 2008 by carrying out a search through the archives section accessible on its website.”

4.13 In a written submission, Air Mauritius commented that “as at today, each economic operator concerned by the Service Fee continues to determine the policy it intends to adopt,” and that “there has been no contact between Air Mauritius and Travel Agents on this issue since then;”<sup>16</sup> referring to the news release that is available on its website and where the service fee as in Annex I is displayed.

4.14 The written submission went on to note that “in the event the CCM finds that there exist a similarity of service fee level on certain routes, the similarity may be explained by the fact that commercial entities simply react to specific market conditions, i.e, alignment of fee level being the result of a rational commercial behavior<sup>17</sup>.” Referring to the case Ahlstrom

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<sup>15</sup> in a meeting held on 30<sup>th</sup> March 2010

<sup>16</sup> Letter from Air Mauritius to the CCM, dated 18<sup>th</sup> May 2010, with Reference L18E10FN1.cr - Paragraph 4

<sup>17</sup> Letter from Air Mauritius to the CCM, dated 18<sup>th</sup> May 2010, with Reference L18E10FN1.cr - Paragraph 5-8

Osakeyhtio and others v/s Commission (II), [1993] ECR1 – 1307, which explains that “similar pricing could be the result of the high transparency in the market and the parallelism of the price could be satisfactorily explained by the oligopolistic tendencies of the market,” Air Mauritius commented that in the absence of evidence, “parallel behavior between Travel Agents and Air Mauritius on certain routes cannot be regarded as proof of concertation.”<sup>17</sup> It also referred to the case of Enso-Gutzeit v Commission [1998] ECR II-1571 to support the argument that parallel pricing does not necessarily result from collusive agreements.<sup>17</sup>

4.15 Air Mauritius argues that it “has announced its pricing on 14 March 2008 and undertakings are free to adapt themselves intelligently to the existing and anticipated conduct of their competitors as explained in ICI v Commission (I), 1972 ECR 619.”

### Travel agents

4.16 BlueSky, a member of MAITA, responded<sup>18</sup> to the Statement of Issues, by saying it “does not follow any guidelines except those which its Management decides to apply, such decision being taken independently of the Air Mauritius guidelines or of any other external organization.” BlueSky denied “having, in any manner, participated in any scheme to distort competition.” BlueSky commented that it “does often apply discounts in order to be more competitive than its colleagues.”

4.17 Summertimes Voyages, another member of MAITA, commented<sup>19</sup> that service fee is determined “having regard to various factors such as the nature of the services required which may include advising the client with regard to visa applications and even handling such application on behalf of the clients, advising clients on travel insurance, obtaining quotes from insurers and processing insurance application on behalf of clients, booking lounge access, hotels transportation and entertainments at destination, arranging for phone roaming with service providers. All these are taken on board as costs to which a margin must be added to ensure the profitability of the business. The reason why travel agents' Service Fees are aligned at base with those of Air Mauritius is because the service fee applied by the national carrier is the minimum threshold beyond which fees charged by any travel agent will no longer be competitive. The fee structure does not stem from a ‘collusive agreement’ but rather from economic rationale of ‘offer and demand.’ Summertimes Voyages also said “that Air Mauritius' Service Fee is not the sole bench mark for us; we use the same practice with other Airlines.”

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<sup>18</sup> Letter from BlueSky to CCM in response to Statement of Issues, dated 26<sup>th</sup> March 2010

<sup>19</sup> Letter from Summertimes to CCM in response to Statement of Issues, dated 24<sup>th</sup> March 2010 & letter in relation to fact verification

## MAITA

4.18 MAITA is of the opinion that travel agents presently charge their own service fee<sup>20</sup>.

## **Responses to the Provisional Findings Report<sup>21</sup>**

4.19 On the 15<sup>th</sup> June 2010, the CCM issued a Provisional Report on this investigation. Air Mauritius and MAITA were given the opportunity to comment by the 13<sup>th</sup> July 2010 at latest. We received comments from Air Mauritius and MAITA.

### Air Mauritius

4.20 Below are the responses of Air Mauritius to the Provisional Findings Report together with CCM comments. The full letter containing the responses of Air Mauritius to the Provisional Report is attached at Annex V.

4.21 “[1.] The Competition Act 2007 came into operation in November 2009. Consequently, any act or omission prior to the commencement date does not fall under the purview of the Act. Indeed, the Competition Act 2007 is not ‘ex-post facto’ law, that is, a law which makes a particular action into a crime and then punishes people who took that action before it had legally become a crime. (see DPP v Pierre Louis JB 2010 SCJ 218) At any rate the power to make law with retrospective effect is subject to a cornerstone provision found in section 10(4) of the Constitution which reads as follows:

“No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute an offence...””

#### **CCM Comments:**

*The CCM recognizes that the Competition Act has no retrospective effects in the sense that parties cannot be found to have committed any anti-competitive behavior before the coming into operation of the Act. This is noted in Paragraphs 3.13 and 3.14 of this report. The CCM is concerned with the continuing effect of the understanding between MAITA and Air Mauritius.*

*Although the infringements of the provisions in Part III of the Competition Act do not give rise to criminal offences, the CCM believes that the spirit of Section 10(4) of the Constitution has been followed.*

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<sup>20</sup> Meeting held with MAITA on 1<sup>st</sup> April 2010

<sup>21</sup> **Note that references to paragraphs have been modified to reflect relevant paragraphs in this report and not the Provisional Report**

4.22 “[2.] Whilst the Provisional Findings does state at *paragraph 3.13* that at the time the alleged agreement was made between MAITA and Air Mauritius, no breach of the Act was committed, it fails to draw one major conclusion from this, namely, whether since the coming into operation of the Act in November 2009, the alleged agreement, which may have had an effect when it was implemented by Air Mauritius as from 1 April 2008, still had an effect on the market as a consequence of the alleged agreement. In simple terms, it is not apparent from the Provisional Findings that the Commission took into account whether there were other plausible possibilities which may explained why the service fee level remained at the level which it was initially put at a time when this was not a reprehensible act under the law. In view of the above, it is difficult to understand why the CCM did not choose to compare the figures obtained as a result of the analysis of the service fee and other charges for tickets sold in a six week period at the end of December 2009 with figures on similar issues for the period immediately after the introduction of the Service Fee in April 2008.”

**CCM Comments:**

*As noted, for example at paragraphs 4.5 & 4.6, the CCM considered alternative explanations for the clustering of prices.*

4.23 “[3.] Indeed, whilst it may be of academic interest to determine the exact nature of the understanding which was reached between Air Mauritius and MAITA following discussion on the implementation of Service Fee by the national airline, it was definitely incumbent on the CCM to consider the structure of the local market since November 2009. This would have revealed that collusion was not the only plausible explanation for the behavior of Travel Agents. In *re B (Children) (Care Proceedings) (2008) UKHL 35, (2008) 3 WLR 1, para 13*, Lord Hoffmann Hoffman stressed that *'There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children.'* Unfortunately, it is not apparent from the Provisional Findings that the CCM considered the probability that the parallelism was the result of the specificity of the market as expressed by Air Mauritius in its letters to the CCM dated 17 March 2010 and 18 May 2010. Mauritius is geographically very small and travel agents are located principally in Port Louis. Customers are in a position to walk from one office to the other to obtain price information and compare them. Consequently, the evolution of the level of the service fee which was imposed as from 1 April 2008 may be very slow since the alignment of the service fee is the result of a rational commercial behavior.”

The only inference drawn by the CCM from the alignment of price is collusion. We respectfully disagree with this approach. In *re D (2008) UKHL 33, (2008) 1 WLR 1499*, Lord Brown of Eaton-under-Heywood said the following *"Obviously, everything going to the likelihood or otherwise of an allegation being true - of an offence having been committed or other reprehensible conduct - is relevant to the Court's consideration as to whether, having regard to all the evidence, it has been established as more likely than not. Generally speaking, as Lord Nicholls was pointing out, people tend not to commit serious offences - not least because of the consequences likely to follow if they do - and ordinarily people are more likely to have been negligent than fraudulent, more likely to have hurt someone unintentionally than deliberately, more likely to have provoked a stepdaughter into complaint by having lost their temper and slapped her than by having raped her. Similarly, as Lord Hoffmann pointed out in Rehman, one is more likely to see an Alsatian than a lioness in Regent's Park (the proximity of the zoo notwithstanding). Similarly too, someone with a good character is less likely to behave badly than someone with a bad character. Someone who values their 'reputation' will be less likely to imperil it than someone known to be disreputable. These are simple illustrations of an obvious point and no purpose would be served by multiplying them.*

*It is surely equally obvious that the more inherently unlikely it is that something has happened, that an allegation is true, the more persuasive (cogent is the word often used) the tribunal will need to find the evidence pointing that way before concluding it to be more likely than not. ""*

4.24 "[4.] It is therefore very apt at this stage to consider the remarks of the European Court of Justice in *Ahlstrom Osakeyhtio and ors v Commission (II) 1993 ECR 1-1307* where it was held that *"parallel conduct cannot be regarded as furnishing proof of concertation unless it constitutes the only plausible explanation of such conduct."* Similarly, in *CRAM and Rheinzink & Cie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission 1984 ECR 1679*, the ECJ held that *"The Commission's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action by the two undertakings. Faced with such an argument, it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and which thus allow another explanation of the facts to be substituted for the one adopted by the contested decision. The applicants have in fact proved the existence of such circumstances.... It follows that.... the Commission has not produced sufficiently precise and coherent proof to justify the view that the parallel behavior of the two undertakings in question was the result of the concerted action between them"*. This judgment was quoted in approval in the *PVC Cartel case 1999 ECR 11-931* where it was established that *"where the Commission's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action between undertakings, it is sufficient for the applicants to prove circumstances which cast the*

*facts established by the Commission in a different light and thus throw another explanation of the facts of the case to be substituted for the one adopted by the Commission."*

### **CCM Comments**

*We do not agree that these precedents are relevant. The quotations refer to inferences drawn from considering solely the existence of parallel prices, in cases in which there is no evidence of communication between the parties. In this case, the CCM has established that, prior to the coming into effect of the Act, there were negotiations regarding Service Fees level, between MAITA and Air Mauritius. These negotiations led to the understanding on service fee levels. The CCM's analysis shows that service fee levels in the market are not merely similar one to another, but similar to the levels negotiated. It is not unreasonable to infer that continued prices at these levels reflect a continued understanding between MAITA and Air Mauritius.*

*Also the comparison of parallel pricing and collusion was highlighted in paragraphs 4.5 & 4.6.*

4.25 “[5.] The introduction of a Service Fee is not peculiar to Air Mauritius on the Mauritian market. Other airlines serving the island such as British Airways, Air France and South African Airways have implemented a service fee system similar to that used by Air Mauritius. We have already explained to the Commission when the Service Fee was introduced in April 2008, the airline had made it clear that Travel Agents were not bound by the grid introduced by Air Mauritius. We are pleased to note that there were no confusion on that issue as evidenced by the article in newspaper *L'Express* dated 7 April 2008 quoted at paragraph 2.13 of the Provisional Findings and which reads as follows "*Loin d'etre une obligation, ce service fee permet aux agences de voyages d'appliquer librement un taux plus bas ou plus eleve.*" This is clear evidence in support of the contention of Air Mauritius that Travel Agents were and are still free to impose their own service fee level. It follows therefore that the comments from BlueSky and Summertimes Voyages as reproduced at paragraphs 4.16 and 4.17 can only reinforce the contention of Air Mauritius that Travel Agents were always free to determine their Service Fee level. It has also been clearly established that there has been no contact or concertation of any nature between Air Mauritius and Travel Agents since its introduction in April 2008. This is admitted by the CCM at paragraphs 4.3 and 5.10. On the basis of these, it is unreasonable for the CCM to conclude at 4.3, by a reversal of the standard of proof that "*The CCM has not seen any evidence that this understanding ceased to have force after the Act came into effect. There does not appear to have been any explicit communication with the object of restricting, preventing or distorting competition since that date*" In fact, there is also no evidence of implicit communication/understanding between the parties since that date! It

is therefore not surprising therefore that the CCM itself states at 4.4 that "*Not all travel agents follow the Air Mauritius grid for setting fees*".

**CCM Comments:**

*The CCM is of the view that price alignment itself at price levels previously negotiated, is evidence of the continuing understanding between MAITA and Air Mauritius.*

4.26 “[6.] According to section 41 of the Competition Act 2007, the collusive agreement can only be sanctioned if as per subsection 1 (c) if it "**significantly prevents, restricts or distort competition**". One essential element is the issue of "significantly". By comparison section 81 of the EC treaty does not impose any threshold limit on "*agreements or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the market.*" Although the wording of Article 81(1) suggests that any restriction of competition is sufficient to bring an agreement or practice within the scope of the prohibition, the Eel had to establish in 1969 a *de minimis* doctrine. In *Volk v Vervaeke 1969 ECR 295*, the ECJ ruled that "*an agreement falls outside the prohibition in Article 81 (1) when it only has an insignificant effect on the markets, taking into account the weak position which the persons concerned on the market of the product in question.*" The Commission subsequently provided guidance on the application of the *De Minimis* doctrine in its *De Minimis Notice of 2001*. The legislator in Mauritius took a different approach when imposing as an element the threshold of "*significantly*" which is clearly a high one. This essential element of the reprehensible act described in section 41 is **totally absent** from the Provisional Findings. One essential element being missing, it is therefore submitted that the findings are **flawed in law** in that respect.”

**CCM Comments:**

*Firstly, as noted at paragraph 2.11 of the CCM Guidelines on collusive behaviour CCM3, the CCM believes that the phrase “significantly prevent, restrict or distort competition” refers to an effect on competition which is “not insignificant” or “of significance.” This approach is in line with other jurisdictions and reflects the policy of the Act in prohibiting collusive agreements.*

*Secondly, as noted at paragraph 4.9, the CCM found that service fees are ‘substantially’ higher on average than they otherwise would be, because of the understanding between MAITA and Air Mauritius (for example, as paragraph 3.8 and the succeeding table demonstrate, service fees in economy are between 33% and 75% higher than they would have been under Air Mauritius’s initial proposals, as a result of the negotiation with travel agents). This is not an insignificant effect on the market. For the avoidance of*

*doubt, the Executive Director regards an agreement having such substantial effects on prices as 'significantly' preventing, restricting or distorting competition within the meaning of the Act. This present paragraph now therefore makes this link explicit, in this final report.*

4.27 “[7.] Further, if we go by the definition of an agreement as per paragraph 2.19 of the Provisional Findings itself, it is clear from the report that there is not an iota of evidence of “a practice involving contacts or communications between competitors falling short of an actual agreement but which nonetheless restricts competition between them.” It is therefore **erroneous based on the facts** for the report to conclude that “the alleged agreement” reached in 2008 between Travel Agents and Air Mauritius continued to affect prices after the coming into operation of the Act in November 2009.”

**CCM Comments:**

*Agreement is defined by the Competition Act as being “any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Mauritius or in a part of Mauritius, and **includes** an oral agreement, a decision by an association of enterprises, and any concerted practice”*

*Concerted practice is defined as “a practice involving contacts or communications between competitors falling short of an actual agreement but which nonetheless restricts competition between them”*

*Also, Section 1.9 of CCM 3 stipulates that, for an agreement to exist, “all that is required is that parties arrive at a consensus, an understanding, on the actions each party will, or will not take.”*

4.28 “[8.] Air Mauritius takes note of the decision of the CCM not to recommend financial penalties in this case. This conclusion is the only logical one possible in view of the provision of section 59 (2) requiring the parties to have acted “intentionally or negligently”. There is nothing in the findings which shows, even remotely that since the coming into operation of the Competition Act Air Mauritius was engaged in promoting directly or indirectly its service fee grid published in April 2008. At any rate, the imposition of a financial penalty makes the offence a quasi-criminal one and therefore it is a requirement that it is proved **beyond reasonable doubt** that Air Mauritius acted “intentionally or negligently.” This “finding cannot be based on mere probability,” (see *KM Mani v PJ Anthony* 1979 2 SCC 223; see also *Ringadoo NRD v Jugnauth* AK 2007 SCJ 80) as exemplified by paragraph 4.8 of the Provisional Findings

and more particularly the following sentence "*It does not seem unreasonable to suppose that Air Mauritius's own service fees and those of many travel agents would have been much lower - closer to the initial levels proposed by Air Mauritius-had the agreement not been in place.*"(Underlining is ours)."

**CCM Comments:**

*No comments*

4.29 "[9.] Insofar as the potential Directions that could be made to Mauritius as listed in 5.11<sup>22</sup>, Air Mauritius wishes to make the following comments :-

(a) The directive that Air Mauritius be ordered to stop and abstain from all communications or collaboration with MAITA and/or any other travel agent on service fee level is not founded on any fact or law. "*To stop and abstain*" imply that Air Mauritius has communicated or collaborated on service fee with MAITA and/or Travel Agents since the coming into operation of the law. That is not true and is recognized by the CCM itself at paragraphs 4.3 and 5.10. To prevent Air Mauritius from doing something it did not do is nonsensical;

(b) The order to issue a press release is not warranted in view of a Circular issued by Air Mauritius to Travel Agents on 30 June 2010 (*copy of correspondence is attached-Annex I*);

(c) The issue of a press release is not necessary in view of the above and in view of the fact that Travel Agents knew from the outset that they were free to determine their own service fee level as evidenced by the Article in *L'Express* dated 7 April 2008.

(d) Whilst Air Mauritius would have no objection to remove from its archives section on its website the news release issued on 14 March 2008, it cannot but find this measure illogical in view of the fact that the grid of service fee level displayed in that release is identical to the circular issued to Travel Agents on 26 February 2008. What would be the purpose of removing something in the archives section of a website which the travel agents already have in their possession as a hard copy? However, in all good faith, Air Mauritius has withdrawn this News Release from its archives on its Website.

(e) The direction contemplated at paragraph (e) of section 5.11<sup>22</sup> is ***ultra vires*** of section 58 of the Act and would be clearly illegal, the aim of any direction being to ensure that the "*enterprise ceases to be a party to the restrictive agreement.*" The CCM has no power to direct enterprises to justify commercial decisions for the future failing which it may be regarded as a "*director*" under section 128 (2) of *Companies Act 2001*. There is a purpose

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<sup>22</sup> Note that this section has been modified

behind section 58 and it is not an unfettered right which is granted to the CCM. It is therefore respectfully submitted that, notwithstanding the fact that" as pointed out by the CCM it may not be "*well placed to assess whether the proposed price are those that would result from free competition*" it is also a well settled principle of law that a public body may not use its powers granted under an act of Parliament for a different purpose from the one envisaged by the law as reiterated by the House of Lords in *R v Secretary of State for foreign affairs, Ex Parte The World Development Movement (1995) 1 WLR 386.*"

**CCM Comments:**

*The Potential Remedies section has been modified in the light of these comments. However it is up to the Commissioners to decide on the remedies.*

4.30 "[10.] The CCM may wish to note that as from 1 July 2010, there is no service fee charged by Air Mauritius worldwide for websales with payment by credit card. This is in line with what was previously explained to the CCM in a meeting held on 30 March 2010 on its strategy to increase websales which had already started without consultation with Travel Agents."

**CCM Comments:**

*No comments*

4.31 "[11.] On a different note altogether, it is our duty to correct your statement at paragraph 2.5 that "both airlines and Travel Agents can be members of IATA." In fact, according to IATA rules which can be viewed on its website, "*IATA formal membership is only applicable for airlines operating air services. Travel Professionals and Freight Forwarders can benefit from IATA Accreditation programmes, and become IATA-approved.*"

**CCM Comments:**

*The paragraph has been modified accordingly, whereby the footnote explains that when the report refers to IATA Travel Agents or IATA Member Travel Agents we mean IATA Accredited Travel Agents.*

4.32 "[12.] In view of the above Air Mauritius reiterates its comments made by way of letters dated 18 May 2010 and 17 March 2010. Air Mauritius respectfully submits that the Provisional Findings Report should not become final. (***Annexures II & III***)"

**CCM Comments:**

*No Comments*

**MAITA**

4.33 Below are the responses of MAITA. A copy of the response is available in Annex VI.

4.34 MAITA commented that they are “unable to agree” with the provisional findings. “However, in order to dispel any misconception or concern regarding the service fee, we annex herewith a circular letter which we have communicated to our members.” (Refer to Annex IV) The circular stipulates that “the Competition Commission has communicated to us its provisional findings report on 156 June 2010. Whilst maintaining our stand that as an association we have never acted in breach of Section 41 of the Competition Act, we would however wish to dispel any misconception that may exist in certain quarters concerning the service fee.”

“In this connection, we therefore advise all our members that should they wish to charge a service fee, they should independently set their own service fee structure, based on the requirements of their respective Companies and the level of the service they provide.”

“The Association will continue to look after the welfare of its members and this within its remit and the framework of the Law.”

**CCM Comments:**

*No Comments*

## 5. Remedies and penalties

5.1 Section 58(1) of the Act stipulates that the “Commission may give the enterprise such directions as the Commission considers appropriate to ensure that the enterprise ceases to be a party to the restrictive agreement.”

5.2 Paragraph 16 of CCM 1, Rules of Procedure, provides that the Executive Director shall notify the parties on the action that may be taken by the Commission for the “purpose of remedying the effects of, or ceasing, a restrictive business practice or any relevant penalty.” CCM 6 – Remedies and Penalties<sup>23</sup> provides guidance on how the Commission will determine the appropriate remedies and penalty in each case.

5.3 Some potential actions that can be taken to remedy the breach are given in the subsections below. These are some of the options that may be available. At this stage, these should be regarded merely as a list of options. It is the Commission who decides on the remedies and/or penalties to be applied.

5.4 During the course of the investigation, the parties did take some actions that may partly mitigate the breach. These actions, which are explained in the last part of this section, have been taken into account for the potential remedies. It is up to the Commissioners to decide on the appropriateness of the actions and remedies and/or penalties to be applied.

### Financial Penalties

5.5 Section 59 of the Act states:

#### **59. Financial penalty**

*(1) The Commission may, in relation to a restrictive agreement falling within the scope of sections 41, 42 and 43, in addition to, or instead of, giving a direction, make an order imposing a financial penalty on the enterprise.*

*(2) The Commission shall not impose a financial penalty unless it is satisfied that the breach of the prohibition was committed intentionally or negligently.*

*(3) Where the Commission imposes a financial penalty on an enterprise, the financial penalty shall not exceed 10 per cent of the turnover of the enterprise in Mauritius during the period of the breach of the prohibition up to a maximum period of 5 years.*

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<sup>23</sup> [http://www.ccm.mu/CCM6%20-%20Guidelines%20-%20Remedies%20and%20Penalties\\_Nov09.pdf](http://www.ccm.mu/CCM6%20-%20Guidelines%20-%20Remedies%20and%20Penalties_Nov09.pdf)

5.6 The duration over which turnover is assessed starts only from the coming in force of the Act, on the 25<sup>th</sup> November 2009.

5.7 *CCM 6*, Guidelines on Remedies and Penalties, explains how the Commission will assess the appropriate penalty, within the framework provided by the Act. In addition to the duration of breach and turnover, the Commission will consider the seriousness of the breach, deterrence effect of the penalty and aggravating or mitigating factors.

5.8 MAITA, as an association of enterprises, is affected by Section 2.18 of *CCM 6* which provides that “where the breach by an association of enterprises relates to the activities of its members, the penalty shall not exceed 10% of the sum of the turnover of the business of each member of the association of the enterprises in Mauritius, active on the market affected by the breach...”

5.9 The agreement clearly had as its object the fixing of prices in the market. Furthermore, this agreement seems to have been effective, at least partially. It does not seem unreasonable to suppose that Air Mauritius’s own service fees and those of many travel agents would have been much lower - closer to the initial levels proposed by Air Mauritius - had the agreement not been in place. Thus, for example, many Mauritian travelers in economy class will have paid Rs. 250 more for each medium-haul trip and Rs. 750 more for each long-haul trip, over the course of the last few years. In its blatant object and its substantial effect, the agreement between Air Mauritius and MAITA to raise service fees would have been a very serious breach of the Act had the Act been in effect at the time that agreement was concluded, and it would seem appropriate to recommend the strongest penalties.

5.10 However, neither MAITA nor Air Mauritius has acted specifically to reinforce or promote the agreement since it came into effect. That it remains in existence is demonstrated by its continued effects in the market but we are not aware of any active communication. The Commission could in principle conclude that it was negligent of MAITA and/or Air Mauritius not to take steps to ensure that the agreement ceased to have effect, from November 2009 onwards. But this represents a continuing agreement. However the Executive Director does not recommend the imposition of financial penalties in this case, unless the Commission is of the opinion that decision not to withdraw the agreement may amount to “negligence.”

### **Potential Directions to Air Mauritius**

5.11 To remedy the breach the agreement must be rendered null and void for that purpose, Air Mauritius may be ordered to stop and/or abstain from all communications or collaboration with MAITA and/or any other travel agent which have the object of fixing service fee levels or which indicate a service fee structure and to take appropriate measures to render the agreement null and void to the satisfaction of the Commissioners.

5.12 The CCM may continue to monitor the service fee level being charged and the market in general in the future.

### **Potential Directions to MAITA**

5.13 To remedy the breach the agreement must be rendered null and void. For that purpose, MAITA may be ordered to stop and/or abstain from all communications or collaboration with Air Mauritius and/or any other Travel Agent in relation to level of service fee or any price, relating to passenger travel and to take appropriate measures to render the agreement null and void to the satisfaction of the Commissioners.

5.14 The CCM may continue to monitor the service fee level being charged and the market in general in the future.

### **Actions taken by the parties following receipt of Provisional Findings**

5.15 Air Mauritius has, during the course of the Investigation withdrawn the News release with the "agreed" service fee level from the archive of its website.

5.16 Air Mauritius has issued a circular to all IATA Travel Agents on 30 June 2010, stipulating that "each travel agent is free to determine independently its own level of service fee to be imposed...consequently, the recommendations outlined in our Circular dated 26 February 2008 on the subject matter must be disregarded." (Refer to Annex V).

5.17 The Circular also mentioned that "Air Mauritius will impose its service fee independently of that imposed by travel agents." (Refer to Annex V).

5.18 The circular also stipulates that "any communication or collaboration between Air Mauritius and Travel Agents on Service Fee is strictly prohibited." (Refer to Annex V).

5.19 MAITA issued a circular to its members (refer to paragraph 4.34 and Annex VI).

5.20 In the light of these circulars, the action that the Commission could require the parties to take to remove the understanding between them appears to the Executive Director already

to have been taken. Furthermore, in the light of the clear acknowledgement that communication between the parties on the Service Fee is prohibited, and the equally clear prohibition in the law, it is not clear that any purpose would be served by a direction not to communicate in future.

### ***Final findings***

5.21 The Executive Director therefore recommends that the Commission:

- (a) Should find that MAITA and Air Mauritius have infringed Section 41 of the Competition Act 2007;
- (b) Should not impose a financial penalty, because no intentional or negligent breach of the Act was committed;
- (c) Should not impose any directions, as the parties have already taken actions to render the agreement null and void.

## **6. Next steps**

6.1 This report will be sent to the parties and a non-confidential version may be issued for public.

6.2 As stipulated in Part V of the Act, the Commission may convene a hearing, tentatively scheduled for the end of August 2010, if parties under investigation so request.

6.3 Finally, as provided under Part VI of the Act, the Commission must determine the case and associated directions / penalties.

6.4 After the issue of any directions by the Commission, the Executive Director may continue to monitor the market under review to see if the restrictive practice has ceased to continue.

## 7. Annexes

### Annex I – Circular by Air Mauritius to Travel Agents



26<sup>th</sup> February 2008

Ref:nn/F2servicefeFeb08

#### C I R C U L A R

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TO : ALL IATA TRAVEL AGENTS

FROM : CORPORATE AGENCY SALES AND SERVICE MANAGER

SUBJECT : IMPLEMENTATION OF SERVICE FEE

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#### CORRECTED VERSION

Kindly find hereunder details regarding implementation of Service Fee by Air Mauritius:

1. In line with Industry trends worldwide, Air Mauritius will implement the concept of service fee (Net fares) in the Mauritius market, effective 01 April 2008.
2. All MK fares will be converted into Net Fares which will be displayed in all CRS/GDS system. These fares will not be commissionable.
3. Air Mauritius will apply a service fee on all tickets issued at its ticketing counters with effect as from 01 April 2008. Agents are recommended to align themselves on the service fee levels applied by MK when issuing tickets for travel on Air Mauritius flights.
4. The service fee grid which will be applied at MK ticketing counters will be as per the annex attached. The grid will be displayed in Amadeus and other GDS.
5. The service fee will be collected separately from the fare and will be mentioned on the payment receipt to be given to the passenger. It will not be mentioned on the passenger ticket.
6. The service fee will be subject to VAT at the applicable rate.
7. A new route-based Incentive Scheme will be implemented effective 01 April 2008 to coincide with the implementation of the service fee concept in the MRU market.
8. A communication campaign will be launched very soon to sensibilise the traveling public about this new system.

HEAD OFFICE : AIR MAURITIUS CENTRE - PRESIDENT JOHN KENNEDY STREET - PORT LOUIS - MAURITIUS - P.O. BOX 441  
TEL : (230) 207 7070 - FAX : (230) 208 8331 - TELEX : 4415 IW - CABLE: AIRMAU - PORT-LOUIS

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Fax Transmission

**MK SERVICE FEE GRID**  
**EFFECTIVE 01 APRIL 2008**

Destination	Economy (MUR)	Business (MUR)
<b>Long-Haul (More than 8 hours)</b> Europe, Australia (MEL/SYD), Hong Kong	2,000	4,000
<b>Medium-Haul (Between 3 and 8 hours)</b> Africa, India, Australia (PER), Singapore, Malaysia, UAE	1,000	2,500
<b>Short-Haul (Up to 3 hours)</b> Reunion, Rodrigues, Madagascar	350	1,000*

**Terms and Conditions:**

- VAT to be added to these levels at the applicable rate.
- Above service fees shall apply for point-to-point routings.
- For multi-sector routings, the applicable fee shall be based on the total flight time from origin to destination.
- Service fees are applicable per passenger at ticketing, and are non-refundable.

\* Madagascar only

Please be guided accordingly.

With Best Regards



Sailesh Kunkun  
Corporate Agency Sales & Service Manager

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Page 2

**Annex II – Information from MAITA****Chronology of events from Information provided by MAITA**

Date	Event Summary	Event Details	Generated Through	Source	File
16-Apr-07	Presentation of Service Fee Structure By MK	"MK presented its proposal for the service fee grid that will be applicable as from 01 April 2008..... MK requested MAITA to analyse the proposal and to revert to MK with their comments and suggestions at the next meeting."	Minutes of Meeting - MAITA & MK	MAITA - Executive Service	M1 19
30-Jul-07	Communication on service fee	A mail was circulated mentioning that "MK has advised that it has accepted MAITA's proposal for service fee for Economy Class" and "Following discussions, MAITA revised its proposals for travel in business class as follows:" Haul Eco Bus Short 350 1000 Medium 1000 2500 Long 2000 4000 It is the same figure as per MK circular dated 28th February 2008.	Mail	MAITA - Executive Service	M1 69
2-Apr-08	Implementation of Service Fee	In this meeting MK commented that the new system was smoothly implemented and thanked MAITA for their "collaboration."	Minutes of Meeting - MAITA & MK	MAITA - Executive Service	M1 23
2-Apr-08	Suggestion to include ITAOA in discussions	MK requested MAITA "to look into the possibility for the monthly meeting to be held jointly with ITAOA (an Association of smaller travel agents)."	Minutes of Meeting - MAITA & MK	MAITA - Executive Service	M1 23
13-Aug-08	Discussion among MAITA / MK on Service Fee & Increase in Fare	MK planned to increase fares on European Routes. MAITA advised "that with the fare increase that entails a fall of about 20 to 30% in the number of passengers travelling, there is a need to review Service Fee upwards for agents to survive and cover their costs." "MK advised that we should get the Service Fee structure right and in this respect invited MAITA to submit their proposal by next week. A special meeting will then be called to decide on this matter."	Minutes of Meeting - MAITA & MK	MAITA - Executive Service	M1 32

20-Aug-08	Discussion on Discounts	"The Chairman once more emphasized on the importance that Travel Agents should not give Service Fee as discount as it would weaken the bargaining power of MAITA towards MK while negotiating for the said fee."	Minutes of Meeting - MAITA General meeting of the Association	MAITA - Executive Service	M1 10
22-Aug-08	Proposition by MAITA on service fee following meeting held on 13/Aug/08	MAITA proposed the concept of fixed level service fee of 10% on Fare. MK rejected the proposition. "MK advised that under the new system MAITA members can charge higher service fees than practiced by MK and some agents are already doing it. Also MK advised that some agents are cutting on the service fee and charging minimum levels to passengers." "MK also advised that it has accompanied the Service Fee by a very attractive Incentive Scheme and there is provision for them to earn additional commission if they can achieve growth."	Minutes of Meeting - MAITA & MK	MAITA - Executive Service	M1 34
24-Mar-09	Proposal to increase service Fee	A proposal was made to "increase service fee for premium class passengers. MK will revert."	Minutes of Meeting - MAITA & MK	MAITA - Executive Service	M1 40
24-Mar-09	Mail informing discussion on Service fee	A mail was circulated by Mr Lebreux which said "following discussions and views from both parties, MK has agreed to review together with MAITA to increase the service fee."	Mail	MAITA - Executive Service	M2
15-May-09	MK rejects proposal to increase service fee.	MK rejects proposal to increase service fee.	Minutes of Meeting - MAITA & MK	MAITA - Executive Service	M1 42

<p>22-Dec-09</p>	<p>Discussion of INV004 with MAITA members</p>	<p>The Chairman informed members about the letter circulated on the 21st Dec 2009, informing the parties about INV004. "The Chairman apprised the members of allegation made by non-Maita members as to MAITA having 'colluded' with Air Mauritius (MK) to determine the service fee." It was also highlighted in the meeting that the circular of MK was circulated to non-MAITA travel agents also.</p>	<p>Minutes of Meeting - General Meeting of the Association</p>	<p>MAITA Executive Service</p>	<p>M1 18</p>
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**Annex III – Information from Air Mauritius****Chronology of events from Information provided by Air Mauritius Ltd**

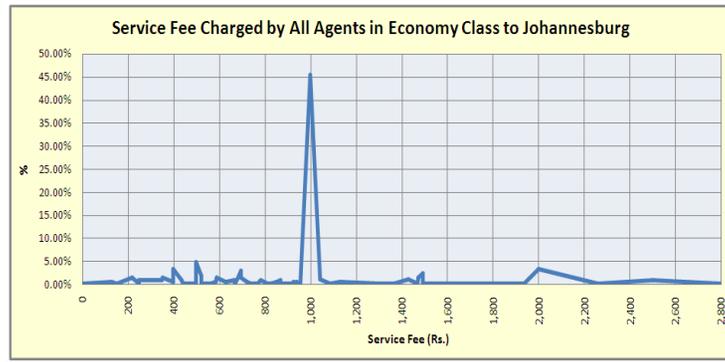
Date	Event Summary	Event Details	Generated Through	Source	File																												
16-Apr-07	Discussion on Service fee	"Mr. Bhujohory advised that the main item for discussion at the meeting will be service fee structure which will become effective as from April 2008."	Minutes of Meeting MK MAITA	Air Mauritius	MK Annex I-9																												
2-May-07	MK seeking MAITA's feedback on service fee	"Following MK proposals for service fee grid that will be applicable as from 01 April 2008, MAITA was called for their feedback. MAITA not agreeable to price range offered by MK but however agrees to routes groupings as proposed by <table border="0" style="margin-left: 40px;"> <tr> <td></td> <td>MAITA Proposal</td> <td>MK</td> <td>MK</td> </tr> <tr> <td>Proposal</td> <td></td> <td></td> <td></td> </tr> <tr> <td>Long haul -</td> <td>Rs. 2000</td> <td>Rs.</td> <td></td> </tr> <tr> <td>1250</td> <td></td> <td></td> <td></td> </tr> <tr> <td>Medium haul -</td> <td>Rs. 1200</td> <td>Rs. 750</td> <td></td> </tr> <tr> <td>Small haul -</td> <td>Rs. 350</td> <td>Rs.</td> <td></td> </tr> <tr> <td>200</td> <td></td> <td></td> <td></td> </tr> </table>		MAITA Proposal	MK	MK	Proposal				Long haul -	Rs. 2000	Rs.		1250				Medium haul -	Rs. 1200	Rs. 750		Small haul -	Rs. 350	Rs.		200				Minutes of Meeting MK MAITA	Air Mauritius	MK Annex I-8
	MAITA Proposal	MK	MK																														
Proposal																																	
Long haul -	Rs. 2000	Rs.																															
1250																																	
Medium haul -	Rs. 1200	Rs. 750																															
Small haul -	Rs. 350	Rs.																															
200																																	
6-Jun-07	Classification of Grid & discussion of Service Fee	In this meeting the way that hauls will be classified was discussed "They (Travel Agents) may even have to consider stop selling short haul when service fee is introduced. MAITA made counter proposals as below for service fee levels in economy class as follows: <table border="0" style="margin-left: 40px;"> <tr> <td>Long</td> <td>Haul</td> <td>-</td> <td>Rs.</td> <td>2000</td> </tr> <tr> <td>Medium</td> <td>Haul</td> <td>-</td> <td>Rs.</td> <td>1000</td> </tr> <tr> <td>Small Haul</td> <td colspan="4">- Rs. 350. "</td> </tr> </table>	Long	Haul	-	Rs.	2000	Medium	Haul	-	Rs.	1000	Small Haul	- Rs. 350. "				Minutes of Meeting MK MAITA	Air Mauritius	MK Annex I-7													
Long	Haul	-	Rs.	2000																													
Medium	Haul	-	Rs.	1000																													
Small Haul	- Rs. 350. "																																

6-Jul-07	Agreement on service fee	<p>"MK advised that it has accepted MAITA's proposals for service fee in Economy class as follows:  Long Haul - Rs. 2000  Medium Haul - Rs. 1000  Small Haul - Rs. 350.  Following discussions, MAITA revised its proposals for travel in business class as follows:  Long haul - Rs. 4000  Medium haul - Rs. 2500  Small haul - Rs. 1000  MK will consider and revert by next week to MAITA about final proposals for service fee in both classes."</p> <p>Under the heading of "Discipline under a service fee regime," the following can be read:  "MK advised that there will be full transparency on its part with regards to the service fee, it will apply at its ticketing counters and it expects Agents to also apply these levels."  "MK urged MAITA to impress on its members not to undercut the service fee..."  "MK will monitor closely pricing policy of Agents under a service fee environment and will act accordingly in case its business is threatened by actions of some Agents."</p>	Minutes of Meeting MK MAITA	Air Mauritius	MK Annex I-6
1-Aug-07	Discussion on Service fee	"The issue of whether service fee levels agreed is inclusive or exclusive of VAT was discussed">	Minutes of Meeting MK MAITA	Air Mauritius	MK Annex I-5

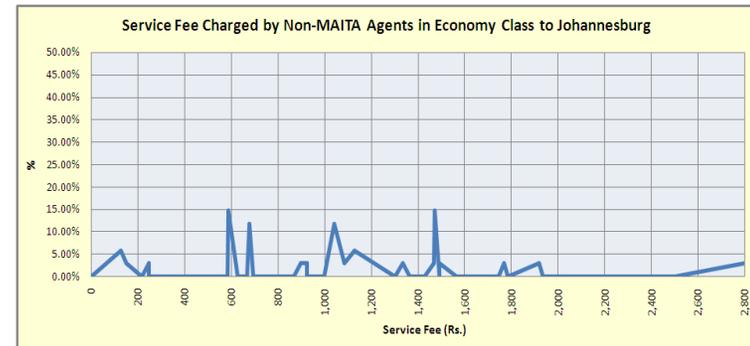
<p>5-Feb-10</p>	<p>Memo within MK after launching of INV004</p>	<p>Mr. Deenanath made mention that "I must advise that at the very beginning when we decided to move to the new regime of zero commission, we opted for a strategy of consultation with the Association of Travel Agents (MAITA) in order to reach a consensus on Service Fee grid to be applied." This applies to the events as explained above</p>	<p>MK Memorandum</p>	<p>Air Mauritius</p>	<p>MK Annex Intro</p>
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**Annex IV – Data Analysis**

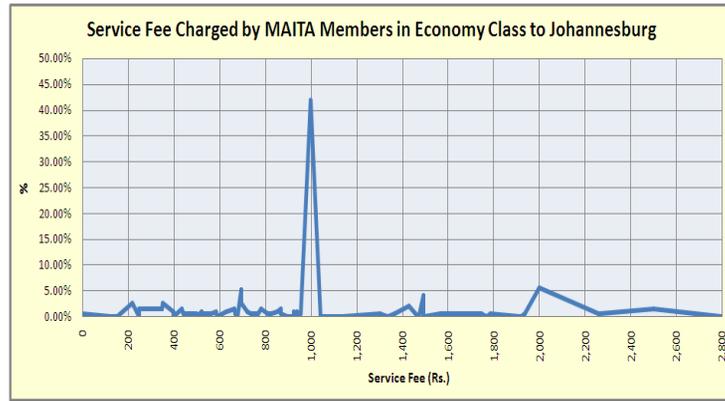
**Figure A - Service fee (Rs.) by tickets for Johannesburg - Economy Class - All Agents**



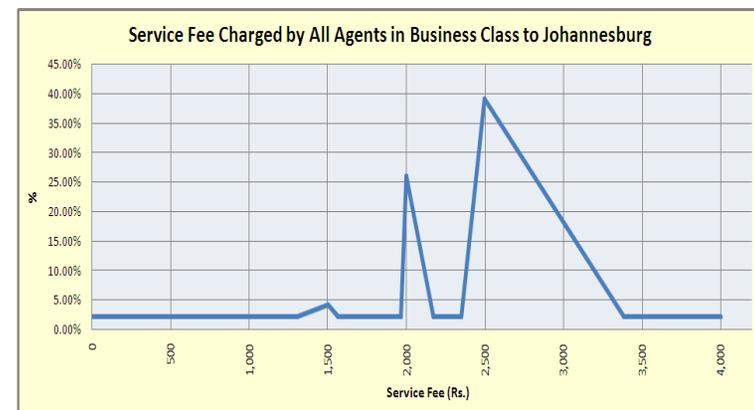
**Figure C - Service fee (Rs.) by tickets for Johannesburg - Economy Class - Non-MAITA**



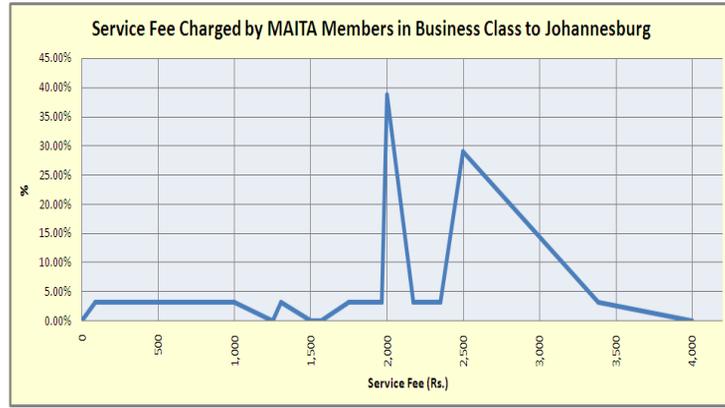
**Figure B - Service fee (Rs.) by tickets for Johannesburg - Economy Class - MAITA only**



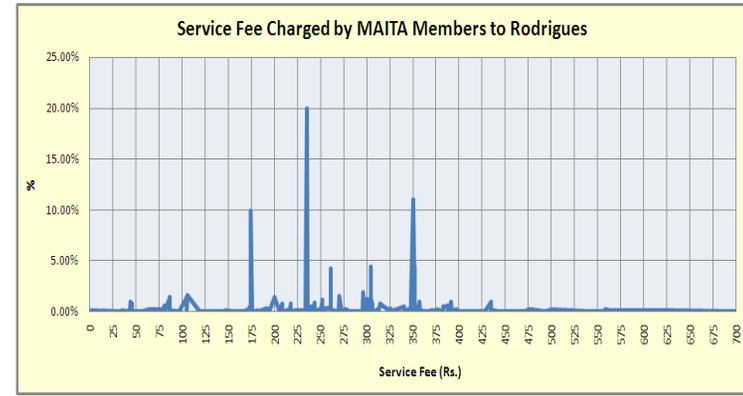
**Figure D - Service fee (Rs.) charged for Johannesburg - Business Class all Agents**



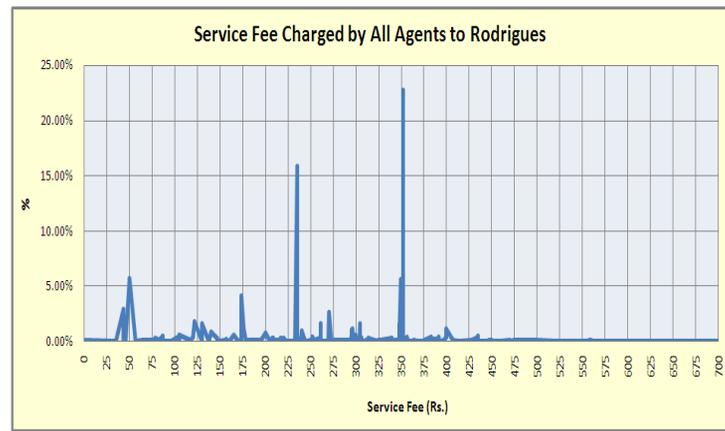
**Figure E - Service fee (Rs.) charged for Johannesburg - Business Class - MAITA Members only**



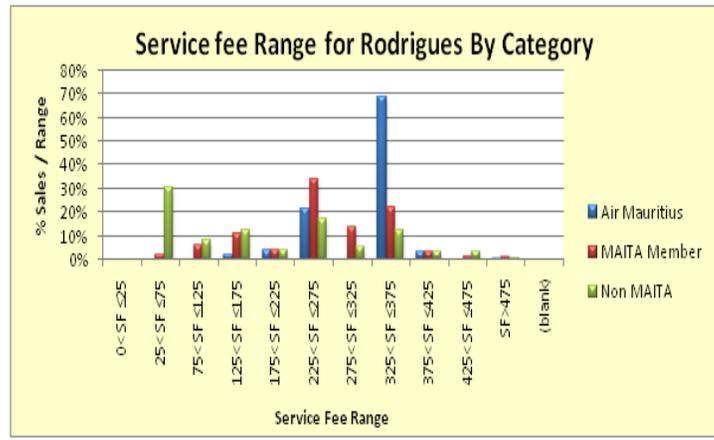
**Figure G - Service Fee (Rs.) by tickets for Rodrigues - MAITA only**



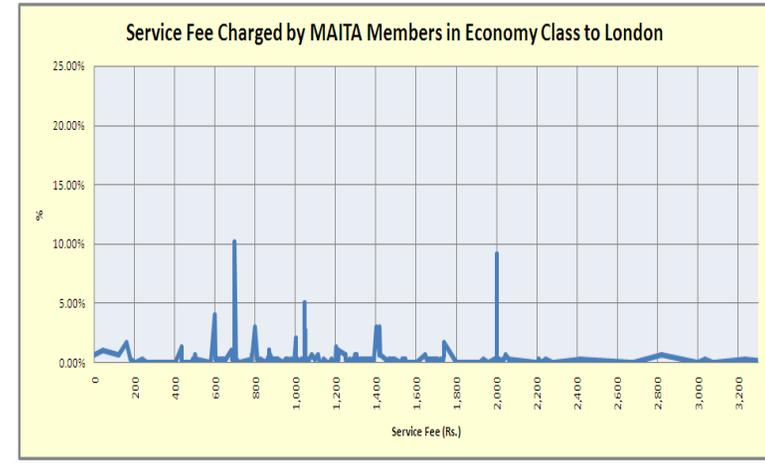
**Figure F - Service Fee (Rs.) charged by tickets for Rodrigues - All Agents**



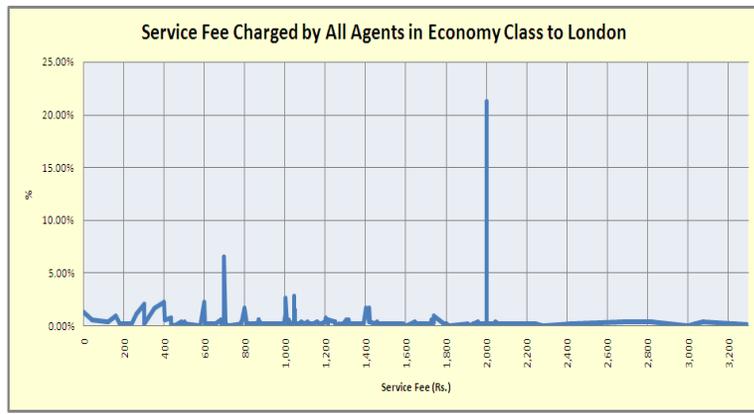
**Figure H - Service fee range for Rodrigues by Category**



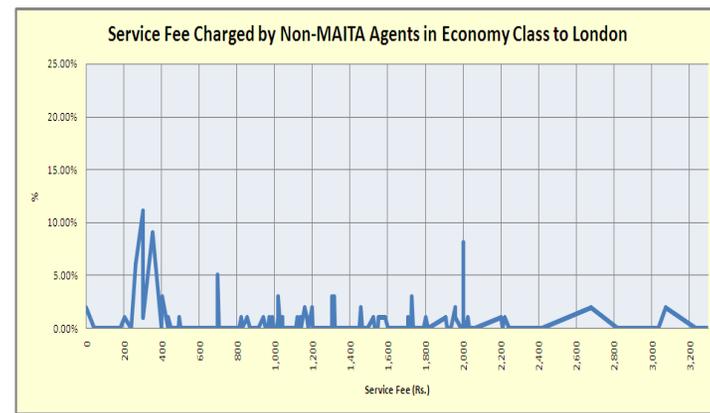
**Figure J - Service fee (Rs.) by tickets for London - Economy Class - MAITA Only**



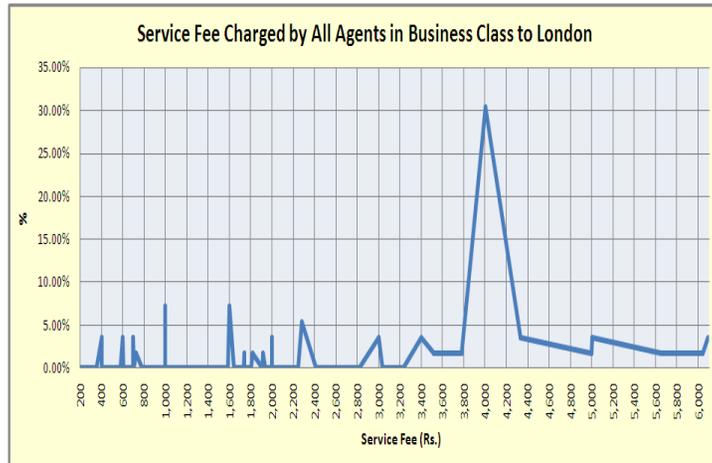
**Figure I - Service fee (Rs.) by tickets for London - Economy Class - All Agents**



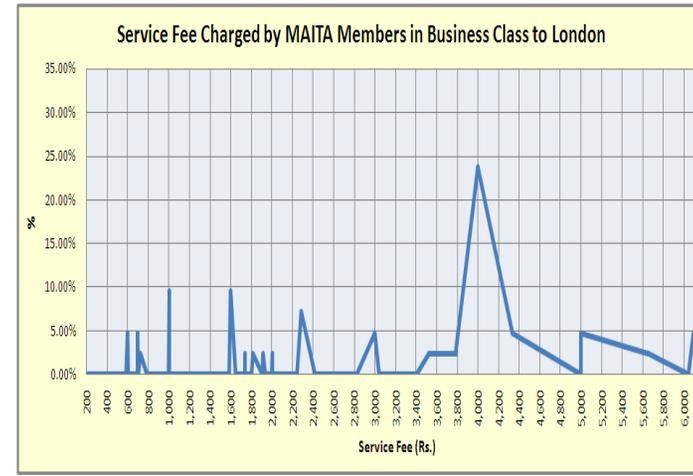
**Figure K - Service fee (Rs.) by tickets for London - Economy Class - Non-MAITA**



**Figure L - Service fee (Rs.) Charged to London in Business Class - All Agents**



**Figure M - Service fee (Rs.) Charged to London in Business Class - MAITA Members**



## Annex V – Response of Air Mauritius to the Provisional Report



Your ref: CCM/INV/004/PF/06  
Our ref: L13G10FN.cr

13 July 2010

Mr John Davies  
Executive Director  
Competition Commission of Mauritius  
7 Maupin Street  
Port Louis

Dear Mr Davies

### PROVISIONAL FINDINGS OF INVESTIGATION ON TRAVEL AGENTS' SERVICE FEE (INV 004)

We have been notified of your Provisional Findings Report on Travel Agents' Service Fee on 15 June 2010. Pursuant to section 14 (b) (ii) of the Procedural Rules established under section 38 of the Competition Act 2007 (GN 161 of 2009), Air Mauritius considers that the provisional findings should not become final for the following reasons:

1. The Competition Act 2007 came into operation in November 2009. Consequently, any act or omission prior to the commencement date does not fall under the purview of the Act. Indeed, the Competition Act 2007 is not an "ex post facto" law, that is, a law which makes a particular action into a crime and then punishes people who took that action before it had legally become a crime. (see *DPP v Pierre Louis JB 2010 SCJ 218*) At any rate the power to make law with retrospective effect is subject to a cornerstone provision found in section 10(4) of the Constitution which reads as follows:

*"No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute an offence..."*

2. Whilst the Provisional Findings does state at paragraph 3.13 that at the time the alleged agreement was made between MAITA and Air Mauritius, no breach of the Act was committed, it fails to draw one major conclusion from this, namely, whether since the coming into operation of the Act in November 2009, the alleged agreement, which may have had an effect when it was implemented by Air Mauritius as from 1 April 2008, still had an effect on the market as a consequence of the alleged agreement. In simple terms, it is not apparent from the Provisional Findings that the Commission took into account whether there were other plausible possibilities which may explained why the service fee level remained at the level which it was initially put at a time when this was not a reprehensible act under the law. In view of the above, it is difficult to understand why the CCM did not choose to compare the figures obtained as a result of the analysis of service fee and other charges for tickets sold in a six week period at the end of December 2009 with figures on similar issues for the period immediately after the introduction of the Service Fee in April 2008.
3. Indeed, whilst it may be of academic interest to determine the exact nature of the understanding which was reached between Air Mauritius and MAITA following discussion on the implementation

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of Service Fee by the national airline, it was definitely incumbent on the CCM to consider the structure of the local market since November 2009. This would have revealed that collusion was not the only plausible explanation for the behavior of Travel Agents. In *re B (Children) (Care Proceedings) (2008) UKHL 35, (2008) 3 WLR 1, para 13*, Lord Hoffmann stressed that *'There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children.'* Unfortunately, it is not apparent from the Provisional Findings that the CCM considered the probability that the parallelism was the result of the specificity of the market as expressed by Air Mauritius in its letters to the CCM dated 17 March 2010 and 18 May 2010. Mauritius is geographically very small and travel agents are located principally in Port Louis. Customers are in a position to walk from one office to the other to obtain price information and compare them. Consequently, the evolution of the level of the service fee which was imposed as from 1 April 2008 may be very slow since the alignment of the service fee is the result of a rational commercial behavior.

The only inference drawn by the CCM from the alignment of price is collusion. We respectfully disagree with this approach. In *re D (2008) UKHL 33, (2008) 1 WLR 1499*, Lord Brown of Eaton-under-Heywood said the following *"Obviously, everything going to the likelihood or otherwise of an allegation being true – of an offence having been committed or other reprehensible conduct-is relevant to the Court's consideration as to whether, having regard to all the evidence, it has been established as more likely than not. Generally speaking, as Lord Nicholls was pointing out, people tend not to commit serious offences-not least because of the consequences likely to follow if they do-and ordinarily people are more likely to have been negligent than fraudulent, more likely to have hurt someone unintentionally than deliberately, more likely to have provoked a stepdaughter into complaint by having lost their temper and slapped her than by having raped her. Similarly, as Lord Hoffmann pointed out in Rehman, one is more likely to see an Alsatian than a lioness in Regent's Park (the proximity of the zoo notwithstanding). Similarly too, someone with a good character is less likely to behave badly than someone with a bad character. Someone who values their 'reputation' will be less likely to imperil it than someone known to be disreputable. These are simple illustrations of an obvious point and no purpose would be served by multiplying them.*

*It is surely equally obvious that the more inherently unlikely it is that something has happened, that an allegation is true, the more persuasive (cogent is the word often used) the tribunal will need to find the evidence pointing that way before concluding it to be more likely than not."*

4. It is therefore very apt at this stage to consider the remarks of the European Court of Justice in *Ahlstrom Osakeyhtio and ors v Commission (II)1993 ECR I-1307* where it was held that *"parallel conduct cannot be regarded as furnishing proof of concertation unless it constitutes the only plausible explanation of such conduct."* Similarly, in *CRAM and Rheinzink & Cie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission 1984 ECR 1679*, the ECJ held that *"The Commission's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action by the two undertakings. Faced with such an argument, it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and which thus allow another explanation of the facts to be substituted for the one adopted by the contested decision. The applicants have in fact proved the existence of such circumstances.... It follows that ..... the Commission has not produced sufficiently precise and coherent proof to justify the view that the parallel behavior of the two undertakings in question was the result of the concerted action between them".* This judgment was quoted in approval in the *PVC*

*Cartel case 1999 ECR II-931* where it was established that “where the Commission's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action between undertakings, it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and thus throw another explanation of the facts of the case to be substituted for the one adopted by the Commission.”

5. The introduction of a Service Fee is not peculiar to Air Mauritius on the Mauritian market. Other airlines serving the island such as British Airways, Air France and South African Airways have implemented a service fee system similar to that used by Air Mauritius. We have already explained to the Commission when the Service Fee was introduced in April 2008, the airline had made it clear that Travel Agents were not bound by the grid introduced by Air Mauritius. We are pleased to note that there were no confusion on that issue as evidenced by the article in newspaper *L'Express* dated 7 April 2008 quoted at paragraph 2.13 of the Provisional Findings and which reads as follows “*Loin d'être une obligation, ce service fee permet aux agences de voyages d'appliquer librement un taux plus bas ou plus élevé.*” This is clear evidence in support of the contention of Air Mauritius that Travel Agents were and are still free to impose their own service fee level. It follows therefore that the comments from BlueSky and Summertime Voyages as reproduced at paragraphs 3.45 and 3.46 can only reinforce the contention of Air Mauritius that Travel Agents were always free to determine their Service Fee level. It has also been clearly established that there has been no contact or concertation of any nature between Air Mauritius and Travel Agents since its introduction in April 2008. This is admitted by the CCM at paragraphs 3.50 and 4.9. On the basis of these, it is unreasonable for the CCM to conclude at 3.50, by a reversal of the standard of proof that “*The CCM has not seen any evidence that this understanding ceased to have force after the Act came into effect. There does not appear to have been any explicit communication with the object of restricting, preventing or distorting competition since that date*” In fact, there is also no evidence of implicit communication/understanding between the parties since that date! It is therefore not surprising therefore that the CCM itself states at 3.51 that “*Not all travel agents follow the Air Mauritius grid for setting fees*”.
  
6. According to section 41 of the Competition Act 2007, the collusive agreement can only be sanctioned if as per subsection 1 (c) if it “*significantly prevents, restricts or distort competition*”. One essential element is the issue of “*significantly*”. By comparison section 81 of the EC treaty does not impose any threshold limit on “*agreements or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the market.*” Although the wording of Article 81(1) suggests that any restriction of competition is sufficient to bring an agreement or practice within the scope of the prohibition, the ECJ had to establish in 1969 a *de minimis* doctrine. In *Volk v Vervaeke 1969 ECR 295*, the ECJ ruled that “*an agreement falls outside the prohibition in Article 81(1) when it only has an insignificant effect on the markets, taking into account the weak position which the persons concerned on the market of the product in question.*” The Commission subsequently provided guidance on the application of the *de minimis* doctrine in its *De Minimis Notice of 2001*. The legislator in Mauritius took a different approach when imposing as an element the threshold of “*significantly*” which is clearly a high one. This essential element of the reprehensible act described in section 41 is **totally absent** from the Provisional Findings. One essential element being missing, it is therefore submitted that the findings are **flawed in law** in that respect.
  
7. Further, if we go by the definition of an agreement as per paragraph 2.19 of the Provisional Findings itself, it is clear from the report that there is not an iota of evidence of “*a practice involving contacts or communications between competitors falling short of an actual agreement but which nonetheless*

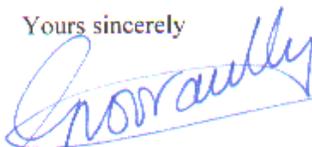
*restricts competition between them.*" It is therefore **erroneous based on the facts** for the report to conclude that "*the alleged agreement*" reached in 2008 between Travel Agents and Air Mauritius continued to affect prices after the coming into operation of the Act in November 2009.

8. Air Mauritius takes note of the decision of the CCM not to recommend financial penalties in this case. This conclusion is the only logical one possible in view of the provision of section 59 (2) requiring the parties to have acted "*intentionally or negligently*". There is nothing in the findings which shows, even remotely that since the coming into operation of the Competition Act Air Mauritius was engaged in promoting directly or indirectly its service fee grid published in April 2008. At any rate, the imposition of a financial penalty makes the offence a quasi-criminal one and therefore it is a requirement that it is proved **beyond reasonable doubt** that Air Mauritius acted "*intentionally or negligently*". This "*finding cannot be based on mere probability.*" (see *KM Mani v PJ Anthony 1979 2 SCC 223*; see also *Ringadoo NRD v Jugnauth AK 2007 SCJ 80*) as exemplified by paragraph 4.8 of the Provisional Findings and more particularly the following sentence "*It does not seem unreasonable to suppose that Air Mauritius's own service fees and those of many travel agents would have been much lower – closer to the initial levels proposed by Air Mauritius-had the agreement not been in place.*" (*underlining is ours*).
9. Insofar as the potential Directions that could be made to Mauritius as listed in 4.10, Air Mauritius wishes to make the following comments :-
  - (a) The directive that Air Mauritius be ordered to stop and abstain from all communications or collaboration with MAITA and/or any other travel agent on service fee level is not founded on any fact or law. "*To stop and abstain*" imply that Air Mauritius has communicated or collaborated on service fee with MAITA and/or Travel Agents since the coming into operation of the law. That is not true and is recognized by the CCM itself at paragraphs 3.50 and 4.9. To prevent Air Mauritius from doing something it did not do is nonsensical;
  - (b) The order to issue a press release is not warranted in view of a Circular issued by Air Mauritius to Travel Agents on 30 June 2010 (*copy of correspondence is attached-Annex D*);
  - (c) The issue of a press release is not necessary in view of the above and in view of the fact that Travel Agents knew from the outset that they were free to determine their own service fee level as evidenced by the Article in *L'Express* dated 7 April 2008.
  - (d) Whilst Air Mauritius would have no objection to remove from its archives section on its website the news release issued on 14 March 2008, it cannot but find this measure illogical in view of the fact that the grid of service fee level displayed in that release is identical to the circular issued to Travel Agents on 26 February 2008. What would be the purpose of removing something in the archives section of a website which the travel agents already have in their possession as a hard copy? However, in all good faith, Air Mauritius has withdrawn this News Release from its archives on its Website.
  - (e) The direction contemplated at paragraph (e) of section 4.10 is **ultra vires** of section 58 of the Act and would be clearly illegal, the aim of any direction being to ensure that the "*enterprise ceases to be a party to the restrictive agreement.*" The CCM has no power to direct enterprises to justify commercial decisions for the future failing which it may be regarded as a "*director*" under section 128 (2) of *Companies Act 2001*. There is a purpose behind section 58 and it is not an unfettered right which is granted to the CCM. It is therefore respectfully submitted that, notwithstanding the

fact that" as pointed out by the CCM it may not be" well placed to assess whether the proposed price are those that would result from free competition" it is also a well settled principle of law that a public body may not use its powers granted under an act of Parliament for a different purpose from the one envisaged by the law as reiterated by the House of Lords in *R v Secretary of State for foreign affairs, Ex Parte The World Development Movement (1995) 1 WLR 386*.

10. The CCM may wish to note that as from 1 July 2010, there is no service fee charged by Air Mauritius worldwide for websales with payment by credit card. This is in line with what was previously explained to the CCM in a meeting held on 30 March 2010 on its strategy to increase websales which had already started without consultation with Travel Agents.
11. On a different note altogether, it is our duty to correct you statement at paragraph 2.5 that "*both airlines and Travel Agents can be members of IATA.*" In fact, according to IATA rules which can be viewed on its website, "*IATA formal membership is only applicable for airlines operating air services. Travel Professionals and Freight Forwarders can benefit from IATA Accreditation programmes, and become IATA-approved.*"
12. In view of the above Air Mauritius reiterates its comments made by way of letters dated 18 May 2010 and 17 March 2010. Air Mauritius respectfully submits that the Provisional Findings Report should not become final. (*Annexures II & III*)

Yours sincerely



**Foad Nooraully**  
**Company Secretary & General Counsel**

cc Chief Executive Officer

Annex 1



30 June 2010

Ref: mm/FservicefeeJun10

**C I R C U L A R**

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**TO** : ALL IATA TRAVEL AGENTS

**FROM** : CORPORATE AGENCY SALES AND SERVICE MANAGER

**SUBJECT** : SERVICE FEE

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Dear All

Please refer to our Circular on Implementation of Service Fee issued on 26 February 2008.

With the coming into operation of the Competition Act in November 2009, your attention is drawn to the fact that each travel agent is free **to determine independently** its own level of Service Fee to be imposed on customers. Consequently, the recommendations outlined in our Circular dated 26 February 2008 on the subject matter must be disregarded.

Air Mauritius will impose its service fee independently of that imposed by travel agents. Any communication or collaboration between Air Mauritius and Travel Agents on Service Fee is strictly prohibited.

With Best Regards

Sailesh Kunkun  
Corporate Agency Sales & Service Manager

HEAD OFFICE : AIR MAURITIUS CENTRE - PRESIDENT JOHN KENNEDY STREET - PORT LOUIS - MAURITIUS - P.O. BOX 441  
TEL : (230) 207 7070 - FAX : (230) 206 8331 - TELEX : 4415 IW - CABLE: AIRMAU - PORT-LOUIS

## Annex VI – Response of MAITA to the Provisional Report



**The Mauritius Association of  Travel Agents**  
*C/o Executive Services LTD, 2<sup>ND</sup> Floor, Les Jamalacs Bldg, Vieux Conseil Street,  
Port Louis, Mauritius; Tel: 2083013, Fax: 2083080; email: maita@executive.innet.mu*

13 July 2010

Mr John Davies  
Executive Director of the Competition Commission of Mauritius  
1<sup>st</sup> Floor, GM Tower  
7 Maupin Street  
Port Louis

Dear Sir

With reference to your letter dated 15<sup>th</sup> June 2010 concerning the provisional findings report of your Commission.

Whilst we find ourselves unable to agree with your findings.

We however, in order to dispel any misconception or concern regarding the service fee, we annex herewith a circular letter which we have communicated to our members.

We remain at your disposal for any further information you may wish to obtain.

Yours faithfully

**MAITA Executive Committee**  
For Bruno Lebreux  
Chairman

Cc: Mr Sailesh Ramyeed

MEMBER OF  UNIVERSAL FEDERATION OF TRAVEL AGENTS ASSOCIATIONS



**The Mauritius Association of  Travel Agents**

*C/o Executive Services LTD, 2<sup>ND</sup> Floor, Les Jamalacs Bldg, Vieux Conseil Street,  
Port Louis, Mauritius; Tel: 2083013, Fax: 2083080; email: maita@executive.intnet.mu*

13 July 2010

TO : ALL MEMBERS OF MAITA

Dear Members

The Competition Commission has communicated to us its 'provisional findings report' on 15 June 2010. Whilst maintaining our stand that as an association we have never acted in breach of Section 41 of the Competition Act, we would however wish to dispel any misconception that may exist in certain quarters concerning the Service Fee.

In this connection, we therefore advise all our members that should they wish to charge a service fee, they should independently set their own service fee structure if any, based on the requirements of their respective Companies and the level of the services they provide.

The Association will continue to look after the welfare of its members and this within its remit and the framework of the Law.

MAITA Executive Committee

MEMBER OF  UNIVERSAL FEDERATION OF TRAVEL AGENTS ASSOCIATIONS

## Competition Commission of Mauritius

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