Neutral citation [2021] CAT 11

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1345/4/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 May 2021

Before:

THE HONOURABLE MR JUSTICE MORRIS
(Chairman)
MICHAEL CUTTING
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

BETWEEN:

SABRE CORPORATION

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard remotely on 24-26 November 2020

JUDGMENT (NON-CONFIDENTIAL VERSION)

APPEARANCES

Mr Tim Ward QC, Ms Alison Berridge and Mr Nikolaus Grubeck (instructed by Skadden, Arps, Slate, Meagher & Flom (UK) LLP) appeared on behalf of the Applicant.

Mr Rob Williams QC, Mr Tristan Jones and Mr Conor McCarthy (instructed by the Competition and Market Authority) appeared on behalf of the Respondent.

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

CONTENTS

A. INTRODUCTION

1. On 14 November 2018, a subsidiary of Sabre Corporation ("Sabre") entered into an agreement to acquire Farelogix Inc ("Farelogix") ("the Parties") for approximately US $360 million ("the Merger Agreement"). The Parties notified the Competition and Markets Authority ("the CMA") of the proposed merger in a Merger Notice dated 19 June 2019. The CMA began an investigation and the proposed merger was referred to an in-depth (Phase 2) merger investigation on 2 September 2019.

2. The CMA issued its Final Report on 9 April 2020 (the "Final Report"). In summary, the CMA found that it had jurisdiction to consider the proposed merger under the Enterprise Act 2002 ("the Act") on the basis of the share of supply test set out in section 23(2)(b). The CMA further found that the proposed merger may be expected to give rise to a substantial lessening of competition ("SLC") in two markets: the supply of merchandising solutions to airlines and the supply of distribution solutions to airlines, both of which are worldwide markets. On that basis, the CMA decided to prohibit Sabre's anticipated acquisition of Farelogix ("the Merger") in its entirety.

3. On 1 May 2020, the Parties announced that the Merger Agreement had been terminated.

4. By this application filed on 21 May 2020, Sabre applies to quash the CMA's decision, pursuant to section 120 of the Act (the "Application"). In its Notice of Application ("NoA") Sabre challenged the Final Report, on the following grounds:

   (1) **Ground 1:** The CMA erred in law in that its Relevant Description of Services ("RDS") is not a lawful basis on which to apply the share of supply test to two highly disparate supplies in the absence of any underlying rationale.

   (2) **Ground 2:** The CMA erred in its approach to the requirement "*supply in the UK*", by conflating supply to an American airline of "FLX

Services" (as defined by the CMA) with a direct supply to British Airways plc ("British Airways" or "BA").

(3) **Ground 3:** The CMA erred in its application of the share of supply test, in that it (i) misconstrued section 23 of the Act in relying upon an increment that was both hypothetical and vanishingly small, and (ii) irrationally and in error of law applied different, and inconsistent, methodologies in respect of Sabre and Farelogix and so failed to compare like with like.

(4) **Ground 4:** The CMA erred in its calculation of the total supply of RDS services in the UK by failing to apply its own definition of RDS consistently or rationally to third party providers.

(5) **Ground 5:** On a correct application of the standard of proof and a proper assessment of the evidence, the CMA could not lawfully have found a SLC in the merchandising market.

(6) **Ground 6:** The CMA's SLC finding in relation to distribution was irrational and unsupported by the evidence.

5. Grounds 1 to 4 relate to the CMA's assertion of jurisdiction over the Merger under section 23 of the Act. On 20 November 2020, Sabre informed the Tribunal that it no longer wished to pursue Grounds 5 and 6, which challenged the CMA's findings in relation to a SLC. Accordingly, the Application is now limited to the issue of jurisdiction only.

6. At a remote case management conference on 16 June 2020 the Tribunal gave directions for the future conduct of the Application which included directions in relation to disclosure.[1] The CMA gave disclosure of various materials in accordance with the process directed by the Tribunal. Sabre nonetheless made an application for specific disclosure on 21 July 2020. On 19 August 2020 the Tribunal issued its ruling, refusing the application ([2020] CAT 19).

[1] See paragraphs 4 to 7 of the Order of the Chairman of 19 June 2020.

B. FACTUAL BACKGROUND

(1) The Parties

7. Sabre is a technology and software provider to the global travel industry. It is headquartered in Southlake, Texas, USA. Sabre provides technology solutions to airlines and travel agents.

8. Sabre provides "core" and "non-core" Passenger Service System ("PSS") IT modules to airlines and operates a Global Distribution System ("GDS") which distributes airline content to travel agents for the purpose of booking airline tickets. Sabre's global turnover in 2018 was approximately £2.8 billion worldwide and approximately £[✂] in the UK.

9. Internally Sabre has two key divisions:

   (1) Sabre Travel Network, which operates Sabre's business-to-business marketplace and consists primarily of Sabre's GDS activities; and

   (2) Sabre Airline Solutions; amongst other activities this business unit is responsible for core and non-core PSS solutions for airlines.

10. Farelogix is a technology and software provider which supplies technology solutions for airlines. It is headquartered in Miami, Florida, USA. It was at the relevant time owned by Sandler Capital Management ("Sandler"), a private equity fund. Sandler was a vendor in the Merger.

11. Farelogix provides "non-core" PSS IT modules and airline content distribution services using the New Distribution Capability ("NDC") standard. Farelogix's turnover in 2018 was approximately £31.2 million worldwide with no material turnover in the UK.

(2) The Products and services[2]

(a) Merchandising solutions

12. The PSS is a central part of the IT system of an airline. It is a complex set of systems which manages various tasks in the booking process, such as pricing or determining the availability of seats on a flight. The PSS includes "core" and "non-core" modules.

13. The core PSS modules are generally considered to be:

    (1) The airline reservation system or central reservation system, which controls the sale of seats, scheduling, passenger name records and the issuance of tickets.

    (2) The airline inventory system, which provides information on available seats.

    (3) The departure control system, which is used to check in passengers at the airport.

    The above core modules are usually bundled together. The PSS enables key information on flight schedules, seat availability and pricing to be distributed to travel agents, passengers and intermediaries.

14. Non-core PSS modules are ancillary to the core PSS modules. They enable airlines to offer ancillary services such as IT solutions for data analytics and airline revenue management. These modules can be of critical importance to the effective management and operation of the airline.

15. Merchandising modules (or merchandising solutions) are a type of non-core PSS module which allow airlines to create offers for passengers to be able to choose from a range of ancillary services such as extra luggage allowance, the option to upgrade their seat, in-flight purchases, airport parking or meal options.

[2] The following reflects the position as described in, and at the time of, the Final Report.

16. The core and non-core PSS components of the IT booking system need to work with each other in order for an airline to sell tickets and offer various ancillary services. Airlines can use the same provider for both their core and non-core PSS components. Sometimes airlines use different providers. Sometimes, a non-core PSS module can be used in conjunction with a third party's core PSS module (a "PSS-agnostic solution"). Some non-core PSS modules offered by a core PSS provider cannot be used by a third party's core PSS (a "PSS-dependent solution").

Merchandising solutions provided by the Parties

17. Sabre provides core and non-core PSS modules to airlines. Currently, Sabre's merchandising solutions can only work with Sabre's PSS, i.e. they are PSS-dependent. Sabre's merchandising modules are not currently compatible with the NDC distribution solutions described below.

18. Sabre supplies two merchandising modules. Its 'Dynamic Retailer' module allows dynamic and personalised product pricing and bundling of ancillaries for distribution through the direct channel (see paragraph 20 below). Its 'Ancillary Services' module focuses on generating and managing the delivery of ancillaries. These modules are PSS-dependent. Airlines that use the Sabre PSS are free to choose a third-party merchandising solution if they so wish. Sabre's merchandising modules are generally sold together.

19. Farelogix only supplies non-core PSS solutions. It supplies 'FLX M', a solution that allows airlines to create ancillary offers across multiple channels. This solution provides the functions of the two merchandising modules of Sabre described above as well as additional supporting features which allow airlines to sell merchandising offers flexibly. However, it differs from Sabre's modules in that FLX M is PSS-agnostic; it can be (and has successfully been) integrated with any airline's PSS, not just Sabre's. Moreover, Farelogix's merchandising solution is compatible with the NDC standard whilst Sabre's is not.

(b) Distribution solutions

20. Airline content (or "travel services information") refers to information on the fare, availability, schedule and other information relating to flight and ancillaries which an airline wishes to make available to travel agents and passengers in order to sell a ticket and make a booking. Airlines deliver their content and sell tickets and services directly to passengers via their own call centre or website (referred to as the direct channel and, in the case of airlines' websites, "airline.com") or indirectly via travel agents (referred to as the indirect channel). In 2018, approximately 50% of global airline bookings were through the direct channel and 50% through the indirect channel.

21. Within the indirect channel, the distribution of content from an airline to a travel agent could be via a GDS or by other means collectively referred to as "GDS bypass", or by "GDS pass through". GDS bypass refers to distribution of content either directly to a travel agent through what is known as a 'direct connect' or using a direct connect that goes via an aggregator (which also aggregates content from multiple airlines) referred to as a "non-GDS aggregator". 90% of airline bookings from the indirect channel are made via a GDS (excluding bookings through local GDS in China, Russia and Japan). GDS pass through is explained further below.

<u>GDS</u>

22. The three largest GDSs are Sabre, Amadeus and Travelport, which together account for almost all GDS bookings worldwide (approximately 85%-95%).

23. GDSs facilitate transactions between different travel services providers (airlines, hotels and car rental operators) and travel agents. They are two-sided platforms with sellers of travel services on the one side of the platform and travel agents on the other. The CMA's inquiry focused on services related to the airline aspects of the GDS business.

24. GDSs receive information from airlines' PSS on flight schedules and availability. The fare (pricing) information comes from a third party, the Airline

Tariff Publishing Company ("ATPCO"). GDSs receive this information from many airlines across the world. Only flight availability is available to the GDS in real time.

25. The GDS consolidates this information about a specific airline with similar information on other airlines and distributes the information to travel agents in an aggregated display. Travel agents can compare information across airlines and book tickets.

26. GDSs also manage some aspects of fulfilment including travel agent back-office accounting and reporting, quality assurance, duty of care management, corporate policy compliance and reservation management in the event of a travel disruption.

27. GDSs have access to data from a large number of airlines which facilitates large scale comparison shopping by travel agencies. Sabre's GDS, for example, gives travel agents access to more than 400 airlines and processes approximately 1.1 trillion messages and 700 billion transactions every year.

28. It is the GDSs, and not the airlines, that are responsible for creating the offer which the passenger receives via the travel agent in response to a travel query. The airlines themselves only have limited visibility over the package offered to the end-customer and little information about the customers themselves, preventing airlines from tracking customer data and adapting to their preferences. For example, airlines do not see what searches were undertaken before a booking is made, which is information that may help airlines hone and improve their services.

<u>Alternative services for indirect distribution - GDS Bypass and GDS pass through</u>

29. Alternatively, airlines can distribute content to travel agents outside the structure of a GDS. Approximately 10% of bookings in the indirect channel are made via GDS bypass. These solutions may be divided between direct connect arrangements and non-GDS aggregators.

30. A direct connect agreement is a one to one connection between an airline and a third party such as a travel agent. For this purpose, the airline must give the travel agent access to the airline's IT system through Application Programming Interface ("API") technology. Some airlines create and manage an API in-house. But others use a third-party provider of API technology. Farelogix provides such a service and is one of the four main providers of such direct connect distribution solutions. Direct connect arrangements offer airlines more control over the offer creation process which is otherwise controlled by a GDS.

31. Airlines can also establish connections using the API with an aggregator that is not a GDS (a "non-GDS aggregator"), which – like GDSs – then combine content across airlines before distributing it to travel agents. An aggregator facilitates comparison shopping for travel agents.

32. GDS bypass is distinct from "GDS pass through" which also depends on an API and involves the distribution of content through a GDS but without offer creation. The use of GDS pass through has been limited to date.

New Distribution Capability ("NDC")

33. Traditionally, airline content collected by GDSs was typically communicated using the Electronic Data Interchange for Administration, Commerce and Transport ("EDIFACT") messaging standard. However, this messaging standard is limited in its ability to handle data-rich digital content. The limitations of the messaging technology used by GDSs mean that most airlines currently have limited ability to distribute dynamic, personalised offers (including ancillary products) to travel agents using GDSs, despite growing demand to do so.

34. In 2012, the NDC standard was launched by the International Air Transport Association ("IATA"). The NDC standard originated from a messaging protocol developed by Farelogix, and it allows for dynamic and personalised offers to be created by airlines (rather than the GDS) and accessed by travel agents. The NDC standard aims to give airlines similar capabilities to construct more dynamic offers in the indirect distribution channel as those that are

available through an airline's own website, but to do it across channels. This capability negates the need for airlines to rely on the GDSs for offer creation on their behalf, and helps airlines realise merchandising revenue opportunities.

The distribution solutions provided by the Parties

35. Sabre provides a GDS which serves to connect airlines with a point of sale operated by a third-party retailer, including travel agents. Sabre's GDS performs other functions in addition to distribution (as described above). It creates offers for airlines; it aggregates content across multiple airlines and distributes them to travel agents; it also manages certain fulfilment functions for travel agents. Sabre has relationships with many UK airlines to which it supplies its GDS.

36. In addition to the existing distribution functions performed by its GDS, Sabre is developing 'next generation distribution' solutions. These solutions, which will be compatible with the NDC standard, aim to allow airlines to distribute personalised and dynamic offers in any channel, and to give travel agents access to these offers on the GDS.

37. Farelogix supplies IT solutions that allow airlines to distribute content either directly to passengers via their own call centre or website (e.g. the direct channel) or indirectly via travel agents. These solutions are FLX OC and FLX NDC API, collectively referred to as "the FLX Services".

38. FLX OC integrates with an airline's PSS to enable airline content to be distributed to third parties. FLX NDC API is an interface that allows airlines to distribute content such as dynamic offers with ancillaries. FLX OC and FLX NDC API are typically provided together. Farelogix's distribution solutions are compatible with the NDC standard. These services enable airlines to connect to travel agents by (i) direct connect; (ii) via an aggregator; (iii) via a GDS platform (if enabled); or (iv) through the airline's own website.

39. The CMA found that Sabre's GDS platform and Farelogix's FLX Services are in competition: see paragraph 93 below.

(3) The Merger and the CMA's inquiry

40. On 14 November 2018, Sabre entered into the Merger Agreement. It was announced publicly on the same day.

41. The Parties notified the Merger to the US Department of Justice ("DOJ") on 6 December 2018. On 20 August 2019, the DOJ filed a complaint in the US District Court in Delaware, seeking a permanent injunction to prevent Sabre from acquiring Farelogix. The DOJ alleged that the proposed acquisition was likely to substantially lessen competition in violation of federal antitrust law. The US District Court trial took place in February 2020. The US District Court declined to prohibit the Merger in an opinion published on 8 April 2020.

42. On 2 September 2019, following a Phase 1 review, the CMA referred the Merger for a Phase 2 inquiry and report by a group of CMA panel members under section 33 of the Act.

43. Provisional Findings ("PFs") were published on 13 February 2020. The Final Report was published on 9 April 2020.

C. LEGAL FRAMEWORK

(1) The Enterprise Act 2002

44. Anticipated mergers are governed by sections 33, 34 and 36 of the Act. The Act provides for two phases in the regulation of merger control by the CMA. Following a Phase 1 review, the CMA must refer an anticipated merger for more detailed investigation at Phase 2 if it believes that (a) "*it is, or may be the case that*" merger arrangements are in contemplation which will result in the creation of a relevant merger situation; and (b) the creation of that situation may be expected to result in a SLC within any market or markets in the United Kingdom[3]. Then at Phase 2, the CMA Inquiry Group must *decide* whether the merger will result in the creation of a relevant merger situation under section 23

[3] Section 33(1).

and, if so, whether the creation of such a situation may be expected to result in a SLC[4].

45. Where the CMA publishes a final report which concludes that a contemplated merger would produce an anti-competitive outcome, the CMA must decide, amongst other things, whether action should be taken "to remedy, mitigate or prevent the substantial lessening of competition concerned"[5]. Remedies may include a range of measures, including the prohibition of a merger.

(2) Jurisdiction under the Act

46. Section 23 defines "relevant merger situation" in two alternative ways. It will be created where two or more enterprises have ceased to be distinct and either:

(1) The value of the turnover in the UK of the enterprise being taken over exceeds £70m (the "turnover test"): section 23(1)(b); or

(2) The merger will result in the creation or strengthening of a share of supply (or purchases) of 25% or more in relation to the supply of goods or services of any description in the UK or a substantial part of it (the "share of supply test").

47. The share of supply test is set out in section 23(2) to (8). Insofar as material section 23 provides:

> "[…]
>
> (2) For the purposes of this Part, a relevant merger situation has also been created if—
>
> (a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and
>
> (b) the share of supply test is met.
>
> (2A) The share of supply test is met if—

[4] Section 36(1).
[5] Section 36(2).

(a) as a result of the enterprises ceasing to be distinct enterprises, one or both of the conditions mentioned in subsections (3) and (4) below prevails or prevails to a greater extent; or

(b) in the course of the enterprises ceasing to be distinct a person or group of persons has brought a relevant enterprise under the ownership or control of the person or group and one or both of the conditions mentioned in subsections (4A) and (4B) below was satisfied in relation to the relevant enterprise before it ceased to be a distinct enterprise.

[…]

(4) The condition mentioned in this subsection is that, in relation to the supply of services of any description, the supply of services of that description in the United Kingdom, or in a substantial part of the United Kingdom, is to the extent of at least one-quarter—

(a) supply by one and the same person, or supply for one and the same person; or

(b) supply by the persons by whom the enterprises concerned are carried on, or supply for those persons.

[…]

(5) For the purpose of deciding whether the proportion of one-quarter mentioned in subsection (3) [(4), (4A) or (4B)] is fulfilled with respect to goods or (as the case may be) services of any description, the decision-making authority shall apply such criterion (whether value, cost, price, quantity, capacity, number of workers employed or some other criterion, of whatever nature), or such combination of criteria, as the decision-making authority considers appropriate.

[…]

(8) The criteria for deciding when goods or services can be treated, for the purposes of this section, as goods or services of a separate description shall be such as in any particular case the decision-making authority considers appropriate in the circumstances of that case.

[…]"

48. Section 36 of the Act sets out questions which are to be decided by the CMA in relation to anticipated mergers following a Phase 2 reference and states insofar as is relevant:

"36 Questions to be decided in relation to anticipated mergers

(1) Subject to subsections (5) and (6) and section 127(3) , the [CMA] shall, on a reference under section 33, decide the following questions—

(a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and

(b) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.

(2) The [CMA] shall, if it has decided on a reference under section 33 that there is an anti-competitive outcome (within the meaning given by section 35(2)(b)), decide the following additional questions—

(a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which may be expected to result from the substantial lessening of competition;

(b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which may be expected to result from the substantial lessening of competition; and

(c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

[…]"

(3) The CMA's Guidance

49. Section 106 of the Act requires the CMA to publish general advice and information about *"the making and consideration by it of references under section 22 or 23*" and indicate how the CMA expects such provisions to operate. This may include *"advice (or information) about factors which the CMA may take into account whether, and if so how, to exercise a particular function conferred by this Part."* The CMA may not depart from the guidance without good reason.[6]

(a) The Mergers Guidance

50. The CMA's guidance on the share of supply test is set out in *Mergers: Guidance on the CMA's Jurisdiction and Procedure* CMA2, January 2014 ("the Mergers Guidance").

51. The Mergers Guidance provides, *inter alia*, as follows:

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[6] *Office of Fair Trading and others v IBA Health Ltd* [2004] EWCA Civ 142 ("*IBA Health*"), at [74]; *Unichem Ltd v Fair Trading Office* [2005] CAT 8, at [199]; *R (Lumba) v SSHD* [2011] UKSC 12; [2012] 1 AC 245, at [26], per Lord Dyson.

"4.53 Under section 23 of the Act, the 'share of supply test' is satisfied only if the merged enterprises:

- both either supply or acquire goods or services of a particular description, and
- will, after the merger, supply or acquire 25% or more of those goods or services, in the UK as a whole or in a substantial part of it.

4.54 Where an enterprise already supplies or acquires 25% of any particular goods or services, the test is satisfied so long as its share is increased as a result of the merger, regardless of the size of the increment. Where there is no increment, the share of supply test is not met.

[…]

4.56 The Act expressly provides the CMA with a wide discretion in describing the relevant goods or services, requiring only that, in relation to that description, the parties' share of supply or acquisition is 25% or more. In applying the share of supply test, the CMA will have regard to the following considerations.

- The share of supply test is not an economic assessment of the type used in the CMA's substantive assessment; therefore, the group of goods or services to which the jurisdictional test is applied need not amount to a relevant economic market, and can aggregate, for example, intra-group and third party sales even if these might be treated differently in the substantive assessment.
- The CMA will have regard to any reasonable description of a set of goods or services to determine whether the share of supply test is met. This will often mean that the share of supply used corresponds with a standard recognised by the industry in question, although this need not necessarily be the case. In applying the share of supply test, the CMA may under section 23(5) of the Act have regard to the value, cost, price, quantity, capacity, number of workers employed or any other criterion in determining whether the 25% threshold is met.

  […]

- The CMA cannot apply the share of supply test unless the parties together supply or acquire the same category of goods and services (of any description). The test cannot capture mergers where the parties are solely active at different levels of the supply/procurement chain. [Footnote 77 gives examples of cases where the relationship between the parties was "not purely vertical" and so the test was applicable].

Supply or acquisition of goods or services in the UK

4.57 The share of supply test requires that the merger would result in the creation or enhancement of at least a 25% share of supply or acquisition of goods or services either in the UK or in a substantial part

of the UK. This does not require, however, that the merger parties be legally incorporated in the UK.

4.58 Services or goods are generally supplied in the UK where they are provided to customers who are located in the UK. That is, in most circumstances, the place where competition with alternative suppliers takes place. The CMA will apply this general rule in a flexible and purposive way. In all cases, it will have regard to all relevant factors, including where relevant procurement decisions are likely to be taken and where, in turn, any competition between suppliers takes place.

4.59 In the case of sales to multinational companies, irrespective of place of incorporation, domicile or principal place of business, the general question is the presumptive location of the procurement decision. It would generally be a UK supply if the procurement decision is made by a business unit located in the UK and it will be non-UK supply if such a decision is made outside the UK. Certain strategic decisions may on the facts be made at a multinational's headquarters, even if the goods are delivered, title passes, or the services are supplied outside the jurisdiction of the headquarters (for example, secondary stock exchange listings)." (Emphasis added).

(b) The Survey Guidance

52. The CMA provides guidance in relation to survey evidence in *Good practice in the design and presentation of customer survey evidence in merger cases* CMA78, Revised May 2018 ("the Survey Guidance"). This sets out the CMA's general views on good practice in relation to such surveys, which are, primarily directed towards parties and their advisers. Paragraph 1.8 states:

> "This document provides principles and examples for illustration, not hard and fast rules or bright-line tests. We recognise that circumstances vary and that knowledge of the relevant scenario, along with judgment and reason, will be required in applying customer survey research methods to a particular case. Where time and/or resource constraints mean that the research possible under particular circumstances cannot comply fully with all of the principles set out here, we will still consider its use to the case."

53. Paragraph 1.9 indicates that "*[s]ubmissions that follow the principles set out in this document are more likely to be given evidential weight in the CMA's merger investigations*".

54. The Survey Guidance states at paragraph 3.7 "*[w]hen designing a questionnaire it is important to use appropriate language to avoid ambiguity or confusion…"*. Paragraph 3.11 provides:

> "A question that is presented in a way that leads customers to one answer in preference to another (irrespective of their actual view or behaviour) constitutes bias, and is likely to be of limited evidential value as a result. Some potential sources of bias that should be considered when drafting customer survey questions include:
>
> […]
>
> (b) Restrictive bias, where the question leads the customer to think only of certain options. For example, asking 'If you had known before you went there that this branch of X was closed for refurbishment for one year, what would you have done instead?' – without an explicit encouragement in the question wording to respondents to consider all options, such as 'Please imagine that you had known before you went there that this branch of X was closed for refurbishment for one year. Thinking of all the options open to you, what would you have done instead?' – may cause respondents to discount shopping online as an alternative source of supply;
>
> […]"

(4) Challenges to CMA decisions

55. Section 120 of the Act enables any person aggrieved by a decision of the CMA under Part 3 to apply to the Tribunal for a review of that decision. In determining such an application, section 120(4) states that the Tribunal should apply the same principles as would be applied by a court on an application for judicial review.

56. In *IBA Health*, the Court of Appeal at [88] stated that this requirement in section 120(4) of the Act *"… seems a clear indication that, notwithstanding the tribunal's specialised composition, the review was not to take the form of an appeal on the merits, but was limited by the ordinary principles applied in the Administrative Court"*.

57. Adopting the principles set out in *IBA Health* at [93] and *Skyscanner v CMA* [2014] CAT 16 at [107], it is common ground that the CMA must (a) take proper account of the material before it in reaching its conclusions and (b) ensure that it has adequate material before it to enable it to reach those conclusions.

58. In *BAA Limited v Competition Commission* [2012] CAT 3 ("*BAA*") Sales J (as he then was) summarised the principles to be applied in judicial review at [20] and stated:

"[…]

(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it (in this case, most prominently, whether it remained proportionate to require BAA to divest itself of Stansted airport notwithstanding the MCC the CC had identified, consisting in the change in government policy which was likely to preclude the construction of additional runway capacity in the south east in the foreseeable future): see e.g. *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B per Lord Diplock; *Barclays Bank plc v Competition Commission* [2009] CAT 27 at [24]. The CC "must do what is necessary to put itself into a position properly to decide the statutory questions": *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in *Khatun*:

> "The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made."

(4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45]".

59. When considering the standard required to give intelligible and adequate reasons for its decision, Sales J further stated at [20(8)]:

> "Where the CC gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in *South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953 (a case concerned with planning decisions) at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."
>
> In applying these standards, it is not the function of the Tribunal to trawl through the long and detailed reports of the CC with a fine-tooth comb to identify arguable errors. Such reports are to be read in a generous, not a restrictive way: see *R v Monopolies and Mergers Commission, ex p. National House Building Council* [1993] ECC 388; (1994) 6 Admin LR 161 at [23]. Something seriously awry with the expression of the reasoning set out by the CC must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it."

60. In *Stagecoach Group PLC v Competition Commission* [2010] CAT 14 ("*Stagecoach*"), the Tribunal, chaired by Ms Vivien Rose (as she then was), stated that on a rationality challenge the hurdle which the applicant had to overcome is a high one, and continued:

> "[45] …Where Stagecoach asserts that there is no or no sufficient evidence to support one of the Commission's key findings, Stagecoach must show either that there is simply no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to Stagecoach, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be wary of a challenge which is "in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review..."
>
> [46]… it is important to consider the evidence relied on in the Decision "taken as a whole" and that the Decision should not be analysed as if it were a statute. The Tribunal must consider the materiality of any "fact" found by the Commission which the Tribunal determines has no evidential foundation – not every failure in fact-finding and analysis by a decision making body requires or permits its finding or decision to be quashed."

61. In *R (Balajigari) v. Secretary of State for the Home Department* [2019] 1 W.L.R. 4647 ("*Balajigari*") the Court of Appeal summarised the duty to make reasonable inquiries at [70]:

> "The general principles on the Tameside duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, paras 99—100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since Tameside itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it." (Emphasis added).

(5) Interpreting and applying jurisdictional provisions

(a) The Parties' arguments

Sabre

62. Sabre submitted that issues of jurisdiction are matters for the Tribunal itself to determine, and the Tribunal should not confine itself to a mere review of the rationality of the decision under challenge. As stated by Atkin LJ in *R v Lincolnshire Justices, Ex parte Brett* [1926] 2 KB 192 (CA), at 202, a decision-maker *"cannot, by a wrong decision with regard to [a jurisdictional fact], give itself jurisdiction which it would not otherwise possess."* Administrative decision-makers must *"confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament"*:

Anisminic v Foreign Compensation Commission [1969] 2 AC 147 (HL), at 194, per Lord Pearce. Sabre relied in particular upon the speech of Lord Sumption in *Société Cooperative de Production SeaFrance v CMA* [2015] UK SC 75 ("*SCOP*") at [31].

63. In Sabre's submission, these cases demonstrate a strict approach by the Courts to findings underpinning the assertion of jurisdiction. In matters that do not "*call for expert economic judgments*", as is the present case, the CMA is entitled to no particular deference in the jurisdictional context. The correct approach to the interpretation of jurisdictional provisions has been explained by the Courts as follows.

64. First, the Court of Appeal held in *Akzo Nobel v Competition Commission* [2014] EWCA Civ 482 ("*Akzo*"), that the jurisdictional provisions in the Act should be interpreted with regard to both (i) the general purposes of the Act in providing an effective regulatory regime to deal with anticipated or actual anticompetitive outcomes; and (ii) the specific purposes of provisions that set boundaries to or otherwise limit the CMA's jurisdiction: per Briggs LJ (as he then was) at [24].

65. Second, *Akzo*, at [20] makes clear that provisions defining the boundaries of the CMA's jurisdiction should be interpreted in the light of the specific purpose for their inclusion, so far as that can be ascertained. Sabre relied, by way of example, upon the approach of Lord Mustill in *R v. Monopolies and Mergers Commission, ex p South Yorkshire Transport* [1993] 1 WLR 23 (HL) ("*South Yorkshire Transport*") at 31, of Briggs LJ in *Akzo* at [26] and of Lord Sumption in *SCOP* at [39].

66. Third, in determining jurisdiction, due regard must be had to the principle of comity: *Lawson v Serco* [2006] UKHL 3; [2006] 1 All ER 823, at [6], per Lord Hoffmann:

> "The English Courts recognise "the general principle of construction … that legislation is prima facie territorial. The United Kingdom rarely purports to legislate for the whole world."

Limits on territorial effect are not just explicit, but also implied. There is a presumption that, absent clear intention to the contrary, UK law does not apply

to foreign persons whose acts are performed outside the UK: see *Arab Bank plc v. Mercantile Holdings Ltd* [1994] Ch 71 at 82. Sabre submitted that section 23 of the Act must be interpreted in accordance with the statutory purposes and the principle of comity, and not so as to strip it of content and fundamentally undermine those purposes: *Akzo* at [24].

67. Fourth, in interpreting and applying the jurisdictional provisions, the CMA or Court is concerned with the economic substance of relevant transactions and not just with their legal form: *SCOP* at [38].

68. Finally, the CMA or Court should avoid a formalistic approach to jurisdiction: *SCOP* at [44]. This approach can be seen in *South Yorkshire Transport*, in which Lord Mustill rejected an interpretation of "*substantial part*" based on comparing the reference area to the whole of the UK in terms of surface area, population and volume of the relevant economic activity. The Court decided that these "*arithmetical approaches*" were inadequate by themselves (separately or together).

CMA

69. The CMA submitted that the Act must be construed in context (*R (Westminster City Council) v. National Asylum Support Service* [2002] UKHL 38 at [5], per Lord Steyn). Context requires regard to both *"the wider general purposes of the Act in providing an effective regulatory regime to deal with anticipated or actual anti-competitive outcomes"* and *"the specific purpose of"* the relevant provision (section 23 of the Act): *Akzo* at [20] and [24].

70. The wider purposes of the Act are equally engaged in the present case. Specifically, where the court is concerned with the interpretation of a jurisdictional provision, the purpose of which is to enable the regulation of mergers believed to operate against the public interest, a restrictive approach to interpretation is not appropriate: *South Yorkshire Transport*, per Lord Mustill at 31F.

71. The *"specific purposes"* of the legislation at issue in the present case are distinct from, but related to, those at issue in *Akzo.* In that case, the Court of Appeal was concerned with the scope of the CMA's order making power under section 86 of the Act, and in particular the interpretation of the *"connecting factors"* specified in that section. In the present case, the Tribunal is concerned with section 23 of the Act which again contains (in the relevant part) *"connecting factors"* to the United Kingdom, which make it appropriate for the CMA to exercise regulatory jurisdiction over the merger. The particular connecting factors differ between the two sections, but their essential purpose is the same.

72. The jurisdictional tests enacted by Parliament in section 23 are both premised on a territorial nexus with the United Kingdom which Parliament has deemed sufficient as the basis for the exercise of statutory powers. According to the CMA, there can be no dispute that its jurisdiction in respect of a transaction can be established even where the transaction is entered into outside of the UK by non-UK parties, on the basis that the transaction has a sufficient connection to UK markets. This was recognised by Briggs LJ in *Akzo* [26].

73. Seen in this light, the CMA contended that Sabre's reliance on the principle of comity does not advance its various arguments on statutory interpretation.

74. Moreover, Sabre's argument that section 23 should be construed restrictively (whether on the basis of the principle of comity or otherwise) is contrary to the wider purposes of merger control identified by Briggs LJ in *Akzo* and which also underpin the approach of Lord Mustill in *South Yorkshire Transport* – that is, the importance of ensuring effective merger control in the public interest.

75. As regards Sabre's submission that the Tribunal should determine the question of jurisdiction for itself and that the CMA's conclusions on jurisdiction are not entitled to any particular deference, the CMA's jurisdiction, and in particular the application of the share of supply test, does not depend on any simple finding of fact, such as whether a person is of a given age and hence a child (see *R (on the application of A) v Croydon LBC* [2009] UKSC 8 (*"A v Croydon"*) at [26]-[32]). It instead depends upon evaluative assessments in relation to several distinct issues which form part of the statutory test.

76. Further, the Act expressly provides in section 23 that the application of the share of supply is a matter for the judgment and discretion of the CMA. Matters requiring judgment under the scheme of the Act will be reviewable only on public law grounds. The judgment of Lord Sumption in *SCOP* at [31] does not suggest otherwise. As Lord Sumption there observed, the Tribunal must determine the scope and meaning of the jurisdictional test to be applied; once identified the application to particular facts is a matter for the judgment of the CMA.

77. In any event Sabre's grounds of challenge do not amount to any error of jurisdictional fact. They instead advance grounds which are, correctly, put on the basis of classic public law principles. Thus, the concept of jurisdictional fact does not apply to the issues before the Tribunal in this case.

(b) The case law

78. The Courts have considered the scope of the CMA's jurisdiction to investigate mergers on a number of occasions in recent years and have set out a number of key principles applicable to the interpretation of the CMA's jurisdictional provisions.

79. In *South Yorkshire Transport*, Lord Mustill considered the interpretation of the words "a substantial part of the United Kingdom" in section 64(3) of the Fair Trading Act 1973 (the predecessor to section 23(4) of the Act). In rejecting an arithmetical test, he stated as follows:

> "Nevertheless I am glad to adopt, as a means of giving a general indication of where the meaning of the word in section 64(3) lies within the range of possible meanings, the expression of Nourse L.J. [1992] 1 W.L.R. 291, 301c "worthy of consideration for the purpose of the Act. [29D].
>
> […]
>
> Like the asset-value criterion of section 64(l)(b), the epithet "substantial" is there to ensure that the expensive, laborious and time-consuming mechanism of a merger reference is not set in motion if the effort is not worthwhile. The reference area is thus enabled to be something less than the whole. [31B]
>
> […]

> Moreover, as was pointed out in argument, since local bus-services are by their nature both limited in F their field of operation and in total mileage run, it is hard to see how on an uncritical application of an arithmetical test they could ever qualify for investigation under the Act. It seems to me that where the task is to interpret an enabling provision, designed to confer on the commission the power to investigate mergers believed to be against the public interest the court should lean against an interpretation which would give ^ the commission jurisdiction over references of the present kind in only a small minority of cases. This is the more so in the particular context of local bus services, since the provision of adequate services is a matter of importance to the public, as witness the need felt by Parliament to make special provision for them in the Transport Act 1985. [31F-G].
>
> […]
>
> Nevertheless I believe that, subject to one qualification, it will be helpful to endorse the formulation of Nourse L.J. already mentioned, as a general guide: namely that the reference area must be of such dimensions as to make it worthy of consideration for the purposes of the Act. The qualification is that the word "dimensions" might be thought to limit the inquiry to matters of geography. Accordingly I would prefer to state that the part must be "of such size, character and importance as to make it worth consideration for the purposes of the Act". [32A-C].

80. In *Akzo* the Court of Appeal considered the jurisdictional provisions in the Act. Briggs LJ stated:

> "[20] The innocent-sounding phrase 'carrying on business in the United Kingdom' has been much used in UK legislation and, indeed, by the English courts as an analytical tool. The industry of Mr Ward and his team suggested that it appeared no less than 135 times in UK legislation going back as far as 1854. It has been in use within competition legislation since the 1940s, having originally appeared in the Monopolies and Restrictive Practices Act 1948. Like any phrase in a statute or other legal document, it must be read in context, having regard both to the general purposes of the legislation in question, and to the specific purpose for its inclusion, so far as that can be ascertained. A phrase may have a natural or ordinary meaning which admits of no ambiguity. Sometimes, as in the present case, ambiguity only appears when an apparently simple phrase has to be applied to particular facts.
>
> […]
>
> [24] It is in my judgment appropriate to have regard both to the wider general purposes of the Act in providing an effective regulatory regime to deal with anticipated or actual anti-competitive outcomes (see s36(2)), and to the specific purpose of s 86(1), which is plainly to set boundaries to the class of persons who may, in relation to their behaviour outside the UK, be targets for enforcement orders. But neither of those purposes leads to a conclusion that s 86(1) should either be broadly or narrowly construed. It must be interpreted with the fulfilment of both those purposes in mind so that, in particular, an interpretation which was destructive of either of them should be rejected, and an interpretation which gives best effect to both of them adopted if possible.

[25] In that context I accept Mr Ward's submission that international comity forms part of the reason why Parliament may be supposed to have thought it necessary to limit the class of targets of an enforcement order, in relation to conduct outside the United Kingdom. But it cannot be supposed that Parliament intended to apply a purely common law notion of comity, such as that set out in the note to section 128 in *Bennion on Statutory Interpretation* (5th edn, 2008):

> '*The principle of comity* An Act is taken to be for the governance of the territory to which it extends, that is the territory throughout which it is law. Other territories are governed by their own law. The principle of comity between nations requires that each sovereign state should be exclusively allowed to govern its own territory. So an Act does not usually apply to acts or omissions taking place outside its territory, whether they involve foreigners or Britons.'

It is obvious that this cannot have been the intention behind s 86(1) since it is in terms intended to permit three classes of persons to be subjected to regulatory control in respect of their conduct outside the UK.

[26] Rather, it seems to me that s 86(1) performs in relation to this regulatory jurisdiction a function often to be found in statutory provisions which give the English courts jurisdiction over the affairs of foreign individuals or companies, namely to set out connecting factors between targets of regulatory action and the UK which make it appropriate, rather than exorbitant, for the particular jurisdiction in question to be exercised over them in relation to conduct outside the UK. The connecting factors in the present case are UK nationality, incorporation under UK law and carrying on business in the UK. If any one or more of those connecting factors is shown to exist in relation to a person, then Parliament must be taken to have decided, notwithstanding the dictates of international comity, that it is appropriate to confer upon the Commission jurisdiction to make enforcement orders regulating that person's conduct outside the UK." (Emphasis added).

81. In *SCOP*, Lord Sumption stated at [31]:

> "It is necessary to deal first with a threshold issue. To what extent should the question whether a 'relevant merger situation' exists be treated as lying within the specialised expertise of the Competition and Markets Authority? I hope that it will not be thought disrespectful of the learning deployed on this issue, if I deal with it shortly. Under ss 22(1) and 35(1) the existence of a 'relevant merger situation' is a precondition of the Authority's jurisdiction to proceed with a reference. Section 35 requires the Authority to decide in the first instance whether such a situation has been created, subject to review by the CAT and appeal from the CAT to the Court of Appeal. But the test for determining what are the relevant 'activities' whose absorption by another enterprise founds the jurisdiction of the Authority is a question of law. It depends on the construction of the Enterprise Act. Of course, the process of construction must necessarily be informed by the purpose of these provisions, and to that extent the economic implications of different interpretations may be relevant. Moreover, once the test has been identified its application to particular facts may call for expert economic judgments by the tribunal of fact, in this case the Authority. But otherwise the Authority's expertise and the specialised nature of its functions do not clothe it with any wider power to determine its statutory jurisdiction

than is enjoyed by other administrative decision-makers, and its conclusions on the point are entitled to no greater deference on a review or appeal."
(Emphasis added).

82. Lord Sumption further stated:

"[38] The first point to be made is that in applying a scheme of economic regulation of this kind, the Authority is necessarily concerned with the economic substance of relevant transactions and not just with their legal form.

[39] Any situation in which an enterprise (call it the 'target enterprise') ceases to be 'distinct' will involve a transfer of control over assets, whether tangible or intangible. The phrase 'bare assets' does not appear in the Act, and simply as a matter of language may not convey much. But it is a useful concept when it comes to analysing the purpose of this legislation. The object of distinguishing between 'bare assets' and assets amounting to an 'enterprise' is to prevent the merger control regime from capturing an acquisition of assets which simply serve as factors of production in a new enterprise or as a means of achieving organic growth. It is designed to distinguish a case in which the acquirer acquires a business exploiting a combination of assets and a case where he acquires no more than he might have acquired by going into the market and buying equipment, hiring employees, and so forth separately. In the latter case, the fact that the equipment or the employees were previously employed in the target enterprise is irrelevant. He has got no more than he would have done if they had not been. So if the assets of which he acquires control are to be regarded as constituting an 'enterprise', (i) they must give him more than he might have acquired by going into the market and buying factors of production, and (ii) the extra must be attributable to the fact that the assets were previously employed in combination in the 'activities' of the target enterprise. Plainly, the longer the interval between a target enterprise's cessation of trading and the acquisition of control of its assets, the less likely it is that either criterion will be satisfied. The alternative is to conclude that the target enterprise has ceased to exist because its business is no longer characterised by any 'activities' capable of being continued by someone else. Ultimately the question turns on what Ms Bacon, rightly to my mind, called 'economic continuity'.

[…]

[41] The Authority directed itself according to the principle set out by the CAT in *Eurotunnel I*, which I have held to be correct. Once that point is reached, the application of the principle to the facts is a matter of expert evaluation. In these circumstances, the Authority's evaluation could not properly be discarded by a court of review unless it was irrational. Sir Colin Rimer found that it was. He considered that the Authority had erred in principle because the facts which it had found did not logically lead to the conclusion that the employees were 'transferred' from SeaFrance to the business operated by GET and SCOP after 2 July 2012…

[…]

[43] The essential reason why Sir Colin Rimer thought otherwise was that in his view the order of the French court on 9 January 2012 directing the dismissal of the employees terminated the link between them and SeaFrance. This, he thought, meant that their future re-employment by GET could not amount to a

> transfer, even when the arrangements embodied in PSE3 were taken into account. In point of form, this was so. But as a matter of economic substance it was not. True it is that the employees were not directly transferred from SeaFrance to SCOP. They were re-employed by SCOP after some months in which they had been unemployed or had found other work. However, the question was not whether the dismissals severed the connection between the employees and SeaFrance. The question was whether it severed their connection with a business that could be acquired and operated by someone else. One may test this by asking how the position would have differed if instead of making the employees redundant SeaFrance had kept them on but sent them on gardening leave. The result would have been legally different but its economic implications for what GET and SCOP acquired on 2 July 2012 would have been the same. It is in this context that one must view the impact of PSE3. The connection between the employees and the business was not severed by the court-ordered redundancies, because the court directed the redundancies on the express basis, required by French law, that a plan would be prepared within 15 days to safeguard their future employment. PSE3, the plan which emerged, provided a significant financial inducement for any acquirer of the ships to re-employ their former crews and shore staff to operate them in the same service as before. The Authority regarded this as a significant pointer to the economic continuity of the business. I think that they were right to do so, but it is enough for present purposes to say that it was a conclusion that they were entitled to reach.
>
> [44] This court has recently emphasised the caution which is required before an appellate court can be justified in overturning the economic judgments of an expert tribunal such as the Authority and the CAT: *British Telecommunications plc v Telefónica O2 UK Ltd* [2014] UKSC 42, [2014] 4 All ER 907 (at [46], [51]). This is a particularly important consideration in merger cases, where even with expedited hearings successive appeals are a source of additional uncertainty and delay which is liable to unsettle markets and damage the prospects of the businesses involved. Concepts such as the economic continuity between the businesses carried on by successive firms call for difficult and complex evaluations of a wide range of factors. They are particularly sensitive to the relative weight which the tribunal of fact attaches to them. Such questions cannot usually be reduced to simple points of principle capable of analysis in purely legal or formal terms. In this case, the majority of the Court of Appeal sought to reduce the question of economic continuity to the single question whether the legal effect of the decisions of the French court in January 2012 was definitively to terminate the employment relationship between SeaFrance and its crews. In my opinion this led them to take an unduly formal approach to the issue before them, and to discount the depth of economic analysis which underlay the Authority's original conclusion."
>
> (Emphasis added).

83. In relation to the limit on jurisdiction, *A v Croydon LBC* concerned the assessment of age of the claimants by a local authority when exercising its statutory duty to provide any accommodation to "any child in need" within the area pursuant to section 21 of the Children Act 1989. The Supreme Court considered questions which are regarded as setting the limit of jurisdiction of

the public authority and which questions relate to the exercise of that jurisdiction. The issue in this case is set out at [14] as follows:

> "The argument on construction, advanced by Mr John Howell QC for A, is quite straightforward. The words of section 20(1) themselves distinguish between the statement of objective fact–"any child in need within their area"–and the descriptive judgment–"who appears to them to require accommodation as a result of" the three listed circumstances–which is clearly left to the local authority. The definition of "child" in section 105(1), which applies throughout the 1989 Act, is unqualified: "a person under the age of 18"–not "a person who appears to the local authority to be under the age of 18" or "a person whom the local authority or any other person making the initial decision reasonably believes to be under the age of 18". Reaching the conclusion that this is what it means in section 20(1) requires, as the Court of Appeal accepted, words to be read into section 20 which are not there."

84. Baroness Hale considered the issues and reached the following conclusion:

> [26] These days, parliamentary draftsmen are more alive to this kind of debate. The 1989 Act draws a clear and sensible distinction between different kinds of question. The question whether a child is "in need" requires a number of different value judgments… Questions like this are sometimes decided by the courts in the course of care or other proceedings under the Act. Courts are quite used to deciding them upon the evidence for the purpose of deciding what order, if any, to make. But where the issue is not, what order should the court make, but what service should the local authority provide, it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and "*Wednesbury* reasonableness" there are no clear cut right or wrong answers.
>
> [27] But the question whether a person is a "child" is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision-makers.
>
> […]
>
> [29] I reach those conclusions on the wording of the 1989 Act and without recourse to the additional argument, advanced by Mr Timothy Straker QC for M, that "child" is a question of jurisdictional or precedent fact of which the ultimate arbiters are the courts rather than the public authorities involved…
>
> […]
>
> [31] This doctrine is not of recent origin or limited to powers relating to the liberty of the subject. But of course it still requires us to decide which questions are to be regarded as setting the limits to the jurisdiction of the public authority and which questions simply relate to the exercise of that jurisdiction. This too must be a question of statutory construction, although Wade and Forsyth on *Administrative Law* 9th ed (2004), p 257 suggest that "As a general rule,

> limiting conditions stated in objective terms will be treated as jurisdictional". It was for this reason that Ward LJ rejected the argument, for he regarded the threshold question in section 20 as the composite one of whether the person was a "child in need". This was not a limiting condition stated in wholly objective terms so as to satisfy the Wade and Forsyth test: [2009] PTSR 1011, para 25.
>
> [32] However, as already explained, the Act does draw a distinction between a "child" and a "child in need" and even does so in terms which suggest that they are two different kinds of question. The word "child" is undoubtedly defined in wholly objective terms (however hard it may be to decide upon the facts of the particular case). With a few limited extensions, it defines the outer boundaries of the jurisdiction of both courts and local authorities under the 1989 Act. This is an Act for and about children. If ever there were a jurisdictional fact, it might be thought, this is it."[7] (Emphasis added).

(c) Our conclusions

85. From the foregoing submissions and authorities, we draw the following conclusions.

(1) Any question of construction of the Act is a question of law for this Tribunal to determine.

(2) The application of the proper construction of the Act to the facts of the case is a matter for the CMA to determine in the first place.

(3) The Tribunal's review of the CMA's application to the facts is determined on judicial review principles and not a matter for fresh determination by the Tribunal. (This is clear from *SCOP*).

(4) Where the CMA's assessment involves matters of expert economic judgment, the Tribunal must show deference to the CMA's assessment, being that of an expert tribunal.

(5) On the other hand, where the CMA's assessment does not involve matters of expert economic judgment, the Tribunal must review that assessment in accordance with standard principles of judicial review, comprising a normal level of intensity of review.

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[7] Lord Hope considered the same issues at [50], [52] and [53]. He reached the same conclusion, on the basis that whether someone was a "child" is a question of jurisdictional fact for the court to determine.

(6) There is no warrant for the contention that because the CMA's assessment is in relation to a question of jurisdiction, the Tribunal's review under judicial review principles should be more intensive than normal.

86. Further, we do not consider that considerations of comity assist in the resolution of the jurisdictional issues in this case. Here, Parliament has expressly identified the relevant connecting factors which enable consideration of a merger with an *"extra-territorial"* dimension. Both jurisdictional tests in section 23 are based on a UK territorial connection. As regards the turnover test, there exists a jurisdictional nexus with the United Kingdom because the relevant turnover arises *"in the United Kingdom"*. As regards the share of supply test, the jurisdictional nexus to the United Kingdom is provided by the fact that the goods or services are supplied *"in the United Kingdom, or in a substantial part of the United Kingdom"*. Considerations of territoriality (and thus comity) are addressed within the share of supply test itself. Parliament has deemed these territorial connections sufficient as the basis for the exercise of statutory powers by a UK authority (see, by analogy, *Akzo* at [20], [24] and [26]). Either the UK has jurisdiction under this territorially defined test, or it does not. (Considerations of territoriality are further provided for in the SLC test, itself directed towards competition within any market or markets in the UK: see section 22(1)(b)). Thus, if the share of supply test is met, the UK has jurisdiction over the impact of the merger on markets in the UK.

87. Where one of the jurisdictional tests is satisfied, there can be no dispute that the CMA has a proper basis for exercising jurisdiction in respect of a transaction which is entered into outside of the UK by non-UK parties. The only possible issues therefore are the proper construction of the statutory test and whether the test is satisfied on the facts, as the CMA found. There is no wider question of the compatibility of the CMA's decision with the principle of comity.

88. In this case, Sabre has not identified any particular question of construction of the Act which would fall to be determined in accordance with the first of the propositions in paragraph 85 above. It is accepted that the selection of the "services of any description" within the meaning of section 23(4) of the Act is a matter for the CMA's discretion. That is a discretion in addition to the express

discretion as to value and criteria, identified in sub-sections (5) and (8) respectively. (By contrast, what is a "service", or "supply" or "prevails to a greater extent" (i.e. the increment), as those terms are used in section 23(4), are or may be questions of construction of the Act. However, Sabre has not identified any issue of construction of those terms).

89. As to the application of the legal test to the facts of the case (paragraph 85(2) above), the present case is analogous to the question of "in need", arising in *R v Croydon*, rather than the question of "age". The jurisdictional issue is not a simple question of objective fact, to which there is a binary "yes/no" answer. The Act expressly provides in section 23 that the application of the share of supply is a matter for the judgment and discretion of the CMA. The application of the test does not involve the determination of a matter of primary fact on which the Tribunal may substitute its judgment for that of the CMA. Rather the issue turns upon the assessment of a number of issues: how particular services may appropriately be characterised and how far they have features in common; how far particular services fall within that description taking into account the commercial substance of the arrangements and not just their form; what metric should be used to measure the parties' shares of supply; and how those metrics should be applied to the facts of a given case. None of these issues are properly characterised as questions of primary fact rather than matters of appraisal and judgment.

D. THE FINAL REPORT

90. The Final Report is a substantial document comprising 439 pages. In addition, there are seven supporting Appendices, A to G, which themselves comprise well over 300 pages. Save where otherwise stated in this judgment, reference to "paragraph" numbers are to paragraphs of the Final Report.

91. In the Final Report, the CMA found, in summary, that (i) it had jurisdiction over the Merger on the basis of the share of supply test in section 23 of the Act; and (ii) the Merger may be expected to result in an SLC within the supply of merchandising solutions on a worldwide basis and the supply of distribution solutions on a worldwide basis.

(1) Summary of the Final Report

92. The Final Report is structured as follows. Chapters 1 and 2 are short chapters setting out the CMA's terms of reference and a description of the Parties. Chapter 3 discusses the industry in which Sabre and Farelogix operate and Chapter 4 describes the Merger and its rationale. Chapter 5 addresses the question of jurisdiction. The following chapters, Chapter 6 (Market definition), Chapter 7 (The nature of competition), Chapter 8 (Evidence on current suppliers), Chapter 9 (Evidence from the Parties' internal documents) and Chapter 10 (Evidence from third parties) address the substantive competition issues. The CMA's overall assessment of the Merger, including its SLC findings, is set out in Chapter 11 which draws on the evidence discussed in other Chapters and in the Appendices. Chapter 12 goes on to consider whether there are any countervailing factors which would prevent a SLC from arising. Chapter 13 is a short one-page chapter summarising the CMA's overall findings and Chapter 14 deals with remedies. Of the supporting Appendices, one, Appendix D, relates to evidence from the Parties, whilst three relate to third party evidence: Appendix E (Competitor evidence), Appendix F (Airline evidence) and Appendix G (Travel agent evidence). The various Appendices are referred to, and relied upon, throughout the Final Report. We note the following particular chapters of the Final Report. (Chapter 5 is addressed in section (2) below).

93. *Chapter 6 (Market Definition)* defines the relevant markets for the assessment of the Merger. The CMA found that the relevant markets were (1) the supply of merchandising solutions to airlines worldwide, and (2) the supply of distribution solutions to airlines worldwide. It found that the Parties compete to serve airlines by both supplying merchandising solutions and distribution solutions which allow airlines to distribute content to travel agents and travellers. In respect of distribution in particular, the CMA concluded that the market includes services provided by GDS, distribution solutions based on NDC API (including GDS bypass) and direct channel (primarily airline.com), for the sale of tickets and ancillary content through travel agents and/or to passengers.

94. *Chapter 7 (The nature of competition)* outlines the relevant parameters of competition for merchandising and distribution. As regards distribution solutions in particular, competition takes place in multiple forms reflecting differentiated business models in the market. While the Parties' solutions allow airlines ultimately to distribute content to passengers, they operate different approaches which affect the ways in which they face constraints from each other and from other suppliers. While Sabre and other GDSs compete for both airlines and travel agents, Farelogix and other suppliers of distribution solutions based on the NDC API compete on the airline side only. Airlines decide how to use these solutions to connect to travel agents and passengers; these suppliers compete with GDSs and with one another by offering reliable innovative technology and lower booking fees to reduce airlines' distribution costs. The two theories of harm considered by the CMA were whether the Merger would give rise to an SLC on a worldwide basis (i) in the supply of merchandising solutions, and (ii) in the supply of distribution solutions.

95. *Chapter 8 (Evidence on current suppliers)* sets out the evidence on suppliers to support the CMA's decision on theories of harm in merchandising and distribution by giving an overview of the capabilities and recent performance of the Parties and their rivals.

96. In respect of distribution, based on the evidence on current suppliers' capabilities, the number and size of airline customers, number of bids won and market shares, the CMA considered that Farelogix was the most prominent and successful provider of NDC-compatible distribution solutions. Based on global market shares in the supply of distribution solutions including the direct and the indirect channels, the CMA found that:

    (1) Amadeus and Sabre are the largest providers by some distance.

    (2) Direct connects (NDC or non-NDC) accounted for 3% of bookings, with Farelogix accounting for less than 1%; and

(3) Direct channel accounts for half of the bookings. The channel's share remains relatively stable over time, but within this, airline.com has grown at the expense of call centres.

97. *Chapter 11 (Assessment of the Merger)* provides the CMA's assessment of the Merger including the relevant counterfactual and competitive effects.

98. *Chapter 13 (Conclusions)* gives a summary of the CMA's conclusions:

(1) The anticipated acquisition by Sabre of Farelogix, if carried into effect, will result in the creation of a relevant merger situation.

(2) The Merger may be expected to result in an SLC in the supply of merchandising solutions to airlines on a worldwide basis including in the UK. This SLC would manifest itself through a loss of innovation in merchandising solutions, resulting in reduced customer choice, fewer new features and upgrades being released more slowly.

(3) The Merger may be expected to result in an SLC in the supply of distribution solutions to airlines on a worldwide basis including in the UK. This loss of competition would lead to a reduction in innovation in distribution solutions, particularly in terms of the development of GDS pass-through capabilities by the GDSs, to the detriment of all airlines and travel agents across the sector.

99. *Chapter 14 (Remedies)* details the criteria applied by the CMA to assess the effectiveness of a remedy and the remedy considered appropriate. The CMA concluded that prohibition of the merger would be effective in remedying the SLCs and adverse effects they had found. Lesser measures would not be effective.

(2) Findings on jurisdiction

100. The CMA found that the Merger will result in the creation of a relevant merger situation within section 23(2) of the Act. Arrangements were in progress or in

contemplation which, if carried into effect, would lead to two enterprises ceasing to be distinct. Its findings on jurisdiction are set out in summary at paragraphs 25 to 36 of the Final Report. The CMA's detailed findings on jurisdiction in Chapter 5 are set out under the Grounds below.

101. The CMA found that the turnover test in section 23(1)(b) of the Act was not met. It therefore considered the share of supply test in section 23(2)(b). The share of supply test is satisfied if the merging enterprises both either supply or acquire goods or services of a particular description, and will, after the merger, supply or acquire 25% or more of those goods or services in the UK.

102. The Parties submitted that the share of supply test had not been met and thus the CMA did not have jurisdiction over the Merger.

103. The CMA considered that the Parties both supplied IT solutions to UK airlines for the purpose of airlines providing travel services information to travel agents, to enable travel agents to make bookings (being the RDS). Sabre supplied the RDS through the provision of its GDS to UK airlines. Farelogix supplied the RDS through its FLX Services to one UK airline, BA, in respect of one type of itinerary, interline segments. The CMA found that the Farelogix supply of the FLX Services to BA was underpinned by three commercial arrangements:

(1) The existing service agreement between Farelogix and American Airlines ("AA"), under which Farelogix supplies the FLX Services to AA, and must support and facilitate itineraries with AA's interline partners (the "Direct Connect Services Agreement");

(2) The interline arrangement between AA and BA (the "AA/BA Interline Agreement") which functions in the context of the joint revenue and cost sharing agreement with AA which, in turn, prompted BA to take steps to enable the sale of its interline segments through the FLX Services; and

(3) The existing 'FLX Interline Distribution Agreement' between Farelogix and BA entered into by BA to enable BA to use and receive supply of

the FLX Services with respect to interline segments (the "BA Agreement").

104. The BA Agreement provides for the creation of a technical connection to enable communication between BA's PSS and Farelogix. This technical connection enables BA to provide travel services information and to market its interline segments through the FLX Services in the context of its interline arrangement with AA and, thereby, to use and receive supply of the FLX Services. It also showed Farelogix's and BA's intentions, respectively to supply and receive supply of, the FLX Services with regard to interline segments in the context of the interline arrangement with AA. The CMA considered that the BA Agreement and supporting contemporaneous documents provided clear evidence that BA took active and conscious steps, and made a deliberate choice, to use and receive supply of the FLX Services. Therefore, BA effectively made a procurement choice in favour of the FLX Services for its interline segments.

105. The CMA considered that:

(1) The Direct Connect Services Agreement contemplates, and is intended to operate in the context of, interline arrangements (including the AA/BA Interline Agreement).

(2) The AA/BA Interline Agreement is necessary context to BA taking steps to enable the sale of its flights through the FLX Services.

(3) The terms of the BA Agreement and associated documents show a clear and active choice by BA to enable it to use and receive supply of the FLX Services to be able to market interline segments in the context of its interline arrangement with AA and that BA had regard to its competitive alternatives in doing so.

The CMA therefore found that Farelogix directly supplied the RDS to BA.

106. The CMA concluded that the 25% threshold was met on the basis that Sabre's share alone exceeded 25% of revenue from the provision of the RDS to UK

Airlines, and the CMA identified some increment from Farelogix's supply of the RDS to UK Airlines.

107. The CMA considered that both Parties derive value from the supply of the RDS to UK Airlines. For the purposes of the share of supply test, the CMA measured the value derived from the supply of the RDS to UK Airlines by considering revenues received and receivable for all providers of such services. It identified two possible indicators of such value regarding supply of the FLX Services by Farelogix to BA, namely part of the fee received by Farelogix from AA which is intended to cover the FLX Services provided in relation to BA Interline Segments, and the fee receivable directly from BA under the BA Agreement. In 2018 only a small number of tickets including a BA interline segment were processed through the FLX Services and the revenues received and receivable from these bookings is therefore small. However, the Act does not require a minimum increment.

108. In conclusion, the CMA found that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

E. GROUND 1: RELEVANT DESCRIPTION OF SERVICES (RDS)

109. This Ground concerns the definition of the RDS. The relevant parts of the Final Report germane to Ground 1 are as follows:

> "5.19 As set out in Chapter 3, Sabre supplies its GDS to airlines on a worldwide basis, including many UK Airlines. Sabre enters into direct agreements with UK Airlines for the provision of its GDS. Sabre's services include the provision of IT solutions to airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings.
>
> 5.20 As also set out in Chapter 3, the FLX Services also include the provision of IT solutions of this description to one UK Airline. In this context, Farelogix has an agreement with British Airways which enables British Airways to use the FLX Services to provide travel services information and market Interline Segments through travel agents. British Airways accordingly receives the supply of the FLX Services for the purposes of marketing its Interline Segments. This

service provision is underpinned by three commercial arrangements…[8]

[…]

Supply of IT solutions to airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings

5.25 As explained in Chapter 3, airlines provide passengers with access to travel services information and the ability to make bookings either directly (via their website or call centres) or indirectly (via travel agents (including online travel agents and travel management companies).

5.26 There are a number of different IT solutions that third-parties provide to airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings. The most common is a GDS. But over recent years Direct Connect services providers and non-GDS aggregators have been providing alternative IT solutions for airlines to provide travel services information to travel agents for the purpose of making bookings. These IT solutions operate in different ways but they all ultimately allow travel agents to access relevant flight information and make bookings on behalf of passengers.

5.27 In assessing whether we are able to identify a reasonable description of goods or services that includes both Sabre and Farelogix, we have first considered the services supplied by each of the parties:

(a) Sabre provides a GDS, ie an IT solution that connects airlines with a point of sale operated by a third-party retailer (such as travel agents and travel management companies). This connection enables airlines to transfer travel services information to the GDS (which subsequently consolidates and provides the travel services information to travel agents), and to sell tickets to passengers through travel agents.

(b) Farelogix (via the FLX Services) provides an IT solution that enables airlines to connect to a third party (including travel agents, non-GDS aggregators, and GDSs) or their own website. To do so, Farelogix builds an Application Programming Interface (API) that, upon the request of the airline, is exposed to third parties (eg the travel agent) to allow that third party to build a connection to the airlines systems. Occasionally, to allow the airline's interline partners to market Interline Segments to passengers through travel agents, via the FLX Services, Farelogix also sets up a technical connection between the airline and certain of its interline partners (where such technical connection is required). The creation of this connection is a necessary component for the interline partner to use and receive supply of the FLX Services in the context of interline bookings as it enables the interline partner to use the FLX Services to provide travel services information and market Interline Segments through travel agents. Thus, both the airline and its

[8] Set out in paragraph 103 above.

interline partner benefit from the creation of the technical connection.

5.28 Accordingly, both Sabre (via its GDS) and Farelogix (via the FLX Services) supply IT solutions to airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings. Therefore, we have identified the supply of 'an IT solution to airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings' as the relevant description of services (the Relevant Description of Services) for the purposes of determining whether the share of supply test is met.

5.29 We consider that other providers of these services are the other main GDSs (Amadeus and Travelport), smaller GDSs (eg Host Direct),9 other Direct Connect providers (including NDC Direct Connect and Non-NDC/XML direct connects), and non-GDS aggregators.

Reasonableness of the Relevant Description of Services

5.30 The Parties submitted that the Relevant Description of Services is inadequate and unreasonable for use in the share of supply test.

5.31 The Parties submitted that the Relevant Description of Services is lengthy, complex, involves a large degree of economic analysis, and has required nearly a year to crystallise. However, we do not consider that these factors, individually or collectively, are determinative of, and nor do they constrain, the application of the share of supply test. We consider the Relevant Description of Services reasonably reflects the outcome of a comprehensive investigation by the CMA to engage with extensive and detailed submissions made by the Parties regarding the highly technical nature of the services they provide and to understand the commercial reality underlying such services.

5.32 The Parties also submitted that the Relevant Description of Services does not correspond to how competition takes place, or any recognised commercial or industry standard. However, we consider that the Relevant Description of Services reflects the commercial reality of how tickets are distributed through the indirect channel. In any event, whilst the factors identified by the Parties may inform our assessment of the commercial reality underlying the nature of the services provided by the Parties, we consider they are not determinative of the appropriateness and reasonableness of the Relevant Description of Services.

5.33 Accordingly, and having carefully considered the Parties' submissions, we consider that the Relevant Description of Services is reasonable and appropriate in the circumstances of this case." (Footnotes are omitted). (Emphasis added).

110. Footnote 117 to paragraph 5.26 states:

[9] Other GDSs (eg Host Direct) are similar to GDSs but are focused on certain geographic areas.

> "We note that airlines can also self-supply these connections in-house. For the purposes of the share of supply test we are considering services supplied to airlines by third-parties."

Paragraphs 5.34 to 5.37 assessed which services fell within, and outside, the RDS: see Ground 4 below. In particular paragraph 5.37(a) (set out at paragraph 320 below) refers to the exclusion of self-supply.

(1) The Parties' submissions

(a) Sabre

111. Sabre submitted that, in the course of its investigation, the CMA had considered and abandoned a series of different formulations of the RDS, in respect of which the Parties raised substantial objections, including as to whether the share of supply would be at least 25%.

112. Eventually, for the purpose of the Final Report, Sabre submitted that the CMA devised a different form of words (at paragraph 5.28) which was vague and sweeping in some respects and convoluted in others. It was not open to the CMA to reverse engineer an RDS to deliver an outcome covering both Parties' products, but narrow enough that the share of supply was over 25%.

113. Sabre argued that, in certain respects, the RDS is so broad as to be effectively meaningless. The term 'supply of an IT solution', for example, can encompass the provision of cables and monitors, or complex software programmes, or an IT helpdesk service. All of these 'IT solutions' are required for airlines to provide travel services information to travel agents, thus limiting the utility of the qualifier introduced by the CMA.

114. The Mergers Guidance states that an RDS will often correspond with a standard recognised by the industry in question. That also serves to ensure that there is an underlying rationale to the RDS. However, the RDS is unrecognisable. The GDS is much more than an "*an IT solution [supplied] to airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings*" (paragraph 5.28). That is a description at a level of

abstraction far removed from the commercial reality of the comprehensive service that the airline customers actually pay a GDS to market, distribute and – ultimately – make sales of its flights through the GDS's travel agent network. It also does not describe the other side of the two-sided platform – the further services the GDS provides to the travel agents.

115. On the other hand, the CMA used the more specific requirement that the services encompass provision of information "to travel agents" to enable "travel agents" to make bookings – rather than, say, end consumers - to exclude other products with functionality that would otherwise fall within the RDS.

116. In applying the share of supply test, Sabre acknowledged that the CMA was not required to carry out a full market definition exercise. However, Sabre argued that the CMA must form a view on whether the relevant services bear such a relationship to each other as to justify the use of the CMA's investigatory resources and enforcement powers.

117. Section 23(8) of the Act requires that the CMA does so by reference to specific criteria to ensure that there is a *rationale* for the CMA's decision to treat the products supplied by the Parties as related sufficiently closely to justify subjecting the transaction to an investigation by the CMA. That requires identifying express criteria, in accordance with section 23(8), and then applying those criteria in a consistent and coherent manner to identify the RDS.

118. Sabre did not dispute that section 23(8) provides flexibility and invests the CMA with a broad discretion. However, Sabre argued that this discretion is not unfettered and is constrained by public law. What the statute requires is the specific identification of criteria that provide a rationale for grouping the two products together, not merely a form of words that, the CMA asserts, encompasses both. A decision made without prior consideration of appropriate criteria, and without reference to those specified criteria, is thus wrong in law, regardless of its rationality. It is moreover inimical to legal certainty if the criteria used are entirely unrecognisable to the industry participants whose transactions are subject to regulation.

119. Sabre argued that the overall result is a definition of the RDS that is arbitrary. The consequence of the absence of any explicit criteria or rationale is apparent from the way in which the CMA "*considered the scope of the RDS and, in particular, which suppliers are to be included and excluded from the RDS*"[10] and the errors it made in that process, which are addressed in Ground 4 of this Application. Under a properly defined RDS, it should, at least in most cases, be readily apparent whether or not a particular service meets the stipulated criteria.

120. Sabre submitted that the invocation of "common functionality" cannot justify the CMA's approach. Paragraph 5.26 does not assist the CMA:

(1) The Act requires the adoption of criteria that in fact describe the relevant economic activity – i.e. they describe the actual product or service being provided. Reliance on mere common functions (such as 'things that fly', or 'sending emails') would not meet that statutory requirement. For example, architects and accountants both use email. But it could not be said that they are 'email sending services' of the same description because of that common functionality. Here, the CMA has identified a "functionality" of the GDS which is far removed from its full suite of functions. It provides no recognisable "description" of those services.

(2) If that was the CMA's approach it would have had to include all "IT solutions", including the IT matters referred to above, within its definition. All of those form part of the function that the CMA purports to rely on.

(3) Neither the GDS nor Farelogix's API provides a complete "commercial solution". As discussed in Ground 4 below, both are, at most, only part of such a "solution". Nevertheless, the CMA excludes a number of providers which also provide such "commercial solutions".

(4) To permit an RDS which relied primarily on common functionalities would make a nonsense of the horizontal overlap requirement in section

[10] As explained in its Defence.

> 23. Many inputs share functions with their downstream products – for example, finance software and trading screens both enable trades to be executed, and flour and cake both enable hunger to be sated.

121. Moreover, section 23 requires that services be of the "same description" and paragraph 4.56 of the Mergers Guidance is explicit that "the test cannot capture mergers where the parties are solely active at different levels of the supply/procurement chain." The Supreme Court in *SCOP* emphasised that in applying jurisdictional provisions, the decision maker had to have regard to the economic substance.[11] Despite this, the CMA failed to give any consideration to the relationship between the parties, and between Farelogix's API and the GDS, in the supply chain. The Farelogix API is an input to an airline's own distribution channel. Airlines use an API to allow third parties to create a connection to their systems, be that a GDS or a travel agent. But Farelogix has no responsibility for distribution of the airline's content.

122. The CMA's failure to consider that vertical relationship[12] cannot be answered by trying to shoehorn an "*overlapping horizontal relationship in the services*" into the broad wording of the RDS. The CMA's assertion of an overlapping horizontal relationship therefore cannot replace a proper assessment of the commercial reality and economic substance of the services involved, so as to ensure the proper application of the statutory requirement and guidance. The failure to carry out such an assessment amounts to an error of law.

123. Finally, Mr Ward, in oral argument in reply, further submitted that if the rationale for the CMA's definition of the RDS is to capture competing products, there would be have been no reason exclude from the RDS airline.com or self-supply, and that it is no answer to say that they are excluded because there is no supply "to airlines". Such an answer merely states the exclusion rather than justifying it. That does not explain why the definition is so framed so as to limit services to those supplied "to an airline". This was the first time that Sabre had raised this argument as a basis for its *Ground 1* challenge.

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[11] *SCOP* at [38].
[12] The Mergers Guidance, paragraph 4.1.4 defines non-horizontal mergers as including "*mergers between firms that operate at different levels of the supply chain of an industry*".

(b) The CMA

124. The CMA refuted Sabre's allegation that the CMA failed to identify the "criteria" on which its RDS is based under section 23(8).

125. The thrust of section 23(8) is not to impose obligations on the CMA; it is to vest the CMA with a broad discretion as to how it identifies a potential overlap, or not, as the case may be. The discretion is to choose the criteria. Here the criterion used to decide whether services are of the same description or a different description is the RDS (as defined in paragraph 5.28). It adopted a formulation of the RDS which has a number of elements and then used that formulation to decide whether the share of supply test is met and whether specific services fell within the RDS or not. The RDS refers to the purpose of the service and the CMA looked at the purposes of various different services. It is concerned with services provided to airlines, and the CMA looked at whether services are provided to airlines.

126. Although framed as an error of law, Sabre's complaint under Ground 1 is in substance that the CMA has acted irrationally (or failed to give adequate reasons) in formulating the RDS. Thus, the argument based on section 23(8) blurs into a complaint that the CMA's decision was not based on "rational criteria" and failed to provide a sufficient "rationale for grouping the two products together".

127. The CMA explained its approach to the RDS at Final Report, paragraphs 5.19 to 5.37. In summary:

(1) The CMA identified the RDS at paragraph 5.28 (in the underlined terms set out above). The terms "airline content" and "travel services information" are used interchangeably in the Final Report.[13] Both Sabre and Farelogix fall within the RDS. Sabre does so by virtue of its GDS. Farelogix does so via its FLX Services (e.g. Open Connect (OC) and FLX NDC API).

[13] As appears from paragraph 3.12 and footnote 111.

(2) In formulating the RDS, the CMA attached particular weight to the fact that Sabre's GDS and Farelogix's FLX Services have common functionality – they both allow travel agents to access travel services information and make bookings of behalf of passengers. The CMA also took into account the fact the two services establish commercial alternatives for airlines for the same purpose (paragraph 5.26). The CMA considered that these factors reflected the "commercial reality" of the position (paragraphs 5.31 and 5.32).

128. These findings must be seen in the context of the CMA's broader findings concerning the competing roles which Sabre's GDS and the FLX Services provide to the industry and will do going forward.[14] The RDS must be read in light of the Final Report as a whole.[15]

129. The CMA acknowledged that Sabre's GDS and Farelogix's FLX Services operate in different ways technologically and provide the RDS functionality in the context of different business models. The CMA expressly "*recognized that these IT solutions operate in different ways*": paragraph 5.26. However, that does not prevent them falling within a common description of services for the purposes of section 23.

130. Given the competition which exists between the supply of Sabre's GDS and FLX Services in facilitating the making of reservations in the indirect channel,[16] the proposition that there is no RDS which properly embraces both of them is implausible and it is also wrong.

131. Sabre's specific criticisms of the CMA's approach to the RDS are flawed for the following reasons.

132. First, Sabre complains that the RDS is overly broad and meaningless. In fact, the RDS read as a whole is suitably specific i.e. it applies to IT solutions which are (i) provided to airlines (ii) to provide travel services information to travel

[14] See e.g. Final Report, paragraphs 5.19, 5.20 and 5.25, referring to the industry section in Chapter 3.
[15] *BAA* at [20(8)] and *Stagecoach* at [46].
[16] As found in the Final Report, paragraphs 6.32-6.36, 7.6-7.7 and 9.215-9.220.

agents (iii) for the particular purpose of enabling travel agents to make bookings.

133. Moreover, the critique is based on a strained and artificial reading. For instance, whilst an IT cable may be used by an airline to set up its IT infrastructure, to suggest that it is an IT solution supplied for the purpose of providing specific types of information to travel agents is to deprive the clear, limiting, language of the RDS of any meaning.

134. Secondly, Sabre contends that the description is not recognisable to industry and does not reflect the commercial reality of how tickets are distributed through the indirect channel. However, the RDS does not reflect an industry standard for good reason - the RDS transects different business models and technological solutions which nevertheless offer common functionality and provide commercial alternatives to one another. In such a context, it is not irrational for the CMA to adopt an RDS which does not follow industry standard terminology, and which instead reflects the commercial reality that the different service models embraced by the description compete to offer the same functionality. Rather, if this was not done, the fact that this is a differentiated market in which the Parties deliver the same function would not be captured.

135. Thirdly, Sabre cross-relies on the points made under Ground 4 to bolster its complaint under Ground 1. The criticism is wrong and illogical. Sabre has engaged in a concerted argument about the scope of the services provided under the RDS, with the purpose of reducing its share of the relevant supply.

136. The further complaint that the CMA has "tailored" the RDS so as to exclude certain services from the RDS is also wrong. The fact that the RDS does not encompass suppliers as diverse as Google and Openreach alongside Sabre and Farelogix does not suggest any flaw in the RDS.

137. Finally, it was rational to exclude self-supply from the definition of the RDS because the purpose of the share of supply test is to identify mergers which have implications for competition. Whilst self-supply might exert some competitive constraint, it is not irrational for the CMA to focus on external suppliers who

provide their services to airlines, operating on a competitive market. Self-supply, even of the same functionality, is of a different nature to the supply by external third parties.

(2) The Tribunal's analysis

138. We start with the observation that Sabre has put forward a series of disparate and overlapping legal bases for its challenge under Ground 1, which have not been easy to separate out. These include the following: the RDS is not a lawful basis - in adopting the description in paragraph 5.28 the CMA "erred in law"; it failed to address itself properly to the statutory questions in section 23 - in particular as to what are the criteria relevant to identifying when goods or services be treated as a suitable RDS in this case; it applied the share of supply test in an arbitrary way, contrary to its purpose as a limit on the use of CMA resources and powers; it disregarded its own Guidance both in relation to vertical relationships and industry categorisation; its approach was unreasonable and insufficiently reasoned.

(a) "Services of any description" and the share of supply test: the relevant statutory provisions

139. First, the issue under Ground 1 is whether the CMA erred in the way it defined, in the Final Report, the RDS for the purposes of the application of the share of supply test in section 23(2)(b) of the Act. The RDS is not a term of art referred to in the Act. The Act refers, at section 23(4), to "services of any description"; and when read in conjunction with section 23(8) effectively requires the identification of services of the same description. The CMA refers to the RDS to identify a set of services of a particular description for the purpose of applying the share of supply test.

140. Section 23(8) makes provision for the criteria for deciding when services can be treated as services of a *separate* description and thus, as a necessary corollary, criteria for deciding when services are to be treated as being of the *same* description. Importantly, those criteria are to be determined by the CMA and on

the basis of what the CMA considers appropriate in the circumstances of any particular case.

141. In our judgment, section 23(8) therefore provides the CMA with a broad discretion as to the *setting* of criteria which identify services of a particular description and distinguish them from services of a separate description. In any event, if and in so far as identification of "services of any description" in section 23(2) is a distinct, and prior, question to the identification of the criteria in section 23(8) (or indeed the measure of value under section 23(5)), it is common ground that the CMA has a discretion in making that identification.

142. Given the width of the CMA's discretion, Sabre's challenge under Ground 1 can only be a challenge to the rationality of the CMA's choice of the RDS and/or choice of criteria. We consider that, under Ground 1, Sabre has not identified any prior question of construction of section 23 upon which it might found an arguable error of law in the CMA's approach to the identification of the RDS.

143. Secondly, central to the rationality of the CMA's definition of the RDS is consideration of the underlying statutory purpose of the requirement for such a definition, and, in turn the underlying purpose of the share of supply test. The "share of supply test" identifies mergers where the turnover test is not met, but which nevertheless fall within the jurisdiction as being suitable for investigation by the CMA. In a general sense, it might be said that the purpose is to identify those smaller mergers which are "worthy of consideration" i.e. warrant the devotion of time and resources by the CMA and the parties. In this regard, whilst recognising that it was specifically directed to the geographical element of supply "in a substantial part" of the UK , we consider that the test of "worthy of consideration for the purposes of the Act" identified in *South Yorkshire Transport* is an important benchmark in considering the jurisdictional threshold test, not least because that too was a case concerning the share of supply test.

144. More particularly the fact that the qualification for jurisdiction is set by reference to specific goods and services and a quantitative assessment of the parties' involvement in the supply of such goods or services indicates, in our view, a more specific purpose of the share of supply test. That specific purpose

is to identify a merger which involves a degree of overlap in commercial activity[17] (i.e. a relevant increase in proportion of supply by the newly single supplier) above a certain level, so as to warrant investigation by the CMA. In turn, we consider the reason that overlap in supply warrants investigation is that such increase in single supply *may potentially* have implications for competition. In summary, the purpose of the share of supply test is to identify a merger which does not meet the turnover test, but in respect of which there is a sufficient prospect of a competition concern arising from an overlap in relevant commercial activity as to render it worthy of investigation. The CMA's chosen definition of the RDS must therefore serve this statutory purpose.

145. Having said that, the share of supply test is not to be equated with a "market share" test i.e. the identification and analysis of an economic market and the merging parties' share of that economic market. Such an analysis requires, in the first place, a detailed market definition exercise and that is an exercise which is to be undertaken by the CMA within the substantive investigation of whether the merger gives rise to an SLC, on the basis that the CMA has jurisdiction over the relevant merger situation. As pointed out in paragraph 4.56 of the Mergers Guidance, the jurisdictional "share of supply" test does not involve the definition of an economic market. That this is so is demonstrated by the fact that in appropriate circumstances on the facts of a particular case a merger might give rise to (and the CMA might properly find) an SLC even where the merger parties have less than a 25% share of the relevant economic market. Indeed that was the CMA's finding in the present case, where in relation to merchandising there was a finding of an SLC in circumstances where Sabre and Farelogix had a combined market share of substantially less than 25%.

(b) The RDS in the present case

146. In the present case, the RDS is as stated at paragraph 5.28 (set out above). That definition has the following elements:

(i) the supply of an IT solution;

[17] In argument, the Parties referred to this as "concentration in supply". We do not use that term because of its specific use in the context of a substantive competition analysis of an economic market.

(ii) to airlines;

(iii) for the purpose of airlines providing travel services information to travel agents;

(iv) to enable travel agents to make bookings.

Element (iii) in turn has two aspects: the purpose of enabling *airlines* to provide travel services information (in general/to anyone); and the purpose of that information being provided *to travel agents* (enabling the latter to make bookings).

147. First, in the present case the definition of the RDS clearly defines the service in question by reference to its functionality. In our judgment, "functionality" describes the purpose of the service in question; and not merely the means by which the purpose is achieved. Thus, Sabre's claimed analogies with the use of emails by both architects and accountants or the supply of an IT cable, fail to distinguish between the purpose of the service and the means by which the service is achieved. That the definition is made by reference to "functionality" is made clear by paragraph 5.26 and in particular the final sentence. The fact that the relevant purpose is achieved by different means does not detract from the CMA's conclusion that the same purpose is achieved by the differing services.

148. The CMA concluded that both Sabre and Farelogix supply the RDS, as so defined. Where airlines are supplying their services through the indirect channel, they have to make travel services information available to travel agents. There are differentiated products available to them to do so. They can use a GDS or they can purchase a stand-alone direct connect. Whilst those differing services are achieved by different means, each has the same "functionality" i.e. serves the same purpose.

149. The CMA's approach is to define the RDS by reference to functionality and common functionality as between services provided by the merging parties. Such an approach cannot be regarded as irrational.

150. Secondly, it is clear from Chapter 3 of the Final Report, that the services of Sabre and the services of Farelogix in serving this functionality are commercial alternatives which to some extent compete with one another. That Farelogix provides a commercial alternative is made clear at paragraph 5.26. The issue is whether the parties to the merger do a sufficiently similar thing. At this stage of jurisdiction, what is being considered is the overlap in supply between the merging parties.

151. Accordingly, within its own terms, we consider that, first, it is appropriate for the CMA to describe a category of services by reference to their functionality; secondly, that here the RDS identifies a service by reference to its functionality; and thirdly that, by reference to functionality, both Sabre and Farelogix supply that service.

(c) Sabre's particular arguments

152. We turn to consider specific criticisms made by Sabre of the CMA's approach. First, as regards the suggestion that the CMA has failed to identify relevant criteria within the meaning of section 23(8), we accept the CMA's contention, developed in oral argument, that the terms of the RDS themselves, comprising the various elements identified above, constitute the criteria for "*for deciding when … services can be treated… as… services of a separate description*" and thus, for deciding when services can be treated as services of the *same* description. Once those criteria have been identified in this way, then, as we point out below, the CMA must apply them uniformly to any and every service which falls for consideration.

153. Secondly, as regards the suggestion that the requirement for "supply of an IT solution" is too broad and that it is inadequate to describe either Sabre's GDS or Farelogix's direct connect service, the scope of the IT solutions falling within the RDS is narrowly circumscribed by reference to the remaining specific elements of the definition described by way of function. Moreover, we note that the parties themselves describe the service that they offer in terms of being an "IT solution".

154. Thirdly, as regards the contention that here the RDS is commercially unrecognisable, the second bullet point of paragraph 4.56 of the Mergers Guidance makes it clear that there is no need for the RDS to correspond with "a standard recognised by the industry". Nor, in our view, in so far as there is a distinction, is there any requirement for the description to be "commercially recognisable", where, as here, there is evidence of common functionality and of perception as commercial alternatives. Indeed paragraph 4.56 emphasises the width of the discretion given to the CMA in describing the relevant services.

155. Fourthly, the facts that Sabre's GDS provides a wider range of services than those provided by Farelogix and indeed beyond the services comprised within the RDS, and that it is a "two-sided" product (supply of services also to travel agents) do not detract from the suitability of the chosen RDS. The purpose of the RDS (and ultimately of the share of supply test) is to identify services with common functionality provided by the merging parties which are regarded as commercial alternatives. The fact that one of the parties' products supplies other services which provide additional functionality (and to another party) is not relevant to whether or not the RDS is appropriate.

156. Fifthly, as regards reliance upon the vertical relationship between Farelogix's API and Sabre's GDS in the supply chain, paragraph 4.56 of the Mergers Guidance makes it clear that the exclusion of vertical relationships from the share of supply test applies only where that relationship is *wholly* vertical. Where there is some horizontal overlap between the services supplied by the parties, the share of supply test is still applicable. Whilst in certain circumstances Farelogix's API may be an input for the supply of travel services information by an airline through the GDS, in many other situations the use of the API is a commercial alternative to the use of the GDS.

157. Sixthly, as to the suggestion that the definition of the RDS is arbitrary in the light of consideration of suppliers found to be included and others found to be excluded, in our judgment, in so far as it relates, for example, to the inclusion of non-GDS aggregators, this is an issue which falls for consideration under Ground 4. An argument that non-GDS aggregators should not have been

included within the RDS *as so defined* does not go to the issue of the rationality of that definition itself: see further paragraph 380 below under Ground 4.

158. As to Sabre's argument that the exclusion of self-supply was contrary to the rationale for the CMA's definition of the RDS, in our judgment there are two relevant features which distinguish self-supply from supply by a third party. First, in the latter case, but not in the former, the service is offered for sale on the open market and is available to all airlines; secondly, in the latter case, but not in the former, the service competes with other suppliers for the business of other airlines. Whilst, even if it might be that, in relation to individual airlines who could and did choose to self supply, self-supply exerted competitive pressure, self-supply is not a product which is made available to airlines generally in the same way as products supplied by external suppliers. There is therefore a sufficient difference in the commercial reality of the availability of those forms of supply. Consequently, whilst "self-supply" is relevant to the economic analysis of SLC issues, the CMA was entitled to conclude that it did not fall for consideration in formulating its RDS at the jurisdictional stage of assessing "share of supply". For these reasons we consider that it was within the discretion afforded to the CMA under section 23 to confine the RDS to external third party supply of the services and it was not irrational to exclude self-supply from the definition of the RDS.

159. As regards the explanation for the exclusion of self-supply given in the Final Report (to be found at footnote 117 and paragraph 5.37(a)), whilst it is very brief, we do not consider that this amounts to a failure to give reasons sufficient to constitute a self-standing basis to impugn the Final Report under Ground 1. First, Sabre did not positively rely upon failure to give reasons *for the exclusion of self-supply* under Ground 1[18]. Secondly, any brevity of reasoning on this one detailed point does not meet the requirements set out in *BAA* [20(8)] (see paragraph 59 above) justifying the quashing of the Report on this ground: this point is not one of the principal important controversial issues; it is not possible to infer from any brevity of reasoning that the CMA failed to reach a rational

[18] NoA paragraph 62 e is a general unparticularised plea under Ground 1; the exclusion of self-supply was not pleaded at all under Ground 1.

decision on the substance of the issue; Sabre has not been substantially prejudiced; and overall this is not an indication of "something seriously awry".

160. Finally, Sabre referred to the fact that, in the course of the investigation, the CMA put forward, at least four earlier, and different, formulations of the RDS which, in the face of objections raised by the parties, the CMA did not pursue further. Whilst not going so far as to suggest that, in reaching its final formulation, the CMA alighted upon one which would give it jurisdiction to make its final determination on the substance, Sabre sought to argue that this demonstrated the arbitrary nature of the definition at which it finally arrived. We shared some of this concern: the putting forward of a variety of formulations might be said to demonstrate a lack of certainty or clarity in the CMA's formulation of its ultimate criteria. However, we do not consider that the CMA's iterative process of itself establishes the irrationality of the CMA's ultimate definition of the RDS. First, the rationality of that definition stands or falls to be determined by its own terms. Secondly, whilst as a matter of strict logical analysis, the question of jurisdiction necessarily arises prior to a substantive SLC examination of the merger, the CMA's consideration of jurisdiction involves two distinct stages: first, under section 33(1), in considering whether a reference should be made, where the issue is whether it is "*or may be* the case" that a relevant merger situation has been created; and secondly, once a reference has been made, under section 36 where the CMA must "decide" whether a relevant merger situation "*has been* created". That latter decision will in general be taken at the conclusion of the reference, and taken following the investigation which has also considered the logically subsequent question of whether there is or may be expected to be an SLC. It is therefore inherent in the scheme of the legislation that the CMA's analysis on the application of the share of supply test (and within that its identification of the RDS) may be refined over, and will take account of all relevant evidence and information gathered in, the course of the investigation. The CMA addressed this point at paragraph 5.31 of the Final Report. We agree that the CMA was entitled to consider the extensive and detailed submissions made by the parties over the course of the investigation before reaching a final view of

the RDS, which properly included a fair and rational assessment of those submissions.

(3) Conclusion on Ground 1

161. For these reasons, the CMA did not fail to address itself properly to the statutory questions arising under section 23. The CMA identified the criteria required pursuant to section 23(8). The CMA did not apply the test in a way that was contrary to the purpose of limiting use of CMA resources and powers. The CMA properly applied the Mergers Guidance both in relation to roles in the supply chain and industry standards. The CMA's RDS was in all the circumstances a reasonable one and the CMA gave adequate reasons for its conclusions.

162. For these reasons, we conclude that, in identifying its RDS, the CMA neither erred in law nor reached a conclusion which was irrational.

F. GROUND 2: FARELOGIX DOES NOT SUPPLY SERVICES OF THE RELEVANT DESCRIPTION IN THE UK

163. The issue in relation to this Ground is whether the CMA erred in concluding that Farelogix made a supply of RDS in the UK, and in particular whether it made a supply to BA.

164. In addition to paragraphs 5.20 and 5.27(b) as set out at paragraph 109 above, the parts of the Final Report relevant to Ground 2 are as follows:

> "5.16 Sabre supplies its GDS to airlines, including many UK airlines (ie airlines which hold a Type A Civil Aviation Authority (CAA) operating licence) (UK Airlines) in respect of a range of itineraries. Farelogix has an agreement with one UK Airline, British Airways, which enables it to use Farelogix's FLX OC and FLX NDC API (collectively referred to as the FLX Services) in respect of one type of itinerary, Interline Segments (as defined in Part A of Appendix B) in the context of its interline arrangement with American Airlines. The effect of this agreement, when considered in the context of a number of other related arrangements, is that British Airways receives the supply of the FLX Services for the purpose of marketing its Interline Segments. We therefore consider that both Sabre (through its GDS) and Farelogix (through the FLX Services) supply services of a particular description, namely IT solutions to UK Airlines for the

purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings...

[…]

5.40 As further explained below, we consider that Farelogix supplies the Relevant Description of Services in the UK to British Airways. In particular, we consider that British Airways uses and receives supply of the FLX Services in order to enable British Airways to market Interline Segments (as defined in Part A of Appendix B) under the interline arrangement with American Airlines.

[...]

Farelogix directly supplies the Relevant Description of Services to British Airways on the facts of this case

5.43 As further explained below, we consider that Farelogix supplies the Relevant Description of Services to British Airways.

5.44 Our finding that Farelogix supplies the Relevant Description of Services to British Airways takes into account the commercial reality of the existing relationships between Farelogix, American Airlines, and British Airways. We have had particular regard to the fact that interactions between firms and their customers in the Parties' areas of activity might not be reduced to single (formal) 'procurement' decisions giving rise to direct contractual relationships, and that it is necessary to consider the significance of commercial relationships in the round and having regard to all of their various component parts.

5.45 Whilst Farelogix has not entered into a Direct Connect services agreement with British Airways for the provision of the FLX Services, when the relevant commercial arrangements are understood in the round, we do not consider that is determinative of whether Farelogix supplies the FLX Services to British Airways with respect to its Interlining Segments under its interlining arrangement with American Airlines. To understand the nature and effect of those arrangements, it is necessary to consider three commercial arrangements: the Direct Connect Services Agreement in place between Farelogix and American Airlines; the interline arrangement in place between American Airlines and British Airways; and the British Airways Agreement.

5.46 When assessing this evidence in the round we consider that Farelogix intends to, and does, supply FLX Services to British Airways in respect of its Interline Segments and that British Airways made a relevant procurement decision, in the UK, to receive supply, and still receives supply, of the FLX Services in respect of its Interline Segments.

The Direct Connect Services Agreement

5.47 We acknowledge that the Direct Connect Services Agreement primarily governs the supply of the FLX Services to American Airlines. However, we consider that:

- The Direct Connect Services Agreement contemplates and is intended to operate in the context of interline arrangements (including the American Airlines' interline arrangement with British Airways).

- The service specifications include requirements for Farelogix to support itineraries with other airlines. The Direct Connect Services Agreement accordingly establishes a framework pursuant to which American Airlines' interline partners (including British Airways) may use and receive the benefit of the FLX Services (subject to the establishment of any required technical connections between American Airlines and its interline partners).

- American Airlines requested British Airways to take steps to allow its Interline Segments to be marketed through the FLX Services.

- The Fee (as defined in Part A of Appendix B) paid by American Airlines under the agreement covers the distribution cost of the Interline Segment when the FLX Services are used to reserve the flights of interline partners.

The interline arrangement between American Airlines and British Airways

5.48 As described in Part A of Appendix B, there is an interline arrangement in place between British Airways and American Airlines which enables British Airways (the marketing carrier of the Interline Segments) to market Interline Segments using American Airlines' distribution channels, and enables American Airlines to issue tickets with a British Airways Interline Segment through its distribution channels. This contrasts with a code sharing arrangement (which is outside the scope of the British Airways Agreement) in which American Airlines is the marketing carrier for the segment operated by British Airways. Thus, under the interline arrangement, American Airlines is a mere intermediary for the sale of a British Airways Interline Segment. The interline arrangement is of particular significance from a commercial perspective for British Airways given the joint revenues and cost sharing arrangement under the AJB Agreement with American Airlines covering all transatlantic services of both airlines.

5.49 As an interline partner of American Airlines, British Airways derives commercial value from the marketing of its Interline Segments using the FLX Services. The FLX Services enable travel agents to access travel services information for British Airways Interline Segments and the booking of such flights facilitate.

The British Airways Agreement

5.50 The British Airways Agreement provides for the creation of a technical connection to enable the communication between British Airways' PSS and Farelogix. We consider that this technical connection enables British Airways to provide travel services information and to market its Interline Segments through the FLX Services in the context of its interline arrangement with American Airlines and, thereby, to use and receive supply of the FLX Services. It also shows Farelogix's and British Airways' intentions, respectively, to supply and receive supply

of the FLX Services with regard to Interline Segments in the context of the interline arrangement with American Airlines (as explained below).

5.51 We consider that the British Airways Agreement and supporting contemporaneous documents provide clear evidence that British Airways took active and conscious steps, and made a deliberate choice, to use and receive supply of the FLX Services for its Interline Segments in the context of its interline arrangement with American Airlines. Therefore, British Airways effectively made a procurement choice in favour of the FLX Services for its Interline Segments. This is demonstrated by the following key evidence:

(a) Prior to the British Airways Agreement, the GDS channel was used by American Airlines to issue tickets with a British Airways Interline Segment. British Airways told us that, at the time of entering into the British Airways Agreement, it 'moved away from' the GDS in order to improve the ability to sell interline tickets. This shows that British Airways considered the competitive options available to market Interline Segments in the context of its interline arrangement with American Airlines, sought to reduce reliance on the GDS, and actively chose to use and receive supply of the FLX Services to be able to market Interline Segments through the FLX Services.

(b) British Airways signed an internal contract approval form on the same date as the British Airways Agreement was entered into. The completed contract approval form shows that British Airways considered a number of issues relating to the use of the FLX Platform (eg value and costs) to market its Interline Segments and that British Airways viewed Farelogix as an alternative to the GDS channel. This further demonstrates that British Airways considered other competitive options to market its Interline Segments and actively chose to use and receive supply of the FLX Services to be able to market Interline Segments through the FLX Services. The Parties submitted that British Airways did not have a choice between competing providers. However, we consider that British Airways could have chosen not to enable the Farelogix connection and instead continued only to utilise other channels (eg GDSs and airline.com) for its Interline Segments. As explained below, most of American Airlines' interline partners did not enter into arrangements equivalent to the British Airways Agreement and, therefore, do not market their Interline Segments through the FLX Services.

(c) British Airways also provided us with a 'Terms of Reference' document dated May 2011 discussing the project plan for implementation of the British Airways Agreement. Under the heading 'Business Case' this document also emphasises the potential benefits of the FLX Platform to British Airways in the 'much reduced' charge relative to the GDS channel, and states that the project 'is also a convenient way to initiate an active commercial relationship with Farelogix'. The Background section states that 'BA share AA's desire to drive down GDS fees and take control of merchandising'. As with the contract approval form, we consider this to be positive evidence that British Airways made an active

decision to establish a commercial relationship with Farelogix regarding the distribution of its interline content, with express regard to its commercial alternatives.

(d) The recitals to the British Airways Agreement show that British Airways wanted to provide interline travel services information for its Interline Segments to travel agents and to market its Interline Segments through the FLX Services (not only via American Airlines but also via other airlines). The Parties submitted that when the recitals are read in harmony with the operative terms of the British Airways Agreement, it is clear that it is only the Direct Connect carriers who actually have the ability to use the FLX Services. However, we consider that the commercial intent is clear from the recitals themselves. Given that the Parties' interpretation of the recitals relies on words that should be 'read in' to the recitals (as opposed to their exact wording), we have not placed any weight on such interpretation.

(e) The British Airways Agreement specifies a fee payable by British Airways to Farelogix in respect of any Interline Segments marketed by British Airways which are included in a ticket issued by American Airlines through the FLX Services (which is distinct from the Fee paid by American Airlines for tickets issued through the FLX Services) (see Part A of Appendix B). [✂] Therefore, we consider that this fee structure further emphasises that the commercial terms were influenced by reference to competitive (GDS) alternatives.

(f) American Airlines told us that it has interline relationships with 'hundreds' of airlines (other than British Airways) but only a limited number of interline partners market Interline Segments through the FLX Service. American Airlines told us that this was in part due to the effort and costs required on the part of the interline partner and therefore an unwillingness of the interline partner to take the necessary steps to market its Interline Segments through the FLX Services (and therefore it tends just to be the bigger/most significant partners that decide to do so). However, British Airways, by entering into the British Airways Agreement, took the necessary steps to market its Interline Segments through the FLX Services. We consider that this supports an active choice by British Airways to procure a solution to enable it to market the Interline Segments through the FLX Services.

5.52 Although the Parties take the view that the British Airways Agreement was 'historic', we consider that, under the contract, the British Airways Agreement enabled, and continues to enable, British Airways to use and receive supply of the FLX Services from Farelogix. If the British Airways Agreement was terminated, we understand that the supply of FLX Services to British Airways would cease and, therefore, the FLX Services could not be used to market British Airways Interline Segments in the context of the interline arrangement with American Airlines.

5.53 We recognise that British Airways does not receive the entire package of services that American Airlines receives from Farelogix, and that the services which British Airways receives are directed specifically at

facilitating the sale of British Airways flights as Interline Segments. The fact that British Airways only uses the FLX Services to this extent and for this purpose does not undermine our view that it is in receipt of the Relevant Description of Services from Farelogix.

Combined effect of these arrangements

5.54 In light of the above, we consider that:

(a) The Direct Connect Services Agreement contemplates and is intended to operate in the context of interline arrangements (including the American Airlines' interline arrangement with British Airways);

(b) The interline arrangement in place between American Airlines and British Airways is necessary context to British Airways taking steps to enable the sale of its flights through the FLX Services; and

(c) The terms of the British Airways Agreement and associated documents show a clear and active choice by British Airways to enable it to use and receive supply of the FLX Services to be able to market Interline Segments in the context of its interline arrangement with American Airlines and that British Airways had regard to its competitive alternatives in doing so.

5.55 We therefore consider that Farelogix directly supplies the Relevant Description of Services to British Airways in the context of interline bookings in partnership with American Airlines.

5.56 We consider that the extent to which Farelogix [✂] is not determinative for the purposes of establishing a supply relationship between Farelogix and British Airways.

5.57 We also consider that the maintenance of records by [✂] of each instance in which a ticket including a British Airways Interline Segment is issued through the FLX Services (as opposed to another channel such as GDSs) is not determinative for the purposes of establishing a supply relationship between Farelogix and British Airways. It is more relevant that [✂] knows that [✂] travel services information for Interline Segments is made available to travel agents through the FLX Services and that [✂] can market its Interline Segments through the FLX Services. In addition, we consider it reasonable to assume that if British Airways interline volumes through the FLX Services were to increase substantially, both Farelogix and British Airways would seek to identify such volumes as anticipated by the (currently unenforced) per ticket payment mechanisms in the British Airways Agreement.

[…]

Geographic element

The Parties supply the Relevant Description of Services in the UK

5.59 With regard to the geographic element, the Act does not provide specific rules on determining whether, and to what extent, an enterprise's activities should be deemed to be in the UK for the

purposes of the share of supply test. The Guidance states that, as a general rule, goods or services are deemed to be supplied in the UK if customers are located in the UK. The Guidance also states that the CMA will apply this general rule in a flexible and purposive way, with regard to all relevant factors, including where relevant procurement decisions are likely to be taken and where, in turn, any competition between suppliers takes place, although our assessment is not constrained to consider only these factors.

5.60 The Parties do not dispute that Sabre provides its GDS in the UK. However, the Parties contend that Farelogix does not supply the FLX Services to any airline customers in the UK. The Parties submitted that the relevant procurement decision was taken by American Airlines, not British Airways and, accordingly, there is no UK nexus in the present case.

5.61 We acknowledge that the existence and/or location of a formal procurement decision is generally a relevant indicator to determine where the supply is taking place. As explained in paragraph 5.51 above, we consider that British Airways considered other competitive options and exercised an active choice to enter into the British Airways Agreement to enable it to use and receive supply of the FLX Services (and therefore to incur any associated costs) for the purpose of providing travel services information for its Interline Segments to travel agents and marketing its Interline Segments. British Airways is a UK Airline and there is therefore a relevant UK nexus. We therefore consider that Farelogix supplies the Relevant Description of Services in the UK." (Footnotes are omitted). (Emphasis added).

165. Footnote 110 (to paragraph 5.16) states as follows:

> "The term 'market' in this Chapter is used in the sense that, pursuant to the interline arrangement with American Airlines, British Airways is the marketing carrier of the Interline Segment. British Airways' flight code is used for the Interline Segment. American Airlines collects the entire fare from the customer via the travel agent and remits to British Airways the amount due for the British Airways Interline Segment based on existing commercial arrangements. British Airways in practice sells its Interline Segments through the FLX Services."

166. In addition, footnote 142 includes Farelogix's explanation of the booking process as follows:

> "Farelogix explained the three key communications required when a travel agent submits a travel request to American Airlines (through FLX Services): (i) a communication between Farelogix and American Airlines (via Google / ITA) that enables Farelogix to check travel information (including fares and schedules) in respect of possible travel itineraries (including itineraries in respect of the BA interline segments) matching the travel agents request; (ii) a communication between BA's PSS and American Airlines (via Google / ITA) to enable American Airlines to access travel services information concerning the BA interline segments. […]; and (iii) a communication between Farelogix

and BA's PSS (via ARINC) to enable Farelogix to confirm availability and the booking of the BA interline segment."

(1) The Parties' submissions

(a) Sabre

167. Sabre submitted that the CMA asserted jurisdiction on the basis that BA received a direct supply of "FLX Services" (that is to say Farelogix's API) from Farelogix, despite the absence of any agreement under which it would do so, and despite the lack of any awareness on the part of BA that it was apparently in receipt of them. It did so by seeking to suggest that BA received a separate and direct supply of "FLX Services" that were supplied under a contract to, and paid for by, AA. This was contrary to the evidence and in so concluding, the CMA erred in law.

168. It is an essential element of the share of supply test that both parties supply services within the RDS in the UK. This reflects Parliament's intention that the share of supply test should (among other things) ensure that UK merger control activity is focussed on mergers "*that relate to activity in the UK*".[19] The same concern was noted by Briggs LJ in *Akzo* at [24] in relation to section 86.

169. The requirement for a "*UK supply*" is therefore part of a framework that limits the jurisdiction of the CMA to cases with a sufficient UK nexus and must be interpreted in a way that gives effect to that purpose.

170. Sabre referred to paragraphs 4.58 and 4.59 of the Mergers Guidance which requires the CMA to have particular regard to the place where competition between alternative suppliers takes place. This focuses the CMA's merger control activity on transactions most likely to affect competition in the UK. This

[19] In the Parliamentary debate on amendments to the Enterprise Act 2002, including specifically in relation to the share of supply test, the then Under-Secretary of State for Trade and Industry, Melanie Johnson MP, stated: "…*the new merger regime is clearly centred on mergers that relate to activity in the UK. The share of supply threshold stipulates that the supply must be in the UK market or a substantial part of the UK, so it is UK centred […] The Government has no desire for the competition authorities to investigate mergers that are not directly relevant to UK markets or activities*". (House of Commons Standing Committee B, Tuesday 30 April 2002, Hansard Record at columns 328-329).

is consistent with the need, described above, to identify an appropriate nexus with the UK before investigating and intervening in transactions.

171. The CMA's approach in this case involved the positing of a supposed direct supply of "FLX Services" (that is to say Farelogix's API) that was outside the scope of any contractual arrangements and to which the supposed recipient was oblivious. This approach was highly artificial, unjustified by the evidence and contrary to the jurisdictional test provided by the Act.

172. The CMA found that Farelogix made a supply within the RDS on the basis that BA received a "*supply of the FLX Services for the purpose of its interlining segments*": paragraph 5.20. The CMA characterised this supply as a "*direct*" supply of these services by Farelogix to BA (paragraph 5.55). Sabre submitted that the CMA made these findings, despite the fact that Farelogix has not entered into any agreement with BA for any such supply.

173. The basis for the CMA's finding was a set of three commercial agreements, the "combined effect" of which, it says, was that Farelogix made a direct supply of the "FLX Services" to BA. As regards those agreements:

(1) Under the AA/BA Interline Agreement, BA authorises AA to sell tickets on BA flights as part of a combined journey, and BA agrees to honour those tickets. There is no reference to the distribution channels that AA may use, and BA is not required to play any active role in the sale.

(2) The Direct Connect Services Agreement is between AA and Farelogix. There is no such agreement between Farelogix and BA.

(3) The BA Agreement between BA and Farelogix, critically, is not a form of direct connect services agreement (such as the one signed with AA). It does not provide an API to BA to allow it to connect to travel agents and others. Nor does it provide message translation. The CMA found that it provided "*for the creation of a technical connection to enable the communication between British Airways' PSS and Farelogix*": paragraph 5.50. The CMA did not find that this "technical connection"

was within the RDS or a supply of "FLX Services". The BA Agreement was nevertheless the focus of its justification for a finding that there was such a supply to BA.

174. AA obtains information about flight schedules, pricing and availability from a third-party provider. It uses these to prepare itineraries and price them, and communicates these to potential buyers in response to relevant queries. Such communication may be on AA's own website, through a GDS or via a direct connection to a travel agent. If a buyer selects an itinerary involving a BA interline segment and makes a booking request, AA makes a final check with BA that the flight is available and confirms the booking. It then provides passenger information to BA. Further, if AA's sale is made via a GDS, the GDS will handle the communications with BA. For issuing interline tickets via Farelogix's API, AA requires a separate means to communicate with BA.[20] Accordingly it asked BA to engage Farelogix to establish a technical connection to enable these messages.[21] Therefore BA entered into the BA Agreement with Farelogix. This is the only relationship that BA has entered into with Farelogix.

175. Moreover, the documents disclosed by the CMA in the course of this Application make clear that far from demonstrating the supply of FLX Services to BA, the BA Agreement was regarded as commercially irrelevant by BA. In its response to putbacks from the PFs, BA commented upon the CMA's reliance in the PFs upon the BA Agreement, stating: "*the British Airways agreement is obsolete*".[22] It made this point repeatedly to the CMA, in correspondence.

176. BA had clarified this, by explaining, first, that its existing team did not know that the BA Agreement was in place, and secondly, that it had little practical implications for BA. No fees were being paid. It involved no active management and BA did not monitor relevant bookings.[23]

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[20] To complete a booking upon request from an agent, AA needs to carry out a final check of availability with the partner airline.
[21] Final Report, paragraph 5.47. The CMA also characterised the BA Agreement as providing for a "technical connection" (Final Report, paragraph 5.50).
[22] BA response to putbacks from the PFs, 5 February 2020.
[23] Final Report, footnote 176 and the CMA call with BA of 12 March 2020.

177. The CMA did not find that the technical connection itself is a supply of services within the RDS; rather it enabled BA to provide travel service information and to use and receive FLX Services: paragraph 5.50. It went on, at paragraph 5.55, to characterise this as a "direct" supply of the "FLX Services" (that is to say Farelogix's API) by Farelogix to BA, despite the fact that BA has not chosen to enter into any agreement for the provision of such services.

178. Moreover, the CMA failed to establish any sufficient basis for its finding that the "FLX Services" are supplied in the UK, despite the absence of any contractual arrangement.

179. Sabre contended that, in order to justify its approach, the CMA relied on three core findings, namely that:

(1) the technical connection enables BA to "market" its interline segments through the FLX Services and "thereby, to use and receive the FLX Services"[24];

(2) the technical connection enables BA to provide travel services information to travel agents through the FLX Services, enabling them to make bookings;[25] and

(3) BA made an active choice to enter into an arrangement with Farelogix.[26]

"Marketing"

180. In its PFs the CMA had expressed its view that Farelogix supplies the FLX Service directly to BA in order to enable BA "to market" Interline Segments using the FLX Services under the interline arrangement with AA. Similar language was included in the Final Report at paragraphs 29 and 5.40.

[24] Final Report, paragraph 5.50.
[25] Final Report, Appendix B Part A paragraph 11.
[26] Final Report, paragraph 5.51.

181. At the stage of PFs, since the CMA did not define the term "marketing", the inference is that it considered that BA was able to undertake activities such as promoting its air content and responding to requests for itineraries and fares. However, the disclosure given by the CMA in the course of these proceedings has revealed that [✂]. The CMA responded by explaining that it understood that [✂].[27]

182. In the context of interlining, "marketing carrier" is simply the airline whose flight number is on the ticket. The marketing carrier is not the carrier who actually sells the ticket – that is the "validating carrier". It is the validating carrier who markets the tickets for sale (in the ordinary sense of the word "markets"). The validating carrier under the AA/BA Interline Agreement is AA.

183. Sabre argued that the CMA addressed this by adding footnote 110 to the Final Report, defining "marketing" by reference to "marketing carrier". However, the CMA does not explain how BA's entirely passive role – authorising AA to sell interline segments and making them available for sale (with AA undertaking all of the activity of preparing itineraries and supplying them to travel agents) - in any way suggests a direct supply of the "FLX Services" to BA. Whilst AA itself makes use of the API which Farelogix contracted with AA to provide, the evidence and reasoning contained in the Final Report provides no basis to conclude that BA used or received such services.

Provision of travel services information

184. Paragraph 5.50 states that BA is able "*to provide travel services information … through the FLX Services*".

185. However, as Farelogix had made clear in its hearing with the CMA BA does not supply its schedule, pricing or availability information to travel agents, or even directly to AA for onward transmission. This information is purchased by AA from a third party. Accordingly, when a travel agent types in a search query and receives a range of itineraries (some including BA segments) with prices and

[27] CMA call with BA, 12 March 2020.

options, it receives that information solely from AA. It is AA that enters into commercial relationships with travel agents via the "FLX Services", not BA. Moreover, BA's only involvement takes place when a travel agent has selected an itinerary with a BA segment and requests a booking. At that point AA requests, and BA provides, a final availability check. This is not communicated to the travel agent – at most the agent can infer this information from the fact that it receives a booking confirmation from AA. Moreover, it takes place after the relevant information has been communicated to the travel agent.

186. In the circumstances, BA does not use the "FLX Services" to supply travel services information. It responds passively to requests from AA for a final availability check. Nothing about the flows of information suggest anything other than a supply of the FLX Services to, and their use by, AA. These arrangements therefore provide no support for the CMA's finding of a supply of "FLX Services" to BA.

An active choice to enter into the BA Agreement

187. Sabre submitted that it was clear from paragraph 5.51, and in particular sub-paragraphs (a) to (c), that the CMA considered BA to have made a choice between alternative suppliers of distribution services when entering into the BA Agreement, and relied on this in its assessment.

188. However, the evidence disclosed by the CMA in the course of this application demonstrates that the suggestion of choice was flatly contradicted by BA itself. The PFs contained paragraphs in terms almost identical to paragraph 5.51 (a) to (c).

189. BA did not accept that it had "moved away from the GDS". It disputed the CMA's interpretation of the contract approval forms. BA had signed the BA Agreement at AA's request, as a result of AA's choice of supplier.

190. BA therefore denied that it had chosen Farelogix over competing alternatives, and indeed specified that it had been AA that made that choice. Thus, the evidence demonstrated that the procurement decision to use the "FLX Services"

was made by AA, in the United States, entirely contrary to the CMA's analysis. The choices as to how the services were used were also for AA, not BA.

191. Further, the CMA conceded in its Defence that BA's only choice was a yes/no one, i.e. whether or not to enable AA to sell interline segments using its direct connects with travel agents. It argued that this yes/no decision was nevertheless a positive procurement decision, and a competitive choice. However, whilst the Mergers Guidance at paragraph 4.58 refers to the location of procurement decisions, it is clear that it is competition between alternative suppliers that is critical. There is nothing in the choices available to BA, or the nature of its decision to enter into the BA Agreement, that supports the CMA's case. The location of the decision to procure the "FLX Services" was in the United States. BA had nothing to do with it. The legally requisite nexus with the UK did not exist.

192. The CMA's conclusion that Farelogix supplies services within the RDS in the UK was therefore wrong in law: the matters relied upon by the CMA do not amount to supply of the "FLX Services" to BA within the meaning of section 23 and the CMA misdirected itself in this regard. The evidence before the CMA does not establish that the legal test for jurisdiction is satisfied. In any event, the CMA's finding was unreasonable.

(b) The CMA

193. According to the CMA, the difference between Sabre and the CMA on these issues is largely down to a difference of starting point:

(1) On Sabre's case, the supply of the FLX Services can only occur where a party receives the full suite of services which Farelogix provides to (amongst others) AA, including, but not limited to, the creation of an API. It follows that BA does not receive or use the FLX Services, and the only relevant procurement of the FLX Services took place by AA in the United States. Sabre's various arguments are all rooted in this core point.

(2) In contrast, on the CMA's case, a party which does not receive the full suite of FLX Services (and thus has not procured its own API to be built by Farelogix) may nevertheless choose to procure the use of the FLX Services on a more limited basis – specifically, and in BA's case only, to facilitate sales made through the FLX Services as part of an interline arrangement with another airline. The use of the FLX Services in this context does not require the supply of a further and additional API to the interline partner (in this case BA), but instead requires the taking of steps to enable the transmission of information by BA to travel agents through the FLX Services.

194. It was a matter of fact that BA had entered into, and remained party to, a direct contractual relationship with Farelogix for the specific purposes of allowing BA to make indirect sales of interline segments using the FLX Services (defined in the BA Agreement as the "FLX Platform").

195. The correct understanding of BA's relationship with Farelogix is that, having entered into that direct contractual relationship, BA obtains the use and supply of the FLX Services when its interline segments are sold over the FLX Platform as part of its interline relationship with AA. The CMA expressly found that "the fact that BA only uses the FLX Services to this extent and for this purpose [*i.e. to facilitate the sale of interline segments*] does not undermine our view that it is in receipt of the RDS from Farelogix": paragraph 5.53.

196. Although Sabre frames Ground 2 as an "error of law" challenge, Sabre's challenge is to the substance of the CMA's assessment of the facts and the evidence. That case must be made out on a rationality basis. Sabre's Ground 2 is a challenge to the CMA's finding that the evidence shows a supply of the RDS in the UK by Farelogix. That is a matter of the application of the test to the facts and it is a matter of factual appraisal to see whether there is evidence of such a supply. It is a question like that in *SCOP* (at [31] and [41]). The challenge has to be made out on a *Wednesbury* basis.

197. BA's relationship with Farelogix must be understood in the context of the three distinct, but related, agreements, as explained in the Final Report:

(1) The AA/BA Interline Agreement enables AA to issue tickets with a BA interline segment: paragraphs 5.20 and 5.48. As part of this arrangement, BA markets its own interline segments and retains control of these segments (Final Report, Appendix B paragraph 6) which are sold through AA's distribution channels. Although Sabre professes to object to the use of the word "market" in this context, there is nothing in the point - footnote 110 makes clear that the term "market" is simply used to mean "sell" which is not disputed. As that footnote goes on to explain, AA collects payment for the flight from the customer and remits payment to BA for the interline segment. Under this arrangement, AA acts, in effect, as intermediary for the sale of a BA interline segment: paragraph 5.48.

(2) The Direct Connect Services Agreement between AA and Farelogix specifically provides for the interline segments of other airlines to be sold using the FLX Services. The FLX Services include the Farelogix NDC API and also Farelogix OC, the purpose of which is to connect to the PSS of the airlines in question (here both AA and BA).

(3) In the context of these two agreements, BA has entered into its own agreement with Farelogix – the BA Agreement - in order that its interline segments can be marketed (sold) using the FLX Services as part of its interline arrangement with AA: paragraph 5.50. Absent the BA Agreement, no sale of a BA interline segment through the FLX Services could take place.

198. The significance of the BA Agreement is that it enables BA to market BA interline segments over the FLX Platform and to provide travel services information to travel agents for that purpose. Moreover, the Final Report found that BA does in fact use FLX Services in the context of the BA Agreement to market its interline segments, making 62 such sales in 2018.[28]

[28] Final Report, footnotes 177 and 206.

199. It is not disputed that BA had a choice as to whether to enable the FLX connection under the BA Agreement. It could have continued only selling its interline segments via other channels (e.g. GDS and airline.com). BA however chose to contract with Farelogix to ensure that the relevant sales could be made over the FLX Platform. To that extent, it is not capable of dispute that BA made a positive procurement decision.

200. Based on an evaluation of contemporaneous evidence, representations from the Parties and further information from BA, the CMA found that BA took deliberate steps, and made a conscious procurement choice, to use and receive the supply of FLX Services to enable it to market its interline segments: paragraph 5.51(a) to (f).

Supply of the RDS to BA in the United Kingdom

201. Sabre's complaint that the CMA has conflated the supply made under the Direct Connect Services Agreement with that made under the BA Agreement was not well founded.

202. The CMA had expressly recognised: (a) that the FLX Services provided to AA are not the same as the FLX Services provided to BA; (b) that BA had not entered into a direct connect services agreement with Farelogix; and (c) that such an arrangement did exist as between Farelogix and AA: paragraphs 5.43 to 5.47. The mere fact that BA does not receive an identical service to AA does not mean that Farelogix does not supply the FLX Services to BA to the extent and in the manner found by the CMA: paragraphs 5.45 to 5.54.

203. The CMA made positive findings concerning the nature and extent of the supply made to BA by Farelogix, and found that, in substance, the relevant arrangements constituted a (partial) supply of the FLX Services. For instance, and as noted at paragraph 5.51(d), it is clear from its recitals that BA entered into the BA Agreement to make (interline) sales through the FLX Services and to provide travel services information for that purpose.

204. The statutory test under section 23(4) of the Act is whether Farelogix supplied the RDS in the United Kingdom. Whether BA does, or does not, receive supply of the full suite of FLX Services is not determinative of this issue (paragraph 5.44).

205. The effect of the BA Agreement was to enable BA to use the FLX Services for the limited and specific purpose of selling interline segments. The CMA was entitled to assess the existence of a relevant supply by examining the evidence in the round, and as a matter of commercial reality, and it was not constrained to look at the matter purely in terms of the specific "deliverables" under the BA Agreement.

Provision of travel services information

206. As to Sabre's argument, at paragraph 185 above, it was wrong to say that the final travel availability check does not involve the provision of travel services information[29] by BA to travel agents. The process is described in the Final Report, footnote 142.

207. The focus is on this "final availability check". Sabre makes two arguments. The CMA rejected Sabre's first argument that the final communication, or message, which the travel agent receives through the FLX Services, was not information about the availability of the flight, but merely a yes/no confirmation from BA whether the flight can be booked. A 'yes' confirms a booking (if the flight is available); a 'no' means no booking. It is impossible to see how this does not involve the transmission of travel services information, defined in the Final Report, as including information about flight availability. The transmission of a positive response by BA is critical to the making of the reservation.

208. Sabre's second argument is that the relevant communications are between BA and AA on the one hand, and AA and the travel agent on the other, such that BA does not communicate information to the travel agent. This treats

[29] At footnote 111, the Final Report defines travel services information as including "[i]nformation on, e.g., flight availability, schedules, fares, and ancillary offerings."

communications to, and through, the FLX Platform as communications with AA as the owner of the platform. However, this does not reflect the reality. There is no further involvement with AA.

The comments made by BA

209. As to BA's responses in the inquiry, this evidence was directly considered and addressed in the Final Report. BA explained during the call with the CMA on 12 March 2020 that the BA Agreement remained in force, but that its practical implications for BA are limited - and that this is what was meant by "obsolete". This is recorded in footnote 176 of the Final Report. Importantly, the notes of the call also record that the existing BA team did not know that the BA Agreement was in place and were not familiar with its terms.

210. In any event, the BA Agreement is not in fact obsolete. A number of BA interline segments (62) were sold through the FLX Platform on the basis of, and because of, the BA Agreement as recently as 2018. The fact that the BA Agreement only results in a small amount of ongoing commercial activity, and is not onerous for BA or high on the radar of its current employees, is not a proper basis on which to claim that the Agreement is obsolete or results in no continued supply. The evidence before the CMA showed the contrary.

BA's positive procurement choice and the location of competition

211. The CMA referred to paragraphs 4.57 to 4.58 of the Mergers Guidance. In the Final Report the CMA found:

(1) BA took "active and conscious steps", and "made a deliberate choice" to use and receive the supply of the FLX Services for its interline segments in the context of its interline arrangement with AA. That choice took account of the competitive options for selling interline segments which included the use of a GDS. In consequence, BA made a UK "procurement choice" in favour of the FLX Services: paragraph 5.51.

(2) As a UK-based airline, BA made an active choice to receive (and did receive) these services in the UK and, as such received the supply of these services in the UK: paragraphs 5.59 to 5.61.

212. There was clear and compelling evidence before the CMA that BA took a procurement decision to use and receive the supply of FLX Services for its AA interline segments. This evidence is set out in detail at paragraph 5.51 (a) to (f):

(1) BA is in a minority of AA's interline partners in having chosen to enable the use of the Farelogix Platform for the purposes of their interline relationship, instead of relying only on other channels (e.g. GDS and airline.com): paragraph 5.51 (b) and (f).

(2) BA's contract approval form in respect of the BA Agreement reflects consideration of matters such as value and costs, in evaluating the decision to enter into the BA Agreement and procure the use and supply of the FLX Services: paragraph 5.51(b).

(3) BA's thinking behind entering into the arrangement with Farelogix is set out in an internal "Terms of Reference" document (May 2011). It shows both a procurement decision as well as an evaluation of commercial alternatives: paragraph 5.51(c).

(4) The recitals to the BA Agreement reiterate BA's procurement choice: paragraph 5.51(d).

213. Sabre's argument that this evidence does not show the existence of a decision between alternatives, but merely an evaluation of whether the costs of entering into the agreement were worthwhile is strained. BA saw the GDS as a competing channel for the sale of its interline segments and chose to enter into the BA Agreement on the basis of the competitive advantages of the FLX Platform. A choice to open up a new channel for sales (rather than to rely only on existing channels) which would operate alongside competing channels and offer distinct advantages is a competitive choice. The evidence demonstrates a procurement decision made by BA in the UK.

(2) The Tribunal's analysis

(a) The key findings

214. The CMA found that Farelogix supplies the RDS in the UK to BA: paragraphs 5.55, 5.61 and 5.40, 5.43 and 5.44. Although the precise terminology used differs, at various points[30] in the Final Report, the CMA expresses the basis of this finding of the supply of the RDS to BA as being the supply by Farelogix, and the use and receipt of supply by BA, of "the FLX Services", in respect, and only to the extent of, sale of its Interline Segments. At paragraph 28 of the summary, the CMA explains that "FLX Services are supplied by Farelogix through its FLX Open Connect (FLX OC) and FLX NDC API".

215. The key finding is at paragraph 5.50:

> "The British Airways Agreement provides for the creation of a technical connection to enable communication between the British Airways PSS and Farelogix. We consider that this technical connection enables British Airways to provide travel services information and to market its Interline Segments through the FLX services in the context of its interline arrangement with American Airlines and, thereby, **to use and receive supply of the FLX services**. It also shows Farelogix's and **British Airways' intention**s, respectively, **to** supply and **receive supply of the FLX services** with regard to Interline Segments in the context of the interline arrangement with American Airlines." (Emphasis and **additional emphasis** added).

216. Further at paragraph 5.53, the CMA stated:

> **"**The services which British Airways receives are directed specifically at facilitating the sale of British Airways flights as Interline Segments. The fact that British Airways only uses the FLX Services to this extent and for this purpose does not undermine our view that it is in receipt of the RDS from Farelogix."

217. We accept Sabre's contention that the CMA's finding of supply of the RDS to BA was based wholly on a finding of supply, and receipt of supply, of "FLX Services". The BA Agreement on its own does not give rise to the supply of the RDS distinct from the FLX Services. That is clear from the various paragraphs in the Final Report referred to above.

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[30] See paragraphs 5.16, 5.20, 5.40, 5.42, 5.46, 5.47, 5.50 and 5.53.

(b) The nature of the challenge under Ground 2

218. In the NoA, Sabre's case is that the CMA's finding is "vitiated by error of law". In its skeleton argument, Sabre expanded upon the basis of its challenge contending, variously, that the matters relied upon by the CMA do not amount to supply of the FLX Services within the meaning of section 23 and that the CMA misdirected itself in this regard; that the CMA's finding was contrary to the evidence; that this is not a matter of expert economic judgment and therefore that the Tribunal should conclude for itself whether the agreements and other arrangements demonstrate that the jurisdictional test in sections 23 was satisfied; and in any event that the CMA's finding was unreasonable, based upon immaterial considerations and a failure to have regard to material considerations.

219. In our judgment, Sabre's challenge on Ground 2 raises no specific question of construction of section 23 of the Act or any other error of law; for example no issue arises in relation to the meaning of the words "supply", "services" and "in the UK". Mr Ward was unable, in argument, to identify any such question. Sabre's challenge to the CMA's finding is that there is no supply at all to BA. It does not argue that either (a) even if there was a procurement choice by BA, it was not made in the UK or (b) regardless of where the choice was made and by whom, the service supplied to BA was not supplied in the UK (i.e. Sabre does not contend that the procurement decision is not determinative of the location of the supply of the service). We therefore do not consider further possible issues as to where a service is supplied or the legal test for "the supply of services … in the United Kingdom" within the meaning of section 23(4).

220. Absent any such issue of construction, the question on Ground 2 is therefore whether the CMA's conclusion that there was a supply by Farelogix to BA was *Wednesbury* unreasonable (i.e. irrational). That conclusion, being the application of the provisions of section 23 to the facts of the case, was a matter for the CMA to determine in the first place. Even if this cannot be said to be an assessment involving matters of expert *economic* judgment, we review the CMA's finding in accordance with standard principles of judicial review. It is not for us to consider the question afresh.

(c) The BA Agreement in particular

221. Whilst there are three relevant agreements which establish the framework for distribution by AA of BA interline segments, in our judgment, central to the issue on Ground 2 is the BA Agreement and its precise terms. The BA Agreement itself is entitled "FLX Interline Distribution Agreement". Thus, its purpose is the distribution of BA interline segments, necessarily to travel agents.

222. The recitals to the BA Agreement record that Farelogix has developed a system and network that permits airlines to provide travel agents and other users access to comprehensive travel services information and conduct reservation, purchase, ticketing and related functions. The recitals go on to state that "*British Airways wishes to make travel services inventory available through the FLX Platform as interline segments on the terms and subject to the conditions set forth in this Agreement"*. Thus, the provision of travel services information by BA is subject to the terms of the BA Agreement itself and BA's purpose in entering into the Agreement is the provision of such travel services information through the FLX Platform.

223. By clause 2.1, Farelogix agrees to set up the technical connection (the messaging interface) between BA's PSS and the FLX Platform which allows interline bookings to be made on BA flights through the FLX Platform Services; FLX Platform Services being the pricing, availability and other services provided by Farelogix through the Platform and the interface on behalf of Direct Connect Carriers. The Direct Connect Carriers include, but are not limited to, AA. Thus, the terms of the Agreement cover, not only BA interline segments sold through AA but segments sold through any other air carrier which has, similarly, entered into direct connect agreements with Farelogix and an interline agreement with BA. Clauses 2.2 and 2.3 make provision for the setting up, and the testing, of the interface. In particular clause 2.3 provides for the parties to test the FLX Platform Services to determine whether they work to create modify and cancel an interline booking, being a BA passenger reservation comprised of the BA interline segment of a ticket issued by another Direct Connect Carrier**.**

224. Significantly, clause 3.1 provides as follows

> "3.1 FLX Interline Booking Services. Beginning on the Commencement Date and at all times during the term of this Agreement, FLX will enable Subscribers to make Interline Bookings on British Airways Flights in accordance with the requirements of this Agreement."

Clause 3.1 is headed "FLX Interline Booking Services". It imposes a contractual *obligation* upon FLX, and one *owed to BA*, to enable travel agents using the FLX Services with the interline partner airline to make interline bookings on BA flights "*in accordance with the requirements of this Agreement*". In this way, by *this agreement*, Farelogix and BA are agreeing that, during the term of the BA Agreement, Farelogix will enable travel agents to make interline bookings on BA flights. Farelogix is agreeing that the functionality will allow such interline bookings. In that way Farelogix is providing a service. Clause 3.3 describes the "Interline Booking Process", setting out the messaging sequence, culminating in BA sending a confirmation message to the FLX Platform via ARINC.

225. By clause 4, Farelogix is responsible for modifications to the FLX services required to ensure that those services and the booking and ticketing of Interline Bookings by travel agents comply with all relevant applicable laws and regulations. Clause 6 provides for BA to pay Farelogix a fee in respect of each interline booking transaction conducted through the FLX Platform.

226. Sabre accepts that BA benefits from the FLX Services. But, it argues that nevertheless BA does not receive the supply of these services *from Farelogix under* the BA Agreement. In our judgment, in the present case, the distinction between benefiting from the supply of a service and receiving a supply of the service is more apparent than real. It may be that in some cases it is possible to benefit from the supply of a service to a third party, without being supplied with that service. However in the present case the crucial additional element is that BA is only able to benefit from that service because of the specific agreement it has entered into with the supplier of that service, namely the BA Agreement. That contract *enables* the benefit to be obtained. Absent the contract the benefit of the service could not be acquired. BA receives the benefit of the FLX service because of the BA Agreement – the AA/BA Interline Agreement does not provide expressly for the use of FLX Services or Farelogix for interlining.

227. In the final analysis, the purpose of the BA Agreement is to enable and allow BA to use or receive the benefit of FLX services – given the emphasis placed by the CMA on the BA Agreement, its consideration is crucial to Ground 2. The BA Agreement provides the link; it enables the FLX services to be provided to BA, in the context of the other agreements. This is not a pure question of construction of the terms of the BA Agreement. Ultimately this is a factual question overall, taking account of the full suite of the arrangements.

228. Further support for this characterisation of the service acquired by the BA Agreement is provided by BA's own contemporaneous procurement documents. That BA contemporaneously considered that it was receiving the FLX services in this way is established by what is recorded in the contract approval form. That form states that the supplier is Farelogix. The service/product description states that it "allows travel agents and other users to access travel services information and conduct reservation purchase ticketing and related functions specifically for interline travel". The "Terms of Reference" document dated 23 May 2011 refers to Type B connectivity "to enable *the sale of BA* on Farelogix as interline with AA".

(d) Sabre's specific arguments

229. We turn to the three specific arguments made by Sabre.

Marketing

230. First, Sabre raises two objections to the CMA finding at paragraph 5.50 that the technical connection enables BA to *market* its interline segments through the FLX services and thereby to use and receive the FLX services. First, it takes issue with the use of the term "marketing", suggesting that it comprises promotional activity. There is no substance to this objection. As explained by the CMA at footnote 110, "marketing" is a reference to the "marketing carrier" in an interline arrangement. The marketing carrier (in this case BA) is the contractual, principal, carrier for the interline segment which is sold on its behalf by the validating carrier (in this case AA). The fare is collected by AA and remitted to BA. In this regard "markets" means no more than "sells". The

second objection is that BA's role is entirely passive, comprising merely authorising AA to sell interline segments on its behalf and cannot amount to the use or receipt by BA of the FLX Services. However, for reasons set out in the next section below, we consider that by sending the final availability check message through the FLX OC and NDC API to the travel agent, BA is using the FLX Services.

Provision of travel services information

231. Secondly, Sabre contends that BA's only involvement in the booking process is that it merely responds passively to requests for a final availability check. The only supply of FLX services is made to, and used by, AA.

232. The final availability check is the last step in the process of communications required when a travel agent submits a travel request to AA through the FLX services. As described at footnote 142, the final availability check is "a communication between Farelogix and BA's PSS (via ARINC) to enable Farelogix to confirm availability and the booking of the BA interline segments". That communication by BA involves BA providing information about the availability of the flight sought to be booked. That information is then transmitted to the travel agent using the FLX Services (via the FLX OC). "Travel services information" as defined at footnote 111 expressly includes information on "flight availability". In our judgment the CMA's conclusion that the provision of a "final availability check" is the provision of travel services information is well founded. The fact that the check is provided by way of a simple "yes/no" confirmation in no way detracts from its characterisation as the provision of information.

233. Sabre's further contention is that BA does not provide that information to the travel agent; rather BA provides it to AA, and thereafter, AA provides it to the travel agent. It is certainly the case that the message is transmitted through the FLX OC. Nevertheless, in our judgment, the final message sent by BA constitutes the provision of travel services information all the way through to the travel agent and not just the provision of information to the Farelogix FLX OC. To break the transmission into two parts and to treat the sending of the

message to the FLX OC as being a communication to AA is artificial. The BA Agreement specifically enables BA itself to transmit information to, and receive information from, travel agents using the FLX platform with no further interaction from AA. Not only is AA not a party to the communication of the final availability under the BA Agreement, but the BA Agreement makes no specific reference to AA at all and is not limited to BA's relationship with the AA.

234. At paragraph 5.53, the CMA found that BA receives a partial supply of the FLX Services. In our judgment, that was not a reference to a suggestion that BA was using part only of those services which make up the FLX Services i.e. using only the FLX OC and not using the FLX API. Rather it was a reference to the fact that BA was using and receiving a supply of FLX Services only in the context of the sale of BA flights as interline segments. In these circumstances, BA does not need a *contract* for the API itself as provided for in a direct connect services agreement like that between AA and Farelogix. The BA Agreement creates the connection to the FLX OC, thereby enabling use of the full FLX Services in the limited circumstances of an interline segment (rather than for the sale directly of its own flights, booked by a travel agent with itself).

235. In these circumstances, the CMA's finding that the technical connection under the BA Agreement enables BA to provide travel services information for its interline segments to travel agents through the FLX services (at paragraph 11 of Appendix B, Part A of the Final Report – alternatively paragraph 5.50) was, in our view, justified and in any event, not irrational. That conclusion served the purpose of the jurisdictional test of share of supply, namely to capture for consideration cases where there is an overlap of supply in the UK.

No active choice

236. Thirdly, Sabre contends that the CMA's finding that BA made an active choice to enter into the BA Agreement is unsustainable.

237. First, BA was not required by AA (whether through the AA/BA Interline Agreement or otherwise) to enter into the BA Agreement. If BA had declined

to use FLX Services (and not entered the BA Agreement), AA could still sell a flight with a BA segment, through a GDS. Although for AA to issue a ticket including a BA interline segment *through Farelogix*, then technical connection between the BA's PSS and the FLX Services is required. The AA/BA Interline Agreement does not require distribution of BA interline segments by any particular route; it did not compel BA to use FLX services. This is clearly explained in paragraph 5.51 (a), (b) and (f). BA's decision was to sell its BA interline segments through the Farelogix distribution channel *in addition to* them continuing to be sold by AA through the existing GDS channel. Indeed in its telephone call with the CMA on 12 March 2020 BA itself confirmed that it was not contractually required to enter into the BA Agreement. Whilst AA had asked BA to do so, BA accepted that it could have refused.

238. Secondly, consideration of the *contemporaneous* BA internal documents confirms that BA, in entering into the BA Agreement, was making an active procurement choice. The contract approval form states that the BA Agreement is "an alternative to a GDS supplier". The financial impact sets out the competitive pricing advantage of selling through the Farelogix platform rather than through a GDS. The Terms of Reference document dated 23 May 2011 is a document which explains why the BA Agreement was entered into. It states that BA shares AA's desire to drive down GDS fees and take control of merchandising. It identifies that the benefits to BA are a much reduced GDS charge for interlining with AA and also with any other Farelogix direct connect airline and a convenient way to initiate an active commercial relationship with Farelogix. These documents demonstrate that BA made a conscious choice to enter into the BA Agreement and thereby to receive the FLX Services, and had not done simply what AA had asked it to do. Moreover the documents demonstrate that the choice was a competitive choice. BA had the choice whether or not to enter into the BA Agreement and the documents demonstrate that, in deciding to do so, it took firmly into account the relative price advantage of Farelogix overusing the GDS distribution channel. The fact that at the time BA was not making a choice between alternatives (i.e. between GDS and Farelogix) does not indicate that BA was not making a competitive choice: the choice was between continuing to use other distribution channels (including

GDS) only and using those channels together with an additional channel. It is clear from the contemporaneous documents that in choosing the latter, the BA took into account the relative competitive prices.

239. Thirdly, as regards BA's subsequent comments, in the course of the CMA's investigation in February and March 2020, in its response to putbacks, BA denied that it had chosen Farelogix over competing alternatives and stated that it had been AA that had made that choice, and that it did not see Farelogix as an alternative to GDS. Despite what was said there, we consider that the CMA was properly entitled to rely upon, and, where inconsistent, to prefer, the contemporaneous evidence as described above rather than upon observations made by employees who had accepted that they were unfamiliar with the BA Agreement and had not been involved at the time in its procurement. Furthermore, of particular note is that BA's comments were responding to the CMA's treatment, in the PFs, of earlier BA evidence. That treatment was based in a material part on the statement which BA itself had made earlier, in its own response to the CMA's Request for further information dated 15 January 2020. In that response BA stated expressly, that in entering into the BA Agreement, BA "moved away from the GDS in order to improve the ability to sell interline tickets". In making these subsequent comments, BA sought to minimise or resile from that statement of its own making.

240. We conclude that the CMA's finding in relation to procurement choice at paragraph 5.51 of the Final Report was one which, on the evidence, the CMA was entitled to reach and was not irrational.

(3) Conclusion on Ground 2

241. For the foregoing reasons, we consider that Sabre's contentions under Ground 2 are not well founded. In our judgment, we agree with the CMA that, as a result of the BA Agreement, when read in conjunction with the surrounding arrangements and facts, BA receives an IT solution which allows BA to sell interline segments through FLX Services and which enables the transfer of BA's travel services information over the FLX OC and NDC API to the travel agent. In this way BA receives the supply of FLX Services from Farelogix in the UK.

In any event, we do not consider that the CMA's conclusion to that effect was irrational.

G. GROUND 3: ALLEGED ERRORS IN THE APPLICATION OF THE SHARE OF SUPPLY TEST

242. By Ground 3 Sabre challenges the increment that the CMA purported to have identified in the supply of the RDS.

243. The portions of the Final Report relevant to Ground 3 are as follows:

> "**Quantitative element**
>
> ***The 25% threshold***
>
> 5.62 The Act gives a wide discretion to the CMA to apply whatever measure (eg value, cost, price, quantity, capacity, number of workers employed), or combination or measures, it considers appropriate to calculate the merging parties' share of supply or procurement and to determine whether the 25% threshold is satisfied.
>
> 5.63 In this case, we consider that the Parties both derive value from the supply of the Relevant Description of Services to UK Airlines.
>
> 5.64 As set out in paragraph 5.16 above, Sabre has commercial relationships with many UK Airlines, to which it supplies its GDS. Farelogix has a commercial relationship with one UK Airline, British Airways, to enable it to use and receive supply of the FLX Services in respect of its Interline Segments. Through this commercial relationship Farelogix supports the sale of certain tickets that it otherwise would not be able to (namely American Airlines tickets that include a British Airways Interline Segment). Farelogix is entitled to receive a fee from British Airways for each British Airways Interline Segment that is marketed through the FLX Services. In our view there is value to Farelogix in the enhanced functionality created by the British Airways Agreement more generally, because it improves the utility and scope of application of the FLX Services. This enhanced functionality is likely to lead to increased revenues in the form of sales made using the FLX Services which would not otherwise be realised (for instance, bookings which depend on a segment which can only be provided by British Airways as an interline partner). We take this broader commercial context into account when interpreting the evidence on share of supply.
>
> 5.65 For the purposes of the share of supply test in this case, we have measured the value derived from the supply of the Relevant Description of Services to UK Airlines by considering revenues received and receivable for all providers of such services. We consider that revenue received is a reasonable measure of value as it represents payment to the Parties (and others) for the supply of the Relevant

Description of Services. Similarly, we consider revenue that a party is contractually entitled to receive, but has chosen not to do so for administrative or other reasons, as an additional indicator of the value of the service provided and, therefore, a further relevant factor to measure such value.

5.66 Based on the data available from both the Parties and third parties, we consider that the share of supply test is satisfied by annual revenue (received and receivable) for the supply of the Relevant Description of Services to UK Airlines.

5.67 The Parties provided 2018 revenue data for Sabre and estimates for each of Amadeus, Travelport, Other GDSs (Host Direct), Direct Connect (excluding Farelogix), and Tour Operators (TOs).

5.68 We performed a number of checks and adjustments on the data submitted by the Parties to devise a robust set of revenue estimates:

[…]

5.69 The actions above adjusted the total UK revenue size of the Relevant Description of Services. The Parties' data estimated the total size of the Relevant Description of Services (by UK revenues) at [✂]. Our estimate for total UK revenues is substantially smaller at [✂]. The difference between the Parties' and our estimates is mostly driven by the Parties' higher estimates of Amadeus and Travelport revenues.

5.70 On the basis of our 2018 revenues dataset which takes into account the adjustments explained in paragraph 5.68 above, the Parties' combined share of supply exceeds the 25% threshold on the basis of revenue (as illustrated in Table 5.1 below).

Table 5.1 – Shares of supply for IT solutions to airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings based on data from Sabre, Amadeus and Travelport and airline submissions (excluding non-VITOs).

Vendor	Revenues ($)	Share of Supply
Sabre	[✂]	[30-40]% [✂]
Farelogix	[✂]	[0-10]% [✂]
Amadeus	[✂]	[40-50]% [✂]
Travelport	[✂]	[20-30]% [✂]
Other GDS (Host Direct)	[✂]	[0-10]% [✂]
Direct Connect (excluding Farelogix)	[✂]	[0-5]% [✂]
Non GDS Aggregators	[✂]	[0-10]% [✂]

Total	[✂]	100%

5.71 Whilst we consider that, on the above basis, the share of supply test is met, we have also considered certain sensitivities to our analysis based on the submissions that have been made to us by the Parties (see Part B of Appendix B).

The Merger results in an increment

5.72 The merger must result in an increment to the share of supply or acquisition. The Act does not prescribe a minimum increment and the Guidance explicitly recognises that where an enterprise already supplies or acquires 25% of any particular goods or services, the test is satisfied so long as its share is increased as a result of the merger, regardless of the size of the increment.

5.73 As explained in paragraph 5.64 above, we consider that Sabre derives value from the supply of the Relevant Description of Services to UK Airlines, and such value can be measured by revenues received from the supply of its GDS to UK Airlines. As illustrated in Table 5.1 above, we consider that Sabre has a share of supply by revenue of [✂] [30-40]% resulting from the supply of the Relevant Description of Services to UK Airlines and that this estimate is robust having considered the various sensitivities described in Part B of Appendix B. Accordingly, any increment to Sabre's share of supply by Farelogix would satisfy the share of supply test.

5.74 The Parties submitted that the Merger does not result in an increment on a revenue share basis. However, as explained in paragraph 5.64 above, we consider that Farelogix derives value from the supply of the Relevant Description of Services to British Airways (which can be measured by revenues received or receivable, or both), and the Merger therefore results in an increment. We understand that 62 British Airways interline bookings were made through the FLX Services in 2018, and in order to measure the value derived by Farelogix we have used these sales as a basis to estimate the revenues received or receivable by Farelogix for supplying the FLX Services to British Airways regarding the applicable Interline Segments. In particular, we have considered:

(a) the Fee payable by American Airlines to Farelogix under the Direct Connect Services Agreement (ie a source of received revenue); and

(b) Farelogix's right to payment under the British Airways Agreement (ie a source of receivable revenue).

The Fee mechanism

5.75 The Parties submitted that the only revenues that Farelogix receives in connection with the FLX Services are the standard fees payable to Farelogix by the non-UK airlines. Therefore, the Parties submitted that Farelogix did not receive any revenue in the UK.

5.76 With regard to the Fee mechanism, the Parties submitted that:

(a) The Fee cannot be treated as money paid by British Airways to Farelogix because the money was not paid by American Airlines on behalf of British Airways, and Farelogix has no recourse against British Airways in respect of such sums.

(b) As the Fee paid by American Airlines is charged per ticket (regardless of the number of segments involved in the ticket), Farelogix will receive the same fee from American Airlines regardless of whether a ticket includes a British Airways Interline Segment. Therefore, there will be no incremental revenue that could be attributed to the British Airways Interline Segment.

(c) Neither Farelogix nor presumably American Airlines will have prepared their accounts or tax filings on the basis that part of the sums paid by American Airlines was actually attributable to British Airways as British Airways was not party to the Direct Connect Services Agreement.

5.77 However, we consider that it is appropriate to consider the Fee mechanism as one indicator of the value derived by Farelogix from supplying the FLX Services to British Airways with respect to the applicable Interlining Segments, and to identify revenue received for the following main reasons:

(a) The fact that British Airways did not pay the Fee and that Farelogix has no recourse against British Airways in respect of the Fee does not undermine a finding that some value is derived by Farelogix from the supply of the Relevant Description of Services to British Airways. Therefore, we consider that this is not determinative for the purposes of identifying revenues received.

(b) The fact that American Airlines pays the same Fee regardless of whether there is a British Airways Interline Segment has no bearing on whether part of the fee is attributable to the services provided in relation to the British Airways Interline Segment where there is such a segment. As explained in paragraph 5.47 above, American Airlines paid the Fee for tickets which incorporated and included a British Airways Interline Segment. Farelogix was only able to derive value from those tickets because the British Airways Agreement facilitated the incorporation of the British Airways Interline Segment. Therefore, we consider that some proportion of the value derived by Farelogix under the Direct Connect Services Agreement is referable to the British Airways Agreement. This is supported by the evidence received from American Airlines, who told us that they paid the Fee for each of the 62 tickets including a British Airways Interline Segment and that, in their view, the Fee is intended to cover the services provided by Farelogix for the British Airways Interline Segment (see paragraph 5.47 above).

(c) As indicated in paragraph 5.62 above, the share of supply test is flexible and its application need not align with tax and accounting laws (in the same way as the Relevant Description of Services does need not align with the economic market).

5.78 In addition, the cost sharing arrangement under the AJB Agreement described in Part A of Appendix B includes the Fee paid by American Airlines to Farelogix for any American Airlines transatlantic ticket issued through the FLX Services (including tickets with a British Airways Interline Segment). Therefore, British Airways does in practice share part of the costs associated with the Fee.

5.79 Therefore, we consider it appropriate to conclude that Farelogix derives value from the part of the Fee attributable to Interline Segments, and therefore that this is an appropriate measure of revenue received for providing the FLX Services to British Airways regarding its Interline Segments.

Farelogix's right to payment under the British Airways Agreement

5.80 As explained in paragraph 5.51 above and Part A of Appendix B, Farelogix is entitled to charge British Airways a fee of [✂] per ticket with a British Airways Interline Segment issued using the FLX Services.

5.81 The Parties submitted that:

(a) Farelogix has not, at any stage, charged British Airways any form of transaction fee for interline tickets and, therefore, has not generated any revenue or value from the small number of tickets issued by American Airlines through the FLX Services which included a British Airways Interline Segment.

(b) Even if Farelogix had asked for payment, it would have amounted to a minimal percentage of Sabre's revenue and an even smaller percentage of the total market revenue.

(c) The CMA has never previously used revenue receivable for the share of supply purposes and it would not be appropriate to do so for the first time in this case.

(d) To the extent that the fee under the British Airways Agreement is for the creation of infrastructure and performing set-up services to create a messaging interface to send messages (as opposed to the FLX Services), it is not appropriate to include such fee in the share of supply calculations.

5.82 However, we consider that it would be appropriate to take into account revenue receivable for the provision of the Relevant Description of Services to British Airways by virtue of the payment right in the British Airways Agreement for the following key reasons:

(a) The right to receive an agreed measure of revenue is a quantitative measure of value attributable to the service.

(b) The fact that Farelogix has to date considered the volumes too insignificant to enforce payment, in our view, does not undermine the value derived from the supply of the Relevant Description of Services to British Airways which we consider appropriate to take into account when assessing whether the share of supply test is met on the basis of revenue received or receivable from providing

the Relevant Description of Services to UK Airlines. The fact that the commercial opportunity did not develop in the way envisaged by Farelogix does not change the fact that value is provided.

(c) The size of the increment is irrelevant for the purposes of the share of supply test (see paragraph 5.72 above).

(d) The absence of precedent is not binding in this case and each case must be considered on its own merits having regard to the particular circumstances.

(e) We consider the fee reflects payment for British Airways receiving the FLX Services and, therefore, it is appropriate to include such fee in the share of supply calculations.

No need to specify the increment

5.83 In this case, we do not consider it necessary to specify precisely how much revenue is received or receivable for the supply of the FLX Services by Farelogix to British Airways (either by identifying an appropriate portion of the Fee or by specifying the precise fees that would be payable under the British Airways Agreement). This is because the 25% share of supply threshold is met on the basis of Sabre's share alone and it is sufficient that we can identify some increment for Farelogix's supply of the Relevant Description of Services.

5.84 As explained above, we consider there are two indicators of, and therefore possible ways of measuring value for of the Farelogix's supply of the Relevant Description of Services to British Airways: by virtue of the revenues received from the Fee under the Direct Connect Services Agreement, or the revenues receivable from the right to payment under the British Airways Agreement (or taking both indicators together).

5.85 To estimate Farelogix's revenue for illustrative purposes in Table 5.1 above, we have used revenue receivable and multiplied the number of British Airways' interline tickets issued through FLX (ie 62) by the [✂] fee under the British Airways Agreement. This calculation results in a [✂] revenue figure. We consider this to be an appropriate estimate of Farelogix's revenue as we note that other possible approaches (eg identifying revenue received (by attributing part of the [✂] Fee paid by American Airlines) or making adjustments on the basis that some fees paid under the British Airways Agreement would be at the [✂] rate) would also fall within the [✂] range.

5.86 These are indicative calculations, however, we consider that they are probative that there is an increment to Sabre's share of supply by revenue.

5.87 Farelogix also submitted that relying on the Fee to allocate UK revenue to Farelogix would be at odds with the rules set out in Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (the Determination of Turnover Order) and the provisions of the Guidance (and section C(V) of the European Commission's Consolidated

Jurisdictional Notice (the Consolidated Jurisdictional Notice) dealing with UK allocation of turnover.

5.88 However, we consider that the Determination of Turnover Order applies to determine the UK turnover for the purposes of applying the turnover test set out in section 23 of the Act. The turnover test is clearly different from the share of supply test and does not allow the same statutory flexibility. Furthermore, the CMA's ability to rely on a broad range of measures[31] which would not involve a strict application of turnover calculation rules means that such rules are not applicable to the revenue calculations.

5.89 As explained in paragraph 5.74 above, in this case we consider that both Parties derive value from the supply of the Relevant Description of Services to UK Airlines and, as regards Farelogix, we have identified two indicators of such value regarding supply of the FLX Services to British Airways, namely part of the Fee received by Farelogix and the fee receivable directly from British Airways under the British Airways Agreement." (Footnotes are omitted).

(Emphasis added).

244. Footnote 186 to paragraph 5.65 states:

> "The term 'revenues receivable' is not used in a technical accounting sense, but rather as a short-hand label to describe any fee that a supplier is contractually entitled to receive for the provision of the Relevant Description of Services to UK Airlines. Farelogix is entitled to receive a fee under the British Airways Agreement. As explained in Part B of Appendix B, we have not seen any evidence to suggest the revenue figures provided by the other suppliers of the Relevant Description of Services exclude receivable revenues similar to Farelogix. Even if this was the case, we do not consider this would materially impact our share of supply calculations." (Emphasis added).

(1) The Parties' submissions

(a) Sabre

245. Sabre argued that the CMA erred in law in concluding, at paragraph 5.17, that "*Sabre's share (by revenue) of the supply of this service is above 25% and that the Merger results in an increment.*" Under Ground 3, Sabre submitted as follows:

(1) The CMA erred in law in the application of the statutory requirements under section 23(2A) and (4) of the Act, in that it assessed the increase

[31] Section 23(5) of the Act.

in share of supply on the basis of a hypothetical increment of revenue on the part of Farelogix.

(2) The CMA erred in in its application of the statutory requirement under section 23(5) of the Act in that:

(a) it assessed the value of supplies by Sabre and Farelogix using inconsistent methodologies;

(b) its choice of revenue to measure of Sabre's share of supply was irrational and/or wrong in law.

246. Sabre submitted that the CMA only has jurisdiction over a transaction if (i) one supplier has a UK share of supply over 25% ("the first limb"), and (ii) "*as a result of*" the Transaction, that prevails or prevails to a greater extent, i.e. there is an increase in the share of supply as a result of the merger ("the second limb").

Hypothetical increment in value

247. Sabre submitted that the purpose of the statutory requirements in section 23(2)(a) and (4) is to establish a jurisdictional test, specifically for those mergers which do not meet the turnover test. These provisions exist to set out connecting factors between targets of regulatory action and the UK.[32] There must therefore be a sufficient link between the transaction and the UK to warrant intervention by the UK regulator. This serves to protect UK consumers, affords due recognition to other countries' authorities, and articulates legal limits to jurisdiction providing legal certainty to entities around the world.

248. Any suggestion by the CMA that such a link is made out by Sabre's existing share of supply in the UK ignores the second limb of the statutory test. It is not enough for just one party to have a nexus with the UK, but the transaction under review must also have such a link. Both parties must provide services within the RDS in the UK. Failing that, the CMA would have jurisdiction over any merger

[32] *Akzo*, at [24] to [26].

involving a party with a significant UK presence, regardless of whether that transaction in fact had any connection to the UK.

249. According to Sabre, the CMA's claim to jurisdiction was based on the assertion that "*Farelogix derives value from the supply of the Relevant Description of Services to British Airways*": paragraph 5.74. The lynchpin of the CMA's analysis for present purposes is the BA Agreement. It provides no support for the CMA's position, however.

250. BA repeatedly pointed out that "*the British Airways agreement is obsolete. No fees are paid to Farelogix.*" The CMA failed properly to reflect those submissions. There was no finding or evidence that any sums under the BA Agreement were ever even invoiced or that there were any contractual payments or that there was any realistic or practicable route to enforcing any such payments. To collect them would have been uneconomic. The cost of collection would have exceeded any amount owed. By foregoing any amount due over a period of years, Farelogix has demonstrated that these claims are of zero value. Even if the payments had been collected (which they were not) this would have amounted to less than [✂] in the relevant year, and thus less than 0.000[✂]% of the [✂] UK revenue the CMA found in respect of Sabre.[33]

251. Even assuming Farelogix was supplying BA, the sole basis on which the CMA asserted an increment in the parties' share of supply in the UK was still no more than an obsolete agreement which provides for purely theoretical payments that, even if they had materialised, would have been negligible. This supposed increment of purely hypothetical revenue was insufficient to establish the necessary connection to the UK to establish jurisdiction.

252. The CMA's assertion that the share of supply test was met in this case was wrong in law, as there was neither an actual (rather than hypothetical) increase in the share of supply, nor a realistic nexus between that alleged increase and the UK – both of these were required for the statutory test under section 23(2A) and (4) to be met.

[33] Paragraph 5.70, Table 5.1.

253. Whilst section 23(5) provides the CMA with a discretion as to which criteria to use in order to determine whether the threshold is satisfied, it does not provide any discretion as to whether an increment actually arises in respect of the criterion identified.

254. Finally, Sabre submitted that its argument does not depend upon the imposition of a general '*de minimis*' threshold. In this case, the focus of Sabre's complaint is the hypothetical nature of the increment. The fact that, if it was economic to have collected it, it would have been negligible in size serves to reinforce the point. Accordingly, the CMA had erred in law in its application of section 23(2A) and (4).

Inconsistent methodologies

255. Section 23(5) gives the CMA discretion in choosing a methodology to decide whether the quantitative element of the share of supply test is met – although this is not unlimited. It does not permit the CMA to adopt different criteria in respect of the different elements being compared. In other words, whichever methodology the CMA decides to adopt must be applied consistently. The CMA failed to do so in this case.

256. For Sabre, the CMA decided to use actual UK revenue as the relevant criterion to establish a baseline share of supply: paragraph 5.73. Farelogix, however, has no actual UK revenue resulting from the supply of the RDS to UK Airlines.[34] Comparing like with like, Farelogix therefore does not contribute anything to Sabre's actual UK revenue, meaning that the share of supply test is not met.

257. Instead of accepting that conclusion, the CMA decided to use a different metric to assess whether the acquisition of Farelogix would result in an increase in the share of supply: it considered not Farelogix's actual UK revenue (which was zero) but whether, more generally, it derived "*value*" from the supply of the RDS to BA: paragraphs 5.63 and 5.65. It then treated such "*value*" as the

[34] At Phase 1, the CMA accepted that Farelogix generates no turnover in the UK.

equivalent of Sabre's actual revenue, thereby allowing it to conclude that there was an increase in the share of supply.

258. The CMA's argument that it "*used the criterion of value*" simply does not address Sabre's criticism that the methodologies the CMA used to find "value" were inconsistent and not properly comparable. As in the context of defining the RDS, the CMA resorts to high levels of abstraction so as purportedly to combine two very different matters in a single concept. An increment in the share of supply can only be found rationally if it is measured in the same way as the base level.

259. The CMA found that the Farelogix derived "*value*" from its relationship with BA in two ways.

260. First, as regards "the Fee mechanism" (paragraphs 5.74(a), 5.75 to 5.79) the CMA accepted that the relevant fees are paid to Farelogix by non-UK airlines (in particular AA), and that Farelogix has no recourse against BA in respect of these fees. As a fee paid by AA, it is US revenue, not UK, revenue. The relevant sales are by one American undertaking to another, with payment made and received in the US under a US contract. Any increase would occur in the US, not in the UK, and therefore cannot affect jurisdiction under the share of supply test. This is fatal to the CMA's analysis.

261. In any event, there is no basis for a finding that the relationship with BA resulted in increased revenues, even in the US. The CMA relies on just 62 tickets containing a BA Interline Segment. AA had stated that the fee paid by it is the same regardless of whether or not a ticket includes a BA Interline Segment. There is no evidence to suggest that the sale of the relevant 62 tickets was contingent on the sale of the BA segment, as opposed to e.g. just replacing it with a different segment.

262. Secondly, as regards Farelogix's right to payment under the BA Agreement (paragraphs 5.74(b), 5.80 to 5.82), for the reasons given at paragraphs 247 to 254 above, this is only hypothetical revenue. According to Sabre, it cannot be considered as equivalent to <u>actual</u> revenue: in any event, that alleged revenue

relates to Type B messaging via ARINC[35] which is not a service the CMA claims falls within the RDS.[36]

263. Thus the measure of value that the CMA applied in respect of Farelogix was materially different to that it applied in respect of Sabre (and in respect of all other market participants included for the purposes of its share of supply calculations). The use of two different methodologies in support of its conclusion that the share of supply test was met was (i) irrational, (ii) failed to have regard to material considerations, and (iii) wrong in law in that it was impermissible under a proper construction of section 23(5) and therefore vitiated the CMA's conclusion that there was a relevant increment.

Appropriate measure of Sabre revenue

264. Sabre submitted that the CMA's choice of revenue to measure *Sabre's* RDS share of supply was in any event irrational and/or wrong in law. The RDS does not describe Sabre's GDS services. It describes only information provision to travel agents. The GDS is a much wider two-sided platform as already explained. Any fees that airlines paid to Sabre cover a complex collection of distribution activities that comprise the GDS. Payments are thus not just for "*information provision*" to the exclusion of all else. Therefore, even if (contrary to Ground 1 above) the RDS was not wrong in law, it cannot rationally be measured by reference to total GDS revenue.

265. The CMA failed to apportion the revenue it attributed to Sabre so as to ensure it reflected only the RDS element. Even if the provision of information to travel agents is an "*intrinsic part*" of the GDS, as the CMA contended, it was irrational, and a failure to have regard to material considerations, to attribute the entirety of revenue received for much broader GDS services to this one small slice of the GDS's overall functionality.

[35] Per the description of the connection and the fee described in the BA Agreement.
[36] Paragraph 5.36(e) set out under Ground 4. See also paragraph 386 below.

266. Further, as to the CMA's argument that it cannot be criticised for failing to address a point that the parties did not put to it during the administrative stage:

(1) During the investigation, the Parties contended that "*[i]t is an error of law to include in the share of supply calculation fees for services that fall outside the Relevant Definition of Services*" and that they disagreed with the CMA's approach to calculation of value.[37]

(2) It remains the CMA's responsibility to ensure its decision is lawful, regardless of whether an issue was drawn to its attention in the course of any consultation and/or investigative process. In the context of a jurisdictional challenge that applies a fortiori.

267. It is not open to the CMA to suggest that it would have been too onerous to apportion the relevant revenue in order to count only the part that actually related to the RDS it had chosen. Having chosen that RDS, it was incumbent on the CMA also to find and use a methodology that properly measured this and allowed a reasonable comparison across providers. Indeed, there was an obvious like-for-like metric that stripped out the disparities between the services, namely the volume of bookings.

268. Finally, as to the CMA's claim that any adjustments *"would not have affected the CMA's calculations",* absent such analysis ever having been carried out, it cannot just be assumed that they would not have had an effect. On the contrary, the Final Report makes clear there are important and material differences between the three major GDSs.

(b) The CMA

269. The CMA submitted that Ground 3 is a challenge to the substance of the CMA's assessment of whether the Merger results in an increment. That challenge must be made out on rationality principles.

[37] In the response to the PFs, paragraphs 2.35 to 2.41 (especially at 2.40).

270. The CMA summarised its approach in the Final Report. In its analysis of the quantitative aspect of the jurisdiction test at paragraphs 5.62 to 5.89, the CMA adopted the criterion of "value" to assess whether the threshold for the share of supply was met (value is specifically referred to as a relevant criterion in section 23(5)). The CMA had then "*measured the value derived from the supply of the RDS to UK Airlines by considering revenues received and receivable for all providers of such services*": paragraph 5.65. These revenues were used as an indicator, or proxy, to measure the supply of value: paragraph 5.77. The same criterion of value was applied to each of the parties.

271. The term "revenues receivable" is explained at footnote 186. The rationale for this approach was that revenue which a party is contractually entitled to receive also reflects, and provides measurement of, value: paragraph 5.65. Farelogix was entitled to receive a fee under the BA Agreement but had not elected to pursue these sums for reasons of administrative convenience. There was no indication from other suppliers that the revenue figures they provided excluded receivable revenues.

272. The CMA submitted that it had analysed various sensitivities in its analysis to ensure the robustness of its findings (see Final Report, Appendix B, Part B).

273. Having found that Sabre's share of supply alone significantly exceeds 25%, the issue was therefore whether the Merger would result in an increment, and whether Farelogix had an incremental share of supply. In that regard, the CMA said that it took into account (a) the value derived by Farelogix from part of the fee paid by AA, attributable to BA's interline segments (paragraphs 5.75 to 5.79) and (b) the fee which Farelogix is contractually entitled to receive from BA under the BA Agreement (paragraphs 5.79 and 5.82)).

274. The CMA concluded that Farelogix's share of supply was very small, being less than 1%. However, as any increment resulting in 25% (or more) share of supply suffices to meet the share of supply test, the CMA found that the statutory condition in section 23(2A) and (4) is met and that jurisdiction is established: paragraphs 5.83 to 5.89.

Hypothetical increment in value

275. There was no material dispute as to the interpretation of section 23(4). However, Sabre had mischaracterised the CMA's position. The CMA had accepted that the transaction must result in an increment (paragraph 5.72), but that there is no *de minimis* threshold for that increment. Where one party has at least 25%, any increment over the initial existing share (however small) will be sufficient to establish jurisdiction. Thus, the dispute between the Parties is not whether an increment is required but whether the Merger does in fact result in an increment. This, said the CMA, is a question of fact and degree.

276. BA's description of the BA Agreement as "obsolete" was taken entirely out of context and ignored what BA subsequently said at the meeting of 12 March 2020. The true position – that the BA Agreement (and FLX Services) continue to be used by BA to sell its interline segments - points to the conclusion that there is a continuing supply, albeit one which (on Sabre's case) has no value at all.

277. Sabre's argument is based, on the claims that (1) payments are not collected from BA under the BA Agreement and (2) even if they were, the payments would be "negligible". These were addressed at paragraphs 5.72 to 5.74, and 5.81 to 5.82. In summary:

(1) Section 23 imposes no minimum increment. The issue is whether the CMA acted rationally in finding that there was an increment (small as it was) on the facts of the case.

(2) Section 23(5) gives the CMA considerable discretion in assessing whether the quantitative threshold of 25% has been satisfied. The criteria used by the CMA in the exercise of that discretion were reasonable and appropriate to address the (unusual) facts of the present case in which payments properly due had not been enforced.

(3) In those circumstances, the issue for the CMA was whether there was nevertheless a supply of value. It is not in dispute that there was a supply

and that payments are contractually mandated for that supply. That is not a hypothetical or a theory, but a fact. The fact that the Parties have agreed on a sum is a measure of that value and as a result the CMA has had regard to such fees as an indicator of the value of the service provided, even if the fees are not collected for reasons of convenience: paragraph 5.65.

(4) The alternative argument, advanced by Sabre, is to conclude that the service actually provided has no commercial value because the costs of collecting payment outweigh the small sums due. That is however a *de minimis* argument which is not open to Sabre.

(5) The CMA also relies on the points made in the Final Report that (a) Farelogix derives value from the provision of the relevant service to BA because it enables the making of sales through the FLX Platform which would not otherwise be made (paragraph 5.64) and (b) a further indicator of the value revenue derived by Farelogix is the "fee mechanism" relating to AA (paragraph 5.77).

278. The CMA submitted that its analysis represented an appropriate means of resolving the issue with which it was presented on the facts of the present case. Sabre's attempts to characterise the value of the supply as hypothetical and theoretical are a disguised *de minimis* argument.

Inconsistent methodologies

279. Sabre's argument that the CMA had used actual UK revenue as the relevant criterion in the case of Sabre, but had used the criterion as "value" in the case of Farelogix is an inaccurate characterisation of the CMA's approach.

280. In both instances the CMA said that it used the criterion of value – which is specifically referred to in section 23(5) – to assess the share of supply. The issue accordingly concerned how value was measured in each case. In the case of Sabre, value could be measured by revenues received. In the case of Farelogix,

value could be measured by revenues received or receivable or both: paragraphs 5.73 and 5.79.

281. As to Sabre's complaint that the methodologies the CMA used to assess value were inconsistent and not properly comparable, the CMA responded as follows.

282. First, section 23(5) does not impose an obligation on a decision-making authority to measure a criterion by reference to a single factor or piece of information. On the contrary, there may be strong reasons not to do so. For example, the "number of workers employed" (also identified in section 23(5) as a criterion for measuring share of supply) might include those employed full-time as well as those on zero-hours contracts. The fact that one business may operate via the former whereas another may operate via the latter may mean that different measures of the size of the workforce need to be taken into consideration in assessing a given merger.

283. Secondly, as made clear at paragraph 5.65, the criterion of value was, in fact, measured in the same way for both parties. The CMA's application of those measures varied according to the circumstances of each undertaking. But this does not mean that the CMA measured or assessed two different things.

284. Thirdly, and critically, Sabre's complaint disregards the issue which the CMA had to resolve, which was simply whether the Merger resulted in *any* increment, given the scale of Sabre's existing supply. For that purpose, it was sufficient to demonstrate that Farelogix made a supply of *any* value to BA which would necessarily mean that the quantitative aspect of the share of supply test was met. The comparability of the measures used was not therefore critical to the issue facing the CMA - the position would be different if the CMA had aggregated a 15% share and a 12% share calculated on different metrics to create a 27% share which would fall below the relevant threshold of 25% if the same measures had been used. In this case, as long as Farelogix made a supply of value to BA, there is no question of the CMA's methodology generating a false positive.

285. Finally, as regards revenues received and the "fee mechanism", Sabre argues that this is US revenue paid by AA which is said to be "fatal" to the CMA

analysis. However, this misunderstands the CMA's approach to this aspect. The question is whether part of the fee is referable to the service supplied in the UK to BA.

Appropriate measure for Sabre revenue

286. The provision of travel services information to travel agents is an indispensable part of, and not readily separable from, the other functionality provided by Sabre's GDS. The Final Report recognised that GDSs provide other functionality and that fees are charged per booking segment and not triggered by the provision of travel services information per se (paragraphs 3.17 to 3.29). However, without the provision of travel services information to travel agents, travel agents would be unable to make the bookings, which serve as a trigger for payment of fees through the GDS to Sabre. As such, the provision of information to travel agents via the GDS system is an essential component of the service for which Sabre receives its GDS fees.

287. On this basis, it was appropriate for the CMA to treat GDS revenue as the relevant revenue for the purpose of the RDS, and any apportionment of the type Sabre proposes would have been hypothetical and highly artificial.

288. Further, the need to arrive at a hypothetical apportionment of GDS revenue was not raised by Parties during the inquiry, despite their seemingly exhaustive representations on jurisdiction. Nor was there (or is there now) any suggestion by the Parties that a process of apportionment would reveal material differences in the share of supply. The single sentence in paragraph 2.40 of Sabre's response to the CMA's PFs was making a different point. Sabre is now criticising the CMA as having acted irrationally for failing to perform a task the parties never suggested the CMA needed to perform. Even now, there is no proposal as to how such a process could practicably have been performed.

289. Whilst these points are not by themselves dispositive of the issue of public law, they are highly material in considering whether the CMA acted irrationally, especially given that the point concerns the way in which the CMA was

proposing to use Sabre's own revenue data and the way its own business worked.

290. Sabre's argument depends on the contention that the CMA was legally obliged to carry out a detailed inquiry into the business lines of all three major GDSs, which would have required extensive additional evidence and investigative steps, all to arrive at an apportionment which would still be no more than a hypothetical construct which does not reflect the reality of their businesses. Given that the measures of revenue in fact used by the CMA were comparable across the GDSs, and did not result in any distortion of the data when compared with others, the CMA submitted that its approach was reasonable. The risk that the further investigations and calculations now suggested would have been spurious is clear.

(2) The Tribunal's analysis

291. Under Ground 3, the overriding question is whether the CMA erred in concluding that the Merger would result in an increment in the merged entities' share of supply in the RDS in the UK. Within that overriding question, four issues fall for determination, which we address in the following order.

(1) Did the CMA apply inconsistent methodologies in measuring the shares of supply of Sabre and Farelogix respectively?

(2) Was part of the revenue received by Farelogix *from AA* in respect of tickets which included a BA interline segment attributable to the services provided by Farelogix pursuant to the BA Agreement?

(3) Was the value of the supply of FLX Services by Farelogix to BA real, as opposed to being hypothetical?

(4) Was the CMA wrong to calculate Sabre's share of supply by reference to the turnover received by Sabre (and others) for activities performed by the GDS as a whole?

(Issue (1) is raised by point 2(a) of Sabre's challenge. Issue (2) and (3) arise under point 1 (and, partially 2(a)) of Sabre's challenge; and issue (4) is raised by point 2(b) of Sabre's challenge.)

(a) The relevant statutory provisions

292. First, the effect of sub-sections (2A) and (4) of section 23 is that, in order for the share of supply test to be met, the combined share of supply of the merged entities must, as a result of the merger, (a) where neither party previously had a share of 25% or more, be 25% or more or (b) where at least one of the parties had a share of at least 25%, be increased. The latter condition is derived from the words "prevails to a greater extent" in section 23(2A)(a). In the present case, because Sabre had a pre-existing share of greater than 25%, the issue is whether the latter condition was satisfied, namely whether there is an increment in the combined share of supply as a result of the Merger. That in turn means that the question is whether Farelogix has a share of supply which can be measured quantitatively.

293. Secondly, pursuant to section 23(5), the CMA has a discretion as to the criterion or combination of criteria which it applies in deciding whether the 25% share of supply condition has been fulfilled. Amongst the criteria which the CMA may choose to apply are value, cost, and quantity. Other criteria might be selected.

(b) Issue (1): inconsistent methodologies

294. First, whilst as pointed out above, the CMA had a wide ranging discretion as to its choice of criteria by which to measure the respective parties' share of supply of the RDS in the UK, we agree with Sabre that, having chosen its criterion or criteria, it was required to apply the same criterion or criteria to both Sabre and Farelogix. Sabre contends that it did not do so because, in the case of Sabre, the criterion selected was revenue *received* and in relation to Farelogix the criterion was, at least in part, revenue *receivable*.

295. We do not accept this contention on the facts. It is clear from paragraphs 5.65, 5.66, 5.73, 5.74, 5.77 and 5.89 that the criterion applied by the CMA to both parties, and to all suppliers, was *value*, being "value derived from the supply". The CMA then decided to measure "value" by reference to a combination of revenue received and revenue receivable. At footnote 186 the CMA explained that revenue receivable was not used in a technical accounting sense, but as a shorthand to describe any fee that a supplier is contractually entitled to receive for the provision of the RDS. Moreover it is not the case that the CMA used solely revenue *received* to measure the value of Sabre's supply, but, on the other hand, used solely revenue *receivable* to measure the value of Farelogix's supply. As regards Sabre and others, the CMA pointed out that, although the relevant figures were principally revenues received, there was no evidence to suggest that their revenue figures excluded revenues receivable. (In any event that would have made no difference.) As regards Farelogix, whilst the measure in respect of the fees due under the BA Agreement was revenues receivable, the measure of value in relation to fees paid by AA was revenues received.

296. In our judgment, the CMA's approach to the selection and application of criteria for assessing whether the combined share of supply met the 25% condition at all or to a greater extent was in accordance with the requirements of section 23(5) of the Act and, moreover, was not irrational.

(c) Issue (2): fees paid by AA

297. At paragraph 5.74, the CMA identifies two specific sources of revenue by which it measured the value derived by Farelogix from the supply of the RDS to BA. The first of these is the fee payable by AA to Farelogix under the Direct Connect Services Agreement, being a source of received revenue (referred to as "the Fee mechanism").

298. At paragraphs 5.75 to 5.79, the CMA proceeds to set out its analysis in relation to fees payable by AA to Farelogix, finding that it is appropriate to conclude that Farelogix derives value from the part of the fee (paid by AA) attributable to interline segments and thus that part is an appropriate measure of revenue received for the provision by Farelogix of the FLX Services *to BA* under the BA

Agreement. The CMA reasons that, in respect of tickets which incorporated and included a BA interline segment, some of the value derived by Farelogix from the fee paid by AA is referable to the BA Agreement, because Farelogix was only able to receive those fees because the BA Agreement had facilitated the incorporation of the BA interline segment within that ticket.

299. Sabre's first objection to this analysis is that any such fee paid under the Direct Connect Services Agreement is paid by a US company to a US company and paid in the US. Neither that fee, nor any part of that fee which might be said otherwise to be referable to the BA Agreement, is UK revenue. Any increase in the combined parties' share of supply would occur in the US and so this revenue received cannot properly be taken into account in assessing value derived by Farelogix. We do not accept this argument. The fact that this revenue is received in the US from a US company does not mean that the revenue should not be taken into account, if it can be established with sufficient certainty that it is revenue received by Farelogix referable to, or in respect of, the supply in the UK by Farelogix to BA of the RDS. The question is whether any part of the fee which it in fact receives from AA is referable to the fact of its UK supply to BA. The physical location of where that fee is paid is not determinative of that question. The point is not from which jurisdiction the actual payment is made, but to which service(s) the transfer of value relates.

300. Sabre's second objection is that there is no evidence to suggest that the sale of the additional 62 tickets which included a BA interline segment would not have been sold absent the availability of such a segment. They could equally have been sold but with a different interline segment. The CMA's analysis is based on the sale of 62 AA tickets which included a BA interline segment (see paragraphs 5.74 and 5.77(b)). The fee paid by AA (including that paid in respect of those tickets) is the same regardless or of whether or not a ticket includes a BA interline segment. The CMA proceeds on the assumption that, absent the availability of the BA interline segment, "those tickets", would not have been sold i.e. that they represented 62 sales arising from the availability of the BA interline segment. Mr Williams fairly accepted, in oral argument, that the CMA did not examine the specific sales to reach a view on whether any such sale would or would not have been made "in the counter factual" i.e. absent the BA

interline segment. But, he submitted – correctly - that those particular tickets which were in fact sold, could not have been offered through the Farelogix platform, absent the BA Agreement.

301. Sabre's argument here was based on a comparison between the actual position and a counter-factual, in which it posited the possibility of the consumer purchasing a different ticket being sold with a different interline segment. We do not accept Sabre's argument. It is clear from paragraph 5.77(b) (the paragraph which deals specifically with the AA Fee mechanism) that the CMA's analysis was not based on such a comparative analysis. The CMA was considering value derived from "those tickets" i.e. the 62 (AA/BA) tickets which were actually sold and sold only because of the BA Agreement. As Mr Williams submitted in oral argument, it was not irrational for the CMA not to look at what the purchaser might have done, if the BA Agreement had not been in place – a process he described as a "rabbit hole with no end". On any view, the specific 62 AA/BA tickets would not have been sold. Nor do we consider that wider general statements made by the CMA at paragraph 5.64 suggest that the CMA took such a comparative approach to the AA Fee mechanism. First, that paragraph is not addressing this issue specifically. Secondly, the tickets which the CMA there identifies as not being sold absent the BA Agreement are, again, the specific AA/BA tickets.

302. We accept that, in principle, each party's share of supply must be quantified. However since *in this case* all that is required is an increment of *some* real value, it is not a valid objection to the CMA's analysis that it did not, nor was able, to identify a *specific* numerical value to the part of that fee which it found to be referable to the supply to BA[38]. At paragraph 5.77(b) the CMA found that *some proportion* of the value was so referable, and that that conclusion was supported by evidence provided by AA itself that the fee was intended to cover the services provided by Farelogix for the interline segment (relying on further material at paragraph 5.47 and footnotes 206 and 207). Thus some, necessarily numerical,

[38] The position would be different where neither party has an existing share of less than 25%. In that event, it would be necessary to quantify more precisely the numerical value of each party's supply.

part of the fee paid by AA in respect of the 62 tickets was referable to the supply to BA.

303. Accordingly, we conclude that the CMA's conclusion that part of the revenue received by Farelogix from the fee paid by AA was attributable to the provision of FLX Services under the BA Agreement was not irrational.

(d) Issue (3): the fees payable under the BA Agreement: hypothetical value

304. This issue relates to the second of the two sources of revenue referred to at paragraph 5.74, namely Farelogix's right to payment from BA under the BA Agreement, being a source of receivable revenue.

305. First, the CMA set the criterion of "value". In our judgment, this must be value *to Farelogix* (and not to BA). The legislation requires consideration of the shares of supply of the suppliers in question. If Sabre's share is being assessed by the CMA by reference to value and that value is measured by revenue received *by* Sabre, that is an assessment of value *to Sabre*. Equally, it must follow that Farelogix's share is to be assessed in the same way i.e. by value to, and revenue to, Farelogix. The issue is "value derived by Farelogix", as recognised at paragraphs 5.74, 5.82 (b) and 5.89.

306. Secondly, there is no "de minimis" threshold when assessing the increment in the share of supply resulting from the merger: see Mergers Guidance at paragraph 4.54. Nevertheless there still has to be some increment, and in this case some increment in value.

307. Thirdly, the increment in value must be capable of quantification i.e. it must have *some* numerical value. This follows from the wording of section 23(4) itself: the requisite share of supply is defined by reference to a numerical value of "one quarter". In the case where one of the merging parties has a share of supply of less than 25% (say 24.9 %), then in order for the CMA to decide whether the condition is satisfied, it must be able to quantify numerically the other party's share of supply i.e. to decide whether that share is or is not 0.1%

or more. The position must be the same in the alternative case where the first party has a share of supply of 25% or more. It cannot be that in that case, the mere finding of the fact of supply by the second party is sufficient for the CMA to conclude, without more, that there is the requisite increment.

308. Fourthly, we do not accept Sabre's arguments, based on BA's subsequent comments, suggesting that the BA agreement was obsolete. As a matter of fact, it remained operative throughout.

309. Fifthly, however, no fees provided for in the BA Agreement had ever been invoiced or paid and we proceed on the basis that there was no prospect of any such payment being made, and that it is not economic for Farelogix to collect those fees. Nevertheless, there remains vested in Farelogix a contractual right to receive payment. The question is whether that contractual right to receive payment is value derived by Farelogix i.e. value to Farelogix. (We can see that the mere statement of the price for the service is a measure of value to *BA* of that service, but as indicated above we do not consider that that is the relevant question).

310. We have not found this issue easy to resolve. Nevertheless we are satisfied that the existence of the contractual right to payment gives rise to a quantitative measure of "value". As considered under Ground 2 above, there was a supply of a service between commercial parties. The question is how to measure the value of that supply. The parties have ascribed such a value in terms of a contractual fee payable. If that fee had been billed, but not paid, then it represents revenue receivable and a representation of the value of supply. We consider that a fee which is billable, but has not been billed is equally capable of being a fair representation of the value of the supply by Farelogix to BA, and that the CMA's decision to measure the value of that supply by reference to such receivable amount was not irrational. Sabre's argument that the value is only "hypothetical" is based purely on the fact that Farelogix has not enforced the right to payment because the practical costs of collection outweigh the sums receivable. That is in reality a de minimis argument i.e. the sums are too trivial to collect. But that does not mean that there is no <u>supply of value</u>. There may be myriad reasons why revenue which is receivable, is not in fact received. But

the right to payment remains. The CMA's view (at paragraph 5.65) that "*revenue that a party is contractually entitled to receive, but has chosen not to do so for administrative or other reasons [is] an additional indicator of the value of the service provided*" is a reasonable conclusion.

311. That the CMA also encountered difficulty with this issue is demonstrated by aspects of its reasoning in the Final Report. For example at paragraph 5.82(b), the CMA relies on the ambiguously stated fact that "*value is provided*". This appears to be a reference to provision of value *by* Farelogix *to* BA. In oral argument, Mr Williams at times appeared to rely upon value to BA, as opposed to value to Farelogix. At paragraph 5.82(d), we have difficulty in understanding the CMA's statement that "the fee *reflects payment* for BA receiving the FLX Services". However no such payment has been, nor ever will be, made. At paragraph 5.65, the CMA explains that receivable revenue which a party has chosen not to enforce is an indicator of "the value of the service provided". That again may appear to be a reference to value to the person to whom the service is provided (here, BA) rather than value to the provider of that service (here Farelogix). However, Sabre's challenge here is one of substantive irrationality, and not based on a failure to give sufficient reasons[39]. We have concluded that Sabre's challenge is not made out. In any event, if a reasons challenge had been made, applying the approach in *BAA* at [20(8)], we would not have been satisfied that the expression of the reasoning was sufficiently "seriously awry" to justify quashing the decision on such a ground.

312. At paragraph 5.82(a), the CMA concluded that "the right to receive an agreed measure of revenue is a quantitative measure of value attributable to the service". That was a conclusion which was open to the CMA, on the facts of this case. It was not irrational.

(e) Issue (4): the appropriate measure for Sabre revenue

313. Sabre's objection here is that the CMA was wrong to assess Sabre's share of supply of the RDS by reference to its total UK revenue derived from the entirety

[39] In contrast to its case on Grounds 1 (and 5 and 6): NoA paragraphs 62 e, 197 f and 235 b.

of its GDS service, and, similarly, to assess the shares of supply of the other UK suppliers of RDS by the same measure.

314. We agree that, whilst the RDS covers only information provision to travel agents, Sabre's GDS services encompass a much wider range of matters including offer creation, normalisation and aggregation, booking, ticketing and settlement. The fee paid by airlines to Sabre is a fee in respect of all those aspects of the GDS and not specifically for that part which constitutes the provision of airline content information.

315. There was no error of law on the part of the CMA in adopting the approach which it did. The issue is whether that approach was irrational. In principle, we do not consider that it was.

316. First, the CMA applied this same "global GDS" approach to the other main suppliers of GDS services. Whilst the Final Report pointed to some difference between the three main suppliers as to their relative regional strength, it also referred to the similarities in their functionality and services. There was no evidence to suggest that, within the group of GDS suppliers, there would be significant differences in the proportions of revenue derived *from different aspects* within the overall service supplied. On that basis, absent evidence of such differential proportions, it follows that relative shares of supply would be broadly the same whether measured by revenue from the full GDS service or by revenue from the RDS element of that service. There is thus no evidence to suggest that, had the CMA sought to allocate part of the revenue specifically to the RDS element of the GDS service, a different result for Sabre's share of supply would have ensued. Secondly, there is no evidence to suggest that it is possible to apportion the revenues of the GDS service between different elements. Thirdly, we do not accept Sabre's submission that during the investigation it specifically raised this issue in relation to the use of total GDS revenues as a measure of shares of supply of the RDS. The relevant passage at paragraph 2.40 in Sabre's response to the PFs addressed a separate argument that the fees payable under the BA Agreement to *Farelogix* were for a service which did not fall within the RDS. The final sentence of that paragraph is a statement of general principle made in connection with *that* argument; in any

event, in using the total GDS revenues as a proxy, the CMA was not "including… fees for services that fall outside the RDS". There was no reference at all by Sabre to the approach to calculation of *Sabre's* revenue. Finally, to carry out an extensive additional attempt at apportionment would have been such an extensive exercise that no reasonable authority in the position of the CMA would have done so.

317. The CMA used revenue derived from the totality of the GDS services, both for Sabre and for other suppliers, as a proxy for the revenue derived from the supply of the RDS. It was not irrational for it to have done so.

(3) Conclusion on Ground 3

318. We do not accept Sabre's arguments on any of the foregoing issues. Accordingly Ground 3 fails.

H. GROUND 4: EXCLUSION OF THIRD-PARTY SUPPLIERS FROM THE RDS

319. This Ground concerns the application of the RDS on the assumption that the RDS is lawful.

320. Paragraphs 5.34 to 5.37 of the Final Report relate to Ground 4 and provide:

> "*Services included in the Relevant Description of Services*
>
> 5.34 The Parties submitted that, even if the Relevant Description of Services is appropriate and reasonable, the CMA has erred in determining which service providers fall in and out of its scope. In particular, the Parties submitted that there are two main flaws in the CMA's approach.
>
> 5.35 First, the Parties submitted that Farelogix does not provide a service that meets the Relevant Description of Services to UK Airlines. The Parties submitted that the services provided by Farelogix are not comparable to the services provided by a GDS on the basis of the CMA's own provisional finding that the services provided by Farelogix and the services provided by GDSs are complementary (rather than substitutable) from a travel agent's perspective. However, we consider that the Parties have overstated the CMA's position, and misconstrued evidence of the preferences of travel agents as a finding of complementarity. In any event, we consider that complementary services may in any event be of the same description as each other. As

explained in paragraph 5.3 above, our Relevant Description of Services does not rely on market definition or an assessment of substitutability.

5.36 Second, the Parties submitted that the Relevant Description of Services excludes a wide range of service providers that meet the description. In particular, the Parties challenged the exclusion of:

(a) *Metasearch engines:* The Parties submitted that metasearch engines (eg Google Flights) do a similar job to aggregators (ie they aggregate and compare content from multiple airlines, whilst not directly connecting to an airline). However, we consider that there is a clear distinction between non-GDS aggregators and metasearch engines. Non-GDS aggregators are an IT solution provided to airlines which enables travel agents to access travel services information and to make bookings (in conjunction with, e.g., a GDS or direct connect). Metasearch engines are not an IT solution provided to airlines but consumer facing sites.

(b) *Non-VITOs:* We address this point in paragraph 5.68 below.

(c) *NDC Exchange:* The Parties submitted that NDC Exchange is an NDC API provider which provides NDC API connectivity to customers and, therefore, a direct competitor to Farelogix. We disagree that NDC Exchange is an NDC API. The evidence received shows that NDC Exchange is a partnership between ATPCO and SITA which provides NDC translation technology and does not provide an NDC API for airlines.

(d) *ATPCO* [Airline Tariff Publishing Company]*:* The Parties submitted that ATPCO's services of collecting and supplying airline data are a necessary and important component for the overwhelming majority of bookings in the indirect channel. However, we consider that ATPCO is not an IT solution provided to airlines but an information tool that collects fare and fare-related data for the airline and travel industry and distributes that information to third parties (eg non-GDS aggregators).

(e) *Other providers:* The Parties submitted that the Relevant Description of Services should include suppliers that facilitate interline bookings (ARINC, SITA); IT companies that create airline travel agency portals for travel agencies; and IT companies that build airline websites. We consider that, providers of messaging technologies (eg ARINC) provide communication services to airlines which do not, on their own, enable airlines to provide travel services information to travel agents or enable travel agents to make bookings. The evidence available does not indicate that airline travel agency portal builders provide an IT solution to airlines which, on their own, enable the transfer of travel services information to travel agents and the making of bookings by travel agents. In addition, we consider that IT companies that build airline websites do not provide an IT solution to airlines that enable travel agents to access travel services information and make bookings.

5.37 In light of the above, we consider that we have included all providers which provide services falling within the scope of the Relevant Description of Services. In particular, we consider that we have included:

(a) All relevant third-party services providers (ie excluding self-supply) involved in the travel agent/travel management company channel (an important airline distribution channel);

(b) IT solutions that allow airlines to connect to travel agents – ie GDSs, or APIs for connection with travel agents through direct connect or non-GDS aggregators; and

(c) third-party services actually used and identified by UK Airlines to allow travel agents to access travel services information and make bookings." (Footnotes are excluded).

321. Further, parts of paragraph 5.68 are relevant to Ground 4:

"5.68 We performed a number of checks and adjustments on the data submitted by the Parties to devise a robust set of revenue estimates:

(a) *Exclusion of TOs:* As further explained in Part B of Appendix B, we consider that the activities of TOs (including non-VITOs) are not comparable to those performed by the Parties (and the other suppliers of similar services identified by the Parties) and should therefore be entirely excluded from the share of supply calculations.

[…]

(d) *Inclusion of non-GDS aggregators revenues:* […] we have included non-GDS aggregators in our calculations on a conservative basis. As further explained in Part B of Appendix B, we have relied on expenditure data from UK Airlines to estimate revenues for non-GDS aggregators (eg Travelfusion). However, we understand that non-GDS aggregators require the use of a direct connect or GDS to provide the data and could, therefore, be considered to fall outside the Relevant Description of Services. Therefore, we have also calculated market shares excluding non-GDS aggregators in Part B of Appendix B. The inclusion or exclusion of non-GDS aggregators does not have a material impact on our calculations."

322. Footnote 122 to paragraph 5.29 provides the following in relation to the inclusion of non-GDS aggregators for the purposes of the share of supply test:

"As indicated in footnote 119 above, we have included non-GDS aggregators in our assessment for the purposes of the share of supply test on a conservative basis. Non-GDS aggregators are providers of IT solutions that aggregate airline content from multiple airlines and transfer that content to a travel agent. In that sense, their functions are very similar to a GDS and therefore we consider it appropriate to include them in the Relevant Description of Services. We do not

> think that the fact that they do not necessarily connect directly to an airline affects our view as they are still a necessary and important component to the transfer of airline content to the travel agent."

323. In relation to the NDC Exchange being a direct competitor to Farelogix, footnote 131 to paragraph 5.36(c) states:

> "ATPCO's Chief Strategy Officer testified in the US proceedings that NDC Exchange does not compete with any products offered by Sabre or Farelogix (United States of America vs Sabre Corporate, day seven, Bench Trial transcript Day Seven, page 1693); [✂]. In addition, even if it were to be included, it has been confirmed by SITA that NDC Exchange [✂] in 2018 and UK Airlines have not listed NDC Exchange as a distribution channel."

324. In relation to airline travel agency portal builders, footnote 134 to paragraph 5.36(e) provides:

> "This is supported by the evidence received by a provider of agency portals who told us that their services are more comparable to services provided by PSS providers and to products such as SAP Hybris than to services provided by GDSs and Direct Connects ([□]). In addition, no UK Airlines identified any of these suppliers as a distribution channel. Even if travel agent portals were included in the Relevant Description of Services, the revenues data available suggests that their inclusion would have a limited impact on our share of supply calculations."

325. In relation to services excluded from the RDS, footnote 135 to paragraph 5.36(e) explains:

> "The Relevant Description of Services also excludes the following services identified by the Parties: (i) airline.com (it is not an IT solution provided to airlines (each airline has its own airline.com), it is generally accessed by travellers directly, and bookings under airline.com are made by travellers directly); (ii) suppliers of communications networks (e.g. Openreach) (as such suppliers do not provide an IT solution to airlines); (iii) EDIFACT (it is a messaging standard used within the aviation industry rather than an IT solution provided to airlines); (iv) PSS providers (as such suppliers do not, on their own, provide travel services information to travel agents or enable travel agents to make bookings); (v) airline revenue accounting services (eg Maureva) (as such suppliers do not allow the transfer of travel services information to travel agents or enable travel agents to make bookings); and (vi) providers of shopping and pricing non-core PSS modules (eg Google/IAT) (as such suppliers they do not, on their own, provide travel services information to travel agents or enable travel agents to make bookings)."

326. Footnote 137 to paragraph 5.37(c) states:

> "The Parties have argued that the CMA did not put the Relevant Description of Services to airlines and therefore cannot rely on the data they provided for this purpose (paragraph 2.11 of the Provisional Findings response). However,

we consider that the line of questioning included in our questionnaires sent to UK Airlines was appropriate to obtain a comprehensive overview of the distribution channels used by UK Airlines, by including definitions of the main distribution channels and giving UK Airlines the opportunity to identify other distribution channels (including indirect distribution channels) in addition to those explicitly identified in our questionnaire. In particular, our questionnaire sent to UK Airlines asked them to provide 2018 booking estimates through the following distribution channels: (i) GDS services; (ii) Direct Connect (GDS bypass); (iii) NDC enabled GDS pass-through; (iv) airlines content aggregation services (non-GDS), eg Travelfusion or similar; and (v) Other content distribution services (please specify). Under the 'other' category, Jet2 and TUI identified their internal tour operators. However, as it is further explained below, Jet2 and TUI are vertically-integrated tour operators which the Parties excluded from their calculations. The Parties submitted that this constitutes a conservative approach to reflect that the majority of bookings made by vertically-integrated tour operators are for its own airline such that they might be considered as relating to the direct channel (Sabre's response to the CMA's RFI dated 16 October 2019). Therefore, the CMA excluded Jet2 and TUI's internal tour-operators from the indirect distribution channel. Under the 'other' category, LoganAir identified [✂] but they later confirmed these were not indirect distribution channels. Also Jet2 listed payments to Expedia which we have been excluded as they are a travel agent. The only providers identified by the UK Airlines to distribute their content through the indirect channel are the ones captured in the Relevant Description of Services."

(Emphasis added).

327. Appendix B, Part B "Adjustments to the share of supply calculations" states (as far as relevant):

"***Exclusion of non-VITOs***

1. As noted above, the Parties proactively excluded VITOs from their revenue calculations, but included non-VITOs in their proposed share of supply calculations. The Parties submitted that non-VITOs should be included in the Relevant Description of Services for the following main reasons:

   (a) Non-VITOs aggregate content from several airlines and are a necessary and important component for the transfer of airline content to travel agents who may be selling their holiday packages.

   (b) A customer booking their holiday through a non-VITO would not generate traffic on any GDS but still be able to compare and browse airline content from several different airlines in one single place.

   (c) Non-VITOs' services have functional similarities to non-GDS aggregators, a service that has been included in the Relevant Description of Services.

   (d) Although TOs are focused on the leisure segment, this cannot be used as a rationale for excluding them from a putative market for services to facilitate indirect bookings.

2. However, we consider that non-VITOs do not provide an IT solution to airlines[28]. The exclusion of non-VITOs from the Relevant Description of Services is supported by third party evidence. Third-party evidence indicates that the activities of non-VITOs are not comparable to the activities of the suppliers of the Relevant Description of Services[29]. Third-party evidence also indicates that non-VITOs generally access airline content in the same way as travel agents (eg via GDSs or Direct connects)[30] and distribute airline content as part of a holiday package including accommodation and other amenities either directly to the public or through travel agents.

3. Therefore, we consider that non-VITOs should be excluded from the Relevant Description of Services for the purposes of applying the share of supply test. For completeness, we note that, even if non-VITOs are included in the Relevant Description of Services and the calculations, the Parties' combined share of supply (by revenue) remains well above the 25% threshold (as illustrated by Table B1 below) …

[...]

Approach concerning non-GDS aggregators

7. As mentioned in Chapter 5, we have included non-GDS aggregators (eg Travelfusion) on a conservative basis in the share of supply calculations. The non-GDS aggregators revenue figures included in Table 5.1 of Chapter 5 rely on UK Airlines' expenditure data for non-GDS aggregators received directly from the UK Airlines. To verify the robustness of the UK Airlines' expenditure data, we compared the UK Airlines' expenditure data for the largest aggregator with the revenue estimates submitted by the largest aggregator (ie Travelfusion) for UK Airlines which demonstrated the UK Airlines' expenditure data was a good approximation of revenues.

8. However, we understand that non-GDS aggregators require the use of a direct connect or GDS to provide the data and could, therefore, be considered to fall outside the Relevant Description of Services. Table B3 below includes the market share calculations excluding these suppliers. As illustrated in Table B3, the exclusion of non-GDS aggregators does not materially affect our initial calculations.

9. The Parties identified a large number of other suppliers which, in their view, could potentially supply direct connect APIs/aggregation services and should, therefore, be included in the denominator. However, we have seen no evidence to suggest that these suppliers earned any revenues in the UK in 2018, and no UK Airlines identified any spend with these suppliers.

Table B3- Shares of supply for IT solutions to airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings based on data from Sabre, Amadeus and Travelport and airline submissions(excluding non-VITOs and Non GDS aggregators)

Shares of supply for IT solutions to airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings (UK Airlines)

Vendor	Revenues ($)	Share of Supply
Sabre	[✂]	[30]-40]% [✂]
Farelogix	[✂]	[0-5]% [✂]
Amadeus	[✂]	[30-40]% [✂]
Travelport	[✂]	[20-30]% [✂]
Other GDS (Host Direct)	[✂]	[0-5]% [✂]
Other Direct Connects	[✂]	[0-5]% [✂]
Total	[✂]	100%

Source: MIDT data, Sabre internal NEF data, 2018 T2RL data, airline data, Amadeus and Travelport data."

328. Relevant footnotes to paragraph 2 of Appendix B, Part B provide as follows:

> "28. The Parties submitted that the CMA's exclusion of non-VITOs has placed decisive weight on the fact that there is no contract between the airlines and the non-VITOs (Provisional Findings response, paragraph 2.26). However, we consider that the Parties have misinterpreted our position as the exclusion of non-VITOs is based on the nature of the services provided by non-VITOs as opposed to the existence or absence of any agreement.
>
> 29. The Atmosphere Research Group Expert Report states that: 'GDSs are airlines' primary distribution channel to the broad travel agency community, which includes retail travel agencies, corporate travel management companies ("TMC"s), wholesalers, consolidators, tour/holiday operators, and online travel companies' (emphasis added). [✂] said that 'In our view, Tour Operators distribution activities are akin to travel agents' activities. Indeed some tour operators also sell standalone flights. They also said that 'we do not have any evidence that other travel agents are using tour operators as content aggregators'. [✂] said that 'As a general starting point, [✂] views Tour Operators' distribution activities to be closer to that of a travel agent than as a distribution channel per se. For example, we would not view Tour Operators as being close to the distribution function offered by GDSs or Direct Connect. Tour Operators may onward sell content to smaller third parties (including other Tour Operators or travel agents) to the extent they are taking the risk on inventory (whether airline, hotel, connections etc) but they are predominantly focussed on sale to end consumers and could not (without high levels of investment and/or material change to business model) offer a service akin to GDSs/direct connects'. The [✂] said that: 'To my knowledge non-VITOs (operators) do not offer airline content distribution services as those provided by GDSs (eg, Amadeus and Sabre) and Direct Connects (eg Farelogix)' and that 'travel agents with an ATOL licence may also act as tour operators'.
>
> 30. [✂] said that 'As far as we understand it, Tour operators connect to airlines in the same way as other travel agents, either via GDSs or direct connects (often using another aggregator). We don't have specific knowledge of whether there are any preferred direct connect providers that are more relevant to tour operators than other travel agents'. [✂] said that TOs connect [✂] via GDSs. [✂] said that 'Based on [✂] experience, Tour Operators (similar to travel agents), are largely reliant on GDS services to access airline content. [✂]. [✂] said that 'Most members will access airfares via an airline consolidator. The consolidators may have a bespoke system which can be accessed by the

operators. Some TOs access airlines via a web portal intended to use by the trade, eg Farelogix'."

(1) The Parties' submissions

(a) Sabre

329. Under Ground 4, Sabre's case falls into two parts (the second of which has two elements), as follows:

(1) The CMA adopted an irrationally inconsistent approach by excluding certain third-party suppliers from its RDS ("the inclusion and exclusion of certain services").

(2) The CMA failed to obtain sufficient evidence:

(a) In breach of its duty of reasonable enquiry, the CMA failed to take adequate steps to obtain sufficient information to reach its decision on the services included in, and excluded from, the RDS ("failure to inquire");

(b) In breach of the Survey Guidance, the CMA inappropriately conducted and relied on responses to a questionnaire sent to UK airlines regarding their use of different distribution channels ("the Survey issue").

<u>The inclusion and exclusion of certain services from the RDS</u>

330. In this regard, Sabre's pleaded case[40] is that the CMA:

(1) was inconsistent in the application of its own definition (NoA paragraph 161 a);

[40] Sub-paragraphs c, d and e of paragraph 161 NoA relate to the second part of Ground 4.

(2) took into account immaterial considerations and failed to take account material considerations (namely the nature of the services it considered) (NoA paragraph 161 b); and

(3) acted unreasonably[41] (NoA paragraph 161 f).

At other junctures, Sabre's case is put in a different way: for example, in its skeleton argument: the CMA acted "*irrationally on the basis of inconsistently applied, additional criteria which are not contained in the RDS*". We take this formulation to encompass all three of the pleaded grounds above.

331. Sabre submitted that the CMA concluded that the Parties' share of the RDS did exceed the relevant threshold, but it did so by purporting to apply the RDS in a manner that was both arbitrary and inconsistent. The effect was to exclude a wide range of other services without justification. The CMA identified the RDS at paragraph 5.28. However, the CMA provided no definitions of any of the component elements of that definition. Instead, when considering a series of services that potentially fell within the scope of the RDS, it decided on their inclusion or exclusion on an individual basis, relying on a variety of *ad hoc* considerations, which form no part of the RDS itself and which are arbitrary and inconsistent.

332. Whilst the CMA enjoys a margin of discretion when determining which criteria to use in identifying an RDS, once it has done so, it must apply those factors consistently and coherently.

333. In the NoA and its skeleton argument, Sabre identified an array of services which it contended had been wrongly excluded from the RDS. As matters developed in oral argument, Mr Ward put four categories of excluded service at the forefront of Sabre's case.

Non-VITOs

[41] i.e. *Wednesbury* unreasonable or irrational.

334. Non-vertically integrated tour operators (non-VITOs) are tour operators which do not operate their own flights. As part of their offering, they aggregate content from several airlines, allowing buyers, including travel agents, to compare and browse airline content from several airlines in one place. The CMA excluded non-VITOs in part simply by stating (without any analysis or any evidence) that non-VITOs' activities were not "comparable" to those of the Parties. Whatever that means, it does not explain why non-VITOs are not part of the definition of the RDS.

335. Sabre submitted that this high-level reason given on its own is completely unsatisfactory because "not comparable" raises far more questions than it answers and certainly is not part of any established test for the RDS. Moreover, the nature of non-VITO supply should fall within the RDS. Non-VITOs are indistinguishable from non-GDS aggregators in the sense that there is no direct connection to an airline.

Metasearch engines

336. As the Parties explained to the CMA, such search engines search across multiple websites to direct consumers towards the lowest price or best value available, which could be a travel service provider (such as an airline) or online travel agent ("OTA"). They receive fees when a consumer "clicks through" from the Metasearch engine. The fact that there is a "click through" from consumer to travel agent should not matter: the ultimate purpose is to land bookings which are landed by travel agents. As regards the CMA's basis for distinguishing Metasearch engines, (at paragraph 5.36(a)), nothing in the RDS excludes transmission of information via such a consumer facing site. This criterion forms no part of the RDS, nor any rational basis to exclude Metasearch. Moreover, the CMA accepted (at footnote 122) that non-GDS aggregators were within the scope of the RDS even though they "do not necessarily connect directly to an airline". The CMA accordingly identified no relevant point of distinction that would serve to exclude Metasearch.

Self-supply

337. This is where an airline provides an API on its own account. The CMA acknowledged that airlines self-supplied NDC API RDS services, such "distribution solutions based on NDC API". It nevertheless decided that self-supply should be excluded from the scope of the RDS, and therefore from the share of supply calculation. The CMA dismissed this without investigation or analysis of this exclusion. Self-supply is a means of transferring information to travel agents; it is a competing service.

Airline websites (airline.com)

338. Airline websites were excluded in part because they are generally accessed by travellers directly (footnote 135), despite evidence that they are also used by travel agents to access travel services information and make bookings (paragraphs 10.123(c) and 10.155(e)). It was illogical that airline websites, which carry a huge amount of traffic are excluded whether they are hosted by the airline if it has its own IT skills, or if it is hosted by somebody else. It cannot be said that an airline's own website is not an IT solution for the purpose of selling tickets.

Other excluded services

339. At paragraph 5.36(e), the CMA excluded two categories of service provider on the basis that they do not "on their own" supply the RDS services.[42] However, none of the services considered by the CMA meet this criterion. All of them are required to work with other services in order to carry out the functions specified in the RDS. The ability to enable the entirety of the communication between airline and travel agent cannot be a requirement of the RDS; if it were, the Parties' own products would have been excluded. Excluding some suppliers on this basis was accordingly arbitrary and inconsistent.

[42] These are: (i) suppliers facilitating interline bookings (ARINC and SITA) and (ii) travel agent portal builders. A similar approach appears to have been taken in relation to NDC Exchange, on the basis that it only provides translation services (which is in any event incorrect).

340. Sabre contended further that the exclusion of a number of other services was arbitrary and inconsistent: namely NDC Exchange, ATPCO, suppliers of communications networks (such as Openreach) and PSS providers.

Inadequate evidence base

Failure to inquire

341. It was incumbent on the CMA to carry out sufficient enquiry properly to establish the functions and capabilities of any candidate services potentially warranting inclusion. This is something the CMA could easily have done, for example, by asking the providers of those services. It has statutory information gathering powers specifically for this purpose. Its failure to do so was irrational and contrary to its *Tameside* duty to make reasonable inquiries.[43]

342. The CMA's analysis was superficial (a number of services were ruled out in a single footnote)[44] and relied upon broad third party statements about whether services were "comparable" to those of the Parties[45] or whether they were regarded as a competitive threat,[46] along with responses to a flawed survey. These provide limited insight into whether the services fall within the scope of the RDS, especially given the breadth of that definition.

343. The CMA was on notice that the exclusion of these services was contested by the Parties and it was aware that it could be determinative on the issue of jurisdiction. It had at best piecemeal and tangential evidence on what it says was the critical issue – the functions performed by these services - and every opportunity to obtain a proper evidential base. The CMA's failure in this regard was *Wednesbury* unreasonable.

The Survey issue

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[43] *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 (HL), at 1065, per Lord Diplock.
[44] Final Report, footnote 135.
[45] See Appendix B, Part B, paragraph 2 and further footnote 29; and footnote 134,
[46] See footnote 131.

344. Having failed to make direct enquiries on the specific question of which providers supplied the functions specified in the RDS, the CMA relied on indirect evidence gathered in other contexts. It placed particular reliance (at footnotes 131, 134 and 137) on a survey questionnaire sent to UK airlines regarding their use of different distribution channels (the "survey questionnaire"). Specifically, the questionnaire asked them to provide 2018 booking estimates through five categories of distribution the channels identified in footnote 137 at (i) to (v). Category (v) was "other content distribution services (please specify)".

345. The question was not intended or designed to understand which services were within the RDS. In determining whether it was nevertheless appropriate to rely on the responses received, and how much weight to place on them, the CMA should have taken into account three key points. First, the question asked about the airlines' use of distribution channels, not what services were available, or which shared a common functionality for the purposes of the RDS. Secondly, the question asked specifically for numbers of bookings by channel. Accordingly, where more than one service was involved in generating a booking, the airline may have chosen one. There was no option for multiple channels on the questionnaire. Thirdly, the question clearly pointed the user towards four specific answers (the services that the CMA had already decided were in the scope of the RDS), by identifying these as the primary options (categories (i) to (iv) at footnote 137).

346. As to this third point, the Survey Guidance specifically warns that questions which ask respondents to identify alternatives should contain explicit encouragement to think widely about those alternatives, to counter a kind of unconscious bias known as "restrictive bias": see paragraph 54 above. It makes clear that merely including an "other" category is insufficient – the question should explicitly encourage the respondent to think about all of the options available. Moreover, the position in the present case gives rise to an even stronger concern than that posited in the Survey Guidance: specific answers are suggested to the question posed. The error introduced by restrictive bias goes to the heart of the issue that the CMA was using the evidence to understand: are there services beyond those specifically listed in the question which fall within

the scope of the RDS? The CMA excluded services on the grounds that they were not identified by airlines in response to this question. In the circumstances, the CMA should at least have acknowledged this issue when relying on the responses in its analysis. Yet, at footnote 137, the CMA was adamant that there was no requirement to take this issue into account when assessing the weight of the evidence.

347. Sabre relied upon *Tobii AB v CMA* [2020] CAT 1, where the Tribunal stated at [219]-[220].

> "If a competition authority wishes to rely on customer questionnaires that fall outside the definition of a statistical survey, it seems appropriate and fair in respect of the questions used for the authority to take reasonable steps to avoid any significant risk that they will derive biased or misleading responses…
>
> The Tribunal accepts that, strictly speaking, the Survey Guidance does not apply in respect of the CMA's customer questionnaires used in this case. Nonetheless, the principles of good practice from the Survey Guidance in respect of question wording or ordering can still be applicable, where appropriate, to the CMA's customer questionnaires. Consistent with this, Counsel for the CMA accepted in oral submissions that it was under a public law obligation as a public authority to ensure it engaged in a fair enquiry and, therefore, not to ask biased or misleading questions. This acceptance of such a public law obligation is clearly correct as a matter of principle."

(b) The CMA

<u>The inclusion and exclusion of certain services from the RDS</u>

348. The CMA submitted that the Final Report explains the reasons for excluding a number of services from the RDS at paragraphs 5.34 to 5.37, and paragraphs 1 to 3 of Appendix B.

349. The application of the criteria chosen under section 23(8) will inevitably require judgment and factual appraisal and raise questions of degree which will not admit of a single right answer in relation to any given example. Accordingly, Sabre must make out an irrationality challenge.

350. The exercise of judgment to complex and varied fact patterns does not mean that the CMA is approaching its task in an ad hoc or inconsistent manner. Performing such an analysis, and taking account of the different features of the

different services under consideration, does not involve introducing "additional" or "hidden" requirements into the RDS, as Sabre suggests. The test is ultimately whether the CMA had rational reasons for excluding the relevant services from the RDS, on the basis of the description adopted.

351. The factors the CMA took into account, and to which it attached weight, in deciding whether to exclude services from the RDS are set out in the Final Report. Sabre's criticisms are very far from establishing any irrationality in the CMA's approach.

Non-VITOs

352. As to non-VITOs, the CMA's reasoning is set out at paragraph 5.68 and in detail in Appendix B part B, paragraphs 1 to 3. They were excluded on the basis that the CMA assess that they do not provide an IT solution to airlines. The exclusion was supported by third party evidence, as referred to in footnote 29 to Appendix B part B. Non-VITOs are effectively consumer facing. Taking account of that evidence, the CMA concluded that non-VITOs did not perform a function comparable to the RDS. That was correct and certainly rational. In any event the inclusion of non-VITOs would have had little impact upon the share of supply calculations: Appendix B Part B paragraph 3. There could therefore be no material error in the CMA's approach to this exclusion.

Metasearch

353. As to Metasearch engines, this is addressed at paragraph 5.36(a). The essential point is that Metasearch engines are "customer facing IT solutions"; they are not an IT solution provided to airlines, as required by the RDS. In oral argument, the CMA placed less reliance on the latter point, but rather emphasised that the purpose of Metasearch was not to facilitate the provision of travel services information to *the travel agents* to enable *travel agents* to make bookings. It was right (and rational) to have excluded them from the RDS. The fact that they do some of the same things as non-GDS aggregators, falling within the scope of the RDS, does not justify their inclusion. Non-GDS aggregators are not customer facing, but provide content to travel agents. In any event they

were a "borderline case" and included within the RDS on a conservative basis (paragraph 5.68(d)).

Self-supply

354. As regards the exclusion of self-supply of an API by airlines, the RDS is concerned with "the supply of an IT solution to airlines". It is not concerned with self-supply. This is made clear, for the avoidance of doubt, in footnote 117. Where an airline provides a service in-house which is capable of serving the same function as the RDS, such services are not offered for sale on the open market and the airline does not compete for the business of other airlines. It was not considered appropriate or informative to include self-supply in an assessment of the share of supply and that approach was not irrational.

Airline.com

355. Airlines' own websites were excluded because they are not an IT solution provided to airlines (each airline has its own website) and because they are generally used by travellers directly who make their own bookings: see footnote 135. There was no strong evidence that they are also used, to any significant extent, by travel agents.

Other excluded services

356. As regards services that do not perform the RDS "on their own", whilst the transmission of information from an airline to a travel agent involves a number of components which work together, the focus of the RDS is on services which exist for the particular *purpose* of providing information to travel agents to enable travel agents to make bookings. It is accordingly necessary for the CMA to judge which of the components in the process share the properties of the RDS such that their suppliers should be included in the share of supply calculation.

357. GDSs and the FLX Services establish a connection which specifically exists to allow travel services information to flow from the airline to the travel agent to make a booking. That is their purpose (in whole or in part) and they do not

depend on other services to make that connection. There is a clear difference between those services, which provide such a connection and fall within the RDS, and the PSS or ARINC's messaging services, which depend on other providers for a connection to allow the flow of information between the airline and the travel agent. That is what is captured by the point that these services providers do not "on their own" meet the definition of the RDS.[47]

358. As to Sabre's contention that this is not the relevant distinction, because the CMA includes non-GDS aggregators in the RDS and they do not connect directly to the airline, footnote 122 states that the CMA included non-GDS aggregators on a conservative basis - that, is to ensure that Sabre's share of supply was not overstated. This is precisely the sort of marginal judgment which it is for the CMA to make under the statutory scheme. The inclusion of non-GDS aggregators on this basis does not mean that other services which do not perform the same central function as a GDS fall within the RDS, still less that it was irrational for the CMA to take that view.

359. Finally, as to the exclusion of a number of other services from the RDS, the reasons for these exclusions are all addressed at paragraph 5.36(a) to (e). The CMA submitted that the RDS is directed at services which perform a particular purpose or role ("the supply of an IT solution to airlines *for the purpose of* airlines providing travel services information to travel agents *to enable* travel agents to make bookings"). In that context, assessing the main or primary purpose of the service in question does not amount to the imposition of an ad hoc criterion, but is a necessary aspect of applying the RDS in a given factual situation.

360. For instance, Sabre says that Openreach - which is a provider of internet infrastructure - supplies services which fall within the RDS. However, the services supplied by Openreach can be used for a multiplicity of purposes and do not serve the specific purpose identified in the RDS. That is clearly a sound reason why they should not be treated as part of the RDS. Indeed, the suggestion

[47] The CMA judged that the same point applies to travel agency portals, albeit that the CMA found that they would not materially affect the share of supply calculation in any event (footnote 134).

that Openreach supplies the RDS is a strong illustration of Sabre's over-inclusive and flawed approach, under which every product used in this operational context is treated as having the same nature and purpose as the RDS.

Inadequate evidence base

Failure to inquire

361. The CMA submitted that Sabre's complaint was vague and that Sabre failed concretely to identify (a) what evidence on functionality the CMA is said to have overlooked in excluding services from the RDS; (b) why such evidence was so material to the assessment that rationality required the CMA to make enquiries into those matters; and (c) why it was not rationally possible for the CMA to reach the conclusions it did on the services to be excluded from the RDS without the (unidentified) evidence.

362. The Parties had extensive opportunity in the course of the inquiry to submit evidence (and did in fact adduce voluminous evidence). Sabre does not explain why it was irrational for the CMA not to have investigated or obtained further (unidentified) evidence, where the Parties themselves did not flag such evidence as important or submit it.

363. Moreover, CMA had ample evidence to reach a reasonable conclusion as regards the "true nature of the services" falling within the RDS. This included evidence gathered from the Parties and from industry as to the nature of the included, and excluded, services. All of this provided a proper (and detailed) evidence base upon which the CMA could reach its determination.

364. Finally, the reasonableness of the enquiries conducted by the CMA must be viewed in the context of the *value* of such evidence. In particular, Sabre ignores the fact that the exclusion of a number of the services about which Sabre raises concerns would have had no, or no material, impact on the share of supply calculation, as pointed out at Appendix B paragraph 3 and Table B1 (re non-VITOs); and paragraph 5.36 (c) and footnote 131 (re NDC Exchange).

The Survey issue

365. The CMA submitted that, in analysing the suppliers which fall within the RDS it took into account responses to the survey questionnaire. This questionnaire asked recipients to provide 2018 booking estimates through different distribution channels. It did not address the RDS in particular, in part because the RDS had not been formulated when the questionnaire was issued.

366. The questionnaire responses were relied on by the CMA for limited and specific purposes. Where they were relied on, it was merely one strand of evidence, among others. First, as regards the category of "other providers" (i.e. providers of messaging technology, airline travel portals and airline.com) footnote 134 noted that no UK airline had listed any of these providers as a distribution channel, and that even if travel agent portals were included in the RDS, the revenues data available suggest that their inclusion would have a limited impact on share of supply calculations. The footnote also referred to other evidence which supported the CMA's analysis of whether these providers should fall within the RDS. Secondly, as regards the services included in the analysis, footnote 137 referred to the questionnaire to support the CMA's factual finding at paragraph 5.37(c).

367. Finally, in any event, as to Sabre's substantive points, its reliance on the Survey Guidance is misplaced for a number of reasons.

(2) The Tribunal's analysis

(a) Part 1: The inclusion and exclusion of certain services from the RDS

Some preliminary observations

368. First, in line with the approach in *SCOP*, the question for the Tribunal is whether the CMA's decision to exclude certain categories of services was irrational i.e. beyond the bounds of what the CMA could reasonably have found. The CMA's decision was an evaluative judgment. The question for us is not simply whether

we conclude, in respect of any particular category of excluded services that, they are, or are not, within the scope of the RDS.

369. Secondly, we accept Sabre's contention that the CMA does not have a broad discretion in its application of the definition of the RDS and/or of the criteria which it had identified under section 23(8). (In this regard, as explained in paragraph 125 above, the CMA positively asserts that, in this case, the elements of the definition of the RDS *are* the section 23(8) criteria.) As Sabre submits, once the definition is identified, the CMA must apply it consistently and coherently. However, in each case, that will involve the application of those criteria to the particular facts of each "service" in question; and that application is likely to involve an evaluative judgment – albeit, not the exercise of a "broad discretion".

The excluded services

370. Sabre identified a number of categories of services the exclusion of which it submits was irrational. We consider the following categories:

(1) Non-VITOs and Metasearch;

(2) Self-Supply;

(3) Airline.com;

(4) RDS not supplied "on its own";

(5) Others.

371. In each case, the question (for the CMA) was whether the service supplied by the third parties met the definition of the RDS in paragraph 5.28. That definition has the four elements as set out at paragraph 146 above under Ground 1.

Non-VITOs and Metasearch

372. We consider these two categories under a single heading. Ultimately they were at the forefront of the Parties' arguments, and in both cases, a central part of

Sabre's argument was comparison with the position of non-GDS aggregators. We consider Sabre's grounds raise, in each case, two distinct questions:

(1) Do non-VITOs/Metasearch fall within the terms of the definition of the RDS? (or, more precisely, was the CMA's decision that non-VITOs/Metasearch do not fall within the terms of the RDS irrational?)

(2) Was the exclusion of non-VITOs/Metasearch inconsistent with the inclusion of non-GDS aggregators? i.e. is there a relevant distinction between non-GDS aggregators and non-VITOs/Metasearch?

As explained below[48], however, we consider that the relative position of non-GDS aggregators is largely irrelevant, whichever answer is given to question (1) above. Question (1) is the overriding question, which falls to be considered first. We will then address the question of consistency with the position of non-GDS aggregators.

(1) Was the CMA's decision to exclude non-VITOs and Metasearch irrational?

Non-VITOs

373. In summary, the CMA excluded non-VITOs because their activities are "not comparable" to those of others within the scope of the RDS. They do not provide an IT solution to airlines because of "the nature of the services" provided by non-VITOs. In more detail the basis of the CMA decision is as follows:

(1) (at paragraph 5.68(a)) the activities of non-VITOs are "not comparable" to those performed by … the other suppliers of similar services to those performed by the Parties. That includes a finding that their activities are not comparable to those of non-GDS aggregators.

[48] See footnote 51 below: Sabre is not contending that, for the sake of consistency, non-GDS aggregators should have been excluded.

(2) (at Appendix B, part B, paragraph 2) non-VITOs do not provide "an IT solution to airlines"; footnote 28 explains that this is not because there is no contract between the airlines and the non-VITOs; it is based on "the nature of the services" provided by non-VITOs.

(3) (at the same paragraph), proposition (2) above is supported by third party evidence, which indicates that their activities are "not comparable" to the activities of suppliers of the RDS. This evidence is summarised in footnote 29.

(4) (at the same paragraph), proposition (2) above is also supported by third party evidence that non-VITOs access airline content in the same way as travel agents e.g. via GDSs or direct connects. This evidence is summarised in footnote 30, which suggests that this often includes connection/access via another aggregator.

374. In our judgment, on the basis of this material, the exclusion of non-VITOs was not irrational. The service supplied by non-VITOs is not "for the purpose of *airlines* providing travel services information to travel agents" "to enable *travel agents* to make bookings". Thus, elements (iii) and (iv) of the definition of RDS are not satisfied. Whilst "the nature of the services" is not further explained in the body of Appendix B part B, this can be seen from the evidence in the footnotes to that Appendix. This is supported in particular by the evidence (at footnote 29) that non-VITOs are "akin to travel agents", are predominantly focussed on sale to end users, cannot offer a service akin to the GDS/direct connects, and that there is no evidence that "travel agents are using tour operators as content aggregators".

375. We accept that, at certain points in the Final Report, the reasons given by the CMA for excluding non-VITOs are confused, not clearly expressed and/or vague. The expressly stated reasons are, first, that activities are "not comparable". Then the reason given is that they "do not provide an IT solution to airlines" i.e. that elements (i) and/or (ii) of the definition are not satisfied (rather than elements (iii) and (iv) as above). Finally, in turn, the reason they do not provide an IT solution to airlines is based upon the assertion as to the "nature

of the services provided"; the explanation for which can only be ascertained from the material in footnotes to Appendix B. However, Sabre's challenge to the exclusion of non-VITOs is one of substantive irrationality, and not based on a failure to give sufficient reasons[49]. We have concluded that Sabre's challenge is not made out. In any event, if a reasons challenge had been made, applying the approach in *BAA* at [20(8)], we would not have been satisfied that the expression of the reasoning was sufficiently "seriously awry" to justify quashing the decision on such a grounds.

376. Finally, we add this: even if there had been a legal error in the CMA's approach to non-VITOs, such an error does not justify the quashing of the decision. The error is not material. Even if non-VITOs should have been included within the scope of the RDS, (and assuming that no other category of third party was improperly excluded) the share of supply test would still have been satisfied (as explained at Appendix B Part B, paragraph 3): see *Stagecoach* at [46].

Metasearch

377. The CMA excluded Metasearch because "Metasearch engines are not an IT solution provided to airlines but are consumer facing sites": paragraph 5.36(a). These were the briefly stated reasons for the CMA finding "a clear distinction between non-GDS aggregators and Metasearch engines".

378. In our judgment, the decision to exclude Metasearch was not irrational. First, and leaving to one side the position of non-GDS aggregators, it is doubtful that Metasearch is an IT solution "provided to airlines". The mere fact that they collect airline information and are accessible by airlines, does not mean what they do is "provided to airlines". Further - and leaving to one side the issue of the intended recipient of the travel services information – this is supported by the fact that the purpose of a Metasearch engine is not to enable *airlines* to provide the information to anyone (travel agents or others) – the first part of element (iii). It is not the purpose of Metasearch engines to provide a link

[49] In contrast to its case on Grounds 1 (and 5 and 6): NoA paragraph 62 e, 197 f and 235 b.

between airlines and travel agents, and they do not generate revenue from airlines.

379. Secondly, Metasearch engines do not serve the purpose of providing travel services information *to travel agents* to *enable travel agents* to make bookings. The second part of element (iii) and element (iv) are not satisfied. The travel services information is provided directly to the consumer; the purpose is to provide that information directly to the consumer to enable the consumer to make the booking – even though in some cases, that booking may be completed through a travel agent where the travel agent pays a referral fee to the Metasearch engine. This is what is covered by the CMA's express reasons referring to "consumer facing sites". This alone provides a rational basis for excluding Metasearch from the scope of the RDS; and further we consider that the CMA's reasons, whilst brief, are sufficiently stated.

(2) Was the exclusion of non-VITOs/Metasearch inconsistent with the inclusion of non-GDS aggregators?

380. As regards the specific issue of consistency with the inclusion of non-GDS aggregators within the scope of the RDS, we can see an argument that their service does not contain all the elements of the definition. (We note that the CMA itself had some doubt in this regard[50]). In particular there is either no or, at least not always a, direct connection between non-GDS aggregators and airlines. However, Sabre has not contended that the inclusion of non-GDS aggregators was irrational and that the CMA should have *excluded* them from the scope of the RDS[51]. Non-GDS aggregators' function of "aggregating airline

[50] See in particular paragraph 5.68(d) and Appendix B, Part B paragraph 8.

[51] Sabre's case on inconsistency is that both non-GDS aggregators and non-VITOs/Metasearch should have been *included* in the RDS; and not that both should have been excluded. We add that even if we had considered that the inclusion of non-GDS aggregators within the RDS *was* irrational, then that would not have assisted Sabre's case. In that event, the inclusion of non-GDS aggregators would have been the relevant error. On that basis, equally, there would have been no rational basis for including Metasearch or non-VITOs; Metasearch and non-VITOs should all have been excluded, and thus the exclusion of Metasearch and non-VITOs was not irrational. It cannot be said that it was irrational for the CMA not to take an equally irrational decision to *include* them. Moreover, as pointed out at Appendix B Part B paragraph 8, the exclusion of non-GDS aggregators would have had no material impact upon the application of the share of supply test.

content" combined with the fact that they exist for the purpose of creating a link for its transmission from airline to travel agent satisfies elements (ii), (iii) and (iv) of the definition. We therefore proceed on the basis that the CMA's inclusion of non-GDS aggregators was rational and justified; and on this basis, the question is whether there was a rational basis for *distinguishing* non-VITOs and Metasearch from non-GDS aggregators.

Non-VITOs

381. As regards non-VITOs, we are satisfied that there was such a rational basis: by contrast with the position of non-GDS aggregators, the service supplied by non-VITOs does not satisfy elements (iii) and (iv): see paragraph 374 above. (Further and in any event, if there was no sufficient reason for distinguishing non-VITOs, and if therefore they should have been included within the scope, this is not a material error as their inclusion does not ultimately make a difference to the application of the share of supply test (see paragraph 376 above)).

Metasearch

382. As regards Metasearch, we are satisfied that there was a rational basis for distinguishing them from non-GDS aggregators, for the reasons given in paragraph 379 above.

Conclusion on Non-VITOs and Metasearch

383. This part of Ground 4 fails:

(1) The CMA's decision to exclude non-VITOs and Metasearch on the basis that they do not provide a service falling within the definition of the RDS set out in paragraph 5.28 was not irrational.

(2) In any event, even if the decision in relation to non-VITOs was irrational, their exclusion makes no difference to the application of the

share of supply test in this case and is therefore not a material error, justifying the quashing of the CMA's decision.

(3) As regards consistency with the CMA's conclusion that non-GDS aggregators do provide a service falling within the definition of the RDS:

(a) assuming that the CMA's conclusion in relation to non-GDS aggregators was not irrational (i.e. was justified), the services provided by Metasearch engines and non-VITOs can properly be distinguished from that provided by non-GDS aggregators for the same reasons as underlie conclusion (1) above; alternatively if non-VITOs cannot be distinguished, then, the inconsistency in treatment is not a material error, for the same reasons as underlie conclusion (2) above.

(b) even if the CMA's conclusion in relation to non-GDS aggregators *was* irrational (i.e. non-GDS aggregators should have been excluded, because they do not meet the definition of the RDS), that is not an error which renders the decision to exclude non-VITOs and Metasearch irrational or otherwise unlawful.

Self-supply

384. At footnote 117 the CMA explained that it had excluded self-supply by airlines of connections to travel agents because, for the purposes of the share of supply test, it was considering services supplied to airlines by third parties. We consider that the exclusion of self-supply on this basis was rational. In the exercise of its discretion, the CMA defined the RDS by reference to the supply of the service to a third party i.e. to an airline. As found under Ground 1, that was a rational exercise of discretion. It is inherent in that definition that there must be a supply of a service from A to B. A notional "supply" within one and the same person cannot be characterised as such a supply of a service. The fact that self-supply might properly be treated by the CMA as falling within a relevant economic market or as a competitive constraint in the SLC assessment does not mean that it falls within the RDS for the purposes of determining the CMA's jurisdiction.

Airline.com

385. At footnote 135 the CMA explained that it had excluded airlines own website (i.e. airline.com) on the basis that it is not an IT solution provided to airlines; rather it is travellers who directly access, and make bookings under, airline.com. The exclusion is based on two distinct reasons. First that airline.com is not the supply of an IT solution to airlines (and thus does not satisfy element (ii) of the definition). As in the case of self-supply, an airline's own website is not a service provided to that airline. Secondly, it is not a service for the purpose of the provision of travel services information to travel agents to enable the latter to make bookings (and thus does not satisfy elements (iii) and (iv) of the definition). Whilst the CMA identified evidence of travel agents making bookings through airline.com (at paragraphs 10.123(c) and 10.144), this was only in a limited number of travel agents and for very limited part of their bookings. The *purpose* of the service provided by airline.com is to provide travel service information to consumers to enable consumers to make bookings directly. The CMA's exclusion of airline.com from the RDS was therefore not irrational.

RDS not supplied "on their own"

386. This covers messaging technologies such as ARINC, SITA and airline travel agency portal builders which the CMA excluded from the RDS as explained at paragraph 5.36(e) and footnote 134. Whilst it is the case that services falling within the RDS (in particular GDS and Direct Connect services) also involve a number of other components, none of these excluded services exist *for the purpose* of enabling the airline to provide information to travel agents; whereas GDS and Direct Connect services establish a connection for that specific purpose. Contrary to Sabre's contention, this requirement of "purpose" is explicitly stated in the definition of the RDS. In addition as regards travel agency portal builders, the CMA had third party evidence that their services were not comparable to those provided by GDS and Direct Connects. We consider that the CMA's conclusion, based on making its factual assessment of the application of the definition of the RDS to these services, was one that was open to it and not irrational.

Other excluded services

387. At paragraphs 5.36(c) (d) and (e) and footnote 135, the CMA excluded from the RDS a variety of other third-party suppliers. These include NDC Exchange, ATPCO, suppliers of communications networks (for example Openreach), PSS providers and IT companies that build airline websites. The CMA gave reasons for the exclusion for each of these. Communications networks such as Openreach do not serve the specific purpose identified in the definition of the RDS. NDC Exchange is not capable of enabling the provision of travel services information to travel agents without an API sourced from elsewhere. ATPCO collects information which it then distributes and does not provide an IT solution to airlines. Suppliers of communication networks such as Openreach supply a multiplicity of different functions, many of which have no relation to the RDS. PSS providers provide the service of an internal information management system for an airline. They do not provide a connection to travel agents. Finally, IT companies that build airline websites do not provide IT solution to airlines for the purpose of enabling travel agents to access other services information. The service is the construction of the website; and, for the reasons given in relation to airline.com, the purpose of the airline website is not to connect to travel agents. In none of these cases is each element of the definition of the RDS satisfied. In our judgment, the CMA's conclusions in relation to each of these excluded services were not irrational.

Conclusion on Part 1 of Ground 4

388. Whilst we had concerns in relation to the CMA's analysis in relation to Metasearch and non-VITOs, ultimately we are satisfied that the CMA's conclusions in relation to those services which it excluded from the RDS were not irrational or otherwise liable to be set aside on judicial review grounds. This part of Ground 4 therefore fails.

(b) Part 2: Inadequate evidential base

Failure to inquire

389. Sabre's case here is that the CMA failed to carry out a sufficient enquiry to establish the functions and capabilities of all services potentially warranting inclusion within the RDS. The CMA's analysis was superficial and relied upon broad statements.

390. The allegation here is breach of the well-known *Tameside* duty. As established by *Tameside* itself and as elucidated in *Balajigari,* (see paragraph 61 above) there is a high threshold to establish such a breach. In particular the CMA was required only to take reasonable steps; it was for the CMA, and not for this Tribunal, to decide upon the manner and intensity of the CMA's investigation; and this Tribunal may only intervene on *Wednesbury* grounds i.e. if no reasonable body in the position of the CMA could have been satisfied that it possessed the information necessary for its decision, nor that the enquiries it had made were sufficient.

391. First, the analysis within the Final Report itself (and in particular at paragraph 5.36 and Appendix B) covered a multitude of candidate suppliers of services and gave reasons in respect of each. Secondly in the course of its investigation, the CMA gathered substantial evidence from a wide variety of sources relevant to this issue. This included evidence from Sabre and Farelogix, from the industry including from airlines through questionnaires and additional evidence from specific airlines, evidence from IATA and expert evidence submitted by travel industry consultation organisations (see footnote 29 to Appendix B). Thirdly, the Parties were given full opportunity, over a substantial period of time, both to submit evidence and to make representations, as the investigation progressed, upon the CMA's ongoing analysis. As the length and detail of the CMA's consideration (both in the Final Report and over the course of the investigation) of the jurisdiction issue alone indicates, the CMA conducted a substantial enquiry both generally and in relation to the identity and nature of suppliers within the sector. Fourthly, we do not consider that having reached its conclusion on the definition of the RDS, the CMA was required to go back to the Parties for their views or to seek yet further evidence. The Parties and others had been given the opportunity to respond to the PFs and had done so. The CMA then took those responses into account in reaching its final

conclusions. To require a further opportunity to comment would lead to an unjustified iterative process, potentially without end.

392. Fifthly and significantly, Sabre has not identified either what further enquiries an authority in the position of the CMA could not reasonably have failed to have made nor what further information it could and should have obtained, in circumstances where it itself had not identified such information or sources of information in the course of the investigation. The duty to enquire remains upon the decision-making body, namely the CMA. However, in the particular context of the sophisticated "participatory" process of a CMA merger investigation where, as in the present case, the CMA has undertaken a detailed investigation and considered the parties' arguments, a participant in that process will not easily establish a breach of that *Tameside* duty to the *Wednesbury* standard.

393. We conclude that the CMA did not breach its duty to make reasonable enquiries.

The Survey issue

394. As part of its challenge to the evidential base for the CMA's conclusions on excluded services, Sabre contends that the CMA was wrong to rely upon responses received to the survey questionnaire. That questionnaire asked respondents to provide booking estimates through different channels, identifying in turn GDS Services, Direct Connect, GDS pass-through, non-GDS aggregation services and, finally, "*other content distribution services (please specify)*": see footnote 137 at paragraph 326 above. The survey questionnaire was relied upon, in relation to the issue of excluded services at footnotes 131, 134 and 137. We do not accept Sabre's arguments on this point.

395. First, where, in respect of any particular third party, the survey questionnaire was relied upon, it was only one part of the evidence to support the CMA's view.

396. Secondly, as regards the application, and alleged failure to follow, the Survey Guidance, the Guidance provides principles and not hard and fast rules. Moreover, we are not persuaded that the framing of the final category of

distribution channel constituted "restrictive bias", as explained in the Guidance. By comparison with the example given at paragraph 3.11(b) of that Guidance, the relevant question here was asking for information about past behaviour; the respondents would know what, if any, "other" distribution channels they had used. Moreover, given the historic nature of the information requested and the express invitation to specify other services, we consider this to be a sufficient encouragement to "consider all options". In fact, some respondents did identify suppliers falling within that category.

397. Thirdly, even if it could be said that the framing of the question did not follow the Survey Guidance, that does not mean that no account could be taken of the responses. As indicated in footnote 137, the CMA was aware, and took account, of the Parties' concerns about the questionnaire when reaching its conclusions. In any event the responses to the questionnaire were used as a cross-check of other evidence.

398. Finally, the survey questionnaire was conducted at a relatively early stage in the investigation. At that time the RDS had not been formulated; that is why the questionnaire was not directed at the RDS specifically. Thereafter the CMA fully considered the Parties' extensive submissions on the alternative approaches to the definition of the RDS and in particular in relation to other third-party suppliers of various services. Sabre itself put forward 49 potential suppliers for the CMA to consider. There is no foundation in any assertion that the manner of the drafting of the questionnaire led to the omission of a relevant line of enquiry.

399. We conclude that the CMA did not breach the Survey Guidance and in any event its reliance upon answers to the survey questionnaire was not irrational.

(3) Conclusion on Ground 4

400. For the foregoing reasons, Sabre has not established its case on any of the points it has raised and Ground 4 fails.

I. OVERALL CONCLUSION

401. For the reasons set out above, we unanimously dismiss all four remaining grounds of the Application.

The Hon Mr Justice Morris Chairman	Michael Cutting	Prof. Robin Mason

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 21 May 2021