**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. : 1345/4/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Tuesday 24 November– Thursday 26 November 2020

Before:
The Honourable Mr Justice Morris
Michael Cutting
Professor Robin Mason
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Sabre Corporation

-v-

Competition and Markets Authority

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# A P P E A R AN C E S

Mr Tim Ward QC, Ms Alison Berridge and Mr Nikolaus Grubeck (On behalf of Sabre)
Mr Rob Williams QC, Mr Tristan Jones and Mr Conor McCarthy (On behalf of CMA)

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**Tuesday, 24 November 2020**

**(10.30 am)** **OPEN SESSION**

**MR JUSTICE MORRIS:** Good morning, everybody, I'm assuming everybody can hear me, and good morning, Mr Ward. Before I ask you to open the case, can I just raise a few housekeeping matters. First, thank you for the revised hearing timetable which we have received over the next three days of the hearing. We will sit the usual hours 10.30 till 1.00 and 2.00 till 4.30. We will take a 15-minute break in each session at an appropriate moment, and no doubt counsel will remind me if that passes me by.

Secondly, it may assist the court to know that Mr Cutting and myself are both present here in the hearing room in the tribunal and have available hard copy bundles. For my part, I will be using largely hard copy bundles. Professor Mason is present remotely and will be working off soft copy electronic documents.

Thirdly, this hearing is being live-streamed and so is open to all members of the public. This means that no recording may be made of this hearing by any person and to do so would amount to a contempt of court.

I draw this to the parties' attention the live-streaming in relation to issues of confidentiality too. As is usual in open public hearings of this tribunal, there is to be no reference to material which has been marked as confidential, and in the event either party wishes to refer to such material, the hearing will go into closed session. I'm sure counsel will indicate if and when this arises. If it does arise, we will rise for a short while and the hearing in terms of the remote hearing will be reconstituted.

In those circumstances, I ask that the parties ensure that those attending the closed session will be limited to those properly within the confidentiality ring or rings which have been established by the tribunal by the previous orders. In this

regard, the parties will bear in mind the separate confidentiality ring concerning Farelogix's legal advisers.

Those are the preliminary matters which I wish to raise and with those caveats, Mr Ward, I would invite you to open your case. I'm getting some -- I think, Mr Ward, when you turn your microphone on, I'm getting a feedback for myself. I don't know whether anybody else is.

**MR WARD:** I'm sorry, sir, I'm the only person in the room.

**MR JUSTICE MORRIS:** No, no it's not background noise. I can hear a feedback of what I'm saying. Maybe it doesn't matter. Once you start, I will mute myself.

**Opening submissions by MR WARD**

**MR WARD:** If I begin and please let me know straight away if it's not satisfactory.

As the tribunal will know, I appear for Sabre Corporation with Ms Berridge and Mr Grubeck. For the CMA, Mr Williams QC appears with Mr Jones and Mr McCarthy.

This is Sabre's application challenging the CMA's decision to prohibit its proposed acquisition of Farelogix on the basis of its Final Report of 9 April 2020. You should have at least in hard copy seven hearing bundles and an authorities bundle which has been divided into three hard copies, albeit it's got letter dividers within that.

There is one housekeeping matter I would wish to raise at this stage, although I don't think it has any impact on today's proceedings. During the course of preparation for the hearing, my solicitors noticed there was some very limited discrepancies in the confidentiality markings relating to Sabre material in the notice of appeal and witness statements. That does not affect any of the submissions I'm making today because almost all of it related to grounds 5 and 6. But there are some slight inconsistencies where there is overclaim of

confidentiality in some respects. They will file corrected and definitive versions in the course of the day and provide hard copies to the tribunal. We are of course very sorry about any inconvenience this may cause.

I'm going to give a brief introduction and then turn to the law, the facts and then the four grounds of challenge.

Grounds 1 and 4 can be developed entirely in open court, but unfortunately grounds 2 and 3 involve quite detailed discussion of confidentiality ring material, but of course we'll come to that in due course.

As the tribunal will have seen, this case concerns a proposed transaction between two US companies. The effect of the CMA's decision is effectively a worldwide prohibition. The transaction of course could not take place at all. That prohibition was imposed two days after the transaction was cleared in the US following an eight-day trial. Our essential submission is the transaction entirely lacked the required nexus with the United Kingdom. One of the parties, Farelogix, has no relevant presence here at all. It has no UK turnover, it has no contract with any UK customers for the services in question. The CMA's efforts to assert jurisdiction led it to a series of artificial constructs which took it far away from the proper application of the legislation. The result was an exorbitant exercise of jurisdiction founded upon errors of law.

The CMA asserted jurisdiction on the basis of the share of supply test under section 23 of the Enterprise Act. I'll be coming to that shortly. It sets jurisdictional thresholds identified by Parliament. These are tests that must be satisfied before the CMA can take action. For present purposes, this requires that the merger gives rise to an increase in an actual share of supply of 25 per cent or more in the United Kingdom of a service of the relevant

description.

In other words, both merging parties must be suppliers in respect of the same relevant activity, and the transaction must give rise to an increment in the supply of those services above that level. That test serves to establish the necessary connection between the UK and the transaction to justify the exercise of the power of merger control. It is accepted that in an appropriate case, it can permit the CMA to regulate mergers which involve overseas entities.

But Parliament has imposed a test which carefully delimits the circumstances in which that can be done. If that test is emptied of content or turned into a purely formalistic exercise, the intention of Parliament is undermined. That, in our submission, is precisely what has happened in this case.

I'm now going to give a very brief summary of the four grounds of challenge. Each challenges one of the fundamental features of this jurisdictional test. If Sabre succeeds in any one of them, the decision must be quashed in its entirety.

The first concerns the definition of the relevant description of services. The CMA considered at least five formulations of this and met sustained objections from the parties. Part of the problem it faced was the products of the parties are fundamentally different. Another problem was that there were numerous other "IT solutions", to use the CMA's expression, that are used by airlines and travel agents.

In the end, it found a form of words which was vague enough in some respects to satisfy it that the products sold by Sabre and Farelogix were included, but narrow enough in other respects to exclude almost everything else in the airline IT industry. Sabre's case is that that approach lacked the essential justification needed to impose merger control. It was simply a lowest common

denominator.

The second and third grounds concern the question whether the transaction would give rise to an increment over 25 per cent in the supply of the relevant description of services. It is not enough if one of the parties supplies more than 25 per cent, the merger must increase that supply. The focus of this challenge is on Farelogix.

The second ground is concerned with the CMA's finding that this test was satisfied because of what it characterised as a direct supply of what it called FLX services to British Airways. Our essential submission is that this conflated an undoubted supply by Farelogix to American Airlines with a supply to British Airways. This was an attempt to construct a supply far removed from the evidence. This does not suffice to show a genuine connection with the UK that the statutory test requires.

Our third ground is a separate challenge to this supposed increment. We say, for reasons we will develop in the closed session, that the CMA has failed to identify any increment arising from this supposed supply. It has again conflated supplies in the US with supplies in the UK. Stepping back at each stage of this analysis, the CMA has strained the language of section 23 to breaking point. The result was an assertion of jurisdiction in a case without genuine connection to the UK.

Finally, our fourth challenge concerns the technical detail of the way in which the relevant descriptions of services was applied. In order to assert jurisdiction, the CMA needed to find that the parties' combined share of the RDS, the relevant description of services, was at least one quarter of those services. It was therefore critical to decide which other services were within the relevant description of services.

What the CMA did was to exclude almost all products of a kind other than those sold by the parties themselves. But it did this by the application of additional criteria that are not to be found in the relevant description of services, and it did it in a way which was inconsistent with the approach it took to the products of the parties themselves. The effect is to undermine any confidence the tribunal can have that the true share of supply of the relevant description of services is 25 per cent or more.

With that introduction, I'm going to turn now to the law which is in large part common ground but in one respect is not. The starting point is the statutory framework which at least is common ground. We can find the relevant sections of the Enterprise Act in volume A of the authorities bundle, which is volume 1, under tab 1. If I could ask you to turn up the very first page of that, which is section 23 of the Enterprise Act.

This is the test for whether there is a relevant merger situation. That is a jurisdictional test and it is foundational to what the CMA could then go on and do. Because it's only if there is a relevant merger situation that the CMA can go on and consider whether it may give rise to a substantial lessening of competition and, if so, whether it should impose any remedies. So this is the foundation of everything that follows.

Now the important point to underline is because this is a threshold condition, it may be that there are cases where the CMA might actually like to investigate but it cannot. There may be competition concerns, but Parliament has decided they should not be subject to regulatory action. To give two obvious examples of this, there could be a vertical merger, a merger between two companies in the supply chain vertically, or there may be parties where the share is just too small. This is a way of focusing the CMA's resources on cases which

Parliament has considered merits its attention.

In broad terms, section 23 contains two different tests. The first one, which is in section 23(1), is a turnover test:

"For the purpose of this Part, a relevant merger situation has been created if --

(a) two or more enterprises have ceased to be distinct and

(b) the value of turnover ... exceeds £70 million."

So if they are big enough, they are caught. It is common ground that that does not apply in this case.

We are concerned with the second limb of this test, which is for mergers between smaller undertakings which do not meet the first limb. We see this at subsection (2):

"For the purpose of this Part, a relevant merger situation has also been created if --

(a) two or more enterprises have ceased to be distinct ... and

(b) the share of supply test is met."

Then subsection (2A) tells us about the share of supply test. It is met if:

"... as a result of the enterprises ceasing to be distinct, one or more of the conditions mentioned in the subsections below prevails or prevails to a greater extent."

That is the language which introduces the requirement of an increment because it has to prevail or prevail more greatly because of the merger itself. That much is common ground.

The relevant condition for our purposes is subsection (4), which is:

"... in relation to the supply of services of any description ... in the United Kingdom ... to the extent of at least one-quarter --

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

In other words, putting it in a nutshell, there has to be an increment in the supply of services of the relevant description of at least 25 per cent. We should also

note subsections (5) and (8). (5):

"For the purpose of deciding whether the proportion of one-quarter is fulfilled with respect to goods or services, the decision making authority shall apply such criterion or combination of criteria as the decision-making authority considers appropriate."

Then subsection (8):

"The criteria for deciding when goods and services can be treated for the purpose 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."

Now we entirely accept of course that that language gives the CMA a discretion in the respects that the subsections identify. But of course that discretion is subject to the constraints of public law. We will explain in the course of the day how it is the CMA has misinterpreted this discretion in certain key respects.

But in substance, what this test does is focus in the case of smaller transactions on those that are likely to have an impact on UK markets because that, after all, is what merger control is all about. It is a concern arising out of concentration levels that may give rise to competition problems, and the share of supply test is a way of measuring whether there has been an increase in concentration in respect of the goods in question.

It then becomes a second question: whether or not if there has been an increase in concentration of this kind, whether that in fact gives rise to a substantial lessening of competition. Our overall submission is that the approach of the CMA has effectively stripped the meaning out of that section.

The next topic on the law is the approach of the tribunal to this challenge. Of course,

as the tribunal will be aware, section 120 of the Enterprise Act makes clear that in determining this challenge, the tribunal should apply the same principles as would be applied on judicial review. It is well established, indeed trite, that judicial review is a flexible and fact-sensitive doctrine. The standard of intensity of review varies. For example, there are cases where there is anxious scrutiny, there are cases where procedural fairness is an issue where the court will come to its own view. And there are a large number of places in the defendant's skeleton where it insists that it's subject purely to a **Wednesbury** type rationality challenge in a case of this kind. If I read from an example -- I don't think we need turn it up because they are numerous -- in the CMA's skeleton at page 5, paragraph 15.1, which is bundle reference 2, tab 2/96, it says:

"The only issue for the tribunal in the present case is whether the CMA had a rational basis for concluding that the legal test applied on the facts, not how that test should be interpreted and applied."

We do not accept that is right at all. We have formulated our grounds of challenge in a range of different ways, but fundamentally here this is a challenge to the question of jurisdiction: does the CMA have jurisdiction at all? It is not a **Wednesbury** question whether the CMA does.

We can see that in a whole range of different contexts, but the one we would accept is particularly apposite here is the SCOP case, and I would like to take you to that, please. It's in authorities bundle 3 or tab J under tab 34. This is a decision of the Supreme Court --

**MR JUSTICE MORRIS:** Mr Ward, I'm sorry, I'm not quite there yet.

**MR WARD:** Sorry, sir.

**MR JUSTICE MORRIS:** No, it's all right, I was just making a note. And I'm still

getting feedback. I don't know if anybody else is getting it --

**MR WARD:** May I try on one thing and see if it helps. I will put on a headset myself just in case for some reason that solves the problem. Obviously I would much prefer you not to have to suffer through that while you are listening to me. **(Pause)**

**MR JUSTICE MORRIS:** Can you remind me of the reference. Which tab is it?

**MR WARD:** Yes. It's bundle 3, tab J, tab 34.

**MR JUSTICE MORRIS:** Can I speak now -- no, I can't hear you at all. Maybe I will try and not speak so much when you speak, but it's not ideal because if we're going to have dialogue ... I don't know whether -- can I just pause a moment and see if -- those who are involved in the setting up of the case -- I think Mr Collier is (distorted speech). We will leave the others to look at it and I will mute myself now.

**MR WILLIAMS:** Sir, if it helps, I think there is an echo and I can hear myself seconds after I speak in the same way there's an echo between you, I have an echo ...

**MR JUSTICE MORRIS:** Mr Williams, when I hear you, I'm hearing you twice. Mr Ward's left. Speak to me now, Mr Williams while Mr Ward has left.

**PROFESSOR MASON:** Mr Ward, I suggest you mute yourself a moment. I now hear myself without an echo.

**MR JUSTICE MORRIS:** Likewise. Mr Williams?

**MR WILLIAMS:** I don't know if I'm echoing now.

**MR JUSTICE MORRIS:** No.

**MR WILLIAMS:** It looks like it's when Mr Ward's microphone is on.

**MR JUSTICE MORRIS:** Mr Ward.

**MR WILLIAMS:** That's right.

**MR JUSTICE MORRIS:** Can I suggest we carry on until the break, we're going to break at 11.30/11.45. I'm going to see whether somebody could look at that and I will mute.

**PROFESSOR MASON:** Could I suggest while others speak, Mr Ward mutes, because that seems to be the source of the problem.

**MR WARD:** Yes, I will do. Sir, are you happy for me to continue for now?

**MR JUSTICE MORRIS:** Yes, I am.

**MR WARD:** Thank you.

I was going to the SCOP case. This was a decision of the Supreme Court in 2015 in another merger judicial review challenge. It also turned on section 23 of the Enterprise Act, although it was a different part of the wording of section 23 which was in issue. We can see this from paragraph 2 of the report which gives us enough fact for present purposes.

It's on page J34/1571 and it says:

"In September 2014, the Competition and Markets Authority, after an investigation of the impact of the transaction on competitions on the cross-Channel routes, prohibited GET from operating any ferry service from Dover using ... ships acquired from SeaFrance ... its jurisdiction to do this depended on whether GET's acquisition ... created a 'relevant merger situation'. The question at issue in this appeal is whether that condition was satisfied. This in turn depends on whether what GET and SCOP acquired ... was an enterprise or merely the assets of a defunct enterprise."

So it's a question of whether the fact established the statutory test was met. In short, this led in fact to a first judicial review that was successful and then a second judicial review -- sorry, which led to a remittal and a reconsideration by the CMA, but that also ended up on appeal and ended up in the Supreme Court.

But it's paragraph 31 which is particularly important in our submission and that's on page 1581. This is where Lord Sumption explains the approach:

"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 sections 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 ..."

We take four points from this passage. First, it is a question of law whether the activities in issue amounts to a supply of the relevant services for the purposes of section 23.

**MR JUSTICE MORRIS:** Sorry, can you just pause there one second. "The question

of law whether the activities in issue," could you give me that again?

**MR WARD:** "Amounts to a supply of relevant services for the purpose of section 23." Because that depends on the construction of the Act.

**MR JUSTICE MORRIS:** Okay, thank you.

**MR WARD:** Secondly, in order to determine that, it is necessary to consider the purposes of the provision, and I'm going to come on to that in due course.

Thirdly, there is only limited scope for deference. Where the tribunal makes expert -- I should say the tribunal or the CMA -- makes expert economic judgments, which are of course part of its special expertise, and we'll see in a moment that's what the Supreme Court thought was happening in that case. But fourthly, nothing at all in this case calls for any expert economic judgment of that kind. You will see the primary facts are largely not in issue, just as you would expect in judicial review. The question is whether they demonstrate that the jurisdictional provisions are made out, and you will see particularly in respect of ground 2 that that largely depends on some simple and broad propositions about some ordinary commercial agreements. These are all things which are well within the expertise of the tribunal to take a view of and in which there should be very limited deference to the views of the CMA.

Now I want to just show you how that approach played out in the SCOP case, partly to anticipate what I think is Mr Williams' submission about this. I've already explained that the matter went to the CAT twice. The first time it went to the CAT, there was some analysis by the CAT about how you should apply this question of whether this was an enterprise as opposed to the acquisition of bare assets. We can see that at paragraph 18 of the judgment where -- if I just invite you to look at that on page 1576 -- there is some quite detailed rubric -- we don't really need to understand or follow the detail -- quoted from

the CAT about what the correct approach is to whether something is an enterprise. The CMA applied that rubric and yet it was challenged again. In this context, the Supreme Court accepted that there was scope for an exercise of a valuation by the regulator in simply applying that rubric that had now been identified. We can see that at paragraph 41 where on page 1584, the Supreme Court says:

"The Authority directed itself according to the principles set out by the CAT in [the first case], which I have held to be correct. Once that is reached, the application is a matter of expert evaluation ... [that] could not be [disregarded] unless it was irrational."

But then on the next page, page1585, we see the court's view of what the nature of this evaluation was. Paragraph 44:

"The 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 [that is economic judgment] ... this is 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. 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. [They] cannot usually be reduced to simple points of principle capable of analysis in purely legal or formal terms."

It is our submission that that is very far indeed from the present case. There was no articulated test or criteria that the CMA applied; it simply looked at the facts and concluded that they demonstrated a supply. Our submission is that that

is simply an error of law and contrary to the evidence. There is nothing about this that requires some special expertise or economic evaluation which should lead particularly this tribunal to defer to the decision-maker to any significant extent.

In short, we submit this is a case where the tribunal can be confident in taking an intensive form of review to this jurisdictional provision rather than deferring to the CMA in deciding for itself whether its jurisdiction is established.

**MR JUSTICE MORRIS:** Mr Ward, I don't know if you are about to leave this case, SCOP -- you are about to leave it -- can I just take you back to the passage in paragraph 31 which you emphasised in your skeleton, where effectively in that sentence, "The test for determining is a question of law". In that case, as I understand it, the issue of law is what is meant by the word "enterprise". What I'm trying to read across here is what is the equivalent question of law in this present case?

**MR WARD:** The equivalent question of law in this case is what amounts to a supply for the purpose of section 23.

**MR JUSTICE MORRIS:** What amounts to a supply --

**MR WARD:** A supply. A supply of the relevant description of services.

**MR JUSTICE MORRIS:** Okay.

**MR WARD:** Our submission is that the conclusion that these facts amount to such a supply is an error of law.

**MR JUSTICE MORRIS:** Can I pause there. You are emphasising what amounts to supply. As I understand it, that certainly comes in at ground 2, but I just want to go back to ground 1.

Do you accept that the CMA has a discretion as to the selection of services that it makes?

**MR WARD:** I do accept that. That is clear on the face of the statute. I would say, sir, I immediately accept that this analysis in SCOP is of particular relevance to ground 2, but it is also a question of construction: what amounts to an acceptable relevant description of services, and indeed, for the purpose of ground 3, what amounts to an increment. These are both grounds which turn on essentially questions of construction of the Act. Not ground 4, that's just a matter of, inter alia, consistency.

**MR JUSTICE MORRIS:** Okay. This is a conceptual issue which I have been struggling with a little bit and it may be in light of your answer to the question which I just asked, which is whether or not the CMA has a discretion when it describes its services, maybe that is the answer to that point.

I was looking particularly at section 23(2) -- I can't remember which -- (2)(a) and the reference to -- because the words "relevant description services" doesn't appear, it's "services of any description", isn't it? But you are not saying that is question of law for us in relation to what services description -- I can see Mr Williams (distorted words) perhaps you can mute for a moment --

**MR WILLIAMS:** I was grimacing at the echo, sir, rather than your observations.

**MR JUSTICE MORRIS:** I was assuming that.

**MR CUTTING:** Can I ask a question. I suppose related to that, Mr Ward, is the issue at definition in the SCOP case where Lord Sumption says it's a matter of law. How do we treat the fact that for the purposes of ground 1 and the services of the relevant description, the distinction is with subsections (5) and (8), where it's explicit that the CMA has a discretion in relation to those points, and there is no equivalent for the CMA having a discretion in the context of the definition of enterprise.

I mean, it's much easier to see how Lord Sumption's comments relate to the very

definition of something which is explicitly not subject to discretion. It must be a matter of law, whereas (5) and (8) make it clear they have a discretion in relation to services of the relevant description, and I think you haven't -- perhaps you'd like to address that because it's something that jumps out from you having addressed it so far.

**MR WARD:** Sir, thank you. I immediately accept there an important distinction there. There is no question that there is discretion in regard to the definition of the relevant description of services. That discretion of course has to be subject to control under judicial review principles.

It is not the same as the question of supply, which as you say involves no element of discretion at all. But I do nevertheless make the broader point that at some point, the relevant description of services falls out of the scope of what is permitted by the statute. When one looks at that question, one is looking at a jurisdictional issue in which a more intensive form of review is required.

But I fully accept that that must still allow of the fact that the statute provides a discretion. So the SCOP case is much more on point for ground 2, but we nevertheless rely on it for the broader proposition that the tribunal should use a more intensive review for jurisdictional questions than it would do otherwise.

Does that answer your question?

**MR JUSTICE MORRIS:** For the time being, yes. So your submission is the more intensive review on the jurisdictional question.

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** Which a slightly hybrid position in comparison with what may be regarded as a more simple jurisdictional precedent fact issue which arises in the Administrative Court more generally. I know the example of (inaudible). It's a more nuanced approach here.

**MR WARD:** It's exactly that, sir. We recognise the relative complexity of the issues here, but it is a jurisdictional challenge. Judicial review is a flexible doctrine and this is not a case in which the tribunal should feel that it need defer to some special expertise of the CMA. So we reject the CMA's contention that all of this is a bare **Wednesbury** rationality challenge.

**MR JUSTICE MORRIS:** Okay. Thank you, Mr Ward.

**MR WARD:** Sir, thank you.

I was going to turn from the SCOP case to pick up one of the points mentioned by Lord Sumption, which is the need to focus on the purpose of the provisions. You will recall that was specifically mentioned in paragraph 31. In our submission, the purpose of the provisions are threefold: firstly, they are concerned with resource allocation. They mean that the CMA need not concern itself with mergers which are below this threshold.

Secondly, they are important for legal certainty. They are businesses, whether home or abroad, to freely transact without the threat of the costly prolonged and intensive investigation which this transaction gave rise to.

But thirdly, these provisions are also important for the principle of comity because they leave matters which don't have this essential connection to the UK to the regulators of other states. This matters because of course just as this case illustrates, section 23 has at least the potential to extend to mergers between overseas entities.

I'd like to show you another authority, Akzo Nobel, which explains the role of comity in the approach to provisions under the Act. That authority is in bundle 3 or tab I at tab 32. The provision in question in Akzo Nobel was a different one, but we will submit the principles it identifies nevertheless apply.

If I could ask you to turn up the report on page 1486, please. The first paragraph of

the judgment explains that the issue was the interpretation of section 86(1) of the Enterprise Act. That section sets out the circumstances in which an enforcement order can be made against a person outside the United Kingdom. It says:

"An enforcement order may extend to a person's conduct outside the United Kingdom if and only if he is a United Kingdom national, a body incorporated under the law of the United Kingdom, or carrying on business in the United Kingdom."

So that was a provision which was, in a sense, expressly about the territorial scope of the Act, whereas our provisions are not, but on the other hand raise precisely the same issue, which is: to what extent will merger control extend to overseas entities? If I can, I'd like to take you now to page 1492 of the bundle, which is page 702 of the report, and I'd like to take you to paragraphs 24 and 26. This is Lord Justice Briggs, as he then was:

"It is in my judgment appropriate to have 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 to the specific purpose of section 86, which is 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 these purposes leads to a conclusion that section 86 should either be broadly or narrowly construed. It must be interpreted with the fulfilment of both of those purposes in mind so that in particular an interpretation which is destructive of either of them should be rejected, and an interpretation that gives best effect to both of them adopted if possible.

"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."

Then he says:

"... but it cannot be supposed Parliament intended to apply a purely common law motion."

Then he quotes from Bennion:

"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."

Then he says:

"It is obvious that this cannot have been the intention behind section 86(1) since it is in terms intended to permit three classes of persons to be subject to regulatory control.

"Rather, it seems to me that section 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 up connecting factors between targets of regulatory action in the UK which make it appropriate rather than exorbitant for the particular conduct in question to be exercised over them in relation to conduct outside the UK."

And we particularly rely on those last words. But in this case, there is a difference. Section 23 is not explicitly territorial but clearly has implications that are extraterritorial. But also it is a threshold condition. Section 86 applies only when a merger investigation has been concluded and the question is whether

there will be effective remedies.

So of course we accept, as Lord Justice Briggs says, the Act must be construed so as to serve the purpose of effective merger control, and that is something the CMA invokes in its defence. But here it is a threshold condition, so referring to effective merger control is potentially just empty and circular. Parliament has decided which transactions will be subject to merger control and which will not. It cannot be interpreted just on a maximalist basis to ensure any transaction the CMA has an interest in is subject to its jurisdiction. That is very different from the situation in Akzo where the court was deciding whether, as the CMA had concerns, whether it had any ability to remedy them at all.

So effective merger control is important but potentially circular in this case. But comity, the other principle Lord Justice Briggs alludes to, is relevant here because the effect of section 23 is undoubtedly in some circumstances extra-territorial reach.

So in our respectful submission, the provision should be interpreted in the light of what we would say are all three of its purposes. Defining a threshold condition, not placing it -- defining the scope of burden for the CMA and of course respecting international comity, save to the extent that Parliament has actually permitted. Our respectful submission is the approach of the CMA effectively collapses through these purposes in order to assert a maximalist interpretation of this provision.

There is one other case I wanted to show the tribunal now in opening which also --

**PROFESSOR MASON:** Mr Ward, sorry to interrupt, since you are moving on to another case, might I ask one brief question on that, please?

Again, similar to an earlier question, could you just detail how the argument and

points you just make relate to ground 1 rather than ground 2?

**MR WARD:** They certainly bear strongly on ground 2. But we do say in respect of all of our grounds that the approach must be taken to give substantive effect to these provisions as a threshold condition on CMA merger control and that under each of certainly the first three grounds, the effect of the CMA's approach is to strip this of meaning. You'll see why when I develop ground 1 in more detail.

But in our respectful submission, if that a relevant description of services then the requirement for it to have a relevant description of services has become empty and does not serve the purpose of establishing a meaningful threshold condition on the CMA's power to investigate.

**PROFESSOR MASON:** Thank you.

**MR WARD:** I was going to turn to one final authority which is the South Yorkshire Transport case, which is in the first authorities bundle, tab D/14.

**MR JUSTICE MORRIS:** If you'd just let me catch up. **(Pause)** Tab 14?

**MR WARD:** Yes. The first hard copy bundle under tab D, tab 14. Do you have that, sir?

**MR JUSTICE MORRIS:** I do, yes, thank you.

**MR WARD:** Thank you. This is an old case about a merger challenge which again turned on a challenge to part of the section which by a long route has now become section 23 of the Enterprise Act. The issue was -- it related to a merger between bus companies, or rather the acquisition of some bus companies. The question was whether the merger concerned a substantial part of the United Kingdom. If you turn to page 625, you can see the section as set out there, which is part of the 1973 Act. It's broadly in very similar terms to section 23 of the Enterprise Act. It's been through quite a lot over

the years, but one can see there is similarity there.

The issue was whether or not the merger concerned a substantial part of the United Kingdom. This went all the way to the House of Lords and Lord Mustill gave the main judgment. He made a number of observations about what the approach to this section ought to be. If we turn to page 29 of the report, or 628 of the bundle, you will see around letter D, Lord Mustill says:

"There are a range of meanings I am glad to adopt giving a general indication of where the meanings lie, something like worthy of consideration for the purpose of the Act."

Then similarly at page 31B, which is 630 of the bundle, his Lordship says:

"The epithet 'substantial' is there to ensure the expensive, laborious and time-consuming mechanism of a merger reference is not set in motion if the effort is not worthwhile."

Again, we are dealing with different words within this now reenacted section. But we do respectfully submit that one can say the same here. There needs to be real connecting factors so that the application of this section has a genuine meaning. In our respectful submission, the CMA's approach has been to reduce these requirements to a pure matter of form rather than substance. That was all I was going to say about the law and I was now going to say a little bit about the products we are concerned with.

You will have seen that in broad terms, before we come to the decision, Sabre provides a whole range of technology and software products to the global travel industry. What we are concerned with is called the GDS, the global distribution system, which I'm going to show you in a moment. Broadly, that distributes airline and other travel services content to a large network of travel agents.

On the other hand, Farelogix is an IT provider that supplies certain software using the NDC messaging standard. All of this I'm now going to unpack in what I hope will be sufficient detail for today's purposes. For this, the best place to go is the report, which is in volume 4 under tab A at page 36, please.

Page 36 under the section "The industry", I want to just take you I hope reasonably quickly through some of the key findings here:

"3.1. Our enquiry centres on some of the IT solutions which are provided as part of the global booking systems for airlines. Airlines use IT solutions within their booking system IT stat called the PSS."

We will be hearing a bit about the PSS in due course. It means passenger service system. Then the CMA broke these functions down into three in 3.2:

"Retailing which enables information on a number of aspects including the travel route, type of seat, schedule ability and price to be packaged so a ticket can be sold. This is referred to as offer creation."

This is an important concept, as we will see. Then there is "Distribution", which transfers the offer to the passenger or travel agent in a way that allows the passenger or travel agent to assess that offer. And then "Fulfilment":

"This refers to a booking being made with an airline, but in the case of bookings via travel agents can refer to a number of associated post-booking services, including travel agent back office accounting and reporting, quality assurance, duty of care management, corporate policy compliance and reservation management in the event of travel disruption."

Then at 3.4:

"Both parties provide airline IT solutions. The heart of an airline's IT system is the PSS, which is a complex set of IT functions managing various tasks in the booking process."

Then it says at 3.6:

"It is the PSS that enables key information on flight schedules, seat availability and pricing to be distributed to travel agents."

Then we can skip a little bit here because of issues that have fallen away, but at 13 you will see a distinction between the direct and the indirect channel:

"Airlines can deliver their content and sell tickets and services to passengers via their own call centre or website referred to as the direct channel, or indirectly via travel agents referred to as the indirect channel."

Then you will see at 3.15:

"Within the indirect channel, the distribution of content from an airline to a travel agent could be via a GDS [which is Sabre's product] or directly to a travel agent through what is known as a direct connect."

And Farelogix's product is used as part of a direct connect, as we will see. Then we get an explanation of what a GDS is at 3.17:

"The three largest GDS are Sabre, Amadeus and Travelport."

Then 3.18 is important, in our submission:

"GDSs facilitate transactions between different travel service providers; airlines, hotels and car rental operators and travel agents. They are therefore two-sided platforms with sellers of travel services on the one side and travel agents on the other. Our enquiry is not concerned with hotel, car rental and other travel services. GDSs receive information from airlines' PSS on flight schedules and availability."

Then they say:

"The fair pricing information comes from a third party called APTCO. Of this information, only flight availability is in real time."

Then at 3.20, it explains what the GDS does with this information:

"The GDS consolidates this information about specific airlines with similar information on other airlines and distributes it to travel agents in an aggregated display. This allows travel agents to compare information. GDS is also managed fulfilment, including travel agent back office accounting and reporting, quality assurance, duty of care management, corporate policy compliance, reservation management in the event of disruption. GDSs have access to data from a large number of airlines, Sabre's GDS for example gives travel agents access to 400 airlines and processes 1 .1 trillion messages and 700 billion transactions a year. It is important to know under existing GDS arrangements, it is the GDS, not the airlines, that are responsible for creating the offer which the passenger receives. The airlines have only limited visibility of it."

So offer creation is a very important aspect of what the GDS does. We can see therefore it is a two-sided platform that assembles a wealth of information from a wide range of sources, including airlines, but many others. It packages that data into offers, it normalises it for the purposes of comparison shopping, then it carries out the fulfilment functions of executing the booking, the ticketing, the settlement.

You can see evidently that part of its value, a lot of its value, will lie in the access it gives to a range, a network of travel agents. In one of the exhibits to Mr Batchelor's witness statements which hasn't found its way into the core bundle, it explains that Sabre distributes to 425,000 points of sale in 140 countries. Just for the reference, that is Bachelor exhibit 23 at page 15.

That is why it is called a global distribution system. What we will see now is that Farelogix's products are fundamentally different. To understand that, we need to start at paragraph 330 of the report, which talks about --

**MR JUSTICE MORRIS:** Pause a minute, please. Yes, when you are ready, Mr Ward.

**MR WARD:** Thanks, sir. I was going to go to page 43 of the pagination, paragraph 330, which explains direct connects, which is where Farelogix comes in.

**MR JUSTICE MORRIS:** Yes.

**MR WARD:** At 330:

"Airlines can distribute content to travel agents outside the structure of GDS in several ways. They can establish direct connects which are a one-to-one connection between an airline and a third party, eg a travel agent. To do so, an airline has to provide the third party with access to parts of its IT system with an API [application programming interface]. Some airlines have built and managed APIs in-house but others use third party providers of such solutions, such as Farelogix."

Then at 331:

"Airlines can also establish connections using the API with an aggregator [we are going to be hearing more about aggregators this afternoon]. That is not a GDS, but like a GDS combines content across airlines. An aggregator facilitates comparison shopping, eg travel fusion. These are sometimes called GDS bypass."

So this is an API which allows, if I put it really colloquially, the airline's computer system to talk to the computer system of the specific travel agent. At 3.33, it highlights a very important distinction between these kind of direct connects and the GDS:

"Using an API, airlines can distribute content via a GDS without [sorry, wrong paragraph but I'll read this anyway] requiring offer creation or other services

from the GDS. The parties refer to this as GDS pass through."

This is highlighting a very important feature of this direct connect. It involves offer creation by the airline itself. So where there is direct connect, the airline establishes the link with the travel agent and the airline assembles the offer. The direct connect simply exists to enable the two computer systems to talk to each other. I'll show you a little more detail of that in due course.

If we now turn on, please, to page 48, paragraph 3.52, I'm going to explain how NDC comes into this, new distribution capability. This starts at paragraph 3.52:

"The airline content collected by GDS is typically communicated using something called EDIFACT, a messaging standard that is decades old."

You will see at the bottom of the paragraph:

"It is limited to displaying basic information."

Then it explains that the NDC standard was developed initially by Farelogix and donated to IATA in 2012. Then at 3.56, again there is helpful explanation of the difference between the GDS and the direct method:

"Under the traditional GDS distribution model, booking queries are received from travel agents are received by the GDS. The GDS then constructs an offer based on schedule and fare information filed with OAG and APTCO [OAG is another body that inputs information into the GDS]. Under an NDC distribution model, offer requests are received by airlines themselves. The airline creates the offer for the travel agent in real time without using this third party information. In short, the NDC standard aims to give airlines similar capabilities to construct more dynamic offers in the indirect distribution channel as are available through airline.com but do it across all channels."

So what we see therefore is that using the Farelogix type product, airlines do a lot of the work themselves that would otherwise be done by the GDS. They do offer

creation and assembly, they have to establish their own network of travel agents, and indeed all the back office functions that the GDS does are left to the airline. The API is nothing more than a connection, and indeed we'll see in a minute, also allows translation between different types of computer messages.

**MR JUSTICE MORRIS:** Mr Ward, I'm just looking at the clock. I'm very happy for you to continue with this factual product description which is very useful. I'm just enquiring how much longer that will take and we can finish and close there or break there.

**MR WARD:** All I was going to do now was show you what the FLX services as defined consist of and try and explain why they are different to the GDS. That will take a maximum of ten minutes, maybe more like five.

**MR JUSTICE MORRIS:** Well, as long the shorthand writers are happy with that, we'll continue. They can send a message if they prefer to have a break now.

**MR WARD:** If it takes me longer than that, I will stop anyway.

I was going to talk now about the so-called FLX Services, which is very important term in this case, although it's a term that was coined by the CMA which, with respect, my clients don't actually recognise. From their point of view, what Farelogix provides is really an API. But in the interests of consistency and not to introduce gratuitous confusion, I will use that term of course without prejudice to my client's view on that. We have to hunt around a little bit in the report to see what the FLX Services means. The first place we can see this is if we go to the report on page 12 at paragraph 28 in the fifth line:

"Farelogix supplies the relevant description of services through its FLX open connect [OC] and FLX NDCAPI, collectively referred to as the FLX Services [so it means FLX OC and FLX NDCAPI]."

We then get a slightly more helpful high level description of them at bundle 65, and that's at 5.27(b):

"Farelogix via the FLX Services provides an IT solution that enables airlines to connect a third party, including travel agents, non-GDS aggregators and GDS, or their own website. To do so, Farelogix builds an application programming interface that upon the request of the airline is exposed to third parties, eg the travel agent, to allow the third party to build a connection to the airline systems."

We don't object to that description, although we object to most of what follows in that paragraph.

The parties also provided some explanation, which is the origin of this in the merger notice. It may be helpful to look at that too. This particular part is nonconfidential, so I can read it out. That is in bundle 6D of the documentation bundle at page 432 -- 6D, tab 9, page 432, and it's paragraph 3.158. I'm going to read this out as I've been told I can. It says:

"Farelogix's order distribution services which are generally sold and implemented as a bundle, are FLX OC, a platform that allows users authorised by Farelogix's airline clients to make and manage bookings."

So it allows the airlines to make and manage the bookings and reservations, it does not do it for them. Then it says:

"It standardises and normalises various messaging protocols eg EDIFACT, OTA and XML [and XML is the more sophisticated recent messaging]."

Then (ii):

"FLX NDCAPI allows delivery of an airline's full suite of content to any sales channels."

So what this amounts to is it provides --

**MR JUSTICE MORRIS:** Mr Ward, sorry to interrupt you. On 3.158(1), I just wanted to check: a platform that allows users authorised by the airline?

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** I just wanted to -- so it's at that end.

**MR WARD:** Yes, sorry. Thank you, sir, I didn't read that out.

**MR JUSTICE MORRIS:** That's all right. Carry on.

**MR WARD:** The critical point I make here is that this does two things. It provides an interface between people's computer systems and it provides message translation. But everything else is done by the airline or the travel agent in terms of booking, assembly of offers, identifying the travel agents. All of that is done separately.

For that reason, we submit that the GDS is a radically different thing. It is a full service global distribution product involving a large network of travel agents, a huge range of inputs from travel service providers, and a whole suite of functions which are, if you like, substantive. It's not merely an electronic pipe between A and B.

So what we would submit is that the FLX Services as defined are really just an input into provision by the airline itself of most of the functions that are performed by the GDS; construct the offer, establish the network, carry out the fulfilment tasks. There is actually a very useful illustration of this difference in the contractual terms which apply to the GDS and the FLX API, and I can show you this without reading it out because I believe this is confidential.

This is quoted in Mr Batchelor's witness statement, which is in bundle 5 at page 71. You will see there is a box there and it contains an extract from the terms and conditions of these two products. I won't read this out but invite you just to read the first three lines of the Sabre box, which makes clear who has

responsibility for the third parties, which would be travel agents. Then one can contrast that with the Farelogix box, which says what the customer will be responsible for, and then six lines down what Farelogix will not be responsible for.

**MR JUSTICE MORRIS:** Okay.

**MR WARD:** Sir, in other words, our submission is these are fundamentally different products. That's all I was going to say about the facts and it's taken me eight minutes, I'm pleased to see, so that would be a convenient moment for a break.

**MR JUSTICE MORRIS:** It would, thank you very much. We'll start again at 12.05. If somebody can look in to the echo issue and maybe, Mr Ward, you need to speak to somebody.

**MR WARD:** Yes, I'll see if there's anything we can do at this end. I'm very sorry.

**MR JUSTICE MORRIS:** That's all right, no need to apologise. It's just one of the wrinkles we have to deal with in these times.

**MR WARD:** Okay. Thank you, sir.

**MR JUSTICE MORRIS:** Thank you.

**(11.51 am)**

**(A short break)**

**(12.08 pm)**

**MR JUSTICE MORRIS:** Thank you, Mr Ward. I'm assuming that everybody can see and hear again and we're ready to resume.

**MR WARD:** Thank you, sir. As you see, I am trying a headset, I hope that will help. I see Professor Mason nodding, that's good news. There's a slight danger of me yanking it out of the side of the laptop, so I'm sure you'll tell me if I disappear.

I was going to turn now, if I may, to ground 1 which I can deal with reasonably briefly. This concerns the definition of the relevant description of services. Of course, as you know, the CMA needed a relevant description services, or RDS as we've referred to it, which would achieve two things. It needed to extend to both of these highly disparate products on the one hand, but on the other hand it had to be narrow enough that the share of supply was over 25 per cent.

By way of examples, if the CMA had simply concluded the RDS was IT systems used by airlines, then plainly it would have lacked jurisdiction because that would have been too wide. On the other hand, if it had concluded that the RDS was provision of GDS services, or global distribution systems, then that would have been too narrow because it would not have covered Farelogix. But it's only stating the obvious that it's not open to the CMA to reverse engineer an RDS that would deliver this outcome because this a threshold requirement; it applies irrespective of whether the CMA has concerns about a potential SLC.

What the history shows is that finding an RDS which would work proved to be quite a challenge for the CMA and it tried a whole series of formulations during these proceedings that were contested by the parties in various different ways. But it kept coming back with new formulations, and it will just save time if I can show you these in our skeleton argument, although of course I'm happy to go to the underlying documents if you would prefer.

It's in our skeleton argument, which is bundle 2, tab 1 at page 121 where we have set them out. In fact, some of these have more subcategories than we've really identified, but these are all things which were at least explored by the CMA, if not ever formally adopted.

**MR JUSTICE MORRIS:** Can you give me the reference again, please.

**MR WARD:** Yes, sorry, sir. It's bundle 2, tab 1, page 21 which is the Sabre skeleton argument.

**MR JUSTICE MORRIS:** Yes.

**MR WARD:** You'll see that they tried -- at least enquired about, I should say, "Services to facilitate indirect airline ticket sales." Then:

"Shares of supplies for airlines which operate flights to or from the UK for services to facilitate airline tickets by direct connect, services which are offered in rich content, NDC ..."

Then two others which were in the provisional findings:

"Services that facilitate the indirect distribution of airline content to travel agents in the UK in respect of specific flights travel destinations [which included places like Puerto Rico and Kazakhstan] and then services that facilitate the indirect distribution of airline content to British Airways."

So it tried all sorts of things before landing upon the one which is actually in issue in this case, which is in fact quoted in the next paragraph, but which we find in the Final Report at paragraph 5.28. This is:

"The supply of an IT solution to airlines for the purpose of airlines providing travel service information to travel agents to enable travel agents to make bookings."

So it starts with a very broad formulation, "supply of an IT solution" in the CMA's words -- I should say as well, by the way, that none of the terms in this are exhaustively defined. There are some examples given of travel services information, which we'll come to a bit later.

But on the face of it, an IT solution could be more or less anything in the ever-complicated word of IT; from a computer monitor to a whole mainframe

computer. But what we'd also say about this is that it is really quite unrecognisable as a description of the services which are actually provided. It is of course the case, as I've explained, that a GDS is far more than this; it is a two-sided platform providing comprehensive distribution services. But it's also not really recognisable as a description of the FLX Services.

To see that, if we could turn back to the decision at paragraph 5.27, which is page 65 in 4A. We can put the skeleton away, I should say, I'm not going to take any more time with that. We have looked at this already --

**MR JUSTICE MORRIS:** Paragraph number again?

**MR WARD:** 5.27(b). This is where it describes the FLX Services and it says there:

"An IT solution that enables airlines to connect to a third party including travel agents but not only ..."

So in that respect already, the FLX Services are much broader than the description. But then it says:

"To do so, Farelogix builds an 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 airline systems."

So again, the API is really just an element of what the CMA has put in its description, which is as we can see at 5.28, this is where the formal finding is to be found. Paragraph 5.28, fourth line:

"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."

So what we have here though as well, paradoxically, is a form of words which the CMA says is broad enough to encompass these two very disparate products. But then these final words "to travel agents to enable travel agents to make

bookings" is used, as we will see when we get to ground 4, to exclude a lot of other things. And we can see how closely tailored this language is if we turn the page to 5.29. This is where the CMA actually says what is and is not within the relevant description of services, or rather what is, I should say. What's not follows and the answer is everything else. So 5.29 at the top of page 66:

"We consider that other providers of these services are the other GDSs, other direct connect providers [and then finally something else] non-GDS aggregators."

So the only things which are within this relevant description of services are strikingly GDSs like Sabre and APIs like Farelogix, and then another category called non-GDS aggregators. I'm going to explain what they are because they actually matter for ground 4, even if you might be at this point thinking you've got enough acronyms and technical names. But I'll just take five minutes, if I may, on those.

Just to remind you, they were mentioned in 5.27(b) as --

**MR CUTTING:** Sorry, Mr Ward, I'm trying desperately hard to keep up. Just allow me to ask one question, if I may.

**MR WARD:** Please.

**MR CUTTING:** When you referred us to 5.27(b), you pointed to the second sentence which previously said actually you don't take issue with the first two sentences, but you don't necessarily accept the rest of the paragraph. But in that second sentence, it says:

"Farelogix builds an API. Upon the request of the airline, is exposed to third parties to allow that third party to build a connection to the airline systems."

**MR WARD:** Yes.

**MR CUTTING:** Then we flip over into 5.28 and we have the definition of the RDS,

which is:

"An IT solution provided to airlines for the purposes of airlines providing travel service information to travel agents."

Just trying very slowly, is it part of your case that because the API allows the third party to build a connection to the airline system that it isn't even within the definition of the RDS because it's not the airline providing travel service information to travel agents?

**MR WARD:** No.

**MR CUTTING:** Okay.

**MR WARD:** We are not contesting whether the Farelogix product is within the RDS. What we will see when we get to ground 4 though is that in fact paradoxically, it's the logic of some of the CMA's that it shouldn't be. But it's not our ground of challenge here that it has erred by including Farelogix in the RDS. I'm glad you asked, sir, because that is an important clarification.

Where I was was on the next page on 5.29, looking at what actually the CMA accepts is in scope. In scope, it's roughly people like Farelogix, people like Sabre's GDS, and one other category of non-GDS aggregators, which I was going to hopefully without testing your patience explain what they are. We see them mentioned in 5.27(b) in that same text Mr Cutting's just taken us back to because it says:

"Farelogix via the FLX Services provides an IT solution that enables airlines to connect to a third party including travel agents or non-GDS aggregators."

Then to understand what a non-GDS aggregator is, we see footnote 118, which starts on page 64 and goes over to page 65 where it says:

"Within the indirect distribution channel, the distribution of content from an airline to a travel agent could be via a GDS or via a direct connect. Content may be

distributed using a direct connect that goes via a non-GDS aggregator which then aggregates content for multiple airlines so the travel agents can compare offers. Non-GDS aggregators cannot distribute content without the support of direct connects."

Then they say their inclusion is conservative but they are at least included. It's worth noting what the -- so a non-GDS aggregator is, in a sense, downstream of a direct connect. But they at least are included in the RDS. I will just show you a confidential figure which shows how significant or otherwise they were in the CMA's calculation of the share of supply. We can see that on page 85 where there is a table which relates to those suppliers who the CMA concludes are within the RDS. You will see -- this is page 85, table 5.1 -- "Shares of supply", and then at the very last line before the total is "Non-GDS aggregators", and there is a confidential figure which illustrates their overall significance in the scheme of things.

So included by the CMA but evidently the very large part of this category they have identified is in fact the products that these particular people sell and other products that are identical or materially the same.

What we have therefore though is that everything else in the entire IT travel industry is excluded, even products which are directly involved in the transmission of airline information to travel agents and end customers. I'm going to be developing that in much greater detail in ground 4. But our essential submission is that what is lacking here is a rationale for treating these particular services together, yet separately from all the other services.

To see why that is needed, we need to turn back to the authorities bundle and to tab 1A, which is the Enterprise Act. I was going to remind you of what we've already seen in sections 23(5) and (8). Section 23(5) on page 2 says:

"For the purpose of deciding whether the proportion of one-quarter is fulfilled, the decision-maker shall apply such criterion as it considers appropriate."

But that has to be read with subsection (8):

"The criteria for deciding when goods or services shall be treated as goods or services of a separate description shall be such as the decision-maker considers appropriate in each case."

What is needed to comply with this section is a criterion which is used to justify treating these services separately. They have to be sufficiently connected that the concern about concentration arising out of the transaction can arise. So what is needed, therefore, is a rationale that is both clear and intelligible and then applied in a consistent and coherent manner. That rationale and that criterion has to be reflective of the true character of those services. So it wouldn't be enough, for example, to describe a car as a radio listening device. But nor is it enough to simply find a form of words which describes one element of the products in question because all that does is empty the share of supply test of substance by identifying a lowest common denominator.

Now this submission gains force from the CMA's own jurisdiction and procedure guidance. If we look at that, please, it's in the first authorities bundle under tab 6 at page 157. Do you have that, sir?

**MR JUSTICE MORRIS:** I have it, I'm --

**MR CUTTING:** I'm struggling, I went to the wrong one. Can you tell me where it is again?

**MR WARD:** First authorities bundle under tab 6, page 157.

**MR JUSTICE MORRIS:** Mr Ward, whilst Mr Cutting finds it, can I just check: it follows, does it not, necessarily that section 23(8) whilst referring to criteria for deciding whether services are separate, presumably the flipside of that coin is

it must be criteria to decide whether they could be treated as the same.

**MR WARD:** Yes, absolutely. What's required here is a rationale for drawing a boundary between these services and all the other services. It has to be a rationale which justifies the exercise of merger control. So for example, it couldn't be, "They're all coloured orange". That would just be irrelevant to the question of whether there's a concentration here which might justify the exercise of merger control powers.

**MR JUSTICE MORRIS:** Okay.

**MR WARD:** I was going to just show you a very short passage in the CMA's own guidance. This is in paragraph 4.56, there's a bullet point at the bottom of the page:

"The CMA will have regard to any reasonable description of a set of goods and 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."

So we don't say that this is itself a per se mandatory requirement. But what it points to is something important, that one ought to think about the way these products are actually described; whereas what we have here is a description, particularly of the GDS, which is simply unrecognisable. It is a lowest common denominator, not a fair description of what it is the GDS does.

In its skeleton argument and defence, the CMA says: well, the answer to this is there is common functionality between these products, between the GDS and the Farelogix services. But we do respectfully submit that common functionality is not sufficient in itself just a bare assertion of common functionality. It's particularly problematic when it is combined with the tailoring here that excludes other products with a similar functionality, which I'm going to come

on to in ground 4. But we put an example in our skeleton that the CMA didn't really like and I'm going to offer a different one, see if I can improve on it.

Suppose the category was things that move people along the road. That would be a fair functional description of both a scooter and a double-decker bus. But it wouldn't be an intelligible or acceptable rationale for separating out these products. It wouldn't identify any nexus that justified intervention in a merger between parties in these two categories. And similarly, to try a different example, things that enable you to listen to music. That could include a radio set on the one hand but a laptop on the other; the shared functionality would just be part of the function of the laptop. To go back to the kind of language I was using earlier, the buyer of the radio would have to self-supply a huge range of other elements to replicate the laptop's functions, whether it be Internet access, document typing or anything.

In our submission, the appeal to common function isn't enough in itself where the description which has been provided is so far removed from the reality of these products.

There's also reference to them being alternative commercial solutions. But again, they're of a very different kind and the CMA was very careful to say it has not done this by reference to an economic market. It is not suggesting that these are products that could be alternatives in a tendering exercise, and in fact the tender evidence which is in the report doesn't show this for me. Of course if it had gone with competing products, that might have ended up in a very different place. We just do not know.

My final point under this head is a closely related one about the partly vertical relationship between the Farelogix services and the GDS. If you still have the jurisdiction guidance open, that would be helpful and I'm sorry, I should have

asked you to keep it open. I see Mr Cutting has had to reach for it, I'm sorry about that.

**MR CUTTING:** That's all right.

**MR WARD:** If we go to the next page, if you did put it away, it's B6/158, the last bullet point in 4.56:

"The CMA cannot apply the share of supply test unless the parties together supply or acquire the same category of goods. The test cannot capture mergers where the parties are solely active at different levels of the supply procurement chain."

That is because, putting it in sort of simple jargon, the test is concerned with horizontal mergers, the same products, not vertical mergers, eg where a supplier buys a retailer. There a whole different world of competition law which deals with that issue. Again, here the question is: what is the rationale for separating out these products? We do not argue that they are in a purely vertical relationship so as to be captured by this guidance. But there is nevertheless a strong element of verticality which the CMA has simply ignored. That is because, as I've already explained, where an airline uses the FLX Services or the FLX API, it essentially self-supplies a wide range of services which are otherwise provided by the GDS -- I won't enumerate them again, I must have done it at least twice or maybe three times this morning. So the Farelogix API is an upstream input used by airlines wishing to self-supply, offer creation, distribution, construction of a travel agent network, fulfilment, all the rest of it.

Farelogix has absolutely no role in any of that distribution activity, so we would submit the relationship between the two is indeed partly vertical. The FLX Services are an input into the much broader supply provided by the GDS.

Again, we submit it is no answer to this to say that a form of words can be found broad enough to capture both. I'll give another example. There's going to be a few today --

**MR CUTTING:** Can I ask you a question?

**MR WARD:** Of course.

**MR CUTTING:** Is the implication of what you are saying there that whenever a vertically integrated entity acquires a business which supplies one function that is also supplied by the vertically integrated entity, albeit on a bundle basis, the share of supply test can't be met?

**MR WARD:** No, I'm not going to put my case as high as that, sir.

**MR CUTTING:** Well, can you distinguish what you've just said from that, because it seems incredibly similar to that.

**MR WARD:** No, I submit that the element of verticality here was a relevant consideration for the CMA. It forms part of my wider argument, not a freestanding killer blow, so in the sense that this element of verticality was something that should have been considered and is another indicia as to why this relevant description of services is not apposite or has any rationale.

I am not going to say there could never be a buyer of a downstream company for which there was some overlap with some description where that could never be the subject of a merger enquiry. I feel it's dangerous to get into examples sitting at my desk, on my feet, but one can imagine that it was clear enough that they were both horizontal competitors in some respect.

So I'd rather not, if you forgive me, answer a question at that very high level of abstraction and tailor my argument purely to these facts where there is this element of verticality which in our respectful submission has been (a) overlooked and (b) is highly telling against the viability of this relevant

description of services.

**MR CUTTING:** Okay.

**MR WARD:** I was going to go on to yet another example to illustrate my point, which is the fact that you can find a form of words which is broad enough to capture both is not itself an answer. We gave the example in our skeleton of edible potato products. That we can see would be broad enough to encompass potatoes and crisps -- or for the benefit of my Texan clients who are listening to this part of the open proceedings, chips. But that doesn't identify any proper basis to assert they could be grouped together for the purpose of the share of supply test.

Here, what the Final Report discloses is no consideration at all of the different roles that these products play in the supply chain. That, in my submission, is another indicator of the lack of rationale for this approach.

So a short conclusion on ground 1 is that the CMA's approach was unprincipled and contrary to the statutory requirements. It found a form of words that it was satisfied would cover both products, but it was commercially unrecognisable and not based on any sustainable criteria. If necessary, we would say that was also unreasonable.

**MR JUSTICE MORRIS:** When you said "contrary to the statutory requirements", you are referring to the use of the word criteria, are you?

**MR WARD:** Yes. If you like, the conclusion of our submission is this is not a relevant description of services within the Act because it suffers from these various public law defects.

**MR JUSTICE MORRIS:** All right, fine. Can I ask you one further question which (inaudible) the ground. You have said and illustrated how common functionality between products is not enough or is not the right approach.

What then is the right approach?

**MR WARD:** Well, what --

**MR JUSTICE MORRIS:** If it's not enough that two things can be used to listen to music or -- I can't remember what your other example was -- things we move along with --

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** -- what is the right approach?

**MR WARD:** I don't dispute that functionality is in principle capable of being a relevant consideration. If you had a fountain pen and a ballpoint pen, it may be possible to describe them both as writing instruments, for example. Or to go back in time a little bit further, an electric typewriter and a manual typewriter could have a similar functionality. But the issue here is whether the functionality that has been identified here is anything more than merely a lowest common denominator. What the CMA has done is taken products, particularly in case of the GDS, with vastly more complexity and then reduced it down to something which is undoubtedly an element of what it does but is totally unrecognisable commercially as a true description of the GDS. In our respectful submission, that is not permissible because it emasculates the legal test which is there intended to identify genuine issues of concentration. So it's not that functionality can never be the right approach --

**MR JUSTICE MORRIS:** No, what I was asking really was: what do you add to functionality to get to a good -- a rational description of services?

**MR WARD:** I would say relevance. Relevance and materiality.

**MR JUSTICE MORRIS:** Okay.

**MR WARD:** It has to be an adequate description. One also needs to consider whether it is a relevant description for the purpose of the exercise of

jurisdiction. That's why we're here: does this description justify the exercise of jurisdiction?

**MR JUSTICE MORRIS:** Which in turn takes, you say, into issues of concentration leading ultimately to issues of whether it is worthwhile investigating whether down the line they are morally SLC issues.

**MR WARD:** Exactly. Having said that of course, as we've already emphasised, the mere fact you are worried about an SLC does not justify you in overriding or emasculating the terms of the threshold test.

**MR JUSTICE MORRIS:** No, that I understand.

**MR WARD:** Sir, does that assist?

**MR JUSTICE MORRIS:** It does, thank you.

**MR WARD:** Thank you. With that -- I'm sorry, Professor Mason.

**PROFESSOR MASON:** If I could, I wanted just to check with you that the status of the point you've made repeatedly about the need for it to be recognisable as a description of the services actually provided and/or commercially recognisable. Do you see that as being a necessary condition for the RDS?

**MR WARD:** It is a necessary condition that it should be recognisable, yes. I do accept that the words in the guidance are -- we're not challenging the words in the guidance which say it doesn't have to correspond with a standard recognised in the industry. But the reason I've given my various examples is that you could not say it was a recognisable description of a laptop that it was a machine for listening to the radio, even though of course you can listen to the radio through a laptop. It's just a distortion of the true nature of the product to focus on that quality in isolation from the rest.

**MR CUTTING:** Can I ask you a question in that context. When you say the RDS is a distortion of the services provided, I think you are very clear on why it's

a distortion of the services provided by a GDS. But I don't think you've asserted that it's a distortion of the services provided by the FLX product, and doesn't that bring us back to the concern about how we then apply the test where a multiproduct acquirer, or target for that matter, merges with a narrow product supplier? I mean, surely the CMA has to take the RDS by reference to the product offering of the smaller player, otherwise it will never have jurisdiction. Isn't that right?

**MR WARD:** Well, sir, may I just on the two answers to that. Firstly, it's not even a complete description of the FLX Services because we saw at 5.27(b) that it allows connections to a range of third parties, travel agents, non-GDS aggregators and GDSs, or their own website. So to that extent, it is incomplete, even for the FLX Services.

But the answer to your question is: it all depends because if your vertical merger involved a radio manufacturing company and a car manufacturing company even though -- so the large vertical entity is the car manufacturer and the small entity is the radio manufacturer -- we wouldn't accept that the description of services that was reduced down to what it is the radio does was an apt description of services if you are contemplating merger with a car manufacturer.

So these are questions of fact and degree which is -- I think again why I was a bit resistant to trying to answer a kind of bright line question that's posed entirely in the abstract.

**PROFESSOR MASON:** That might have been my question you are referring to and I just wonder if I could return to it just so I'm clear. The guidance you've quoted says, "Share of supply use services", paragraph 4.56 in my soft copy, which is B/6, page 157. There it says:

"The share of supply used corresponds with the standard recognised by the industry in question although this need not necessarily be the case."

What I was just trying to understand from you, where you say that something -- you refer to the criterion that it's commercially recognisable and your response to the question, "Is that a necessary condition?", you said, "Yes, it is." Could you just distinguish between your commercially recognisable and what's in the guidance standard recognised by the industry which is not necessarily --

**MR WARD:** Sir, if I may say respectfully, you have very effectively cross-examined me now on two very similar formulations and if I may have another go. I accept that the wording in this guidance is not mandatory, it's not our case it should be mandatory. Our case is that the description of the services ought to be recognisable and comprehensible as a description of that product in the way that a description of a car or a laptop as a machine for listening to music is just not. It is too far removed from the overall nature of those products to justify describing them in that way.

The other thing to say of course is that just thinking about Mr Cutting's example again, it isn't the case that the API is just a subset of the GDS. It's a completely different thing. It is true that information starts with airlines and ends up in travel agents, but it is an entirely different mechanism. One is computer interface with messaging translation, the other is a two-sided platform with all of the content services I've already described.

Unless there are more questions -- Professor Mason, it looks like you have --

**PROFESSOR MASON:** Sorry, therefore just to close that off and hopefully to clarify at least for my consumption: it's therefore a matter of degree that you are arguing.

**MR WARD:** It would be a matter of degree, yes. We simply say this is far beyond

what could be acceptable in that respect.

**PROFESSOR MASON:** Thank you.

**MR WARD:** Sir, unless there are more questions on ground 1, I was going to turn to ground 2. It is 12.47 and I can start this in open session and then fairly quickly we'll have to go into closed session. So if it would be convenient, I can go all the way to that point. It will certainly be before 1.00, it might be five minutes before 1.00.

**MR JUSTICE MORRIS:** Fine, yes. If you want to have the break and then go into closed session after the lunch adjournment, that would be fine. I thought you were going to say the opposite, that you wanted to go on a little bit longer for the first bit, but that's fine.

**MR WARD:** No. I'll get to the point which I've marked in my notes as "Confidential session only" and we will see what the time is. But it will certainly be before 1.00 -- I say certainly, I'm now looking at my notes wondering. But anyway, certainly I can do the introduction to this and then we will have to switch tracks.

The issue in ground 2 is whether the CMA erred in concluding that Farelogix made a supply of the relevant description of services in the UK. This is a pivotal issue because if it erred in this regard, there is no basis for the assertion of jurisdiction. The basis of the CMA's finding, as we will see in a minute, is that it concluded there was a direct supply of what it calls FLX Services by Farelogix to BA.

It drew this conclusion despite the fact that there was no contract between Farelogix and BA to supply FLX Services. The very services in question were supplied under a contract between Farelogix and American Airlines. As we will see, the supposed recipient of these services, BA, had other views. In our

respectful submission, this is another instance of the CMA stretching the jurisdictional provisions beyond their true construction and purpose.

Again, I want to go back to what the purpose of the test is here. The purpose is to establish sufficient connecting factor and sufficient reason to get engaged. That requires there should be a real supply, a real supply. Because it's only a real supply that could give grounds for concern about concentration in these particular goods and services. It's useful here to look at another piece of CMA guidance which bears upon this issue, which is this time at page 158. Again, apologies for not asking you to keep this open. This is paragraph 4.58 of the same guidance where it says:

"Services or goods are generally are supplied in the UK when 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."

And in the case of multinational companies, it says this will be where relevant procurement decisions are made. And this has an obvious logic to it because it serves to identify a nexus with the UK that can justify investigation, because of course the merger regime is ultimately about competition in the United Kingdom, not in Texas. And in our submission in this case it is precisely this nexus that is missing.

I'd like to put the guidance away now -- I can say with confidence, as it's not coming back, or at least not for a good while, sorry about that -- and go back to the decision. Because I want to start by showing you in the nonconfidential decision how the CMA's reasoning actually worked here and then we'll go to the confidential details of some of these agreements after lunch.

The starting point is on page 63, Final Report, paragraph 5.20. We'll see the structure of this. They say:

"As set out, the FLX Services include provision of IT solutions 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 through travel agents. BA accordingly receives the supply of FLX Services. This is underpinned by three commercial arrangements. The first one is the service agreement between Farelogix and American Airlines, the direct connect services agreement; the second is an interline agreement; and the third is the so-called British Airways agreement, also referred to as FLX interline distribution agreement."

We are going to look at some of that detail in closed session. But on the basis of this the CMA concluded, if we flip forward to page 79, under the heading, "Combined effect of these arrangements", the CMA again reiterates the three agreements, and then be at 5.55 it says:

"We therefore consider Farelogix directly supplies the relevant description of services."

So this a very stark conclusion, in our respectful submission, that despite the absence of any agreement for provision of FLX Services there was in fact a direct supply.

I've already shown you the material that explains what the FLX Services actually are. And it's very important that the -- CMA's case is not that BA actually received an API, or that it actually received message translation or Cloud hosting, any of those other things which make up the services. It does not get FLX OC, it does not get FLX NDC API, even though they are the exhaustively defined terms that constitute the FLX Services.

But the basis of its finding was nevertheless what is essentially an interlining arrangement under which AA can sell segments of BA tickets. But it's very

important that the British Airways agreement, which we're going to look at, is the only relationship between Farelogix and BA that the CMA relies on.

I think we can carry on in open session for now. I was just making sure, sir, before going any further that I'm still okay in open session. I think I am.

If we go now, please, to appendix B of the report, which is where there is more detail on these three contracts, although we will go to some of the underlying material. We can pick this up, please, at page 4B2/450. This starts with the agreement between Farelogix and American Airlines. The first of the three agreements which are said to add up to the supply of FLX Services. I'm reading from the report:

"The direct connect services agreement is the commercial agreement under which Farelogix supplies its FLX Services to American Airlines."

So in other words this is a contract between Farelogix and American for FLX Services. Then it says:

"The terms of this agreement include requirements for Farelogix to support and facilitate itineraries with American Airlines' partners, including interline segments."

But there is, it is common ground, no agreement of this kind between Farelogix and BA. And it was just useful to see what Farelogix says about this in its response to the provisional findings which is in bundle 6H, tab 22, at page 1160.

**MR JUSTICE MORRIS:** Just give me a moment, please. **(Pause)** Sorry, I thought you said it was the wrong reference.

**MR WARD:** No, I'm so sorry. It was right all along. It's 6H, tab 22, page 1160. I'm only going to read out a small piece of this that was already quoted non-confidentially in our skeleton so I know I can read this with confidence.

**MR JUSTICE MORRIS:** Yes.

**MR WARD:** This is where Farelogix is disputing whether indeed it supplied FLX Services to BA. It says, three lines from the bottom:

"Of course Farelogix would have been delighted to win British Airways as a new customer and had there been any prospect of establishing a commercial relationship with BA and actually supplying services to BA, Farelogix would have jumped at it."

But it is common ground there was no such contract or commercial relationship.

Sir, it's just gone 1.00. I was going to go on to the interlining arrangement and then the BA agreement. Some of what I said about the interlining arrangement's not strictly confidential, but it takes me quickly to something that is. So if it's convenient we can stop there and resume in confidential session at 2.00?

**MR JUSTICE MORRIS:** Yes. Thank you. I've just been reminded to ask -- first of all to inform everybody that when we resume at 2.00 pm the live-stream will no longer be connected because, we're going into closed section, and to remind the parties to send to the tribunal the names and email addresses of those within the confidentiality ring who are permitted to attend the closed session.

Before we do that can I just pose one question for you to contemplate on this issue, ground 2. Is it a requirement of section 23 -- I suspect section 23(4), supply of services, that assuming a supply of services by person A to another person in the UK, there has to be a contract between those two people.

**MR WARD:** Sir, thank you. I'll answer that at 2.00.

**MR JUSTICE MORRIS:** It's just a thought in my mind.

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** Thank you very much.

On that basis we will bring there morning's session to a close. Can I thank everybody, and we will resume at 2.00.

**(1.00 pm)**

**(The short adjournment)**

**(Hearing in closed session, extracted)**

**(3.56 pm)**

**(A short break)**

**(4.02 pm)**

**MR JUSTICE MORRIS:** So what are we in now? Mr Ward is there.

Mark, would you like to switch on your microphone. I don't know if you're in. Hold on, at the moment I can't hear anybody. I can't hear anybody through the microphone.

Mr Ward -- I can hear now.

**MR CUTTING:** This is Robin.

**MR JUSTICE MORRIS:** I can hear Robin but I can't see Robin.

Mr Ward, can you hear me?

**MR WARD:** Yes, I can hear you, sir.

**MR JUSTICE MORRIS:** Ah, now I can hear you.

Mr Williams, Mr Cutting, Professor Mason, can you hear me?

**PROFESSOR MASON:** I can hear you clearly. Are you able to see me now, because there is some --

**MR JUSTICE MORRIS:** I can see you.

**PROFESSOR MASON:** Very good. Thank you.

**MR JUSTICE MORRIS:** So we should be in open session.

I can't see anything on the live stream at the moment. I don't know whether that is operating yet. I think we're in now. That's fine.

Yes, Mr Ward, I think we're ready.

**MR WARD:** Thank you, sir.

**Submissions by MR WARD (continued)**

**MR WARD:** I'm turning now to ground 3, which is an independent criticism of the increment that the CMA purports to have identified in the supply of the relevant description of services. And of course you will recall from our review of the law this morning that the transaction must result in an increment in the relevant description of services to found jurisdiction, because the level of supply must be at least one quarter and increased as a result of the merger.

And this is again a jurisdictional threshold condition. It must, again, have content if the jurisdiction test is not going to be turned into a dead letter. That means it has to be something real that actually anchors the transaction in UK markets so as to raise the prospect that it might affect those markets in a way that is worth investigating.

That, of course, is critical to legal certainty for those who contemplate such transactions. And it is our submission that the CMA has again interpreted this requirement in a way that strips it of content. And that is an error of law. It also has a compounding effect on our criticisms raised in ground 2, where we have said it has taken a wholly artificial approach to the construction of a supply and then taken an equally artificial approach to increment.

Now, I want to start with a point of law on which there is at least superficial disagreement between ourselves and the CMA. For this we need to go to the CMA's defence. It is in bundle 1, tab 2, page 133. This is paragraph 132. It says:

"Section 23(5) confers discretion on the CMA to determine whether the 25 per cent

threshold is met, providing that for the purposes of determining whether it is fulfilled the decision-maker shall apply such criteria [et cetera] as appropriate."

There is certainly a discretion as to which criteria should be used. But that is not a discretion as to whether the increment actually rises. The latter is not a question on which the CMA is entitled to much, if any, deference; and you'll see in this case that the basis for the supposed increment is not some complex economic evaluation, rather, this is just another issue in which, in our submission, the CMA has taken a position that is entirely at odds with the evidence.

With that legal point I'd like to turn to what's actually said in the decision, all of which I think we can deal with openly until we get into the detail. The starting point is page 82, paragraph 5.64.

**PROFESSOR MASON:** I'm sorry, Mr Ward, which bundle?

**MR WARD:** So sorry, bundle 4. Tab A1, page 86.

**MR JUSTICE MORRIS:** 86?

**MR WARD:** Sorry, I'm so sorry, 82, and it's paragraph 5.64. This is a brief summary of its reasoning, and we'll look at it in a little bit more detail. It says, 5.63:

"Both parties derive value ['value' is the word] from the supply of the relevant description of services to UK airlines."

In Sabre's case, we are going to see in a minute this is fairly straightforward, but for Farelogix the reasoning is much more contorted because it talks about, in 5.64:

"Farelogix has a commercial relationship with one UK airline [British Airways] to enable it to use and receive the supply of FLX Services."

Obviously a description we don't accept:

"Through this commercial relationship Farelogix supports the sale of certain tickets

that it would otherwise not be able to. Farelogix is entitled to receive a fee from British Airways for each segment that is marketed through the FLX Services. In our view there is value to Farelogix in this enhanced functionality."

And then at 5.65 it says:

"For the purpose of the share of supply test in this case we have measured the value derived from the supplier of relevant description of services to UK airlines by considering revenues received and receivable."

So that is the measure of value.

Then in the case of Sabre, it's all pretty straightforward and we can see that on page 86, 5.73, where a confidential figure is given that doesn't matter at all. But we can see:

"We consider Sabre derives value from the supply of relevant description of services to UK airlines and such value can be measured by revenues received from the supply of its GDS. As illustrated at table 5.1 above we consider Sabre has a share of supply by revenue."

So that is a readily comprehensible measure of actual revenue. But at this stage I'm afraid I'd like to go back into closed session to discuss the position with regard to Farelogix.

**MR JUSTICE MORRIS:** We will do that, we will have another hopefully short break to do that. Thank you.

**(4.09 pm)**

**(A short break)**

**(Hearing in closed session, extracted)**