IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1226/2/12/14

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28th July 2014

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
BRIAN LANDERS
STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

SKYSCANNER LIMITED — Appellant

- and -

COMPETITION AND MARKETS AUTHORITY — Respondent

- and -

BOOKING.COM BV
SKOOSH INTERNATIONAL LTD
INTERCONTINENTAL HOTELS GROUP PLC
EXPEDIA, INC. — Interveners

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H E A R I N G

D A Y O N E

APPEARANCES

Miss Kassie Smith QC (instructed by Maclay Murray & Spens LLP, Edinburgh) appeared on behalf of the Appellant.

Miss Kelyn Bacon QC and Mr David Bailey (instructed by the Office of General Counsel) appeared on behalf of the Respondent.

Mr Alistair Lindsay (instructed by Slaughter and May) appeared on behalf of the Intervener Booking.com B.V.

Mr Duncan Sinclair and Samar Abbas (instructed by Shoosmiths) appeared on behalf of the Intervener Skoosh.

Mr Tim Ward QC and Miss Jessica Boyd (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Intervener IHG.

Mr Josh Holmes (instructed by King & Wood Mallesons LLP) appeared on behalf of the Intervener Expedia.

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THE CHAIRMAN: Good morning. Just before you start, we have reasons for a ruling from Wednesday to hand down, so can that be done. I am sure you will read it and consider it in the fullness of time, I do not want it to interrupt the proceedings now, but we just want to get it off our desks and on to yours.

MISS SMITH: Thank you, sir.

THE CHAIRMAN: The second thing, we have a statement to make if I may make it. All three of us have, as a matter of our ordinary activity, accessed, used, and on occasions made bookings through one or more of the online services provided by one or more of the interveners, and indeed of the applicant. We do not regard this as in any way impairing our objectivity in the present dispute, or giving rise to any perception of impairment, but if any party objects to our continuing to hear this case we should like to know it now, and we shall take silence as consent. If that is out of the way, on you go.

MISS SMITH: Sir, thank you. I appear for Skyscanner, the appellant in this case, in this challenge to the Competition and Market Authority's Decision of 31st January 2014 to accept the various commitments from Booking.com, Expedia and Inter-Continental Hotels Group. Miss Kelyn Bacon QC and David Bailey appear at the other end of the table for the CMA, Duncan Sinclair appears for Skoosh supporting my application, and Tim Ward QC, Alistair Lindsay, Josh Holmes and Jessica Boyd appear for the interveners, Booking.com, Expedia and IHG, supporting the CMA.

Sir, you should have a number of bundles in front of you, three main authorities bundles, which are lever files, two lever arch files which are called core 1 and core 2, but, in fact, they are the full bundles of all the documents in the case. I think in front of you there is a small bundle of additional authorities that has been prepared by the CMA for today containing three additional authorities.

THE CHAIRMAN: What do you want us to do with these?

MISS SMITH: Those I have in a separate bundle, but if you want to put those ----

THE CHAIRMAN: I do not want to spend the next half an hour clicking open files, but equally I do not want to lose the authorities.

MISS BACON: Sir, there should be a small black file with three additional authorities, and in addition to those on your desk you should have three things. The first is a full judgment in the *Bolton* case. We noticed that only the headnote had been included in tab 21, so *Bolton* should go in tab 21. The second is the court judgment in the *Pierre Fabre* case, because the current bundles only contain the Advocate-General, and we thought it would be useful for you to have, if you wanted to refer to it, the court as well. That should go behind what is

currently in tab 51. The third thing is the actual commitments given in *E-Books*, and those can go behind the *E-Books* decision in tab 55.

THE CHAIRMAN: Can you give us some idea of how you are going to plan out the next two days, please?

MISS SMITH: Sir, we have had discussions between counsel on that, and we anticipate that this side of the court, that is me and Mr Sinclair, will be finished by, at the latest 3.30, so that the CMA can get started on their submissions this afternoon for perhaps another 45 minutes or so.

THE CHAIRMAN: We want to finish at 4.15 today. We are quite happy to go on tomorrow.

MISS SMITH: The CMA and the interveners on the other side of the room have agreed that they will be finished by 3.30 tomorrow, which gives them essentially the same time as we will have, and then there will be time for replies for the last 45 minutes or so. We hope that this will work.

THE CHAIRMAN: If nothing goes wrong, that seems fine.

MISS SMITH: We are ever hopeful, sir. The structure of my submissions, just to outline where we are going today, I propose, first, to make some brief introductory remarks about the nature and importance of the metasearch model in the online hotel booking market. Secondly, I want to address in a little more detail the decision making process engaged in by the CMA leading to the acceptance of the commitments on 31st January of this year. Then finally, I will address against that background, although I will have covered a lot of the substance of the submissions I want to make in that second tranche of my submissions, to address the Grounds of challenge. I am going to do that backwards, starting with Ground 3, then Ground 2 and finally Ground 1.

THE CHAIRMAN: A sort of countdown. Half way through the morning there will be a convenient pause.

MISS SMITH: For the transcribers, yes, I will keep an eye on the time.

THE CHAIRMAN: The transcribers and for us, I think!

MISS SMITH: And for us! So, sir, the brief introduction, the metasearch model: as you say, you and your colleagues have used this model, and so you are familiar with it.

THE CHAIRMAN: We did not say that.

MISS SMITH: The model is simply, if one looks at Skyscanner, for example, there are a number of operators, price comparison sites or metasearch sites out there in the market. What one does is click on to the site and search in the hotels for a hotel - they also do flights. For a hotel you would put in the place where you want your hotel and the dates and the search engine will search across all online travel agents, and will provide details of all the offers of

hotel rooms for that date in that particular town, comparison between the prices and hotels offered by all the online travel agents.

Could I ask you, first, just to give a bit of the background of what the market was like at the time or shortly before the OFT made its decision, to look at core bundle 1, tab 2, the witness statement sworn by Miss Jameson for Skyscanner in support of our application, and the first exhibit to that statement at CJ1 is a report entitled "European Consumer Travel Report Fourth Edition", by a body called PhoCusWright. That report was published, you will see on the second page, p.32 of the bundle, in September 2013, so at about the time between the OFT's first consultation on the commitments and its second consultation on the commitments. This sets out a survey of the European trave9l market. Could I ask you to turn to p.40 of the bundle, this comes under the heading, p.38, Research Highlights. The first bullet point on p.40, "Meta muscles in":

> "Travel metasearch engines command a lot of attention in the online shopping process, possibly at the expense of online travel agencies (OTAs), which lost a bit of consumer reach during 2013. Well over a third of online travel shoppers in all markets already use metasearch sites to compare flights, hotels and other travel products."

I would emphasise there that over a third of online shoppers use metasearch sites, so it is obviously an important element of the market for online hotel booking. We will look at the specific figures for hotel booking in a moment.

The second bullet point under the heading "Fewer shopping on supplier.com", just towards the end of that paragraph:

> "Price-sensitive travelers looking for the best deals on flights and hotels often appreciate the breadth of content available on OTAs and travel search engines, compared to the relatively limited content found on hotel and airline websites."

Of course, the whole point about metasearch particularly is that they provide a comparison of all the offers available across the whole market.

If you could then turn to p.67 of the bundle, the third paragraph on that page:

> "While brand name OTAs like Booking.com, Hotels.com, and Odigeohave been at the heart of Europe's dynamic online travel market, online travel agencies have lost a bit of consumer reach over the past year. The drop was consistent across markets but strongest in Germany, where the number of online travel shoppers who visited an OTA fell [and you see the figures]. Much like in the US, European OTAs are encountering stiff competition from the rising stars in metasearch",

and then there is reference to Easyvoyage and Trivago. And the point here made in the summary:

> "Well over a third of travelers in all markets already use metasearch sites to compare flights, hotels and other travel products and a strong growth in metasearch use is expected to continue".

And then the example is given of Kayak.com and then at the end of that paragraph:

> "European travel shoppers gladly welcome any website that can serve up more of this content in one place".

And that is the point, it is in one place. Then, towards the end of the next paragraph:

> "Price-sensitive travelers looking for the best deals on flights and hotels tend to appreciate the breadth of content available on OTAs and travel search engines, compared to the relatively limited content found on hotel and airline websites".

And then finally on p.75, figure 43 gives the specific figures for typical purchase methods for lodging. So, that is for hotels, and there it is broken down for France, Germany and the UK. And if you look at the third set of results "Using a travel search engine", this is along the bottom line of the graph, using a travel search engine you see the figures for France, Germany and UK for 2011, 2012 and 2013. And in the UK about 20 per cent of consumers use a travel search engine specifically for hotel bookings.

So, we say that the benefits of metasearch sites or price comparison sites are obvious. They enable consumers to compare prices in one place which increases price transparency and reduces search costs, and there are self-evident benefits to competition arising from this model.

So that is just the brief – to set the scene, as it were – for the decision making process then carried out by the OFT.

THE CHAIRMAN: Miss Smith, would it be reasonable for us to use the term "price comparison website" and "metasearch" interchangeably?

MISS SMITH: Yes, sir. My understanding is they are essentially the same.

THE CHAIRMAN: Right.

MISS SMITH: So, sir, the Decision that is at issue here is of course the Decision by the OFT to accept commitments, which is a Decision they made under s.31A of the Competition Act. I will take you to the specific section in due course but, just by way of introduction, that applies in a case, as we know, where the OFT has begun an investigation under s.25 of the Act but has not yet made a decision. The OFT will have identified competition concerns and it is allowed under s.31A to accept commitments which address those concerns. The wording of the section is "address those concerns", but the OFT accepts that what that

means is the commitments have to fully address those concerns. The OFT accepts that that is the test that has to be fulfilled in para.13 of their defence. They say there:

> "The CMA does not contend that it is entitled to accept commitments that only partially address its competition concerns".

So there is agreement between the parties on that point.

Now, the process of accepting commitments under s.31A and the European law equivalent contained in Article 9 of Regulation 1, 2003, is said to be justified by considerations of procedural economy, and what does that mean? The CMA recognises, and this is para.53 of its skeleton:

> "… that this does not entitle the OFT to adopt a Decision accepting commitments that are restrictions of competition".

Well, one would obviously hope not, but also the CMA says that:

> "… it is permissible for it [for the OFT] to accept commitments that address its competition concerns without it having to carry out a detailed analysis of every other competition issue that might potentially arise from the conduct under investigation".

Quite apart from whether that is the same as "fully addressing" the competition concerns, we say that submission is not really to the point. Our case is – our issue is – with the fact that we say the commitments that were accepted by the OFT in the present case themselves had a consequence of introducing a potential restriction on competition, which is quite a different matter.

THE CHAIRMAN: So, you are saying that it is permissible to start an investigation covering a number of issues and then focus on one and accept commitments in relation to that. That will be all right. What you are saying is that the commitments themselves cannot raise competition issues that -----

MISS SMITH: We are saying our case in this instance, we do not need to go that far, Skyscanner's case is that the commitments that were accepted by the OFT – and I will go on to develop this point – but they first of all left in place what were known as "residual restrictions" on price competition; but they also, and this is Skyscanner's particular objection, introduced a new restriction on the advertising of prices. And our objection, Skoosh comes at this from a slightly different angle because they are a classic online travel agent, although a small market participant, we are a metasearch site, our concern is with transparency and the ability to advertise the actual prices available with discounts. But there are, and I will take you through this, the OFT identified in its statement of objections which, sir, you have now, ordered should be disclosed, a number of competition concerns. They then accepted commitments which left in place residual restrictions on discounting.

You can only discount into a closed group. You can only offer discounts after a first full price sale has been made, and you can only offer discounts to the extent of – an online travel agent can only offer discounts to the extent of their commission, they cannot offer any deeper discounting. So, those are what are described by the OFT as "residual restrictions" in its Decision.

The commitments, however, also introduced what we say was an additional restriction on advertising. So, I will come back to develop those points, but at the moment, looking at what is the role of commitments in the competition landscape, obviously if a Regulator such as the OFT or the Commission accepts commitments, that Regulator and the parties being investigated do not have to go through the detailed decision making process and detailed determination of remedies. The *quid pro quo* for that, we submit is that higher demands are made as to the appropriateness of the commitments to address the competition concerns identified. And in this regard I would ask you to look briefly at the Advocate General's opinion and then the judgment in the case of *Alrosa*, and that is in authorities bundle 2, tab.44. This was the appeal from a Decision by the European Commission to accept commitments by De Beers after an investigation under Article 82 in De Beers' sale and purchase of rough diamonds. I just want to take you to the Advocate General's opinion on p.144 of the Advocate General's opinion of the bundle. Just for a little bit of background, *Alrosa* was objecting to the commitments on the basis that the commitments that had been accepted effectively stopped it, *Alrosa*, entering into agreements with De Beers, and *Alrosa* said that there were less onerous commitments that could have been accepted by the Commission which could have had the same impact on competition, or would have had the same beneficial effect, and the Commission should have considered those less onerous alternatives, therefore it's decision to accept the particular commitments in this case was disproportionate.

The AG made some useful, and we say interesting, comments on the role of commitments in the competition landscape and at para 51 of her opinion she talks about Article 9 of Regulation 1/2003, which is the European equivalent of s.31A. She says:

> "Article 9 of Regulation 1/2003 is characterised by a concern for procedural economy."

She then explains that it cuts down effectively the extent of the investigation. She compares that with a decision under Article 7, which is a full decision (an infringement decision) leading to the imposition of remedies.

In para. 52 she says the distinctive features of Article 9 of Regulation 1/2003 affect the examination of proportionality of decisions on commitments adopted under that provision in two ways.

Then we would underline what she says in para. 53:

> "First, higher demands are to be made in the context of Article 9 of Regulation 1/2003 as regards the *appropriateness* of the commitments which have been made binding. If such commitments are not *manifestly appropriate* for eliminating the competition problems identified by the Commission,the Commission is entitled to reject them."

Then she goes on to say this is the only way possible to meet the objective of Article 9 to ensure a quick and efficient resolution of the competition problems while avoiding the considerable investigation and assessment.

Then, over the page, in para. 57 she is addressing the question of proportionality.

> "However, in this connection, the Commission is required to take into consideration only alternatives which are *equally appropriate* as the commitments offered to it with a view to resolving the competition problems identified. Both the commitments actually offered and any alternatives to those commitments must therefore be *manifestly* appropriate for resolving the competition problems."

And I would ask you also, I am not going to read them out but for your note, sir, to look in due course at paras. 60 and 61 of the AG's opinion.

For completeness, I can take you to the Judgment in *Alrosa* which appears in a separate tab of the authorities bundle, authorities bundle 3, tab 48. It is true the Judgment does not use the words "manifestly appropriate" but, in our submission, its decision is consistent with the approach of the Advocate General. If you look at para. 41 of the Judgment, which is at p.1675 of the bundle. Paragraph 41:

> "Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No.1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately."

Then, over the page, para. 48:

> "Undertakings which offer commitments on the basis of Article 9 of Regulation 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the

infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine."

So we say that is consistent with the AG's approach, but the *quid pro quo* for avoiding a full investigation is that, as the AG put it, the commitments must be manifestly appropriate for addressing the competition concerns identified.

THE CHAIRMAN: But you are not making any argument on proportionality?

MISS SMITH: Not in this case, no. It is just that, in assessing that question of proportionality the AG made what we say are useful comments about the approach that should be taken to the acceptance of commitments.

THE CHAIRMAN: But you have already said that the CMA accepts that the commitments must fully address the concerns.

MISS SMITH: Yes.

THE CHAIRMAN: Is there any difference between manifest appropriateness and full addressing?

MISS SMITH: I think there is. First, and this again I will come back to, is the difference that I've highlighted between sufficient and appropriate. You have to accept commitments that fully address the competition concerns but that are also appropriate to address those competition concerns. Now, we say, there may be a case and this case probably is not it, because of the residual restrictions that are left in place, but there may be a case where commitments fully address the competition concerns that I have identified, but are not appropriate because they introduce further and different impacts on competition.

THE CHAIRMAN: But there is nothing of that in *Alrosa*?

MISS SMITH: That particular factual situation is not ----

THE CHAIRMAN: *Alrosa* is a case where the commitments arguably went too far, and the Advocate General is discussing proportionality in that context.

MISS SMITH: Yes, but she is also making the point that the *quid pro quo* for the parties and the regulator of being able to avoid an infringement decision and the process that leads to an infringement decision is that commitments must be manifestly appropriate and the court accepts that that means they may go further than what might be imposed as a result of an infringement decision.

THE CHAIRMAN: I think that is what I am saying. When the Advocate General says that proportionality is affected in the commitments context in two ways, the first is that the commitments must be manifestly appropriate, is not what she is meaning there that compared to the remedies part of a final decision, which may be more finely tuned, the commitments might be a bit broad brush and a bit crude and go further than is justified?

MISS SMITH: Well, she certainly was not considering the factual situation that we are considering here, and I do not think there are any cases that I have been able to find that consider the factual consideration we are considering here, which is that ----

THE CHAIRMAN: I think you are right, I think we have not found any either.

MISS SMITH: Commitments that not only, we say – and we leave to one side that they leave in place residual restrictions – but they go further in that they introduce a new and different restriction and we are saying that what one gets from the language of the Act and the approach that the courts have taken, of course they have not addressed the particular factual circumstance that we have here, but the language of appropriateness brings with it not just a concept of sufficiency, are they sufficient to address what they have identified as competition concerns, but are they appropriate and, in considering whether commitments are appropriate one has to consider the role that commitments play in the competition regime as a whole. We say that commitments that introduce a new and different restriction on competition plainly cannot be appropriate.

THE CHAIRMAN: Do you think there are any relevant differences between the EU commitments regime and the UK commitments regime?

MISS SMITH: Off the top of my head I am not sure I can answer that one way or the other. Generally, I have not identified, and I do not want to rely on any differences for the purposes of this case.

THE CHAIRMAN: It would affect the weight we attached to Judgments and Advocates General's opinions in cases like *Alrosa* if there were relevant differences.

MISS SMITH: Well, sir, I am certainly not arguing that there are such that you cannot attach weight to that Judgment. I accept that that Judgment does not deal with the factual situation that is on all fours with this case, but I accept that you can get some guidance from what the AG says in that case which, in fact, is echoed by the language of s.31A which talks about being appropriate to address the competition concerns, and I take it no further than that. And, yes, of course, this also, in fact, is a response to the CMA's reliance on procedural economy in their skeleton argument. In their defence they put procedural economy up front as their defence, as saying that this gives them, as I understand it, a margin of appreciation and a margin of discretion and we say: No, procedural economy, as considered by European Courts brings with it this *quid pro quo*, that if you are going to do it quickly you have got to make sure that what you put in place is manifestly appropriate.

THE CHAIRMAN: I am sure the CMA will enlighten us as to what they think we should make of *Alrosa*. Do my colleagues have anything on this point? No. Please go on.

MISS SMITH: If I can then go to the process leading to the Decision, and I hope you and your colleagues have a copy of the Statement of Objections that was disclosed finally to the Tribunal and to Skyscanner last week. I have it in a separate file. It looks like you also have it in a separate file, so let us deal with it on that basis. By way of introduction, this Statement of Objections, which is dated 31st July 2012, of course, we fully accept, contains only provisional findings by the OFT, but what it does do is it sets out the competition concerns found by the OFT in response to which the interveners then offered the commitments. So this sets out the OFT's position and it is this document and these findings in response to which the interveners offered their commitments. I will take you to various particular paragraphs in the SO that we say are relevant, but in summary the points that we take from the Statement of Objections are threefold. First, it is clear that the OFT provisionally held that the prohibitions on discounting between the parties were hardcore restrictions under Article 4A of the Vertical Block Exemption Regulation. The OFT held that they were hardcore restrictions on the basis that "they restricted the OTAs' ability to determine the sale price of hotel rooms".

The arrangements between the parties putting in place those restrictions were therefore presumed to fall within Article 101(1), presumed to infringe competition law and were held to be unlikely to fulfil the conditions of Article 101(3), the exemption, the possibility for an individual exemption. That is the first point we make.

The second point that we make is that the OFT provisionally found that there was "a commercial link" between the agreements that restricted price discounts and Rate Parity Agreements, also known as Most Favoured Nation clauses, which were agreements between the parties that "I will not offer a price lower than that which you offer". Those were also widespread in the market, the OFT found, and the OFT found that those Rate Parity Agreements were monitored and enforced by the parties.

The third point I want to take from the Statement of Objections is that the OFT found that there were real benefits arising from the price transparency and the low cost of searching that was enabled by online sales of hotel rooms. Those were seen as a potential driver for discounting: if there is price transparency and low search costs a consumer is able to look at all options and that drives discounting of price in the market, but the OFT found that those benefits were being explicitly countered by/ responded to, by the parties with the combination of restrictions on discounting agreements and Price Parity Agreements.

Those were the competition concerns identified on a provisional basis by the OFT and the SO.

Having now seen that SO and comparing it, looking at it, against the commitments that were accepted by the OFT, which supposedly addressed the OFT's competition concerns, we say a number of immediate questions arise. First, the OFT indicated in the SO that the restrictions on discounting, as I have said, were a hardcore restriction, but the commitments leave in place restrictions on the OTAs' ability to determine the sale price of hotel rooms - what I have already said the OTA described as "residual restrictions". Those are the fact that discounts can only be made to members of a closed group after an initial full price purchase and for no more than the extent of the OTAs' commission.

I will come back to this point, but the OFT accepts explicitly in the Decision that it reached no conclusion on the efficiencies relied on by the interveners. Those efficiencies are summarised in annexe 2 to the Decision, yield management arguments, etc. The OFT explicitly accepts in the Decision that those efficiencies provided no justification for the residual restrictions, so you may ask yourself, "What did?" and we will look at the Decision in that regard. That is the first question that arises.

The second question, and for the purposes of Skyscanner, perhaps even more importantly, as I have said, the commitments introduced these additional restrictions on the advertising of discounts. That is OTAs are prevented from publicising what is defined as "specific information" about reductions on hotel rooms to consumers who are not closed group members. So they cannot put the actual discounted prices on offer to closed group members on their own websites or on price comparison or metasearch sites. So that is, in effect, a prohibition on advertising the actual discounted price that might be available.

We say that restriction self-evidently reduces price transparency and increases search costs, and therefore we say that it was at least incumbent on the OFT to justify this effect of the commitments, or at least to properly consider it.

As I will, I hope, make good, the OFT did not do that. The OFT provided, we say, absolutely no justification for the introduction of this restriction.

Sir, if I can look at the Statement of Objections itself, can I take you to internal page numbering 6, and this is under the heading "Relevant price agreements constitute hardcore restrictions", para.1.7:

> "In the OFT's view, restrictions on the ability of OTAs to determine the sale price for Room-Only hotel accommodation, for instance …"

so that is just an example -

> "… by restricting OTAs from sharing their commission with the customer, or within the scope of Chapter I prohibition and constitute 'hardcore' restrictions."

Paragraph 1.8 rejects an argument that appears to have been made of Expedia and Booking.com that they were agents. The reasoning on that is much fully redacted from the SO, but this appears to be an argument that was made by Expedia and Booking.com and was rejected by the OFT. They give reasons for that in para.1.9.

Paragraph 1.11 on p.7:

> "Given that the Relevant Price Agreements constitute 'hardcore' restrictions, they are presumed to fall within the Chapter I prohibition and Article 101(1), and it also presumed that they are unlikely to fulfil the conditions of section 9 or Article 101(3)."

However, the OFT then goes on for the purposes of the statement to say that it has not considered the extent to which the exemption criteria might be met, and it is for the parties to put forward any arguments on that. That is, of course, correct, the burden is on the parties to justify an exemption under Article 101(3).

Could you then go to the background to these agreements, para.1.13 on p.8. At 1.12 the OFT explains the complaint that they received, in fact we now know from Skoosh. At 1.13:

> "The OFT understands that to the extent that these vertical agreements have been adopted, sale prices for Room-Only hotel accommodation at any given individual hotel do not vary across third party distribution channels. The industry generally refers to such limited intra-brand price competition as 'rate parity' or 'price parity'."

Then 1.14:

> "The OFT understands that, historically, rate or price parity became increasingly prevalent in response to the growing importance of the internet generally and online distribution models more specifically. The internet brought about price transparency across the market, enabling consumers to identify the best deal, i.e. the lowest price … at very low search costs."

So this is finding that the benefits of the internet are countered by a combination of restrictions on discounting and Price Parity Agreements.

Paragraph 1.15 is also important. This deals with the point that eventually was brought up by the OFT about alternative ways of introducing discounting, for example, through membership arrangements. The OFT there, at 1.15:

> "As a result of vertical agreements between hotels and OTAs, there is limited variation of sale prices for Room-Only hotel accommodation, largely depriving customers of the ability to identify and obtain a better, discounted deal by shopping around. Any discounting of hotel accommodation, for instance by allowing OTAs to

share their commission with the customer, can (and does) take place only through much smaller, niche distribution channels – hidden/opaque, membership or package - which do not allow for room only price comparison".

So the OFT notes that:

"… in that sense, the distribution arrangements resulting in rate or price parity undermine the benefits of transparency and enhanced search functions brought about by the internet and the possibilities offered by e-commerce".

So this is a point that we now see is actually consistent with the submission that Skyscanner subsequently made, that before the commitments were introduced, the use of closed groups or membership arrangements was very small scale and "niche" as described here. It was definitely limited. That is supported by (if you could perhaps keep a finger in that page at p.9 and flick forward to the submission)submissions that are made by Skoosh at para.2.59, p.43, there is a quotation from a submission that Skoosh made, and the third paragraph of that quotation at the page:

"There are some niche opportunities still available such as members' sites and flash sales … However, these opportunities are relatively limited and are created by necessity from an artificially restricted environment" etcetera.

So the evidence, clearly, before the OFT was that these membership groups in so far as they did exist before the commitments were introduced, were very small scale.

THE CHAIRMAN: A membership group is a closed group on your part.

MISS SMITH: That is my understanding.

THE CHAIRMAN: And this is hotels, not any -----

MISS SMITH: This is simply hotels we are talking about here, the OFT's investigation was limited to hotel booking. So, if I can then take you to some of the points that we wish to highlight in the SO about the state of the market at the time – if I could ask you to turn, this is in chapter 2 which is called "Background information or facts" and we will go straight, if we can, to para.2.41 which is on p.36. This says:

"However, both independent and branded hotels acknowledge the increasing significance of the OTA distribution channel and use OTAs to target audiences they would otherwise hardly reach. In this regard, it is notable that certain customers appear to have developed a degree of brand-loyalty to particular OTAs, which, from the OTA's perspective, is vital for the purposes of being recognised as a relevant business partner by hotels, for example".

I draw your attention to that point just to emphasise the brand loyalty towards large online travel agents. And that is borne out by what is said in para.2.44. I am not going to read that

out, but what that essentially says, and it is borne out by the figure that follows, para.2.44 is that there are a couple of very large or possibly three very large players in this market, Expedia, Booking.com and Travelocity, and they have a relatively stable combined share of supply, but "the OFT notes", and this is the end of para.2.44, "… in contrast a number of smaller OTAs have exited the market in recent years".

So the market is characterised by a small number of large OTAs with brand loyalty, and a number of small OTAs who have been seen to exit the market.

Paragraph 2.42 considers online advertising, and there is an interesting contrast here between the quotation from Expedia which talks about the importance of – and you will see about halfway through that quotation – search engines and metasearch engines as well as the use of internet search engines such as Google, which is not a specific travel search engine but simply you put in a hotel name or something like that through Google and you will get results.

THE CHAIRMAN: This is a quote from a Form 10K submission. Just remind us of what a Form 10K is.

MISS SMITH: Good question! I may have to come back to you on that one, I am afraid. I think it may be an internal annual report.

THE CHAIRMAN: Yes.

MISS SMITH: Something like that.

MR LINDSAY: The US SEC filing that is akin to an annual report but has more details.

MISS SMITH: Thank you.

THE CHAIRMAN: I thought that was right, and so that is emphasising dangers and threats to your business.

MISS SMITH: Yes.

THE CHAIRMAN: So that you are not misleading the market.

MISS SMITH: Yes. So Expedia certainly see not only the Google type of advertising but the specific search engines and metasearch engines as an important player in the market. But what I said the interesting contrast is is that the OFT in its commentary at para.2.42 only picks up search engines like Google. And this is a consistent strangeness in the OFT's approach to this issue, because if you look, for example, at the diagram in para.2.82 which is on p.51, the diagram is on p.52, the OFT has constructed a diagram which shows how when a customer goes about booking a hotel in Intercontinental Hotel London. There are only two routes identified there for the customer to reach an online travel agent site, either by typing in the actual address of the online travel agent, "www.expedia.co.uk" or by searching for "luxury hotels London" on Google, because Google have an agreement with

Expedia, the AdWord agreement, it clicks through to the website. What the OFT does not recognise there, despite the fact that we have seen this is a substantial proportion of the market, is the role that price comparison metasearch sites play.

So if we then go on to the OFT's theory of harm which is on p.67 of the SO, and the OFT makes the point there in para.2.116, "There is a restriction on the buyer's ability to determine its sale price", a broad definition of what the restriction is, and then the example given, for instance by restricting the buyer from sharing its commission, "This is an object infringement and a hardcore restriction", and again makes the point it is not necessary for the OFT to demonstrate anti-competitive effects. And then you will see that there are three aspects to that theory of harm. The first heading, just above para.2.118, "Restrictions on discounting limit price competition and increase barriers to entry", and the explanation is given in those subsequent paragraphs.

And if I can – for your note, I am not going to read them out – ask you to look in due course at para.2.119 which is about the importance of price transparency and low search costs, paras.2.120 and 2.122. Then the second aspect of the theory of harm is the heading below para.2.123:

> "Rate Parity obligations are capable of reinforcing and exacerbating any prevention, restriction or distortion of competition arising from discounting restrictions",

and that is considered in the following paragraphs 2.126, "Rate Parity obligations reduce the incentive to negotiate lower rates"; 2.127, Less incentive for OTAs to lower their margins or commission; 2.128, "However, the OFT has not investigated the extent to which Rate Parity obligations are capable of reinforcing…". Then the third aspect of the theory of harm is the heading under para.2.128:

> "To the extent that similar discounting restrictions and Rate Parity obligations are replicated in the market, then any prevention, restriction or distortion of competition is further reinforced and exacerbated",

and the point is essentially made in para.2.131:

> "A market in which both discounting restrictions and Rate Parity obligations are prevalent is likely to be characterised by significant limits to price competition and barriers to entry"

Then 2.132:

> "The OFT has also seen evidence of Rate Parity obligations being imposed on a number of hotel chains. This evidence indicates that such obligations may be replicated in the market alongside discounting restrictions, although this is not an issue the OFT has investigated, and the OFT makes no findings in this respect."

THE CHAIRMAN: This is just saying that this is a case against these two groups but other people may be at it.

MISS SMITH: Sir, yes. The legal framework is in s.3, I am not going to take you through that.

MR WILKS: Can I just raise one other question before you leave the theory of harm?

MISS SMITH: Yes.

MR WILKS: The introduction to the theory of harm 2.116, as you say talks about hardcore restrictions and infringement by object, and it goes on to say the OFT does not need to demonstrate that the agreements did, in fact, have an anti-competitive effect. Are you comfortable with that objects approach?

MISS SMITH: That is the approach the OFT took to the restrictions. We do not challenge that approach, no. If you go to chapter 4, which starts on p.113. This is the analysis of the relevant price agreements, it is quite extensively redacted, but if you look at what is actually p.192 you can see about 70 or 80 pages appear to have been redacted. Page 191, the heading is "The Expedia Price Agreement", and the OFT heading is: "does not benefit from the Exemption in the Vertical Block Exemption Regulation". Paragraphs 4.157 to 4.161, which is on p. 193, sets out the finding of the Expedia Price Agreement, essentially the points we have already made; it is a hardcore restriction within the meaning of Article 4A of Vertical Block Exemption Regulation andcannot benefit from the exemption. It is a hardcore restriction because – this is para. 4.159 – it involves a restriction on the ability of the agent to determine the sales price, and therefore, 4.161 it's presumed to restrict competition or fall within Article 101(1), also presumed unlikely to fulfil the conditions of Article 101(3).

There's the conclusion set out in para. 4.166 and the same conclusions you'll see in the following pages for the Booking.com agreement.

The proposed decisions are on p.262. As regards the Expedia Price Agreement, para. 6.4: "Strong and compelling evidence to find that Expedia IH London IHG infringed the Chapter 1 prohibition. The proposed decision relates to the Expedia Price Agreement, which restricted Expedia's ability to determine its sale price, for instance by restricting its share in the commission, and the OFT proposes to find that the alleged infringement lasted from 17th October 2007 to 21st September 2010. So that arrangement has finished. The Booking.com agreement, is in the same Decision in para. 6.5, but you will see over the page, on p.263, that the Booking.com price agreement is ongoing. So therefore, in para. 6.9 the OFT proposes that Booking.com and other parties to that agreement should be ordered to take action to bring the alleged infringement to an end, and proposes to direct the parties to bring the alleged infringement to an end, such that Booking.com's ability to determine its sale

price is no longer restricted. So the proposed direction is effectively to remove the restrictions completely.

THE CHAIRMAN: No residual restrictions?

MISS SMITH: No. That is the position as of 31st July 2012 as set out in the SO, but despite what we say are those strong provisional determinations the OFT, as you are aware, does not proceed to make an infringement decision or impose a remedy requiring the parties to put the infringements to an end. Instead, it is persuaded to accept the commitments proposed by the parties, reaching the view, apparently, that those commitments fully address its competition concerns.

THE CHAIRMAN: Miss Smith, do you attach any significance to the apparent intention to impose a fine?

MISS SMITH: Well, there is a provisional finding there that this was intentional or negligent behaviour and therefore a fine should be imposed.

THE CHAIRMAN: Going back to our discussion about relevant differences between this and the EU regime, am I correct that, under EU practice, if a fine was being imposed commitments would not normally be considered to be appropriate – or, am I wrong?

MISS SMITH: I will have to double check, sir, but I believe that is the position.

THE CHAIRMAN: Perhaps somebody will confirm that for us in due course.

MISS SMITH: The OFT guidance, certainly does not say that.

THE CHAIRMAN: No, I am aware of that.

MISS SMITH: The OFT guidance identifies other situations where commitments are unlikely to be appropriate.

THE CHAIRMAN: I think the EU Best Practice Notice might be relevant.

MISS SMITH: I think that is the case, sir, but I will double check.

THE CHAIRMAN: Well, I am asking whether you attach any significance to it and you are saying you do not.

MISS SMITH: Sir, it may be significant but it is another point to put into the mix.

THE CHAIRMAN: All right.

MR WILKS: You have highlighted the fact that the Expedia agreement had ended in September 2010 when the Booking.com had continued. Are you drawing some conclusions from that? Is that significant in some way?

MISS SMITH: I do not know why that was the case. I do not know why and I cannot speculate. All I am saying is that for the agreement that was ongoing the OFT proposed to make a general order that they should stop the infringing behaviour without any continuing restrictions, completely stop the behaviour, and I will – at a later stage in my submissions –

come back to that point when we look at the commitments that have been accepted generally in the European Union. Generally, where there are agreements involved the commitments that have been entered into by the parties have involved complete removal of the infringing behaviour.

THE CHAIRMAN: It is the reverse of the *Alrosa* case, just to note.

MISS SMITH: Sir, that is where we are in July 2012, as I have said, but the OFT does not proceed to this infringement Decision that it has proposed, it is persuaded to accept commitments.

THE CHAIRMAN: Have we finished with the Statement of Objections?

MISS SMITH: We have, sir, you can put that away. So, how does the OFT get to that decision? If I could ask you to open core bundle 2 and look at the OFT's evidence in this regard from Mr Rasmussen at tab 13. Tab 13 is the first witness statement of Mr Rasmussen, put in with the CMA's defence. He tells you who he is, and what his role was. He was project director of this investigation.

He sets out the factual background at p.582 of the bundle. Paragraph 11 – the Statement of Objections is issued on 31st July 2012, that is just what we have been looking at, and on 9th August 2013, just over a year later, he says at para. 12, the OFT announced a public consultation on commitments that had been offered by each of the parties in order to address the OFT's competition concerns.

Then, at para. 13, a second public consultation on 2nd December 2013. So we have the SO, we have a year of behind the scenes discussions, we have the first public consultation on the commitments on 9th August 2013; the second public consultation on 20th December 2013.

The first public consultation is addressed in paras. 19 and onwards of Mr Rasmussen's statement at p.585 – I am not going to read it out but he gives you details of the publication of the first notice. Then in para.23 he says:

> "… the OFT proactively contacted various interested parties …"

The last sentence of that paragraph:

> "The OFT also tried to contact Skyscanner by completing an enquiry form on its website, in response to which it received an automated reply."

I do not think any real emphasis is given to this point any more by the CMA, but I will be corrected if I am wrong, but it has been addressed - sir, for your note, if I may - in paras.4.3 and 4.4 of Miss Jameson's second witness statement, which is at core bundle 2, tab 22. The point is that it would appear that the OFT clicked on a link "Contact our commercial team", but did not go back the next step, which you might have thought was reasonable, to look at the details of the legal team which were on the website, including the contact details of,

among others, Miss Jameson, and the legal team on Skyscanner's website. Then when the OFT received a standard form automated reply from the button they pressed saying, "Contact our commercial team", they took it no further.

We do not make a big play of this. It is just that in the OFT's defence and skeleton they make the point, "We tried to contact you in the first consultation, you did not take part in the first consultation", and we have a response to that evidence.

THE CHAIRMAN: I have no idea what we are to make of this. It is ironic, Skyscanner is an online organisation, you contact it online, the online contact does not work for the purposes of contact. It is slightly curious.

MISS SMITH: We would say you chose to press the button. You pressed a button to the commercial team when you could have contacted the legal team. In so far as in the OFT seeks to put any weight on this point, we have responded to it in those paragraphs, and I would ask you to have a look at those paragraphs if the OFT proceeds with this point.

THE CHAIRMAN: In hindsight, it is a pity.

MISS SMITH: Sir, I am not sure that it is. The point is that Skyscanner did take part in this consultation process. We say the representations it made were not properly considered by the OFT.

There is also the point that at this stage Skyscanner's business in hotel online booking was relatively under-developed. Skyscanner bought a Spanish hotel online booking company in September 2013.

THE CHAIRMAN: So they might have replied, "This is of no concern to us".

MISS SMITH: I am not going to speculate, sir, but it is simply to respond to that point made in Mr Rasmussen's statement. I would ask that you do not take it at face value, have a look at Miss Jameson's statement at 4.3 and 4.4.

At para.25 of Mr Rasmussen's he says that the OFT commissioned a market research agency Opinion Leader to carry out qualitative research on consumer's views about the initial commitments. I would like, if I may, to take you to that, which is exhibited to Mr Rasmussen's statement at exhibit KTGR9. You have there "Online hotel bookings Qualitative research report", dated 12th September 2013. So this was being done in line with the first consultation, and it is some consumer work on market research on the proposed commitments. In the Executive Summary on p.760, the second bullet point:

> "The main objective of the research was to understand consumers' views around the concept of joining an OTA's closed group in order to receive discounts on hotel room bookings."

Then bullet point 3 explains what the research consisted of, four 90 minute focus groups with consumers. Then bullet point 5:

"The majority …"

it does not say how many, or what proportion -

"… of consumers were open to the proposed changes and saw themselves as likely to join a closed discounting group. They felt that there were no significant downsides to joining and that it made sense to make the most of potential cost savings."

The next bullet point:

"Most …"

again, we do not know how many or what proportion of those who took part in the four 90 minute focus groups that covers -

"… were also open to joining multiple groups. Although they expected to try to stay loyal to one group initially, they did not want to find themselves tied to one OTA and wanted to be able to continue to shop around. Those who were booking hotels more frequently were more likely to expect to join multiple groups …"

The next bullet point:

"There was some concern that there would be restrictions placed on discount offers, such as time limits or minimum bookings - consumers sought reassurance that any such caveats would be minimal …"

Then on p.763 we get a bit more detail of what this consumer research consisted of. Under the heading "Methodology":

"A total of four 90 minute focus groups were conducted in London on Tuesday 20 and Thursday 22 August 2013. 30 consumers took part overall."

So that is 30 people split between four groups. I do not need to make the point, that is pretty minimal.

Then we see at the bottom of that page:

"… consumers were taken through a slideshow (prepared by the OFT) that outlined the current situation and proposed changes. Participants could then conduct informed discussions …"

So there were slides prepared by the OFT.

Just before we leave this document, could I take you to p.768. This is under the heading at the top of the page, "Using multiple OTAs", and this is effectively the possibility of what has become known as "multi-homing", joining more than one proposed group:

"One issue mentioned spontaneously by consumers was what would happen if they made full price booking with one OTA but when they went to book a second hotel, the hotel they wanted to stay at was not available, so they would have to book via a different OTA and join a second discounting group. Some …"

again we do not know how many -

"… felt that this would be problematic and would rather only join one group, whereas others …"

again we do not know how many -

"… were quite sanguine about this happening."

We have quotations from both sides, so views were mixed. Then in the following paragraphs after the quotations:

"Many …"

again we do not how many -

"… thought it likely that they would join a number of closed discounting groups …"

Then after the quotation:

"Others felt that the proposed changes would make them more loyal to one OTA in particular, and that they would make an effort to always try to book hotels from the same site, or at least always start their hotel searches with that one site."

So really the evidence is, we say, completely mixed. Some will join many groups, some will not, and we do not know how many on each side. In any event, there are only 30 of them who have been asked.

Page 769: there is an interesting paragraph after the quotations at the top of the page:

"Having heard earlier in the focus group that there may be no difference in the prices offered by different OTAs for the same type of room in a hotel, there was a feeling amongst some that there should be no need to join more than one discounting group, as all the OTAs would be offering the same deals."

It is not entirely clear, this may be a reference to ate parity, it may be a slight confusion on the part of the consumers as to whether or not there would be discounting after commitments.

Then finally on p.772, the top of that page:

"Having to join a club in order to see discounts

> Most consumers were not concerned by the fact that they would have to join the closed discounting group in order to see the discounts, although some felt that the hassle factor would put them off."

Importantly in this regard, the attention of these consumers in the focus groups was not drawn to the impact on price comparison metasearch sites. When we were given Mr Rasmussen's statement Skyscanner asked to see the slides that the OFT had prepared for these focus groups, and they were disclosed by the OFT and they are exhibited to Miss Jameson's second statement, and I would like to take you to those. Miss Jameson's second statement is at tab 22 of the same bundle. Reference is made to this request and the OFT's response in paras.2 and 3 of her witness statement, p.836, and the slides are at exhibit CJ22. I am not going to take you through those slides in detail, but if we flick through them, p.848, how do you book, 849, hotels, online travel agents, examples given at 850 and 851, an example of a direct sale from the hotel's own site 852. Explanation of pricing, p.853. Two sales routes, p.854, booked on online travel agent, booked on Randomhotel.com, pricing strategy at 855. Then 856, airlines, the pricing method is similar. 857, hotel sets price. What is the result? Then after a five minute break on p.859 we go back to the sales routes. Then we get to the question at 860, how could online travel agents offer discounts? It is an explanation about basically sacrificing part of the commission. Then p.861, why can't they adopt this approach now? Effectively, because they are restricted by price parity clauses, top slide on 861.

A solution is offered at the bottom slide, p.862. It is a solution that effectively appears to respect the existence of the Price Parity Agreements.

Then on p.862, why shouldn't everyone see the discount? The answer given by the OFT appears to be, it is all about yield management. So the OFT was telling these consumers that hotels need to engage in yield management, even though we know subsequently in the Decision the OFT explicitly said it did not reach a view on whether this was an efficiency that justified the restrictions contained in the commitments. They are basically saying this is why everyone should not see the discount.

Page 863, the proposed scheme. This outlines the closed group scheme, you can join multiple closed groups, you can then see the discounts, you can benefit from the discounts after you have made your first purchase. Then it explains on p.864 and 865 how that works in practice, and comparison is drawn to a customer loyalty scheme which we strongly dispute. Putting that to one side, that is p.865. Then in practice, 866, and a recap at 867.

There is absolutely no reference in these slides to the role played by price comparison sites or metasearch sites, even though this research was carried out, or these slides were

presented to the consumer groups in August or September of 2013, which is exactly the time when the PhoCusWright report was published showing that about 20 percent of all hotel sales in the UK online were made via price comparison sites. There was no metasearch at all. The only mention of any searching that may be made apart from a via a hotel own website or an OTA website is back on p.861, slide 23, the second slide on p.861, there is a little reference at the second bullet point:

> "This would mean that consumers could receive a discount after having satisfied certain qualifying criteria so that the actual discount would not be publicly displayed to everyone, for example upon searching on Google".

So, as I said, this strange blindness, again, on the part of the OFT.

THE CHAIRMAN: Talking of five minute breaks, are you coming to the end of this point?

MISS SMITH: Sir, yes. Now would -----

THE CHAIRMAN: Before you do, can I just ask, it may be somebody else can tell us – in this focus group choice, the 30 consumers, is there any indication of how often these consumers make bookings?

MISS SMITH: There is some indication, sir, in the report at, I can give you that straightaway, p.763 of the bundle, in the report itself at KTGR9, it is badly photocopied but it says that, in a photocopy it tells you each group, group 1 predominantly used OTAs for booking short stays, min 4 frequent users; group 2 predominantly used OTAs for booking short stays, min 4 occasional users; group 3 predominantly used OTAs for booking long stays, min 4 frequent users; group 4 predominantly used OTAs for booking long stays, min 4 occasional users. And then, under the table:

> "In addition, each group included:
>
> * a minimum of [men/women]
> * 3 who had booked for stays planned well in advance and 3 who had sought rooms at the last minute
> * 3 who were members of numerous loyalty schemes
> * 1 business [user]

THE CHAIRMAN: So, "occasional" or "frequent", whatever that means.

MISS SMITH: There is a further explanation, actually, in the witness statement of Mr Rasmussen, in the second witness statement of Mr Rasmussen, which is at tab.24, para.23. Sorry, my 24 has the skeleton and the second witness statement. So, it is the second witness statement of Mr Rasmussen, para.23, that is a Mintel report that the OFT considered.

THE CHAIRMAN: Different report.

MISS SMITH: Okay – which makes the point that 53 per cent book more than once, 47 per cent only book once, a year, in the context of two year commitments I am reminded. So, sir -----

THE CHAIRMAN: Thank you, okay. We will rise.

(Short break)

MISS SMITH: Thank you, sir, we were in Mr Rasmussen's first witness statement, tab.13 of core bundle 2, para.26. And here he is still talking about the first consultation and says they received a total of 36 responses and no response from Skyscanner, and he goes on to explain how he considered those other responses.

Paragraph 30, none of the responses to the first consultation was a price comparison site. Two respondents, however, did raise a general point about how the initial commitments might affect the operation of metasearch engines. We asked for disclosure of those two representations and they were given and are exhibited to Miss Jameson's second witness statement, if I could ask you just to leave a pen or finger in Mr Rasmussen's statement and go to CJ22, it is on the second page of that exhibit, p.846. Those are the extracts from the two representations, p.846, that draw the OFT's attention to metasearch price comparison sites. I am not going to read them out, but they essentially make the point "If you don't allow metasearch engines to display discounted comparison prices there is by definition no open price competition, it is a retrograde step, representation one. Representation two, how are price comparison sites going to fit in, effectively how will price comparison sites fit in. The rules emasculate the potency of price comparison sites which is not good for competition.

So, those were the submissions that were in front of the OFT in the first consultation.

Back to para.30 of Mr Rasmussen's first witness statement p.588. He says, and this is a refrain we will hear again and again in this case:

> "The OFT considered [the] issue but decided … the concern was unfounded. There was no evidence before the OFT … indicating that consumers would or might stop using price comparison sites".

Two points in support of this, first:

> "… the consumer survey … evidence showed that the Initial Commitments would not discourage consumers from shopping around"

Well, we have seen the consumer survey evidence, but all that says, well, first of all, there is no mention of price comparison sites at all in the slides presented to the consumer groups, that issue was not drawn to their attention. And the only evidence from that group as regards multi-homing generally was that many thought they would; others thought they would not.

The second matter relied upon by Mr Rasmussen:

> "… the OFT's investigation had identified a number of Closed Groups already in existence and these did not appear to have adversely affected metasearch sites".

An interesting point to make given that the only evidence that I have certainly seen on that point is what is contained in the SO which makes it absolutely clear that closed groups already in existence were small scale and niche and certainly did not consider their impact on metasearch sites.

Now, those two representations were made in the first consultation. I will come back to this point when we are considering the Decision, but we make the submission that although at para.20 of annexe 3 to the Decision, the OFT records in passing these representations. In its response to the first consultation it does not address them at all, and I will come back to that when we look at the Decision document.

So, back to Mr Rasmussen's evidence, para. 33 and onwards he addresses the second consultation, and he says in para. 33, last sentence: "The OFT specifically invited Skyscanner to participate in a second consultation". Again, that does not actually give the full version. I will not take you to it for time purposes at the moment, but Miss Jameson's first witness statement, paras. 14 to 16 sets out what actually happened. Skyscanner got in touch with the OFT on 19th November asking what was going on and it was not until 20th December, that the OFT got back in touch with Skyscanner about the second consultation. But, in any event, Skyscanner did make representations in the second consultation and I will take you, if I may, to core bundle 1, and Miss Jameson's first witness statement at tab 2. As I have said in para. 16 of that statement, p.22 onwards, Miss Jameson explains how Skyscanner became aware of the consultation on the proposed commitments and the contact there was between Skyscanner and the OFT.

Then in para. 16 she said: "Skyscanner made representations to the OFT on 17th January 2014, which was the date the OFT specified as being the final date for comment". She attaches a copy of Skyscanner's submissions but, in the interests of time, I am not going to take you to that, but for your note this is at CJ8. There were a number of concerns raised, those that are of particular relevance to this appeal are quoted in the following paragraphs of Miss Jameson's statement: paras. 17 to 19. Again, I will let you read those in your own time, sir, but they are summarised in para. 19. We make the point that what was raised by Skyscanner was effectively the impact on the price transparency and consumers' ability to compare prices via metasearch sites, the impact that the commitments would have on that.

In para. 20 of her witness statement Miss Jameson refers to the meeting with the OFT of 20th January. You will have seen from the various witness evidence that has been put in on

this meeting, that there's some dispute about exactly what was said, and what was meant at that meeting. Miss Jameson's account was at para. 20 to 23 and, also for your note, in her second witness statement, core bundle 2, tab 22, paras. 7 to 8. I would invite you, sir, to look at that in due course in some detail. I think the points I want to make can be taken from the OFT's meeting note. This is a meeting note taken by the OFT and for that I am afraid we will have to go back to core bundle 2, tab 13 exhibit KTGR11. We are looking here at the OFT's own note, and I can make the points I want to make from that. The first paragraph: GR – Gaucho Rasmussen – "thanked Skyscanner for their time. He suggested discussing where we are and Skyscanner's concerns. He noted that Skyscanner's concerns expressed in relation to the first consultation were arguments rather than data." Then he goes on to say:

> "GR noted that the OFT will be rigorously monitoring in case there are any unintended consequences."

So he is talking about the future after the commitments decision is made. Then, on p.778, the third to last paragraph on that page, there is some discussion about closed groups:

> "In response to CJ's question concerning closed groups, GR asked whether there are contractual obligations between Skyscanner and hotels. CJ [Carolyn Jameson] said that the answer was sometimes yes and sometimes no. CJ noted that its activity in relation to hotels was new (since September) and the sales team is trying to sign hotels up. Where agreements have been reached, the guest would pay after their stay. GR suggested that in these circumstances Skyscanner might be acting as an OTA. GR queried whether hotels on Skyscanner had any rates behind some sort of wall."

I understand this to be reference to some sort of membership group.

> "CJ said that she had not seen evidence of this, but that this was a new area for Skyscanner.
>
> GR noted that Skyscanner might find that some rates are not picked up."

Then he says in the middle of the following paragraph: "We would be actively monitoring the sector and other things." Last sentence: "If this is causing difficulties we would like to hear about this. How this impacts on Skyscanner accompanied by data which we can assess." That is clearly talking about the situation once the commitments are in force. The last paragraph on that page: "We had made it clear that people could come to us", that is we had made it clear in the commitments Decision people could come to us. "Data is at the heart of it."

Top of the next page, 779, they talk about limits on transparency. GR said that "in our assessment the commitments would introduce competition where that is currently restricted". Then there were discussions about the consumer research. CJ said that she was not sure that consumers would multi-home. Miss Jameson has given evidence explaining that what she meant by this is that she really did not think they would. "GR said that we had not seen evidence that consumers would not multi-home."

THE CHAIRMAN: And the next sentence?

MISS SMITH: "CJ [Carolyn Jameson] noted that people used flights and car hire more than once a year." and we have seen the figures on that.

THE CHAIRMAN: So frequency of booking.

MISS SMITH: Contrast between hotel booking on the one hand, which is less frequent, and car and flights, which Miss Jameson is saying is more frequent.

THE CHAIRMAN: So the more frequently you book the more significant is single or multi-homing.

MISS SMITH: Or the more likely is multi-homing.

THE CHAIRMAN: More likely.

MISS SMITH: Yes.

THE CHAIRMAN: Because you have more opportunities.

MISS SMITH: Then the last but one paragraph on that page: "GR noted that the consultation had closed on Friday. The OFT would make an announcement in due course", and in fact it made an announcement on 31st January. This was a meeting on 20th, 31st January the Decision was issued, so the Decision was imminent.

Then we have, half way down that paragraph:

> "GR invited Skyscanner to stay in touch and let the OFT know if the proposed commitments are not conducive to consumer welfare."

So, again, see how it all pans out, let us know how it pans out. Then the last paragraph:

> "GR concluded by inviting Skyscanner to let us know of any concerns and suggested a follow up meeting be held with Skyscanner in one year's time."

So it is clear, in our submission, that the focus of that meeting was that the Decision was imminent and that Skyscanner should stay in touch and let the OFT know of any concerns arising after the Decision, in particular there is a meeting in one year's time.

Of course, we accept that Mr Rasmussen said, and it is recorded at the start of the note, that Skyscanner had only provided arguments and not supporting evidence and evidence. He then went on to say, in future, if you get any data let us know.

What we do not agree with is what the CMA says, that they specifically invited Skyscanner to provide evidence of its concerns before the Decision was reached. That is where the difference is between the parties. Skyscanner's understanding is clearly set out in its witness evidence, that the Decision was imminent, as it was, and that Skyscanner could submit any evidence which it had subsequently, and the OFT could reopen the Decision.

It is important to note, sir, and this submission is made in response to suggestions in the OFT's skeleton and pleadings and the interveners' skeletons and pleadings, implying, although maybe not being explicit, that it was sufficient for the OFT to have maintained contact with Skyscanner after the Decision, and that you should somehow give some weight, or give substantial weight, to the fact that the OFT was prepared to consider submissions made to it by Skyscanner after the Decision was made. In that regard, sir, it is very important that, once a decision accepting commitments has been made, the regime under s.31B kicks in, and decisions accepting commitments can only be reopened once they have been made in very limited circumstances.

As set out in s.31B, essentially in order to reopen a decision accepting commitments the CMA has to have evidence that it had been misled, or that there was a material change in circumstances. That is quite a significant threshold to meet, and we say the fact that the OFT can, in those very limited circumstances, reopen a decision is absolutely no substitute for proper consideration of matters before the decision is made.

On that note, sir, can I take you to the decision itself, which is in core bundle 1, which you should already have open, and it is tab 2, CJ10. This is the Decision, finally we get there at 12.15, dated 31st January 2014. Page 243 sets out the OFT's Executive Summary of the Decision, and you will have seen this, I am sure. The OFT's competition concerns are set out at para.1.4 on p.243, and there are three headings. It says there in para.1.4, and I only just noticed this last night:

> "The OFT's competition concerns as set out in its Statement of Objections are as follows …"

The headings there are somewhat different from the headings that we have seen in the Statement ofObjections. They omit, for example, any mention at all of price parity.

Page 245 sets out what the final commitments do, and para.1.9 the key principles. The first bullet point, OTAs are free to offer reductions funded by their commission. Then the top of 246, eligibility for such discounts is dependent on the consumer having joined a closed group and having made a single previous booking.

The second bullet point, hotels will also be free to offer reductions off their own headline rates to closed group members on the same basis as OTAs. Then in footnote 8:

"However, there is no form of financial 'cap' or limitation on the extent of the discounts that hotels can offer to closed group members, unlike OTAs."

OTAs can only discount up to the extent of their commission. Hotels, however, can discount as much as they want.

Then bullet point 3, advertising of hotel room discounts. This for Skyscanner is the crux:

"OTAs will be free to publicise information regarding the availability of discounts … However, OTAs cannot publicise information regarding the specific level or extent of discounts …"

The commitments themselves are set out in annexe 1, and I will look at those in some detail when I come to address Ground 1, but effectively they set out required conduct which imposes certain obligations on the parties and obligations on the parties in their agreements between themselves, but also obligations on the parties as regards their agreements with what are defined as other OTAs and other hotels. So there is a required conduct part of the commitments and then there are the principles, and the principles which the parties have to respect in their commercial arrangements include at principle 19 a restriction on advertising of the actual discounted price.

THE CHAIRMAN: So you would say they are not just principles, they are requirements?

MISS SMITH: Yes, but I will go on to explain them in Ground 1. They are clearly requirements. There is required conduct, which says - I can take you there now, but I am aware of the time, it might be easier to come back ----

THE CHAIRMAN: No, stick to your chosen order.

MISS SMITH: Thank you. There are clear requirements that the parties shall do this, effectively the parties shall change their existing arrangements so that they are consistent with and comply with the principles. The parties shall not enter into any future agreements unless they are consistent with, comply with, the principles. That is how they work.

Then in the Decision itself, if I could just flick through - we do not need to look at the parties or the background, I think that is all pretty familiar now - to p.261, which is where the OFT sets out it competition concerns in more detail. The three headings are as before. I do not propose to go into those in any detail, but you can see the three headings: above 5.5, Current restrictions on discounting limit competition on room rates, above 5.9, Current restrictions on discounting may increase barriers to entry; 5.10, To the extent that similar discounting restrictions are replicated across the market then there is further exacerbation.

Section 6, p.265, this is where the OFT considers that there is an appropriate case for commitments. In para.6.3:

"The OFT considers that this is an appropriate case for commitments for the following reasons:"

Bullet point 1, there are identifiable competition concerns; bullet point 2, competition concerns are addressed by the Final Commitments; and bullet point 3, the Final Commitments are capable of being implemented effectively and, if necessary, within a short period of time.

The second of those is what I want to focus on, "Competition concerns are addressed by the Final Commitments", and in that second bullet point the OFT cross-refers to its reasoning which is set out at para.6.43 and following.

Before we get to that, could I just, rather than jumping backwards and forwards, go to the account of the consultation process which follows starting on p.270. The first consultation, at this stage we know Skyscanner had not made submissions, but two other parties had raised points about the impact of commitments on metasearch sites. If you look at para.6.23 on p.271, the responses to the first consultation are there summarised, and under the second bullet point :

"Potential adverse impact on market structure: Some respondents submitted that the Commitments may have an adverse impact on the market structure. Some respondents submitted the commitments may have an adverse impact on the structure of the market in a number of ways, strengthening OTAs' market position *vis-à-vis* hotels, that is the first point; strengthening Booking.com and Expedia's market positions so the large OTAs strengthening their market positions; and, third, impacting on consumers' ability to shop around.

Now, that third point is a point under which the OFT noted the submissions made by those two respondents, and if you look at annexe 3 which they say in para.6.24 sets out the OFT's consideration of the first consultation, annexe 3 which is at exhibit CJ10B, annexe 3 sets out the consultation and we have on the first page, p.300 of the bundle, the first consultation and the main points that were considered in the first consultation. Five headings, and at number two, "Impact on the structure of the market" which is issue 2. So, issue 2 is addressed on p.302, and we see the headings, the three points, first, above para.10:

"Commitments may strengthen the OTAs' market positions vis-à-vis hotels". Above para.16 on p.304: "Commitments may strengthen Booking.com and Expedia's market positions", so the large OTAs. Then on p.305, top of that page the heading, "Commitments may impact on consumers' ability to shop around".

And at para.20:

"Some respondents raised concerns about consumer confusion regarding the availability and level of discounts. For example, it was submitted that because price differences would only be visible to closed group members, rather than publicly, it would not be easy for consumers to compare the effective prices being offered by OTAs and hotels via their closed groups. It was also queried whether consumers would be able to figure out which website will offer the best long-term deal".

Now, there is no explicit reference there to price comparison sites or metasearch, but it appears that that is essentially the point that was raised by those two respondents. But you will notice that under para.21 the OFT sets out its response to these issues. It sets out its response to the first under the heading, "Competition between OTAs and hotels' direct online booking channels". So, that is the hotels/OTAs competition. Then "Competition between OTAs" above para.27, and then we carry on and get to p.311 and it goes to issue 3, the efficiency arguments. "The OFT does not consider at all the impact on consumers' ability to shop around" that is recorded in para.20, there is no response at all to the concerns raised in para.20, except the points that I have taken you to after the event in Mr Rasmussen's statement. Nothing in the Decision.

So, if you go back to the Decision document.

THE CHAIRMAN: There is discussion on the impact on metasearch sites.

MISS SMITH: In the context of the second consultation.

THE CHAIRMAN: You are going to come back to that.

MISS SMITH: First I am dealing with the first consultation and those points raised by the two parties who are not Skyscanner, and now I am moving on to the second consultation, which is addressed at para.6.25 and onwards of the Decision, p.272 of the bundle. Page 272, para.6.25 the second consultation, and para.6.27, second bullet point, "potential adverse impact on market structure", last sentence, "A concern was raised about the metasearch business" and then there is a cross-reference back again to annexe 3. So we go back to annexe 3, leaving our pens or fingers or whatever in the Decision, and annexe 3, I am sorry I have an incorrect reference.

THE CHAIRMAN: I am at para.55.

MISS SMITH: Yes, I am just wondering whether before we get, sorry, to the second consultation I should have drawn your attention to (I am sorry, I am jumping about a bit). Before we get to the second consultation, I should have drawn your attention to paras.41 and 44 on p.312 of annexe 3 which are about the residual restrictions, and this is the point, para.41:

"During the First Consultation, the OFT also received additional representations … on the need for hotels to independently set and control headline room rates"

etcetera. This was the efficiency arguments that were put forward by the interveners and summarised in annexe 2.

> "However, in the absence of an appropriate counter-factual, the OFT did not receive any evidence to substantiate the Parties' contention that the specific shape of the residual restrictions proposed in the Commitments (and by implication, the Final Commitments), for example, the closed group and prior booking requirements, are essential to deliver the efficiencies ….",

and then goes on to make the point about yield management. And then again, para.44,

> "However, the OFT did not receive evidence that either strongly confirmed or refuted the efficiency arguments put forward by the Parties to justify the residual restrictions …. Therefore, the OFT has insufficient evidence on which to make a definitive assessment of these efficiency arguments. In particular the OFT has insufficient evidence on which to make a definitive assessment of whether removing all restrictions on OTA discounting would have all of the potentially negative consequences claimed by the parties".

Now, the efficiency arguments which were summarised at annexe 2 of the Decision have been rejected there by the OFT as providing justification for the residual restrictions. This is not the advertising, additional advertising restrictions at this point, this is the residual restrictions about discounting having to be into closed groups after a first full price purchase and only up to the extent of the OTAs' commission.

THE CHAIRMAN: But they do say they have struck a balance based on all the evidence available to them.

MISS SMITH: Well, what I say is this – they rejected, the OFT explicitly rejected these efficiencies, that is the first point, on the basis that they did not justify the residual restrictions. So any attempt by the interveners to rely on those efficiencies is misguided. That is the first point.

THE CHAIRMAN: I am sure the interveners will make their point in due course. But what the Decision is saying is that the OFT has insufficient evidence on which to judge this matter.

MISS SMITH: Yes.

THE CHAIRMAN: Not that they reject them, they are not going to…

MISS SMITH: No, there is insufficient evidence.

THE CHAIRMAN: – come to a view because they put the onus on the parties to come forward with these arguments, it has been a year's discussion and it is sort of stalemate and they then struck a balance, that is what it is.

MISS SMITH: Absolutely. Sir, the point we make in this regard is, and this is perhaps anticipating an argument that may be made against us but has not yet been made against us, which is the OFTs' approach to evidence in this context They were entitled to reject these points on the basis there was no evidence, why could they not deal with your submissions in the same way, Skyscanner? And we say that the approach the OFT took to evidence in this context was appropriate because the context is quite different. The OFT had found in the SO that the pricing restrictions were object infringements of Article 101 and that they were therefore presumed to be infringements of Article 101. The burden then shifted on to the parties to justify an exemption under 101(3) and that is what the parties were doing when they put in their efficiency arguments. So, it was appropriate for the OFT to require evidence in that context.

We say that context is quite different from our case where we say, "OFT, you are proposing yourselves to put in place or to accept commitments which have an impact over and above these residual restrictions on competition, and you have to consider our representations properly when you are considering whether or not to do that".

THE CHAIRMAN: But, just to repeat what I said, the point made against you is that the way the OFT saw it was that there was a discussion about countervailing benefits which was inconclusive.

MISS SMITH: Yes.

THE CHAIRMAN: And they then struck a balance, and the residual restrictions and the restriction on disclosure of specific discounting is part of the balance of how much intervention is needed. I am just reading para.45 benevolently. That is the argument you have to overcome, I think.

MISS SMITH: Yes. This is the residual restrictions, I am making the point about —

THE CHAIRMAN: But in the balance would also come the restrictions on disclosure because they are part of the balance.

MISS SMITH: No, they do not.

THE CHAIRMAN: They do not?

MISS SMITH: With the greatest respect, sir, they do not.

THE CHAIRMAN: You say they do not, right?

MISS SMITH: What the OFT are considering here is simply the shape of the residual restrictions proposed, the closed group and prior booking requirements. It has never been suggested that these, what is being considered here, is the restriction on advertising and the impact that would have on metasearch sites.

THE CHAIRMAN: Does it not -----

MISS SMITH: This is being considered in the first consultation when we did not make those points. I had not yet made those points.

THE CHAIRMAN: I understand what you are saying, but the closed group, to be closed, has to have some kind of restriction on it otherwise it is not a closed group.

MISS SMITH: Well, sir, there could be a number of degrees of what a closed group means. You could very easily have a closed group to the extent that you have to become a member of this group before you can get these good deals.

THE CHAIRMAN: That is a customer loyalty scheme, yes.

MISS SMITH: Yes, you have to sign up, you even have to make a first booking at full price. But you certainly do not have to, for there to be a closed group, say that anyone outside that closed group who might be considering whether or not to join that closed group has no access to the prices that they could get if they joined that closed group.

THE CHAIRMAN: So you are going to say that is not inherent in the ----

MISS SMITH: Absolutely not inherent in the concept.

THE CHAIRMAN: -- idea of a closed group, it is an extra restriction tacked onto this concept?

MISS SMITH: Absolutely, and insofar as one can refer to this we put in with Miss Jameson's second witness statement a report from Oxera, which makes absolutely that point that, it will be yield management, if you want to engage in those issues it does not have to be done with extra restrictions on price transparency.

THE CHAIRMAN: Okay. I do not want to put you off your stride, please continue.

MISS SMITH: Anyway, the second consultation starts at p.314 of annexe 3, five key headings, the second one: "Input on the Structure of Market" and it is here where the OFT address the issue of the impact on price comparison sites, and if you go to p.317, the submissions are there recorded. A metasearch site respondent, i.e. Skyscanner, submitted that the closed group and advertising restrictions – so the OFT itself there distinguishes between the concept of a closed group and advertising restrictions imposed over and above - just taking up the point you made, sir – envisaged by the final commitments would result in a lack of clarity for consumers with regard to price, and inaccurate search results. It notes its belief that consumers are frequently driven by price, particularly in the case of making a hotel booking. Therefore, it considered that final commitments had the potential to undermine the value of metasearch sites and search engines to consumers.

Then there is a different point, which is Skyscanner's point that the final commitments should be extended to relate to metasearch sites as well as OTAs. Basically that metasearch sites could set up their own closed groups. It also requested the final commitments allow discounts to be available after a prior purchase of any product offering not only a previous

hotel room booking. So those are slightly different points. But this is just recording the submissions.

The OFT's response, as you can see from the heading just below para. 67 is set out thereafter, and it is set out in para. 74, at the bottom of p.318. It is very important, this is really the big focus, to see what is there said by the OFT.

So the final commitments allow hotels to prevent OTAs from publicising information regarding the specific level of discounts for a particular room to consumers who have not joined their closed groups, for example, on price comparison websites and metasearch sites.

Yes, that is the effect of the effect of the final commitments. There are similar restrictions on hotels publicising such information.

So that is just stating what the final commitments say. Then:

> "However, OTAs and hotels are free to publish information on the general availability of discounts in a clear and transparent manner, including to price comparison websites and metasearch sites."

Okay as far as it goes. Yes, if you look on Skyscanner and you search for a hotel in Paris on 1st August you could have a result that flicks up saying: "Booking.com headline rate £100." If you go off to Booking.com and join a closed group you might be able to get a discount, but you cannot know what the level of that discount might be, or compare it when you are at your one stop shop of looking at Skyscanner. You cannot compare it with what the discount might be available if you joined a closed group for Expedia, or Trivago, or Skoosh. So in order to get access to the information, not just in order to get access to the discount, but in order to get access to the information a consumer has to go on to each of the different OTA websites, access their closed groups, join their closed group and for each of the different websites, then find out what the price might be available.

THE CHAIRMAN: So for my holiday on 1st August I would probably have to book full price anyway.

MISS SMITH: Maybe, but what you cannot do is go on to Skyscanner one-stop shop, transparency, low search costs, find out what all the prices are that are available out there in the market and make your choice. So the point that the OTAs and hotels can publicise information on the general availability of discounts, yes, that is not our problem. Then the OFT's reasoning stops. The OFT then says:

> "We remain of the view that the final commitments, including the provisions relating to advertising are sufficient to address its competition concerns, which relate to inter-brand competition and barriers to entry for OTAs."

It then goes on in 75 to consider the additional and different points made by Skyscanner. But there is absolutely no explanation of why the OFT remains of that view.

I do ask you to note the use of the word there "sufficient". The CMA criticises our focus on this word as semantics but, in fact, in our submission it provides a real insight into the OFT's thinking, and someone has been very careful about their use of language here.

As I have said, commitments may be sufficient to address the competition concerns identified, that is the restrictions on discounting, in fact Skoosh dispute even this, and we may dispute that on the basis of the residual restrictions. But, it cannot be said to be appropriate, which is the language of s.31A, not "sufficient", "appropriate". These commitments, we say, cannot be said to be appropriate to address those competition concerns if they introduce new and additional restrictions on advertising.

THE CHAIRMAN: I recall something about 'fully addressing', are you going to say that too?

MISS SMITH: Yes, fully addressing, addressing.

THE CHAIRMAN: That is from the OFT guidance, is it not?

MISS SMITH: Yes, and the OFT accept it has to fully address. If you look at s.31A there are two aspects to the commitments, they have to 'fully address', and they have to be 'appropriate'.

THE CHAIRMAN: So you would have liked to have a paragraph of reasoning before that last sentence, and then you would have liked it to have said: "are manifestly appropriate fully to address its competition concerns" ----

MISS SMITH: Well, we would like to know why.

THE CHAIRMAN: -- then you would have been happy ----

MISS SMITH: Well, we would like to know why ----

THE CHAIRMAN: -- if the reason was there.

MISS SMITH: -- and still in the position, we say, that we do not know why

THE CHAIRMAN: So you say it is defective because ----

MISS SMITH: Yes, absolutely.

THE CHAIRMAN: -- it does not include that.

MISS SMITH: Yes, it displays quite clearly a failure to consider the point that was made to them.

THE CHAIRMAN: And you say the words were carefully chosen to cover what they had done but not what they should have done. Is that what you are saying?

MISS SMITH: I mean conspiracy theories abound, but ----

THE CHAIRMAN: I would not go there.

MISS SMITH: Fine.

THE CHAIRMAN: We shall not follow you.

MISS SMITH: But we say that it is clear, it jumps from, in its reasoning, you can tell them about the availability of discounts and therefore we are satisfied, but that is absolutely not the point as I have explained. The point is you cannot compare actual discounted prices, and that is obvious and self-evident, we say, that that will have an impact on price transparency and search costs.

So if we can then go back to the Decision, which is at p.278 of the bundle, in para. 6.43 and following, the OFT, you will remember, say, "This is where we set out our assessment of the final commitments". What they assess is set out in 6.44:

> "In terms of the impact on intra-brand competition …"

that is competition for the same hotel room on different sites -

> "… the Final Commitments offered by the Parties allow for greater discounting freedom, albeit with some residual restrictions."

It is absolutely clear, when you go on and read the rest of this section through to para.6.60, that the residual restrictions that are being considered here are the restrictions inherent in the proposal for closed groups - that is you have got to become a member, you have got to have made one initial full price purchase, and OTAs can only discount up to the extent of their commission. What is absolutely clear is these residual restrictions which are considered from para.6.43 through to 6.60 do not include the additional restriction on advertising. I am not going to read them all out. It is not good use of our time, but I will ask you to look at para.6.52 where the OFT carries out this assessment of the residual restrictions:

> "Therefore, while the Final Commitments do not allow for unrestricted discounting, the OFT expects them to result in greater price competition, where there may be currently be none or it may be significantly restricted …"

further competition.

Then 6.53:

> "The OFT has considered the issue of how much discounting freedom would be appropriate … the OFT is aware that online travel agency services, including hotel online booking, is a growing sector … and that there is a complex interaction between various players and distribution channels … In this context, freedom by OTAs to discount hotel accommodation without any restrictions may potentially have harmful effects by reducing the incentives of hotels to deal with OTAs …"

6.54:

"Risks could also be created by requiring a greater degree of price freedom than provided for by the Final Commitments because such freedom might jeopardise the possible realisation of the efficiencies put forward by the Parties."

These are yield management -

"… a greater degree of pricing freedom could also result in a shift in the balance of power between hotels and their OTA partners …"

They go on to say:

"… the submissions by Expedia and Booking.com that requiring a greater degree of pricing freedom may mean that OTAs' incentives to invest … may be undermined …"

Then the conclusion at 6.55:

"[We] did not receive evidence that either strongly confirmed or refuted the efficiency arguments …"

I make two submissions on these paragraphs. First, in our submission, when read in context, these clearly do not consider the additional restriction of the advertising. You have my point on that.

My second submission is that this appears to be the extent of the OFT's balancing exercise for the residual restrictions.

THE CHAIRMAN: This was my point earlier.

MISS SMITH: Your point earlier. They say at 6.55 at they have no evidence that either strongly confirmed or refuted the efficiency arguments, and they have said in para.44 of annexe 3, no evidence, but the basis upon which they carry out their balancing exercise here as regards the residual restrictions is, in our submission, wholly at the conceptual level. Paragraph 6.53:

"… freedom by OTAs to discount hotel accommodation without any restrictions may potentially have harmful effects …"

Risks could be created, 6.54:

"… because such freedom might jeopardise the possible realisation of [these potential] efficiencies."

We say this is in stark contrast to the approach that the OFT subsequently took in its defence when we say to it, "You did not take into account our submissions on metasearch", "Oh, no, we did not need to because you did not put in any evidence". That is a wholly asymmetric approach. As would be expected, they have to predict what might happen in the future. They took a conceptual approach to balancing here, saying, "We do not accept that the efficiencies are fully borne out on the evidence, but they might be, full discounting,

unrestricted discounting might have these effects, so we will weigh it up". Then, when we come to say to them, "Look, you did take into account our submissions on price transparency", "We did not need to, because you did not put in any evidence, and we were only required to consider your representations if you put in evidence".

Just the last point on the Decision document, behind - and I will come back to it, but just for your note, the OFT at the same time as publishing the Decision, published a number of FAQ documents which are at CJ10D, FAQs for hotels ----

THE CHAIRMAN: Just before we leave the Decision, are you going to take us through 6.56 to 6.60?

MISS SMITH: I was not going to, no, there is nothing I particularly want to highlight there. Obviously you will have to read - I have made my submission about 6.43 to 6.60.

THE CHAIRMAN: That is risk of harmful effects, and you are not making any point on them? I thought you were arguing that the commitments have harmful effects which have not been considered and you seem to be considering them.

MISS SMITH: Sir, yes, my point on that - I am not going to read it all out - is the risk of harmful effects that are considered here do not include the impact on price transparency.

THE CHAIRMAN: You cannot squeeze that into switching costs or anything like that?

MISS SMITH: These are the switching costs that are considered when you look, for example, at the consumer group. If you are going to have access to the discounts themselves you have to be a member of a closed group.

THE CHAIRMAN: So you are saying these are the wrong sort of harmful effects?

MISS SMITH: They are not considering the harmful effects that we raised.

THE CHAIRMAN: Thank you.

MISS SMITH: Just for your note the FAQ documents were published on the same day as the Decision, and they will be relevant for my Ground 1, and I will come back to them. They are at CJ10D, E and F.

After the Decision was made on 31st January 2014, there was ongoing contact between the OFT and Skyscanner, and in response to the OFT's requests Skyscanner has sought to find evidence of the commitments on metasearch and has submitted that to the OFT. We say that that is strictly irrelevant. What was relevant was what was before the OFT at the time of the Decision, but we have put in evidence in this regard because it is notable that in the OFT's defence and the interveners' statement quite a lot of play was made of the fact that there was ongoing contact with the OFT, and also of the fact that the point was made, and I can find particular quotations, that Skyscanner did not provide evidence before the Decision was made and they have still not provided any evidence. So in response to that we have

now in the form of the Oxera report. In so far as is necessary, I will address that, if I may, in my reply.

THE CHAIRMAN: We are not asked to consider whether the commitments are working.

MISS SMITH: No, sir, absolutely not.

THE CHAIRMAN: I am relieved that is the case.

MISS SMITH: That is not a point before the court, which is why we found it strange that in the defence and the statement of interventions there were these comments to the effect, "We still have not found any evidence, they do not have this effect". We felt obliged to put this evidence in in response.

There have also been further meetings between the CMA and the OFT in March of this year, which you will have seen in Mr Rasmussen's evidence, and in the CMA's defence. Again, we say that as these meetings took place after the Decision they are strictly irrelevant. What is relevant is whether what the OFT did before its reached its Decision was sufficient and appropriate. We have already noted the very different high threshold that has to be reached if a Decision is to be reopened after the event, after s.31B.

Now, this is my response to particularly para.22(e) of the interveners' skeleton that says it is relevant to its submission that the OFT took Skyscanner's representations into account and that it has, and I quote, "continued to engage in dialogue with Skyscanner since the Decision was made and the interveners then go on to say, "This behaviour is hardly suggestive of a closed mind, a lack of interest or an unwillingness, conscientiously to take relevant matters into account", and invite you, in effect, to draw implications from that continuing contact.,We say, no, that is a very dangerous implication to draw. It may equally be suggestive of a concern on the part of the OFT that it did not do it properly the first time round. Nothing can be drawn from the fact that subsequent meetings have taken place. What is important is whether what the OFT did before the Decision was made was sufficient and appropriate.

So, then, sir, with ten minutes to go before lunch I turn to the grounds of appeal, and I hope, having gone in quite a lot of detail through the documents, I can deal with those relatively briefly.

THE CHAIRMAN: That is our hope, yes.

MISS SMITH: Me too! So, the law. It is common ground that this is a third party appeal under s.47.1(c) of the Act, it is in tab.2 of authorities bundle 1, I am not going to take you to that, and the Tribunal is therefore required to determine the appeal by applying the same principles as would be applied in an application for judicial review.

What I will take you to, if I may, is the *Merger Action Group* case, which is in authorities bundle 2, tab.43, which contains a good summary of the different types of grounds on which judicial review can be brought and made. Authorities bundle 2, tab.43, this is a decision of the Tribunal and I would like to take you straight to paras.59-60. This was a merger case but the same principles apply to the present case. The case has to be determined on judicial review grounds, 59, I think this is all wholly non-controversial but it is important to remind ourselves of the different bases for an application for judicial review, and I say this because the way in which the law has been presented in the skeletons for the CMA and the interveners and in their pleadings is they have effectively sought to collapse everything into an irrationality challenge. They keep coming back to the point about, it is all about *Wednesbury* unreasonableness, it is all about irrationality, and we make the point that there are a number of different grounds for judicial review, well-established grounds, and as is said in para.59 of that judgment, illegality, irrationality and procedural impropriety, and the quotation there is from Lord Diplock:

> "'Illegality' … the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it",

which is different from irrationality. And then the third head, "Procedural impropriety". So, as I said, I am going to deal with the grounds backwards. Ground 3 is a challenge based on illegality. The first of the heads set out by Lord Diplock.

THE CHAIRMAN: That has got a bit of irrationality in it.

MISS SMITH: Well, no, if I can just explain the point, sir. It is a ground based on illegality, but we say by putting in place the final commitments without considering properly or at all their potential anti-competitive consequences, the OFT acted contrary to the policy and objectives of the Act. That is an illegality challenge. In the alternative, and it is an alternative argument, we say that in so acting the OFT acted irrationally. But the primary challenge is on the grounds of illegality and that is not the same as irrationality, it is simply that if a court finds that a public authority has acted contrary to the policy and objects of the legislation which gives it the power to act, it is also highly likely to be acting irrationally.

THE CHAIRMAN: The trouble with these grounds is they do tend to overlap, do they not?

MISS SMITH: But we say, and if I can explain, that this *Padfield* ground does have its own life and is important. And if I can explain why, I will take you to the cases and then why we say this is different from Ground 2 and why we say this is different from the irrationality challenge because the OFT's attempt to deal with Ground 3 in its skeleton seems to be just to collapse it all into Ground 2. It is all about Ground 2, it is all about procedural irregularity – deal with all those points and completely ignore the argument about the

purpose and object of the Act. It is under the same heading, they do not even mention the *Padfield* test.

THE CHAIRMAN: I think they say that you have now accepted that, so you are going to disabuse us of that, are you?

MISS SMITH: Yes, well, that is pretty clear I have not. If you want to go straightaway to my skeleton you can see that at para.71 of my skeleton.I deal with that point now because it is such a bad point. It is para.71 of my skeleton which is relied on for that submission. I say the factual basis is the same, but I say it is the case that the OFT's failure to consider properly or at all the impact the final commitments might have on price transparency and metasearch sites forms the basis of both Grounds 2 and 3 so, yes, that factual matter forms the basis of both Grounds 2 and 3; but I then go on to say, which I hope could not be said more clearly:

> "Skyscanner's Ground 3 is not simply a reiteration of Ground 2 dressed up as a complaint regarding a breach of s.31A of the Act".

So, it is a complete misquotation of para.71 of my skeleton. I am sorry, it is para.71 of my skeleton argument.

THE CHAIRMAN: I am better equipped than I was before the break, in terms of paper, that is.

MISS SMITH: So, if I can just, I hope, deal with the cases on the purpose and object of the Act before we break, I think I probably can with your permission, sir, then we can get to the substance after lunch.

If I could ask you first to look at *Padfield* which is in authorities bundle 1, tab.13. This is a very well-known case dating back a long time but subsequently confirmed in a number of cases, a case in the House of Lords and the first reference I would ask you to have regard to is para.1030, sorry, I am looking at the internal report numbering. This is Lord Reid, from B-D, this is talking about the Minister's argument that:

> "… he has unfettered discretion to refuse to refer … I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act".

So, if I could then ask you to turn to 1032G, again Lord Reid, at the bottom of the page:

> "It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint to the committee, that if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him in a worse position. But I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act".

And then, finally, Lord Pearce at 1053D:

> "It is quite clear from the Act in question that the Minister is intended to have *some* duty in the matter. It is conceded that he must properly consider the complaint. He cannot [simply] throw it unread into the waste paper basket. He cannot simply so …. To allow him to do so would be to give him power to set aside for his period as Minister the obvious intention of Parliament, namely [in this case] that an independent committee set up for the purpose should investigate grievances and that their report should be available to Parliament. This was clearly never intended by the Act. Nor was it intended that he could silently thwart its intention by failing to carry out its purposes".

And then he says he does not think a failure to give reasons means the court cannot consider the Minister's exercise of his discretion. He has to exercise his power in line with the purposes and object of the Act. As regards how to construe the purpose and object of the Act, that is made clear from Lord Reid's statement at p.1030, it is a question of statutory construction.

And, just one case before we break, one more case, *Spath Holme Ltd* which is at the very back of this authorities bundle, tab.25, another case of the House of Lords. And this is how to construe the purpose and objects of the relevant legislation. Lord Nicholls first at internal page numbering 396D:

> "I go back to first principles. The present appeal raises a point of statutory interpretation: what is the ambit of the power conferred on the minister by s.31(1) of the Landlord and Tenant Act 1985? No statutory power is of unlimited scope. The discretion given by Parliament is never absolute or unfettered. Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose".

And he then quotes Lord Reid in *Padfield*, the purpose and object of the Acts:

"The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute, or it may be implicit, then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation."

The question in that particular case was whether or not it was appropriate to use Hansard to determine the purpose of that particular Act, but the general statement made there by Lord Nicholls about discretion not being unfettered it has to be exercised only in furtherance of the purpose policy and objects of the Act, stands good, and that it is a question of statutory interpretation as to what the purpose and object might be.

Then, finally, Lord Hope on p.404 at D:

"The primary rule is that a discretion which is conferred by Parliament on a Minister must be taken to have been conferred on him with the intention that he should use it to promote the policy and objects of the Act, *Padfield*. No Minister who seeks to exercise a discretion which legislation has conferred on him can claim that the discretion, however widely expressed is unfettered or unlimited. This is essential to maintenance of a sound relationship between the Executive and the legislature in a democracy. Discretionary powers may be sought from Parliament by the Executive, but decisions as to the extent of those powers, and the purpose for which they may be exercised rests solely with Parliament. They depend upon the meaning and effect of the legislation which confers the power. This is a matter for Parliament not the Executive. So when issues are raised as to the scope of the discretion …"

as they have been in this case:

"… it is necessary to construe the Act. The purpose of doing so is to discover the true intent and meaning of the provision by which the discretion has been conferred by Parliament on the Minister.

So, just before we break, our Ground 3, the issue is one of legality. As Lord Nicholls put it, powers are conferred by Parliament for a purpose and may lawfully be exercised only in furtherance of that purpose. In the present case the OFT is exercising its power and discretion under s.31A to accept commitments, and we say – and I will develop this point after lunch – that the OFT has exercised its power in the present case contrary to and so as to frustrate the policy and objects of that power under the Act.

THE CHAIRMAN: How are you doing for time?

MISS SMITH: I am doing relatively well.

THE CHAIRMAN: "Relatively well"?

MISS SMITH: I will have a word with Mr Sinclair, but I think we are fine; I think we are on the way to meeting our time estimate. I spent a lot of time, obviously, this morning because a lot of it was going through documents which inevitably takes more time than making submissions.

THE CHAIRMAN: That is understood, and I am sure you will be aware we have to decide the case by reference to your Grounds.

MISS SMITH: Yes.

THE CHAIRMAN: Thank you. 2 o'clock.

(Adjourned for a short time)

MISS SMITH: I will now go to Ground 3 where, as I say, the issue is one of legality. As Lord Nicholls put it powers are conferred by Parliament for a purpose and may lawfully be exercised only in furtherance of that purpose. So, in the present case, the OFT is exercising its power under s.31A to accept commitments. What is the purpose for which that power has been conferred, and the question of what is the ambit of that power are matters of statutory construction. It appears to be common ground, it has certainly not been disputed by the CMA that the purpose of the Act at a general level is to promote competition to the benefit of consumers, and one can take that from the overall structure and provisions of the Act. So, therefore, we say, when exercising its powers under s.31A the OFT must not have acted so as to frustrate that purpose.

At a specific level as well the purpose and ambit of s.31A is also a question of statutory interpretation which is to be carried out against the background of the general purpose of the Act. In a nutshell our case is that Parliament gave the OFT its powers to accept commitments under s.31A so as to enable it, as I have said, to accept commitments which fully address its competition concerns, and which are appropriate for meeting those concerns in line with the general object and purpose of the Act to promote competition for the benefit of consumers. We say, clearly, by accepting commitments which incorporate an additional restriction on the advertising of discounted prices, and which therefore have a potential but we say self-evident detrimental impact on price transparency and search costs, without, it goes further, even considering that consequential impact properly or at all, we say the OFT was clearly acting contrary to the purposes for which it was given the power under s.31A.

The position that the interveners and the CMA take in their skeleton arguments is effectively to seek to collapse Ground 3 into Ground 2, and to argue that Ground 3 is no

more than a procedural impropriety challenge to the OFT's consultation process. I have made my point, Ground 3 is not the same as Ground 2, it goes further, and goes to the very substance and legality of the action taken by the OFT when judged against the statutory purpose of the s.31A power.

With respect, this Tribunal cannot dispense with Ground 3 simply by finding, as the CMA seems to suggest you should, that the OFT considered the issue. We say, in any event, and this is our Ground 2, that the OFT did not consider the issues raised by Skyscanner adequately or at all but, in any event, that is not an answer to Ground 3, even if it were borne out on the facts.

Under this Ground, in our submission, the Tribunal needs to consider the OFT's Decision to accept the final commitments as a matter of substance. As Lord Reid said one has to consider whether the effect of the Decision is to frustrate the objects and purpose of the Act, so one has to look at the effect and the Decision as a matter of substance.

In light of that, it is helpful to look, or it is illuminating to look, at the CMA's response to Ground 3, which is in their defence. If I could ask you to open that, it is core bundle 2, tab 12.

THE CHAIRMAN: Can I just ask while we are doing that, is there no disagreement as to what the policy and object of the Competition Act is at the relevant time. There is obviously disagreement as to whether the measures frustrated or gave effect to that purpose, but is there any disagreement as to what the object is because that would save a lot of semantic discussion.

MISS BACON: No, we do not disagree, we just say that that does not add anything to the grounds of appeal.

THE CHAIRMAN: So you do not disagree with the formulation, you just say it is not ----

MISS SMITH: That is how I understood it, simply as I have put it, perhaps in a slightly less complimentary way, I have said that the CMA has sought just to collapse this Ground 3 into Ground 2.

If you look at their defence, tab 2 in the second core bundle, p.574 of the bundle numbering.

The crux of the OFT's defence is para.72. That is, in essence, their response to ground 3:

> "The answer to that allegation is as set out above in relation to the second Ground of appeal that the OFT asked Skyscanner to provide evidence of the alleged harm, but none was provided. The OFT therefore did not have any reason to investigate this unsubstantiated assertion further."

The OFT is saying effectively that it chose not to consider the potential consequences of the final commitments. It did not have any reason to investigate this unsubstantiated assertion

because Skyscanner had not provided evidence. We maintain the submission made in our defence that such an assertion on the part of a public body charged with promoting competition is astounding.

In para.74 of the CMA's defence, the CMA says:

> "… Skyscanner's theory seems to be that consumers will not use metasearch engines and therefore will not see the offering of other OTAs. There is no evidence for this, nor is this an obvious consequence of the Final Commitments."

There is no question of any theories of harm here and the position is clear. The commitments require the OTA parties not to publicise specific information on metasearch and price comparison sites. That is there required by the commitments, not to advertise the actual discounted prices available. So, as I have already said, in order to discover those prices consumers have to join an OTAs closed group. As I have already explained, instead of undertaking one search on a metasearch site such as Skyscanner, and obtaining a comparison of all of the prices actually available for a hotel room offered by different OTAs, a consumer will have to join a number of closed groups for each different OTA just to access that information. We say that has obvious and self-evident detrimental effects on price transparency and search costs, and a potential detrimental impact on competition.

In so far as the CMA engages with the substance of this case, this Ground 3, it appears to be doing so in para.76 of its defence. I do not know if you have got them in the same bundle or whether you have extracted the skeletons, perhaps the quickest and most efficient way of dealing with this is to have open my response to the CMA's para.76 of this defence which is contained in para.74 of my skeleton argument. It is p.831 of the bundle. I make two preliminary points. First of all, the Tribunal should treat with some caution reasons that are given after a Decision has been made and which do not appear in the Decision itself. I refer to cases that have been cited in para.57(q) of my skeleton, and I do not think I need to take you to that.

I make the second preliminary and very important point that in para.76 of its defence, as in, in fact, the Decision, the CMA carries out what we say is a false comparison, what Mr Sinclair has characterised as using the wrong counterfactual, which is that it compares the situation under the final commitments with the arrangements that existed previously. Those are the words that they use in the introductory section at para.76. We say that is mistaken, the issue is not whether the situation under the final commitments which allow discounting subject to restriction is a bit better than what was going on before when there were price agreements that prohibited discounting completely. That is not the question,

whether it is a bit better. The issue for us is whether the final commitments themselves introduce restrictions having other anti-competitive effects which could have been avoided. The OFT make it clear that they chose not to consider that issue.

The points set out at 76(a) through to (d) of the CMA's defence:

> "(a) As regards price transparency, consumers are in as good a position to compare headline room rates as they would have been but for the final commitments."

That is non-discounted prices. Yes, so what?

> "Consumers will also now benefit from OTAs publicising information regarding the availability of discounts …"

I have already dealt with that point. Yes, they will be able to see that discounts are available, but they will not be able to see what those discounts are, the actual discounted prices, unless they go off and join a whole load of other closed groups. The whole point of metasearch sites and the way in which they facilitate competition is that they provide a one-stop shop for price comparison.

Paragraph 76(b):

> "… there was no evidence before the OFT that consumers were unable and/or unwilling to 'multi-home' or join multiple closed groups. On the contrary, the OFT's consumer survey evidence showed that 'many [consumers] thought it likely that they would join a number of closed discounting groups …"

You have already had my submissions on this consumer survey evidence which was, on its face, extremely limited, 30 people in total were talked to. You have also seen that there is no indication in the report as to how many of those consumers made up the "many" who were supposed to have been willing to join multiple closed groups. It is quite clear that the attention of those consumers was not drawn to the metasearch price comparison model in asking that question about multi-homing. We say this is a surprising omission given that metasearch and price comparison sites were a significant and growing sector of the market being investigated.

Paragraph 76(c) of the CMA's defence:

> "As regards the alleged harm to inter-brand competition between OTAs, Skyscanner's theory seems to be that consumers will not use metasearch engines and therefore will not see the offerings of other OTA's. As noted above, there is no evidence for this theory, nor is such an outcome obvious."

I have already made the point, it is certainly plausible, and we would go as far as to say that it is obvious that if a consumer goes on to a metasearch site and they are confronted with the

information that says, "We cannot tell you what the actual price you might be able to get is you have to go off and join a closed group for all these OTAs if you want to find out those prices", that they will be discouraged from using those sites, but at the very least that is an issue which the OFT should have investigated and it did not.

Then in para.76(d) the CMA says:

> "Finally, even if (which the CMA does not accept) there was some negative impact on price comparison sites, it is important to consider whether or not this impact would ultimately result in a detriment to consumer welfare. There was (and is) no evidence to suggest that consumers would be worse off compared with the situation before the final commitments where there was limited, if any price competition between OTAs."

So again they are making the false comparison between the situation before and after the final commitments, not the situation which they should have compared with, which is what would happen if there were none of these anti-competitive restrictions in place.

In para.77 of their defence the CMA relies on the fact that it sought to minimise uncertainty by reducing the duration of the final commitments, putting in reporting obligations and explaining that it is willing to receive evidence after the event. You have already had my submissions on the fact that receiving evidence after the commitments decision has been made really is not good enough.

So, in conclusion on Ground 3, the point is really pretty simple, and the CMA has provided no answer to Skyscanner's case. It has failed to engage with Ground 3, as you can see from its skeleton argument where it does not even engage with the issue of object or purpose, it simply says this adds nothing to Ground 2. But we say it cannot avoid the consequences of its unlawful action simply by seeking to collapse the Ground 3 case into a procedural challenge as it is not. For the reasons we have given the Tribunal has to consider, as Lord Reid said in the *Padfield* case, the effect of the Decision and whether the effect of the Decision is to frustrate purposes of the Act, and we say it clearly is.

So, that then brings us to Ground 2, and Ground 2 is a challenge based on procedural impropriety, the third potential head for judicial review as set out in the *Merger Action Group* case. In a nutshell our case is the OFT failed to take into account properly or at all the representations that Skyscanner made to it on 17th January and therefore failed to take into account relevant considerations or acted in breach of para.2(1)(b) of schedule 6(a) of the Act.

Now, the starting point in our submission is the OFT's obligations under the relevant statutory framework, and by s.31A(5) of the Act, schedule 6(a) of the Act sets out

procedural requirements for the acceptance of commitments – and there are a couple of cases as well. So, I am going to ask you to open authorities bundle 1, tab.2, p.27 of the bundle numbered in the bottom right hand corner, p.27 schedule 6(a) to the 1998 Act, "Procedural requirements for the acceptance and variation of commitments".

Paragraph 2(1):

> "Before accepting the commitments or variation, the CMA must:
>
> (a) give notice under this paragraph; and
>
> (b) consider any representations made in accordance with the notice and not withdrawn".

Obviously the OFT is under an explicit statutory obligation to consider representations made in response to its consultation notice. In carrying out that consultation process, the OFT is also subject to general public principles to carry out a fair consultation, and this is all well known, but in that regard if I can just take you to the *Coughlan* case which is at tab.24 of authorities bundle 1. Paragraph 108, this very well known passage, of the judgment in *Coughlan*, page numbers 638 (bottom left hand corner), para.108, at *Consultation*:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken",

and those are known as "the Gunning principles".

We place particular emphasis on the last of those principles, that the product of consultation, the responses to consultation must be conscientiously taken into account when the ultimate decision is taken.

Looking at this from a slightly different angle, the CMA is also required to take into account all relevant considerations. If I can just take you to one case in that regard, we are still in the same bundle, authorities bundle 1, tab.20, the *Tesco Stores* case. This is a judgment of the House of Lords, again, very well known, extremely frequently cited, p.534 of the bundle, 764 of the internal report numbering, down at 764G, Lord Keith says, is considering the issue of taking into account relevant considerations:

> "It is for the courts, if this matter is brought before them, to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration

is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again".

That is compared with what Lord Keith goes on to say. He draws a contrast with the situation that:

"But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably".

Now, the CMA and the interveners have sought to characterise our challenge under this ground as being a challenge to the weight that the CMA attached to our representations, and that that decision as to the weight can only be attacked on *Wednesbury* unreasonableness grounds. But we say no, it is clear from what the CMA says in its defence and in its evidence, and I will take you to those shortly, that what happened here is exactly what Lord Keith is anticipating in the first part of that quotation. A decision maker, here the CMA, wrongly took the view that the matters raised by Skyscanner were not relevant and therefore decided to have no regard to them. In that case, the decision maker has acted illegally, it is not a question of irrationality, they have acted unlawfully and their decision cannot stand and they must be required to think again.

I will come back to that, but it is absolutely clear from what the CMA say in their defence and in their evidence that this is exactly what they did. Skyscanner made submissions to them and the CMA held that because those submissions were, in its view, not supported by evidence, it rejected those submissions and as the CMA says I think – I will take you to it shortly, but I think it is para.72 of their defence – those submissions were rejected on legitimate grounds, they say.

We say, "No, you wrongly rejected those representations and the exercise you therefore engaged in squarely falls within that first illegality/unlawfulness ground outlined by Lord Keith, failure to take into account relevant considerations.

THE CHAIRMAN: Not supported by evidence is not quite the same thing as not relevant.

MISS SMITH: No, exactly. The reason they said "We are not going to consider it", is because it was not supported by evidence. I will take you to the defence, but it is absolutely clear, they say, "We were not required to consider unsupported assertion, therefore we did not consider unsupported assertion because there was no evidence", and when you read that together with the absolute absence of any reference to those representations in the Decision it is quite clear that that is what they did. The CMA did not look at those representations and weigh them in the balance against the other factors set out in the Decision, they did not mention these price transparency points at all in the Decision. What they have done is

exactly what they said in the defence and their evidence, Mr Rasmussen's evidence. They decided not to consider those, rejected them because they were unsupported by evidence.

MISS BACON: I am sorry, that is not our case. We are not saying that we did not consider them. We say we considered them and we did decide not to pursue them further at that stage. We have not ever said that they are not relevant in the sense of something we should not have considered.

THE CHAIRMAN: So, you would say they are relevant but implausible without evidence.

MISS BACON: We are not saying that the concern was fanciful. We are saying that we had to exercise judgement as to whether to pursue it further before accepting the commitments, and we exercised our judgment not to go into detailed investigation of it. We are not saying that we did not consider it, and we are certainly not saying that it was simply irrelevant for us to address our minds to it, if you like.

THE CHAIRMAN: Let Miss Smith make her case. You will have your chance.

MISS SMITH: Obviously this will be addressed, and it is notable in that regard that the position the CMA now seek to take in their skeleton is in effect rowing back from what we say was quite clear from their defence and the approach they took in the Decision.So I will take you to those documents, if I may, and then Miss Bacon can respond in her reply.

We have seen the case law and the relevant statutory obligations, so the OFT is subject to an explicit statutory obligation to consider representations made to it and under a public law obligation to give them conscientious consideration. How far that goes in any particular case obviously depends on the factual context.

In the present case we say that the relevant factual context includes the following matters. First, an industry participant, Skyscanner, who operates in a significant and growing sector of the market under investigation had raised real and plausible concerns about the potential impact of commitments which the OFT itself proposed to accept – not about anti-competitive behaviour engaged in by other participants in the industry, but about restrictions which the public regulator itself was proposing to adopt and accept.

The second relevant factor is that, as I have already said, under the relevant statutory provision s.31A, it was for the OFT to satisfy itself that the proposed commitments were appropriate to address its competition concerns.

The third relevant factor is that the OFT had been investigating the market by this time for three years, and we say in that situation it should have, and might be expected to have, been able to recognise the real difference between discounting into closed groups subject to advertising restrictions and discounting generally, and also the importance of price transparency in this market.

In fact, the OFT now appears, now we have seen it, to have itself recognised that discounting in this market was driven by price transparency and low search costs. It made this point in the SO. But the parties were seeking to undermine that driver of discounting by a combination of their agreements restricting discounts and their Price Parity Agreements.

The fourth relevant factor is the proposed commitments introduced a particular form of discounting into closed groups. Insofar as there were any membership groups as existed before the commitments were in place. I have already made the point that those were very limited, but they were also quite different in form. The commitments introduced a particular form of closed group, leaving in place these residual restrictions, i.e. you only get the benefits of the closed group if you have made one full price purchase and you can only discount up to the commission, but also introducing the new restriction on advertising.

The fifth factor is we make the submission that the OFT was the expert regulator in this market and it was the OFT's role to consider issues that were raised to it during consultation. The OFT had the expertise to consider those issues and the ability to seek further evidence if it thought that evidence was required.

Finally, we make the point that it does not matter, should not matter, when the representations were made - on day one of the consultation period or on day 99 of the consultation period. The fact is that they were made during the consultation period and had to be considered. The fact that the OFT wanted to rush out the Decision 10 days later should not impact on its duty to properly consider representations made to it.

As I have said, the OFT's response now to Ground 2 in its skeleton, and the interveners, is that "we did take those representations in to account".

That submission is summarised in the interveners' skeleton at para. 22. They say in terms the OFT did take Skyscanner's representations into account and in support of that they rely on the following four matters. If you want to look at this it is para. 22 of the interveners' skeleton. This really just boils down into a convenient form, the submissions that are made by the OFT as well. "… the OFT did take those representations into account" and it relies on five matters.

First, the OFT clearly considered the contents of the submission of 17th January 2014, since it invited Skyscanner to a meeting on 20th."

Then it "was given every opportunity at the meeting of 20 January 2014 to elaborate its concerns."

"Thirdly, Skyscanner's concerns were then clearly identified in paragraph 66".

"Fourthly, Rasmussen 1 makes clear that the OFT took Skyscanner's concerns into account, but concluded that '*Skyscanner's arguments were insufficiently substantiated for them to*

carry great weight". That is very – well, we will see what he actually says and in what context that statement is made, but it is definitely a very selective quotation from his evidence. Then: "Finally, the CMA has continued to engage in the dialogue."

I have already addressed the last point and I am not going to labour that point. The fact that the OFT engaged Skyscanner in dialogue after the Decision is made does not make its consultation before the Decision was made adequate.

As for the meeting of 20th January, I have taken you to the note of that meeting, and I do not propose to take you back to it but my submissions on that meeting are as follows: There is obviously a dispute between Skyscanner and the CMA as to whether or not the OFT invited Skyscanner to submit evidence immediately before it submitted its Decision or whether it was inviting Skyscanner to submit evidence after the Decision.

We say the OFT's note makes it clear the Decision was imminent and any concerns which Skyscanner had could be raised after the Decision.

In either case, the OFT's focus was on the evidence. The OFT said it is all about the data, you have to put in evidence. The OFT was not, in our submission, prepared to consider the issues raised by Skyscanner unless they were supported by evidence. We say that is clear from the defence and the evidence they put in. So if you go to the OFT's defence, core bundle 2, tab 12, p.562, para. 18. This is a general introduction by the CMA, it sets out its position:

> "If an interested party wishes to raise a concern about the possible effects on competition of a set of proposed commitments, it is for that party to explain its concern clearly, and substantiate that concern on the basis of at least some evidence. When a party has put forward relevant, reliable and credible arguments, the CMA will consider those arguments. It cannot be for the CMA to set up and disprove a case founded on pure assertion …"

In other words, which is not supported by evidence. It becomes more explicit…

> "Nor can the CMA be expected to examine or discuss competitive concerns that are neither obvious, nor issues on which it has not been provided with evidence during a consultation."

So as a matter of general approach we are not expected to, and we will not consider issues on which we have not been provided with evidence.

Paragraph 33, p. 565:

> "As discussed further below in relation to Grounds 2 and 3, there was no evidence before the OFT … indicating that the Final Commitments would or might in themselves give rise to a different restriction of competition … Nor was there any

evidence indicating that the Final Commitments would have the actual or potential effect of restricting competition. For that reason …"

i.e. because there was no evidence, there was no need for the OFT to justify the Final Commitments on the basis of an efficiency analysis. For that reason, because we had no evidence, we are not going to balance those submissions against the efficiency arguments. For example.

"The OFT therefore did not take any definitive view on the efficiency arguments. Put another way, given that there was no evidence that the Final Commitments would or might give to a restriction of competition, it was not necessary for the OFT when exercising its discretion under section 31A(2) of the Act to carry out an assessment under Article 101(3)."

Then para.67, which is under Ground 2. After setting out what the OFT did, 67 is the submissions that the OFT make after saying, "This is the process we went through":

"Skyscanner's second allegation is also without merit. Again, there was no evidence before the OFT that the Final Commitments would harm metasearch sites as alleged or at all. In the OFT's view the alleged harm was too remote and indirect to be relevant to the appropriateness of the Final Commitments. As noted in paragraph 18 above …"

this is the paragraph I have taken you as to the OFT's general approach -

"… if Skyscanner was concerned about the potential effect of the Final Commitments, it was for Skyscanner to explain that concern clearly to the OFT, and provide the OFT with supporting evidence."

So the OFT is effectively putting the burden on Skyscanner to provide it with evidence. It then says:

"The OFT could not (and the CMA cannot) be reasonably expected to carry out a detailed analysis of a claim of anti-competitive effects for which no evidence is furnished."

THE CHAIRMAN: If I may say so, they seem to be putting your argument on anti-competitive effects of the disclosure restriction into the same sort of analytical basket as arguments on efficiencies. Therefore, it is for the parties to make the case, the parties claiming that those matters are true.

MISS SMITH: Even though there is a fundamental difference because the ----

THE CHAIRMAN: Just reading those passages, that is what one might conclude? No doubt we shall hear.

MISS SMITH: Yes, but it is definitely putting the burden on Skyscanner, "You have got to put evidence in", even though this is not a question about justifying a pre-existing restriction on competition under Article 101(3), applying for an individual exemption. When it is clear that the parties are arguing efficiencies under that ground the burden of proof is on them. What Skyscanner were doing was making representations about a proposal by the OFT to put in place commitments itself which it is said would have potential anti-competitive effects, and they are effectively putting the burden on Skyscanner saying, "You have got to prove that by evidence".

THE CHAIRMAN: You are saying that even though the inclusion of arguably unnecessary restrictions - which is how you would categorise them, "are necessary and harmful" in your words - is a matter in 101(3) as part of the Article 101(3) analysis, it is not for the party accused of infringing to put that forward or a third party, it is for the authority themselves to investigate - is that what you are saying?

MISS SMITH: No, I am not sure that I am. I am not sure that I understood your question. Where parties who have been provisionally found to be infringing Article 101(1) by their restrictions on discounting, say those restrictions or residual restrictions must remain in place because they are justified by efficiencies, in effect there are ----

THE CHAIRMAN: Countervailing benefits?

MISS SMITH: Yes, which are ----

THE CHAIRMAN: It is common ground that for those arguments it is for the parties accused of the infringements to put before ----

MISS SMITH: The burden is on them. It is very different when a participant in a market says, "You are proposing, OFT, to do something to accept commitments which we say will impact on the market in a different way and give rise to a different restriction on competition and will have an impact on how we contribute to competition in the market".

THE CHAIRMAN: So you are saying that is for the authority to establish one way or the other?

MISS SMITH: Absolutely, or at least to investigate. You cannot reject representations like that on the basis that the third party has to produce evidence. The OFT is proposing to accept commitments which, in our submission, have a self-evident impact on price transparency, a self-evident impact on search costs, but are saying, "Unless you can prove to us with evidence that it is going to do exactly what you say, we are not going to consider what you say".

The heart of the OFT's defence actually is at para.69 on p.574:

> "The second ground of appeal is therefore unfounded: the OFT did consider the representations made by Skyscanner, but it rejected them, and did so on entirely legitimate grounds."

It is not saying, "We considered them and we weighed them in the balance against all the other considerations that we were considering", it says, "We rejected them, and we did so on entirely legitimate grounds, i.e. that there was no evidence". That falls four square into the test or the approach that was taken by Lord Keith in *Tesco Stores*. If the decision maker wrongly takes the view that some consideration is not relevant and therefore has no regard to it, his decision cannot stand. Here the OFT rejected the representations on the basis that they were unsupported by evidence. We say they, therefore, wrongly took the view that these considerations were not relevant.

If you look at the evidence that the OFT has put in, Mr Rasmussen's first witness statement, which is at tab 13 of core bundle 2, the next tab, again I make the point *ad nauseam*, but it is important, that these issues were not considered in the Decision, and so we are going with evidence that is put in subsequently, but, in my submission, even in that case it does not disclose a proper approach. So Mr Rasmussen's first witness statement, p.593, para.46, and this is where he says what the OFT did with Skyscanner's concerns. He sets out the three concerns that Skyscanner raised, and I want to focus on the first, which is the effects of the principles on the metasearch sector, which essentially is the price transparency and search costs point. He says at para.47:

> "The OFT concluded that Skyscanner had put forward no convincing evidence that there would be any harm to metasearch sites as alleged or at all. Nor did the OFT have any other evidence from any source showing that harm would or might occur. There was, for example, no evidence that traffic would be driven away from metasearch sites compared with before the Final Commitments. Furthermore, the case team and I thought that Skyscanner's arguments were insufficiently substantiated for them to carry great weight."

It is that sentence that the interveners put a great deal of emphasis on. They say, "Look, this is the OFT weighing up the evidence and deciding what weight to attribute to Skyscanner's arguments. However, if you actually read this with what goes before in para.47 and what goes afterwards, this is not a question of weighing up the evidence, this is a question of rejecting Skyscanner's argument, because it was, next sentence:

> "Skyscanner's argument that consumers would abandon metasearch sites under the Final Commitments was no more than assertion."

"So because it was no more than assertion, because it did not have evidence, we rejected it". Then he goes on to say that Skyscanner's submission might have been more persuasive if it had, for example, given the following evidence. None of this evidence was provided. So the approach that the OFT took is made clear in para.48:

> "The OFT considered that the Final Commitments were appropriate to address its competition concerns. In the absence of any evidence of any harm to metasearch sites the OFT did not consider that it was necessary to carry out further analysis of that issue … The OFT cannot be expected to carry out a detailed analysis of hypothetical competitive issues that might arise from a set of proposed commitments".

What you do not give in evidence, do not put in evidence, we are going to discount what you say. Now, as regards the examples, the examples given in para.47 of Rasmussen as to the kind of evidence that Skyscanner might have adduced is addressed in Miss Jameson's second witness statement which I think is worth going to. It is in this second core bundle, tab.22, p.839, para.8.3:

> "… as regards the evidence which CMA now states Skyscanner should have submitted to it, I note the following".

She deals with the first point made by Mr Rasmussen at para.47:

> "explained which hotels and OTAs it had arrangements with and what proportion of rates and hotels it already had access to".

Well, that does not strictly go to the impact of the final commitments, but in any event she says that she was asked about this at the meeting of 20th January and she understood that she had addressed those questions. Paragraph 8.3.2:

> "Skyscanner could have provided the OFT with information on the effects of pre-existing Closed Groups on the use of its site".

The same point is made in para.47 of Rasmussen. Now, she says, as she had explained:

> "… at the meeting on 20 January Mr Rasmussen had asked about whether hotels on Skyscanner had 'rates behind some sort of wall'. I replied that I had not seen evidence of this".

So, again, this issue she thought she had addressed. We have now seen in the SO in any event that such closed groups were very rare before the Decision. At para.8.3.3 Skyscanner should have carried out its own consumer research, apparently. Now, she says there would not have been time to do this, nor did the OFT even raise or allude to that possibility.

> "I am surprised the CMA believes it would be the responsibility of a company in our position to undertake such an extensive piece of research. This was something that the OFT was in a far better position to do than Skyscanner".

And in fact it did, but it did not include metasearch.

Paragraph 8.3.4, it should have provided data, apparently Skyscanner should have provided data as to:

> "… the extent which prices varied and how this might be expected to change under the commitments".

Miss Jameson makes the point that Skyscanner did subsequently provide data showing that hotel prices prior to the commitments did vary significantly, but this really is the crux of the point here. The OFT are saying Skyscanner should have provided evidence as to what is going to happen in the future as a result of commitments that it has not yet put in place. Skyscanner's submission would have been more persuasive, says Mr Rasmussen, if it had provided data on the extent to which prices varied and how this might be expected to change under the commitments.

Now, the OFT is effectively asking Skyscanner to have provided evidence of what might happen in the future, and we say the OFT was imposing an unattainable and unreasonable burden on Skyscanner.

Evidence of these sort of issues is extremely difficult to provide, predicting what might happen in the future under a different market dynamic. It is exactly the sort of issue in which the OFT is supposed to be engaged. The sort of educated judgement and prediction which the OFT is supposed to consider – not say "You provide me with evidence of how things are going to pan out in the future otherwise I am not going to consider what you say". That is not a threshold to be applied by the OFT before it will consider representations made to it.

Now, as I have already said, the OFT in any event was taking a totally asymmetric approach to Skyscanner's representations. When you look at the Decision, and I have taken you through it, you look at the analysis that the OFT carried out in the Decision of the existing competition concerns, and its assessment of the proposed commitments in section 6, there it was engaging with issues "may", "might", "would". Full discounting "may" lead to problems and therefore we balance and we come to our conclusion. Applying a completely different threshold test to Skyscanner. A completely asymmetric approach.

Finally, it is important to recall – I am not going to take you back to it because you have seen it – how the OFT actually addressed Skyscanner's representations in the Decision itself.

Now, you recall that the OFT purported to respond to Skyscanner's submissions in paras.74-75 of annexe 3. And they said –effectively they completely avoided the issue. They said the final commitments allow hotels to prevent publication of actual prices, but they are free to publicise information on general availability of discounts and then without more we remain of the view the final commitments are sufficient to address the competition concerns. The OFT did not explain why it remained of that view despite the representations made by Skyscanner. So, in our submission the OFT completely failed to engage with the points made by Skyscanner, and simply sought to avoid the issues by asserting that the final commitments were sufficient to address its competition concerns, and the CMA has said nothing subsequent to the Decision in our submission which has been able to rectify that obvious procedural failing. So, as a result we say its Decision of 31st January should be quashed on that ground as well.

THE CHAIRMAN: So, just on the evidence, you are saying that some OFT evidence that was being asked for would simply not be available because Skyscanner was too recent into the sector; some evidence could have been obtained, but it was not Skyscanner's job to get the evidence; and some is about the future and therefore inherently unreliable and soft. And you are saying that in relation to the efficiencies, the OFT was willing to contemplate evidence about the future that was of the soft variety, is that right?

MISS SMITH: Well, it is very difficult with the efficiencies, because I really cannot quite understand what the OFT did in the Decision about the efficiencies, because there are explicit statements in the Decision saying, "We have reached no conclusion on the efficiencies". Explicit statements. Mr Sinclair can -----

THE CHAIRMAN: They have obviously read what was put to them and then -----

MISS SMITH: Reached no conclusion but nevertheless balanced it.

THE CHAIRMAN: – struck a balance test as to how much intervention.

MISS SMITH: How can they do that? Read what was put to them, say "We've reached no conclusion on it", not "We think it is something we should balance – we reached no conclusion on it, but then we are going to balance it against" – I have to admit I have a real problem with what the OFT says was the justification for the residual restrictions.

THE CHAIRMAN: It is a commitment decision, it is not a final 101(3) ruling.

MISS SMITH: No, it is a commitments decision that allows the parties who have been provisionally found to be engaged in a hard core restriction on resale prices to continue to limit the extent to which prices can be discounted. So, yes, it is only a commitments decision not a final decision, but we say in that situation where the commitments are not as they are in any number of other commitments decisions accepted by the European

Commission, a commitment to take out from your agreements resale price maintenance clauses completely; it is allowing them to keep certain restrictions in, and in that situation it requires a great deal of justification to decide that those are appropriate and that they fully address the competition concerns.

THE CHAIRMAN: This was where we began this morning.

MISS SMITH: Yes, it is, and we have -----

THE CHAIRMAN: Is it your contention that a commitment decision necessarily will contain less analysis because it is only a commitment decision, or that because the commitments have to be in your words "manifestly appropriate" that therefore it should in a slightly paradoxical way contain more analysis so that one can be sure?

MISS SMITH: It depends what you are allowing to continue under commitments.

THE CHAIRMAN: Well, I do not quite see where procedural economy fits into that.

MISS SMITH: It depends what you are allowing to continue as a result of the commitments.

THE CHAIRMAN: If anything.

MISS SMITH: If anything. If the commitments had been on the part of the parties: 'We will remove from all of our agreements with the OTAs anything that stops them discounting our price ----'

THE CHAIRMAN: Then you would not need any analysis of …

MISS SMITH: Yes.

THE CHAIRMAN: Cut to the chase.

MISS SMITH: Well, the fact it is commitments rather than infringement is not actually the issue, it's what the commitments are, and what they leave in place.

THE CHAIRMAN: Okay .

MISS SMITH: So, finally, Ground 1 and that might, given the time, be addressed most efficiently by reference to my skeleton, I think.

THE CHAIRMAN: Perhaps we could help you on Ground 1 by saying our question would be to you: supposing the commitments were, in fact, specific remedies following a full infringement decision, which is theoretically possible. Would your objection to them in relation to their effect on third parties be exactly the same, or would it be different?

MISS SMITH: I think I would like to just consider that point and come back to you, if I may, on it.

THE CHAIRMAN: Thank you. It gives you some guide as to where we are.

MISS SMITH: Yes. It might be answered by looking at the commitments that have been given in other contexts, but the point is relatively simple under this Ground. We say, and I do not think it is disputed, that the persons who give commitments must be the persons who have

been investigated, and the action to be taken under the commitments must be action taken by the people who have been under investigation. That point is made at para. 12 of my skeleton and para. 13. I do not think there is any dispute over that. The CMA simply says – para. 14 – "the Final Commitments are binding on the Parties that offered them … and no one else" although they do have the effect of requiring third parties to comply with the Principles. We say they go further than that, because if you look at the Commitments, core bundle 1, tab 2, exhibit CJ10A, that is annexe 1 to the Decision. If I could just ask you to open that to make the point good – p.286 of core bundle 1 – so these are the commitments. You will see at the bottom of that page: "Required Conduct". First, joint commitments by IHG and Booking.com, joint commitments by IHG and Expedia on p.287, and then 288 Commitments from IHG, and if we can focus on these, similar commitments are made by Booking.com at para. 14 and Expedia at para. 16. The commitments "IHG will", so it is a requirement: "(a) clarify or amend its existing commercial arrangements to ensure that they comply with the principles." That is about its existing commercial arrangements. The same with subparagraph (c): "To the extent necessary, clarify or amend in their existing commercial arrangements … subject to para. 12 below." So both of those, what they are required to do to their existing commercial agreements are subject to paragraph 12 which says that: "To the extent that IHG's ability to clarify or amend any existing commercial arrangements … requires the consent of the respective counterparty …" So you have an existing agreement with someone who has not given commitments, other OTAs, other hotels, you are committing, because you are the party offering the commitment, to amend those existing agreements, but that is subject to a reasonable endeavours requirement, because other counterparties need to consent for you to change those agreements. 'Reasonable endeavours' is defined on p. 295.

Effectively what that means, the definition that is there set out, is that other OTAs can refuse to amend existing agreements to make them compliant with the principles, so they can refuse to accept a restriction on advertising, for example. But, if it is still in their commercial interests, IHG can, nevertheless, continue with that agreement.

That is contrasted with the position under 11(b) of the Commitments on p. 288. 11(b) is about new commercial arrangements with other OTAs.

> "… for the duration of the Commitments, any new commercial arrangements with Other OTAs [have to] comply with the Principles."

The same under 11(c) and 11(d) standard terms and conditions have to comply with the principles. No reasonable endeavours caveat. So any other OTA that has not signed up to the commitment, not accepted the principles, wants to enter into a commercial arrangement

with Inter-Continental hotels, they are required to accept the principles. IHG says that it is basically prohibited from entering into any sort of new commercial arrangements with other OTAs unless they comply with the principles, including the restriction on advertising. So we say, to this extent, the final commitments do impose requirements on third parties. Any new entrant OTA who wants to enter into commercial arrangements with Inter-Continental Hotel Group as to advertising its hotels on their online travel website, the only agreement that is available to them is one that is consistent with the principles and that includes the restriction on advertising. There is no other agreement available to them. There is no reasonable endeavours clause for future agreements that are entered into during the course of the commitments. So they do impose requirements on third parties.

Now, the OFT's response to that is, no, no, it is just having effects on third parties and that is wholly normal. Look at these other commitments decisions, and they cite in para. 18 of their skeleton *De Beers*, *Repsol* and *Road Fuels*. *Road Fuels*, we say, is just a recent CMA decision which has not been tested in the courts and we say has little precedential value and should not really sway the Tribunal.

But, if you look at the *De Beers* case that is an Article 82 case, where commitments were accepted by the Commission. It is in authorities bundle 2, tab 36. The practices raising concerns are set out at paras. 28, 30 and 31 of the decision. De Beers was found to be dominant, and the agreement between *De Beers* and *Alrosa* was found to lead to a *de facto* exclusive distribution agreement. The commitments that were offered by De Beers effectively, and they are summarised by the OFT in its skeleton argument. De Beers committed not to enter into these agreements with Alrosa.

So, what the commitments did was to remove what had been provisionally found to infringe Article 82. Similarly in the *Repsol* agreement, that is tab 38 of the authorities bundle, have a look at that. It is very short, just one page. This was an Article 81 case, and again there were non-compete clauses that raised concerns under Article 81, and Repsol effectively undertook to take those out of its agreements. Again, the commitments removed the infringing aspects of the distribution agreements.

The interveners rely on *E-books* and, if necessary, I'll come back to that in reply, but again the commitments were about removing the restrictions on retail prices that existed in the agreements between the parties. So there is a real difference between saying, commitments have effects on third parties, when those effects are to prevent those third parties engaging in anti-competitive behaviour, which is what those commitments are all about in the *De Beers* case, the *Repsol* case and the *E-Books* case. Those effects on third parties were to stop third parties engaging in behaviour they should not have been engaging in anyway.

They removed the anti-competitive restrictions. It is very different from here where the effect on the third parties is that if you are a new entrant OTA who wants to come into the market during the two years of the commitments Decision and you want to enter into an agreement with Inter-Continental Hotels, you have got to accept restrictions on your commercial freedom, restrictions on your ability to compete or to provide effective competition, because you have got to accept restrictions on what you can advertise. You are not allowed to put your actual discounted prices on metasearch sites. You are only allowed to discount through the medium of a closed group. We say there is a very different position in the present case.

THE CHAIRMAN: Just to make sure I am following you, you are saying that it is one thing to prohibit future agreements which are between the same parties as have been found to infringe?

MISS SMITH: No, it is the nature of the effect. To say that commitments can have effects on third parties when those effects are simply to say those parties who have offered the agreements are not allowed to enter into agreements with third parties that restrict competition, they are not allowed to act in a way *vis-à-vis* other third parties that infringe Article 82. It is quite different from the position here when the effect on these third parties is to say that if they want to enter in an agreement they have to comply with the principles.

THE CHAIRMAN: It is related then to your objection to the principles themselves as being, by their nature, restrictive?

MISS SMITH: Yes.

THE CHAIRMAN: So you are saying that that is the effect that is unfortunate on what you call innocent third parties?

MISS SMITH: Yes, and is *ultra vires*. We say in that case the OFT is acting *ultra vires* by imposing those requirements on third parties, and has therefore exceeded its powers under s.31A.

THE CHAIRMAN: I am sorry to be pedantic, but it is not imposing a requirement, because the third party still has the freedom not to contract?

MISS SMITH: Yes, they have the freedom not to enter into contracts, but that is an illusory freedom if you want to operate in the market.

THE CHAIRMAN: I think it was discussed at some length by Advocate General Kokott in *Alrosa*, was it not, in relation to Alrosa's similar claim, but you would say that does not matter because they are infringers?

MISS SMITH: Yes, does a party have a commercial freedom to engage in anti-competitive behaviour?

THE CHAIRMAN: Freedom of contract, that is freedom not to engage in it.

MISS SMITH: I am asked to stress the point, and I think it is an important point, Skyscanner was not trying not to provide evidence to the OFT when it engaged with the OFT, it was willing and keen to help the OFT as far as it could when it met with the OFT on 20th January. I stress the point that the understanding that Skyscanner had at that meeting was that the Decision was about to be issued and you can put in your evidence after the Decision has been issued. I just want to avoid any suggestion that Skyscanner was in some way seeking to avoid putting in evidence and putting in full representations to the OFT.

THE CHAIRMAN: One other question, you are not objecting to the precedent value of the commitments, the idea that this kind of behaviour might catch on, other hotels might sign up to similar arrangements? You are not specifically objecting to that? That is also in the Decision.

MISS SMITH: I make the point in my skeleton that it does appear that the OFT's intention was that this model should go across the market.

THE CHAIRMAN: That would be perfectly legitimate if the commitments themselves were legitimate.

MISS SMITH: Obviously we say that, as it is flawed, that should not be ----

THE CHAIRMAN: That is a different point.

MISS SMITH: Yes. Thank you, sir, unless there are any further questions, those are our submissions.

THE CHAIRMAN: Thank you. As we are finishing early I was going to plough on. I hope that is all right.

MR SINCLAIR: Sir, members of the Tribunal, this case is an important case in at least two respects: first, as a matter of legal precedent. It is the first time that commitments at EU or UK level, as far as we are aware, and I understand, Mr Chairman, you have come to the same conclusion ----

THE CHAIRMAN: A provisional conclusion.

MR SINCLAIR: A provisional conclusion, that there is at least an allegation - let us put it that way - that the commitments accepted introduce or maintain unlawful restrictions of competition, restrictions therefore contrary to Article 101 where such restrictions are not justified under 101(3).

It is also a case, we say, involving fundamental errors of assessment by the adoption of incorrect counterfactual contrary to all accepted principle. It was, therefore, both irrational and in breach of the principle in *Padfield*, which, as my learned friend has explained, is primarily an attack based on illegality not on irrationality.

Secondly, it is a case of practical importance, both to my client, to other OTAs, including metasearch sites, and more generally to the state of competition in this sector.

On 19th May 2014, upon reading Skoosh's submissions and the CMA's application to exclude them, the Tribunal made a reasoned order that both the issues of, first, the counterfactual, and second, the application of Article 101(3) were "inevitably issues to address in this case". We respectfully concur and will seek to address those two issues and ancillary points raised by the CMA in respect of them as briefly as possible.

As we have just been talking about *Alrosa* I am going to step out of my intended order and ask you, if you would, to turn to Advocate General Kokott's opinion, which is in authorities bundle 2, divider 44, p.1447, para.53, where Advocate General Kokott says:

> "First, higher demands are to be made in the context of Article 9 [i.e. commitments] as regards the *appropriateness* of the commitments which have been made binding. If such commitments are not *manifestly appropriate* for eliminating the competition problems identified by the Commission, the Commission is entitled to reject them."

The language of "entitled" of course is relevant to the context of the case because that is what was taking place, contrary to this case. As, sir, you put it earlier, the factual scenario here is, in fact, the reverse.

Let us look at what Advocate General Kokott and how much one can read into it. Can you turn, first, to the final sentence:

> "The Commission is not required to agree to commitments the appropriateness of which could be assessed only after a thorough examination by the Commission."

There is a good reason for that, and we say in a case where commitments appear to go too far, the opposite applies, and the competition authority should not - one may even go so far as to say is required not to - agree to such commitments. The reasoning in the middle of that paragraph applies regardless of whether one is in the *Alrosa* scenario of potentially going too far, if you like, or the alternative scenario, as here, where one is accepting commitments contrary to, we allege, the Treaty provisions. She says:

> "Only in this way is it possible to meet the objective of Article 9 of the [Modernisation Regulation], which is to ensure a quick and effective resolution of the competition problems while avoiding a considerable investigation and assessment effort on the part of the Commission."

It is our contention, and we will make this good by turning to passages in the Decision, that it is at least implicitly accepted by the CMA, I think, that where restrictions of competition

appear to subsist or are to be introduced, then Article 101(3) will become relevant, and that is to be assessed by reference to the correct counterfactual. I will spell out what that is, but you will anticipate it is the absence of any restrictions in accordance with *Societe Technique Miniere* and well established principle. So it is only in this way, as Advocate General Kokott puts it, that the principle of procedural economy may be met.

THE CHAIRMAN: So "procedural economy" may mean more work - is that what they say?

MR SINCLAIR: Not at all. It does not apply to permit a competition authority some kind of short cut where there would otherwise be an infringement of Treaty provisions. That, of course, is constant with the legislative hierarchy. The modernisation regulation or any subsidiary regulations cannot take precedence over the Treaty. Specifically they cannot take precedence over the effect of Article 101(2), the effect of which is, of course, if there is an unlawful restriction and that unlawful restriction is not justified under 101(3), the restriction is void. The commitments process is not intended to, and nor could it lawfully provide any kind of shortcut, and that is why Advocate General Kokott is saying that the procedural economy is only relevant, can only be applied, can only be considered, where a party comes to a competition authority with manifestly appropriate commitments, typically getting rid of all restrictions so it comes to an Article 101 case. Not always, but that is a classic case.

I am, if I may, going to address the Tribunal on four related points as quickly as possible.

THE CHAIRMAN: Just before you do, what is your timetable, Mr Sinclair, what are you hoping to do?

MR SINCLAIR: Originally I was to have half an hour, but the intention was to finish at half past three, I have lost ten minutes.

THE CHAIRMAN: Procedural economy taken quite a long way. If you finish by a quarter to four?

MR SINCLAIR: I am grateful. I intend to make very short work of point four of the three in particular.

THE CHAIRMAN: Right.

MR SINCLAIR: First, the bold assertion made by the CMA is that there is no evidence of a restriction of competition, that is contrary to the OFT's Decision.

Secondly, as a matter of fact these restrictions were then considered under the rubric of efficiencies, and I am grateful to my learned friend who has assisted me in procedural economy to this extent – in taking the Tribunal to various passages that show that the OFT I think concluded that there was indeed insufficient evidence in considering efficiencies. So they did consider efficiencies, they found insufficient evidence.

Thirdly, the OFT then adopted an incorrect counter-factual. One falls here into primarily the point addressed earlier whereby the OFT says it attempts to strike the right balance. That is simply insufficient. It is not a question of striking the right balance. If you have gone through an efficiency analysis, if you found that there are residual restrictions, then procedural economy does not help you out. It is not a short cut.

And it is as employed by the CMA effectively a short-cut contrary to the burden of proof on parties to make good Article 101(3) submissions on efficiencies, contrary to the principle in *Societe Technique Miniere* about adopting the correct counter-factual contrary to *Padfield*, contrary to *Alrosa*. So, first point, assertion of no evidence. I would ask you to turn up the two passages, let us focus on the defence, core bundle 2, divider 12. So, para.88 of the defence I think I have to read out the whole thing because there are certainly two separate points that come from it. The CMA says:

> "That does not mean, however, that the OFT applied, for the purposes of an analysis under Article 101(1) or (3) TFEU, an incorrect 'counterfactual'. The purpose of a 'counterfactual' analysis … is to assess whether an arrangement gives rise to a restriction of competition, and if so whether that restriction may be justified on the basis of countervailing benefits (ie efficiencies). As already noted, the OFT had no evidence [no evidence, that is repeated in Rasmussen 1 just for your reference at para.38 in equivalent terms – no evidence] indicating that the Final Commitments would or might restrict competition. It was therefore not necessary … to consider or apply any 'counterfactual' whether for the purposes of [the Articles in the Treaty]".

So there are two points I would take:

> * first, they say there is no evidence;
> * secondly, there is at least an implicit recognition that if there was evidence then they would be required to carry out an analysis under Article 101(3).
> * thirdly, there is an inherent tension between the first and second parts of this paragraph, where they say on the one hand, "The purpose of the counterfactual is to identify whether there is a restriction", but then they say at the end, "As there was no evidence for a restriction, there was no need to consider a counterfactual".

Well, those two positions cannot be maintained at the same time. As my learned friend has already taken the Tribunal to a number of passages in the Decision I will just make reference to the paragraph numbers where the CMA, or rather the OFT at the time, recognise there were restrictions. For example, para.644, "The final commitments allow for greater discounting freedom, albeit with some residual restrictions"; 648, "New entrants will still be prevented from offering a discount on an initial purchase. However, they will

be able to compete by offering discounts on future purchases". This is principle 18(a) so new entrants will be prevented from offering a discount on initial purchases. At 649, the switching costs arising from the closed group are referred to, and then at 650 one finds hidden in the midst of this part of the Decision a rather unusual and I would say unsupportable attempt at justification, 650, perhaps we should turn to that, it is core bundle 1, CJ10 at 278. So, it is para.650 which is p.279 if that helps, p.279 of core bundle 1. So, 650 reads:

> "In addition, the final commitments envisage a cap on OTA discounting up to the level of commission revenue or margins."

That is principle 18(b), what we would call 'Restriction 18(b)'. "The OFT considers that such a cap might serve to protect new entrants", and again we have a "might" rather than evidence which is required if the OFT is to accept anything against accepting commitments, but might, in any event, serve to protect new entrants from an aggressive response, for example retaliatory deep discounting by incumbent OTAs that might otherwise deter entry. Mr Rasmussen goes on his statement (Rasmussen 2 at para. 39) referring to 'aggressive' i.e. loss leading pricing.

It looks to me like the theory of harm here is effectively predatory pricing. I have two comments, I suppose. First, as a consumer I rather like the sound of 'deep discounting', but secondly, as a competition lawyer I would expect this theory of harm really only works when there is dominance, the theory being you exclude competitors – not just new entrants, but any smaller competitor, and then recoup the losses incurred by loss leading, as Mr Rasmussen now calls it, 'discounting'. So really there is nothing in the point at all, indeed, it is rather more persuasive or, at least, the reasoning is more compelling on this point in the statement of objections. I will not take you to the passages, but would simply refer to paras. 2.122, where there is effectively a standard competition law analysis as I would put it, that where you have RPMs then there will be barriers to entry.

THE CHAIRMAN: So you are saying that the Decision does acknowledge that it contains restrictions.

MR SINCLAIR: Absolutely. Secondly, the SO at para. 2.131 links RPMs with MFNs and the OFT said:

> "A market in which both discounting restrictions and Rate Parity obligations are prevalent is likely to be characterised by significant limits to price competition and barriers to entry."

That, I say, is a normal analysis and in stark contrast to that set out in the Decision at 650. Certainly, on the first point I say despite the very stark denial by the CMA in its pleadings, and witness evidence of any restrictions of competition, their Decision says the opposite. The second point, these restrictions are then considered under the rubric of efficiencies, but the evidence was inconclusive.

On this, in the interests of time I will rely largely on my learned friend's analysis, and I think she took you to a number of relevant passages, for reference: Decision 6.54, 6.55 and it may be worth turning up annexe 3, which is referred to in the Decision, which is core bundle 1, at 312. We have seen a lot of that before, in the middle of para. 41: "However, in the absence of an appropriate counterfactual" – pausing there, I do not really understand what they mean by that –

> "… the OFT did not receive any evidence to substantiate the Parties' contention that the specific shape of the residual restrictions … (and, by implication, the Final Commitments), for example, the closed group and prior booking requirements, are essential to deliver the efficiencies claimed …"

The part my learned friend then did not go onto read, but I think is also relevant is the final sentence:

> "For example, the OFT did not receive any evidence from hotels to substantiate the claim that yield management …"

And recall that 'yield management' is a core supposed justification for the residual restrictions; but no evidence from any hotels, and that probably means any hotels except for IHG being parties to the commitments – "to substantiate that yield management would be wholly unworkable without some form of discounting restrictions."

We have seen para. 44, the OFT has insufficient evidence on which to make definitive assessment of whether removing all restrictions would have all of the potentially negative consequences claimed by the parties.

One then turns to para. 45, which is striking the right balance. Our contention is that in this context of accepting commitment avowedly including restrictions of competition one has already moved a very long way from the manifestly appropriate scenario in which the principle of procedural economy may be engaged. It is also contrary to the burden of proof on the parties to prove that the elements of 101(3) are met and, indeed, to the extent there has been any assessment of efficiencies, there were glaring errors in it. I do not want to push it too far because the OFT accepts that it does not rely on these efficiencies, and did not have any evidence, but one glaring error is that a fair share of benefits would be passed to consumers.

Another glaring error is any finding of necessity or that the restrictions are necessary. Here one really does find an attempt to subvert, I would suggest, the legislative hierarchy and the objects and purpose of the relevant provisions contrary to the principles in *Padfield*, specifically that competition will be maintained on the market to the benefit of consumers. It is not enough to strike a balance, to take a *reduction ad absurdum*, faced with a cartel the OFT could not say: "We will make things a bit better by accepting commitments that the parties will agree not to direct the exact prices, but to allow 15 per cent between themselves.

THE CHAIRMAN: So half a loaf is better than no bread is not a proposition that finds favour with you?

MR SINCLAIR: It is not a proposition that is sustainable at all in competition law is my contention, sir. It certainly does not find favour with me, no.

THE CHAIRMAN: So you are really saying, just to follow the logic of your argument, that in the sort of context that we have it is almost not open to the authorities to settle a case on the basis of more limited restrictions where they have set out their purpose of eliminating the restrictions altogether. Is that what you are saying?

MR SINCLAIR: If they are to do so then a proper 101(3) analysis would have to be carried out.

THE CHAIRMAN: They have got to do as much work as they would under a full decision, which rather begs the question of why they would use the commitments option in the first place.

MR SINCLAIR: Indeed, sir.

THE CHAIRMAN: This is quite important for general approach to things, but no doubt we shall hear a different view.

MR SINCLAIR: I have no doubt you will, sir, but it is of fundamental importance. You have correctly summarised our position.

THE CHAIRMAN: I do not know whether that is a good thing or a bad thing.

MR SINCLAIR: To expand slightly on the balancing undertaken, let us return to the Decision at para.6.57 and onwards. 6.57 is a long paragraph, and I am looking at p.282 approximately half way down:

> "However, for the reasons set out in paragraphs 27-37 of Annexe 3, on balance, the OFT's assessment is that the benefits to competition from allowing closed group discounting under the Final Commitments are likely to outweigh the potential risk …"

My learned friend has pointed out that is heavily caveated with "mights" and "maybes" -

> "… from increasing any switching costs, relative to the current market position."

The counterfactual there, again quite clearly is taking, if you like, as a starting point the position in which there were absolute restrictions on discounting, and replacing them not with absolute restrictions but restrictions which prohibit discounting to any first time purchaser, and then as to amount of discounting for any purchaser that falls within a closed group having made a full price purchase to effectively their levels of commission.

These, as we set out in our skeleton argument, and in the interests of time I will not go through, look to amount to, potentially at least, the restrictions by object.

I would just make a couple of brief related points. In referring in our skeleton argument to the example of *Yamaha*, there were indeed a wide range of restrictions on discounting imposed in that case. We refer explicitly to the restrictions in the Netherlands. They are described and found at the paragraph referred to in our skeleton argument. Those restrictions permitted discounting by up to 15 per cent. That was found to be a restriction by object. That, to me, looks very similar indeed to principle 18(b) that the commitments allow for restrictions on discounting by reference to a certain level.

Finally, on a related but separate point, since seeing the SO, it became clear that most favoured rate parity clauses were certainly under consideration during the course of the over two year investigation leading up to the statement of objections. Indeed, they find voice, the CMA says, and are properly addressed in the commitments which are, in fact, pro-competitive in this respect.

Our comment would simply be this: if one looks at the reasoning adopted in Mr Rasmussen's second statement, there really is an exercise of double-think. He accepts and works from the basis that it is a feature, and implicitly an immutable feature of the market which could not be impugned or reconsidered by the OFT at the time, which is part of the relevant factual and economic context - one sees this at para.17 - that MFNs existed. Because they distorted the market he effectively says the closed group cannot be open to everyone - i.e. it cannot be free to enter a closed group - there has to be some cost. That "some cost", at whatever level it is set, is a restriction, or at least it adds to the restrictive effect of the residual restrictions. This really is the snake eating its own tail, we submit, to find a restriction accepted by way of commitments justified by reference to other identified restrictions in the market.

Sir, I am approaching my allotted time. Unless you have any further questions, those are my submissions.

THE CHAIRMAN: We have, I think.

MR WILKS: Yes, an intriguing presentation of some quite fundamental arguments here, but can I take you up on a couple of points you made in your skeleton. At para.25 you argue that the

object was to maintain prices. You make an allegation of resale price maintenance in effect. Then again in para.28 you talk about the existence of restrictions on pricing discounts will amount to a restriction by object. So you are talking about the CMA tolerating either continued or putting in place new restrictions by object. Now, my question really is, do you apply this to what you call the "residual restrictions", which are essentially the closed groups, or are you making that argument in relationship to disclosure of pricing information and therefore the pricing restriction, or both?

MR SINCLAIR: Well, sir, we focus on the residual restrictions and in particular those set out in principles 18(a) and 18(b). But we very much support Skyscanner's submissions as regards transparency in the market, for without it smaller OTAs will find it harder to compete, particularly when combined with pricing restrictions, they will find it harder to compete with the big players. One will find an entrenchment of the position.

MR WILKS: Okay, thank you.

THE CHAIRMAN: Thank you, Mr Sinclair. Now, Miss Bacon, if you want to start now that is fine by us.

MISS BACON: I might as well.

THE CHAIRMAN: Yes.

MISS BACON: Sir, and members of the Tribunal, I wanted to start by making some preliminary comments on the nature of a commitments decision and explaining in broad terms what the OFT had to do and what the CMA now has to do if it wished to accept commitments that had been offered by parties under investigation, and so I hope that by doing that I will lay the ground for much of my submissions in terms of what the OFT did in this case and why that does not disclose any traditionally reviewable error.

To assist the Tribunal I have done a short hand-out, it is only a page, really just summarising the main obligations that were on the OFT and that are on the CMA.

But, before I launch into conditions 1, 2, 3, 4 and 5, a few comments on the nature of the commitments. The starting point is to understand, I am sorry, I should let the Tribunal read the hand-out.

THE CHAIRMAN: Its all right, I am multi-tasking. Go on.

MISS BACON: Multi-tasking if not multi-homing at this moment. The starting point before I launch into those conditions is to understand that a commitments decision is not a decision making a formal finding one way or the other as to whether there is or has been or will be a competition infringement by the parties under investigation, so it is not an infringement decision. What section 31A does is to provide a pragmatic and effective way for the CMA to close a case where the parties under investigation have offered voluntary commitments

and the CMA considers that those commitments address the competition concerns that have provisionally been raised.

So, this has some similarity to a decision closing a case on administrative priority grounds. The difference is that in a commitments case the trigger for deciding not to continue the investigation is not the CMA's view that the case is not sufficiently important to spend time pursuing, but it is rather a decision that because the provisional concerns identified have been addressed by the commitments, it is appropriate to close the investigation. In that regard there are five legal conditions set out in the statutory framework and in the general principles of public law that must be satisfied before the CMA can accept commitments in a case involving an alleged breach of Article 101.

As to these legal conditions, sir, you asked whether there was a relevant difference between this regime and the EU regime, because as you pointed out in the EU regime the Commission cannot accept commitments in a case where it intends to impose a fine. The answer is that that is a difference but it is not a relevant difference for the purpose of these grounds of appeal. In other words, that difference does not have any bearing on the answer that we say is to be given to the grounds of appeal put forward by Skyscanner or indeed the different ways in which Skoosh has framed its case. I think that that is common ground.

So, sir, if I can then go on to the five conditions.

The first is that there must be domestic consultation and the requirements for that are set out in schedule 6(a) to the 1998 Act. I will not take you to that, it is in the bundle. It is also in the **Purple Book**. But in outline, the CMA has to give notice of its intention. Do you want the reference? It is in the authorities bundle, tab.2 at p.27, those are the numbers at the bottom. So the CMA has to give notice of its intention to accept commitments and it has to allow consultation for a period of at least 11 working days starting with the date on which notice is given; and over the page para.3 of schedule 6(a) that is p.29 in the bottom right hand corner, if there is an amendment to the commitments proposed, then at least six working days of consultation is required – that is further consultation.

So, the essential purpose of these domestic consultation requirements is to market test the proposed commitment, so to identify any weaknesses in them and to ascertain whether they might have any unintended adverse consequences. And in the present case the first consultation ran from 9th August to 13th September 2013 which is a total of 25 working days. So the requirement was 11 and the OFT consulted for 25.

The second consultation ran from 20th December 2013 to 17th January 2014, a total of 18 working days so, in both cases significantly longer than the period set out in the 1998 Act.

The Tribunal should also note that schedule 6(a) does not require the CMA to go out and pro-actively consult specific interested parties, but the OFT did so in the present case, and that is set out in the second witness statement of Mr Rasmussen at paras.23-25, and the OFT did so to gather as many and as wide-ranging views OFT market participants as possible, so that is condition number one.

Condition number two, obligation to consult the European Commission, and that is set out in Article 11(4) and Regulation 1 of 2003; and national competition authorities have to inform the Commission at the latest 30 calendar days before a commitments Decision applying Articles 101(1) and 101(2) is adopted. And the purpose of that is to give the Commission time to make observations to the NCA or initiate proceedings relieving the NCA of its competence to adopt the proposed Decision, and in this case the OFT complied with that requirement and the first tab in the supplemental authorities bundle is the speech of Mr Italianer, we have just put it in because it was quite interesting that Mr Italianer who is the Director General of the DG Competition gave a speech on 7th March this year in which he noted the fact that there had been consultation of the Commission. So, if you would like to look at p.8 he is referring in the speech to hotel booking cases. You can perhaps read the whole of that later, but I would just take you to a passage on p.10 where he notes that the British and German competition authorities started investigations in 2010, that is a reference to this investigation, and said that in the UK the case focused on resale price maintenance. He noted that Booking.com, Expedia and IHG have given commitments. He set out the form of those commitments. They enable the online travel agents to offer discounts on final room rates up to the level of their commission, to ensure that the hotel retains some control over the pricing. These discounts will only be available to a closed group of repeat customers. He contrasts this with the approach taken in the German case which focused on price parity or in other words the MFN. So he is saying that different approaches were taken by the different competition authorities. We focused on resale price maintenance, the Germans focused on the MFN clauses, and then says that "The Commission has been consulted on these cases through the EU Competition Network and we ourselves are monitoring the sector".

So, the OFT did consult the Commission and this has been referred to in Mr Italianer's speech. Number three -----

THE CHAIRMAN: The actual conclusions are fairly bland, you would agree.

MISS BACON: Yes, he is -----

THE CHAIRMAN: It is hardly a sort of major contribution to jurisprudence.

MISS BACON: No, I am not drawing your attention to this as in any way conducting a legal analysis.

THE CHAIRMAN: Nor does it contain any Commission explicit approval

MISS BACON: No, what he is saying is that the Commission has been consulted and the purpose of the consultation if the Commission does not approve of what is being done, it has the power to take over the case from the National Competition Authority.

THE CHAIRMAN: Yes, as I think was suggested at one stage, and all this tells us is that through the ECN the European Commission is watching closely the activities of the National Competition agencies – we would expect nothing else.

MISS BACON: The point that I draw from this is that the Commission has cited this as an example of the way in which this has been dealt with. It really relates to Mr Sinclair's submissions, Skoosh's submissions, which I will come to in more detail tomorrow. But in my submission it is completely inconceivable that if the Commission had taken one look at this it would have said that there is an obvious object restriction of competition. The OFT is accepting commitments that create or maintain an object restriction of competition; it is inconceivable that they would have simply allowed this to pass. It would have had to exercise their powers to prevent the OFT from doing this, or to take the case over from it and they did not do so. Not only did they not do so, but he says in his speech: "This is what has been done in the UK with no suggestion of the fact that, according to Mr Sinclair, this is a blatant object restriction staring everyone in the face, that is really what I draw from it, but at this point I just wanted to show you the fact that they have consulted the Commission, which is the second thing that they were required to do, and the Commission have not taken this away and said that the OFT cannot do it.

The third requirement is that having consulted the OFT needed to consider conscientiously the responses to the consultation and we absolutely accept that that is a statutory requirement as well as a public law requirement. It is set out in para. 2(1)(b) of schedule 6A, and then the OFT had to satisfy itself that the commitments addressed its competition concerns, and that is set out in s.31A of the 1998 Act, the basic test.

Just to note, and I think this has now been clarified, we do not consider there to be any difference in substance between the test of addressing the competition concerns and fully addressing, as far as we are concerned it means exactly the same thing.

THE CHAIRMAN: Does that mean if you address you fully address?

MISS BACON: If you address you fully address. We are not saying that you can address but only partially address.

MR WILKS: I thought you did say that?

MISS BACON: No. We have said that there is no difference, and we consider in this case that the competition concerns were fully addressed.

In this case, the specific competition concern was that the parties agreed that IHG could set the retail rate effectively at which the OTA, that is Expedia and Booking.com could offer the room for sale, and the OTAs agreed not to discount below that headline rate; that was the overall competition concern. The OFT took the provisional view that this agreement had, as its object, or these agreements because there are two between the two individual parties, had as its object the restriction of competition contrary to the Chapter I prohibition, and Article 101. In particular, the OFT articulated two main theories of harm and perhaps at this point it is helpful to turn to the Decision. I have it in a separate file, but I am assuming you know where it is by now, it is CJ10.

The first main theory of harm is set out in a nutshell at para. 5.8 of the Decision.

> "When OTAs face the current restrictions on discounting a hotel's Room Only accommodation, there is likely to be limited, if any, competition on the offer of room rates to consumers between OTAs and between OTAs and the hotel's direct online sales channel."

Then, over the page, para. 5.9 sets out the second main theory of harm, which is that:

> "The restrictions on discounting may create barriers to entry to the extent that they prevent new OTAs from entering the market …"

So the first is a standard concern about lacking competition on prices, and the second is a concern about prevention of new OTA entry.

Underneath that, then Decision at paras. 5.10 to 5.12 makes reference to the fact that although the OFT has not investigated the extent to which similar restrictions are replicated in the market, the OFT understand that they are potentially widespread. So it is a comment that these may be widespread but it is not something that has been investigated specifically by the OFT. So the provisional concerns were, therefore, the two main theories of harm and the basic question was whether the commitments addressed those two main competition concerns, and the OFT thought they did.

Regarding the first theory of harm, the commitments explicitly permitted discounting which was previously entirely prohibited under the agreements, and regarding the second theory of harm, in terms of competition from new OTAs, the OFT expected that the commitments would encourage new entry as well as driving further competition between existing OTAs, and that is set out para. 6.52 of the Decision:

"The OFT therefore expects the Final Commitments to introduce further competition between OTAs, and between OTAs and hotels' direct online sales channels, while also encouraging new entry of OTAs."

Skyscanner and Skoosh have claimed that the commitments do not, or do not fully address the concern about the prohibition on discounting because they left some restrictions in place. I will give the long answer to that tomorrow, but the short answer is this: it is true that the commitments permit the parties – and it is permissive not mandatory – permit the parties to establish a mechanism for discounting to take place through a closed group, which is essentially a loyalty scheme, and the commitments provide that hotels and OTAs must be at least allowed to discount to members of closed groups under that kind of mechanism subject to specific conditions. But the OFT is not saying that those conditions are restrictions on competition within the meaning of Article 101, para. 1.

Sir, that answers the point made by my learned friend, Mr Sinclair, when he says throughout the Decision there are numerous references to restrictions. Yes, restrictions in the sense of these are the conditions under which the parties have offered to allow discounting to take place. The OFT is absolutely not saying these are residual restrictions on competition that we would consider to be object restrictions or, indeed, effect restrictions, within Article 101, that is a completely different thing.

THE CHAIRMAN: I suppose there then could be restrictions on competition, even if the CMA does not regard them as such, that is a matter of objective judgment is it not?

MISS BACON: It is a matter of judgment, and I will come to the *Cityhook* case tomorrow, which is why I put this in the bundle, and why I made the reference earlier on to the decision to close a case on administrative priority grounds, because the test is a matter of judgment for the OFT, and it comes down to a rationality point as to whether it can lawfully accept these commitments as being appropriate and, of course, if there was really an absolutely obvious object restriction, then Skyscanner and Skoosh would come along and say that it cannot be rational to accept that restriction as being appropriate, because there is an ----

THE CHAIRMAN: Or legal – that is right, is it not?

MISS BACON: Or legal, and it does not really matter whether it is framed as a rationality ground or a legality ground. At the end of the day the question is one of appropriateness because appropriateness is the statutory test. In that respect, my learned friend is correct to say it comes down to the test of appropriateness, but to decide what is appropriate one has to bear in mind that this is a matter of judgment, and the exercise of judgment by the OFT, and the question is whether it was perverse, illogical or completely unreasonable for the OFT to consider that these continued conditions on discounting, or restrictions on discounting, were

actually pro-competitive. That is our submission. They are referred to as restrictions in the sense that they are restrictions on discounting that have been offered by the parties as part of the discounting mechanism that has been put forward. They are not what the OFT considered to be restrictions on competition, and that is why the OFT regarded this set of commitments as fully addressing its competition concerns. The OFT is not saying and was not saying, and the CMA is not saying that there was a partial addressing of the competition concerns and that is good enough. That is not our case.

THE CHAIRMAN: Are you going to develop the point that you made that these are permissive, not mandatory?

MR LANDERS: Pro-competitive.

MISS BACON: There are two different points there.

THE CHAIRMAN: In your defence at para.51 you say these are minimum requirements.

MISS BACON: There are two points there about permissive and pro-competitive.

THE CHAIRMAN: With great respect to my colleague, leave pro-competitive.

MISS BACON: The permissive point is this: the OFT is not saying to the parties, "You have to go out and impose these restrictions in your agreements", it is not saying that it is mandatory for the parties to conclude agreements with other OTAs that have these provisions in. They say you have to at least allow discounting through this mechanism. The parties remain free to allow completely unrestricted discounting in their contracts with other OTAs. My learned friend said that is cloud cuckoo land, of course they are not going to do that. The question is that the legality of what the OFT has accepted, and the OFT has not made it mandatory for the parties to these commitments to include these provisions in all of their agreements, it is a minimum standard.

THE CHAIRMAN: Does that not go to the nature of the commitment? The parties have offered commitments and the OFT/CMA has accepted the commitments, so it has endorsed promises as to future behaviour.

MISS BACON: It is a promise as to future behaviour, and it is a promise which, as far as the OFT is concerned, removed its concern which was that there was no discounting permitted.

THE CHAIRMAN: I understand that point. We seem to be straying into whether these are mandatory or minimum. If the parties breached these principles then presumably the OFT would consider enforcement action.

MISS BACON: I think we have to be careful about what we are saying when we say, "If the parties breached the principles". The parties are free to have agreements which go beyond the principles.

THE CHAIRMAN: More discounting.

MISS BACON: More discounting.

THE CHAIRMAN: What if they agree less discounting?

MISS BACON: If they were to provide for less discounting that would be a breach.

THE CHAIRMAN: So to that extent they are mandatory?

MISS BACON: Mandatory minimum, one can say. I think that is right. It is a mandatory minimum rather than a mandatory maximum.

THE CHAIRMAN: I find the use of the word "minimum" in the context of relaxing a restriction quite confusing, but I think I understand you.

MISS BACON: The other point to make while I am just talking about the third condition, which is that the commitments have to address the competition concerns, is quite an important one, and that is that addressing competition concerns has never been interpreted as requiring undertakings immediately to remove all restrictions in all agreements to which they are party. It is quite common for commitments to be accepted where the effect of those will evolve over time. You can see that in the cases cited in para.18 of my skeleton, and I will not take you to them because we have been to some of them already, firstly *De Beers*, and secondly, *Repsol*. In the *De Beers* case the commitments provided for a year on year reduction in the value of diamonds that would be purchased by De Beers from Alrosa, so over three years with De Beers stopping all purchases from Alrosa by 2009. So it was not the case that the Commission said, "On day 1 you are no longer permitted to buy from Alrosa, you have to sever all relations with Alrosa from day one". This really goes to the point that you made, sir, "On 1st August you still have to make a full price purchase". It is permissible to accept commitments where you see that the effect of those is going to evolve over time, and over time consumers will make full price purchases and over time more and more consumers will become eligible for the discounting that is permitted and required under the commitments.

The other case is *Repsol*, where there was a concern that there were non-compete clauses in Repsol's supplier agreements with service stations and Repsol undertook not to conclude any further long term supply agreements, and also undertook to give the stations in question financial incentives to terminate the existing supply agreements. This is another case where again, on day one, one did not see the full effect of the commitments but it was envisaged to evolve over time as Repsol then successfully terminated its existing supply agreements and then concluded new agreements on different terms.

So in the present case the fact that the eligibility for a discount is triggered once the consumer has made a first purchase does not mean in some way that the commitments do not address the OFT's competition concerns, and the OFT was entitled to, and did look at

what would happen over time rather than expecting the benefits of the commitments to crystallise on day one.

The fourth condition, which I have put as a separate condition, is the appropriateness of a commitment. The OFT under s.31A had to be satisfied that the commitments were appropriate. I acknowledge that this is very closely linked to the condition that the commitments address the competition concerns. If the question is whether the commitments are likely to be effective at addressing the relevant concerns, that is an issue of appropriateness, but it could also be said to go to the question of whether the competition concerns will be addressed in the first place. To that extent, they do overlap. I have separated them out because Skyscanner's case is precisely that even if the commitments do, on their face, address the competition concerns they are not appropriate because they cause other problems. They have a side effect of creating a different restriction of competition.

I am aware that Skoosh puts it slightly different, that because Skyscanner has made the point that there is a disjunct here between addressing an appropriateness, I think in this case it is appropriate analytically to separate out those conditions.

When the OFT, or now the CMA, is considering the issue of appropriateness, that is not, as I said, a hard edged question - you will recall the debate that we had a few minutes ago - because it requires the CMA to exercise its judgment looking at the nature and effectiveness of the commitments themselves and all the material before it from the consultation process. The debate this morning about the *Alrosa* case, you, sir, characterised the commitments regime as effectively a broad brush remedy, and we agree it is a broad brush remedy and inevitably involves the exercise of judgment by the relevant authority, be it the CMA now or the Commission.

As part of that exercise of judgment, the CMA has to assess the likelihood of any side effects that are claimed, but what it does not have to do is come to a definitive conclusion equivalent to some kind of formal decision as to the competitive effects of the commitments. That is not part of the test set out in s.31A, nor could it feasibly be.

As we have seen from *Alrosa*, which I will go to in a minute, the whole purpose of the commitments regime is to enable the CMA or the Commission in a parallel regime there to conclude its investigation without reaching a definitive view on whether there was or will be an infringement. That is not consistent with the suggestion that the CMA should do a detailed investigation of the competition effects of the commitments, rather the way that we put it is to say that the extent to which the CMA will have to investigate possible potential future competitive effects of the commitments that have been postulated by parties to the consultation will vary from case to case and ultimately, when it comes to an appeal, if it

comes to an appeal, the question will be whether, on all the facts, the Decision that the CMA came to was irrational.

The *Alrosa* does not cast doubt on that principle. I am sorry for asking you to turn up this a third time, but there is a part of the opinion of the Advocate General that you were not taken to this morning or this afternoon, but I think would be helpful for you to see. That is at bundle 2 of the authorities, tab 44.

THE CHAIRMAN: Are you still on the Advocate General?

MISS BACON: Yes, that is the Advocate General. I am, finally, before I stop today, also going to take you to the Judgment which is in a different bundle, but it is just two paragraphs of the AG, and that is at p.1451 in the bottom right hand corner. You have seen para. 53, but I think you should also look at paras. 70 to 71, which talk about the margin of assessment on the Commission, which we say is absolutely equivalent to the margin of assessment on the OFT in this case, or the CMA now going forward.

At para. 70, under the heading: "(i) Existence of a margin of assessment enjoyed by the Commission" there is this:

> "70. The examination whether certain measures are appropriate and necessary in order to address competition problems identified by the Commission requires an appraisal of complex economic matters. In this regard the Commission enjoys a margin of assessment.
>
> 71. Contrary to the position taken by the Court of First Instance, there is no fundamental difference as regards the assessment of commitments offered by undertakings between proceedings under Article 9 of Regulation No 1/2003 and merger control proceeding."

- and this is the important passage:

> "In both cases the Commission is called to give a decision in the nature of a forecast in which it has to assess the shape future market activities will take in the light of the commitments. The fact that in the context of Article 9 of Regulation No.1/2003 'existing practices' constitute the reason for the proceedings does not affect the need for a future-oriented 'prospective economic analysis' of the expected effects of commitments on market activities."

So the Advocate General there is making a point that we would rely on heavily which is that the OFT was required to exercise Judgment as to what it considered was likely to happen in the future, and because it was making a prospective assessment it had a margin of discretion, and the same point is picked up by the court in its Judgment, and that is at tab 48

of the next bundle. First, I just wanted you to look at three paragraphs and then I will stop. The first is at p.1675 in the bottom right hand corner. Paragraph 42, where the court says:

> "Judicial review for its part relates solely to whether the Commission's assessment is manifestly incorrect."

THE CHAIRMAN: This is European judicial review?

MISS BACON: European Judicial review, yes.

THE CHAIRMAN: Not quite the same as ours, is it?

MISS BACON: Largely the same. I think the point being made is that ----

THE CHAIRMAN: We could discuss that ----

MISS BACON: Yes, we could do.

THE CHAIRMAN: -- perhaps not now.

MISS BACON: The point here is the court is that the court is not exercising a merits review, it is a judicial review, and it is not second guessing the Judgment of the Commission and the same point arises in English judicial review proceedings, you are not exercising a second look at it and coming to your own judgment as to what was right or what was wrong. It is a question about manifest error, which is very similar to the rationality standard.

THE CHAIRMAN: I am tempted to say if only it were so simple.

MISS BACON: So the other paragraphs that I wanted to show you were paras. 63:

> "The General Court could have held that the Commission had committed a manifest error of assessment only if it had found that the Commission's conclusion was obviously unfounded, having regard to the facts established by it."

Paragraph 67, this point about whether the General Court substituted its own assessment – the point I have just made to you:

> "By so doing, the General Court put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment."

A further paragraph, 94, the last sentence:

> "It follows from Article 9(1) of Regulation No 1/2003 that the Commission has a wide discretion to make a proposed commitment binding or to reject it."

And, as I have said, it is common ground that, for the purposes of these grounds of appeal we do not submit – and it is common ground as far as I understand as regards Skyscanner and Skoosh as well – there is no relevant difference, there is a wide margin of discretion as to whether to accept commitments because the question is one of appropriateness.

I think I should stop there and I will continue tomorrow with the remainder of the five points, and then I will go to the Grounds of appeal which I will address in turn.

THE CHAIRMAN: That is fine, thank you, so half past ten tomorrow.

(Adjourned until 10.30 am on Tuesday, 29th July 2014)