IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1226/2/12/14

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29th 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

_____

Transcribed from tape by Beverley F. Nunnery & Co.
(a trading name of Opus 2 International Limited)
Official Shorthand Writers and Audio Transcribers
One Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
(*info@beverleynunnery.com*)

_____

H E A R I N G

D A Y T W O

A P P E A R A N C E S

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 & 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.

THE CHAIRMAN: Miss Bacon, good morning. Just before you get into your flow, we were familiarising ourselves once more with the *Alrosa* case and Advocate General Kokott's opinion, which has been referred to. You quoted various paragraphs to us in a rush at the end yesterday, and it was rather hot. Did you refer to para.77? I cannot really tell from my note. If not, could you just draw it to the attention of the Tribunal, so that it is on the record.

MISS BACON: Would you like me to read it?

THE CHAIRMAN: If it is not too much trouble.

MISS BACON: So para.77:

> "The existence of a margin of assessment in economic matters does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. Rather, it has the power to examine the material lawfulness of Commission Decisions with a view to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment. It must not only establish whether the evidence relied on is factually accurate, reliable and consistent but also examine whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions from it."

As the Tribunal will know, that is the very well known test for the factors to take into account in assessing a manifest error of assessment set out in *Tetra Laval* among other cases.

THE CHAIRMAN: Making due allowance for the fact that we operate under a slightly different regime, you would accept that that is a reasonable basis for the Tribunal to exercise its role in this case?

MISS BACON: Yes, and I was going to make the point to you that, as you may recall in the *UniChem* case - I have not got it here but I will give you the reference for your note, it is 2005 CAT No. 8 - the Tribunal commented at paras.168 to 169 with specific reference to *Tetra Laval* that the test for review of a Commission Decision in what was now the General Court was close to the JR test, as articulated by the Court of Appeal in the *IBA* case.

THE CHAIRMAN: That will be music to Mr Bailey's ears, I am sure.

MISS BACON: It was Mr Bailey that was omniscient enough to draw that to my attention yesterday.

THE CHAIRMAN: One has degrees of omniscience?

MISS BACON: Whether or not the test for judicial review is exactly the same, we do make the same point in these proceedings that the CMA, in accepting this set of commitments, had to exercise its judgment as to future potential effects. We also make the point about the role of this court being to control the legality of the judgment rather than engaging in a review on the merits of the CMA's judgment. In those respects the comments of Advocate General Kokott, and indeed the ECJ in *Alrosa*, are, we say, transposable to this case.

The way that Skyscanner and Skoosh try avoid the rationality basis of a challenge is to characterise their submissions as turning at least in part on points of law, rather than issues of reasonableness. As I trailed yesterday, the answer to that is the *Cityhook* case, and that is why we have included that in the supplemental authorities bundle. If you would like to turn to that, it should be at tab 2.

Just to explain what this case was about, Cityhook had complained that it was the victim of collective boycott by several telecoms companies who had refused to purchase its technology. When the OFT investigated the matter, there was a stark difference of views internally as to how to proceed. As is recorded in the judgment, the case team considered it was an object infringement, but the senior review team believed that it was an effects case, which would require substantial further work to adopt a decision. Ultimately, what they decided to do was the close the case on administrative priority grounds. Cityhook tried to appeal that to the Tribunal but failed here on the grounds that the OFT had not adopted a decision that could be appealed to the Tribunal. They then brought a judicial review in the High Court arguing, among other things, that the OFT had erred in law by not characterising the boycott as an object infringement. That submission is recorded at para.121 of the judgment. You will see the parallel with the submissions that are being made in this case. Mr Justice Foskett concluded that the question was, contrary to Mr Lasok's submissions, not a simple question about whether there was an error of law. That was because ultimately the OFT had not reached a concluded view as to whether there was an object infringement, rather because it had decided not to pursue the case further, the question really was about the rationality of its decision in that regard. It was not a binary black and white question of whether there was an object infringement, but rather the grey question of whether the OFT's decision was a wholly untenable one. That position is recorded at para.123 where he says:

> "If the error is a pure matter of law that is central to the decision to close the file, then the scope for judicial intervention plainly exists. If, however, the error on the part of the decision-maker is to have acceded too readily to one side of a

genuine argument about the law, then at what stage is the court in a position to say that the decision-maker has acted unreasonably in the *Wednesbury* sense."

He then answers this question at paras.131 to 135. Perhaps, rather than reading those out, I could just sit down and ask the Tribunal to read those paragraphs.

THE CHAIRMAN: (After a pause) Your point is that this is all about reasonableness, not about legality?

MISS BACON: Yes, that is my point.

THE CHAIRMAN: But you would agree that there is not an exact parallel between the case closures procedures and commitments which are more formalised and reflected in the statute?

MISS BACON: Yes, I agree that there is not an exact parallel, but on this point my submission is that analogy can be drawn, because the OFT, in accepting commitments, is equally not reaching a decided view as to whether there was, or will be, an infringement of competition. What it is doing is taking a more or less pragmatic decision to proceed by way of commitments, and what it has to do is not decide concretely, black and white, was there an infringement or not, but whether the commitments are appropriate. So on that basis, because there is no black and white view expressed in the Decision, it is not question of law, but rationality.

In our submission, by analogy with *Cityhook*, the test is whether the commitments led to such an obvious restriction, either by object or effect, that the decision of the OFT to accept those commitments was, in the words of *Cityhook* at para.135, "wholly untenable".

That was the first point I wanted to make today about the parameters of the review of appropriateness. The other point that I wanted to make on appropriateness, before I move on to point 5 on reasons, was this, and it concerns the role of procedural economy.

Miss Smith yesterday characterised our case as being that procedural economy gave the OFT and now the CMA a margin of discretion, and the implication was that we are trying to wave a magic wand of procedural economy to justify the way in which the OFT approached its decision to accept the commitments. The answer to that is that we are not relying on procedural economy in that way.

It is right to say that procedural economy is the principal benefit of, and the reason for, having a commitments regime in the first place. It explains why the 1998 Act permits the CMA in a commitments case to conclude its investigation without a lengthy and detailed assessment of the object and/or the effects of the relevant conduct. That is the sense in which we said in our defence at para.9 that they keystone of the commitments regime is procedural economy. That is also the sense in which Advocate General Kokott in the Court

of Justice referred to the idea of procedural economy in *Alrosa*. Just to give you the reference, it is para.60 of Advocate General Kokott's opinion, and para.35 of the judgment of the Court of Justice both of which refer to the procedural economy basis for the parallel commitments regime in the EU proceedings. But when it comes to whether specific commitments should be accepted, the statutory test is as set out in section 31A and our position is that the commitments met that test. We are certainly not claiming that the considerations of procedural economy that underlie the statutory regime allow the CMA to depart from that test in any way by accepting commitments that are not appropriate, and more specifically with regard to the contentions of Skyscanner and Skoosh, the CMA does not say that procedural economy allowed the OFT to accept commitments that it considered to be restrictions of competition. What we are saying is that the OFT simply did not consider this set of commitments to lead to an object restriction, or that the commitments would have the obvious or necessary consequence to harm metasearch sites in a way that restricts competition by effect.

Now, either those conclusions were rational, as we say they were, or they are not, and I will come to that in addressing the specific Grounds of appeal, but ultimately we say it is a question of irrationality and we are not relying on procedural economy.

Sir, those were the submissions that I wanted to make by way of preliminary remarks about appropriateness, then can I just turn to the final point on my hand-out concerning the overall obligations of the OFT now CMA in accepting commitments – and that is that there is a general public law duty to give adequate reasons for a decision and in this case a decision to accept commitments.

If I can, I would like to show you a few passages in two cases and then just refer you for your notes to two more cases which I will not show you. So, the two cases I did want to show you are both in bundle 2 of the authorities bundles and the first is at tab.31, that is the *IBA* case and I am sure you are very familiar with this. It is just the section right at the end of Lord Justice Carnwath's judgment starting at para.102 where he comments on the reasons point, and this passage has been picked up in various other judgments. It is p.895 in the right hand corner and he says there:

> "… although inadequacy of reasons is not a ground of challenge as such, it may be helpful to comment briefly on the Tribunal's observations on this aspect".

He noted that the Tribunal had expressed concern at considering material extraneous to the decision letter, and then he comments at para.104:

> "With respect I think this concern, and the associated criticisms, were misplaced. The statutory duty to give reasons is an important one, but it is not the same as a duty to

give a 'judgment' (such as that of a court) or a duty to make a 'report' (such as that of an inquiry inspector). […] The numerous cases on the subject lay down no general test, other than the requirement that reasons must be 'intelligible and must adequately meet the substance of the arguments advanced'"

And then in the next paragraph:

"In a case such as the present, where the subject-matter is complex and the supporting material voluminous, there is no statutory requirement for all the evidence to be set out in the decision letter. However, when a challenge is made, there is, as the Tribunal noted, an obligation on a respondent public authority to put before the Court the material necessary to deal with the relevant issues; 'all the cards' should be 'face upwards on the table'".

And then at para.106:

"There is certainly nothing unusual, particularly in a case which has to be dealt with in a relatively short timescale, for the stated reasons to be amplified by evidence before the Court. While in some areas of the law, the Court may need to be 'circumspect' to ensure that this is not used as a means of concealing or altering the true grounds of the Decision, that does not arise in this case. As I understand it, no objection had been taken to any of the evidence being put before the Tribunal [….] The question for the Tribunal was not whether the reasoning was adequately expressed in the Decision, but whether the material ultimately before it, taken as a whole, disclosed grounds on which the Tribunal could reasonably have reached the decision it did".

And the second case is in the next tab, helpfully, the case of *Porter*, which is a planning case and actually many of these cases are planning cases in the High Court. This was a judgment of the House of Lords and the relevant passage starts on p.905 in the bottom right-hand corner. This is Lord Brown, and at para.34 he cites the *Bolton* case which is the bundle, you remember that I handed up the full judgment in that, but I do not actually need to take you to the judgment because the relevant passage is cited here. The passage from *Bolton* in Lord Lloyd of Berwick's speech:

"In so far as the Court of Appeal were saying that Decision letter must refer to 'each material consideration' I must respectfully disagree. […] What the Secretary of State must do is to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the 'principal important controversial issues'. To require him to refer to every material consideration, however insignificant, and to deal with every argument, however peripheral, would be to impose an unjustifiable burden".

And then at para.36, summarising the law:

> "The reasons … must be intelligible and they must be adequate. They must enable the reader to understand … what conclusions were reached on the 'principal important controversial issues' [and] they can be briefly stated. [….] The reasons [must] refer only to the main issues in the dispute, not to every material consideration".

And then over the page, quite an important passage:

> "Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision".

So those were the two passages that I wanted to show you for your note. There are two other passages which we refer to in our skeleton argument. The first is the *Merton* case which is at tab.28 of the second authorities bundle, and the paragraphs are 41-42. The second is the *Bank Mellat* case which is in tab.39 of the third authorities bundle at paras.81-82. If I could summarise the propositions that I draw from all of those authorities, there are essentially four propositions relevant to this case:

* The first is that what is required is for the readers of the decision to know the reasons on the main issues. It is sufficient if what the decision maker says shows the parties the essential basis on which it has acted. It is not necessary for the decision maker (here the OFT) to deal with every argument or set out all its reasons and evidence in minute and exhaustive detail.
* The second proposition is that it is relevant to look at other contemporaneous materials where they exist, and that is set out particularly in the *Bank Mellat* case. And it is also relevant, as I have just read in the passage at the end of *Porter*, to consider the extent to which the parties were in any event well aware of the issues and arguments.
* The third proposition is that it is clear that the decision maker can amplify the reasons in evidence before the court provided that this is not used as a means of concealing or altering the true grounds of the Decision.
* The fourth proposition is, again, one that was made in the last passage in *Porter* which is that a reasons challenge will only succeed if a party can show substantial prejudice by the failure to provide an adequately reasoned decision.

So those are the parameters by which I submit the Tribunal should approach the submissions of Skyscanner and Skoosh in relation to the reasoning in the Decision, and it is

perhaps helpful now to look at the way the Decision was structured and its overall findings, particularly mindful of the point that Lord Templeman made in a passage that I have cited at para.8(f) of my skeleton argument. Of course in judicial review proceedings, as many other proceedings, everything depends on the facts, but judicial review should not be allowed to run riot. The practice of delving through documents and conversations to extract a few sentences, which enables us as a skilled advocate to produce doubt and confusion where none exists should not be repeated.

THE CHAIRMAN: We are familiar with that passage.

MISS BACON: I am going to attempt to dispel any doubt and confusion that may, I am sure inadvertently, have been sown by my learned friend. So if I could ask you to turn to the Decision and it is in core bundle 1 at CJ10. I do not think we need to look at the opening sections of the Decision, s.1 is just the Executive Summary, then there is a description of the parties and the background. I think we can start at s.5 which is the Theory of Harm. I took you to that yesterday, so I do not think I need to show you any of this in detail. As I said yesterday, essentially this sets out two theories of harm and then makes a comment about similar restrictions being replicated elsewhere in the market.

More importantly, I think it would be helpful to look at s.6 which addresses the commitments, and this is, of course, for present purposes the key section of the Decision. I am also going to look at annexe 3. I am afraid my version of the Decision is unnumbered, so I am not going to refer to the page numbers, I am going to refer to the paragraph numbers of the Decision.

If you could start with s.6.3, I am going to canter through these quite quickly until I get to the bits about the OFT's assessment of the final commitments. Section 6.3 summarises the case for accepting commitments, and you will see that at the end of the second bullet point, and there is an explanation of why, in more detail, the OFT's concerns at para. 6.43 and following below. Those are obviously going to be the key paragraphs.

Then at 6.6 and following describe the final commitments in narrative terms, and the final commitments, as you know, are set out at annexe 1 in full.

Then para. 6.19 and following describe the main responses to the two consultations and, in several places refers the reader to annexe 3, which sets out the key issues raised in the consultations and the OFT's response to those issues.

You will see at para. 6.24 annexe 3 sets out under these headings the key issues raised, together with the OFT's response, so there is a cross reference there.

6.27 refers to the key issues raised in the second consultation, and if I could just draw your attention to the second bullet point there, which notes at the end:

"A concern was also raised that the Final Commitments do not adequately take the meta-search business into account."

Which shows that the OFT clearly had this in mind; it was not something that the OFT simply ignored.

Then, at 6.28 there is again the cross-reference to annexe 3 setting out the key issues with the OFT's response.

Paragraph 6.29 and following describe the amendments as a result of the first consultation, and it might be helpful for you to look, in particular, at 6.38 which makes some comments about duration. In the first bullet point it is said that:

"… the OFT considers that a duration of less than two years would not address the OFT's current competition concerns because there would be insufficient time for the full benefits of increased retail rate competition to be realised. On the other hand, the OFT considers that a period of longer than two years risks excessive regulatory intervention in a dynamic innovative sector and would not allow the OFT to react as quickly to any changes."

So that they requested that the parties reduce the commitments from three to two years, and the point is being made there rather reflective of my point yesterday about the commitments not crystallising in their effect on day one. The reason for having at least two years is to give the commitments sufficient time for the benefits of the increased competition to be realised.

THE CHAIRMAN: Do we deduce from that that the CMA believed that two years was about the right period for those benefits to be realised or ----

MISS BACON: Yes.

THE CHAIRMAN: -- is that not something we get from the Decision?

MISS BACON: It was striking a balance. It was saying that less than two years it did not consider to be sufficient. More than two years would not enable it to intervene – the point is being made and I will show you later that it is not absolutely certain how the market will evolve, and that is one of the reasons why it wanted to have a sufficiently short long-stop date for it to review the commitments and decide whether these were working and whether they were appropriate. So two years was the balance struck in the final commitment.

THE CHAIRMAN: Right. I think the point was made yesterday also that it is a hurdle for reviewing the commitments on grounds of material change of circumstance was quite high. Do you have anything to say on that?

MISS BACON: Well, one of the bases for reopening the investigation is that there has been a material change in circumstance. If, for example, the OFT were to consider that actually it

had compelling evidence, for example, of a severe detrimental effect on competition that could be – I am not saying it would be – a material circumstance that may incline it to reopen the investigation, but it is a matter for the OFT's judgment. As Mr Bailey is pointing out to me, the test in the Statute, s.31B(4), subsection (2) also does not prevent the OFT from continuing the investigation, making a decision or giving a direction where it has reasonable grounds for believing. So, again, it is a question of the OFT's judgment, if it has reasonable grounds for believing that there has been a material change of circumstances since the commitments were accepted.

THE CHAIRMAN: The commitments are running at the moment. At the end of two years they will expire, what happens then?

MISS BACON: The idea is that they will be reviewed at that point, and that is the ----

THE CHAIRMAN: Reviewed or renewed?

MISS BACON: Well, that is the point that is made in the second bullet point:

> "After two years, the CMA will be able to reassess the position using the information provided by the Parties in annual reports…"

because annual reports is another feature.

THE CHAIRMAN: Sorry, to interrupt you, is the default that the commitments continue?

MISS BACON: I will just take instructions on that. (After a pause) The default is that they expire.

THE CHAIRMAN: They expire, at which point we are back at large with a Statement of Objections hanging on the fire somewhere.

MISS BACON: It depends what agreements the parties propose to conclude. If, at that stage, what the parties propose to do is to continue with these agreements, the OFT would assess that. If the parties were to come along and say: "No, we are going to revert to the old agreements in respect of which you issued a Statement of Objections" then I can see the OFT might well ----

THE CHAIRMAN: Or perhaps no agreement?

MISS BACON: Or perhaps no agreement, which would be complete discounting freedom. It really depends on what the parties propose to do at that point but the default is that they expire.

MR LANDERS: Could I just ask on the previous point about the two year period? Our attention was drawn yesterday to the annexe to Mr Rasmussen's second statement, and the data showing that on average about half of UK customers only use the hotel once a year. Is there some sort of model then that the OFT has set up, based on that data, that it will be able to

judge at the end of the two years the success of the scheme, or is it a question that it is going to just ask the parties whether they think its worked?

MISS BACON: No, there is a requirement for annual reporting and the OFT is going to judge on the basis of that and, presumably, any other information it receives from interested parties in the sector. Of course, it would then be open to the OFT to call for further information and evidence if it saw that there was or could be a concern. To answer your specific question there is not a specific economic model if you like, based on the percentage of consumers who were making purchases in any one year, no.

THE CHAIRMAN: I thought that was the kind of evidence that the OFT, now the CMA, thought that Skyscanner should be producing. Is that not right?

MISS BACON: Yes, the OFT envisaged that Skyscanner could submit, and might well want to submit, evidence in the course of that two year period. As I understand it, there is an agreement that it would meet with Skyscanner again at the latest in a year's time.

THE CHAIRMAN: The CMA is not doing that of its own accord as part of the monitoring of the commitments?

MISS BACON: (After a pause) Sir, my instructions are that the CMA is primarily going to be relying on the annual reports and the information that is submitted to it by parties such as Skyscanner.

THE CHAIRMAN: So reactive not proactive?

MISS BACON: Reactive but not proactive, but that does not preclude that it may decide to call for evidence. For example, it commissioned the Opinion Leader consumer survey when it was engaging in the consultations. That went beyond what it was required to do. It is not, of course, ruled out that the OFT could decide to commission further independent research if it wished to.

Can I then turn to what I think is the most important section of the Decision for the purpose of reviewing the OFT's reasoning, and that is ----

THE CHAIRMAN: I do apologise for interrupting you all the time, Miss Bacon, we must get on, but in your point 5 on conditions for accepting commitments, you do list in the last two bullet points meetings and letters after the date of the Decision.

MISS BACON: I am going to go to those shortly. I had initially intended to trail what I was going to say about that if I had a bit more time yesterday, but since I did not have time I am going to deal with it when ----

THE CHAIRMAN: Sorry, that is our fault.

MISS BACON: That is quite understandable. Skyscanner and Skoosh needed time to put their argument. So para.6.43 onwards contains the OFT's assessment in the main body of the

Decision of the final commitments. As you will recall, I said yesterday that there were essentially two theories of harm. You can see how the OFT deals with those two theories of harm in these paragraphs. 6.44 and 6.45 address the first theory of harm, the impact on intra-brand competition. 6.45 is saying that OTAs will have to use discounts to try and entice consumers to join their closed groups and not purchase from a rival. What the OFT is effectively saying is that although only what I would call a second time buyer will be able to take advantage of a discount immediately, what consumers will do is to look around at what is available. If the consumer, let us say Mr Bailey, sees that Bacon.com generally offers better discounts to its members than Booking.com, Mr Bailey will be induced to join Bacon.com and make his first purchase from that site rather than from Booking.com.

Just to note in passing, the reason why Bacon.com can try and attract Mr Bailey's custom in this way is principle 19, which sets as a minimum requirement that OTAs can publicise the information regarding the availability of reductions on metasearch sites and price comparison sites. That is not only the general availability of reductions, such as saying discounts are available, but the specific availability of reductions in relation to specific hotel on specific dates.

THE CHAIRMAN: But not the specific amount?

MISS BACON: But not the specific mark-down. That is all they cannot do.

THE CHAIRMAN: Quite an important specific, I imagine.

MISS BACON: Yes, that was an important provision, but my submission is that that does not mean they cannot say anything about the discounts, and it goes beyond saying just generally, on this OTA, discounts will be available, but they would be able to say, when a specific hotel comes up on a price comparison website, and there are discounts available in relation to that specific hotel.

So the point that is being made by the OFT here is that the discounting provisions will address that first theory of harm concerning inter-brand competition, and will do so not only for second time buyers, but also the first time buyer who has not made a purchase because that first time buyer will be the target of price competition from the OTAs by showing that first time buyer what is available down the line. That is the first theory of harm.

The second theory of harm is addressed at 6.46 to 6.51. As you will recall the second theory of harm concerned the barriers to entry for new OTAs. 6.58 makes a similar point to the ones I have just highlighted in 6.45, which is that although new entrants will not be able to offer discounts on the initial purchase, that is to a first time buyer, they will compete by offering discounts on future purchases, and this will provide new entrants with additional

scope to compete to the benefit of all consumers, whether or not they have joined a closed group.

Then 6.49 deals with a point that some respondents raise, that in fact the switching costs for customers may have the opposite effect by entrenching the positions of incumbent OTAs. It says that the OFT's view was that any switching costs would not undermine the ability for greater price competition to emerge, and the reason for that is set out in more detail in para.32 of annexe 3. I will not take you to that now, but para.32 contains a whole list of reasons why the OFT considers that the switching costs issue is not the major concern. Switching costs really is about shopping around - whether consumers will shop around, whether they will actually take this idea of closed groups and multi-homing.

So that was the section of these two pages dealing with the two theories of harm.

Then at para.6.52, there is a sort of interim conclusion on both theories of harm where the OFT says:

> "Therefore, while the Final Commitments do not allow for unrestricted discounting, the OFT expects them to result in greater price competition …"

introducing greater price competition between OTAs where there is currently none or almost none, and also expects the commitments to introduce new OTA entry, and that this obviously will benefit all consumers, as the OFT has said.

The next paragraphs then go on to consider the evidence and arguments on efficiencies. That is at para.6.53 to 6.56. At some point yesterday my learned friend Miss Smith suggested that the efficiencies arguments have been rejected as such. As I think you said, sir, in response, it is not that they have actually been rejected. What the OFT is doing in these paragraphs is identifying certain of the arguments that it has placed some weight on - for example, at the end of para.53, saying that the parties also referred to other risks - for example, in para.6.54 - and commenting that although overall the evidence did not either strongly confirm or refute the efficiency arguments, the material before it suggested that at least some of the arguments might have some merit in this sector. That is the last sentence of para.6.55.

Just pausing there, it is said against me that the way that the OFT dealt with efficiencies and the way that it dealt with the arguments of Skyscanner was, in some way, asymmetric or unbalanced. It is said that there was quite a lot of discussion in the Decision about efficiency, with various comments that there may be the effect suggested, whereas Skyscanner has made claims about potential effects also, and the OFT has chosen not to pursue those on the grounds that there is no evidence. The answer is, as you might expect, the Decision was the culmination of what was essentially an iterative process that consisted

of two consultations, with very lengthy consultation documents, and the OFT's consideration of the responses to those consultations.

The first consultation bundle is in the first core bundle. I will not take you to it, but if you look at it you will see that this contains substantial material on the efficiency arguments put forward by the parties and sought further evidence on those. Although the OFT recorded that it had not obtained evidence to support some of the specific efficiency arguments, annexe 3, para.40, which perhaps I will take you to, slightly out of turn, recorded that several respondents did support a number of the efficiency arguments that had been put forward. Can you just put a finger where we were and just flick forward to para.40 of annexe 3 and you will see at the end of the first full paragraph several respondents supported the efficiency arguments put forward by the parties to justify the retention of some restrictions on discounting. In particular the OFT was told that" -----

And then three bullets. But then at para.41, the OFT records, quite fairly, that in relation to certain of the arguments it had not received evidence. So what it is saying here is that the evidence on the efficiency arguments was … there was some support but some of the other arguments did not receive supporting evidence. This evolution of the decision through the processes of consultation and responses to those is the reason why there is at various points in the Decision and annexes discussion of the efficiency arguments, with the conclusion consistent with what is recorded in annexe 3 that the OFT could not decisively confirm or reject them, but it thought that at least some of them had merit. But, by contrast, what the OFT were saying in relation to Skyscanner was that Skyscanner's claims were actually unsupported by anything before it, and if anything at least some of Skyscanner's submissions were contradicted by at least some of the material before the OFT and nor did the OFT consider that Skyscanner's concerns were obviously or inevitably right. I will develop that point when I come to the grounds of appeal, but in relation to the point about asymmetry, the reason why the OFT treated the two sets of submissions differently was that its assessment of their merits was different. It had come to the conclusion, clearly recorded in the Decision, that at least some of the efficiency arguments were likely to have some merit, it had recorded that actually it had received consultation responses supporting some of the efficiency arguments, but in respect of Skyscanner's arguments it took the view that the commitments were not likely to harm metasearch or distort competition between OTAs. So the difference arises because of the different assessment of the two sets of submissions, not that it was placing some higher evidential burden on Skyscanner than any other respondent.

THE CHAIRMAN: Is it the CMA's view that for both those sets of contentions that there are efficiencies or in Skyscanner's case that the commitments in some way damage competition and their position that in each case the burden is on the "complaining party", if you like, to establish the plausibility of that contention, or is there any difference -----

MISS BACON: Well, ultimately, in both cases parties were making submissions about how the market would evolve under different hypothetical sets of circumstances, and the OFT in both cases was saying, well, it is going to consider this on the basis of the evidence. It raised the point specifically in the first consultation asking for evidence on it from all consultees, because that is what the parties themselves said, the parties under investigation, and that is why there is a lot of debate about efficiencies because it was raised right from the start in the first consultation.

THE CHAIRMAN: They are countervailing benefits to the prohibition so it is fairly standard that it is for the parties claiming the benefits to prove their case.

MISS BACON: Yes, exactly. The OFT was saying, "We'd like to see what evidence there is of this".

THE CHAIRMAN: But what do you say to the argument, though, that this is not a countervailing benefit that Skyscanner are alleging, it is an unnecessary restriction in 101(3) parlance, and you are still saying that they have to prove their case on that.

MISS BACON: What Skyscanner were saying was that it considered that the market would evolve in a specific way which would harm competition. What the parties were saying was that they considered that under a different set of circumstances the market would evolve in a different way but would also harm competition, and in relation to both of those the OFT were saying, well, it would like to see what evidence there was and assess the matter on the basis of the evidence before it. In relation to the efficiencies argument it considered that there was some merit; in relation to Skyscanner's arguments it did not consider that they were supported by anything in front of it.

THE CHAIRMAN: I think that is a "yes", but I am not sure.

MISS BACON: I think it is a "yes". It is a "yes".

THE CHAIRMAN: In the words of the Tribunal, "I feel a 'yes' coming on".

MISS BACON: You are right, it is a "yes". There was, as with any complainant an initial evidential burden on Skyscanner if it made the submission, to put forward some substance, you know, some substantiated evidence. Otherwise, if it did not – it did not have to put forward any evidence substantiating it, but if it did not and the point was not obviously and compellingly right, then the OFT in our submission was rational to decide "Well, it's not an

obvious and inevitably right argument, and we have not seen any evidence, and what we have suggests the opposite and therefore we are not going to pursue it".

MR WILKS: Just to try and pin that down a bit further, some changes were made to the commitments were they not, as a result of the first consultation?

MISS BACON: Yes.

MR WILKS: Time, something to do with the MFN as well, I think.

MISS BACON: Time and also the point that hotels did not have a cap on the extent of their discounting, and also a point about the geographic scope.

MR WILKS: So, what was the basis for those changes to be made?

MISS BACON: Those were, the submissions that had been made in the consultations, the various submissions and the OFT took account of those, and certainly in relation to -----

MR WILKS: So, were they evidenced?

MISS BACON: I think, to answer that fully I would need to trawl through all of the responses to the consultations. There were submissions made and some of those submissions would have been made by reference to facts, as one may expect, and some may have been made by reference to what was expected. I am afraid that we have not got before us, and this is not a challenge to the rationality of those bits of the Decision, we have not looked at all of the consultation on those but the answer, the short answer, is that those were modifications made as a result of the submissions expressed. And indeed the time point actually has a very real bearing on what Skyscanner are saying, because Skyscanner is saying, "Well, we are concerned about the way that the market is going to be evolving", that was a point made in response to the second consultation, but obviously in response to the first consultation there were submissions made by parties about how the market would evolve, and that was one of the reasons why the OFT requested that the commitment time be reduced to two years.

MR WILLKS: Can I just follow up, I am still not entirely clear, what you mean by "evidence". Just reading the Decision evidence seems at times to mean "The parties said", you know, "The parties said that the quality of their brand would be affected with discounting". "The parties said that yield management would be a problem". Is that sort of evidence a statement, or is it evidence such that in a parallel area, like flights, the booking arrangements that airlines use, the yield management in that sector has been affected and here is the data? When you are asking for evidence both from Skyscanner and from the other parties, are you asking for their opinions, or are you asking for solid hard, some sort of data that you can get your hands on?

MISS BACON: I think sometimes, if you use the word "evidence" it obscures the real point which is that the OFT was talking about the overall material in front of it, and some of that material would have consisted of submissions which may have referred to existing facts. Other of that material would have consisted of submissions as to what might have happened, and one can imagine, for example, that if you were making a prediction as to what might occur, you could put in an economic model and that would be regarded as evidence. If you are making a submissions about what would occur and saying, "This will happen because something similar has happened in the past", you would be able to refer to a fact – so for example in this case Skyscanner had it been a long standing player in the market, and I accept that it was relatively new and only started its hotel business last year, but had it been a long standing player in the market, it could have come along and said, "We've been in metasearch for several years and we are aware that there are a number of closed group schemes already operating and those have had the following detrimental effects on our business model. This is what we haven't been able to do and we have noted that this has encouraged consumers away from us – or some such thing, and then they would say, "Well, if you make this more prevalent by embedding this concept in the commitments, we then predict that it will continue to have those effects", those are exactly the same kind of arguments that one gets in a merger analysis, for example, you take what has happened and you extrapolate out to what will happen. I think when we are referring to evidence I think in many places it would be better expressed as material in terms of the totality of the material before it.

So if you could go back to the Decision, and I was talking about the comments on efficiencies, and I had got up to 6.56. 6.57 makes the point that I trailed a little bit earlier about the OFT recognising "that the exact consequences of the introduction of limited price competition through the Final Commitments cannot be anticipated with complete certainty." They give an example about whether there might be an increase in switching costs.

They therefore say on that basis that they are reducing the time period. 6.58 is where the point about three to two years is made.

Then 6.61 over the page sets out the conclusion:

> "Accordingly, in light of the considerations set out above, based on an assessment of the evidence available to it, the OFT considers that the Final Commitments address its competition concerns …"

And it sets out the two competition concerns and the way they are addressed. Then the last sentence:

"The OFT is satisfied that the Principles are sufficient and appropriate to address its competition concerns in the context of the affected markets".

That is why, we say, the emphasis on the word "sufficient" that has been placed by my learned friend in respect of para. 74 of annexe 3 is a purely semantic point, because quite properly the principles are both sufficient and appropriate, and that was the OFT's conclusion.

THE CHAIRMAN: I think I asked Miss Smith yesterday whether she was relying on the content of para. 6.56 onwards, where it does talk about the potential risk of harmful effects, and I think I got the answer that she was not, and I think the reason was that they do not discuss the restriction on disclosure which is was the potential harmful effect that Skyscanner was complaining of. Is that your understanding also?

MISS BACON: My understanding is that she does not rely on it. The reason why I am showing you these is to explain how the OFT dealt with the efficiency point.

THE CHAIRMAN: I understand that. What I am asking is whether, in your view, 6.56 is talking about ----

MISS BACON: No, it is not talking about ----

THE CHAIRMAN: -- damage to other OTAs or what?

MISS BACON: No, it is not. 6.56 is talking about the potential harmful effects that were raised by parties, and that is why I said a minute ago both sides were saying that there could be 50 different kinds of harmful effects.

THE CHAIRMAN: I think we are agreeing. It does not address the restriction on disclosure and the effect on metasearch.

MISS BACON: I am going to come on to that because these various concerns were discussed in more detail in annexe 3 and perhaps you could go to annexe 3. Miss Smith took you to this annexe yesterday and I am not proposing to go through it in detail.

THE CHAIRMAN: We know it quite well.

MISS BACON: Yes, so do I for my sins. I have already shown you paras. 40 and 41 and I have mentioned in passing para. 32, which is the one dealing with switching costs.

What I suggest I do with annexe 3 is this, which is to answer the three main criticisms that Miss Smith made of the reasoning in annexe 3, the first concerned para. 20, and this is the point about transparency.

Miss Smith says that there is no specific response to the issue flagged up here that it is not easy for consumers, or might not be easy for consumers to compare the effective prices being offered by OTAs. Just by way of context, the first point to make is that this paragraph comes in the section of this annexe that deals with the first consultation and, as

you know, Skyscanner did not participate and so this is not a point about whether the OFT considered Skyscanner's concerns. Those are recorded in a section of the annexe dealing with the second consultation. This is also not a point specifically about metasearch. In our submission it is not obvious how this point about para. 20 relates directly to the grounds of appeal concerning how the OFT treated Skyscanner's submissions. In any event ----

THE CHAIRMAN: You do not think it responds to the two extracts that the CMA have provided ----

MISS BACON: No, I asked ----

THE CHAIRMAN: -- other respondents?

MISS BACON: No, and I asked the CMA that and their understanding is that they do not interpret this and they do not believe that this was a response to those specific respondents, because the point is a much more general one and does not refer at all in this paragraph to metasearch. What it is saying is there was a general concern that consumers could not compare the effective prices and the heading is about consumers' ability to shop around.

THE CHAIRMAN: So where do we find the response to the two extracts?

MISS BACON: There is not a specific response to those two in relation to the first consultation. What you do get, as you might recall, when I took you to the section of the Decision which summarised the responses to the consultations and the way the OFT had dealt with them, it was in relation to the second set of consultation responses. It is the second bullet of 6.27, where the OFT records the concerns about metasearch. So they dealt with that when they were dealing with the second consultation response.

THE CHAIRMAN: So you are saying that includes Skyscanner's concerns and these two other ----

MISS BACON: Yes.

THE CHAIRMAN: -- at the moment anonymous concerns?

MISS BACON: Yes. To be fair, those were two paragraphs in larger responses of two respondents to the first consultation, neither of which were metasearch sites and there were 34 other responses.

THE CHAIRMAN: You have the advantage, we have no idea who they were or what else they said.

MISS BACON: Actually, I do not have any idea who they are either, but those behind me, I think, have a better idea who they are; I certainly have not for all of the consultation responses. There were 36 responses, of those two, neither of which were metasearch sites, included in their responses these two paragraphs which have been extracted.

THE CHAIRMAN: They were not metasearch companies?

MISS BACON: They were not metasearch companies, no. That was all that the OFT had on metasearch in the first consultation. So, going back to the reasons point, it was entirely fair that this did not feature explicitly in the summary of the key points raised in the first consultation. My instructions are that 20 is not a specific response to those two paragraphs. In any event, whether or not it is relevant to Skyscanner's appeal, the answer to the question of where it is dealt with is the way the OFT structured its response was to deal with its concerns thematically from para. 22 onwards looking first at the competition between OTAs and hotels, and at para. 27 onwards looking at competition between OTAs themselves. The OFT saw this general point about consumers shopping around and comparing prices as being, essentially a concern about whether the commitments would allow for consumers to shop around and compare discounts, and that point was addressed at para. 31 and, to some extent, 32, and also footnote 10 where the OFT notes that joining a closed group is intended to be a relatively low threshold. So the OFT saw para. 20 as being essentially about shopping around and dealt with it in its comments about shopping around.

THE CHAIRMAN: So you shop around, but you shop around in a closed group in future?

MISS BACON: You shop around through a closed group, or by going to a price comparison website, searching for your hotel, seeing a little pop-up that says: "Ping, if you go and book through Bacon.com you can get a discount on that hotel for this date", and what you do not know is how much the discount is, so you go to Bacon.com and you enter your personal details, it takes you 30 seconds and you find out what the discount is.

THE CHAIRMAN: I am very worried about this idea of Bacon.com!

MISS BACON: Actually there is a Bacondarwin.com which is my domain name, but I have not set up a Bacon.com, I think I've got better things to do with my time than run a metasearch site – I probably would not be very good at it. Anyway, that is the answer to para. 20, and actually Skyscanner itself raises this concern, that the reason for transparency is shopping around, so it is not surprising it is dealt with by the OFT in dealing with shopping around.

I said there were three main criticisms of annexe 3. The second criticism was that Miss Smith could not understand the OFT's approach to efficiencies, and I have taken you to the relevant paragraphs of the annexe that deal with that, and that is paras. 40 to 42. I have explained what the OFT is doing here is setting out the various different responses on the efficiencies. Then the OFT's response is at paras. 43 to 45.

The third criticism, and perhaps the most important one for Skyscanner's case, concerns a point that although she says Skyscanner's specific concern was noted at para.66, Miss Smith, in the section dealing with the second consultation responses, she said it was not answered properly. It was answered at 74, and 74 is what she focuses on. You have seen

what 74 says. 74 contains part of the OFT's response on this, and it is a key part, which is that although metasearch sites will not be able to display the specific discounted rate, they will be able to display the fact of the availability of discounts. I have explained to you the extent to which that goes. So it is not just the general availability but specific availability on certain dates at certain hotels.

I absolutely accept that what 74 does not say is the point that there is no other evidence that there would be harm to metasearch sites, or, in terms of the phrase that I used a little while ago in my discussion with Mr Landers, there was no other material suggesting that Skyscanner's concerns were substantiated. I accept that is not stated clearly in para.74. This has to be read in the context of the fact that there was a meeting between the OFT and Skyscanner some 11 days before the Decision was adopted, in which Skyscanner was told explicitly, and it is common ground that they were told this, that the OFT do not have evidence suggesting that the commitments would harm metasearch.

So I go back to my point about the reasoning principles. They have been already told this. It was not set out in the Decision, but they were well aware that this was one of the concerns that the OFT had with their submission. If there was any doubt, the point was also repeated in the meeting of 26th March and the letter of 28th March so before Skyscanner brought this appeal. So there was not only a meeting before the Decision, there was some of the reasoning set out in the Decision, and then you have got the meeting and letter after the Decision clarifying if there was any residual doubt in Skyscanner's mind as to why the OFT had reached the Decision and the basis upon which the OFT had reached its Decision.

So the fact that this point about the lack of other material was not explicitly articulated in para.74 does not mean either that the OFT simply ignored Skyscanner's representations, nor does it mean that overall Skyscanner was not provided with sufficient reasoning to understand why its claims were being rejected. We say, taking the totality of what Skyscanner had, it perfectly well understood the basis for the OFT deciding to accept the commitments without pursuing this point further.

MR LANDERS: Can I just go back to footnote 10, that you were talking about, joining a closed group is intended to be a relatively low threshold which means that consumers will not be disincentivised from joining several groups due to onerous joining mechanisms. The example you quoted, I thought I had understood that the process was that the average customer, which we determined that visits a hotel once a year, they will go into Bacon.com when the pop-up comes up on the metasearch site saying you can get a discount. They will go into Bacon.com, they will then have to pay a full amount, and then the next year they will either have to go back into Bacon.com, or to join several groups they will then have to

join another group and pay an amount and then the subsequent year join another group. So, in fact, to join several groups they will have to pay full prices for three or four years. Do you not consider that onerous?

MISS BACON: The point that is being made here is not about the eligibility for discounts. What is being said here is that you can see the actual discount as soon as you join Bacon.com or Booking.com or Expedia.com, as soon as you join the loyalty group.

MR LANDERS: Without buying?

MISS BACON: Yes, without buying. That is an important point, because the transparency issue only relates to going on to Skyscanner's site today, and as Mr Freeman said earlier, absolutely correctly, on Skyscanner's site you cannot see the actual discount. So the price we are charging for this room, or the price that Bacon.com is charging for the room is £80 a night. You will not see that that is the discounted rate that Bacon.com is charging. However, if you go to Bacon.com, enter you details, name, presumably email address or some password, or something like that, then you can see everything, you see the whole lot. That is the reason why the OFT thought that there would be this competition to attract the first time buyers. If there is no cost to you at all to go and sign up on zillions of these OTAs, you just have to go and it would take you literally 30 second or a minute to put in your details and then you can see everything.

MR LANDERS: So it will come up saying, Bacon.com, the charge is £100 normally, our discounted rate is £80, if you pay £100 this time you will get £80 next time?

MISS BACON: Yes, and that is precisely why I gave the example of Bacon.com and Booking.com competing to attract Mr Bailey's custom, because Mr Bailey can register on both of them and see Bacon.com was offering a discounted rate at this hotel he wants to go to of £80 a night, Booking.com is charging £90 a night. He will think, Bacon.com is a good deal, I will go with Bacon.com, I will make my first purchase with them and in future I will buy through their closed group scheme. That is why there is competition for the first time buyer.

MR LANDERS: All right, I had misunderstood.

MISS BACON: I appreciate I am making somewhat slow progress, but I hope once I have made a final point about the Decision, I will be able to go fairly quickly through the grounds.

THE CHAIRMAN: If your final point was ten minutes we might then pause.

MISS BACON: I think my final point is ten minutes, if that. The final point I wanted to make about the decision, and this is another general criticism that is made of the Decision, and that is the counterfactual. Skyscanner and Skoosh have identified various passages in the Decision and in the evidence which they say show that the OFT used the wrong

counterfactual because it compared the position before and after the commitments, rather than comparing the commitments with a position of completely unrestricted discounting. In our submission, that simply misunderstands what the OFT was doing in the Decision.

As I noted at the outset of my submissions at the end of the day yesterday, when the OFT adopted its Decision it was not conducting a full competition analysis, and it did not need to reach a definitive view on whether the original agreements infringed Chapter I prohibition or Article 101. What it did was to set out its provisional view before considering whether the commitments addressed those provisional concerns. In the context of that determination of whether the commitments addressed the OFT's provisional concerns, it was absolutely right for the OFT to compare the situation before and after the commitments, because the whole point was to work out whether the OFT's concerns under its theories of harm about the previous situation of little or no price competition and the barriers to the new OTA entry were addressed by what had been offered.

Similarly, when it was assessing the comments made in the consultations about the effectiveness and the appropriateness of the commitments, the focus of most of those comments was on the same kinds of questions, whether the commitments would, in fact, be an effective way of introducing discounting and promoting greater competition between OTAs and allowing new OTA entry, or whether it actually had the opposite effect and might even entrench the position of the incumbent OTAs. So again, in that context, in referring to those submissions and the OFT's response, it was absolutely right to compare the competitive situation before and after. An example, if you would like to turn to it, is the Decision, para.6.49. Paragraph 6.49, as you might recall, is in the section of these paragraphs which are dealing with the second theory of harm. As I said , paras.6.46 to 6.51 were addressing the second theory of harm. What the OFT is doing in 6.49 is looking at respondents' concerns regarding switching costs and asking itself whether it might mean that the commitments do not actually have the desired effect, so focusing on the second theory of harm, its question was whether the switching costs would mean actually the scope for new entry was quite limited and that the commitments would entrench the position of the incumbents, contrary to the OFT's view or the suggested view that, actually, it would do the opposite by encouraging new entry. And the OFT's answer is that on balance it considered the benefits to the competition would outweigh the risks of the switching costs. So, in other words, the OFT was considering that the commitments would address its competition concerns, so that is an example of a case where the OFT is looking at a submission that says, "Well, it won't actually produce a benefit compared to the pre-existing situation" and the OFT says, "No, we think that on balance it will produce a benefit

compared to the pre-existing situation", so in those paragraphs of the Decision which I feel are the paragraphs that my learned friends have alighted on, the OFT was applying the right counterfactual. That does not mean that the OFT did not consider at all the position of complete discounting freedom as a relevant counterfactual in relation to any of its analysis. Where it was relevant to the specific concerns raised, the OFT did consider that and two examples are para.6.50 where the OFT is considering the cap on OTA discounting up to the level of the OTA's commission, and it is considering that such a cap might serve to protect new OTAs. Well, obviously the counterfactual there as what happens if you do not have that cap at all. So, that is what would happen if you removed that so called "restriction".

THE CHAIRMAN: But with the commitments operating without the cap.

MISS BACON: If the commitments operated without that cap, yes.

THE CHAIRMAN: It is not complete free competition.

MISS BACON: No, this is a counterfactual that applies the suggestion that there would not be that particular restriction in there. And perhaps the better example is 6.53 where the OFT is considering explicitly complete discounting freedom and they are saying, in the second half of that, "In this context freedom by OTAs to discount hotel accommodation without any restrictions may potentially have harmful effects by reducing the incentives to hotels to deal with OTAs". And as I have shown you, the reason why the OFT comes to this conclusion, actually some of these points made on efficiencies may have some merit is explained in more detail in annexe 3.

THE CHAIRMAN: So, in annexe 3 para.41, the consultation says that there was no adequate appropriate counterfactual.

MISS BACON: What para.41 is saying in particular is that the OFT has not had evidence from hotels to substantiate the claim that yield management would be wholly unworkable without some form of discounting restrictions, and what it has also said in para.40 is that several respondents supported the efficiency arguments put forward by the parties to justify the retention of some restrictions on OTA discounting. And it is this mixed nature of the evidence that leads the OFT back in the main paragraphs of the Decision to say, "Well, there may be potentially harmful effects. We have not had evidence strongly confirming or refuting the efficiency arguments, but some of the arguments may have some merit". But I am not addressing you on the efficiency arguments. What I am saying is that at certain points in the Decision the OFT did consider what would happen if there were no restrictions at all, so it is not the case -----

THE CHAIRMAN: A much better way of putting it than counterfactual, I think.

MISS BACON: I agree, and actually counterfactual is very ambiguous because counterfactual is normally used in a very specific context of weighing up efficiency benefits under an Article 101(3) analysis, and it is clear that that is not what was going on in this case because the OFT did not consider that there was a restriction *prima facie*, so it did not carry out a detailed counterfactual analysis under 101(3). So, it is much better, as you say, to say "Well, in certain circumstances in response to some of the submissions it looked at what would happen without the provision at all, and in response to other of the submissions it was looking at what was the situation before the commitments".

The only further point, and this is just a one-minute point, Miss Smith said that at para.76 of our Defence we betrayed that we were using the wrong counterfactual, and the very – perhaps you had better turn up para.76. That is in core bundle 2, tab.12, and if I can also ask you to multi-home to this extent, and also take up Skyscanner's Notice of Appeal which is in core bundle 1, tab.1 and if in Skyscanner's Notice of Appeal you could open up p.17 and look at para.62 and put that side by side with para.76 this will explain why 76 was written in the way that it was – 62 was a specific submission that:

> "The Final Commitments [although they] seek to address the … restrictions on discounting contained in the Relevant Price Agreements, they create a new market equilibrium that is potentially worse than the existing one",

and the response in 76 is "There wasn't any evidence that the Final Commitments would be potentially worse or evidence that such a new market equilibrium would emerge". So this was, again, it makes precisely my point that this was responding to a submission in the Notice of Appeal, that "The commitments make things worse", and the response is, "No, they don't make things worse", and that is why para.76 is addressing the before and after situation because that was the submission that was being put to it by Skyscanner. So, that is all I needed to say on the counterfactual. After the break I am going to get to the grounds of appeal.

MR WILKS: One last point before we leave the Decision, if we are doing – just in the Decision itself I am having a little bit of confusion about the relationship between competition concerns and the Statement of Objections. In 6.61 of the conclusion, the Decision says, "The OFT considers that the final commitments address its competition concerns".

In 6.43 the OFT's competition concerns are set out in the Statement of Objections, but you have referred far more to theories of harm. Can we regard the competition concerns as equivalent to the concerns that are laid out in the Statement of Objections?

MISS BACON: Yes, and the reason why I have referred to theories of harm is it is a way of describing the different competition concerns that were raised in the Statement of

Objections and in the decision. In the statement of objections those two theories of harm were the competition concerns raised.

What the Statement of Objections also said was two other things:

* The first was this point about restrictions being replicated elsewhere in the market, and I showed you where that appeared also in the Decision, and the comment was made in the decision that the OFT had not investigated this. Obviously it had this in mind as part of the background to its investigation.

* The second further point made in the Statement of Objections when it set out the competition concerns was a similar point and it was about rate parity or MFN provisions and again there the Statement of Objections dealt with this in much the same way, and I can take you to – would you like me to do this now? I was going to come to it anyway.

MR WILKS: It is a slightly semantic point, but your point being they are fully addressed.

MISS BACON: No, actually, I am not. I was actually going to say that the MFN point, the OFT dealt with it in the same way as it dealt with the point about the replication of these provisions elsewhere, which was by saying they had not investigated it. The OFT did not pursue the MFN point as a separate competition concern. That is why it is not dealt with in the theories of harm in section 6.

THE CHAIRMAN: I suppose the question arises, do the OFT/CMA's concerns (they are set out in the Statement of Objections, everybody agrees that).

MISS BACON: Yes.

THE CHAIRMAN: Do they then remain immutable throughout the process leading up the commitments? Or can the OFT/CMA decide that some concerns are more important than others and the more important ones are the ones that need to be addressed in the commitments?

MISS BACON: The answer is at a theoretical level, no, they are not immutable, they are provisional. But as a matter of fact I think there may be some misunderstanding about the way in which the point was put in the SO. We are not saying that in this case the MFN point was set out as a competition concern that was being pursued in the Statement of Objections. What the OFT did, and I was going to come to this, it was one of my submissions under the grounds of appeal, the OFT said, "We are aware of this. It may have the potential to exacerbate these restrictions, but we have not investigated the extent to which that is the case, and in the Decision it makes this point we are not pursuing MFNs as a separate concern, we are addressing in this Decision and in this investigation the restrictions on discounting alone.

THE CHAIRMAN: When you refer to 'provisional concerns' which were in the SO and then talk about 'fully addressing' are we saying that we fully addressed the provisional concerns in the SO, or are we saying that we fully addressed the concerns that existed at the time of the Decision and which may have been modified or allayed during the consultation process?

MISS BACON: Again, there are two answers. At a level of abstraction the OFT could do both, in this case we are saying they fully addressed the competition concerns as set out in the SO. The specific competition concerns were the two theories of harm, and the OFT made clear in the SO and in the Decision that it was not pursuing the point about MFNs as a separate competition concern at all, it had not investigated the extent to which that was the case. I am going to deal with the MFN point.

THE CHAIRMAN: We look forward with anticipation, thank you.

(Short break)

MISS BACON: Sir, the way I propose to deal with my submissions on the grounds of appeal is as follows: I am going to address five points. The first was whether the OFT's Decision was procedurally unfair, whether by failing to take account at all of Skyscanner's concerns, or by not setting out its reasons sufficiently.

The second is whether the commitments have the effect of creating a restriction of competition, particularly in relation to metasearch sites, that the OFT was obliged to investigate or consider further.

The third is whether the commitments had as their object a restriction of competition.

The fourth is the MFN issue, which relates to the discussion which we were having just before the short break; and, finally, the third party point, whether the Decision was *ultra vires* by imposing binding requirements on third parties. I anticipate I will not need to say very much about the last two points, but I will address those.

THE CHAIRMAN: You are going to leave it to us to decide which grounds those points fall under?

MISS BACON: I can tell you: point 1 is essentially Skyscanner Grounds 2 and 3. Point 2 is Skyscanner Grounds 2 and 3, but mainly Ground 3. Point 3 is Skoosh's argument, although I note that Miss Smith, to some extent, adopted that in her submissions yesterday. Point 4 is Skoosh's argument about the MFNs which we say was not raised at all by Skyscanner and it is inadmissible but, in any event, it is wrong. Point 5 is Skyscanner Ground 1.

THE CHAIRMAN: Thank you.

MISS BACON: Starting with the procedural issues. The CMA's position is that the OFT did conscientiously consider Skyscanner's concerns, as well as providing Skyscanner with a sufficient explanation of its position within the case law on reasoning. The starting point is

that two respondents had already raised the issues of metasearch in the first consultation. So what Skyscanner was saying was not entirely new and Rasmussen 1, para. 30 notes that the OFT had considered those two comments at the time already and we have seen the actual responses, the two paragraphs – I do not need to take you to them.

Skyscanner then put in its written response on the last day of the consultation and that is in core bundle 1, tab 2, exhibit CJ8 – I do not suggest you turn it up. Three days later, Skyscanner had the meeting with the OFT on 20th January, that is the subject of some disputed evidence. It is clear that there is some disagreement about exactly what was said at that meeting.

Miss Jameson says that the CMA presented the Decision at that meeting as a fait accompli. That is vigorously denied by Mr Rasmussen, he says, not surprisingly, that if Skyscanner had turned up at that meeting with further evidence the CMA would, of course, have considered it. I think I just need to take you to, or perhaps even read out one paragraph of Mr Rasmussen's second witness statement, which is at the end of the second core bundle. I have it at tab 25.

THE CHAIRMAN: You are not taking any point on the fact that the response came in on the last day of the consultation?

MISS BACON: No.

THE CHAIRMAN: It is quite common, parties often have responses on the last day, that is in their nature.

MISS BACON: No, I do not take any point on that at all. I am certainly not saying that because it came on the last day we gave it less weight. We did not, we had a meeting with Skyscanner after the end of the consultation because we were anxious that Skyscanner should have the opportunity properly to put its concerns to us. In respect of the 20th January meeting Mr Rasmussen says at para.9 of his second witness statement:

> "Third, I do not accept Ms Jameson's assertion that the OFT did not make it sufficiently clear that it would pause the decision making process if Skyscanner had provided us with evidence. By the time of the 20 January meeting the OFT had already reviewed the Skyscanner Response, and I told Skyscanner that it had provided arguments but not data. I told Skyscanner that if it had evidence to back up its arguments then it should provide that evidence to the OFT. Had such evidence been provided, the OFT clearly would have taken it into account before reaching its decision; as far as I am concerned, this was clear to Skyscanner at the meeting. Skyscanner did not, however, provide any further evidence, nor did it indicate that it intended to do so. Indeed, as I explained in

> paragraph 42 of Rasmussen 1, the OFT heard nothing further from Skyscanner until it received an undated letter on 13 March 2014."

So that is what Mr Rasmussen says. Although we maintain his account is an accurate one of what happened at the meeting, for the purposes of the procedural challenge our submission is that nothing turns on this factual dispute, and you do not have to decide it. What is clear is that Skyscanner was told at the meeting that they had presented arguments but not evidence, or perhaps as I better phrased it earlier, material in support, and that is explicitly recorded in the CMA's notes of the meeting. Miss Smith very fairly accepted that it was recorded there.

This shows two things, leaving aside the factual dispute. The first is that the OFT certainly did consider Skyscanner's representations and went to the trouble of effectively extending the consultation period by allowing Skyscanner to meet it after the consultation period had closed. Secondly, it did tell Skyscanner at that meeting what it considered to be the problem with what Skyscanner had submitted, namely that what Skyscanner said was assertion and was not supported by any other material.

After that, matters did not stop there, because there was then the meeting on 26th March with Skyscanner shortly before Skyscanner brought its appeal. I do not suggest you go to this, but for your note the attendance note of that meeting is at exhibit CJ17 at tab 2 in core bundle 1.

After that meeting on 26th March, for the avoidance of any doubt, the OFT wrote to Skyscanner essentially putting in writing what had been said at the meeting of the 26th. I would like you to turn that up. It is at the following tab, exhibit CJ18. On p.389 the letter records the OFT's comments that it had taken the representations it received from Skyscanner into account and explains why the OFT did not decide to pursue those further at this stage. The OFT explains that Skyscanner had raised a concern about inter-brand competition. That had been considered generally in certain paragraphs of the Decision that are set out, and then at the bottom of the page:

> "… your client's second concern about the effect of the revised set of proposed commitments on metasearch providers was raised during the OFT's second consultation [by Skyscanner]. As noted in your letter, that argument was identified and acknowledged in paragraph 66 of the Annexe 3 to the Decision."

Then the OFT explains why it took the view that it did in the following paragraph, and this is on p.390:

> "The OFT carefully considered all of the representations that it received, including Skyscanner's arguments, and took the Decision on the basis of the

evidence before it. The OFT ultimately concluded that neither Skyscanner nor any of the Companies had put forward any evidence that there would be the harm to metasearch sites of the kind described in your letter and the Companies' joint letter."

The "Companies" is referring to a joint letter from Skyscanner and various other companies that had been sent to the OFT.

"Indeed, as noted above, your client recognised at the 26 March meeting that it had not identified any competitive impact of the Final Commitments on its business to date. Furthermore, even if the Final Commitments drive some traffic away from metasearch providers, there is no evidence currently before the OFT that such changes in traffic would necessarily lead to consumer harm."

Then the OFT explains ----

THE CHAIRMAN: What does that actually mean? Does that mean that consumers may benefit in the round from the commitments, even if Skyscanner's business model is damaged?

MISS BACON: Yes, that is what the OFT is saying. Then the OFT says at the end of the following paragraph:

"… the OFT/CMA is and remains open to receiving any evidence from Skyscanner or any other interested party that shows the actual or likely impact of the Final Commitments on other OTAs, metasearch engines, and - in particular - on consumers. The OFT will naturally look at any such evidence carefully and consider what action, if any, might be appropriate, including its powers under section 31B(4) of the Competition Act 1998."

So the OFT was thereby clarifying to the extent that it needed clarifying the basis for its decision in relation to Skyscanner's submissions. As I said, it was simply there repeating what had already been said at the 20th January.

Miss Smith, I think, makes the submission that anything after the Decision is completely inadmissible, as explaining the reasoning for the OFT's Decision. In our submission, that is simply contradicted by the case law, including the specific cases I took you to earlier this morning, *IBA* and *Porter*, as well as *Bank Mellat*, which show that it is possible to refer to other contemporaneous materials and indeed subsequent witness evidence in court elucidating the grounds for the Decision. Neither Skyscanner nor Skoosh have suggested that what is said in any of this, in the letter of the 28th or in Rasmussen, contradicts what is said in the Decision and is actually an attempt to put forward different reasons that were not in the minds of the OFT at the time, and nor could they because, as I have said, the point

about the lack of evidence was made to Skyscanner on the 20th before the decision was taken.

What Skyscanner does say, rather than saying that this contemporaneous material is contradictory, is that some of what we say is *ex post facto* rationalisation. This was a point that was in their skeleton argument and repeated yesterday by Miss Smith, and she was referring specifically to para.76 of the defence. It is perhaps helpful if you would turn up para.76 so that I can explain why this is not *ex post facto* rationalisation. The defence is in core bundle 2, tab 12, and 76 is at p.575. To explain why this is not *ex post facto*, 76(a), and I will go through these quite quickly, makes a point that consumers can continue to compare headline room rates as they would have been but for the final commitments. That is just a statement of what the commitments do, it is not a statement of *ex post facto* reasoning. The second sentence is 76(a) is:

> "Consumers will also now benefit from OTAs publicising information regarding the variety of discounts to (among others) price comparison websites …"

That is a point that is made in the Decision, it is not *ex post facto* at all. The footnote reference shows where it is, it is at 6.12 of the Decision.

76(b) is a reference to the consumer survey evidence, and this was not only before the OFT when it took the Decision, but it was also specifically referred to in the Decision. Just for your note that is at annexe 3, paras.31 to 32 of the Decision. So this is not *ex post facto* either, 76(c) is a comment that there was no evidence for Skyscanner's theory that consumers will not use metasearch, and that is a comment on the absence of material before the OFT, not a positive statement of something that has not been referred to before. But in any event, as I have said, the same point was made in the meeting of 20th January before the Decision was adopted.

And the final point at 76(d) is a comment that even if there was some negative impact on price comparison sites, it would be important to consider whether this would ultimately result in detriment to consumer welfare. Again, that is simply a comment on the absence of material before the OFT at the time of the Decision rather than coming up with something novel. So, in my submission there is no plausible objection in any of this that the OFT simply ignored Skyscanner's contentions, or that it did not give them conscientious consideration, it clearly did. Nor is there any tenable objection that the OFT has not sufficiently explained the basis for its Decision overall, taking the Decision overall together with the other matters of which Skyscanner was aware and taking that together with the clarifications if such were needed in the meeting of 26th and the letter of 28th.

And there is certainly nothing in the Decision or in the defence or in the witness evidence of the CMA which suggests that the OFT simply rejected Skyscanner's contentions as being irrelevant, as Miss Smith claimed yesterday. And there is a fundamental difference between a submission being irrelevant which is not what we said, and a submission being relevant in principle but unsubstantiated, which is what we said. So, we did not consider that what Skyscanner were saying was irrelevant, we considered that what it was saying was unsubstantiated.

THE CHAIRMAN: And you are saying that you explain that adequately either in the Decision or in correspondence or at meetings?

MISS BACON: Absolutely, yes.

THE CHAIRMAN: And it is not your job to investigate it. Not your job to investigate something that you regard as implausible?

MISS BACON: No, I would not put it that way. We are not saying that it was implausible. We are not saying that it was fanciful. What we are saying is that it was relevant and it is conceivable in theory that there could be some harm in the way that Skyscanner is suggesting. So, it gets over a threshold of plausibility. What we are saying is, though, it is conceivable there was not actually any material to suggest this is what actually would happen, and on that -----

THE CHAIRMAN: It is the complainants' job to investigate and provide the material and not the authority's. That is what you are saying?

MISS BACON: What I am saying is if a complaint is made that commitments that we are accepting will have an effect on competition in a particular way and nothing before us, whether put forward by the complainant or whether gathered on the basis of our own market intelligence or gathered on the basis of the consultations suggests that this is actually something that is likely to happen, and we can make a judgment as to whether we pursue that further, and in this case we made that judgment and it was a rational one.

THE CHAIRMAN: So all these companies that we have never heard of, that you mention in the letter of 28th March, Momondo, Wegotravel and, presumably metasearch companies, none of them presented any evidence either during the enquiry or afterwards?

MISS BACON: No. No, the companies that are mentioned in that letter sent a letter to the OFT after the Decision.

THE CHAIRMAN: But they have been asked for comments in the same way that Skyscanner were and none of them contributed anything?

MISS BACON: We proactively consulted Skyscanner and, well, there is this issue about whether we did so adequately, whether we clicked the right button on their website, but the OFT had

taken steps to consult Skyscanner proactively. All those other companies could equally have submitted comments during either of the two consultations and none of them did. Skyscanner was the only metasearch provider to submit comments in either of the two consultations, and it did so, as I have said, on the last day of the second consultation. No metasearch provider submitted comments in relation to the first consultation. That is one of the reasons why we said, "Look, it wasn't something that we had an enormous body of submissions and intelligent fact, evidence, whatever you – different kind of material that the OFT might have before it in a process of, a consultation process. This was not that kind of case.

THE CHAIRMAN: Although you did know it was 20 per cent of the market, that metasearch was 20 per cent of the online travel market. Was that the figure I believe was quoted yesterday?

MISS BACON: That figure was in a report that is in Skyscanner's evidence. As far as I am aware that report was not before the OFT and I did ask. That report was not before the OFT. It was not submitted by Skyscanner during the consultation, so I cannot say that we had that figure in mind, no.

MISS SMITH: The previous year's report, that particular market report, was referred to by the OFT in the SO, so the OFT -----

THE CHAIRMAN: PhoCus?

MISS SMITH: Yes, PhoCus. Obviously it is the report for that industry, and the one I referred to was published in September 2013 between the first consultation and the second consultation.

MISS BACON: So, in our submission the real objection of Skyscanner is not really that we did not sufficiently consider their concerns or that we did not give reasons for rejecting their concerns, but rather that we were wrong to reject their concerns, and that is the second point that I wanted to address concerning the grounds of appeal. Whether this is formulated as a rationality challenge or whether it is formulated as a legal challenge based on the policy of the 1998 Act, the thrust of Skyscanner's case is the OFT should have accepted its submissions about the adverse effect of commitments on metasearch. And our response is that the OFT's decision was entirely rational and cannot be impugned in the present judicial review challenge. As I have just said in my exchange with the chairman, we are not saying that Skyscanner's concerns were completely fanciful or not genuinely held, we are saying that simply showing that an assertion of possible future competitive harm is not fanciful, or in other words "get over the threshold" is not good enough, and that is because the OFT could not, and the CMA cannot now, make the acceptance of commitments dependent on a full investigation of every non-fanciful, or to put it in other words plausible, suggestion that

is made about the possible effects of commitments. What the CMA has to do, and this is the point I have just made, is exercise judgement about whether the material before it indicates that it should be investigating a particular point further. And you will recall Advocate General Kokott, in the paragraph I took you to yesterday, that a judgment in this kind of case involves the predictions as to what, will or might be the future effects of a commitment. So, this is inherently an issue on which there cannot be a right or wrong black and white answer as such, but rather an answer which in judicial review terms is either rational or irrational. So, the question is whether in relation to a particular concern raised by an interested party and on the material before the OFT, it would be irrational for the OFT to accept the commitments without investigating further in some way. And in our submission Skyscanner may and does disagree with our conclusions, they do not come close to showing that our conclusions were irrational in the sense of perverse and illogical.

And you have the point that we concluded that there was no material suggesting positively that the commitments would have an adverse effect on metasearch sites. And I have also trailed the point that if anything Skyscanner's claims were contradicted by our understanding of the market.

First of all, although Skyscanner was concerned about the viability of the metasearch model if discounts were offered in a non transparent way, the OFT was aware that there were closed groups already in use in the hotel sector, but there was – and this is a point I made earlier this morning – there was no claim that those existing closed groups had caused any harm to the metasearch model. I appreciate that perhaps Skyscanner would say, "Well, we can't show that because we've only recently started up our hotel business", but no-one else suggested that either.

THE CHAIRMAN: Were these the same sort of closed groups as the ones that are now in existence as a consequence of the commitments?

MISS BACON: My understanding is that in broad terms they are, there are things like hotel own loyalty schemes. Perhaps they did not operate in precisely the same way but they were schemes where you were a member of a loyalty group, operated by a hotel, and many hotels had them, and you were able to get some discount or reward through that loyalty group and those would not have been transparent or visible to Skyscanner and other metasearch sites.

THE CHAIRMAN: Are you aware that they contain the same restrictions on specific disclosure as these commitments?

MISS BACON: I am having shakings of head behind me, so ----

THE CHAIRMAN: Is that 'doesn't know' or 'no'?

MISS BACON: I think probably 'no' as in the loyalty schemes didn't operate in exactly the same way, but the general point being made was that there were closed groups. Those entailed the offering of discounts that were not transparent, and that is the point that is being made by Skyscanner.

THE CHAIRMAN: I think we need to understand what is meant by "not transparent", particularly in the light of the points you put to us earlier this morning.

MISS BACON: Not transparent in the sense that they were not advertised on metasearch sites such as Skyscanner.

MISS SMITH: There is absolutely no evidence on that, we do not accept that.

MISS BACON: Rasmussen 1 makes the point at para. 30 that the OFT was aware of closed group schemes, and those had not affected metasearch sites anyway.

THE CHAIRMAN: I am aware of that but I think we also noted the point in the Statement of Objections, which describes these schemes as very narrow and niche ----

MISS BACON: I was going to come on to that point.

THE CHAIRMAN: -- not really very significant.

MISS SMITH: Rasmussen para. 30 says nothing about whether they included advertising.

THE CHAIRMAN: That is okay, I think I have that point. Can we have one at a time, please?

MISS BACON: I was going to come on to the niche point. I am not saying that this was all the OFT had before it. All I am doing is going through what we did know which, if anything, suggested that Skyscanner's concerns were not necessarily well founded, and the first point was that there were schemes already operating in the sector. I completely accept that, as Miss Smith said yesterday, and as the statement of objections said, these were niche offerings. That is why the OFT said at several points in the Decision that it could not predict with certainty how these commitments would work. The point, though, was, that on the information before the OFT there was nothing to indicate that metasearch had been fundamentally harmed by the various non-transparent methods and, of course, they included not only closed groups, but things like opaque channels, nothing to indicate that metasearch model had been fundamentally harmed by the non-transparent methods of discounting that were already on the market.

Skyscanner was also concerned, for example, that consumers would not be likely to multi-home, and this is articulated in the first witness statement of Miss Jameson at paras. 42 to 43, and the point seems to have been made, and a concern raised, that consumers would not bother with metasearch sites in the future. Again, the material before the OFT including its consumer survey which indicated that consumers were not overly concerned with the idea

of closed group discounting, saw themselves generally as likely to join in a closed group and were mostly open to joining multiple groups, and that is the Opinion Leader report. Again, we are not elevating this to a point of decisive importance. We are simply saying we did commission this consumer survey, it was to get a flavour of the consumer reactions to the concept of closed group discounting if it were embodied and enshrined in the commitments and the idea of multi-homing. It is true, this is not a large scale survey of consumer views, and we have never pretended that it was. The objectives were to gauge the general reactions to the idea of closed groups and whether multi-homing was something that appealed to consumers, and within those parameters, in terms of what the OFT was seeking to do with this consumer survey, the survey tended to contradict Skyscanner's claim that consumers would not multi-home.

THE CHAIRMAN: I was going to say you are getting quite close to saying the CMA did not believe Skyscanner?

MISS BACON: No, I am not saying, and I would emphasise, we are not saying that Skyscanner's concerns were implausible or fanciful. I made the point that there was no positive evidence suggesting that they were likely to be correct ----

THE CHAIRMAN: You are saying it was not consistent with other evidence here that the OFT had?

MISS BACON: Exactly. Insofar as we had other material that had a bearing, and I am not saying we had conducted some massive consumer survey, but the material in front of us that had a bearing on the concerns that Skyscanner raised tended to contradict them.

In those circumstances the OFT was entitled to say: "We have considered the concern when it was raised in the first consultation. We have considered it again when it was raised by Skyscanner in the second consultation. At the moment, on the material before us, including all of the responses to the consultations, including the consumer survey we commissioned, we have nothing indicating that this is likely to happen, that metasearch sites are likely to suffer competitive injury as a result of the principles, and the commitments. We therefore do not consider that this concern undermined the appropriateness of the commitment, and therefore the OFT was entitled to say: "In the circumstances we are going to draw a line, and we are exercising our judgment" – because it is a matter of judgment – "not to pursue the matter further before accepting the commitments, but we will keep the situation under review and we will be receptive to anything that Skyscanner, or anyone else, provides to us concerning the effects of the commitments", and that is what the OFT did say and in our submission that was an entirely rational decision for the OFT to take.

The striking point is that in bringing this challenge, whether it is based on rationality or legality, Skyscanner has not shown the Tribunal anything positive that was before the OFT when it took its Decision that indicates that its Decision was irrational in the sense of perverse or wholly illogical. In other words, Skyscanner has not pointed to some smoking gun before the OFT that indicates that it is concerned about the future predicted harm to Metasearch or plainly something which we should have taken more seriously.

THE CHAIRMAN: But the position you have outlined is a little like a doctor saying: "Let's see if the patient dies and then we'll take it seriously" – is it not a bit like that?

MISS BACON: No, that is not what we are saying. We are saying that this predicted effect was not supported by anything in front of us. If anything, the material that we did have tended to contradict the concerns that were being raised. However, we will keep it under review. I come back to my point: it would be impossible to accept commitment if, in every case, a respondent to a consultation was entitled to come along to the OFT and say: "We think this is going to cause some harm down the line" and that posited harm is not supported by anything that the OFT has in front of it on the basis of its own understanding of the market, or on the basis of two consultations.

THE CHAIRMAN: I think we have the point of what you are saying.

MISS BACON: Yes. My point I just made was that there was not anything positive, but what Miss Smith does rely on, and I need to deal with, is there are four reasons why, even in the absence of evidence, it was unreasonable for the OFT to reach the decision that it did. The first is her point about the OFT expecting Skyscanner to provide evidence, and she said it was something for the OFT itself to gather. The answer is that the OFT was, and the CMA is a specialist regulator but it is not omniscient, and if a respondent to a consultation comes forward with a claim of potential future competitive harm that is not substantiated by what is before the OFT, it is entirely reasonable for the OFT to decide not to place weight on that in deciding whether to accept the commitment.

The second point that she makes is that, in any event, some of what the OFT was expecting in terms of evidence or material was impossible to provide because Skyscanner would need to wait and see how the market developed. That, with respect, points in favour of the approach that we adopted, which was to say we do not have anything currently before us indicating that the commitments are likely to harm metasearch sites, but we accept it is difficult to predict so we will reduce the period of commitments from three to two years and we will keep the commitments and their operation under close review.

The third criticism is she says if the OFT wanted anything else from Skyscanner they should have asked for it. The answer is a point that I have already made about drawing a

line. We had two consultations. We met Skyscanner after the second consultation had closed. It was not unreasonable to decide after that meeting to take the decision on the basis of the material before the OFT. It is not incumbent on the OFT to keep going back to respondents to a consultation for ever and a day asking them for more information on the points that they have raised.

THE CHAIRMAN: Just on the two years, I thought that was in response to concerns about barriers to entry, or have I misunderstood?

MISS BACON: The three to two years was an amendment made in relation to the comments made after the first consultation. So the amendment was made in the second consultation process.

THE CHAIRMAN: That cannot have been a reaction to Skyscanner.

MISS BACON: It was not a specific reaction to Skyscanner, but what I am saying is that it mitigates the effect of what Skyscanner are saying, because the OFT is saying, "In any event, we are keeping this under review, and we are going to ask for an annual report and we will monitor the situation and at the very least there is a longstop date of two years".

THE CHAIRMAN: Trust the doctor.

MISS BACON: There is a point that the OFT was not saying it is just going to let the patient die because it said in its letter of the 28th, "We will specifically receive any evidence that you may submit to us", so if the patient has come along and said, "I am actually now ailing", it is not a suspicion that I might get the flu, I have actually got the flu. The OFT said, "We remain open to receiving any evidence from Skyscanner or other interested party that shows the actual or likely impact of the final commitments", and the OFT will naturally look at such evidence carefully and consider what action may be appropriate, including the powers under s.31B. So the OFT said in a letter explicitly it would not rule out reopening the consultation if Skyscanner came to it with something that indicated in concrete terms either that there was an actual harm to competition or that there was likely to be, but at the moment on the evidence before the OFT it did not have that.

THE CHAIRMAN: So that is reopening the consultation?

MISS BACON: Yes.

THE CHAIRMAN: Not reviewing the operation of the commitments in two years time?

MISS BACON: The OFT said several things, firstly, the Decision provided that the commitments were only going to last for two years and at that point it was going to review. The Decision also provided for annual reports. In the letter to Skyscanner the OFT made clear that if Skyscanner did come forward with further evidence the OFT remained open to the idea of reopening the consultation.

THE CHAIRMAN: Was this the March letter or the January letter?

MISS BACON: That is the 28th March letter.

THE CHAIRMAN: So from that time the commitments are already in force?

MISS BACON: They are already in force, yes.

THE CHAIRMAN: Does the OFT have the power to reopen the consultation?

MISS BACON: It is reopening the investigation under s.31B.

THE CHAIRMAN: I have a very clear impression that the OFT intended to keep under observance. I do not think that is in dispute. The question is whether that is enough or not.

MISS BACON: The OFT was certainly not saying, "We will only take further action if the patient has actually died". The OFT was very concerned that the patient should not be allowed to die.

THE CHAIRMAN: Keep the patient alive by all means.

MISS BACON: The final point that is made by Miss Smith about the OFT's reasonableness in the absence of evidence was that, in any event, she said Skyscanner's claims about the effects on metasearch sites were - and I am relying on Mr Bailey's note here - obviously and self-evidently detrimental. It is a point that you did not evidence because this was intuitively correct. With respect, that submission is too simplistic. I accept that principle 19 means that an OTA will not be able to advertise the precise discount on a metasearch site, but it is not obviously and self-evidently detrimental - here we go, it is transcript of Day 1, p.45, line 33, "self-evident detrimental impact". It is not self-evident that the restriction on advertising the precise discount on a metasearch site as opposed to, for example, advertising the fact that there is a discount, but unspecified, will drive consumers away from metasearch sites. I have already made the point which was referred to in the Decision itself at para.74 that OTAs can still advertise the fact of the discount, just not the specific rate of the discount. That is the first point.

There was a submission yesterday that this is not good enough because metasearch sites aim to provide a one-stop shop and that is what consumers want. So if you cannot get that one-stop shop, you are not going to use the metasearch site. It has never been the case that consumers have understood metasearch sites as providing a one-stop shop giving the prices offered by every single hotel across the market. Skyscanner itself does not claim to provide a complete one-stop shop on all hotels. Miss Jameson in her first witness statement at para.11 says:

> "In the hotel price comparison segment, pricing data is obtained under agreements Skyscanner has directly with hotels, or with OTAs or affiliate networks."

So it is dependent on Skyscanner concluding agreements with hotels. As Skyscanner said to the OFT in its meeting on the 20th, its activity in relation to hotels only started in September, and its sales team was still trying to sign hotels up. So it is not that a metasearch site will necessarily provide information on everything anyway.

THE CHAIRMAN: It might make it a bit harder. I think one thing that puzzles us, or may puzzle us, is, why is the restriction on disclosure in principle 19 essential for the operation of the commitments?

MISS BACON: The restriction on disclosure was there because of the idea of closed groups. Closed groups were accepted as an appropriate way forward. The OFT has never said this is the only way forward.

THE CHAIRMAN: I think you said before that closed groups that existed previously do not have this restriction necessarily.

MISS BACON: As far as I understand it, it is not necessarily the case that every closed group out there in the market before had precisely the same restrictions. We have not put in evidence any comments on the specific restrictions in the previous closed groups. What we have said is that there are closed groups there and we did not have evidence that they had harmed metasearch.

THE CHAIRMAN: It may be that you cannot answer my question, but I am just asking why in these commitments was a restriction on the specific disclosure of the actual discount regarded as essential?

MISS BACON: It was there to make the concept of a closed group work, and specifically in the context of the MFNs. The MFN idea, as I have said, and I am going to take you to the MFN point, the fact of MFNs was one of the reasons why the OFT was conducting the investigation. It was part of the factual background. The OFT in this case did not pursue the MFN arrangements, it pursued the discounting arrangements, but it still formed part of the relevant context. That was the reason why the idea of a closed group was put forward and that was the reason why there was a restriction on transparency, because otherwise the rates would be visible across the board and the MFNs would then kick in.

I am just being told, Mr Bailey is pointing out that this particular point is explained in para.17 of Rasmussen 2. He says one aspect of the relevant context was the prevalence of Rate Parity obligations.

> "This created a risk that hotels offering MFNs would refuse to deal with OTAs offering discounted public rates given the potential cost of honouring the hotel's MFN, and in that context a mechanism was proposed to allow OTAs and hotels

to offer discounts that would not be publicly available and thus not subject to MFNs and this mechanism was the closed group."

THE CHAIRMAN: So because of the existence of Rate Parity obligations another restriction has to be included in the closed group concept to make it work - is that what you are saying?

MISS BACON: That was what was offered by the parties, and the OFT did not consider that that was inappropriate. It considered that would be workable, given in particular the provision that says that the OTAs have to be free to advertise the fact of the discount, what they cannot do is advertise the specific rate. However, you can get the specific rate by becoming a member of the closed group, and deliberately the threshold condition for entry to closed group was designed to be as low as possible.

THE CHAIRMAN: We saw from Mr Italianer's speech at Innsbruck that the CMA could have followed the German approach and actually tackled the rate parity issue head on, but it chose not to do that?

MISS BACON: The German approach was to attack the MFN provision, the OFT's approach was to look at the discounting restriction. So there are two different mechanisms of addressing the issues in this market place. This is not a challenge to the OFT ----

THE CHAIRMAN: It is not a competition between competition authorities, I know that.

MISS BACON: This appeal is not a challenge to the scope of the CMA's investigation.

THE CHAIRMAN: I know that too.

MISS BACON: I am simply answering the question as to why they were. As I have pointed out, it is in Mr Rasmussen's evidence.

MR WILKS: Although MFNs were highlighted in the Statement of Objections.

MISS BACON: I am going to come to that. They were highlighted in the Statement of Objections as part of the relevant context which was why the OFT was opening in this investigation. What the OFT said in the Statement of Objections was that it was not, it had not investigated the extent to which MFNs did exacerbate these restrictions of competition, and it is common ground, undisputed, that the focus of the OFT's investigation was not on MFNs, it was on the discounting restrictions, it was on what was regarded as RPM.

THE CHAIRMAN: Just to go back to para.17 of Rasmussen, it says specifically that it was necessary to ensure that prices were not publicly available. But what you were saying earlier is that joining a closed group was so unonerous that you could join several, that a member of the public could easily find the price.

MISS BACON: Yes.

THE CHAIRMAN: So, it is publicly available.

MISS BACON: No, but the fact of joining a closed group did not trigger the MFNs, so you can find the price and it is easy to find it by joining the closed group, however, if the rate had been advertised on a price comparison site, that would have triggered the MFN.

THE CHAIRMAN: So the point of this restriction is specifically to stop price comparison sites making information publicly available that is in effect publicly available to anybody who wants to join a closed group.

MISS BACON: The point of the restriction is to stop the MFN being triggered.

THE CHAIRMAN: And that is to do with the way that the wording of the MFN -----

MISS BACON: Yes, it is not about preventing metasearch sites from carrying on their business. The specific reason for the restriction is to stop the MFN being triggered in circumstances where the OFT had decided to focus its investigation on the discounting restrictions rather than the MFNs.

THE CHAIRMAN: So, it is not to keep the prices secret from the public.

MISS BACON: No.

THE CHAIRMAN: It is to keep them secret from the metasearch sites.

MISS BACON: No. And that is why the OFT makes the point in the Decision that the threshold for joining the closed group, that is the footnote 10 which we were discussing earlier, is set to be as low as possible. It is not about secrecy of the discounted rate because you can get that. You, as the consumer, can get that discounted rate up on your screen when the actual rate, not merely the fact of a discount, when you join a closed group.

THE CHAIRMAN: So, the only impact is to stop metasearch sites publicising that rate.

MISS BACON: The impact is that the metasearch sites cannot publicise the actual rate.

THE CHAIRMAN: The actual rate, yes.

MISS BACON: The actual rate. And therefore it does not trigger the MFN.

THE CHAIRMAN: And the argument is that this does not damage the consumer in the round because the consumer benefits from the other effects of the commitments, even if there is some detriment, unintended detriment, to metasearch sites.

MISS BACON: Two, yes, two points:

* firstly it does not damage the consumer because of the increased competition because there is discounting competition.

THE CHAIRMAN: That is a weighing of the balance, is it?

MISS BACON: Well, it is both. It addresses the competition concern because there is price discounting in the market; and it addresses the second theory of harm because it encourages new entry, allows new entry because a new entrant OTA can compete on price, whereas before they could not compete on price, there was no scope at all for competing on price,

because of the way the agreements worked, there was a fixed retail rate set by the hotel. So it addresses both of the theories of harm and the idea is that this is not undermined by the residual restriction or condition if you like which is not considered to be a restriction on competition.

THE CHAIRMAN: I understand what you are saying,

MISS BACON: And the other point is of course that although this was very much the OFT's concern, that although it means that the metasearch site cannot display the actual rate, the OFT did not consider that this would actually harm the business of the metasearch model or competition generally there because it did not have anything indicating that because the actual rate was not able to be displayed on the metasearch site, the price comparison site, consumers would be driven away from those sites.

THE CHAIRMAN: It could not decide one way or the other; on your proposition it had no evidence either way.

MISS BACON: Absolutely – because this had not been prevalent before, the OFT just simply could not take a view on whether this was going to harm that model. It was not intuitively and obviously correct that the metasearch model would be harmed, because consumers would still be able to go to the metasearch site, I could go to Skyscanner and look for hotels in a particular area and see that on a particular hotel there was a discount being offered by Expedia or Booking, and use that as a way to travel on the internet, click through to Expedia or Booking to see what specific discounted rate was available, and because it was essentially costless for me to find that out, I could do that.

THE CHAIRMAN: I am sure Miss Smith will have views on this in her reply. How are we doing for time? I know how we are doing for time. How are you doing in your argument?

MISS BACON: Well, how I am doing in my argument is for you to decide shortly, but how I am doing -----

THE CHAIRMAN: Well, quantitavely, not qualitatively.

MISS BACON: On a quantitative basis I think I have perhaps another hour, and I was due to finish by three-thirty, no, we were due to finish by three-thirty, so I am due to finish by two-forty-five. I will be finished by two-forty-five.

THE CHAIRMAN: So Mr Ward, how long do you need?

MR WARD: Well, sir, I am busy crossing things out that Miss Bacon has already said.

THE CHAIRMAN: Because they are untenable, or because they are already established?

MR WARD: Sir, I do not want to tire you by hearing them twice. I certainly will need less than 45 minutes.

THE CHAIRMAN: And you have time to reply. We will sit as long as it takes today. I think on that basis we might stop there, thank you. We will reconvene at two o'clock.

(Adjourned for a short time)

MISS BACON: Unless you have questions for me at the outset, I propose to move on to the third main heading in my submissions on the grounds of appeal, which is the object point.

THE CHAIRMAN: I think we would rather you proceeded.

MISS BACON: Good. So Skoosh says and, to some extent, Skyscanner adopts Skoosh's submission that what the OFT has done is to give its blessing to what is an object restriction of competition and our position is: this is categorically not the case. I have covered to some degree the relevant test by referring you to the *Cityhook* case. So, although both we and Skoosh have, to some extent, put our submissions in black and white terms in the sense that we say there definitely was not a restriction of competition by object, and Skoosh says that an object infringement was staring the OFT in the face, so those are rather stark positions, but the Tribunal does not have to give a black and white answer. You can give a grey answer, which is permitted by *Cityhook*, which is to say that as a matter of law there was or was not an object restriction. What was before the OFT did not make it irrational for the OFT to decide to accept the commitments, or you could say – although it would not be my submission – Skoosh would say you should say it was irrational for the OFT to accept the commitments in those forms, but it is a question of rationality rather than a question of black and white law.

Then if I turn to the substance of the point. Skoosh puts its case in an attractively and perhaps deceptively simple manner, that there must be an object restriction because there is still a residual restriction on discounting to the first time buyers. As Oscar Wilde said: "The truth is rarely pure and never simple".

THE CHAIRMAN: He said a lot of other things too.

MISS BACON: Yes, I was trying to find something more apposite to the hotel sector, and I did not find anything in the Importance of Being Earnest, but that was there. Identifying something as an object restriction is never a matter of simply picking out a single provision in a set of commitments and saying there is a bit of a restriction still there. That is not how the test for an object restriction works, particularly in a case, as in this case, where we are dealing with a vertical agreement rather than a horizontal agreement. I should then perhaps take you to some of the definitions of an object restriction in the guidelines and in the case law. If I could start by asking you to turn up the Commission's Article 81(3) guidelines as they were, and that is in the first authorities bundle at tab 6, and if you could turn to p.100 and look at paras. 21 to 22, there it is said that:

> "Restrictions of competition *by object* are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules."

Then down to para. 22:

> "The assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object."

If you then turn forward a few tabs to tab 11, something similar but not quite identical is said in the Staff Working document giving "Guidance on restrictions of competition 'by object'." This is the document that was adopted this year (June) only a month or so ago. If you turn to p.257 the middle paragraph contains a statement which is almost exactly the same as para. 21 in the Article 81(3) guidance that I have just shown you.

The next paragraph has a key difference, which is that the word "may" has become "must" in this document. So:

> "In order to determine with certainty whether an agreement involves a restriction of competition 'by object' regard must, according to the case law of the Court of Justice of the European Union, be had to a number of factors, such as the content of its provisions, its objectives …."

and then:

> "and the economic and legal context of which it forms a part."

Then, over the page: "In addition, although the parties' intention is not a necessary factor … the Commission may nevertheless take this aspect into account in its analysis."

So, whereas in 2004 the Commission were saying: "it may be necessary to consider the actual context now what is said", and that reflects the case law, "is that regard must be had to the economic and legal context of the restriction, and I will just show ----

THE CHAIRMAN: My view is that the second view was probably correct in 2004, but that is gratuitous.

MISS BACON: Yes, but I am just drawing your attention to the fact that this is now crystallised in the Staff working document, and then our submission – this is right ----

THE CHAIRMAN: Mr Sinclair referred us to *LTM*.

MISS BACON: Yes, in which exactly the same ----

THE CHAIRMAN: The full cycle.

MISS BACON: Yes. So at some point in the middle the view seems to have been taken that this was not mandatory, but it is the case, and just in case there was any doubt as to the current state of the case law I have included in the supplemental authorities bundle at tab 3 the *Allianz* case, a recent case within the last year.

THE CHAIRMAN: I think we are probably not going to be very much convinced with all this. We are meant to know all this – we probably do not, but there we are.

MISS BACON: The point then is it is not possible to establish that something has an anti-competitive object simply on the basis of an abstract formula or presumption and that is the point that was also made by Advocate General Mazak in *Pierre Fabre*. You cannot simply pluck one provision of the commitments in isolation out of context and say this little bit looks like an object restriction, which is essentially what Skoosh is inviting the Tribunal to do. You have to look at the commitments as a whole, consider their purpose, and consider them in their factual and legal context, a great deal of which I have gone […..?] this morning. Specifically in relation to principles 18(a) and (b), which was the way that Skoosh put its object case in its skeleton argument, those are addressed in detail in paras.58 and 60 of our skeleton argument, applying the legal test that I have just shown you to those principles. I would refer you to those paragraphs in my skeleton argument, which I am not going to read out, but perhaps I can just give you the highlights of the features that form part of the legal and the economic context that the OFT had in mind and that the Tribunal now needs to have in mind when assessing the submission.

The first is that the evidence before the OFT indicated that substantial numbers of hotel users in the UK did make repeat bookings of hotel rooms in a single year period of 2012. Of course, the OFT also had in mind that, to be eligible for discounts, the period of time is not confined to a single year. If you make a full price booking this year you will be eligible for discounts in perpetuity thereafter with that OTA. For that reason in particular, the OFT

did not think that the first booking requirement which is encapsulated in principle 18(a) would be an unduly onerous or restrictive requirement to trigger the discounts. It thought this was a reasonable requirement to trigger eligibility under the closed group mechanism. You will also recall the point that I made yesterday that addressing competition concerns does not require that all competition concerns be completely eliminated on day one. The key point in a market like this is that it is dynamic and evolving.

The second point is that the commitments permit discounts to be advertised to all members of closed groups. That is the point that we discussed this morning. So it is not the case, as I explained to you this morning, that first time buyers are in some way excluded by principle 18(a) from price competition. On the contrary, as the Decision explained in the passages that I took you to, the OFT considered that OTAs would need to try and attract first time buyers by offering them competitive discounts down the line. That is why the OFT considered that discounting into closed groups would actually benefit all buyers. More generally, the OFT expected that the discounting freedom would introduce and encourage new OTA entry. That was part of the reason that the OFT felt that the commitments, notwithstanding principles 18(a) and (b), would benefit first time buyers as well as benefiting the second or third time buyers.

The OFT also considered in para.6.53 of the Decision that I took you to this morning that completely unrestricted discounting might have harmful effects on OTA competition. So it was not obvious that complete discounting freedom was the most pro-competitive solution.

THE CHAIRMAN: That is a change from the provisional view in the Statement of Objections.

MISS BACON: I would not say that it is a change, but it is a point that was made in response to the arguments of the parties made in the course of the consultation.

THE CHAIRMAN: The Statement of Objections said that the agreements that had been identified as provisionally restricting competition were unlikely to benefit from exemption.

MISS BACON: I am afraid we are not talking about exemption here. The point that is being made in 6.53 is not an exemption point. It is a point that completely unrestricted discounting is not necessarily the most pro-competitive solution.

THE CHAIRMAN: I may be taking you off your chosen path, but if one is objecting to agreements which prohibit discounting effectively then, going back to our discussion about the counterfactual, you would expect the Authority's preferred solution to be the prohibition of those agreements, and, as we established in discussion earlier, the alternative would be absolute freedom to discount. So all I am saying is that the Authority must have evolved its assessment during the course of proceedings to come to the view that maybe totally free discounting was not altogether beneficial.

MISS BACON: Yes, you are right to say that, and, as I have just said, the OFT's thinking did evolve through the course of the procedure. That is perfectly legitimate. What I do not want to say is that, right from the start, the OFT had some fixed view that necessarily the correct remedy was going to complete discounting freedom.

THE CHAIRMAN: You have also told us that the concerns remained unchanged.

MISS BACON: The concerns remained unchanged. It is right to say, and particularly in relation to these arguments about potential efficiencies or potential harms, if there was a situation of unrestricted discounting, this was an iterative process through the two consultations.

I am relying on that now to show why, as part of the economic and factual context, the OFT did not necessarily consider that the most pro-competitive solution, the best solution, was one in which there was completely unrestricted discounting, which helps to show why, in contrast to that, it did not consider that there was necessarily a negative effect. In fact, it considered quite the opposite, that the commitments would be pro-competitive overall.

There is a further specific point regarding principle 18(b). Principle 18(b), if you recall, is the cap on discounting to the level of the commission, but it is not simply the level of the commission on an individual transaction. Principle 18(b) refers to the level of commission earned by that OTA on the particular transaction, or the aggregate commission earned for the relevant hotel property over the course of the time period determined by the OTA but not exceeding a year. The cap is not required to be set at the level of the commission on a particular transaction.

This particular principle was introduce to stimulate OTA entry. I took you this morning to the paragraph in the Decision which dealt with it, and explained that this was designed to protect new entrant OTAs from an aggressive response, for example, retaliatory deep discounting (para.6.50 of the Decision), and the same point is made in the second statement of Mr Rasmussen at paras.31 and 32.

In addition, it is perhaps worthwhile looking at para.49 of the guidelines on vertical restraints. This is in authorities bundle 1, tab 8, p.132. Paragraph 49 reads:

> "In the case of agency agreements, the principal normally establishes the sales price … However, where such an agreement cannot be qualified as an agency agreement for the purposes of applying Article 101(1) and obligation preventing or restricting the agent from sharing its commission, fixed or variable, with the customer would be a hardcore restriction …"

So what is being talked about there is a hardcore restriction, and this exactly mirrors the OFT's concern as set out in the Decision and the SO, the restriction on sharing commission which is why that particular restriction has to be abolished in the commitments.

MR LANDERS: Could you just explain 6.50 to me again. I am not sure I understand that. A new entrant can offer a discount up to the amount of its commercial decision but a new entrant OTA could not discount Commission on its first transaction since it was just coming to the market.

MISS BACON: Not only new entrant, but all OTAs can offer a -----

THE CHAIRMAN: But an existing OTA can offer discounts that in total come to the commission for the preceding 12 months, whereas a new OTA who has only been in the market for a month can offer discounts for what they have earned in the month.

MISS BACON: Yes, that is right.

THE CHAIRMAN: So, how does that stop retaliatory – surely that means that the established OTAs have more cash to pay on discounts than new OTAs.

MISS BACON: You are right, you are right, that to some extent this would give an incumbent OTA a slight advantage in that they may have a longer time period in, say, the first month over which to consolidate their commission that could then be offered. But overall, a cap on discounting one of these two alternatives prohibits the very aggressive loss leading discounting below the level of the commission over the course of the year. So, it is not a complete prohibition on loss leading to that extent, but -----

THE CHAIRMAN: So, if an established OTA wants to go in for retaliatory deep discounting, they have got to do it quickly is basically what you are saying.

MISS BACON: Exactly. It is not a complete panacea, but to some extent it mitigates the concern that there was regarding -----

THE CHAIRMAN: Long term benefit.

MISS BACON: The other authority that I should draw your attention to is *the E-books* Decision, this is at authorities bundle 3 tab.55 and this is the Decision of the Commission, and this also permits agreements limiting discounting up to the extent of the Commission in a very similar model. I hope that you inserted yesterday the commitments in the *E-books* Decision, behind tab.55, that was one of the hand-ups, and I am not sure the chairman suggested that you might do this later and I am not sure if you have already done that.

THE CHAIRMAN: It was done for me.

MISS BACON: It was done for you. Very good. So, hopefully at the end of tab.55 you will be able to see the commitments offered by Simon & Schuster, annexe 5, and para.5.2 contains a very similar cap on the commission that can be sacrificed:

> "S & S may enter into agency agreements with E-book retailers in relation to the EEA under which the aggregate value of the price discounts or any other form of promotions to encourage consumers to purchase one or more of S & S's E-books is

restrictive provided that such agreed restrictions shall not interfere with the E-book retailer's ability to reduce the final price by an aggregate amount equal to the total commissions S & S pays to the E-book retailer over a period of at least one year in connection with the sale of S & S's E-books to consumers".

So, it is a similar provision there.

THE CHAIRMAN: Those commitments abolish MFNs, so those commitments abolish MFNs prohibit it.

MISS BACON: Well -----

THE CHAIRMAN: But you are coming to that.

MISS BACON: I am coming to the MFN point. My answer on MFNs is the one that I have already given, that the MFNs in this case were outside the scope of the specific competition concerns to the extent that they were articulated as points that exacerbated our competition concerns, they were not pursued as part of the investigation. So, they were part of the economic context, if you like, they were not part of a theory of harm that we took forward. Taking all those points in the round, and also the points that I have made in my skeleton argument, our submission is that it is completely rational for the OFT not to take the view that principles 18(a) and (b) were object restrictions. It did not consider that these were object restrictions and that was a rational conclusion. The commitments in those principles were not designed to achieve RPM but completely the opposite, they were designed to facilitate new entry and drive competition in the market, and these provisions – and I am talking about principles 18(a) and (b) – bear no resemblance at all to the types of RPM measure at issue in cases like *Yamaha*.

Now, there has been some suggestion in addition to Skoosh's original claims, that the object restrictions are to be found in principles 18(a) and (b). The same is true for provisions on advertising discounts in principle 19, and the question was put to Mr Sinclair, "Do you also say it is about principle 19?" And he rose to that and said, "Yes, of course we are also talking about 19", though he quite fairly said that his focus was on 18(a) and (b).

MR SINCLAIR: Just to be clear, I was not making the point that the provisions of, in principle 19 were also restrictions by object. That is simply saying that the two interacted together or we supported Skyscanner that they were restrictions most likely by effect; but I certainly was not saying they were restrictions by object.

THE CHAIRMAN: The more Skoosh's arguments can be put in support of Skyscanner, the happier you presumably are with their intervention and would not argue too far against it.

MISS BACON: Yes, yes. The less inadmissible their arguments become.

THE CHAIRMAN: And yours.

MISS BACON: Now, I am now wondering whether I need to deal with the principle 19 object point. Perhaps I should just briefly -----

THE CHAIRMAN: I do not think you need.

MISS BACON: Right.

THE CHAIRMAN: Go on to the next point.

MISS BACON: If the point against me is only taken on principles 18(a) and (b) we have made our submission. The primary submission is it is absolutely not, these were absolutely not restrictions by objects looking at them in context and looking at what they were designed to do in the context of the commitments as a whole, but going back to the *Cityhook* test, we do not need to put it that high. The basic point is that nothing in the argument about object is so compelling as to demonstrate that our decision to accept the commitments was an irrational one.

Just one point on principle 19 before I go any further, which I had been minded to make, which was this idea about which undertakings principle 19 bites upon and before the lunch adjournment there was a question about whether it was in some way targeted at metasearch sites and I said it was not targeted on metasearch sites at all, it was designed for a specific purpose and was not aimed at harming metasearch sites. But the other point to make is that actually principle 19 does not only bite on metasearch sites, it bites on any OTA which is advertising its price, so the prohibition on advertising a price applies generally not only to an OTA, let us say Booking.com advertising X specific discount on Skyscanner, but it also prevents that OTA from advertising its discount on its website to all and sundry. What it means is that the specific rate has to be confined within the closed group. This is not a provision that was target at metasearch sites *per se*.

Now, the two final points I need to deal with are the MFN issue and third party effects. On the MFN point, what Skoosh says is that in some of the paragraphs of the SO it is said that the Rate Parity obligations and the agreements between the parties were capable of exacerbating the effects of the discounting restrictions, and our answer is that is true, and the fact that there were also MFN clauses in these agreements was one of the reasons why the OFT was looking carefully at the agreements, but as the OFT made clear from the start and this is consistent from the SO, it had not investigated MFN clauses specifically in the sense of making provisional findings even about the extent to which they reinforced or exacerbated the prevention restriction on the source of competition.

THE CHAIRMAN: I get very muddled by this, it investigated them up the point where it issued a Statement of Objections.

MISS BACON: Yes.

THE CHAIRMAN: Which is something that happened -----

MISS BACON: It was aware of, and perhaps actually I can deal with this by taking you to the relevant paragraphs of the SO.

THE CHAIRMAN: That is the question, I mean, just that words are being used rather loosely.

MISS BACON: Well, the precise answer is contained in footnote 19 of the SO, which is why I wanted to take you to this.

THE CHAIRMAN: Right, well, let us go there. Good idea.

MISS BACON: Perhaps before you read that you can look at 1.18 and 1.19 which are the ones that Skoosh has cited in its skeleton argument, and it cited these without the footnotes attached, so 1.18 says:

> "The OFT considers that the existence of Rate Parity obligations alongside the discounting restrictions is capable of reinforcing and exacerbating any prevention restriction or distortion of competition described above".

THE CHAIRMAN: Okay, so -----

MISS BACON: And makes a similar statement in relation to replication of the discounting restrictions in the market, but the key is footnote 19 which says:

> > "However, the OFT has not investigated the extent to which Rate Parity obligations are capable or reinforcing and exacerbating, and makes no point ----"

THE CHAIRMAN: I have misunderstood the situation so in the SO, which is to some extent the culmination of an investigation ----

MISS BACON: Yes.

THE CHAIRMAN: -- although it is provisional, and that prioritisation away from investigating the MFNs migration as a separate head, that had already been taken ----

MISS BACON: Yes, and that is why I ----

THE CHAIRMAN: Because I cannot ask at what point that was, because that is probably completely irrelevant.

MISS BACON: And I could not answer that if you did ask me. That was why ----

THE CHAIRMAN: In view of the German authority's approach, it is interesting is it not?

MISS BACON: There are two different NCAs which take two different approaches to a set of varying restrictions and agreements. The CMA has decided to prioritise the discounting restrictions and the German NCA has obviously decided to prioritise the MFN. That scoping decision was taken by the SRO, and that is why I said, sir, this morning that it was not a case of the OFT setting out a competition concern which it then decided not to pursue. It had already decided that prior to the SO.

The other paragraph I wanted to show you was para.2.128 which makes the same point but not in a footnote, and it said: "The OFT has not investigated the extent to which Rate Parity obligations are capable of reinforcing, and so makes not finding in this respect."

So 2.128 replicates what is said in footnote 18 just for the avoidance of any doubt. I think that answers the MFN point that it is not the point that the OFT has issued its SO pursuing MFN clauses and then decided in the course of the subsequent investigation to drop the point.

MR SINCLAIR: Sorry to interrupt, I referred the Tribunal yesterday – while we are on this page – to para. 2.131. I did not refer to it but it may also be relevant to read 2.132.

THE CHAIRMAN: This is the application further in the market.

MISS BACON: Exactly. As I said, there were two points which the OFT said in the SO: "We bear them in mind but we have not investigated them, one is the replication point and the other is the rate parity, or MFN point." The same is said in the Decision.

In respect of both points it is saying: "We are aware of them. It may be capable of exacerbating but we are not making any findings in that regard". In my submission none of this has any bearing on the questions before the Tribunal or suggest that the Decision was, in any way, irrational.

THE CHAIRMAN: But this issue does, in part, explain, as you put it to us, why there is this restriction on specific disclosure.

MISS BACON: Yes.

THE CHAIRMAN: So the proposition I put to you before lunch, that this is necessary because of one restriction being tolerated, you have to add another restriction in very broad terms is still true?

MISS BACON: Subject to the point that the OFT has reached no conclusion on whether the MFNs are ----

THE CHAIRMAN: That is a pragmatic solution to a situation found on the market?

MISS BACON: Yes, and the OFT made not even a provisional conclusion in the SO regarding whether the MFNs infringed competition. It said it was not making any findings. Its provisional conclusion was limited to the two theories of harm.

THE CHAIRMAN: Has that proposition got past Mr Bailey? I am not sure?

MISS BACON: Let me just see if it got past Mr Bailey? (After a pause) I think I may have persuaded Mr Bailey to agree, so I continue in an attempt to finish by 2.45.

MR LANDERS: I am just trying to understand the logic, we are saying that the OFT has not investigated the extent to which MFN has an impact on discounting, and then says that our

solution to discounting has to be adjusted by putting in this non-disclosure clause, in order to reflect the extent or the impact of MFN on discounting. I am a little confused.

MISS BACON: The point being made was that there are MFNs. We have to have a solution that is workable. In the light of the various kinds of MFNs out there, in respect of which the OFT had made no finding one way or another as to whether they were infringements. In light of MFNs out there, this was the solution put forward by the parties and accepted by the OFT. The OFT was specifically not making any finding provisional or otherwise, regarding the MFNs as restrictions of competition. What they were saying was because the MFNs were there it meant, for example, that if there was a restriction in an agreement with one OTA that was effectively replicated across the market.

MR LANDERS: Yes, I understand the absence of findings, but what it specifically says is that the OFT did not investigate the extent of the impact of the MFNs on discounts.

MISS BACON: Yes.

MR LANDERS: If you have not looked at the extent of the impact, how can you come up with a solution that solves an extent that you have not investigated?

MISS BACON: As the Chairman said, it was the pragmatic solution. The OFT thought that this was an appropriate way forward. It was the solution offered by the parties, the closed group mechanism, and the solution was offered in light of the economic context which included MFNs.

THE CHAIRMAN: It was a comment, it was not intended to indicate approval.

MISS BACON: However, that is the position.

THE CHAIRMAN: Okay, I think we have the point. Please go on.

MISS BACON: I just need to deal with the third party effects. Thumbs up from behind me to go on to third party effects very briefly. In response to the questions from the Tribunal, the way that Miss Smith put the case yesterday, was to say that the reason why this set of commitments imposed unlawful obligations on third parties was that it did not remove the restrictions but created new restrictions of competition and that was unlawful, and if that is the position then Skyscanner's Ground 1 essentially turns on and essentially merges into Grounds 2 and 3, and is not a standalone point. I have addressed Grounds 2 and 3.

If it is a standalone point, as we had previously understood then our position is that it is completely wrong for the reasons given in our skeleton argument. It is simply not the case that the OFT is not permitted or enabled to impose commitments that in some way have effect on third parties. This is standard practice.

By way of conclusion, the questions for the Tribunal arising from Skyscanner's and Skoosh's submissions and our answers, are these: Question 1: did the OFT properly

consider the submissions of Skyscanner and provide sufficient reasoning for its conclusions, and it did for the reasons I have given today. In our submission Skyscanner's claim that the OFT has somehow ignored what it had said about metasearch is simply hopeless. It is quite clear that the OFT did consider Skyscanner's representations and that the real issue is whether the OFT's decision not to pursue the matter further was a rational one. And, as a related point, concerning the reasoning of the OFT I have also explained why, in our submission, the approach to the counterfactual in the Decision was correct.

Question 2: was the OFT irrational in deciding not to pursue further the issue of the effects of the commitments on metasearch, and the OFT considered on the basis of the material before it that the commitments were not likely to harm metasearch or distort competition between OTAs, and it is certainly not obvious that this will be the effect of the commitments.

Just to pick up one point by way of clarification, this is not about a burden of proof point. We are not talking about burdens of proof in a sense that under Article 101(3) there is a burden of proof to prove efficiencies, or under Article 101(1), the burden is on the OFT to prove an infringement. We are talking about the rationality of the OFT's judgment.

THE CHAIRMAN: So the Article 101(3) proof framework does not apply to commitments ----

MISS BACON: Yes.

THE CHAIRMAN: -- in your submission?

MISS BACON: What the OFT is doing is deciding whether the commitments are appropriate, and whether it needs to address certain points further before accepting these commitments. So it is a rationality point, it is not a burden of proof point. Our submission is that the OFT's Decision was entirely rational. However, of course, mindful of the dynamic nature of the market we are saying that we did ask the parties to reduce the duration from three to two, and we do require the parties to report each year in order to assist us in monitoring the effectiveness of those commitments. So that underscores the rationality of what we are doing.

The third question is whether principles 18(a) or (b) have as their object the restriction of competition, and we consider that they do not. The commitments were objectively designed to facilitate new entry and drive competition on the market given the particular features of the market, and they were designed to encourage competition not only for second time or third time buyers, but for all customers. I have just explained why that is the case. The first purchase requirement, in summary, was designed to be a threshold condition for eligibility for discounting in a closed group, and the cap on discounting in 18(b) was something that

the Commission itself has endorsed in its *E-Books* Decision and was designed to prevent, to some extent, loss leading by incumbent OTAs that had strong positions on the market. That is why the OFT accepted these conditions and, coming back to the rationality test in *Cityhook*, we submit that none of that can be characterised as irrational.

The fourth question is whether the OFT's approach to MFNs suggest that the OFT erred in some way, and the answer is no, for the reasons that I have just given. They were part of the context to the OFT's investigation, but were not investigated as a separate issue. The references in the SO do not add anything to the Grounds of appeal.

Lastly, do the commitments unlawfully impose requirements on third parties? The answer is, again, no. The commitments only bind IHG, Expedia and Booking.com. Those parties agreed to alter their dealings with third parties when they offered the commitments, and they were free to do that. None of that means that the commitments bind third parties or that the OFT exceeded its powers.

Unless I can assist you further, those are the submissions of the CMA.

THE CHAIRMAN: Thank you very much, Miss Bacon. Mr Ward, you have waited patiently.

MR WARD: Yes, thank you, sir. I am going to make some brief remarks on behalf of IHG, Booking.com and Expedia. I will refer to them collectively as the Interveners, although of course we do not speak for Skoosh, with whom we disagree fundamentally. I am going to make just some opening remarks about the nature of the Decision and the scope of this challenge, and then focus my attention on Skyscanner's Ground 2 and 3 with just one brief point on Skoosh's intervention.

Starting with the nature of the Decision, it is of course common ground that the CMA or the OFT has a discretion about whether to accept commitments, and, if so, as to the nature of the commitments. You have not actually been taken to s.31A(2) of the Act, but if I may just remind you of what it says.

THE CHAIRMAN: We have been there. We may not have been taken there, but we have been there.

MR WARD: There are three discretionary elements in it:

> "… the CMA may accept from such person(or persons concerned) … as it considers appropriate commitments to take such action (or refrain from taking such action) as it considers appropriate."

What this enables of course is the CMA to take a pragmatic view about how to efficiently bring a competition investigation to an end and use its finite resources on other things. As Advocate General Kokott said in *Alrosa*, which I will not take you back to, it is a quick and effective resolution of the competition problems avoiding a considerable investigation and

assessment effort. That exercise involves an exercise of appraisal and judgment by an expert regulator, susceptible to challenge only on judicial review grounds.

If I may, I will take you briefly to two authorities that set out well established propositions as to what those judicial review grounds amount to. The first one is a very recent ruling of this Tribunal in the *Healthcare* case, which is at authorities bundle 3, tab 58. This is Mr Justice Sales' recent ruling on a preliminary issue. The issue in question does not concern us. It was whether or not expert evidence could be adduced by the applicant. There is a passage of general principle which we find at bundle page numbering 2213, para.4(b):

> "The relevant decisions of the CMA involve technical issues in questions of evaluative assessment of economic evidence which is within the remit of the CMA and for which it has particular expertise. As noted, section 179 proceedings are review proceedings, not an appeal on the merits."

Pausing there, the *HCA* case was a market investigation challenge, but we have seen already that the statute applies to judicial review tests also in this case.

> "In relation to decisions of this character taken by a body of this kind, the well established legal approach is that a substantial degree of discretion or significant margin of appreciation is allowed in relation to expert assessments made by the CMA. This reinforces the review function of the Tribunal and emphasises how far removed from a merits appeal these kinds of proceeding are. In our view, the Tribunal is rightly resistant to attempts by any party to try to convert this review jurisdiction in this context into something resembling an appeal on the merits."

I will be submitting that this Tribunal has had those attempts in these proceedings as well. May I also show you another authority for a related point. It is in the first authorities bundle. It is an authority that is very, very familiar in these kinds of challenges, a case called *Cellnet*, tab 23, a decision of Mr Justice Lightman from 1998. The case is a telecoms challenge, the substance is far removed from where we are today, but could I ask the Tribunal to turn to p.587 of the bundle, p.13 of the report. It is addressed to a decision of the Director, being the Director General of Communications, which became Ofcom. Just picking it up at the top of the page:

> "It is for him, and him alone, to consider the economic arguments, weigh the compelling considerations and arrive at a judgment. The applicants have no right of appeal: in these judicial review proceedings so long as he directs himself correctly in law, his decision can only be challenged on *Wednesbury*

grounds. The court must be astute to avoid the danger of substituting its views for the decision-maker and of contradicting (as in this case) a conscientious decision-maker acting in good faith with knowledge of the facts. As Lord Brightman said in [the *Pulhofer* case]:

'Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision making power save in a case where it is obvious that the public body, consciously or unconsciously, is acting perversely.'

If (as I have stated) the court should be very slow to impugn decisions of fact made by an expert and experienced decision maker, it must surely be even slower to impugn his educated prophesies and predictions for the future."

THE CHAIRMAN: How do you relate all that to our friend, *Alrosa*, para.77?

MR WARD: Sir, I do not think there is a submission being made that *Alrosa* somehow lowers the threshold for the claimants to cross. In the *UniChem* case, the observation was made by the Tribunal that it was close, the test was close. The test is manifest error of assessment in *Alrosa*. I am not inclined to ask the Tribunal to dance on the head of a pin as to whether that is the same or different.

THE CHAIRMAN: That is kind of you!

MR WARD: In our submission, when one looks at the challenge that is brought, it is appropriate for the Tribunal to apply a wide margin of discretion to the expert judgments of the regulator, and the ECJ itself most certainly does that in areas of economic assessment. I anticipate the Tribunal will conclude it is not necessary to decide whether *Alrosa* really is identical or not, but we certainly do not accept it gives anything to the claimants that makes their task any easier.

THE CHAIRMAN: I am sure we will be very careful not to change the law on this subject in any way.

MR WARD: Sir, I hope so! Just stepping back from that for a moment, it is not enough, therefore, for the claimants to show they disagree or for the claimants to persuade the Tribunal that it might have done something different, or that given the opportunity to be the decision-maker it would have chosen a different solution. Nor is it enough for the claimant to show that the Decision is detrimental to metasearch sites, because of course the purpose of competition law is to protect competition and consumers rather than particular competitors, and there were certainly times when Miss Smith's argument shaded in the

direction of saying, "This is bad for Skyscanner and therefore that must be contrary to competition law". Matters are not that simple.

Now, in the course of her argument, what she is trying to do very hard is to get away from any *Wednesbury* approach, to get away from the rationality threshold. She has been careful to formulate her arguments in ways that avoid that, but I will submit, I hope very soon, that in fact that is wholly unsuccessful. I mean, in reality this challenge does collapse into a *Wednesbury* case. But before I deal with her arguments, I want to make one other point of context against which in our submission the case has to be evaluated. The essential complaint here is that the OFT did not go far enough, it should have allowed a higher measure of discounting freedom. But it is worth asking at a high level of pragmatism why the OFT did not go further, and the answer is there to be seen in the Decision. It was investigating a very new form of sales channel in a fast moving sector with "frequent introduction of new technology" and new entry. Those are not my words, the last formulation comes from the Decision itself in para.6.36. So, we had novel subject matter in the form of online travel agency, and indeed a finding of infringement that therefore would have been breaking new ground. So, it was understandable in those circumstances that the OFT was rather cautious. It did not want to make the competitive position worse. What it says in para.6.53 is that it did not want to chill innovation or damage competition, and we will come back to that paragraph in a moment, you have seen it a number of times already. But what this tells us is the OFT was taking a risk-averse approach. And you have seen that there were a whole series of procedural safeguards built into its Decision, and just to tick through them again (you have already heard them a number of times) you have heard that there is at commitment para.23 a continuing duty of cooperation on the parties and an annual reporting requirement, and I understand from my clients that the nature of that reporting requirement is very detailed indeed. That is to be found in commitment para.23. You can also see that the commitments actively encourage the parties (other hotels, other OTAs) to contact the CMA both about compliance with the commitments, but also other contractual arrangements. And in the case of Skyscanner the CMA specifically invited them to keep the CMA informed. Miss Bacon read this to you some time in the last hour, but just again for your note, this was in the letter of March, we urged Skyscanner, we urged them to submit to us any evidence that, contrary to our expectations, the Decision is causing or likely to cause material harm to competition and consumers. That is volume.1 under CJ18 at p.387.

So, the OFT was very careful not to decide this once and for all and slam the door, but to put in place a regime it thought would meet its concerns but keep a very close eye on

whether or not it was working. And there is another important sense in which it was risk averse. It was risk averse in that it did not decide to just remove all restrictions on discounting, to be dogmatic and just say "any restriction must be a restriction on competition". What it did instead was to introduce what it thought would be an effective mechanism to make discounts actually realised in the market, and not to run the risk that the measures would prove to be self defeating, and I will come on to the detail of that in a moment. So, that is in a sense cautious, pragmatic, risk averse on the part of the OFT. Skyscanner and Skoosh would have liked it to be bolder. But the question is whether that shows any error susceptible to judicial review. In our submission it is simply second guessing the decision of an expert Regulator.

Now, I wanted to turn on that note to Skyscanner Grounds 2 and 3. As I have said a moment ago, we do submit that they can both of them collapse into *Wednesbury* challenges. And the starting point for this proposition is the *Tesco Stores* case, some of which you have seen but not in my submission the most important passage, and this is in authorities bundle 1 under tab.20. I would like to take you, please, to p.780 of the report which is p.550 of the bundle in the speech of Lord Hoffmann. If I can pick it up under the heading, "Materiality and planning merits", it is obviously a case about planning law, but the point is of general application:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of [in that case] planning judgment which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all".

So, an authority can have regard to a material consideration and then conclude it is of no weight. What Miss Smith said in this case was that the client's submissions were not taken into account at all. On p.51 of the transcript of yesterday -----

THE CHAIRMAN: Could you just go on with your -----

MR WARD: I am sorry.

THE CHAIRMAN: – Lord Hoffmann extract, the following paragraph which ends:

> "If there is one principle planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State".

That is not quite true of competition, is it? It is just that this aspect of competition is subject to judicial review. And certain others are and others are not.

MR WARD: Yes, I think, with the greatest of respect, to Lord Hoffmann, what he means here is that this is a matter for the decision-maker. I am sure his Lordship did not intend to exclude the possibility of judicial review.

THE CHAIRMAN: He sort of rounds off his pronouncement in a rather ringing phrase which does not resonate here.

MR WARD: Well, sir, I think, with respect, that probably was not meant to be an exclusion of the court's jurisdiction.

THE CHAIRMAN: And you are going to tell me it does not matter anyway. So -----

MR WARD: Indeed, but may I just, against that context, remind you of what Miss Smith said yesterday. It is on the transcript at p.51 lines 18-19 and what she said was that the CMA wrongly took the view Skyscanner's submissions were not relevant and therefore had no regard to them. So, she tries to characterise it as a failure to have any regard for them, but in my submission this confuses two very different things. The first is whether the submissions were considered, which they undoubtedly were, and the second is whether they were accepted, because as we have just seen from Lord Hoffmann it is perfectly intelligible to have regard but then attach no weight at all. And the basic weakness in Skyscanner's position was that its submissions were both brief and unsupported by evidence. It is perhaps surprising that we have got to three o'clock on day two without the Tribunal having even seen Skyscanner's submission, but I would like if I could now just to take you to it very briefly. It is in bundle 1 under tab.CJ8 at p.234. It is this submission that is the foundation of this judicial review challenge.

THE CHAIRMAN: You are not suggesting we have not read it, you are suggesting our attention has not been drawn to it.

MR WARD: Well, it has been referred to, it just has not been opened. But what one sees immediately is it is 3½ pages long, and that mostly it deals with a range of problems but in respect of the central problem here which is the inability on the part of the metasearch site to advertise the prices, there are really two passages that are important. It says at 235 in the second paragraph:

> "OTAs will only be able to publicise discounts on UK hotel rooms to members of a Closed Group".

Now, that is not quite right, they can only publicise the rate, as Miss Bacon emphasised, and offer discounts on UK rooms to those members who previously made a hotel room booking.

"Skyscanner will be unable to offer members of a Closed Group the lowest price as the data in relation to the discounted pricing will be unavailable to Skyscanner. Although the commitments specifically permit price comparison websites to be notified where Closed Group discounts are available, we would be unable to include actual discounted prices within our search results. The effect of this would be a lack of clarity for consumers …".

And in the next paragraph it makes the point that:

"Even where Skyscanner is able to indicate to consumers that discounts may be available … this … would not be meaningful …. They would be required to click through to the OTA website and log in and search for the [price]".

Now, just pausing there, yes, of course search for the pricing data on the OTA site again hindering their ability to easily and actually compare prices.

What I was going to say was it is important to appreciate that in a metasite, a metasite in effect advertises what is available on other sites and if anyone is interested in what the metasite is advertising they have to click through in any event in order to get to the underlying site where the booking and any other details might be found. So, that is what is explained. Then you will see in the next paragraph down they deal with a different point which is whether consumers mind about price, and you will see just below the second hole punch it says, just three lines below there:

"The price is the decisive factor. In support of this position, Skyscanner refers to data included within the PWC UK Hotels Forecast 2014",

which shows certain things about price. So there, there, they actually put some evidence on that point. And what we are left with, at the bottom of p.2 and on to p.3 of the submission: "Although it is clearly encouraging that competition within the online travel industry is being considered, Skyscanner does not believe that the commitments proposed enhance competition within the travel sector. The commitments have the potential [the word 'potential' Miss Smith used this word as well] to undermine the value afforded to consumers by both meta-search sites and search engines within the travel sector, and disrupt a distribution channel which specifically encourages competition within the travel sector.

MALE SPEAKER: (No microphone) …

MR WARD: Yes, of course.

"This disruption will only increase as the use of Closed Groups proliferates, ultimately obstructing active participation in the travel sector by distribution models other than OTAs and hotels, discouraging potential new entrants to the meta-search market thus negatively affecting competition further."

That is what we have that forms the basis of this judicial review. Then there were the meetings as well which you have seen. Those few brief lines are, in effect, the premise upon which this whole rationality, illegality challenge is based.

THE CHAIRMAN: Are you saying that they should have said they were actual effects?

MR WARD: No, it is not for me to say. That is what they did say, that is all. I am simply pointing out ----

THE CHAIRMAN: No, but it is not unreasonable to talk about 'potential effects' ----

MR WARD: No, it is not unreasonable at all.

THE CHAIRMAN: -- for something that has not yet been introduced. It seems to me there was no great issue there, you were just saying it was too thin?

MR WARD: I am just saying it is what it is. I am showing the Tribunal what it was that was actually put forward and then we can see – we have already seen what the OFT made of it, but I would just like to show you one sentence in Mr Rasmussen's witness statement, which is in bundle 2, tab 13. It is in para.47, which is on p.593 of the bundle. We have seen this before so I will take it quickly. Six lines down in this paragraph:

> "The case team and I thought that Skyscanner's arguments were insufficiently substantiated for them to carry great weight."

For Miss Smith to say that the OFT had no regard to her client's submissions, she has effectively got to say that is untrue and she, quite rightly, did not go that far. But once we have to accept, as we must, that the OFT did have some regard to Skyscanner's submission, it surely becomes a matter of whether the weight attached was actually irrational in the *Wednesbury* sense.

In our respectful submission they are nowhere near that threshold, and that is why Miss Smith has tried so hard to avoid facing the question at all.

As the challenge morphed, the other way it was put was that there was something unfair, or maybe irrational, about the OFT's failure to elicit more information from Skyscanner. At times, it sounded as though she thought Skyscanner ought to be treated as a party to a Competition Act investigation, or at least as a complainant, someone who would have been sent a Statement of Objections and had the opportunity to answer the CMA's concerns in detail. That is completely wrong. This was just a public consultation or, to be more accurate, there were two public consultations. Skyscanner, like every member of the public, was at liberty to respond to that consultation, they are not obliged to, nor did it have a privileged position in that consultation.

May I just take you back to an authority Miss Smith did show you, the *Coughlan* case, which is in bundle 1, tab 24, which, as she rightly said, sets out the classic requirements for

fair consultation. The relevant paragraph is on p.638, para. 108. The test, the much repeated test, starts in the third line: "To be proper consultation must be undertaken at a time when the proposals are still at a formative stage", well that is not an issue.

> "It must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response, and also adequate time".

The only question in public law is whether the consultation gave Skyscanner the opportunity to make an intelligent response to what the OFT was saying.

MISS SMITH: (No microphone) …

MR WARD: Of course. "and it must be conscientiously taken into account." Well, we have just covered that question. It plainly was taken into account, there just was not very much weight attached to it.

THE CHAIRMAN: Does "conscientiously" add anything there?

MR WARD: In my submission, no. What this is intended to deal with ----

THE CHAIRMAN: What does it mean?

MR WARD: It deals with the case ----

THE CHAIRMAN: You must have thought about this, Mr Ward, I am sure.

MR WARD: Yes, what it deals with is the case where you imagine a public authority running what is, in effect, a paper consultation exercise only. It has as good as decided it runs a consultation, it does not even bother to think about the responses it has, it just waits for the consultation to close and then it issues the Decision.

THE CHAIRMAN: "Conscientious" just means earnest, genuine, diligent ----

MR WARD: "Genuine", I will happily accept "genuine" as opposed to "pro-forma" or "artificial".

THE CHAIRMAN: Going through the motions.

MR WARD: Exactly, going through the motions. Plainly that is not alleged, nor sensibly could it be. But this does not say it is for the public authority to tell consultees what to put in; it is a matter for the consultees. It is not a question of putting a burden of proof on the public, as was suggested at some point in argument. Skyscanner is just a member of the public for the purpose of this public consultation. It is not a burden of proof question. It is just a question of Skyscanner having the opportunity to tell the OFT whatever it wanted to tell it. It was then the OFT's job as a public authority to consider it conscientiously and evaluate the weight that it would attach.

THE CHAIRMAN: I think it was a question I asked Miss Bacon this morning, which is: what is the legal framework under which commitments ought to be assessed? It has been put to us

that it is a form of 101(3) and I think it has been put to us by Miss Bacon that it is not, it is more like regulation ----

MR WARD: It is.

THE CHAIRMAN: It is just a consultation.

MR WARD: It is a public consultation as part of a form of regulation. The OFT's job, as expert regulator, is to reach a rational appraisal of the evidence, to hold consultations which are required by the Statute, and to conscientiously consider what it receives in reply.

THE CHAIRMAN: Putting it another way, it has decided not, in this case, to proceed against something it thought was an infringement – provisionally viewed that it was an infringement – but decided to deal with it pragmatically.

MR WARD: Exactly, sir. But the question really, the sharp-edged question that Miss Smith's submissions raise is just how much did it have to do for Skyscanner? It had a public consultation, Skyscanner had the opportunity to put in its submissions. The OFT actually went further, they had a meeting with Skyscanner. It positively invited Skyscanner to give it more material. It did not have to do any of that as a matter of public law. In public law terms it was, in truth, *ex gratia.* But the suggestion that it has somehow fallen down on its duty is, in my submission, wholly unsustainable.

THE CHAIRMAN: It depends if you mean the duty to Skyscanner. Without putting words into your opponents' mouths, I think they would also say there is a public duty and what they did was to alert the CMA to it and the CMA fell down on that, it is not just a duty to Skyscanner.

MR WARD: I will come back to that in a moment, because I respectfully agree, that is part of the case. I do want to just make this observation, that there is an oddity in the case that you are facing here. The OFT had a public consultation, Skyscanner took no part at all in the first consultation. It then made very limited submissions that I have shown in the second consultation. It then had a meeting with the OFT in which the OFT said it was interested in data, not mere assertion, and normally, as the Tribunal will know from many other contexts, parties that have real interests at stake in a competition investigation tend to fight tooth and nail through the administrative phase. What we have here instead is a very, very flimsy submission made in the public consultation, and then in truth an attempt to re-argue it in the judicial review, but here in the judicial review court Skyscanner is hampered by the fact that it has to actually persuade the Tribunal that there is a legal error, in particular *Wednesbury* unreasonableness, and they actually do not come anywhere close.

Part of the argument from Miss Smith was that there was simply nothing that Skyscanner could have produced. What could it do? This is double-edged. On the one hand, what we

have here is a metasite itself. One is bound to start from the expectation that they would have some access to data or some commercial experience they could bring to bear. We know that Skyscanner only relatively recently acquired this business. What we do not know is why the existing employees or previous owners could not have told Skyscanner anything about this.

If this was difficult, even for a metasite, to predict exactly how this would play out, it is hardly surprising that the OFT was rather cautious about these assertions.

That takes me, sir, to the point that you have just raised with me ----

THE CHAIRMAN: Before we get there, I think they also said that commitments like this, closed groups like this, have not existed before so there would not be any data.

MR WARD: You have seen, of course, the OFT's evidence.

THE CHAIRMAN: The CMA have put to us that closed groups exist but they were not sure whether they were the same as these closed groups - the wrong sort of closed groups, if I can put it colloquially - is that right?

MR WARD: Sir, I do not know.

THE CHAIRMAN: I do not know either.

MR WARD: The point I make is simply this: whether it was Skyscanner's lack of diligence or a simple lack of information in the works, either way, what the OFT was left with was not very much. In my submission, the conclusion it reached on rate is unimpeachable on *Wednesbury* grounds. Other decision makers may have attached a different weight to it, but the OFT cannot be criticised as irrational for failing to afford more weight than it did.

THE CHAIRMAN: So the conscientious aspect goes back to the fact of the consideration?

MR WARD: Yes, and the question of weight is pure *Wednesbury*.

THE CHAIRMAN: So weight does not come into conscientiousness at all in your submission?

MR WARD: No, subject to *Wednesbury*. Of course, if it is *Wednesbury* irrational, then yes, that is a perfectly legitimate ground of judicial review.

Sir, you did put to me a point that Miss Smith has made in writing and orally, which is that the OFT in a sense should have conducted further enquiries. It should have taken the little gem that Skyscanner gave it and tried to develop it into something more. Here I would like to go back to the authorities bundle, please, bundle 3, tab 53, and this is the *BAA* decision of the Tribunal, Mr Justice Sales again. On this occasion I would like to go to p.1876 of the bundles.

THE CHAIRMAN: This was an appeal against my decision, of course, as I am sure you are going to tell me.

MR WARD: Well, sir, the legal principles are of general ----

THE CHAIRMAN: Absolutely! You are going to say we are all on the same side next!

MR WARD: May I take you to what is said here, and it starts just above the first hole punch, para.20(3) of the judgment. The Tribunal says:

> "The CC 'must do what is necessary to put itself into a position properly to decide the statutory questions'…. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it … In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test …"

Then there is a quotation from case law, Lord Justice Neill, which is indented:

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

So this too collapses into a *Wednesbury* challenge. One only needs to step back from it, in my submission, to see that it is without merit. In a nutshell, what happened here is that the CMA carried out two public consultations. It had even proactively contacted Skyscanner. There is a complaint from Miss Smith that this proactive contact was to the commercial team rather than the legal team. In my submission, that was actually quite a sensible place to start in order to gather information about the commercial impact of these arrangements. Be that as it may, the OFT was not even obliged to go that far. It did not have to proactively contact anybody.

Then what happened of course is that when Skyscanner put in its representations, the OFT had a meeting, it made clear what its concern was, that the concerns were not backed by evidence. In assessing whether this is sufficient as a sufficient level of inquiry, we come back again to the safeguards built into the Decision. It is not a decision once and for all. The OFT is keeping it closely under review. It has invited representations, it has required reporting, the duration is only for two years. It was not legally obliged to simply defer action indefinitely while it carried out even more inquiries. The inquiries it carried out were manifestly sufficient to satisfy the judicial review test.

Sir, you put to Miss Bacon in argument, "Does that mean, let us see if the patient dies?" She gave you one answer, which was, "We are not sure that the patient even has flu". There is another answer here, which is that one has to ask, "Who is the patient?"

Of course, this is not about protecting the interests of Skyscanner, this is about protecting the interests of competition and consumers. The OFT had reached a judgment about what was in the interests of competition and consumers which Skyscanner has come nowhere close to impugning on judicial review grounds.

Sir, I was going to go briefly to Ground 3, if I may. Here again, we do submit, as we did in writing, that this adds nothing at all to Ground 2. Miss Smith insists that it is an illegality point, not a *Wednesbury* challenge, because she packages it as a *Padfield* point - in other words, something was contrary to the proper purposes of the Act. I would like to show you how the point is put in her skeleton argument, which is bundle 2, tab 21, p.830. This accurately reflects how the argument was developed orally. I just want to highlight two sentences on this page. The first one is at the very top of the page in para.71:

> "It is the case that the OFT's failure to consider properly or at all the impact that the Final Commitments might have …"

"might have" -

> "…on price transparency and metasearch sites forms the basis of both Grounds 2 and 3."

That is a reflection that the complaint is essentially the same. Then picking it up ----

MISS SMITH: You cannot make that submission without reading the rest of the paragraph.

MR WARD: I will read it out with pleasure:

> "However, Skyscanner's Ground 3 is not simply a 'reiteration' … It is fundamental to the exercise of the OFT's powers under section 31A of the Act that they are exercised in such a way so as not to frustrate the purposes of the Act. In exercising such powers, the OFT cannot simply ignore the potential anti-competitive consequences of its proposed commitments (through reducing price transparency), even if (which is not accepted) those commitments might be 'sufficient' to address other competition concerns (restrictions on discounting)."

Then at para.73, the third line:

> "… in the face of real and plausible concerns raised by an industry participant about the potential anti-competitive impact of commitments which the OFT proposed to accept, the OFT should have investigated these matters itself."

The reason why we say this collapses into Ground 2 is it is actually in substance exactly the same complaint. There might be a competition problem. There is a potential competition problem. The OFT should have properly investigated it. And there is no magic wand that one can wave using the *Padfield* case to convert what was a *Wednesbury* challenge in Ground 2 into something else altogether. What Miss Smith said is that her complaint went to the substance of the action because there was an additional restriction introduced, but this came dangerously close to inviting the Tribunal to substitute its own view of the desirability of all of this. But in truth, even at its highest, even at its highest, the Skyscanner complaint is only about the potential impact and therefore the further enquiries that it says the OFT should have carried out. So, in our submission, this is just a lightly re-skimmed *Wednesbury* challenge, another attempt by Miss Smith to avoid having to satisfy the *Wednesbury* test but, we would respectfully submit, in substance precisely the same play again.

I want to just address briefly, though, what is in truth the substance of her concern. Miss Bacon has traversed this territory so I can be very brief. The particular issue that concerns Skyscanner is that it cannot advertise the discounted rate. And Miss Smith has described this as introducing a restriction. But the short point, of course, is that the OFT used closed group discounting as a tool to seek to ensure that the introduction of discounting was actually effective so that it would not lead to harm for consumers. And of course what she calls "introducing a restriction", was in fact part of a package that was improving the availability of discounts and indeed only a minimum requirement. But I would like to show you what was said about this in the Decision itself, which is at bundle 1 under CJ10 at p.280. And this is para.6.53 – and echoing something that Miss Bacon said in her submission, but I am going to add a particular point from the Interveners' perspective. Page 280 of the bundle, para.6.53 of the Decision. You see that this paragraph begins:

> "The OFT has considered the issue of how much discounting freedom would be appropriate in the context of the dynamic nature of the market …. As described in para.6.36 … the OFT is aware that online travel agency services, including hotel online booking, is a growing sector and is characterised by frequent introduction of new technology or platforms and development of new business models. The OFT recognises 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 (or to limit the number of OTAs that they deal with thereby

potentially damaging inter-brand competition, and chilling innovation in the development of new business models".

And you heard Miss Bacon explain, she showed you Mr Rasmussen's witness statement at para.17, that what they were worried about here was the interaction of the discounting measures and the existing MFN clauses. I do not intend to go back into that argument that we have already heard at some length, but from the interveners' perspective the parties that actually proposed these commitments, there was a further commercial consideration and you can see it, or the genesis of it in the Statement of Objections. May I take you to p.47 of that document, para.2.70.

THE CHAIRMAN: Okay.

MR WARD: I am sorry, it is in the statement of objection, I am afraid I do not know where that is in terms of – I have a loose copy. We pick it up under the heading, "Lowest Internet Rate Guarantee or Best Rate Guarantee", 2.69 and 2.70:

"Many hotels, in particular large hotel chains, offer lowest internet rate guarantees or best rate guarantees to customers on their own websites".

And then at 2.70 it says something about the particular form of best rate guarantee that IHG has. Now, these kind of guarantees are rather like John Lewis "never knowingly undersold". No-one has suggested in these proceedings that there is anything remotely contentious about this from a competition perspective. And whilst we have the Statement of Objections out, could I take you back to para.1.12 which summarises what the complaint was. And you will see that this is talking about Skoosh's complaint: "The OFT received a complaint from an OTA on 13th April 2010 according to which there were vertical agreements between hotels and OTAs containing restrictions on price." And then the second bullet point:

"Rate Parity obligations, whereby hotels agreed to provide OTAs with retail rates for hotel accommodation that are no less favourable than the rest."

So, what I am calling a "John Lewis price promise" is nothing at all to do with a complaint. no-one has suggested it is in any way contentious, but from the perspective of the interveners this is very important. What the CMA says is there may be harmful effects in reducing the incentives of hotels to deal with OTAs or limit the number, because of course the concern is if these rates are, if they deal with OTAs and they offer discounted rates, the OTA, the MFN, they will end up, sorry, the hotel -----

THE CHAIRMAN: Too many acronyms.

MR WARD: There are far too many acronyms! The concern is that the hotel itself will end up having to offer the same discounted rates the OTAs are offering and that this will produce a strong deterrent effect on the hotels not to deal with OTAs at all. And what the CMA is doing here is trying to ensure that there are no harmful consequences for competition from the way that its discounting is introduced. Now, I emphasise that this matter I have just drawn to your attention is one of those behind the offer of commitments by the Interveners. I am not suggesting that Mr Rasmussen is talking about this in his witness statement.

THE CHAIRMAN: No.

MR WARD: But it is another reason why the concern that Miss Bacon explained has got commercial teeth.

BRIAN LANDERS: Can I take it then you are speaking for both sets of Interveners? I can see why that would be an argument for the hotels, but you are saying that Expedia would not want unlimited discounting?

MR WARD: No, no, it is a point, it is really dealing with the incentive for the hotel to deal with them, and of course they do want the hotels to deal with them.

BRIAN LANDERS: Yes, but I just want to establish that is the viewpoint of the OTAs, that when Expedia applied for leniency and ended their agreement in 2010, it is not the position from that party that unlimited discounting is ----- Well, put it another way, if hypothetically unlimited discounting was an option, as opposed to the commitments, would Expedia and Booking.com go for unlimited discounting, or would they go for the commitments?

MR WARD: Sir, I am very hesitant to speak for them. May I just quickly take instructions? I would point out that the commitments were put forward by all of the parties, so I think one can infer what is necessary from that.

BRIAN LANDERS: So they had a common interest in putting forward commitments, even though their interests in relation to the commitments are different?

MR WARD: They were all able to propose the same set of commitments as a way of addressing the OFT's competition concerns. I would prefer to put it.

BRIAN LANDERS: What happened in the period after 21st September 2010, when the, after the Expedia agreement had ended but while the investigation was still going on. What was the arrangement between Expedia and the hotels?

MR WARD: I will again have to take instructions, sir. I understand that the contentious provisions were terminated by Expedia at that time, which I think is actually what the SO reflects.

BRIAN LANDERS: So, Expedia occupied a position of unlimited discounting freedom?

MR WARD: Pending the outcome of the strongly contested OFT investigation, so there may have been …

THE CHAIRMAN: Yes. To which they were, we assume they were taking part in that?

MR WARD: Yes this is just a commercial risk averse approach in the face of an investigation by the OFT. Even though the intervening parties very strongly contested the OFT's analysis.

THE CHAIRMAN: And presumably there is some data as to what happened in the three years after that new arrangement took place.

MR WARD: I do not know, sir.

THE CHAIRMAN: No. Are you going to relate what you were talking about before my colleague's question to the restriction on disclosure of specific discounting, and how that relates both to the best rate guarantee, and the Rate Parity obligations?

MR WARD: Sir, yes. The point is that the restriction on disclosure of specific discounts is there, as it says here to ensure that the hotel's incentives are not undermined.

THE CHAIRMAN: You are saying that is a harmless commercial practice.

MR WARD: No one has suggested otherwise.

THE CHAIRMAN: No one has suggested that is wrong.

MR WARD: No.

THE CHAIRMAN: So that has been boosted, bolstered, retained, and protected by this restriction on ----

MR WARD: As a matter of commercial reality it means that what might otherwise have been an adverse incentive from the point of view of the hotels is not introduced.

THE CHAIRMAN: So it is part of the structure of the commitments.

MR WARD: It is part of the practical effect.

THE CHAIRMAN: You would say it is an essential part of the structure, because ----

MR WARD: From the Interveners' perspective, yes. As I said, this is ----

THE CHAIRMAN: Not from the CMA's perspective necessarily?

MR WARD: I am not seeking to suggest it is in Mr Rasmussen's witness statement, it is not. I simply say from our perspective this is one of the important features which drives the incentive properly that the CMA has rightly identified in paragraph ----

THE CHAIRMAN: So we would be entitled to deduce that the incentive for this restriction came from the Interveners?

MR WARD: The Interveners proposed the commitments, of course.

THE CHAIRMAN: With this provision in it?

MR WARD: With this provision in it. Of course, to put this argument in perspective, we entirely accept that it is possible in the long run that the judgment that the CMA has made about

how much discounting to allow may require re-visiting one way or the other – more restriction, less restriction is all possible, but that does not mean its judgment was *Wednesbury* unreasonable or contrary to the policy of the Act. What the OFT has done here is enter commitments even though it recognises the outcome is uncertain. We can see that in para. 6.57:

> "The OFT recognises that the exact consequences of the introduction of limited price competition… cannot be anticipated with complete certainty."

THE CHAIRMAN: A statement of the obvious I would have thought?

MR WARD: It is a statement of the obvious and it is paradoxically underlined by many of the submissions Miss Smith has made about how difficult it is to know how this would play out in the metasearch sector in particular. Of course, we come back again to the point that this is not about protecting metasearch, it is about a judgment made by the CMA about what would best serve the interests of competition and consumers, that is a quintessential regulatory judgment and, in our respectful submission, it cannot possibly be undermined on the basis it is advanced before the Tribunal.

I was going to make one point about Skoosh, which is really very brief, and then I will, I think, have used up – but hopefully not exceeded – my time. It is about the object infringement. Here, we respectfully adopt what Miss Bacon said. At the heart of it the so-called object restrictions are simply the means by which the CMA make the discounting effective. It was not prepared to take the risk of going further. Miss Bacon already showed you a legion of authorities for the proposition that object infringement has to be assessed in its context, but I wanted to show the Tribunal just one case which is fairly close in certain respects to the present, to underline that point. It is in authorities bundle 2, under tab 46. It is a case called *Pedro*, concerning petrol distribution.

It is a Judgment of the Court of Justice from 2009, and I just ask you to pick it up in the bundle numbering at p.1578. It explains briefly what the case is about. Paragraph 3, in the course of proceedings between Pedro and Total España relating to an application brought by Pedro to the annulment of a complex contractual relationship between these two companies on the ground it included clauses which restrict competition. I can spare you much of the factual pain I am pleased to say. If I could ask you to turn on to p.1588, question 3 that was referred to the Court of Justice concerns whether certain price clauses that were restrictive on the resale price of petrol were contrary to the requirements of the block exemption. If I can just invite you to skim read question 3 because, you will see in a minute, nothing turns on the detail of exactly what was in issue. The regulation mentioned there is the predecessor to the current block exemption.

Turning on in the Judgment to p.1601, at the top of the page:

> "By its third and fourth questions, which it is appropriate to consider together, the referring court asks, in essence, whether contractual clauses relating to the retail price of the products, such as those at issue in the main proceedings, are prohibited under Art 81(1)(a) and cannot benefit from the application of the block exemption …"

Then, if we can just turn on again, because fortunately the details do not really matter, at para. 79, p.1603, and if your copy is similar to mine I am afraid the paragraph numbering is extremely hard to read, it is the second paragraph on this page.

> "In the light of the division of jurisdiction between the national courts and the Court of Justice … it is for the referring court, which alone has direct knowledge of the dispute before it, to assess the manner in which the retail price was fixed in the main proceedings … in particular, to ascertain, account being taken of all the contractual obligations in their commercial and legal context, and if the conduct of the parties to the main proceedings whether the retail price recommended by the supplier constitutes, in reality, a fixed or minimum sale price."

So that is a factual question the referring court would have to visit. Then, in the next paragraph:

> "It is for the referring court, furthermore, to examine whether it is genuinely possible for the reseller to reduce that recommended sale price."

Then it is the last two paragraphs which I really want to draw attention to:

> "If the referring court were to reach the conclusion that Pedro IV was bound, in reality, to adhere to a fixed or minimum sale price imposed by Total, the exclusive supply agreement for fuel would be ineligible for the block exemptions."

This is, in a sense, stating the obvious, you may say, but it is really the last paragraph that matters here, reinforcing Miss Bacon's submission:

> "However, as pointed out in para. 68 above, although the fixing of a retail price constitutes a restriction of competition expressly provided for in Article 81(1)(a) EC, it causes that agreement to be caught by the prohibition set out in that provision only where all other conditions for applying that provision are met, that is to say, that the object or effect of the agreement is perceptibly to restrict competition …"

THE CHAIRMAN: That is *LTM*.

MR WARD: Yes, sir. In a sense …

THE CHAIRMAN: I don't disagree.

MR WARD: .. I anticipated you would say this was an obvious point.
THE CHAIRMAN: Well, it is not obvious, but it is settled law.
MR WARD: It is settled law, even in the context of a price restriction that might infringe the block exemption ----
THE CHAIRMAN: Mr Sinclair managed to rely on it too. I will have to work that one out.
MR WARD: Sir, unless I can assist further, those are the submissions on behalf of the Interveners.
MR WILKS: I apologise if this is slightly repetitive, because I think my colleagues have also … Can I just rehearse your position on the commitments? Commitment 19(a), which is a price disclosure restriction, you say is essential to the commitments?
MR WARD: Yes.
MR WILKS: Because it bypasses the MFNs. Are you arguing that the MFNs and rate parity are actually pro-competitive or are you arguing that the CMA thought they were pro-competitive?
MR WARD: Neither, sir. What I am arguing is, what I think is Miss Bacon's submission, it is simply outside the scope of this appeal. This appeal is about the question of whether the commitments are unlawful for the various reasons that the parties have advanced, that it is in a sense taken as fact in that context that the MFNs are there, because the purpose of the commitments is to meet the OFT's competition concerns, both the SO and the Decision say, unequivocally, that the OFT has not investigated the question of whether the MFNs are or are not contrary to competition law.
MR WILKS: So they have not been investigated?
MR WARD: They have not been investigated; that is what it explicitly says. Miss Bacon took you to the references towards the end of her submissions, both in the SO and in the Decision itself, and the only question for the court is whether the CMA was entitled, on a judicial review test, to conclude that the commitments satisfied its competition concerns. So they are, in truth, in that sense, outside of the scope of the issues we are considering.
MR WILKS: We will think about that, thank you.
MR WARD: You were taken to where it says this in the Decision, 6.39, which is bundle 1, CJ10, p.276. Sir, you will see the language there is extremely similar to the language that is in the SO, which Miss Bacon did take you to, if you remember, footnote 19, and then another paragraph that was to precisely the same effect.
THE CHAIRMAN: One final question: you mentioned in passing that the commitments are only minimum standard, a point made by Miss Bacon. Can you just give the Interveners' interpretation of that? How does that work in practice?

MR WARD: It just simply means that if the Interveners wish to offer more discounting freedom, or wish to publicise their closed group rates, they are free to do so. This is just a minimum amount of discounting that is required. There may be perfectly good commercial reasons why the Interveners choose to do so, but that could only mean that the practical effect of these is less restrictive, to use Mr Sinclair's formulation, than the minimum that the CMA has required.

THE CHAIRMAN: What is your answer to Miss Smith's point that it is unlikely to happen in practice, so it is an empty and formalistic point?

MR WARD: Sir, it is not the core of our submission. The reality is, the real issue here is whether or not the commitments address the competition concerns.

THE CHAIRMAN: It is in the CMA's defence, but not your submission, that is true.

MR WARD: I gather that, in practice, it does actually happen. This is obviously *ex post facto* material. I am not relying on that. I already hear Miss Smith huffing and puffing. I do not invite you to rely on that fact.

THE CHAIRMAN: I think you have probably helped us enough, Mr Ward.

MR WARD: Thank you.

MISS SMITH: Mr Sinclair is going to make some very brief submissions.

THE CHAIRMAN: I propose we have a comfort break if that is all right, and we will resume in ten minutes time.

(Short break)

THE CHAIRMAN: Mr Sinclair, you are an intervener and you are eating into the time available for the applicant.

MR SINCLAIR: Sir, I agreed with my learned friend for the applicant that I would be five minutes and it really is a very quick point.

THE CHAIRMAN: Why not do that then, and be brief, please.

MR SINCLAIR: I am grateful. Sir, we have heard that this matter concerns rationality, a wide margin of discretion and a balancing is appropriate. We say that *Padfield* must be applied and that involves the fulfilling of the purpose and objects of the legislation. It is particularly in this case because the legislative hierarchy involves Article 101 of the Treaty, and that, itself, involves a balancing exercise. The tension obviously is between 101, and if you fall within that you must justify it under 101(3).

Let us put an entirely plausible factual scenario looking forward a few weeks after this judgment. Skoosh, or any other party in this industry, is subject to the provisions foreseen by the commitments. It attempts to discount in breach of conditions 18(a) and/or (b), so either to a non-member of a closed group or beyond a commission rate. It is sued by IHG

or any other party. It is a shield rather than a sword case, but it could work the other way round. The case goes down the road to the High Court. Skoosh says, "This is either a restriction by object or one obviously having an effect", and the evidence for that, or at least the attempt is to prohibit us from discounting freely. Article 101(1) applies, so does Article 101(2) unless Article 101(3) is made out.

We say to the court, "You must have regard to the primacy of the Treaty. It is our submission that the court can only agree with that. There is nothing in the commitments process either at EU or UK level that enables one to elevate that above the primary Treaty provisions.

This is where we started with our *Padfield* approach, and this is where we end. So the court's attention is brought to the OFT's Decision. The court looks at the very interesting arguments that the OFT has found for an exercise of balancing under s Section 31A, that discounting restrictions are necessary for the closed group concept to work, that this is pragmatic and indeed the restrictions are pro-competitive, but it sees the necessity of the closed group referred to simply begs the question. It assumes the need for the restrictions and it appears to be justified, as it happens, by other restrictions, the MFNs. It says, really we need to see an analysis carried out under 101(3). It looks at the OFT's approach to this and the documents are manifestly clear. They did carry out an efficiency analysis, they found that it was inconclusive, it did not justify the restrictions in question. It certainly also did not apply the fourfold criteria contained in Article 101(3). So the court has to rule that the clauses are void and unenforceable.

We say this underscores the *Padfield* error inherent in this case. 31A and the commitments procedure generally works for manifestly appropriate cases, and we have given an example of removal of all restrictions, but it does not work as a short cut as I said yesterday or as I will say today perhaps more accurately, "Does not work for cutting corners", and that is what has occurred in this case and it has subverted the object and purpose of the legislative hierarchy and in particular the prohibition on restrictions of competition.

THE CHAIRMAN: Is that not just the same as saying that commitment decisions do not bind a national court?

MR SINCLAIR: No, indeed they do not bind a national court. This is simply a way of demonstrating -----

THE CHAIRMAN: So if Skyscanner were to go off and start a private action in the national courts on some factual scenario which I am sure they have considered, then that court would be free to judge the legality of the Decision, the Decision where …

MR SINCLAIR: Indeed. That court would find that -----

THE CHAIRMAN: Not much we can do about that, I am afraid.

MR SINCLAIR: Well, the court will be applying the same legislative architecture as is raised in this case.

THE CHAIRMAN: I understand what you are saying, but the CMA has dealt with that and has said that the framework of 101(3) does not apply to commitment proceedings -----

MR SINCLAIR: Yes, and -----

THE CHAIRMAN: – and they have not applied it.

MR SINCLAIR: Yes, and we say that must be wrong.

THE CHAIRMAN: And I have seen that in the Decision there is actually a footnote to that effect, footnote 53 which -----

MR SINCLAIR: Indeed, sir -----

THE CHAIRMAN: So they are quite -----

MR SINCLAIR: I am not for an instant saying that they do not take a different position.

THE CHAIRMAN: And that is your point, right.

MR SINCLAIR: That is my point, that it would be a very odd situation indeed to find the Tribunal upholding a decision of the competition authority which -----

THE CHAIRMAN: Failing to quash it on judicial review grounds.

MR SINCLAIR: Yes, indeed. Failing to quash it and remit it for reconsideration for breach of the principle in *Padfield* that the objects and purpose of the legislation had not been met. Which objects and purpose are then considered in the context of a dispute between the parties, and that court applies those objects and purposes properly, as we say the OFT should in this case, and cannot use 31A to circumvent it. Sir, those are my submissions. I appreciate you understand it and I promised to be brief.

THE CHAIRMAN: Thank you. Miss Smith.

MISS SMITH: Sir, members of the tribunal, I would like to make two brief points in reply to Mr Ward's submissions and then I will concentrate obviously on the CMA as they are the decision maker who need to justify or whose decision is challenged in this case.

First, Mr Ward quoted one sentence from the witness statement of Mr Rasmussen in support of his submission that our case is simply an irrationality challenge, a challenge to the weight and therefore cannot succeed. And he was very careful just to cite that one sentence alone. If I can take you back to that, it was Mr Rasmussen's first witness statement at core bundle 2, tab.13, p.593, para.47 of Mr Rasmussen's statement, and the sentence that Mr Ward drew your attention to was the sentence that starts "Furthermore, the case team and I thought that Skyscanner's arguments were insufficiently substantiated for them to carry great weight". And, yes, it is true that in that one sentence Mr Rasmussen very carefully uses the language

of weight. But what did he actually mean by that? And we say the very next sentence makes the OFT's position clear:

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

He then goes on to say Skyscanner should in effect have put in the evidence, and he gives some examples of evidence. And then his position and the OFT's position is made absolutely clear in para.48:

> "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 before accepting the Final Commitments. The OFT cannot be expected to carry out a detailed analysis of hypothetical competitive issues that might arise from a set of proposed commitments".

Well, that is quite a bold statement to make. What is the OFT to be expected to do when they are considering final commitments. Surely their job is to analyse the hypothetical, therefore future not yet occurring competitive issues that might arise from the commitments they are proposing to accept. That is exactly what they should be doing and exactly what they did not do in this case.

The second point that I want to address in Mr Ward's submissions was that he emphasised and relied upon as justification for closed group discounting generally – and I think he relied upon it as well for advertising restrictions being part of that package, as he put it, he relied upon para.6.53 of the Decision. I would just remind the Tribunal that Miss Bacon in her submissions confirmed in response to a question specifically from the Tribunal that in those paragraphs of the Decision the OFT was not addressing the advertising restriction. She said in terms – we were not addressing the advertising restriction in those paragraphs of the Decision, we were addressing the residual restriction, the points made on transparency by Skyscanner were addressed in annexe 3 para.74, and that was in response to a specific question from the Tribunal.

MISS BACON: I am sorry, that is not what I was saying. I was asked a different question about different paragraphs of the Decision and whether the harm that was referred to there which the OFT was dealing with was this specific restriction, and I was saying that there were different paragraphs of the Decision dealing with different kinds of harm, and this was dealing with the arguments of the parties. But we have said 6.53 referred in general to the necessity for having restrictions as a whole. I was not discounting any reliance on 6.53 as a partial answer to why there were restrictions.

MISS SMITH: Well, we will come to the various justifications -----

THE CHAIRMAN: The transcripts will.

MISS SMITH: The transcript will bear out the point. But we will also come back if I may to the various justifications that the OFT has given for the advertising restriction that have only finally in my submission have been crystallised at this hearing.

Going then to the points made by Miss Bacon, she made the five points in a note that she handed in yesterday to the Tribunal.

The first point of her note was about the consultation requirements that are set out in the statutory framework, and she said the purpose of those, or she rightly accepted, that the purpose of those consultation requirements was, and I quote, "to market test the proposed commitments", and again I quote, "to discover whether they may have unintended adverse consequences". We completely agree with that submission. That is exactly what the purpose of the consultation should have been, and when such consequences are brought to the OFT's attention as they were by Skyscanner, the OFT must properly consider them.

Point 3 of Miss Bacon's note she says that the OFT must conscientiously consider the representations, and that they must be satisfied that the commitments address the competition concerns identified. She accepts that that means fully address, and she said that we are not saying that they can only partially address the competition concerns.

Now, what she appeared to be saying yesterday just before we rose was, she cross-referred to the competition concerns set out in paras.5.8 and 5.9 of the Decision, you will recall, and if we could just look at paras.5.8 and 5.9 of the Decision, which is in core bundle 1 tab.2 CJ10 p.262, she said what the commitments addressed, the competition concerns set out in, and she cited specifically para.5.8:

> "When the OTA has faced current the restrictions on discounting a hotels room only accommodation, there is likely to be limited if any competition",

and then she said, "Well, that is the first competition concern, that current restrictions limit competition on room rates". She said, the second concern, 5.9 over the page, "The current restrictions may increase barriers to entry". Her emphasis yesterday on these current restrictions, as set out in the Decision, appears to be saying that as the competition concerns defined in the Decision are defined by reference to current restrictions, it is enough that they get rid of those current restrictions in order to fully address the competition concerns, even if they leave in place other residual restrictions.

It seemed to be that what she was suggesting was that because we are looking at current restrictions there was no discounting before, now there is some discounting so we have addressed the issue.

Three points arise on that. First, the commitments were offered to address the competition concerns set out in the SO, and those competition concerns, although there were three of them as well in the SO, were expressed in very different terms. And, again, in response to questions from the Tribunal today, Miss Bacon confirmed that the OFT considered that the commitments fully addressed the competition concerns as set out in the SO. If I can ask you to look back at the SO and to note just how differently the competition concerns were identified.

If you could first look at p.67 of the SO, "The Theory of Harm" at para. 2.116, the theory of harm – it is called the 'theory of harm' here, you will see that in effect the OFT sets out its provisional views on what are the three competition concerns, under headings I, II, III. The theory of harm is introduced at para. 2.116, and it is identified as follows:

> "… a restriction of the buyer's ability to determine its sale price, for instance by restricting the buyer from sharing its commission with the customer."

So, the example that is given is the restriction on a buyer from sharing its commission with the customer, but the concern generally is a restriction of the buyer's ability to determine its sale price, and that is repeated again in s.6, which sets out the findings in 6.4 and 6.5. It is the restriction on Expedia's and Booking.com's ability to determine its sale price for instance by restricting them from sharing their commission.

The commitments do not fully address that competition concern as set out in the SO. They explicitly leave in place restrictions on the buyer's ability to determine its sale price. It is only by careful re-characterisation of the competition concerns in the Decision, so they refer to current restrictions, that the CMA can even argue, in my submission, that the commitments address those concerns. It was not until last week, when we saw the SO that we realised just how different the position was.

The second point in response to that is that Miss Bacon said yesterday: "Don't worry about the residual restrictions" because the commitments are what she described as a 'mandatory minimum'. Parties can agree to allow discounting to a greater extent than that set out in the commitments, but in that regard we maintain our contention that that really is cloud cuckoo land.

The parties had in place agreements prohibiting discounting. They fought hard the provisional findings set out in the OFT's SO. They argued, although their arguments to this extent are redacted from the SO. They argued that they were not even independent operators, that they were agents, and therefore they did not even fall within the ambit of Article 101, and they accepted proposed commitments, or the proposed commitments to close the case.

To argue that, in those circumstances they would engage in deeper discounting we say is fanciful. Mr Ward used very careful language in his submissions to you this afternoon. If the interveners wish they can offer discounts, and I huffed and puffed for very good reasons. The point is that the interveners had every opportunity to put in evidence in this case and, in fact, asked specifically for a provision in the CMC order allowing them to put in evidence in this case. They chose not to put in evidence in this case, and they certainly did not put in any evidence, it is notable by its absence, any indication that they have discounted to a greater extent than set out in the commitments, that they intend to do it, or that they even might do it.

As to the point found in the SO that Expedia had terminated the infringing agreements in 2010, again, despite every opportunity to do so, Expedia put in no evidence to this court, because even if they terminated these agreements they have not actually engaged in any discounting post-2010, and that seems very unlikely in that in 2014 they pushed for and entered into commitments that did not allow unrestricted discounting.

The third point I make as regards fully addressing the competition concerns, is that the OFT's argument in our submission ignores the additional restrictions on advertising that the commitments put in place, and the impact that these would have on price transparency and search costs. I emphasise that obviously Skyscanner's particular and individual interests are affected by this case but the point that Skyscanner made to the OFT was that the interests of competition and consumers will be affected by the commitments, by the reduction in price transparency and the increase in search costs that will be engendered by the advertising restriction.

Now, Miss Bacon says that that issue is not about fully addressing, that issue is about appropriateness, which is her point 4, and I will come back to that, if I may.

Before I leave her point 3 about 'fully address' she says that commitments do not have to remove restrictions on competition straight away, they can evolve over time – a gradual ceasing of the restrictions. She says that is exactly what we are doing in this case. Consumers over time will have made their first full price purchase, will have entered and joined a closed group, and then the concerns will have been fully addressed, and they can take advantage of the discounts.

Our response to that is, first, the restriction on the extent of discounting set out in principle 18(b) does not disappear over time, nor does the additional restriction on advertising and, in any event, we have seen the evidence that consumers do not purchase hotel rooms that frequently – just under 50 per cent only make one purchase a year (Mintel Report), and that

one purchase, as we know, will be at full price. I am talking here about purchase, I will come on to knowledge of the existence of discounts.

Here, taking advantage actually of the discount, you have to make your purchase at full price and the next purchase on which you will get your discount has to be with the same OTA.

We also have seen the Statement of Objections recorded the extent of brand loyalty and incumbency advantage that the large OTAs, basically Expedia and Booking.com, enjoy, as opposed to the small OTA new entrants who are exiting the market. The commitments entrench that incumbency advantage. Why was it in the interests of Booking.com and Expedia to enter into these commitments and to throw their hat in with the hotels?

The incumbency advantage is reinforced by the advertising restrictions, because small OTA's, new entrants cannot take advantage of the shop window provided by the price comparison sites, and it is not just Skyscanner, there are a number of price comparison sites over there.

Miss Bacon appeared to suggest that the price comparison sites cannot cover the whole market, Skyscanner has only just started. Well, the whole model of the price comparison site is that you cover the market, and Skyscanner and other price comparison sites do just that.

The market is fast moving. Small OTAs can go out of business very quickly and two years is more than enough time for that to happen, and for the incumbency advantage to have become entrenched. Those are the residual restrictions on discounting.

The Tribunal brought up and drew the attention to footnote 10 of the Decision. We have never suggested otherwise, it is absolutely the case that in order to see the discounts available via closed groups you just have to join those closed groups. You have to input your data on that closed group website, and you have joined that closed group and you can see the prices available. You cannot take advantage of them until you have made your first full price purchase, but you can see the price available.

We do absolutely reject the submission that joining a number of closed groups is, as I think Miss Bacon went to say, essentially costless. It is absolutely not. Compare the position without the advertising restriction with the position with the advertising restriction.

Without the advertising restriction as a consumer you go to one website, you say, "I want a hotel, I have done this before, 1st August, Paris", and you get all the prices offered by all the OTAs for that hotel.

If you want to see discounts available, post the commitments, you go on to Skyscanner, you see all the prices, the headline room rates available, you see next to each of the OTAs'

websites, “Discounts may be available”, “Discounts will be available”, “Discounts may be available if you join a closed group”. So you go to Booking.com, you click on it, you join its closed group and you see what discount is available. If you make your first purchase with Booking.com then you have to click through a number of different sites, input your data on each site in order to see the actual prices available.

That situation does clearly increase search costs. It clearly has that impact. It clearly reduces price transparency.

There is a further point and it is this: if you make your first purchase with Booking.com, what incentive do you even have to look at what discounts may be available on Bacon.com? You know that even if you go to Bacon.com and you join their closed group and they are offering a better discount than would be available to you on your second purchase on Booking.com, you cannot take advantage of that discount today. You cannot take advantage of that discount until you make your second purchase on Bacon.com. You do not even know what discount might be available for your second purchase, let alone when you are going to make your second purchase. So once you have been caught by the closed group for Booking.com, what incentive is there to even go and look at the other closed groups, even to join the other closed groups. What incentive is there to go to Booking.com and join their closed group to look for discounts, let alone the incentive to go to Sinclair.com and join that closed group, Smith.com, and join that closed group? There is not any. Before the advertising restrictions were put in place, you would have had access to all this information in one place.

Miss Bacon’s fourth point is that the commitments must be appropriate, and it is here that she addresses our points that I have already elucidated on, the additional different restriction imposed by the advertising restrictions. She says the obligation that commitments must be appropriate is not a hard-edged obligation. There must be a measure of judgment available to the OFT and she relies on the OFT’s margin of appreciation in that regard. We say that the OFT’s margin of discretion cannot allow it to put in place restrictions which, as I have identified, clearly have the potential to reduce price transparency and increase search costs, clearly have the potential to restrict competition and are contrary to the purpose and object of the Act without even properly considering the impact those might have.

As for the justification now given for the advertising restrictions - that is that they are justified by the economic context of the MFNs, the price parity agreements - first, Mr Ward rightly acknowledged that the impetus for this restriction came from his clients. I note that this explanation for the advertising restriction was not given in the Decision. It was not given in Mr Rasmussen’s first witness statement. It was only when Mr Rasmussen lodged

his second witness statement last week, I think, that he explained that it is all about the MFNs.

Then in response to a question from the Tribunal, "How do you justify a restriction on advertising by reference to a pre-existing restriction?" the OFT said, "We made no findings on MFNs". Let us actually see what they did find in the Statement of Objections. Could I just ask you to look back at that, para.1.18? This paragraph contains the footnote that Miss Bacon relies upon. I say there is a finding in para.1.18 and the OFT cannot go back from that. The OFT says that it:

> "… considers that the existence of Rate Parity obligations alongside the discounting restrictions is capable of reinforcing and exacerbating any preventing, restriction or distortion of completion …"

That is their finding, it is capable of doing that. The footnote says the OFT has not investigated the extent to which it might do that.

So when you have an existing state of affairs which the OFT has found to be capable of reinforcing restrictions of competition put in place as a result of discounting restrictions, to say "We can rely on that because we did not find to what extent they restricted or reinforced those restrictions", we say is simply stunning.

If you look at the meat of the Statement of Objections, para.2.124 onwards, p.69, I have already said the three headings under the Theory of Harm, on p.67, I, "Restrictions on discounting limit price competition and increase barriers to entry", II, on p.69, "Rate Parity obligations are capable of reinforcing [those restrictions]", that looks to me like a pretty clear finding. Then it goes on in 2.124:

> "The existence of Rate Parity obligations alongside the discounting restrictions is capable of reinforcing [the restriction]."

Paragraph 2.125:

> "In practice, any such obligations [the Rate Parity obligations] are capable of reinforcing any prevention, restriction …"

Paragraph 2.126:

> "Rate Parity obligations also reduce the incentive of OTAs to attempt to negotiate lower rates …"

Paragraph 2.127:

> "Likewise, Rate Parity obligations mean that there is less incentive for OTAs to lower their margins or commission."

Then the only caveat in para.2.128 is that the OFT has not investigated the extent to which they might be so capable.

Moving on from that point, to Miss Bacon's point 5 on the sheet she handed in yesterday, she characterised her point 5, or she put her point 5, as being about adequacy of reasons. Adequacy of reasons is not a ground of challenge that we have made. We say that when one looks at the Decision and the OFT's pleadings and the OFT's evidence, it is not that they are inadequately reasoned, it is that they make it clear that the OFT has not properly considered Skyscanner's representations on price transparency and increasing search costs. In particular, in that regard, the failure to engage with them at all in the Decision shows that the OFT failed conscientiously to consider those issue - Ground 2 of our grounds - and we say, further, that failure, which is clear from the face of the Decision is not made good by the subsequent amplification of its case, the OFT's case in the pleadings and evidence. We do not say those pleadings and evidence are inadmissible, we never have, so all the time that Miss Bacon spent on those cases, we do not argue with that. We do not say those pleadings and evidence are inadmissible. We say that when you look at them, they make the OFT's position clear, that it did not consider Skyscanner's submissions on the grounds that they were unsubstantiated.

Now, Miss Bacon said, "Look, we did consider. We had a meeting, we sent them letters subsequently". You have heard what I had to say about the meeting of 20th January. The point was made clear in that meeting that the OFT did not think Skyscanner had put in evidence or data. The difference of opinion is whether the OFT made it clear that they wanted it immediately or that they were asking the Skyscanner to put it in after the Decision had been made. We say the OFT were saying Skyscanner should put it in after the Decision was made. But, leaving that to one side the OFT made its position clear in that meeting of 20th January, you remember that very first sentence of the meeting note, "OFT considered it was only argument, not evidence or data". We are not going to consider what you say without evidence or data.

Miss Bacon says, "Oh, but look what's in the letter of 28th March". Now, my submission is that you should put very little weight – in fact no weight – on what is said in that letter. That letter was produced by the OFT after it had received a letter before action from Skyscanner and a number of other metasearch sites. This is the letter before action, I think it is probably worth taking you to it, core bundle 1, exhibited to Miss Jameson's first witness statement, CJ16, letter of 18th March 2014 from solicitors Maclay Murray & Spens, Skyscanner's solicitors who continue to represent them:

> "Dear Ms Pope, Proposed appeal under s.47 [a clear letter before action] We are instructed by Skyscanner" … and then at the end set out the concerns, last page of the letter just before the heading, "Response to this letter", "In the event that the OFT

does not or cannot resolve Skyscanner's concerns, it is Skyscanner's intention … to lodge … a notice of appeal".

So it is a letter before action. And the meeting that took place on 26th March which is at the next tab, CJ16, the meeting of 26th March and the OFT's letter of 28th March at tab.CJ18 upon which Miss Bacon relied was a response to threatened litigation. I do not again say this material is inadmissible, but I do say that it is irrelevant to whether or not the decision was made lawfully or properly and I do also say that what is said in that letter should be treated with caution, and I make that point on the back of the cases which I would as you just to look at, not look at the cases, but they are cited in my skeleton and you can look at them in due course. In my skeleton at para.67(q) which is p.825 I cite two cases, *D v Secretary of State for the Home Department*, it is well established that the court should exercise caution before accepting reasons for a decision which were not articulated at the time of the decision but were only expressed later, in particular after the commencement of proceedings", and we say equally after the issue of a letter before action.

And then the case of *Goldsmith*, Court of Appeal judgment, the court has to look at the Decision at the time it was made and at the manner in which it was communicated to the person or persons affected by it.

Now, Miss Bacon also made the point that Skyscanner was the only metasearch site to submit comments in response to the consultation and other companies could have done so. For example, she said, those parties who were cited in the letter before action, those other metasearch sites, could easily have made submissions to the consultation, why did they not do so? Well, it is not suggested by the OFT that the OFT pro-actively contacted those metasearch sites, and we say it was simply not unreasonable, nothing can be made of the fact that other metasearch providers did not respond to the consultation. In that regard I think it is important, sir, in the light of the point that has been made, for you and your colleagues to see what the OFT actually said in its public press releases about the consultation. If you go to core bundle 1 CJ4.

THE CHAIRMAN: I am sorry, can I just check - I thought that the OFT said they did pro-actively consult.

MISS SMITH: They said they did pro-actively consult Skyscanner, which we say is a rather slightly strange way of putting the position, because if you look at Miss Jameson's statement we initiated contact with the OFT via Mr Vincent Smith who was then Skyscanner's solicitor, on 19th November, and the OFT sat on that email for about a month and on I think it was 19th or 20th December got back in touch with us and said, "Well, we have now got a new consultation. You might want to respond to it". That is their pro-active

consultation of Skyscanner. As regards this I do not think the OFT has ever put in evidence that they pro-actively contacted anyone else, the suggestion was that the -----

THE CHAIRMAN: Does the CMA want to deal with that point?

MISS BACON: The first witness statement of Mr Rasmussen says that, "we did pro-actively contact a number of interested parties", that is para.23:

> "From 12 to 29 August 2013, the OFT contacted a total of 29 interested parties inviting them to provide the OFT with evidence and their views on the Initial Commitments",

and then footnote 24 makes the point that, for example, on 16th August the OFT contacted TravelSupermarket through its brand owner, MoneySupermarket.

MISS SMITH: Okay. I was responding to the submission made by Miss Bacon that these other people who were named in Skyscanner's letter before action could very easily have responded to the consultation, and I do think in that regard I would like you, sir, if I may just to look at the press release that was issued in light of the evidence that Miss Bacon has put in, that Mr Rasmussen's evidence that the OFT contacted a number of unidentified parties (we do not know if they were metasearch sites or not) and contacted Travel Supermarket.

If you look at exhibit CJ4, this is the OFT's public statement, press release, the first consultation 9th August:

> "The OFT today opened a consultation on commitments proposed by Booking.com … designed to address its competition concerns. […]
>
> The three businesses under investigation are proposing to address the OFT's concerns by giving formal commitments that would relax existing restrictions so that OTAs can provide discounts on the rate at which room only hotel accommodation bookings are offered. Under the proposed commitments OTAs would be free to use their commission revenue or margin to fund discounts to consumers who meet certain criteria"

And then, just two paragraphs down:

> "Ann Pope, Senior Director … said: 'The OFT is consulting on whether these commitments offer an immediate and effective means of injecting some meaningful price competition into the online offering of room only hotel accommodation bookings where, in our provisional view, none may exist. Under the proposed commitments, OTAs would be able to offer discounts off hotel room bookings to qualifying consumers. The OFT would now like to hear the views' [… before it decides whether to accept]".

So, what the OFT is saying is, "We are introducing discounting". Full stop. It does not say, "We are introducing discounting subject to advertising restrictions".

The same point can be made and I do not need to take you to it, but for your note it is exhibit CJ7, press release on 20th December 2013 does exactly the same thing, "Commitments to allow discounting, would you like to respond to consultation on those?"

Now, what the OFT's case having heard Miss Bacon's submissions appears to boil down to as regards the points raised by Skyscanner. First, she accepts quite properly that Skyscanner raised plausible concerns, she says "I absolutely accept they were plausible concerns". But she says that despite those plausible concerns the OFT was entitled on the basis of the material set out in para. 30 of Mr Rasmussen's first witness statement, to decide not to investigate further and you will recall – it might be worth, for the very last time I promise, to go back to Mr Rasmussen's first witness statement, para. 30 and see what that material was that Miss Bacon says the OFT relied on in order to decide not to take these concerns further.

First, consumer survey evidence, you have heard my submissions on that. The OFT's consumer survey evidence made absolutely no mention of the role played in the market by metasearch sites. So consumers' attention was in no way drawn to the possible impact on price transparency and the increase in search costs that would be brought about by the inability of those consumers to find the actual discounted prices in one place.

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

Mr Rasmussen certainly does not give evidence that the existing closed groups were the same as the ones now proposed, and I think properly Miss Bacon's clients, at least, accepted that they certainly were not, and that they did not contain advertising restrictions. We have seen from the SO that they are very, very small scale, but that is the material on which the OFT decided not to investigate further.

More importantly, however, that is the material on which the OFT said: "No, no, it is up to you, Skyscanner to go out and investigate further, and that is a fine position to take because we are going to keep this under review."

You have my submissions on the power of s.31B of the Act, keeping under review is absolutely no answer to not having carried out a proper conscientious consideration of these representations before the decision is made. At danger of doing this metaphor to death – sir, you said it is like a doctor saying: "Let's wait for a patient to die before taking this seriously" ----

THE CHAIRMAN: I think I asked a question, I did not say ----

MISS SMITH: How can you trust the doctor, we say, when the doctor is refusing to carry out a proper examination. What really puts this into stark contrast is what the OFT actually said in the meeting of the 26th March, which Miss Bacon wanted to rely on. If I can ask you to go to core bundle 1, CJ17 – this is the last document I will take you to. This is the attendance note, at 378, of 26th March 2014. You see who is there. I just want to ask you to look first at what is said on p.385, Mr Rasmussen ("GR"):

> "This meeting has been framed by the correspondence we have received. We are open to dialogue and want this to continue."

"CM", that is Miss Munro, the solicitor for Skyscanner:

> "We will need to consider that. Certainly we will want to keep the dialogue open but that does not stop our concerns. Without pre-empting my client's instructions, an appeal may need to be lodged but even so we hope to continue this dialogue. We would want to bring the data to you in parallel, with a view to reopening the case."

"AP":

> "In the event that you are successful on appeal it may not lead to a reopening of the investigation. Do not assume that we will pick up where we left off. You have concerns and we have sympathy for this but we do not think you can say and confirm that harm has happened."

"CM":

> "The interests of meta-search sites are in line with consumers' interests. We understand better what you are saying we need to do."

"GR":

> "In terms of managing expectations, if we are in litigation the dialogue between us would be hampered. We would be less inclined to review any data you submit. There will be a limit to what we can share across the bench. If you are to appeal, you need to bear this in mind."

It is not a particularly open-minded continuation of consideration. Then Ms. Pope:

> "The case is closed, the investigation is complete and you had your chance for us to consider."

Then, on the final point, and I want to take you to this, because, sir, you almost read my mind when you said: "It is like waiting for a patient to die before taking the case seriously". On p.384, just towards the bottom of that page Mr Rasmussen says:

"For example, nobody nowadays bemoans the fate of bricks and mortar travel agents. The growth of travel sold online has increased consumer welfare. The demise of this sector [meta-search sector] does not necessarily mean consumer harm. In fact, we might crack open the champagne if that does happen because that will be evidence of our success."

THE CHAIRMAN: I thought he was referring to travel agents, sorry.

MISS SMITH: Bricks and mortar travel agents, they have died.

THE CHAIRMAN: Yes, he is not referring to metasearch though.

MISS SMITH: "And that does not seem to have caused a problem, you can die".

THE CHAIRMAN: I did not read it that way.

MISS SMITH: 'We will crack open the champagne if this does not happen'.

THE CHAIRMAN: I am sorry, for what it is worth, I read it as he was bemoaning the fate of bricks and mortar travel agents saying we could crack open the champagne if – we will look at it.

MISS SMITH: In any event, sir, in conclusion, our submissions are that the OFT did not conscientiously consider the submissions made by Skyscanner about what we say were plausible and self-evident concerns, 'rejected' – and I use that word advisedly – Skyscanner's representations on the basis that they were not supported by evidence, and therefore wrongly failed to take into account a relevant consideration – our Ground 2. Also, on Ground 3, by putting in place commitments which did have this potential impact but deciding, nevertheless, to continue without properly considering that impact, they were acting contrary to the objects and purpose of the Act.

Sir, unless I can assist you further, those are our submissions in reply.

THE CHAIRMAN: I think that concludes the proceedings for today. It remains for me to thank everybody for the courteous and comprehensive way in which the case has been argued over two rather hot days – I am afraid we cannot answer for the weather – but thank you very much. Judgment will be reserved.

MISS SMITH: I hesitate, sir, but I have been asked to ask if there is any way you might be able to indicate if you have any idea when Judgment might be handed down?

THE CHAIRMAN: I expect it will be some time in September.

MISS SMITH: Thank you, sir.

THE CHAIRMAN: Predictions about the future are very hard to substantiate – we do not have an economic model. Thank you very much.