**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. : 1345/4/12/20

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

Tuesday 24 November– Thursday 26 November 2020

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

BETWEEN:

Sabre Corporation

-v-

Competition and Markets Authority

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# A P P E A R AN C E S

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

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**Wednesday, 25 November 2020**

**(10.30 am)** **Open Session**

**Opening submissions by MR WARD (continued)**

**MR JUSTICE MORRIS:** Good morning, Mr Ward.

**MR WARD:** Good morning.

**MR JUSTICE MORRIS:** I believe we are going to be in open session.

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** And therefore we will be on live-stream. I'm looking up to the screen and awaiting the live-stream to come online. **(Pause)** Is the live-stream on? It is running, very well.

Good morning, everybody. We're ready to proceed on the second day of the hearing. I just want to remind everybody that we are in open session and the hearing is being live-streamed and to remind everybody that recording of this hearing is not permitted and any such recording would amount to a contempt of court.

Mr Ward, when you are ready.

**MR WARD:** Thank you, sir. I'm now turning to ground 4 of our application. This concerns the application of the RDS on the assumption that it is a lawful RDS. As the tribunal will be well aware, the CMA only had jurisdiction if the combined share of supply of the RDS is at least 25 per cent. So it is essential to correctly identify which other services fall within the RDS. If they are excluded without justification, that risks inflating the parties' share of supply. It's our submission that that is precisely what happened in this case.

You will recall from yesterday that the relevant description of services is the supply of an IT solution to airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings. And that as you saw yesterday is at 5.28 of the Final Report.

Our submission is the CMA then went on to exclude a series of other services on the basis of ad hoc and inconsistently applied additional considerations which form no part of its definition of RDS. I want to just quickly show you the pleadings in the skeleton argument as to how this is actually put by the CMA. Starting with the defence please, which is in bundle 1 under tab 2 at page 139, we can see at paragraph 158 the CMA's high level response to our claim. Sabre says that:

"Various services were wrongly excluded from the scope of the RDS. This contention is wrong. In excluding these services, the CMA acted well within the broad discretion vested in it by section 23(8) to treat those services as a separate description."

Sir, as we discussed yesterday, the CMA enjoys a margin of discretion when determining which criteria to use in identifying an RDS but once it has done so, it must apply those factors consistently and indeed coherently.

We can see there may be hard cases where the application of the criteria does require a degree of judgment. But most of the time, it is going to be straightforward to identify whether something is, for example, a cake or a biscuit. But every so often, something comes along like a Jaffa Cake which is harder to decide. But the CMA says everything is a Jaffa Cake and every application of the criteria is a matter of judgment. We see this if we could now close the pleadings but go to the skeleton argument, which is in the bundle 2, tab 2, page 123, and it's paragraph 114.

**MR JUSTICE MORRIS:** Just give me moment. Yes.

**MR WARD:** Paragraph 114:

"The CMA's position is that the application of the criteria chosen under 23(8) will inevitably require judgment and factual appraisal and raise questions of degree which will not admit of a single right answer in relation to any given example."

So it's always a Jaffa Cake.

But in our submission, if the criteria never give a clear answer, then they are plainly not adequate. That would be highly detrimental to the legal certainty which a jurisdictional provision requires. Our case is that section 23 requires two things: identification of criteria which are specific enough to delineate the borders of the relevant description of services, and then the application of those criteria consistently. It is possible there could be a difficult judgment call to be made but there is nothing like that in issue in this case. What we will see instead in many cases is a cursory dismissal of a number of IT solutions in just a few words.

What I'm going to do in part in the interests of time is to just focus on four examples. I'd like to go now, please, to the decision in bundle 4, under tab A starting on page 64 -- bundle numbering 66. I'll just show you the scheme of this.

**PROFESSOR MASON:** Sorry, Mr Ward, could you repeat the location.

**MR WARD:** Bundle tab 4A tab 1, page 64 the CMA's Final Report.

**PROFESSOR MASON:** Thank you.

**MR WARD:** We start with the paragraph I showed you yesterday at 5.29 where the CMA identifies which services are included in the RDS. As I made the point yesterday, essentially that's only the products equivalent to those of the merging parties and non-GDS aggregators. Then if you look at the next page at 5.36, it says:

"The parties submitted that the relevant description of services excludes a wide range of service providers that meet the description."

Then there is a whole series of bullet points and then if you just skim on -- I'll obviously pick up some of the detail of this in a minute -- on to page 69, you will see footnote 135 deals with six different categories with Roman numbering all in

a few words. I'm going to focus my challenge on just four of those categories. The first one I'm going to talk about is so-called non-VITOs, which are on page 68 at bullet B. I'm going to go back to bullet A, which is metasearch, but for reasons which I hope will become clear, the argument flows from the argument on non-VITOs. So what is a non-VITO, that seems like good place to start. The short answer is, it is in the jargon, "A non-vertically integrated tour operator". In other words, a tour operator without its own airline and therefore sells flights of other airlines. Its effect is obviously, and I don't think controversially, that it therefore provides a distribution channel for airlines.

We're going to see some detail about this in a minute, you don't just have to take my word for that. But I want to go through the CMA's reasoning in the order it arises. If we start at 5.36(b), all it says is:

"We address this point in 5.68 below."

So of course we have to turn on to 5.68, and that's on page 83. When we get there, we're still not much the wiser because at 5.68(a) it says:

"As further explained in part B of appendix B [where we will go in a moment] we consider the activities of TOs, including non-VITOs, are not comparable to those performed by the parties."

So immediately, we would submit this high level reason given on its own is completely unsatisfactory because not comparable obviously raises far more questions than it answers and certainly isn't part of any established test for the RDS. But there is more detailed reasoning and it is important, and most of it is in fact in appendix part B as is flagged up here. For that, we must turn to 4B, tab 2, page 456. We are looking now at paragraph 1 which explains the reasons why the parties submitted that non-VITOs were included. None of these reasonings are disputed, I should say, by the CMA. If I may just take you through them:

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

So the essential element of travel agents is in there:

"A customer booking their holiday through a non-VITO would not generate traffic on any GDS but would still be able to compare and browse airline content from several different airlines in one place. Non-VITO services have functional similarities to non-GDS aggregators, a service that has been included."

And then:

"Although TOs [tour operators] are focused on the leisure segment, this cannot be used as a rationale for excluding them from a putative market for services to facilitate indirect bookings."

We can see at a glance they are strikingly similar to non-GDS aggregators in this regard and they are indeed a distribution channel of airline information to travel agents. Why then are they excluded? The answer lies in paragraph 2, but we're also going to have to look at some detail of the footnotes. Let's just see what paragraph 2 says first:

"However, we consider that non-VITOs do not provide an IT solution to airlines."

So that's the first reason which we'll come to in detail in a moment:

"The exclusion of non-VITOs is supported by third party evidence. That indicates that their activities are not comparable."

That's the form of words which appears to be in our submission empty. Then they also say:

"Non-VITOs generally access airline content in the same way as travel agents, i.e. via GDS or direct connect and distribute it, albeit to the public or through travel agents."

So in a sense, they're downstream of the GDS or direct connect, but nevertheless they are distributing to travel agents.

So what then is the real problem with this? I want to just go back and look at this issue of do they provide an IT solution to airlines. The footnote here is of real importance, it's footnote 28:

"The parties submitted that the CMA's exclusion of non-VITOs has placed decisive weight on the fact there is no contract between the airlines and the non-VITOs."

You can see why that's the case, they are downstream of the GDS or the direct connect:

"However, we consider that the parties have misinterpreted our position as the exclusion of non-VITOs is based on the nature of the services rather than the absence of any agreement."

It's very important that the absence of any agreement cannot be the reason. The reason I say that is because that's precisely the position in respect of non-GDS aggregators who are included in the relevant description of services. Just to show you that and make it good, we need to turn back to page 66 and a footnote. It's footnote 122.

**MR JUSTICE MORRIS:** It's page 66.

**MR WARD:** Page 66. It says:

"We have included non-GDS aggregators in our assessment for the purpose of share of supply test on a conservative basis. They are providers of an IT solution that aggregate airline content for multiple airlines and transfer that content to a travel agent."

I would say just like a non-VITO:

"In that sense, their functions are very similar to GDS and we consider it appropriate to include them in the relevant description of services. We do not think the fact

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

Just to remind you, if we turn back two more pages of a footnote I did show you yesterday, footnote 118, second sentence which begins at the bottom of page 64:

"Content may also be distributed using a direct connect that goes via a non-GDS aggregator."

So essentially then, the position appears identical as between non-GDS aggregators and non-VITOs because they're both downstream potentially of a direct connect or even a GDS, they both aggregate content and they both provide that content to travel agents. In neither case is there, or is there necessarily at least, a contract with any airline, and all we are left with is the assertion that there is some lack of comparability in the nature of the services. That is not a test we can find anywhere in the RDS. It's simply a question of: are they or are they not within the description?

Does this matter? The CMA says it doesn't, it's not material. But of course we're interested in the cumulative effect of a number of errors and what I'd like to show you is even on its own, non-VITO is really important. I can do that without any confidential information, I'd like to reassure you immediately. Can we please turn to page 85 in the report. This is a table I think you've seen before.

**MR JUSTICE MORRIS:** We have.

**MR WARD:** Thank you. You'll see it's "Share of supply for IT solutions", et cetera, and then very importantly at the end of the bold in brackets "(excluding non-VITOs)". I'm going to use the nonconfidential ranges but invite you to look at the confidential figures. For Sabre in the first line, the share of supply range

is given as 30 to 40 for the nonconfidential, and you see the confidential figure. But we also have a figure to show us what happens if you include non-VITOs. That is at 4B, tab 2/458. This time, this is table --

**MR JUSTICE MORRIS:** I'm not there yet, one moment.

**MR WARD:** I'm so sorry.

**MR JUSTICE MORRIS:** No, it's all right. I've got it.

**MR WARD:** 4B/2/458 table B1. This time you'll see "Share of supply", et cetera, then at the end, "Including non-VITOs". And for Sabre, you can see a different bracket and a different confidential figure. So this alone is important, alone. So that's non-VITO. Now I want to go back to paragraph 5.36 --

**MR CUTTING:** Sorry, Mr Ward, I realise I may be being slow -- if we can capture in relation to non-VITO. I don't know whether I missed it, but are you saying that the nature of the non-VITO supply is basically the same as captured by footnote 122 which becomes an included product?

**MR WARD:** Yes. But even more importantly, I'm saying the nature of the supply is such that it falls within the RDS. There's no relevant distinction in the nature of the supply to the qualities that are required by the RDS. Obviously a non-VITO is not the same thing as a non-GDS aggregator, they're two different services. But the critical question actually is only: do they fall within the RDS, not are there any fine grain differences.

**MR CUTTING:** So there is a nature in which they are -- notwithstanding what the CMA says, you say they are actually supplied to airlines.

**MR WARD:** Yes, and that's not even disputed by the CMA. It says there's just something about these services which is different and therefore we're not including them. My respectful submission is that is either a hidden criterion or

an irrational criterion, but is certainly not a straightforward application of the RDS.

**MR CUTTING:** Sorry, I was obviously a bit slow. Thanks.

**MR WARD:** No, thank you, sir, thank you. I was going to turn on to metasearch engines.

**MR JUSTICE MORRIS:** Just while we're there on the figures on the last point, I see the difference it makes, although I'm allowed to refer, aren't I, to the Sabre figure at page 458?

**MR WARD:** The one in brackets is nonconfidential.

**MR JUSTICE MORRIS:** Yes. You are showing the difference between the two Sabre figures.

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** Therefore it makes a difference.

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** But I note that the Sabre figure is 20 to 30.

**MR WARD:** I'm not making the submission that on its own we get home with just this point.

**MR JUSTICE MORRIS:** You are saying it makes a difference --

**MR WARD:** I'm saying -- yes.

**MR JUSTICE MORRIS:** -- and you are going to add in other things that make a difference.

**MR WARD:** I am. And to be absolutely clear, I'm not in a position to say exactly which of these adds up to take us under the magic number of 25. I don't know because these are all third party products. I use that as an illustration because it's one where it is clear that it is important.

Another one of the illustrations I'm going to use is also going to be very obviously

important and I've steered away from things which are potentially of no importance or appear more peripheral --

**MR JUSTICE MORRIS:** Or smaller.

**MR WARD:** -- so I'm going for big things. But I don't know, I don't know what the magic number is and I'm not sure whether the CMA does.

Sir, I was going to turn, if I may, to metasearch. That is at 4A/1, page 67. What the reasoning does is it quotes or summarises what the parties submitted about metasearch and then it explains why the CMA has rejected it.

The parties submitted that metasearch engines, e.g. Google Flights, do a similar job to aggregators. They aggregate and compare content for multiple airlines while not directly connecting to an airline. However, we consider there a clear distinction between non-GDS aggregators and metasearch engines. Non-GDS aggregators are an IT solution provided to airlines that enables travel agents to access travel services information and to make bookings in conjunction with a GDS or direct connect. Metasearch engines are not an IT solution provided to airlines but are consumer facing sites."

So there are two elements here: not an IT solution to airlines, and not consumer-facing sites.

The way these sites actually worked was explained by the parties in the merger notice and I want to show you that, and I have specific instructions I'm able to read in open court the bit that's actually useful for this purpose. For this, we need to turn to bundle 6D, tab 9, page 387.

**MR JUSTICE MORRIS:** I'm sorry, can you say that again.

**MR WARD:** D/9, page 387. This is a confidential document but I have permission to read out the little bit I'm going to rely on. It's paragraph 3.14 and I want to read the first sentence, then I'm going to read a little bit of one of the footnotes:

"Travellers may also use metasearch engines such as Kayak, Trivago and Skyscanner which search across multiple websites to direct consumers towards the lowest price or best value available which could be from a TSP [which means a travel service provider, e.g. an airline] or indirectly through an OTA [meaning online, e.g. Expedia]."

So that's what they are, if there was any doubt. Then in footnote 21, there is a little bit of explanation about how it actually works. It's the second sentence I want to read out:

"Metasearch engines do not typically charge consumers and derive income from a combination of referral fees, i.e. a fee referred from an OTA when a booking is made on that OTA after a click through from the metasearch engine."

So what's really important to see there is that the consumer goes on the metasearch site, it sees e.g. a flight on American Airlines, it clicks on that and what happens is it goes through or it may go through to an OTA, e.g. Expedia.

So let us now look at the two reasons that the CMA -- we can put that away. We can look at the two reasons the CMA gave and see if either of them stand up. The first is not an IT solution provided to airlines -- I hope my submission now is going to be obvious from what I've already been saying about non-VITOs. This is indistinguishable from non-GDS aggregators in the sense that there is no direct connection to an airline. The CMA has made clear that is not required either for non-GDS aggregators or indeed non-VITOs, even though it still ruled out non-VITOs.

So that reason can't help them. The second reason is that they are not consumer-facing sites. But as the evidence I have shown you demonstrates, a click through the metasearch engine leads back to the travel agent. So all it is is another intermediary stage between the airline and the travel agent, but

ultimately information is provided to travel agents.

In our respectful submission, this invocation of it being consumer-facing is either inconsistent or at odds with the evidence itself.

**MR JUSTICE MORRIS:** Mr Ward, could you just go back to first reason, explain again why you say it is an IT solution. I understand there's no direct connect to the airline, but the argument you say is that the metasearch engine, Skyscanner for example, is providing a service to an IT solution to the airline.

**MR WARD:** Yes, because it's offering a platform through which the airline sells tickets, albeit by means of click through to the travel agent. So if you imagine there's a whole chain of computers, which is the reality of all of this, starting with the airlines' booking stack, the PSS, ending up in the travel agent's booking. In between them is the metasearch engine and to that extent, we say it's no different from a non-GDS aggregator. The footnotes I just showed you on non-GDS aggregators and non-VITO make it clear the CMA does not rely on the absence of a contract.

**MR JUSTICE MORRIS:** That I understand.

**MR WARD:** Does that answer your question?

**MR JUSTICE MORRIS:** I think it does, yes, for the time being. It's just the notion of an IT solution being provided --

**MR WARD:** You might say exactly the same about the GDS because what the GDS is of course is a two-sided platform with all of these functions. IT solution is a term we have understood to be as broad as possible for the CMA. It's certainly not defined. Solution/solutions are one of those banes of modern English, but --

**MR JUSTICE MORRIS:** The fee here that Skyscanner earns is something from the travel agents, is it?

**MR WARD:** Yes, according to that footnote.

**MR JUSTICE MORRIS:** And not from the airline?

**MR WARD:** Yes. But my submission is nothing turns on that, it's just the way it works, and I don't know what other payment flows there may or may not be.

**MR JUSTICE MORRIS:** Okay.

**MR WARD:** So that's metasearch.

Then I'm going to -- if you now look back at page 69, this takes us to the footnote 135, which has a whole slew of different services, each of which you'll see is dismissed in just a couple of words. Actually you will have seen we have a challenge based on failure to make sufficient enquiry. Just to deal with that very briefly now, this is the principal target of that complaint because we would say it's hopelessly insufficient as a basis for excluding a wide range of services. What was needed was a detailed understanding and consideration of these individual services to decide whether they fall within the RDS.

Now in the defence of the CMA, it basically says it was for Sabre to advance this information. But of course these are all third party services. Indeed, for the benefit of your note, Sabre did actually make extensive submissions on a large number of these in its response to the provisional findings -- and I'll just give you the note. It's 6H/22/1161, paragraphs 222 to 2030, and indeed in its response to the technical working paper on jurisdiction at 6F/15/807. But in any event, Sabre should not be seen as the primary source of information about third-party services. The CMA has statutory powers to gather information specifically for this purpose.

I'm going to talk about just one of these that's particularly large. But before I do, may I just add one more piece of information in answer to Mr Justice Morris' question which has just been given to me by my solicitor about payment flows.

It's pointed out to me that non-GDS aggregators also do not charge airlines, they in fact charge travel agents. I don't know if it's helpful, but it's just for clarification.

I'm going to target my attention on just one item in this footnote 135 and it is in fact the first --

**MR JUSTICE MORRIS:** Airline.com.

**MR WARD:** -- which as I'm sure the tribunal will appreciate means the airline's own website. Before we get stuck into this, I want to show you this is a very, very important item. We can see this from page 161 of the report, we have another table. Again, we can go with the nonconfidential figures. This is table 8.10, "Global airline passenger bookings by booking channel or vendor 2018", and you will see figures for the various GDS. Then "Direct channel", which is airline.com and airline call centres, the percentage range given in the second column is 40 to 50.

So that's obviously not exactly the same as the RDS, I'm not suggesting it is. I use that figure just to show it's a very big item indeed.

If we turn back now, please, to the CMA's reasoning. This is in footnote 135 on page 69, we see the reasons given:

"Airline.com is not an IT solution provided to airlines because each airline has its own and it is generally accessed by travellers directly and bookings are made by travellers directly."

So again, we have two reasons. Firstly, we have an appeal to this concept of IT solution, which as I have said is completely undefined and, in our respectful submission, is entirely general. But if the point here is something about how airlines don't maintain -- or they maintain their own website or something, it's worth noting, if you look at the previous page in bullet E under "Other providers",

another thing they exclude in the fourth line is IT companies which build airline websites.

So these websites which carry this huge amount of traffic are excluded whether they are hosted by the airline if it has its own IT skills, or if it's hosted by somebody else. In our respectful submission, one way or another, it can't be said that an airline's own website is not an IT solution for the purpose of selling tickets.

But then the second reason is also, in our respectful submission, unsustainable even though it's very carefully worded. It says:

"It is generally accessed by travellers directly."

This is a good example of the CMA using the tailored language of the RDS to try and exclude services because of course they have to be provided to travel agents to qualify under the wording of the RDS. But the important point is there was evidence before the CMA that they were used by travel agents to a material extent. We can see this in the body of the report in -- we'll have to go to three places, but if we could start, please, at 10.123(c), which is on page 319.

**MR JUSTICE MORRIS:** Just give me a moment. Can I just ask you, if you have the other two references, could you just give me the references because I'm scribbling in.

**MR WARD:** Yes, of course sir. I'm going to take you to paragraph 10.123(c), which is at page 319, then 10.144 at page 329, and then to a table which is 4B2/754.

**MR JUSTICE MORRIS:** Thank you very much. 10.123(c).

**MR WARD:** Yes. This is from a section dealing with evidence from travel agents. If we look at the bottom of the page, 10.123(c), it's talking about B&M, and B&M means bricks and mortar as opposed to Internet travel agents. At the bottom of the page, it says three B&Ms indicated they made some use of bookings direct using the airline's website in relation to budget airlines.

Three B&Ms may not sound like very much, but what we are going to see in a minute is they only received responses from seven. So three out of seven said they did use airline.com, and this is -- I'm going to make this good, I can reassure you. Then if we turn on to page 329, please, we get to subparagraph (e) on that page, which is 10.155 -- forgive me, I have given you the wrong reference, that's a summary. It's page 324, paragraph 10.144. Now we're into a different category of travel agents called TMCs, travel management companies, which I understand means companies more targeted at the business user, who is able to meet the more complex needs of a business user. What's said here in 10.144 in the sixth line:

"Four TMCs said they access some content via airline.com but this was for 1 per cent or less of bookings for three agents, although a small TMC indicated it was for 10 per cent of their bookings."

But again, there were only our 12 TMCs that responded to any of the CMA's questionnaires and I'll show you why that's actually a maximum number. For this, I would like to turn to page 754, which is 4B/2/754, which is a list of travel agent respondents by type and source. All the names are of course redacted and don't matter at all, but what we can see is it starts with a list of 12 travel management companies and then it explains at which phase questionnaire they responded. So six responded to a Phase 1 questionnaire and eight responded to a Phase 2 questionnaire. I don't know which of these questionnaires this question arose in, but this maximum of 12 and maybe as few as six or eight which are relevant. Then for B&M, which is lower down the page, there are seven.

What this shows us then is a significant number, a significant proportion used airline.com at least part of the time.

So in our respectful submission, it appears to be another irrationality or hidden criteria or inconsistency, however one wishes to put it, because these have been excluded despite the fact it appears there is appreciable use of these services by OTAs. If there is some question of degree here, then that itself is not apparent on the face of the relevant description of services.

**MR JUSTICE MORRIS:** I'm not really formulating my question clearly enough and I would hope you can assist me. Let's assume that, I don't know, 90 per cent of airline.com users are travellers directly -- 95 per cent and 5 per cent is travel agents. If airline.com is to be included in the RDS, which bit of that is included in the 25 per cent, if you see what I mean?

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** Are you able to help me? I think you've got the point.

**MR WARD:** I've got the point.

**MR JUSTICE MORRIS:** I'm not --

**MR WARD:** I'm going to try and say it should be all of those. The reason I say that is that all of the Farelogix revenue is included, I believe. But if we go back to -- I'm sure Mr Williams will correct me if I've got this wrong because this is an inference I've drawn rather than something I can say with absolute confidence -- but if we go back to 5.27 in the report, a paragraph you've seen quite a lot of times, on page 65, it says:

"Farelogix provides an IT solution that enables airlines to connect to a third party, including travel agents, non-GDS aggregators, or their own website."

So Farelogix API obviously has a multiplicity of uses and I need to be careful because I'm not confident whether all of that would be included.

**MR JUSTICE MORRIS:** Okay. That's something we can come back to, but it may be --

**MR WARD:** But what I would say is airline.com, in our submission, is an IT solution and one -- I'm looking at the definition of RDS:

"For the purpose of providing travel services information to travel agents."

It's not a differentiated service, it's just Virgin Airlines has one website. If it falls within the description, it is in, and these are important things which the CMA has not considered. And let's not forget, this is a judicial review, I'm not trying to win any issues of primary fact on this point so much as to point to the fact that the CMA's reasoning is insufficient and appears to rest on some form of unarticulated hidden criteria.

**MR JUSTICE MORRIS:** Okay.

**MR WARD:** I was going to turn to one fourth category, which is self-supply, self-supply. In other words, where an airline provides an API on its own account. I need to take you through a few references on this, starting on the Final Report, page 140 of the bundle, paragraph 8.53.

**MR JUSTICE MORRIS:** Just bear with me, please. Can you repeat the page number, please.

**MR WARD:** Yes. It's page 140, and it's paragraph 8.53. This is a paragraph -- a lot of it is confidential but we luckily don't need any of the confidential bit. It comes from a section which is talking about -- if you turn to the previous page actually, you can see what the section is about. It's about current suppliers of merchandising solutions and NDC API. At paragraph 8.53, it says:

"In terms of distribution solutions based on NDC API, five airlines self-supply."

You can glance at which airlines they are, please. There's a very substantial element here of self-supply, and very importantly, the CMA also found that this self-supply was actually a competitive constraint. We can see that at page 369. This is paragraph 11.121.

**MR JUSTICE MORRIS:** Yes.

**MR WARD:** "We have found that self-supply of NDC APIs imposes some constraint on the parties. We recognise several large or mid-sized airlines do self-supply ... and then others choose to outsource."

So self-supply here is a real thing and is indeed a sufficiently real thing to be a competitive constraint on the parties. So why then, may you ask, is it excluded from the RDS? The answer to that lies back on page 64. What it says in footnote 117:

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

In my respectful submission, that is not a sufficient reason to exclude them. They are competing service, they are a means of transfer of information to travel agents, et cetera. That reason is highly insufficient.

**MR JUSTICE MORRIS:** How can that fall within the definition?

**MR WARD:** It's a self-supply of a service to the airline. The airline is supplying it itself.

**MR JUSTICE MORRIS:** So it would read "the airline" -- I won't name a name --

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** "-- is supplying an airline solution to an airline."

**MR WARD:** Something like that, sir.

**MR JUSTICE MORRIS:** So it's a service -- does it follow as a matter of definition? I mean, I understand the point about a competitive constraint. But a competitive constraint can come from a service or a product which is not the same product --

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** -- and can come from outwith it. I don't know think it follows

from your submission that the finding of it's a competitive constraint necessarily means it's the same service.

**MR WARD:** It certainly does not follow from that, and I'm glad you are pushing me on that because I did not mean to say that. I showed you those passages to show it is a real and significant element in the context, not some hypothetical. That's why I showed you that. I'm not arguing it simply follows that it's included for that reason.

**MR JUSTICE MORRIS:** No, okay. But it's a slightly odd -- if you go back to the statutory definition of what we're looking for, we're looking for a supply of services.

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** On this analysis, the word "supply" can include A supplying A.

**MR WARD:** Yes, self-supply. But that's not an alien concept in this context. But that is the point, sir, and I'm glad you're asking the question because it's important clarification.

**MR CUTTING:** Sorry, can I ask a question as well.

The CMA had set out the RDS as the supply to airlines.

**MR WARD:** Yes.

**MR CUTTING:** You are suggesting that that includes self-supply in the context of to airlines.

**MR WARD:** Yes. Well, why do you say "two airlines", sir -- oh, I thought you meant numeral 2. I'm so sorry.

**MR CUTTING:** You are suggesting when airline A provides its own service, it's supplying that service to itself.

**MR WARD:** Yes, that's the essence of self-supply.

**MR CUTTING:** And that's your challenge rather than saying, or maybe in addition to saying, that the specifying of the requirement of a supply to airline is itself something we should say is amenable to judicial review in the sense the CMA should not have put that element into the definition of RDS in the first place.

**MR WARD:** Well, that is back in the rubric of my ground 1 challenge, really, about whether this is identifying any rational boundary between the things that are included and the things that are excluded. One of the things that was said by the CMA is the products we've included in the RDS are things with an alternative commercial solution.

One of the important points is, well, obviously self-supply here is an alternative commercial solution. So your question is leading me back to my ground 1. But also, I mean one needs an element of reality about this; that self-supply in all likelihood is going to mean some specialist helping with this, who knows exactly where the bright line lies. Certainly it's not something the CMA has really investigated. My judicial review challenge is that this has just been dismissed with a handful of words and without enquiry or investigation.

**MR CUTTING:** That was going to be a follow-up question, which is about the extent to which these services are in fact hosted or supplied by parties outside the airlines. Because if we accepted that supply to airlines doesn't include self-supply because that's not to an airline, it's by an airline, then the question is your reasonable enquiry point applies to the fact there's nothing in the -- well, I'm not sure if there is anything in the report about the extent to which these things are third-party hosted or not.

**MR WARD:** No, there isn't. All there is again a dismissal, which I'll just remind you, if I may, which I showed you a few minutes ago.

**MR JUSTICE MORRIS:** Page 66 are you talking about?

**MR WARD:** Yes, page 66 of the report or page 68 of the bundle.

**MR JUSTICE MORRIS:** Yes, IT companies.

**MR WARD:** IT companies that build airline websites are excluded.

**MR JUSTICE MORRIS:** Why are they not included?

**MR WARD:** Yes, exactly. So this is all material that just hasn't been -- this is an issue that just simply hasn't been excavated by the CMA and as you say, it is something -- again, part of our complaint here this is just cursory dismissal of what are obviously really quite complicated issues and your questions to me, sir, about how it is hosted are precisely the kind of problem we are talking about. If you could just give me a moment, I've just been passed some information by email I want to just assess. It **(Pause)**

What's pointed out to me is that the CMA's own procedural guidance says:

"The jurisdictional test applied need not amount to relevant economic market and can aggregate, for example, intra-group and third party sales even if they might be treated differently in the substantive assessment."

So in principle, it's all potentially up for consideration. But the CMA has not been clear at all about what the true basis of excluding these products is and there's nothing to suggest they've even really considered it.

**MR CUTTING:** Okay. I just wonder if you can help me with something else, which is that for non-VITO and metasearch, you prefaced your comments supporting their inclusion -- I hope you don't think this is an unfair characterisation, but I have a note of it -- by saying that they kind of met the same criteria as non-GDS aggregators. So if non-GDS aggregators were in, there was no good reason for excluding non-VITO and metasearch. But that's not the case in relation to airline.com and self-supply.

**MR WARD:** No.

**MR CUTTING:** You are saying they get home or should get home by virtue of some accessing by travel agents in the first case and the self-supply concept in the second.

**MR WARD:** Yes, exactly.

**MR CUTTING:** Okay.

**MR WARD:** So the non-VITO and the metasearch, there is an overlap in the flaw in the CMA's reasoning because the same reason is invoked, and the other two are freestanding arguments.

**MR CUTTING:** Is it right -- perhaps you can remind me or perhaps Mr Williams is going to remind us later -- that the CMA had only included non-GDS aggregators on a conservative basis?

**MR WARD:** It does, but it's very important to see what is said about that. I read this to you earlier. If we go back to footnote 122, there's a definite sense of trying to have it both ways. If we look on page 66, they say they have included it on a conservative basis without really explaining what that means. But then if you skim down three lines, it says:

"The functions are very similar to a GDS and therefore we consider it appropriate to include them."

So it might be being conservative, but they've definitely made a finding that they should be included. They haven't said they shouldn't be included but as a sensitivity test, we'll just see if it makes any difference. That would be a very different form of reasoning.

**MR CUTTING:** Okay, thanks, yes.

**MR WARD:** Those were the only categories I was going to focus on. In our submission, this is sufficient to demonstrate that the CMA's approach was inconsistent and indeed arbitrary. It flows from a lack of specificity in the RDS

and from a failure to properly investigate what these services amount to. In our submission, this is sufficient to undermine any confidence the tribunal could have that the 25 per cent threshold was crossed in this case.

I have one final freestanding point under ground 4, which relates to the use of survey evidence by the CMA. To pick this up, we need to go back to page 69, paragraph 5.37. Here we see:

"In the light of the above, we consider we have included all providers which provide services falling within the scope of the RDS. In particular, we consider we have included at (c) third party services actually used and identified by UK airlines to allow travel agents to access travel services information and make bookings."

That's obviously the language of the RDS. Then what we are concerned with, I'm afraid, is rather detailed consideration of footnote 137. Footnote 137 says:

"The parties have argued that the CMA did not put the relevant description of services to airlines and therefore cannot rely on the data they provided for this purpose. However, we consider the line of questioning included in our questionnaires sent to UK airlines was appropriate to obtain a comprehensive overview of the distribution channels used by UK airlines."

Then it explains what this survey was. It says if you look down another four lines:

"In particular, our questionnaire sent to UK airlines asked them to provide 2018 booking estimates through the following distribution channels: GDS, direct connect, NDC-enabled GDS pastoring and airline content aggregation services [i.e. non-GDS aggregators] and then other."

What we can see, just pausing there, if you turn back three pages to page 64 at 5.29, the things that have been specifically referred to are in fact the things that the CMA decided were within the RDS. So it asks the airlines what distribution channels they used, enumerating the ones which are in the RDS, and then just

having a category of "Other, please specify".

In our respectful submission, there are two essential flaws in the CMA's reliance upon this material. The first is that the question asked was neither intended or designed to understand what services were within the RDS. That point is actually acknowledged by the CMA in its defence, so I'd like to keep that page open because we'll be looking at it again. But if we go to the CMA's defence in the pleading bundle at page 147, we can see what they have to say -- sorry, that can't be right, it must be 47.

**MR JUSTICE MORRIS:** Paragraph number, please?

**MR WARD:** That's wrong as well. Forgive me, I'll get the right reference in a moment. I'm so sorry, it's bundle 1, tab 2, page 147. It says at 172.1 --

**MR JUSTICE MORRIS:** Just give me a moment. Have we -- Mr Cutting, are you there?

**MR CUTTING:** I am.

**MR JUSTICE MORRIS:** Your picture has gone from my screen for some reason. It doesn't matter.

Mr Ward, can you just give me the paragraph number.

**MR WARD:** Yes, it's 172.1.

**MR JUSTICE MORRIS:** Ah, so it's on page --

**MR WARD:** 147.

**MR JUSTICE MORRIS:** No, it's not, is it?

**MR WARD:** In the defence.

**MR JUSTICE MORRIS:** The defence, sorry. I was looking at the skeleton.

**MR WARD:** That might be my fault, sorry.

**MR JUSTICE MORRIS:** No, it isn't, it's my fault.

**MR WARD:** It's definitely the defence I would like to look at.

**MR JUSTICE MORRIS:** It's fine. Give me the paragraph number again.

**MR WARD:** 172.1. I'm making good my complaint that the survey was not actually asking about the RDS. The CMA agrees and says:

"The purpose of the questionnaire was not to obtain the views of respondents on the RDS as such but to obtain information on distribution channels used by airlines to provide travel services information."

So the CMA accepts immediately that the survey wasn't actually asking about the RDS but uses its conclusions to conclude what is within the RDS. So in our respectful submission, that is already a major concern about the reliance on this survey. Instead, what it asks about was what are the booking channels actually used, and that of course is not even a question about what might be available. Bearing in mind of course when surveys of this kind are sent out, you do not get a comprehensive set of responses, just like we saw the handful of travel agents that responded.

So it wouldn't have captured, for example, any channels that the particular airlines who happen to respond didn't use, even if they were aware of them. So it's at very best only indirect evidence of what services should be included in the RDS and it leaves open a real concern that this evidence was not comprehensive.

But our second concern is that the survey question pointed very clearly towards four specific answers which in fact coincide with the CMA's view because those were the services which were within the RDS. In our respectful submission, this gives rise to a form of bias in the technical sense of bias known as restrictive bias. We can see that from the CMA's own guidance on design and presentation of customer survey evidence in merger cases. This is in authorities bundle tab C7, which is the first hard copy bundle, page 340.

**MR JUSTICE MORRIS:** What's the page number again?

**MR WARD:** 340.

**MR JUSTICE MORRIS:** Thank you.

**MR WARD:** It's paragraph 3.11:

"A question that is presented in a way that leads customers to one answer in preference to another, irrespective of their actual view or behaviour constitutes bias and is likely to be of limited evidential value as a result. Some potential sources of bias that should be considered include ..."

I'm going to show you a bit of this, but it's really important to see just how high the sensitivity is to this issue which is exhibited by the CMA guidance. The first one, which is not relevant directly but just shows how high the threshold of concern is, is acquiescence bias:

"Where the customer thinks they should agree with a statement included in the question and therefore does so."

For example, "Have you been to the dentist in the last year?" contains an acquiescence bias to the response "Yes", even though I suspect most advocates would regard that as a solidly open rather than leading question. A better about more neutral question would be "When if at all did you last go to the dentist?"

Then restricted bias, which is the kind we allege here, is:

"Where the question leads the customer to think only of certain options. For example, asking if you had known before you went there that this branch of X was closed for refurbishment for one year, what would you have done instead?"

Again, a nice open question to most members of the bar, but it's said that without an explicit encouragement to consider all options, such as, "Please imagine you had known before you went there that this branch was closed for refurbishment for one year, thinking of all options open to you, what would you have done

instead?"

So again, a very high degree of sensitivity. But these examples, in our submission, show that where we have here an iteration of four specific categories -- which by the way is completely missing from these examples -- and then just a reference to other "please specify", that simply does not go far enough.

In fact, this is an issue the CMA ought to have acknowledged and considered. But instead, what it does in the report, if we go back now to footnote 137, it just robustly defended it and said in their third to fourth line of the footnote:

"We consider the line of questioning was appropriate to obtain a comprehensive overview of distribution channels."

Then of course it's used those distribution channels as evidence to define the parameters of what is in the RDS. But in our submission, that is plainly erroneous and at the very least what the CMA ought to have done is recognised that these flaws in the survey limited the weight that could safely be put on it.

I will very quickly mention the points the CMA has made about this in its skeleton to explain why we say they're of no avail. Firstly, just one to get out of the way: in their defence, they argued that the guidance was irrelevant because it was not a statistical survey, but they'd rightly abandoned that point because the tribunal's justice in Tobii shows that it's of more general application. I will give you the note to that to save time. The Tobii case is in authorities bundle 3, tab K38, page 107, paragraphs 219 to 220. I think it's common ground now that the guidance at least applies in principle. I hope you still have it open, I didn't ask you to, but I want to show you one other feature of it.

**MR JUSTICE MORRIS:** The guidance?

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** In authorities bundle 1, yes.

**MR WARD:** Yes. I'm going to come back to that because I'm going to just try, as it were, quickly tick off the CMA's points on it. These come from its skeleton argument in paragraph 139. Firstly, it says:

"We were asking for factual information about past matters rather than a hypothetical futures situation."

That's no answer because we can see from the guidance, if we go back to paragraph 3.11, the paragraph we've already looked at, in the second line, it says the problem of bias arises in an answer to a question, irrespective of their actual view or behaviour. So these problems arise both in terms of hypothetical matters but also actual behaviour.

Secondly, we would say this would all be a much better point if the question had been clear. If the question just said, "Which bus did you get today?", that would have been much clearer. But here, the way they frame this introduces all manner of uncertainties, not least because it seems to allow estimates by channel without even contemplating that a particular booking might use more than one.

Then finally, I would point again to the striking absence in this taxonomy of airline.com which itself is suggestive that the CMA was really only asking questions about a particular type of distribution; namely the indirect channel.

So in our respectful submission, these are significant flaws in the reliance of the survey which in turn casts doubt on the question whether the CMA truly has captured the entire universe of relevant services that could fall within the relevant description of services.

Our overall submission on ground 4 is the approach is -- I'm so sorry.

**PROFESSOR MASON:** Mr Ward, just before you move on to an overall summary, can I ask a question on the point you have just made --

**MR WARD:** Yes, please.

**PROFESSOR MASON:** -- on the question specifically. I wonder if you could help me with this because I'm sure you must have wrestled with it yourself: your argument there is that we should at the very least be cautious in treating the evidence from the questionnaire because of the design flaws you've pointed to. How do we balance that point against your earlier point particularly for metasearch and travel agents where you did use evidence from the questionnaires?

**MR WARD:** I simply used the evidence that the CMA has put before you for that purpose. I'm pointing to internal inconsistencies in the report. I reiterate my point that of course this is a judicial review. I'm not here engaged in some kind of proof of primary fact; rather saying even on the CMA's own findings, their reasoning is unsustainable.

So in my respectful submission, there's no tension in my argument at all, I'm just pointing to different flaws and inconsistencies in different aspects of that reasoning.

**PROFESSOR MASON:** Okay, thank you.

**MR WARD:** Unless there are further questions, I was just going to sum up and say in our submission, the approach to the application of the RDS was both inconsistent and arbitrary, it's driven by a lack of specificity in the RDS and the effect of all of this is to undermine any confidence the tribunal can have that the 25 per cent threshold was crossed in this case.

It is 11.45 and I am delighted to say that concludes my submissions, unless I can be of further assistance.

**MR JUSTICE MORRIS:** Mr Ward, thank you very much. The only point I had was a background thought that you didn't yesterday get to the end of ground 3 and I think at least one final strand of ground 3 relating to the use of all of Sabre's

GDS revenue. It may be you don't want to develop it and we can deal with it in the skeletons, but I just wanted to remind you about that.

**MR WARD:** Thank you for the reminder, sir. We weren't planning to develop it, as a way of best using our time by focusing on the points we have already made on ground 3 and then on ground 4.

**MR JUSTICE MORRIS:** That's fine. We will no doubt read what is said there.

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

**MR JUSTICE MORRIS:** I would imagine to the extent that Mr Williams addresses it, you may have a right to reply on it.

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

**MR JUSTICE MORRIS:** Very well, that timing works out very well. We will have a break now till 12.00, Mr Williams can start his submissions. I'm assuming, Mr Williams, that you will be at least starting in open session?

**MR WILLIAMS:** Yes, I will be, sir.

**MR JUSTICE MORRIS:** Very good. All right, thank you all very much. I actually just want to check with my fellow tribunal members whether they had any final questions they wish to raise with Mr Ward.

**PROFESSOR MASON:** I had a very brief one, if time permits.

**MR JUSTICE MORRIS:** Yes.

**PROFESSOR MASON:** Mr Ward, it may be that the correct view of your argument is that we should treat your arguments for ground 2 and ground 4 as separate and distinct. But I just wondered if you had any reflections on how the points you have made under ground 4 affect the points you made under ground 2.

**MR WARD:** If we succeed on any of these grounds, the decision must be annulled in its entirety because we have four freestanding challenges to jurisdiction. The challenge under ground 2 is that there is a failure to -- the CMA has erred in

concluding that there is a supply here within the relevant description of services. Ground 4 proceeds on the basis that the other grounds have all failed and the only thing left to consider is whether or not the CMA has correctly concluded that the increments of supply is over 25 per cent, or rather the total supply is over 25 per cent. So they are logically freestanding grounds.

**PROFESSOR MASON:** Understood. I suppose the specific point I was probing there was the approach you advocate for ground 4 is, for want of a better phrase, inclusive of things that fall within the RDS, whereas your argument for ground 2 is exclusive and I just wondered how to balance the two.

**MR WARD:** The answer is of course ground 2 is focused on the particular question of whether there is a supply of FLX Services to BA. Ground 4, again this is a judicial review, we're not actually making a positive case about what really ought to be in the RDS so much as pointing to the illogicalities and inconsistencies in the way the CMA has excluded things. So that's the judicial review challenge to its reasoning and of course we wouldn't expect the tribunal to substitute its own view about what actually does fall within the RDS.

**MR JUSTICE MORRIS:** Can I have a follow-up there: in relation to ground 2 -- I understand what you're saying about ground 4, but in relation to ground 2, and let us assume that services has been appropriately defined under ground 1, RDS. Once that definition is there and not impugned, is not the question of whether in the context of Farelogix and BA that amounts to -- I'll go back a stage. The next question is what's meant by the word supply. It seems to me the question of what the word supply means is a legal question, that's a question of the construction of the Act.

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** Once you have then decided what supply means and once you have decided that CMA's definition of services is okay, is it not then a question of fact as to whether or not what goes on between Farelogix and BA constitutes such a supply, and is that not a question of fact -- going back to SCOP -- a question of fact for the tribunal to decide, and it is no answer for the CMA to say "Well, one reasonable conclusion is that it is supply of a service as we've defined it".

**MR WARD:** Sir, I think that's actually -- oddly, that's two different ways of describing the same point, which is to say we would certainly agree that the tribunal should not be deferring to the CMA on the question of whether these primary facts about the BA/Farelogix arrangements amounts to a supply within section 23.

**MR JUSTICE MORRIS:** Yes.

**MR WARD:** That's certainly our submission and you can put that in two different ways. You can say the tribunal can reach its own view of what those facts amount to factually, if you like, or you can say -- and this is the way we've put it really in the light of SCOP -- these facts do not establish something which falls within the meaning of supply when it is correctly construed. So it's an odd position where it really is the same point that can be described in two different ways.

**MR JUSTICE MORRIS:** Yes. But if you go back to SCOP, what Lord Sumption said is stage 1 you define what the word "enterprise" means, what sort of activity. Stage 2, you decide whether the activities in question meet that legal definition and subject to issues of economic expertise, that is ultimately a decision for the court hearing the case.

**MR WARD:** Yes. We would of course -- I was about to say we accept what Lord Sumption says, of course we do, but we also accept its applicability here.

But equally, there's important difference here between SCOP and this case. In SCOP, the tribunal on what they call the case number 1 had actually adumbrated in quite a lot of detail what the requirements were for an enterprise to cease to be distinct, therefore there was a sort of rubric -- I think I used the word yesterday -- that was being applied by the CMA after the remittal. Here, there is no such rubric or analysis by the CMA of what supply means, it just concludes that these facts do amount to such a supply.

But frankly, sir, we are content with whichever way you look at it. I respectfully agree with the point you are putting to me that in any event, what really matters here is there is a very important role for the tribunal, not just being deferential on a **Wednesbury** basis to an exercise of discretion by the CMA, which is the way they would prefer to characterise it, at least in their skeleton argument.

**MR JUSTICE MORRIS:** Well**, Wednesbury** unreasonableness might come in at other stages, as it plainly does in the grounds. I think it probably comes in at ground 1.

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** I'm talking really about the process in ground 2.

**MR WARD:** We accept unhesitatingly. I think it was Mr Cutting who put to me there is an important difference between grounds 2 and 3 and ground 1. Ground 1, obviously there is a discretion on the face of the Act, absolutely there is. So that clearly is an important factor in the tribunal's assessment. There is still nevertheless legal content in the provisions we were looking at, but of course you have to analyse it in the light of that discretion.

But nothing like that arises in respect of the meaning of supply in ground 2, or indeed the question in ground 3 of whether there has actually been an increment.

**MR JUSTICE MORRIS:** Yes, okay. All right, thank you very much. Now that time

has ticked on, I think we will start again at 12.10.

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

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

**(11.53 am)**

**(A short break)**

**(12.10 pm)**

**MR JUSTICE MORRIS:** Yes, Mr Williams, good afternoon.

**Opening submissions by MR WILLIAMS**

**MR WILLIAMS:** Good afternoon, sir, Mr Cutting and Professor Mason. I'm going to structure my submissions in the following way: I'm going to make some introductory observations on the parties and the services which they provide, and that is to put the question of jurisdiction in context and particularly to set the scene for ground 1 of the challenge.

I'll then deal with the legal framework as it relates to jurisdiction and judicial review in the public law principles. Then I'll touch very briefly on the US proceedings and Mr Batchelor's evidence, very briefly indeed. Having done that, I'll address Sabre's four grounds of challenge in relation to the jurisdiction, and I'll be in open session at least until I get some of the way into ground 2.

I've just seen Mr Cutting appear on my screen. Can I just check he was online when I made those introductory observations?

**MR CUTTING:** I was, yes. It's only the video that's causing me to go in and out. My attention is absolutely rock solid.

**MR WILLIAMS:** I'm grateful, sir.

I won't spend time now giving an overview of our position. I think you have our position and overview from our defence and skeleton argument and I'll get straight into the meat of the topics.

Starting with the parties and the services they provide, the tribunal is aware that the merger was of concern to the CMA because there are two areas of competitive overlap between Sabre and Farelogix, that is merchandising and distribution. They're not the only services which the parties provide, but they were the focus of the CMA's investigation.

The relevant markets are defined in section 6 of the decision with a conclusion in 6.64. The markets are defined as:

"The supply of merchandising solutions to airlines worldwide and the supply of distribution solutions to airlines worldwide."

So the parties are both US companies, as Sabre emphasises, but they compete in global markets which include the UK, and the relevant customers are airlines.

Of the two markets, I don't need to say very much about merchandising because that doesn't affect the jurisdiction debate. I expect the tribunal has seen how this unfolded on the case as it stood prior to last week. Farelogix is a major player in merchandising, Sabre is not at the moment, but it is developing a new product or products. The CMA's assessment was that it would become a much more important player in merchandising in the next three to five years, and that conclusion was the main territory of the debate under ground 5 until last Friday.

There is some interaction between the consideration of competition in merchandising in the report and competition in distribution because the new generation of merchandising products, NDC compatible products, require NDC compatible solutions on the distribution side. That is something which broadly speaking plays to Farelogix's strengths. I'm going to talk about NDC in a little while. I make the tribunal aware of that link between the theories of harm merely just as a matter of context, it doesn't affect the issues which now arise on jurisdiction.

But the distribution side is relevant to jurisdiction and the position in outline, as the tribunal has seen and heard, is that the parties provide different forms of distribution solution. But the CMA found that they are in competition and that led to the SLC finding, which was challenged by ground 6 but is now no longer in issue. The issue under ground 6 was not whether the parties are in competition, Sabre did at one stage argue that it didn't compete with Farelogix. We will see it said that, but that wasn't ultimately the basis of the challenge. Ground 6 was in the end a relatively narrow challenge, which I will summarise as follows: the CMA found that Farelogix had been a significant constraint or has been a significant constraint on Sabre because Farelogix's NDC compatible solutions have driven a competitive response from Sabre; and Sabre said well even on that basis, that competitive constraint has essentially expired because the market has moved on. The CMA didn't accept that and it reached an SLC finding, which as I say is no longer in issue.

I of course accept that before making those findings, the CMA had to establish jurisdiction to consider the merger and that question is prior to the question of competitive effects. But the question of the competitive interaction between the parties on the distribution side is relevant to jurisdiction and in particular to ground 1, so I will want to say a bit about that.

So that the tribunal is aware, it's never been in issue in these proceedings that if the CMA gets over the hurdle of jurisdiction, the merger has implications for competitions in the UK. In other words, the issues raised about territoriality which are raised in relation to jurisdiction, they don't carry over to the competitive effects assessment. The CMA dealt with that at 11.32 to 11.33 of the report. We are going to go to the report in a minute, but I might -- I think I should just show you that for your note before we get into the jurisdiction

material.

**MR JUSTICE MORRIS:** Yes. Just give me a moment, please.

**MR WILLIAMS:** Yes. It's bundle 4, tab A, page 340. There's a heading in there, "Relevance of the merger to the UK", and this is I stress part of the competitive effect assessment, not the jurisdiction discussion, which is separate. The only point I am making about that is that the debate about territoriality begins and ends with jurisdiction.

The market on the distribution side is the supply of distribution solutions to airlines and those words also form part of the RDS, as the tribunal has seen. The market breaks down into the direct and indirect channels and the CMA found that those are both one market. But within that market, there is an overlap between the parties in relation to distribution in the indirect channel, that is in particular sales to travel agents.

I stress the word "to airlines" not only because it's part of the RDS but it's because the CMA found that competition in relation to the different solutions which the parties offer is driven really by the changing demands of airlines on the distribution side. We're not concerned with the SLC today and so I won't go into this in the same level of detail as I would have done in ground 6 was still in issue. But it is important to give the tribunal enough of an outline of that broader picture for the purposes of the jurisdiction issue.

Mr Ward has covered some of this so I will try not to repeat things he has already covered, but I will show you where they fit into the points I am making. If you turn back in the report to section 3 and if we can pick it up on page 38, paragraph 3.12. I'm afraid I'm just going to do one more bit of jumping around before we flick through because there is just a preliminary point I want to pick up and this is as good a point as any to do it.

3.12 starts with a definition of airline content, or an explanation of what airline content is. The tribunal is concerned with jurisdiction and the relevant description of services which refer this to the concept of travel services information. I don't know if the tribunal has this point, but those are two different labels which are attached to basically the same thing. I can show the tribunal that if that would help at this point. The relevant reference is footnote 111 to paragraph 5.16, which is on page 62.

**MR JUSTICE MORRIS:** Yes.

**MR WILLIAMS:** Towards the end of 5.16, you have "Travel services information", then you have the footnote.

**MR JUSTICE MORRIS:** Yes.

**MR WILLIAMS:** The points aren't in the same order, but you have "Availability", "Fare", "Schedule", and so on, and the ancillaries. So slightly unhelpfully, we have two different terms for broadly the same thing. But it's not a point of any substance, that's just really explanation for the tribunal.

Going back to page 38, I just want to pick up paragraph 3.15, which I think Mr Ward did mention. It's a short but important paragraph and in particular the first sentence:

"Within the indirect channel the distribution of content from an airline to a travel agent could be via the GDS or directly to a travel agent through what is known as a direct connect."

That's a short but important paragraph because it identifies the core functional overlap between the GDS and the direct connect; namely that they distribute content from an airline to a travel agent. That's really central to much of the argument which follows. It is the core of ground 1, it's central to the CMA's answer to ground 2 as well, which is that BA has obtained a supply of this type from

Farelogix and not just the technical messaging capability as Sabre says it has.

**MR JUSTICE MORRIS:** The word "content" there being the airline content above?

**MR WILLIAMS:** Yes.

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

**MR WILLIAMS:** There's then a discussion of GDSs starting at 3.17, which Mr Ward took you through. I just want to make the point that here one sees the CMA discussing the main features of the GDS, the features which Mr Ward drew out yesterday, and the respects in which it ultimately differs from a direct connect, so the CMA had all of this very much at the front of its mind. We have the point that the GDS is a two-sided platform, we have the point that multiple airlines and travel agents all participate in the same network. There's the various different functions that performed, including aggregation, the fact that the GDS creates the offer, and indeed that's a feature of the GDS. As we will see, it's actually one of the relevant competitive weaknesses of the GDS in the modern market. So I won't go through all of that again, but that's the point we take from it.

At 3.30, the report moves on to discuss direct connects, GDS bypass and GDS pass through. Mr Ward picked this up -- if I can just direct your attention to the end of paragraph 3.30:

"Direct connect offers airlines more control of the creation process but direct connect providers generally facilitate more limited post-booking fulfilment functions."

So I mean that's to the reason why an airline would want to establish a single direct connection rather than to rely on the overall aggregator function because it gives it that additional control. This links to the NDC, or new distribution capability. Mr Ward drew this out yesterday, this point about offer creation as a difference in functionality, difference in the business models. But the point

I want to just pick up and draw to the tribunal's attention is that this is actually something which has materially driven competition between the business models. What Mr Ward identifies as a difference is in fact the source of that competition in part.

3.32 picks up the language of GDS bypass which as a label tells us something about the competitive interaction between the solutions and GDS. GDS bypass means the airlines don't need GDS to communicate with the travel agents as they might otherwise do. The report goes on to explain GDS pass through in 3.33, which I don't need to dwell on. But that does involve using a GDS in combination with an API to pass a new distribution capability content through to the travel agent. I will explain a bit more about what I mean by that in a minute.

NDC is then further discussed as Mr Ward highlighted at 3.52 and following. I'd just like to pick up really where Mr Ward left off. He showed you much of paragraph 3.56, which explains the additional benefits of the NDC distribution model in terms of allowing the airline to create its own offer. There's a sentence a bit more than half of the way through which starts, "In short":

"In short, the NDC standard aims to give airlines similar capabilities to construct more dynamic offers in the indirect distribution channels as those which are available through airline.com but to do it cross channels."

And Mr Ward stopped there. I would carry on and say:

"This capability will negate the need for airlines to rely on the GDSs and undertake this service on their behalf."

And then there's a diagram. These paragraphs are explaining the difference that NDC makes and the advantage an NDC compatible provider such as Farelogix has over the GDS.

3.57 makes the important point that:

"For distribution of content compatible with the NDC standard, airlines require an NDC API through which to connect to third parties."

3.58, which I won't go into, starts to explain the importance of this in terms of competition for airlines, particularly on a forward looking basis. That theme is then again picked up in 3.63 in a section headed "NDC and the future of the industry". I won't read that out, I think the tribunal will have the sense of how this all fits in to the CMA's understanding of the market and later on in the report its discussion of the competitive effects. So that's the background material in Chapter 3.

Chapter 6 contains a more detailed discussion of the parties' products and draws out the differences between them and the differences which Mr Ward focused on yesterday. Chapter 6 starts on page 93, but we're interested in distribution which starts at page 97. These are all points which I think the tribunal has seen or will be aware of, but given that it's said the CMA has looked past the differences between the products, it is important I show you this.

The points made here broadly are that the GDS connect multiple airlines to multiple agents through the same platform. That's 6.19.

**MR JUSTICE MORRIS:** Just pause a minute, please. **(Pause)** Yes.

**MR WILLIAMS:** It performs other functions, which are 6.20, and it aggregates content, which is also 6.20.

6.21 picks up next generation NDC again. 6.22 discusses Farelogix and the key points made in relation to Farelogix are that it's channel agnostic and NDC compatible and that they allow the airline to distribute contents, such as dynamic offers, such as ancillaries. So that's what Mr Ward characterises as the input point; that is to say that the airline is self-supplying and using the Farelogix connection

to distribute that content.

6.24, Farelogix's markets its distribution solutions to airlines, but not travel agents. That's in contrast to the GDS's two-sided platform.

A point which was prominent in Mr Ward's submissions yesterday was what he described as the vertical relationship between the GDS on the one hand and the Farelogix direct connect on the other hand. He emphasises that vertical dimension, as he characterises it, almost to the exclusion of the consideration of whether the products are alternatives or in competition. That emphasis echoes a position the parties took at least at an early stage of the enquiry, as you can see if you carry on reading 6.25 and 6.26. They said at least in the early stages that the relevant market was either GDS services or alternatively all airline content. Then in 6.26, you see the points that they say the two products are entirely non-substitutable.

6.28 records that by the time of the PFs, they were no longer arguing that point, although they did continue to reserve their position on that in substance. I'm not going to go into this discussion now, it is a matter of record that the CMA rejected that and indeed went on to find an SLC. But for the tribunal's note, there is then a range of evidence dealing with that issue at 6.32 and following. You have views of airlines from around 6.35 to 6.36. You have the views of PDSs from 6.37, and then we get to travel agents at 6.38.

I just want to pause here and slightly change topic. So far, I've been focusing on the market from the perspective of airlines, but I do just want to introduce the interaction with the travel agent as well as part of this broader context.

The use of direct connects and their impact on travel agents is dealt with in these paragraphs. What you see from 6.39 is that the evidence indicated the GDS bypass is mainly used for distribution of content to OTAs, who typically serve

leisure passengers with simple itinerary and fulfilment requirements as distinct from TMCs who have a commercial client base and traditional bricks and mortar travel agents. They use it to a significantly lesser degree.

There's some evidence bearing on that. The tribunal may be I think more interested for present purposes in 6.41 which just I think gives a bit of colour to why the market operates in this way. The point that's made is the investments required to make a direct connection tend to be made by OTAs, who are well resourced global businesses, and they've already made investments to establish direct connect. So those bigger businesses are in a better position to make the specific investments needed to accommodate the airlines' preferences.

6.43 is I think a useful conclusion to flag because it deals with this issue that:

"Whilst Sabre's GDS performs wider functions and provides wider geographic coverage than Farelogix's API, such differences matter less when airlines wish to distribute to OTAs or home country travel agents. We consider that for these groups, along with a material proportion of others, airlines have a choice between using a GDS and a GDS bypass."

So that's a choice for the airline.

And this all feeds into the conclusion at 6.44, which is a conclusion -- it's a market definition conclusion but the issue for today isn't market definition. But I think it's important that you see that this whole question of the differences between the products and their competitive interaction, how that affects their competitive interaction is all fully considered.

I'm going back to my point about --

**MR JUSTICE MORRIS:** Sorry, which paragraph did you say?

**MR WILLIAMS:** 6.44:

"Overall, the evidence does not support the parties' view that GDS and direct connects

are entirely non-substitutable."

**MR JUSTICE MORRIS:** Okay.

**MR WILLIAMS:** Then there are some points which the tribunal will now be reasonably familiar with.

Just going back to my brief observations on the travel agent perspective, 6.45 picks up the point that the GDS is of course a two-sided platform. You can see toward the end of that paragraph, it says:

"We consider that competition between the parties primarily occurs on the airline side and the option that NDC APIs give airlines to directly manage the travel agent relationship is an important part of the competitive dynamic."

So again "to airlines". This discussion is taken forward in Chapter 7. Obviously discussion of competitive effect is a long way beyond jurisdiction and I'm not going to take you through that. I think I just want to show you that this discussion really picks up where we've just left off. If you look at 7.5, an important paragraph as the sort of starting point for the discussion of competitive effects:

"In the supply of distribution solutions, competition takes place in multiple forms reflecting differentiated business models in the market. While the parties' solutions allow airlines to ultimately distribute content to passengers, they operate different approaches which affect the ways in which they base their constraints from each other and from other suppliers."

Sorry, my pedantry interrupted an important point there.

**MR JUSTICE MORRIS:** Your pedantry is noted and not dissented from, on my part, but there we are.

**MR WILLIAMS:** It's about the only point of grammatical pedantry I'm even aware of, so ...

You see the important point is that this is competition based on differentiated business models, about which you've heard very much.

So that's the sort of platform for the discussion. If the tribunal wants then to understand better the competitive interaction arising from the shift towards NDC compatibility, that is picked up at 7.9 and runs through to 7.20, broadly speaking. And to boil it down for you essentially what it says is that airlines have an increasing demand for NDC compatible solutions for the reasons we've seen. And that GDSs were slow to react, that created an opportunity for the direct connects, and ultimately it's driven a competitive response from the GDSs. And you've probably seen all that in the pleadings but I thought it would be just helpful to give you some of those references.

Had ground 6 been an issue still there would have been more to say about all that, but I think the tribunal will have a flavour of why the CMA went on to find the SLC in this market.

The issue of jurisdiction, coming back to the issue for today, obviously looks at this issue through a different lens. It doesn't look at the issue through the lens of an economic market definition and certainly it's not based on a developed analysis of competitive effects. But I hope the importance of the material that we've just seen is clear.

What one sees is that airlines supplying through the indirect channel, they have to make airline content or travel services information available to travel agents. There are differentiated products available to perform that service or function depending on what the airline is looking to achieve. They can use the GDS which will do a host of things and aggregate content for them, or they can purchase a stand-alone direct connect which will offer additional functionality, certainly compared to the current generation of GDSs. But those are two

alternative products or services which offer that functionality. They offer the same service, and contrary to the position the parties initially advanced there is serious competition between them, which indeed resulted in an SLC. So that is all context for ground 1.

I'm not reading Chapter 7 of the report into the jurisdiction finding. But we do say that the core insight I've just drawn out about the common functionality of the products and the fact that they offer commercial alternatives which compete with one another, that is central to the RDS and it is central to ground 1.

**MR JUSTICE MORRIS:** Pause a minute. **(Pause)** Thank you.

**MR WILLIAMS:** Sir, I will now deal with public law principles. Most of this is common ground. If the tribunal doesn't mind, I'd like to take out one case on the public law principles which is BAA, authorities H, tab 29. And the reason to take this one out is it's the one case I can get most from by opening one case. I think the tribunal will probably be familiar with paragraph 20 because it's one of these paragraphs that we come back to again and again as containing a useful statement of principles. This is a tribunal including Mr Justice Sales, as he then was. I take three points from this. (3) is the principle that the steps that the CMA takes to investigate a merger, and the extent of the steps that it takes are reviewable on rationality principles. That's subparagraph (3).

**MR JUSTICE MORRIS:** Tameside.

**MR WILLIAMS:** At paragraph (4) it's a rationality test which applies to whether the CMA had sufficient evidence, and the way it's formulated it there must be evidence of some probative value on the basis of which the CMA could rationally reach the conclusion.

Subparagraph (8) is the test for a reasons challenge.

Then you see after the quote from the Porter case the tribunal adds -- sorry, the

standard is the CMA has to give intelligible and adequate reasons:

"In applying these standards it is not the function of the tribunal to trawl through the long and detailed reports of the CC with a fine-tooth comb to identify arguable errors. Such reports are to be read in a generous and not a restrictive way. There is something seriously awry with the expression of the reasoning must be shown before the report would be quashed on grounds of inadequacy of reasons."

That can, of course, in contrast to many administrative decisions where the decision might be a letter of a page and a half, we're dealing here with reports of hundreds, if not thousands, of pages quite often. So adequate reasons has to be seen in that context.

Two other points on the public law principles which are just dimensions of the rationality test. Again this isn't in issue. Obviously a challenge to the CMA's reasoning has to demonstrate that the reasoning is irrational. That is reasoning as distinct from reliance on evidence to the extent that those are different.

**MR JUSTICE MORRIS:** By irrational you mean **Wednesbury** unreasonable.

**MR WILLIAMS:** **Wednesbury** unreasonable.

**MR JUSTICE MORRIS:** Thank you.

**MR WILLIAMS:** And similarly the relevant considerations test:

"Unless the statute mandates the CMA to take account of the specific consideration it is for the CMA to decide what is and is not a relevant consideration."

Relevant consideration just becomes another form of rationality test. That's not in BAA, but the reference for that is the Khatun case, which is authorities E20, paragraphs 34 and 35. I will not take it up because it's not in issue. That's, as I say, common ground.

There are, however, a number of important differences between the parties in relation

to the legal framework. First, Sabre argues that the tribunal should construe the share of supply test on the basis that it's a limit on the CMA's consideration of mergers which fall below the turnover threshold, and this submission points the tribunal towards a narrow interpretation of application of the share of supply test -- a narrowing, I should say.

Now it is obviously true that the CMA only has jurisdiction over a merger which doesn't meet the threshold test if the share of supply test is met. So in that sense it's obviously a condition which has to be met for there to be jurisdiction in a non-turnover case. But we don't agree that it follows at all that the share of supply test should be construed in a way which narrows its scope to ensure that the CMA isn't taking an exorbitant jurisdiction or infringing the principle of comity, which is really the tenor of the submission that's made.

Mr Ward showed you Akzo Nobel. I won't ask you to take it out again because I think you've seen what it says. It's concerned with a different provision. It's concerned with enforcement jurisdiction, rather than substantive jurisdiction to consider the merger. But the essence of the decision is that merger control can apply to the non-UK parties that supply UK markets. And to deal with that the legislation contains connecting factors which define the circumstances in which a merger has a sufficient connection with the UK for various powers to be exercised. The carrying on business test is a test for the purposes of enforcement jurisdiction. For substantive jurisdiction there are two potential connecting factors, one is the turnover of the target in the UK, such as a purely financial quantitative threshold. And share of supply is a different connecting factor. It's to do with the concentration of supply in the UK. And as you've heard, and we agree, it requires an increment over a 25 per cent share of supply of services of a relevant description.

And there are, in my submission, obvious and sound reasons why the legislation should be concerned with concentrations of supply in the UK regardless of where the parties come from, regardless of where they're based.

And when we look at section 23, and the tribunal's already seen it, it vests the CMA with considerable discretion to identify overlaps in supply. There's a discretion as to what criteria are used to identify an overlap in supply and there's discretion as to how shares of supply are measured. So that gives the CMA flexibility to identify mergers of concern. And those provisions don't apply differently to overseas companies than they do to UK companies.

And although Sabre points to the presumption that legislation is territorial, given that it is common ground that this legislation can apply to parties based overseas on the basis that they make a supply in the UK, that submission doesn't go anywhere because this legislation isn't purely territorial in that sense, in the same way that the legislation in Akzo Nobel wasn't territorial.

And it is important, I think, to put these points in context. There really is no question of the CMA having indiscriminate power to block global merges. The SLC has a territorial aspect and I touched on that earlier on. And as Akzo Nobel deals with, there are further provisions dealing with the scope of its enforcement powers. And what the hurdle of jurisdiction does is it vests the CMA with power to scrutinise the merger in the context of that wider framework.

So the overall submission on this issue is that treating the share of supply test as a limit on jurisdiction misses the point that it reflects connecting factors which establish a positive basis for UK merger control jurisdiction. Parliament has decided that those connecting factors, share of supply, is a sufficient basis for jurisdiction regardless of where the parties are based. And so while we accept, of course, there has to be a balance between (inaudible) on the one hand and

effective merger control on the other hand, that balance is struck within section 23. Parliament decided how that balance should be struck.

The essential criterion is there is an increase in the concentration of supply on the terms set out in the statute, and the tribunal's task in this case is to apply that test and to review the CMA's findings as they bear on that test.

So that deals with the interpretation of the share of supply test generally.

**MR JUSTICE MORRIS:** And its purpose.

**MR WILLIAMS:** And its purpose, yes sir.

And Sabre makes some related submissions which go to the standard of review. First, it suggested in its skeleton that the tribunal may apply particularly close scrutiny to this merger because it involves two US companies; that's paragraph 17 of Sabre's skeleton. We don't accept that suggestion for reasons I've already expressed. It's really just another version of the point I've just been dealing with expressed through the prism of standard of review.

But there is a separate issue which is the question of the standard of review in relation to findings of jurisdiction more generally; that is to say, not particularly because the parties are overseas companies but because these are matters of jurisdiction.

**MR JUSTICE MORRIS:** Yes.

**MR WILLIAMS:** Sir, I see the time. What I'll do is there's at least one case I'd like to try and get through before we break.

**MR JUSTICE MORRIS:** Okay.

**MR WILLIAMS:** Then I'll carry on with this topic after lunch.

**MR JUSTICE MORRIS:** Okay.

**MR WILLIAMS:** But broadly speaking -- the point Mr Ward made was that judicial review is a flexible tool and the tribunal can apply a more intensive level of

scrutiny to jurisdictional findings than it might do to other findings. This is a new version of a different point which Sabre initially argued, indeed it argued in its skeleton, that this is a case involving findings effectively of precedent facts, jurisdictional facts, which the tribunal should decide on the merits. And explained in our defence why that's wrong. The reasons why it's wrong also apply to the new submission, as I'm about to develop. The case I want to look at before we break is the Croydon case which is authorities G25.

**MR JUSTICE MORRIS:** Age assessment.

**MR WILLIAMS:** Yes, child in need, yes.

**MR JUSTICE MORRIS:** Who decides how old a child is.

**MR WILLIAMS:** Yes sir, exactly. I think it might help for the tribunal to look at the headnote just to get the context.

**MR JUSTICE MORRIS:** It's a matter of style, are you inviting us to read or are you going to read?

**MR WILLIAMS:** I didn't think it was helpful for me to read the headnote out.

**MR JUSTICE MORRIS:** So you want us to read --

**MR WILLIAMS:** want the tribunal to read the headnote, yes. **(Pause)**

**PROFESSOR MASON:** Just so I'm spending my reading time correctly, is that on page 1046?

**MR WILLIAMS:** Yes.

**MR JUSTICE MORRIS:** It's from 1406E over the page to 1047.

**MR WILLIAMS:** You don't need to look at the Article 6 issue, you only need to read as far as really A on the second page. **(Pause)**

If the tribunal has read that, the point that's made is that whether a person is a child is an objective question, and it's therefore to be determined by the court, rather than treated as a matter of public law by the decision-maker. I'll just show you

some of the key paragraphs. Paragraph 1 explains:

"In the context of this provision 'child' is expressly defined in the legislation as a person under the age of 18."

You see that just underneath the quote from section 21. And so it's a statutory power which apply to any child in need, and what constitutes a child is expressly defined.

The issue is set out in paragraph 14, which says:

"The argument on construction is quite straightforward. The words of section 21 distinguish between the statement of objective fact any child in need within the area and the descriptive judgment ..."

Who appears to them to require accommodation as a result of.

And so it's said that the court can determine questions of objective fact but not necessarily questions of judgment and appraisal.

**MR JUSTICE MORRIS:** Where does it say that?

For my part Mr Williams, I think it would be helpful either if you read out the passage you are relying on or directly point to us, rather than trying to summarise I think.

**MR WILLIAMS:** I'm sorry.

**MR JUSTICE MORRIS:** No, don't apologise, it's a style matter. But I like to follow it, mark up what's being referred to.

**MR WILLIAMS:** Yes. Paragraph 14 says:

"The argument on construction is quite straightforward, and the words of section 21 distinguish between the statement of objective fact any child in need within the area and the descriptive judgment, who appears to them to require accommodation ..."

It goes on to say:

"The definition of 'child' in section 105 of the Act is unqualified. A person under the

age of 18, not the person who appears to be under the age of 18."

And it says that the Court of Appeal treated this -- it says the Court of Appeal. I beg your pardon:

"Reaching the conclusion that this is what it means in section 21 requires, as the Court of Appeal accepts, words to be read into section 20 which are not there."

So the Court of Appeal found that the question of whether the person was a child was revealable on public law principle.

**MR JUSTICE MORRIS:** Yes, as a matter for the local authority.

**MR WILLIAMS:** As though it had been a matter -- a question of what appears to the local authority, rather than whether the person is a child.

**MR JUSTICE MORRIS:** Yes.

**MR WILLIAMS:** The discussion about issues starts at paragraph 26. Starting in the second sentence:

"The 1989 Act draws a clear and sensible distinction between different kinds of question. The question of whether a child is in need represent a number of different value judgments."

And then examples of that are given. Picking it up at D:

"Questions like this are sometimes decided by the court in the course of care order proceedings. Courts are quite used to deciding them upon the evidence for the purposes of deciding what order to make. Where the issue is not what order the court should make but what service should the local authority provide it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and **Wednesbury** reasonableness there are no clear-cut or wrong answers."

Then the distinction is drawn in paragraph 27 between that assessment of whether the child is in need and the objective question of whether they are a child because that is a question with a right or a wrong answer. And it says:

"Decision-makers may have to do their best on the basis of less than perfect or conclusive evidence but that is true of many questions of fact. That does not prevent them from being questions for the courts rather than for other kinds of decision-maker."

So the key distinction is between statutory questions with a right or wrong answer, or questions which require an evaluative appraisal.

**MR JUSTICE MORRIS:** Yes.

**MR WILLIAMS:** And at 29 Baroness Hale reaches that conclusion:

"On the wording of the Act and without recourse to the additional argument advanced by [counsel] that child is a question of jurisdictional or precedent fact of which the ultimate arbiters are the courts rather than the public authorities."

So this now relates, this principle, to the question of jurisdictional fact which Sabre relied on in its skeleton. I don't need to show you in particular the rest of paragraph 29 and 30, but if I could just pick it up again at 31:

"This doctrine is not of recent origin or limited to powers relating to liberty of the subject. But of course it still requires it to decide which questions are to be regarded as setting the limit of the jurisdiction of the public authority and which question simply relate to the exercise of that jurisdiction."

Then they cite Wade and Forsyth for the principle that limiting conditions stated in objective terms will be treated as jurisdictional. Then Baroness Hale goes on to observe that the question of whether a child is an objective, the question of whether a child is in need is not an objective question.

**MR JUSTICE MORRIS:** Thank you.

**MR WILLIAMS:** Just for your note, Lord Hope considers the same issues at paragraphs 50, 52 and 53 and reaches the same conclusion.

**MR JUSTICE MORRIS:** Just give me a moment. I'm just going to mark those: 50, 52 and 53.

**MR WILLIAMS:** Yes.

**MR JUSTICE MORRIS:** Okay.

**MR WILLIAMS:** I'll just make my submissions about this and then I'll deal with SCOP after lunch, if I may.

**MR JUSTICE MORRIS:** Yes.

**MR WILLIAMS:** So applying those principles there is clearly no right or wrong answer to the share of supply test. Power is given to the decision-maker, that's just the CMA, to decide how to assess the question. Mr Ward has taken you to the section we'll look at it **(distorted words)**.

**MR JUSTICE MORRIS:** Can I interrupt you, Mr Williams. Sorry, there's a glitch. Your connection -- there's a delay in your sound compared with your visual and it's slightly breaking up.

**MR WILLIAMS:** Will it help, sir, if I made my submissions after the adjournment and hopefully there'll be a reconnection.

**MR JUSTICE MORRIS:** I think it would, yes.

What I would like you to think about is -- you just said no right or wrong answer to the share of supply test. I would like you to give consideration to breaking down the issues that arise on these grounds and to make your submissions in relation to each strand: ground 1, the selection of the services; ground 1, the need for criteria; ground 2, what constitutes a supply, all those different strands as to what you say about how we should approach each of those and whether it is the same in relation to each.

**MR WILLIAMS:** Understood, sir.

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

Unless anybody else has any observations or my fellow tribunal members have, I will propose bringing this morning's proceedings to a close. Just wait a second in case Mr Cutting, Professor Mason, have anything they wish to raise at the moment.

**MR CUTTING:** None.

**MR JUSTICE MORRIS:** We will start again at 2.05.

**MR WILLIAMS:** I'm grateful sir.

**MR JUSTICE MORRIS:** Thank you.

**(1.05 pm)**

**(The short adjournment)**

**(2.08 pm)**

**MR JUSTICE MORRIS:** Good afternoon, Mr Williams.

**MR WILLIAMS:** Good afternoon, sir.

**MR JUSTICE MORRIS:** Before we start, can I just point out that at the moment it's intermittently, I think I have the echo issue. If it causes a problem, I will indicate and try and do something about it. But in the meantime, let's continue. Yes, Mr Williams, when you are ready.

**MR WILLIAMS:** Yes, sir. Before I start, is it an issue where if I turn off my microphone when you are speaking, it helps, or is it not that issue?

**MR JUSTICE MORRIS:** I don't think it is, no. In fact, I don't have the issue at the moment at all. We think it's something to do with the connection with my headset, but let's see what happens.

**MR WILLIAMS:** Okay, thank you.

Your question before the short adjournment has helped me to rein my submissions

about the standard of review. It's highlighted that one needs to distinguish between two types of argument.

First, I was dealing with Sabre's generalised argument that one should apply a heightened standard of review to a jurisdictional issue because it is a jurisdictional issue. The point I draw out from the Croydon case is that isn't correct and certainly not correct as a generalised submission because jurisdictional questions are of different shapes and sizes, different kinds. The particular distinction Croydon draws is a distinction between objective questions going to the existence of a power, and questions which require an evaluation on the part of the decision-maker. Here, one certainly can't say that jurisdiction generally turns on an objective standard.

**MR JUSTICE MORRIS:** Sorry, jurisdiction here doesn't turn on a --

**MR WILLIAMS:** Jurisdiction in this case -- I'm dealing now with the generalised argument that because it's a jurisdictional question, one looks at it more closely. What the tribunal has seen already is that here the question of jurisdiction bakes in a host of discretionary questions and judgments. So overall, there isn't a right answer and one can't treat the question overall as having an objective right answer.

There is also no support in those authorities for the submission that there is an intermediate category of finding which is not a purely objective matter but which is subject to a heightened standard of review because it's a jurisdictional matter. The principles one saw in Croydon were if it's a matter of appraisal, it's a matter of **Wednesbury**; and if it's an objective matter, it's a matter which is capable of being looked at by the tribunal on the merits. I wanted to make that general point in relation to Mr Ward's overarching submission.

**MR JUSTICE MORRIS:** Before you move on to your -- you were going to a second

point. Is it the case that in Croydon, the question of age plainly was a jurisdictional question which they said was an objective fact, to which I simply observe it's not actually in practice a very straightforward objective fact, but there we are.

The second aspect, child in need -- and I haven't got the paragraphs, I haven't got it open -- where there was appraisal. Was that also regarded as a jurisdictional question?

**MR WILLIAMS:** It was regarded as a condition for the exercise of particular -- for the application of particular statutory provisions. Baroness Hale looked at it first as a matter of construction of the power; and secondly, she said, "I have reached this conclusion without needing to consider the alternative submission that this is a jurisdictional fact."

But she then broadly goes on to say even if I had analysed it on that basis, I would have come to the same conclusion because it's not an objective question.

**MR JUSTICE MORRIS:** So your submission is -- this a point I hadn't I think fully appreciated -- that Croydon provides some support for the proposition that even if you are in a jurisdictional question, precedent fact question, the child in need might have been such a question and within that category, jurisdictional fact, precedent fact, it's authority for the fact that two different approaches can be taken.

**MR WILLIAMS:** That's right. If it's not -- the initial discussion of the construction of the power is expressed in terms of right and wrong answers.

**MR JUSTICE MORRIS:** Yes.

**MR WILLIAMS:** The discussion of jurisdictional fact is discussed as an alternative to objective standards. But the submission I'm making is those are broadly speaking two different ways of approaching the same question and the

distinction is drawn between questions -- I don't know if it would help to look at it again, sir.

**MR JUSTICE MORRIS:** No, I think I understand what you say. I was assuming that the question of age was the question of jurisdictional fact that fell for determination and the question -- that was the threshold question -- the question of child in need to be determined by the local authority was not a jurisdictional question. But your submission on Croydon is based on the fact that that second aspect is also a jurisdictional question.

**MR WILLIAMS:** Yes, and the Court of Appeal said it was a composite question, child in need, and that involved appraisal. What Baroness Hale said is you split out the question of whether there's a child from the question of whether the child is in need.

**MR JUSTICE MORRIS:** And the difference between objective fact and matters of appraisal, okay. I have that point, thank you.

**MR WILLIAMS:** So that's why one needs to do the exercise you asked me to do before the short adjournment, sir, which is actually to look at the specific grounds and the specific issues which arise under the ground to see what the standard of -- what is the nature of the challenge and what standard of review ought to be applied. I'd like to do that once I've looked at the SCOP case, if I may.

**MR JUSTICE MORRIS:** Yes, of course.

**MR WILLIAMS:** That will shed light on the position.

SCOP is -- I've lost the reference for it, is it tab 34?

**MR JUSTICE MORRIS:** I can't remember either.

**MR WILLIAMS:** Yes, it is. It's authorities J, tab 34. Just to link what I've been saying to SCOP, this is a case involving review of a jurisdictional finding but in the

mergers control context. Again, there is no suggestion in this case that when one's dealing with questions of appraisal judged on irrationality standards that there's a heightened standard because it's a matter of jurisdiction. On the contrary, in fact the discussion goes in the other direction.

**MR JUSTICE MORRIS:** Just remind me what the jurisdictional fact question was in that case. It was whether or not enterprise had ceased to be distinct.

**MR WILLIAMS:** Whether the form of business of SeaFrance still constituted an -- whether it constituted an enterprise or whether by the time of the merger, it was simply bare assets. In fact, that way of analysing it was the answer to the legal question in the sense that that was the way in which the tribunal below defined the test for whether there is an enterprise on the facts of the given case. Just to foreshadow where I'm going, the central taxonomy under SCOP is a distinction between questions of legal interpretation, what is the legal test, and how does that legal test apply to the facts of a given case. The former is a question of law and it's for the tribunal; the latter is a question of appraisal and it's reviewable on a rationality or **Wednesbury** basis. That is going to be the submission.

**MR JUSTICE MORRIS:** Can I just take that down, please. **(Pause)** Yes, thank you.

**MR WILLIAMS:** So picking it up then -- I'll take this fairly quickly because Mr Ward did show it to you. Paragraph 31 was the paragraph he focuses on particularly. The heading, as you will see, is "The approach to construction", and then one sees the discussion of the threshold issue. The important point I want to pick up is about halfway through that paragraph. The key words are:

"But the test for determining what are the relevant 'activities' whose absorption by another enterprise founds the jurisdiction of the Authority is a question of law."

So that's the test that it's a question of law, it depends upon the construction of the

Act.

Then it goes on to say that the authority doesn't have wider power to determine its jurisdiction, but the point it's making --

**MR JUSTICE MORRIS:** Let's go to the previous sentence:

"Moreover, once the test has been identified its application to particular facts may call for expert ... judgments by the tribunal of fact."

That's the authority. Okay, carry on.

**MR WILLIAMS:** I'm sorry.

**MR JUSTICE MORRIS:** But otherwise --

**MR WILLIAMS:** "The Authority's expertise and the specialised nature of its functions do not clothe it with any wider power to determine its statutory jurisdiction than is enjoyed by any other administrative decision-maker."

What this is saying is the fact that the CMA is an expert decision-maker doesn't mean there is some exception to public law principles as far as determining the questions of jurisdiction are concerned. And on ordinary public law principles, any questions of law, the construction of a statute, it is a question for tribunal. We accept that.

**MR JUSTICE MORRIS:** Actually it's silent, isn't it, on the issue I'm concerned about, this passage, is it not? Because what it's saying -- let's assume there's no expert economic judgment to be made as a tribunal of fact:

"Otherwise its expertise does not clothe it with any wider power than any other administrative decision-maker. Its conclusions are entitled to no greater deference on review or appeal."

It may be that it does actually answer the question, they use the words "on review". But what it doesn't say, it doesn't actually expressly say what the role of the CAT is in that process.

**MR WILLIAMS:** Paragraph 31 doesn't, but paragraph 41 does.

**MR JUSTICE MORRIS:** Okay. You are going to take me to that now.

**MR WILLIAMS:** Yes. If we move on to paragraph 41, the heading of which is "Irrationality".

**MR JUSTICE MORRIS:** Thank you.

**MR WILLIAMS:** It says:

"The Authority directed itself according to the principles set out by the CAT in Eurotunnel which I upheld to be correct. Once that point is reached, the application of the principle to the facts is a matter of expert evaluation. In these circumstances, the Authority's evaluation could not properly be discarded by a court of review unless it was irrational."

So I accept the point, sir, that this is picking up the point that the question of whether there's an enterprise on given facts will involve a level of expert evaluation by the tribunal. I'm going to develop the point in a moment that in broad terms, all such questions of factual appraisal to a lesser degree involve the use by the tribunal of its expertise in this arena and --

**MR JUSTICE MORRIS:** Used by the authority.

**MR WILLIAMS:** Used by the authority of its expertise, I'm sorry. All such questions will involve the use by the CMA of its expertise in this arena and that's true of the issues in this case.

**MR JUSTICE MORRIS:** Is there any more in SCOP you want to refer me to or is that -- carry on.

**MR WILLIAMS:** If one then moves into paragraph 43, the point that's being dealt with here is the reason why the Court of Appeal had decided that there was no enterprise on the facts of the case. It says about five lines in:

"In point of form this was so [as in what Sir Colin Rimer thought was so], but as

a matter of economic substance, it was not."

So the distinction is drawn between the form of arrangements and questions of economic substance.

**MR JUSTICE MORRIS:** Then the last sentence:

"The Authority regarded this as a significant pointer to the economic continuity. I think they were right to do so but it is enough for present purposes to say that it was a conclusion they were entitled to reach."

**MR WILLIAMS:** Yes.

**MR JUSTICE MORRIS:** That's a strong pointer to the court's review of the application of the facts to the test and facts. I think part of the muddle is this reference to expertise in the tribunal.

**MR WILLIAMS:** Yes.

**MR JUSTICE MORRIS:** I think if you go back to 31, what they're talking about there is within a JR context, the circumstances in which the court when JRing a conclusion of appraisal made by the CMA or any other body the extent to which you show deference because it's expert, you either do or you don't. But that is all still within in the context of a JR.

**MR WILLIAMS:** That's right, sir. I really have two points to make in relation to this reference to experts' economic judgment. The first point, which I'll develop in just a moment, is that this case does involve expert economic judgment. It certainly involves the use by the CMA of its expertise in appraising competition matters.

The second point is whether or not one is dealing with a question that involves specific economic content, on ordinary public law principles, any question of factual appraisal is on first principles a matter for the decision-maker. I've already shown you that the share of supply test in this context is not a question of

precedent fact in the ordinary sense. What that takes you to then is really a taxonomy which distinguishes between two types of question; the question of the interpretation of the legal test on the one hand and then the question of the application of that test on the facts. Once one's into the territory, in my submission, of applying the law to the facts, then you are in the realms of a discretionary assessment which is reviewable on **Wednesbury** principles. That submission is fortified by the points I'm about to make about why this case does in fact involve expert judgment on the part of the CMA.

The first is that the CMA was quite clear in the decision that in looking at the arrangements in this case, it was concerned with economic substance, not form. It was concerned with whether there is a supply based on the evidence in the round rather than, for example, just interpreting the terms of any one contract in isolation. That is a question of economic substance, so in my submission, questions of economic substance are by their nature questions which will engage the expertise of the CMA.

Secondly, there are specific factual issues in the case which engage the CMA's expertise. For example, in this case, there is evidence of the decision that BA made when it entered into the contract with Farelogix, and we will look at that in closed session. But the question is: is that a decision that has any competitive aspect or not? That is very much the sort of mixed factual and economic question which draws on the CMA's specialist remit. We say it's very clear from the evidence what it shows and there is competitive aspect to this. But it's certainly a matter which engages the CMA's expertise as the competition authority.

Those are our overall submissions on the standard of review.

**MR JUSTICE MORRIS:** That's helpful. Can I just tease out again so that I'm really

repeating back for my own understanding. Legal test construction of the Act, what does supply mean, et cetera, the application of the test to the facts you say is a matter for the decision-making body reviewable on public law grounds.

**MR WILLIAMS:** Yes.

**MR JUSTICE MORRIS:** You say (1) once you are in the public law territory, there's no authority for the proposition that it's a heightened standard of review because it's a jurisdictional question; (2) you say some of these matters were expert economic matters, therefore presumably we should show more deference; but (3) presumably you say you don't need to go that far because you still say that they are matters in the first place for you and it's not for us to substitute our assessment unless irrational, et cetera.

**MR WILLIAMS:** Yes, and I think that's a very accurate summary of our position. I think it will help when I now deal with the four grounds because I'm going to pick up some of those points now.

**MR JUSTICE MORRIS:** Okay.

**MR WILLIAMS:** Answering your question to me before the short adjournment, breaking it down: ground 1, Sabre does put this on the basis that the CMA made an error of law in determining the relevant description of services because it says the CMA failed to identify criteria in accordance with section 23(8). So we accept that that is put on the basis of an error of law. We say the argument's wrong as a matter of construction and application and even if it's right, we say the CMA did identify criteria for its decision.

If we're right that there is no legal issue about the interpretation of section 23(8), i.e. the CMA didn't misdirection itself under 23(8), we say there are two aspects of ground 1 left. One is a challenge to the choice of RDS, and because section 23(8) makes clear that is a matter for the discretion of the authority, we

say that has to be made out on a rationality basis and I think that's accepted. Then related to that, there's a reasons challenge, which is an ordinary public law reasons challenge.

**MR JUSTICE MORRIS:** Okay.

**MR WILLIAMS:** So we'll have to deal with section 23(8) but once you get past that, you are into rationality and reasons, sir.

**MR JUSTICE MORRIS:** Thank you.

**MR WILLIAMS:** Secondly, ground 2: Mr Ward was asked yesterday about what is the error of law under ground 2 and Mr Ward said there's a legal error in relation to whether there is supply. I think you already have my submission on this: there is actually no legal issue between the parties as to what constitutes a supply. It's not -- there's no suggestion that CMA specifically misdirected itself; indeed Sabre hasn't actually made any submissions about what supply means in the context of the legal tests.

The territory of ground 2 is a challenge to the CMA's finding that the evidence shows a supply of the relevant description of services in the UK by Farelogix, in particular to BA. That is a matter of the application of the test to the facts and it's a matter of factual appraisal to see whether there is evidence of such a supply. It is a question in the end like the question in SCOP, which is: was this an enterprise on the facts of the case? So we say that has to be made out on a **Wednesbury** basis.

I make more or less the same submission in relation to ground 3 because the legal question under ground 3 is whether there's an increment. But actually that turns on the CMA's findings on the facts that there is a supply on value because it's accepted that the CMA was entitled to choose value as the relevant criterion under section 23(5). So the question is then: was there a supply on value?

Again, no specific submissions are made about what value means. There's no difference between us as to what the word value means as a matter of construction.

The question is: is there evidence which establishes that the supply the CMA found as debated under ground 2 was a supply of a value? If it was a supply of value, the CMA's case is that establishes the increment because Sabre's already over 25 per cent. So in my submission, Mr Ward hasn't put that case on the basis that there is a misdirection of law, it's a question of evaluation of the evidence.

**PROFESSOR MASON:** Mr Williams, can I ask you one question on that.

**MR WILLIAMS:** Yes, sir.

**PROFESSOR MASON:** I think I heard you just say that there is no difference between the parties on the definition of value, am I misquoting or mis-paraphrasing you there?

**MR WILLIAMS:** No. Mr Ward hasn't submitted that the word value means something as a matter of legal construction and that the CMA proceeded on the basis of a misunderstanding of what the word "value" as used in the statute means. He says the evidence doesn't establish that there was a supply of value. And --

**MR JUSTICE MORRIS:** It's quite a difficult question ultimately as to whether something is a pure question of construction, or question of application of facts to meaning. I'm not sure I immediately know the answer to that. But carry on, Mr Williams: has there been any specific submission that value means x, y and z, and because it means x, y and z, whatever happened here couldn't be value.

**MR WILLIAMS:** That's the submission, sir, yes, that's right.

**MR JUSTICE MORRIS:** Can I be clear on that point: going to your question was there a supply of value, you say that is only reviewable by us on **Wednesbury** grounds -- sorry on public law grounds.

**MR WILLIAMS:** Well, unless a case is made that the CMA has proceeded on the basis of a legal misdirection as to what the word value means, we say you are then into the appraisal of the evidence to decide whether it establishes a supply of value. And following the taxonomy, that's a **Wednesbury** question.

**MR JUSTICE MORRIS:** Yes, okay.

**MR WILLIAMS:** Then ground 4, this breaks down into two issues. Obviously ground 4 is somewhat bitty, but I think the broad characterisation of the first aspect of it is do services of a particular description -- let's say non-GDS aggregators or non-VITOs because that was one of the points Mr Ward challenges -- do those fall within the relevant description of services? Are those specific services IT solutions which are supplied to travel agents for the purposes, et cetera, et cetera? In my submission, there is no question of law really there. That is a question of evaluation and appraisal and it's a question to which the **Wednesbury** standard applies.

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

**MR WILLIAMS:** Then the last aspect of ground 4 is the failure to carry out adequate investigations and it's accepted that that is a rationality challenge.

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

**MR WILLIAMS:** That really completes my submissions on the law, apart from one point of sweeping up which I can deal with by looking at Sabre's skeleton, which is authorities bundle 2, tab 1, and I'm going to paragraph 30. This is just a convenient way to deal with the South Yorkshire case.

**MR JUSTICE MORRIS:** You are going to the skeleton?

**MR WILLIAMS:** The skeleton. I just want to deal with the submission that's made, which I think Mr Ward developed it using the authority yesterday, but I just want to deal with the submission.

**PROFESSOR MASON:** Could you confirm the page number, Mr Williams.

**MR WILLIAMS:** I actually can't because my skeleton is not matching.

**MR JUSTICE MORRIS:** I can. It's bundle 2, tab 1, page 13, paragraph 30.

**MR WILLIAMS:** I don't have the same skeleton bundles as you, I'm afraid. Paragraph 30:

"Finally, the CMA should avoid a formalistic approach to jurisdiction."

Well, we agree with that. But the point which the paragraph then goes on to make is that in the South Yorkshire case, the court decided that.

"An arithmetical approach [this is towards the end of the paragraph] was inadequate and that the CMA's predecessor, the MMC, should address whether the reference area was of such size, character and importance to make it worth consideration for the purposes of the Act."

But that was of course a case about the interpretation of the word "substantial" in the context of "a substantial part of the United Kingdom". Of course our case doesn't -- it's common ground there's no de minimis threshold. The point isn't put exactly in this way, but the tribunal shouldn't read that kind of qualitative threshold into the question which arises particularly on ground 3, "Is it worth considering for purposes of the Act", because that is specifically an interpretation of the word "substantial" which doesn't arise in our provision.

**MR JUSTICE MORRIS:** There was a question of construction.

**MR WILLIAMS:** Yes.

**MR JUSTICE MORRIS:** That was the prior question of construction of the Act, what does the word "substantial part" mean.

**MR WILLIAMS:** Yes, but it shouldn't -- we accept that the tribunal shouldn't take a formalistic approach -- in fact, we encourage you not to take a formalistic approach -- but that doesn't mean you can ask yourself in relation to all of these

questions, "Do we think that this issue is worthy of consideration for the purposes of the Act?", particularly under ground 3 where there is no de minimis threshold. That's the point.

**MR JUSTICE MORRIS:** Yes, fine, thank you.

**MR WILLIAMS:** It's a point really about the increment.

Just to pick up two more preliminary points before I get to the grounds. Mr Ward referred briefly to the outcome of the United States legal proceedings yesterday and the fact that the court in the US didn't reach the same headline conclusion as the CMA. This is dealt with in our defence at paragraphs 47 and 48. I'm not going to ask you to turn them up, but we basically say there that the issues raised in the United States are different in substance from the issues which arise before this tribunal and the findings of the court are in any event inadmissible; and if the court were to look at them -- and we are not suggesting you should -- you would find they are not all supportive of the case they want to advance in any event. But we don't need to get into that and I'm not going to, I just wanted to give you that headline.

The second preliminary point is about Mr Batchelor's evidence, which we dealt with in the annex to our defence. You'll have seen that we registered our objection to the evidence but we didn't ask the tribunal to determine admissibility as a preliminary issue because we thought that would be hard work and we wanted to see how far it would be relied on at this hearing before one gets into the weeds on that. Our particular objection was to evidence which provided commentary on the case and representations on substance which frankly, in our submission, puts Sabre's gloss on the evidence.

Mr Ward didn't take you to any evidence of that nature yesterday, he only took you to the statement as a vehicle for advancing if I can call underlying evidence, rather

than Mr Batchelor's primary evidence. So that being the case, I don't think it's a good use of time for me to get into the admissibility of Mr Batchelor's statement at this hearing, but I just ask the tribunal to keep our objections in mind to the extent that Mr Batchelor's evidence is in play, if that's a satisfactory and a proportionate way of dealing with that issue at this stage.

**MR JUSTICE MORRIS:** I think it is, and I haven't consulted my fellow tribunal members. I think it would help us to know from Mr Ward the extent, not necessarily at this moment, to which evidence in Mr Batchelor's witness statement is positively relied upon, most particularly -- well, not most particularly, but one particular aspect is the extent to which it is said that what is said in that witness statement about the factual background and the nature of the products is at variance with everything we've been shown so far, which is namely in the report and in your defence. In that context, I think it would help us to know from Mr Ward, or indeed -- we have looked particularly carefully at paragraphs 14 to 41 I think of the CMA's defence, certainly in my reading as well as the report, I have used that as a useful starting point for the description of products and the like. It would help us to know -- I'm not asking Mr Ward now, but by the close of the hearing -- to what extent those paragraphs are either not agreed or there's additional facts he says are missed out. But at the moment, Mr Ward has not taken us to that (distorted words) expressly. But you wanted to say something on that.

**MR WARD:** If I may, just briefly. We obviously noted the various objections that were made. Like Mr Williams, we have been keen to have this hearing without descending into a large collateral battle about what is or is not admissible in Mr Batchelor's statement.

Sir, you saw that in the course of opening this appeal, I relied on primary documents

and I relied on statements in the CMA's report. And I confess, if you would like us to do the exercise you have just asked, it will require a little time, if you would understand. I can ask my solicitors to look at this very closely and if we might just write to you about that. But precisely to avoid getting sucked into these kind of issues, and given the inevitable narrowing of focus that occurs by the time you get into a hearing, we have in fact tried to sidestep this by going to primary material.

But if you would like an answer to that question about paragraphs 14 to 41, we would just ask for a little time --

**MR JUSTICE MORRIS:** Of course. But that is really -- I have the echo now. **(Pause)**

**MR WARD:** Sorry, sir, is that better?

**MR JUSTICE MORRIS:** It is. It's not a pleasant experience. For me, to hear one's own voice is not pleasant. You are all used to it by now, but I'm not.

I think there are two separate -- I have conflated two things, haven't I? One is to what extent is Mr Batchelor expressly relied upon and we need to look at it, and from what you are saying at the moment, I think the answer is no.

**MR WARD:** Yes.

**MR JUSTICE MORRIS:** The second separate question is the extent to which you are happy or not happy with paragraphs 14 to 41. It's not saying we would -- I think we would like to use that as a starting point, just as a description of the products and the like. By all means, take time on that, and I think the clarification you have given is helpful for Mr Williams.

**MR WARD:** We will write to you, if we may, about paragraphs 14 to 41 of the defence.

**MR JUSTICE MORRIS:** Thank you. Thank you very much. Yes, Mr Williams.

**MR WILLIAMS:** Sorry, I wasn't intending to reignite the debate on Bachelor with those observations, but it sounds like where we've ended up is that I haven't at the

moment.

**MR JUSTICE MORRIS:** No.

**MR WILLIAMS:** Ground 1. I've laid some of the foundations for this when I introduced the report. If I may, I'll just start with section 23. You have seen it, but I think it's a good place to start. It's authorities A, page 1.

**MR JUSTICE MORRIS:** Just give me a moment. **(Pause)** Yes.

**MR WILLIAMS:** Sir, you have the submission that the section's infused with discretion. It's services of any description in subsection (4), express discretions in subsections (5) and (8); also discretion in subsections (6) and (7) although they are not engaged in this case.

The focus of ground 1 is on subsection (8). You observed yesterday, sir, that this is an odd provision in one sense because the focus of subsection (4) is on services of the same description, whereas subsection (8) is focused on services of a different description. But it's common ground, I think, that the provision must work both ways around because you can't have discretion as to whether something is different and not have discretion as to whether it's the same. So it's a drafting oddity, but the position in substance is I think clear enough.

The point we make about subsection (8) is that the thrust of the section is not to impose obligations on the CMA, it's to vest the CMA with a broad discretion as to how it identifies a potential overlap, or not as the case may be. I do just want to unpack this because Mr Ward's challenge is based squarely on the obligation to state criteria. In my submission, there is a prior point about how one reads the statute. What subsection (8) says is that:

"The criteria for deciding when goods or services can be treated as of the same or a separate description shall be such as in any particular case the decision-making authority considers appropriate."

So that's the discretion. The discretion is to choose the criteria. How does that work in practice? Well, at a practical level in this case, the criterion used to decide whether services are of the same description or a different description is the RDS. The CMA adopted a formulation of the RDS which has a number of elements and then used that formulation to decide whether the share of supply test is met and whether specific services fell within the RDS or not. The RDS refers to the purpose of the service and the CMA looked at the purposes of various different services. It's concerned with services provided to airlines, and the CMA looked at whether services are provided to airlines, and so on.

It is important to see how Sabre puts its case in relation to this. Could I ask you to take out the notice of application in authorities bundle 1.

**MR JUSTICE MORRIS:** It's bundle 1, not authorities bundle 1.

**MR WILLIAMS:** Yes, that's right. Hearing bundle 1, paragraph 59 at page 23.

**MR JUSTICE MORRIS:** Just bear with me a moment, sorry, I'm now ...

**MR WILLIAMS:** There's a complaint in the first sentence about the breadth of the RDS, and I wanted to pick up the second sentence:

"The effect of establishing an RDS of such scope and imprecision without prior elucidation of the relevant criteria by which it is to formulated is to empty the share of supply test of substance."

**MR JUSTICE MORRIS:** One moment, Mr --

**MR CUTTING:** Sorry where are we? In pleadings bundle 1.

**MR WILLIAMS:** Page 23, paragraph 59, I am sorry. The second sentence:

"The effect of establishing an RDS of such scope and imprecision without prior elucidation of the relevant criteria by which it is to be formulated ..."

In my submission**, that's not what section 23(8) is about. It's not about criteria for the criteria, it is about giving the CMA discretion to choose the criteria. In**

**other words, to choose the RDS.**

Now we accept of course that there's a need to state reasons for the decision as a matter of public law and it may be that these two things come to the same thing. The submission that the CMA needs to state criteria may effectively be another way of saying the CMA has to give reasons for the decision. But section 23(8) doesn't add anything, in my submission, to the duty to give reasons and the public law principles I took you to earlier on.

Conversely, one can treat the CMA's reasons for choosing the RDS as the criteria on Sabre's submission, but it isn't really necessary to do that. What we say here is that Sabre has used section 23(8) to try and build up ground 1 as an error of law challenge and to say, well, the CMA has misdirected itself in law when there isn't really a question of law and there's certainly no misdirection of law. That's why I said earlier on, ground 1 really in the end has two related aspects: is the RDS rational and has the CMA given reasons for it? In my submission, the case based on section 23(8) doesn't really add anything to those different ways of putting the case on public law principles.

**MR JUSTICE MORRIS:** Can I comment there. I was initially thinking along the lines that section 23(8) was something separate from section 23(4) and the words "supply of services of any description", and I was concerned as to -- I think Mr Ward accepted that the selection of services was a matter for discretion with almost carte blanche subject to rationality.

If one follows the logic through of -- I think what you're saying 23(8) actually answers the question in relation to 23(4) because if you read 23(8) as the first stage of the analysis as including the criteria for deciding whether services can be treated as of the same description, so whether service A is the same as service B within the description, and then the second step is that actually the criterion

you say is the description that you choose.

**MR WILLIAMS:** That --

**MR JUSTICE MORRIS:** That's the point I just got out of this last passage of your submission; that the criterion is actually your formulation of the service of a particular description.

**MR WILLIAMS:** That's certainly the approach taken in the report, sir. The CMA arrives at a relevant description of services and then it uses that to assess whether services are of the same description for the purposes of the share of supply test or of a different description.

**MR JUSTICE MORRIS:** Yes. I mean, if it were otherwise, there would be no guidance in the Act as to how the CMA goes about deciding what the -- we call it the RDS, but the words "relevant description of services" is not actually a term of art, it's one you've all used.

**MR WILLIAMS:** That's right. That's right, sir. Broadly speaking, the share of supply test involves identifying the relevant services and the services where there's an overlap -- and that's section 23(8) -- and then deciding what are the shares of supply -- that's section 23(5). What we say is that really deciding how the CMA assesses -- the statute provides for a discretion for the CMA as to how it's going to assess both of those questions, the qualitative aspect and the quantitative aspect.

**MR JUSTICE MORRIS:** Thank you.

**MR WILLIAMS:** It's not about prior elucidation of criteria, it's about picking a criterion which then has to be rational. So that's why in my submission Sabre is absolutely right to accept that the challenge to the RDS has to be on rationality principles because it follows directly from section 23(8).

**MR JUSTICE MORRIS:** Okay.

**MR WILLIAMS:** If we can then turn to the CMA's reasons for (inaudible) in the RDS. This is the report, page 64, bundle 4, tab A. Sir, it's paragraph 5.25, and there's a cross-reference back to Chapter 3. I showed you quite a lot of Chapter 3 earlier on because I said it all bore on the question of whether the CMA had adopted a reasonable RDS, and that ties it together.

The first point made is that:

"Airlines provide passengers with access to travel information and the ability to make bookings directly or indirectly."

You can see 5.26 narrows the focus to the indirect channel, which is the area of competitive overlap. It picks up the point we've already seen:

"There are a number of different solutions that third parties provide to airlines for the purposes of providing travel services information to travel agents. The most common is a GDS."

But then it says:

"Direct connects are an alternative solution for airlines to provide travel services information to travel agents for the purpose of making bookings. These IT solutions operate in different ways but they all ultimately allow travel agents to access relevant flight information and make bookings on behalf of passengers."

That pulls together the central themes I developed earlier on when we looked at the report, which is that these are doing the same thing, they have common functionality and they are alternatives, they compete.

Then what the report goes on to do is to consider -- and it's fair to say at this point, the CMA hasn't arrived at the RDS, but you can see that paragraph 5.26 picks up quite a lot of the language of the RDS. That then feeds into 5.27 and teases out whether that language applies to the solutions that the parties provide. So does it work in the real world? The CMA decides that it does.

I'll also pick up footnote 118, which is at the end of 5.26.

**MR JUSTICE MORRIS:** Yes.

**MR WILLIAMS:** Again, there's a reference back to 23 in referring to the fact that, "These solutions all ultimately allow travel agents ..."

Then it picks up the point I showed you in paragraph 3.15 that the distribution of content could be via a GDS or the direct connect. That's the alternative point again.

Then it actually picks up the position of non-GDS aggregators and it makes the point that they don't involve a direct connection and when they've been included in the relevant description of services, that's on the conservative basis. We will come back to that on ground 4, but what that is drawing out is the important common feature of the Farelogix solution and the Sabre solution, which is they do provide a connection through to the travel agent by way of contrast with non-GDS aggregators. The fact that non-GDS aggregators don't have that feature is why they are only included on a conservative basis, which is why I am going to deal with that under ground 4.

Then there's a conclusion in 5.28 which uses the same language.

**MR CUTTING:** Can I ask you a question there, please. I just wondered, just picking up this -- sorry to be catching up with you, but just looking at the reasoning in 5.25 through to the first half of 5.27, actually all the way through 5.27(b), is there -- I can't see anything which supports the idea that the relevant product needs to be supplied to airlines in the way that is then quite heavily relied on in relation to self-supply.

**MR WILLIAMS:** If you look at the start of 5.26, sir, it says:

"There are a number of different IT solutions that third parties provide to airlines for purposes of ..."

So it's external supply.

**MR CUTTING:** I'm not entirely clear why that focus is on third party supply at that point. You said yourself that this section is about the reasons for the selection of the delineation of the RDS. I guess what I'm just pushing back on is where that reasoning goes for what we see in relation to 4, but you know clearly it's relevant to 1, is that delineation that chops out those other services?

**MR WILLIAMS:** Yes. Well, it comes back to the purpose really of the share of supply test because the purpose of the share of supply test is to identify concentrations and supply all in the context of a merger control regime, which is about identifying mergers which may have implications for competition. In that context, it is true that self-supply exerts some competitive constraint, as Mr Ward identified in his submissions this morning.

But in the context of a regime which is focused on concentrations of supply, it is usual, and certainly not irrational, sir, for the CMA to focus on suppliers which operate on a competitive market; that is to say they are external suppliers who provide their services to airlines and who compete in doing so. So it is right to say that the reason for focusing on external supply to airlines isn't drawn out, but the reasons for doing that are implicit, in my submission, and, with respect, fairly obvious.

Actually if one circles back to the statutory question, the statutory question is whether there are any services of the same description and it's natural, in my submission, to characterise the supply of these solutions by external third parties to airlines as being of the same nature and the self-supply by airlines of the same functionality as of a different nature and it's in any event not irrational to approach the matter on that basis.

**MR JUSTICE MORRIS:** Is self-supply a service, a supply of a service?

**MR WILLIAMS:** Well, it is -- that's --

**MR JUSTICE MORRIS:** I don't know. I'm only raising that hypothetically, I'm not expressing a view.

**MR WILLIAMS:** Yes. But that's right, sir. I mean, I think it's the point you drew out in Mr Ward's submissions earlier on, which is there's a difference between something exerting a competitive constraint and it being the supply of a service on the same basis as these external supplies of a service.

But this is drawing out the commonality of the two solutions, the fact that they're both third party solutions provided to airlines, et cetera, et cetera, the CMA is effectively saying, "We think that these surveys can be sensibly grouped together". It's rational and it's cogent, sir.

**PROFESSOR MASON:** If I might ask another aspect of that just so that -- I take it what you are walking us through is the process by which the CMA arrived at the RDS in showing that it was, as you say, rational or reasonable and cogent. Taking another part of the RDS which is eventually arrived at in 5.28, IT solutions as a concept, and looking prior to paragraph 5.25 and the section "Supply of IT solutions", looking prior to that in the Final Report, there is, as far as I can see, no place where that is defined or given any sharp boundary. So where does that concept of IT solutions emerge from the analysis and evaluation of the CMA so that it ends up in the RDS?

**MR WILLIAMS:** I'll perhaps revert to you on that question, if I may, once we've had the short adjournment. But broadly speaking, both of the parties are technology solutions providers which operate in this sector and in essence, it is the nature of their businesses, they provide IT solutions. Mr Ward criticises the words "IT solutions" as very broad and generalised, but that critique is advanced by separating them from all the words that follow which define what the purpose

and the function of the IT solution has to be.

So there's nothing controversial, in my submission, about the concept of an IT solution or an IT solution provider. The criticism made of it is that it's vague on its own. The reason we say that is not a fair or legitimate criticism is because it proceeds as though the CMA has used that language or the words which follow it. I'll see whether there is anything more specific -- what you see in 5.27 is that the CMA characterises both of the products as IT solutions, and I don't think that's challenged.

I don't think it's challenged that that is the broad nature of their business, and indeed I think the complaint about the words "IT solutions" is that it's overly generalised at least when looked at on its own. But I don't think there's any suggestion that the words in themselves are meaningless, other than on the basis that Sabre construes them in isolation.

I've helpfully been handed a note which refers back to paragraph 3.1 of the report.

**PROFESSOR MASON:** Yes, I had spotted that, but I'm not sure it quite reaches the heights of a definition.

**MR WILLIAMS:** No, that's a fair point. But equally, one has to construe the words in their ordinary and natural meaning. The point I've already made, sir, is that they are intelligible words, but really they derive their meaning and context from all of the words which follow them in the RDS. There's no question of the CMA saying that this merger is concerned with suppliers of IT cables or monitors because those products don't serve the particular function which is identified in the remainder of the language. Unless the tribunal thought there was something contentious or inadequate about that language in itself, and in my submission there isn't, it has to be interpreted and applied with reference to the RDS as a whole.

**PROFESSOR MASON:** Forgive me, Mr Williams, I have a slight gap between audio and video, so your audio arrived before the video and I wasn't sure whether you had stopped speaking or not.

At this stage, I'm just seeking greater understanding rather than reaching any conclusion, so let me just ask one more question on that, if I may. You've said IT solutions should not be construed in an overly narrow way, hopefully that's not misinterpreting what you've just said.

**MR WILLIAMS:** Given its natural meaning, yes.

**PROFESSOR MASON:** Is its natural meaning one that indicates a broad and comprehensive system?

**MR WILLIAMS:** Well, it's directed at a solution which exists to serve a particular purpose. When we come to ground 4, the general point we make about ground 4 is that a complex process, such as transmitting information through to a travel agent through multiple layers of technology, always involves a number of component parts, and those component parts have all brought together as part of that overall process. Some of those components may be components which are capable of a very general application -- like an IT cable, like the internet connectivity that Openreach provides, for example -- and some of those products will exist to serve that particular functionality, and it's a question of fact and degree in trying to understand the extent to which a particular product is of that description and exists for that purpose, is supplied for that purpose, rather than merely being used as part of that overall process.

The hallmark of these services is that their raison d'être, at least in part so far as the GDS is concerned, is to carry travel services information and airline content through from the airline to the travel agent to enable the booking or the flight to be made in contrast to, for example, the PSS; in contrast to, for example,

a contract with Openreach which allows the information to be transmitted over the Internet, and so on.

One can have that debate for any one of a number of components, but that's why the emphasis on the purpose of the service in the RDS is important, and I would emphasise the particular purpose of the supply rather than the point you put to me, sir, about whether it is, if you like, comprehensive. We accept that even these supplies operate in conjunction with other components, so in that sense they're not completely comprehensive, it's more a matter of looking at a particular purpose.

**PROFESSOR MASON:** Okay for now. I reserve the right to return to it later if that's all right as we develop the discussion.

**MR JUSTICE MORRIS:** In that context, I have been looking at this point which arose earlier today about IT companies that build websites at 5.56(e), but that again presumably come back to it in ground 4, I've read the explanation of the distinction. I don't go there now but I just want you to be aware that in my mind, I need to understand why they do not provide an IT solution which meets the definition.

**MR WILLIAMS:** I'll come back to that, sir. A note has been handed to me, I just want to make this point. When the CMA looked at an RDS, obviously the ultimate question is: do these parties overlap? Do they provide an overlapping service which might trigger the share of supply test? So the CMA starts with what the parties offer, and so to the extent it started with the words "IT solution" a part of the picture is that these parties supply IT solutions in this sector and then it's a matter of drilling down and defining what it is exactly they supply.

So why is the RDS said to be irrational? I'm going to move to my submissions on that. Looking at the time, I wonder if I ought to break, sir, and just run through this

after the adjournment.

**MR JUSTICE MORRIS:** Yes, depending on how long you are going to be. I think we can go on a little bit longer because we started only about an hour ago.

**MR WILLIAMS:** I forgot.

**MR JUSTICE MORRIS:** How long is your next segment?

**MR WILLIAMS:** I think it might be ten minutes.

**MR JUSTICE MORRIS:** Subject to the shorthand writers being content and my fellow tribunal members, I think we should continue for ten minutes.

**MR WILLIAMS:** I am grateful.

So why it is said to be irrational? The core of the complaint is that the definition was not as the industry describes itself; it's unrecognisable to industry and unrecognisable to Sabre. Mr Ward said more than once yesterday that the RDS is not a true description of the GDS, and that the CMA has reduced the GDS down to the description in the RDS -- sorry to build up the acronyms.

But that's not a fair characterisation of what the CMA did, the CMA is not describing the GDS. The CMA's position is that the RDS is a service provided by the GDS, together with other services or other functions. It's distilled the RDS as one thing the GDS does, it doesn't purport to be a description of the GDS.

A key plank of the complaint is that the GDS does not reflect an industry standard, and you saw the CMA's guidance in relation to this yesterday and the exchanges with Professor Mason teased out. Sabre doesn't say the description has to reflect an industry standard and the guidance says in terms that this need not necessarily be the case.

But it is worth posing the question, as I think you did yesterday, sir, Mr Justice Morris: what would commercially recognisable terminology be in this case? Mr Ward, part of his answer anyway, was it might be the GDS. You can see the difficulty

with that approach straight away, which is that if you consider these product in silos using the specific products which the parties provide, you will not pick up the fact this a differentiated market in which the parties deliver the same function using differentiated solutions.

In other words, you won't pick up the concentration and so this is a good example, in my submission, of a case where using an industry standard will obscure the wood for the trees. So there's no presumption that the CMA should use an industry standard either under the guidance or otherwise and, in any event, there is a good reason not to use the language of GDSs and APIs.

The next point I want to deal with is another point derived from the guidance, which is that the products operate at different levels of the supply chain; that is to say Farelogix is an input, as Sabre puts it, into self-supply. In my submission, this point doesn't really get going because as the tribunal saw, the guidance says:

"The share of supply test will not apply to parties who are solely active at different levels of the supply chain."

Footnote 17 of that guidance gives examples of cases where the share of supply test has applied to parties whose relationships are not purely vertical. However one looks at it, that is not this case. It's not in issue that there is a horizontal overlap between these party. We have a whole SLC analysis and an SLC decision, so this paragraph is not engaged. Given that, Sabre is driven to run this point in a more dilute way on the basis that the CMA failed to consider the verticality, the vertical dimension.

As our defence says, the point wasn't really put in this way during the investigation, but the CMA clearly did recognise the way in which the different models pieced together. I showed you various parts of the report today in which the different models, the differentiation of competition, was explored and explained.

What Sabre has lost sight of is the point I've already made, which is that the CMA's concern was with concentrations of supply. So it's not surprising that it focused on the overlap rather than the respects in which they didn't overlap. Indeed, the differentiation is part of what has driven competition, as I showed you in the Final Report earlier on. That point holds whether or not elements of the different models could be characterised as standing in a vertical relationship. And Mr Ward did, in my submission, struggle to answer Mr Cutting's question yesterday as to whether his submission meant that a vertically integrated supplier can avoid the share of supply test when it applies the supplier of a downstream component, and we strongly agree with the thrust of that point, it's looking at the issue through the wrong end of the telescope.

But to put this point in basis terms, what is a relevant consideration is subject to the rationality test and it is not irrational for the CMA as a competition authority to focus on the fact that there is a concentration of supply, albeit one party offers the service as part of a bundled or integrated product. Mr Ward submitted that the purpose of this provision was to bring that concentrations of supply into interplay under merger scrutiny, and the CMA's approach was consistent with that purpose.

This is also the answer to Sabre's complaint that the RDS doesn't work because the GDS does more than the RDS. That is true, but it isn't an answer to the point that it does perform the RDS and it competes with Farelogix's products in doing so.

In its skeleton, Sabre has developed that argument with reference to architects and accountants. As Mr Ward said yesterday, we didn't think that was a very good example because no one is suggesting that architects and accountants perform the same function. Yesterday we had scooters and buses and cars and radios

and in the end, if I may respectfully say so, we don't think these examples take the debate forward. Mr Ward accepted that functionality is relevant and it's a question of fact and degree whether services are sufficiently closely related to form part of an RDS.

None of Mr Ward's examples involved products which are in any real sense commercial alternatives. They are on any view more removed by degree than a GDS and a direct connect. In the end, questions of fact and degree are subject to review on a rationality basis, and the examples don't take Mr Ward any closer to showing that the CMA's decision on the facts was irrational.

It is notable that Sabre criticises the RDS for being both too wide and too narrow at the same time. This is a point I started to discuss with Professor Mason: it complains that the words "IT solution" are wide enough to catch an IT cable, but then it complains that the effect at the end of the definition is to exclude various services, it says the definition has been tailored.

The problem with both of these points is that they don't read the RDS as a whole. No reasonable reader of the relevant description of services would think that it includes IT cables. It's not a solution purchased where an airline wants to transmit information to a travel agent. That's not the specific function of an IT cable and doesn't help to try and chop the RDS up into pieces and to read it in bits.

As I say, having complained those words are too wide, Sabre then complains that the latter part of the definition has too much of a narrowing effect. The language that Sabre complains is too narrow is the language which gives the words "IT solution" precise definition. When the description is read as a whole, it is neither meaninglessly broad, nor is it conversely too narrow; it provides an intelligible and appropriate level of definition.

In its skeleton, Sabre relies on its arguments under ground 4 to buttress ground 1 and it says the CMA was driven to rely on ad hoc criteria to make the RDS work. We dispute that for reasons we will look at when we look at ground 4, but in outline we say that the core of the application of the RDS is an assessment of function and purpose. What is the particular functionality of this product as distinct from the other products which may be used as part of the overall process? There's a second aspect, which is: who is the product supplied to, who is the customer? Is it an airline, is it somebody else?

What the CMA did in dealing with the specific services was apply those different component parts of the definition individually and cumulatively to different services and arrived at a view as to whether they fell within the RDS or not. That is not unreasonable elaboration driven by an excessively vague definition, it is simply the application of the criterion to the facts.

Finally Sabre makes a point about how the CMA arrived at the RDS and the various previous iterations of the RDS. I don't want to say anything in particular about that. If the criterion used by the CMA in the final analysis is reasonable, it doesn't matter that it took the CMA a bit of time to arrive at it. The CMA has never said this is the easiest or most straightforward of cases. The tribunal has seen the industry context; it is complex and the arrangements on the facts require some analysis. But in the end, the question is: was the RDS rational and were reasons given for it? So we do say that the history is really no more than a jury point.

Sir, those are the submissions I wanted to make on ground 1, subject to any questions of course.

**MR JUSTICE MORRIS:** Thank you very much. Just one question I think probably before we break, unless either of the other tribunal members have a question.

This is probably a jury point question: do you say that the fact the CMA went through a number of iterations shows that it gave the issue very careful detailed consideration, thereby illustrating its rationality? Or on the other hand, does it show that the fact it took you five attempts -- I'm putting this in the most pejorative way -- does that show that you are fishing around for something that can't be done? Maybe --

**MR WILLIAMS:** The answer to your question, sir, is what it shows is the CMA was considering the representations which were put to it at each stage. You've seen that jurisdiction was hotly contested and the CMA formulated an RDS, I believe, in a working paper originally. There was then the preparation of the provisional findings, and representations were made at each stage and previously, and of course there was a phase 1 process as well.

So it's not a secret that Sabre has regarded jurisdiction as an extremely hot topic and it's had lots to say on the subject. Of course when a party makes detailed representations, those are considered by the CMA carefully. And the more representations Sabre makes, the more material there is for the CMA to consider. So we do say this is an iterative process but, if you like, the ball stops rolling when you get to the Final Report and we are all here to argue about whether that RDS was rational and the reasons were given for it.

**MR CUTTING:** Can I perhaps -- and I don't know when you want to consider this, it may be that you weren't planning to, but I'm curious about how you would respond to a couple of points which I think came out of Mr Ward's submissions yesterday, and apologies in advance to Mr Ward for no doubt bastardising your submissions.

I suppose I would quite like to know what you say to his argument that, you know, is your case that actually the CMA could indeed come up with an RDS that was

the lowest common denominator of what you find in relation to the narrowest scope in order to come up with a 25 per cent? I think at its most aggressive, he said perhaps you are claiming the right to go for a lowest common denominator approach.

Then the second thing which I think is sort of brought into issue by his opening yesterday is that the share of supply test is all about a concern arising out of concentration levels which give rise to competition problems -- this is page 9 of the transcript yesterday:

"... and the share of supply test is a way of measuring whether there's been an increase in concentration in respect of the goods or services in question."

Which to me sounded like he was pushing that the share of supply test should be quite close to a market share test. He may not go that far, but I wonder whether you would like to comment at some point on the extent to which the share of supply test ought to bear a relation to the economic substance, given that it is the CMA which is now given the discretion as to share of supply, whereas under the Fair Trading Act it was the Secretary of State.

I just wonder whether that shift in the Enterprise Act suggests that there should be either a closer correlation between share of supply and market share, or share of supply and where you end up -- so there's the contrast there on the one hand can you get away with an LCD; and on the other should you be pushing towards something that makes greater economic sense than that.

Sorry, I know those are different and relatively big questions so I'm not looking for an answer now. But I think those issues feel to me as if they've been put squarely in issue in this case.

**MR WILLIAMS:** I understand the questions and I'll deal with them. I might deal with them tomorrow, there is a need for getting on with other things today. I think

certainly in relation to the first point, I took that as a pejorative take on our approach.

**MR JUSTICE MORRIS:** It just begs the question how narrowly you can go, and the second question is a much more specific elucidation of a more general point for me, which is if we are going to construe it, what is the statutory purpose of the share of supply test? I think it may be the same thing, but --

Very well, are we ready for a break?

**MR WILLIAMS:** I would have thought you are, sir, having listened to me for -- I have been going for hour and a half --

**MR JUSTICE MORRIS:** No, that's all right. It's the way I was nodding off, or something like that. We will say 3.45. Thank you very much.

**(3.30 pm)**

**(A short break)**

**(3.45 pm)**

**MR JUSTICE MORRIS:** Yes, Mr Williams.

**MR WILLIAMS:** Thank you, sir. I'm going to move on to ground 2 and come back to those important questions tomorrow once I've had a chance to take instructions.

Ground 2, challenges to the finding that Farelogix supplies the relevant description of services in the UK by supplying BA with the FLX Services to market BA interline segments. Just to make a few preliminary points about terminology: one is the word "market". The CMA -- you've seen the sophistry of this point -- the CMA use the word "market" because under the interline agreement between BA and AA, BA is referred to as the marketing carrier. That means it's a BA flight. BA doesn't issue the ticket, but it does sell the flight, albeit that AA ultimately sells the ticket, and Sabre has sought to generate some controversy about this

language. But there is a footnote, 110, which clearly deals with the issue. It's probably worth you looking at it because it's a point they come to more than once. It's on page 62, if you could read that to yourselves. **(Pause)**

**MR JUSTICE MORRIS:** Yes.

**MR WILLIAMS:** Although the language was at one stage queried, the point's explained and addressed. And the final words:

"British Airways in practice sells its interline segments through the FLX Service."

That's the key point, BA gets to sell a flight. There's no dispute that that happens, so the controversy about that word, such as it is, goes nowhere.

**MR JUSTICE MORRIS:** BA is the principal, this is the carrier, it receives the fare. The sale is effected through you say the FLX Services. It's sold effectively by AA as agent for BA.

**MR WILLIAMS:** There is an express finding to that effect. I think it's in appendix D.

**MR JUSTICE MORRIS:** The word "intermediary" is used on a contractual -- as an agency. But there we are, anyway. Yes, okay.

**MR WILLIAMS:** BA's business is selling flights and here they get to sell a flight. The second aspect of the terminology I wanted to pick up is the word "directly" which Mr Ward came back to and one sees, for example, at 5.55:

"Farelogix directly supplies the RDS to BA in the context of interline bookings in partnership with AA."

That word is there in case there's any doubt. To meet Sabre's case, the parties' complaints about this that the CMA has conflated a supply to AA with a supply to BA. The point of the word "directly" is to make clear that BA's case is not based on BA being an incidental beneficiary of the AA arrangement with Farelogix, nor is it the beneficiary of a supply that's made by AA, which is one of the ways Sabre puts the case. It's based on a supply by Farelogix to BA,

and obviously I will develop how we make that case. But that's the point of the language.

Thirdly, FLX Services and FLX platform I think this is pretty straightforward because Mr Ward explained it yesterday. We agree those two things are interchangeable, and FLX platform tends to be used in the context of the BA agreement, but means same thing as FLX Services. I think you have the point that the FLX Services break down into two: there's open connect, which is the software which connects to the PSS, which is sometimes called the translation layer; and then there's the API, which makes the connection to the travel agent.

The tribunal has the point that it's the combined effect of these services that the airline can transmit travel services information and airline content through to the travel agent so that bookings can be made. That's the core functionality of the direct connect, that's the functionality we say BA receives from Farelogix as distinct from, for example, a technical messaging component. And that's why we say BA receives the RDS.

Before I get into the argument, I think it is helpful to just summarise the issue as we think it can helpfully be drawn out of Mr Ward's submissions yesterday. Sabre's case, it seems to us, has three key propositions. Fundamentally, it's said that BA hasn't contracted for the FLX Services because that would require a full direct services agreement with all of the clauses Mr Ward mentioned yesterday and it would involve the provision of an API.

Secondly, Sabre says BA has in fact only contracted for the supply of a technical connection which operates between its PSS and FLX. It hasn't contracted for a solution which communicates through to the travel agent, and hence it says BA doesn't receive the RDS. Thirdly, it says if BA does receive a supply of the FLX Services, it's an indirect supply from AA, not from Farelogix.

In outline, our response to that is as follows: fundamentally we say that BA does not just receive the supply of a technical bridge to connect to the FLX platform. BA receives a supply of the core functionality of the FLX Services, which is the connection through to the travel agent which enables it to transmit travel services information and sell flights concluding in bookings. This is really the key difference between the parties and I'm going to show the tribunal that Sabre's characterisation of the case and its attempt to confine the supply to that technical connection and no more is really not consistent with the evidence, and the functionality BA obtains from Farelogix is more than that.

Secondly, we say that what BA receives is a partial supply of the FLX Services because BA is obtaining that core functionality, the connection through to the travel agent but only for the purposes of interline sales. The CMA was completely clear that it's not saying the FLX Services as delivered to BA are the same thing as AA receives, and that has two obvious implications.

First, BA didn't need to build an API because relevant sales would be made through existing connections with BA's interline partners. And secondly, the use of the FLX platform to that extent doesn't require all the same commercial terms as applied between AA and Farelogix. So attacking the finding on the basis that BA's relationship with Farelogix doesn't look like American Airlines' relationship with Farelogix, that is aiming at a small target.

And thirdly, we say it's clear as a matter of fact that BA is making sales through travel agents, through the FLX platform and it's transmitting travel services information to travel agents for that purpose. There is really no getting away from the fact that BA is using the platform in that way, and Mr Ward's attempt to draw a line between, if you like, the communications between BA and Farelogix and the onwards transmission to the travel agent, the onward

communication. That's not a realistic characterisation of the evidence, in our submission. It's certainly not irrational for the CMA to have rejected that characterisation.

It is perhaps with that in mind that Sabre advances its fall-back case that if BA does obtain a supply of the FLX Services, it obtains that supply indirectly from American Airlines. We say really that's an attempt by Sabre to make sense of the facts, but it really does come out of thin air. There's nothing to substantiate an arrangement between BA and AA in relation to the supply of the FLX Services, in contrast to the evidence the tribunal has of BA's relationship with Farelogix and all the material going to that. So we say there is a supply of the FLX Services, partial supply, to BA and it comes from Farelogix, not from American.

The tribunal has seen that the CMA's assessment is based on the three agreements and it looked at those three agreements in the round. The key agreement is the BA agreement, we accept that. Sabre calls it the linchpin -- I'm not sure I would have used that word -- but we do accept that the BA agreement tells you the most, it's the most informative. The other two predominantly context for that arrangement and help to understand its significance.

Mr Ward did say several times that the CMA does not find that the BA agreement establishes a supply of the relevant description of services itself. But that I think is based principally on his submission that the agreement only establishes the supply of a technical connection, which he says is not itself a supply of the relevant description of services.

It's true that the CMA found that that agreement provides for a technical connection, but the CMA did not draw a ring around the BA agreement and find that agreement on its own wasn't enough. It instead looked at the position in the

round and decided whether there was a supply of the relevant services to BA from Farelogix, taking into account the evidence as a whole, including the procurement material and the other agreements.

I do just want to show you that if Mr Ward does try and compartmentalise the finding in that way, he's not right to do so. Can we pick it up at 5.16, please, which is on page 62 of the report. I'm just going to give you some references. I think you've seen all of this and probably more than once, but I just wanted to draw attention to these paragraphs in this context. It's the top of page 62:

"Farelogix has an agreement with one UK airline, BA, which enables it to use --"

**MR JUSTICE MORRIS:** Sorry, I'm not with you, I'm afraid. Sorry, I get confused between the page number of the report and the bundle page number. That's my fault. I'm with you now, "Farelogix has an agreement ..."

**MR WILLIAMS:** "Farelogix has an agreement with one UK airline, BA, which enables it to use Farelogix's FLX Services in respect of one type of itinerary interline segments in the context of its interline arrangement with American Airlines."

So that's simply looking to the bottom line, if you see what I mean, rather than saying what one agreement does or doesn't do in isolation. But certainly, it is talking about the BA agreement as leading to that end conclusion.

5.27(b) on bundle page 65, picking it up at "occasionally", this explains setting up the technical connection and then there's a sentence which starts:

"The creation of this connection is a necessary component for the interline partner to use and receive supply of the FLX Services in the context of interline bookings and enables the interline partner to use the FLX Services."

So again, the CMA looked at the position altogether and in the round.

Turning then through to 5.49, I want to pick this up for a slightly different purpose because when we looked at paragraph 5.50 yesterday, a point you made to

Mr Ward was that 5.50 says, "Enables BA to provide travel services information", and it doesn't say "to travel agents", and the question arose: is that significant? The answer is it's not significant because if you look, for example, at 5.49, you have a fuller formulation there which says:

"The FLX Services enable travel agents to access travel services information for British Airways interline segments."

So the drafting is not completely consistent, but it's not a point of substance that 5.50 stops at the words "travel services information", it's just shorthand. There's another example not very far ahead.

5.50 is another paragraph which just if you like deals with the matter in the round:

"BA agreement provides for the creation of a technical connection to enable the communication between British Airways PSS and Farelogix. This technical connection enables BA to provide travel services information ... and thereby to use and receive."

So again, the position is taken altogether.

5.52 is a paragraph which is about what would happen if the BA agreement was terminated, and if it was terminated the FLX Services couldn't be used to market British Airways segments, and so on. So that's a link between the termination of the agreement and the provision of the services. And actually earlier on in that, we have "It enables and continues to enable BA to use and receive supplies." So again it's in the round.

5.53 is a different point, but it is a very important point, which is this point about not receiving the entire package. That's why we say attacking the finding on the basis that the relationship doesn't look like the relationship with American is aiming at a false target, it's absolutely clear. And to emphasise the final words:

"The fact that BA only uses FLX Services to this extent and for this purpose does not

undermine our view that it is in receipt of the relevant description of services from Farelogix."

**MR JUSTICE MORRIS:** Just pause a moment, would you. **(Pause)** Okay, yes.

**MR WILLIAMS:** Then just to go back to the point I made on 5.49, 5.57 is another paragraph which talks about travel services information being made available to travel agents.

**MR JUSTICE MORRIS:** It's the middle sentence, is it? "It is more relevant ..."

**MR WILLIAMS:** Yes. The CMA looks at the matter in the round, but that doesn't mean that the CMA made a positive finding that if you only look at the BA agreement, there's not enough in it. That's just not the way the CMA looked at the case.

So pulling those points together, the CMA found that BA receives the supply of an IT solution from Farelogix which has two critical features from BA's perspective. First, it allows BA to market, i.e. sell, interline segments through the FLX Services; and secondly, for that purpose it enables the transfer of travel services information from BA over the FLX platform to the travel agent.

There are two main strands of the evidence supporting that conclusion. There's the agreement itself and the evidence of the procurement decision. There's also evidence from Farelogix which I can look at more briefly but I'm going to have to look at all that evidence in closed session in the way Mr Ward did yesterday, and that's what I would propose to do for at least the rest of today.

**MR JUSTICE MORRIS:** Thank you very much. Well, we will need to close the hearing and go into closed session. A reminder -- yes.

**MR WARD:** Sir, sorry, I was just delayed putting my headset on. I'm told, and I want to make sure that everyone is agreed on this, that it's common ground that two lawyers from Macfarlanes who are in the confidentiality ring are allowed to stay

for the closed session because they have permission to look at the material relating to BA and Farelogix. I'm told that's been flagged up with the CMA and for reasons I can't immediately explain to you, this is catered for by the confidentiality ring.

But I thought we should flush that out now before we resume. I'm sure someone can explain to me how this follows from the terms of the confidentiality ring. But I don't want there to be any doubt about this and any doubt that the CMA agrees that this is an appropriate course.

**MR WILLIAMS:** There's no objection on our side, I don't think.

**MR JUSTICE MORRIS:** I also don't know how it necessarily works in the ring other than the fact that I'm aware obviously, having made the order some time ago, that there is provision for Macfarlanes' lawyers to be within the ring and for specific purposes. If you are both satisfied that the next session is appropriately for that purpose, then I have no objection to the representatives of Macfarlanes staying within the hearing.

**MR WARD:** While you rise, sir, I'll try and have it explained to me because I was informed of this slightly on the hoof while the session has been in progress. So I want to make sure I've actually got this right. The fact that Mr Williams agrees and indeed it reflects your understanding, sir, is highly reassuring to me, but obviously I don't want any mistakes in this --

**MR JUSTICE MORRIS:** I would rather you got the reassurance from Mr Williams, but --

**MR WARD:** I have that as well.

**MR JUSTICE MORRIS:** Okay.

**MR WARD:** I'll just double check with my solicitors now, if you don't mind.

**MR JUSTICE MORRIS:** We will rise and wait to be told when we're ready for the

closed session. But just for the record, as far as the open session is concerned, for reasons of confidentiality, the next session of the hearing will be done in closed session within the confidentiality ring. Thank you very much.

**(4.06 pm)**

**(A short break)**

**(4.14 pm)**

**(Closed session Extracted)**