Neutral citation [2020] CAT 19

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1345/4/12/20

Salisbury Square House
Salisbury Square
London EC4Y 8AP

19 August 2020

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

Sitting as a Tribunal in England and Wales

BETWEEN:

SABRE CORPORATION

Applicant

- v –

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING: SPECIFIC DISCLOSURE

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

A. INTRODUCTION

1. On 21 July 2020 Sabre Corporation ("Sabre") made an application for specific disclosure (the "Disclosure Application") in the context of its substantive application under s. 120 of the Enterprise Act 2002 ("EA") for judicial review of the decision of the Competition and Markets Authority ("CMA") to prohibit Sabre's proposed acquisition of Farelogix Inc ("Farelogix") (the "Merger") in its entirety (the "Decision"). The Decision is set out in the CMA's Final Report dated 9 April 2020 (the "FR").

2. At a remote case management conference ("CMC") on 16 June 2020 the Tribunal gave directions for the future conduct of the substantive application which included directions in relation to disclosure.[1] In accordance with those directions, the CMA has provided certain disclosure to Sabre since the CMC. By the Disclosure Application Sabre seeks further disclosure in the form of the removal of redactions (i) of supporting footnotes in the FR; (ii) in two supporting appendices to the FR; and (iii) in specified paragraphs of the FR.

3. Nothing in this ruling prejudges the issues to be determined at the hearing of the substantive application.

4. Sabre is a US technology and software provider to the global travel industry. It operates a global distribution system ("GDS") which distributes airline content to travel agents for the purpose of booking airline tickets. In addition, Sabre provides IT solutions to airlines.

5. Farelogix is also a US technology and software provider. It supplies technology solutions for airlines, including merchandising modules and airline content distribution solutions.

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[1] See paragraphs 4-7 of the Order of the Chairman of 19 June 2020. The deadline for Sabre to file any specific disclosure application was subsequently extended: see paragraph 1 of the Order of the Chairman of 20 July 2020.

6. In the FR, the CMA found, in summary, that (i) it had jurisdiction over the Merger on the basis of the share of supply test in s. 23 EA; and (ii) the Merger may be expected to result in a substantial lessening of competition ("SLC") within the supply of merchandising solutions on a worldwide basis and the supply of distribution solutions on a worldwide basis.

B. THE SUBSTANTIVE APPLICATION

7. An application under s. 120 EA for review of a decision of the CMA in respect of a merger is to be determined by the Tribunal applying the same principles as would be applied by a court on an application for judicial review (s. 120(4)). Further, such an application must set out the specific grounds on which the decision is challenged: see rules 9(4)(d) and 26(1) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules").

8. By its notice of application filed on 21 May 2020 (the "NoA")[2], Sabre challenges the Decision on six grounds. Four of those grounds relate to the CMA's assertion of jurisdiction over the Merger (Grounds 1-4) (the "Jurisdiction Grounds"). The other two grounds (Grounds 5-6) relate to the CMA's substantive findings that the Merger would lead to a SLC in each of merchandising and distribution (the "SLC Grounds").

9. The Jurisdiction Grounds arise from three core findings on which Sabre says the CMA relied in asserting jurisdiction over the Merger, namely: (a) that Sabre and Farelogix each supply services which can properly be included in a single description of services for the purposes of s. 23 EA; (b) that Farelogix supplies relevant services within that description in the UK; and (c) that the Merger increases a share of supply in such services of 25% or more in the UK. Sabre contends that each of these findings are unlawful on four alternative or cumulative grounds, Grounds 1 to 4.

[2] The NoA is supported by a witness statement from Edward Batchelor.

10. The Disclosure Application is said by Sabre primarily to relate to the SLC Grounds. Sabre contends that:

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

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

C. THE FR AND THE DISCLOSURE APPLICATION

11. The FR is a substantial document. The redacted version currently before the Tribunal comprises over 440 pages in the main body of the report ("the Main Report"), including over 1,900 footnotes. In addition there are seven supporting Appendices, A to G, which themselves comprise well over 300 pages including just under 1,000 footnotes. In its original published form, the FR contained a considerable number of redactions, made by the CMA under its duty to protect third party confidentiality.

12. The FR is structured as follows. Chapters 1 and 2 are short chapters setting out the CMA's terms of reference and a description of the Sabre and Farelogix parties respectively. Chapter 3 discusses the industry in which Sabre and Farelogix operate and Chapter 4 describes the Merger and its rationale. Chapter 5 addresses the question of jurisdiction. The following chapters, Chapter 6 (Market definition), Chapter 7 (The nature of competition), Chapter 8 (Evidence on current suppliers), Chapter 9 (Evidence from the parties'[3] internal documents) and Chapter 10 (Evidence from third parties) address the substantive competition issues. The CMA's overall assessment of the Merger, including its SLC findings, is set out in Chapter 11 which draws on the evidence discussed in other Chapters and in the Appendices (see §11.1). Chapter 12 goes on to consider whether there are any countervailing factors

[3] i.e. Sabre and Farelogix.

which would prevent a SLC from arising. Chapter 13 is a short one-page chapter summarising the CMA's overall findings and Chapter 14 deals with remedies. Of the supporting Appendices, one, Appendix D, relates to evidence from the parties, whilst three relate to third party evidence: Appendix E (Competitor evidence), Appendix F (Airline evidence) and Appendix G (Travel agent evidence). The various Appendices are referred to, and relied upon, throughout the Main Report, including in the footnotes.

13. In particular Chapter 10 (Evidence from third parties) states expressly that it "sets out" or "presents" the "evidence …gathered from third parties", namely, in turn, competitors, airlines and travel agents. The sections dealing with competitors and airlines run to 57 pages and 117 paragraphs. They contain not merely summaries of evidence or overall conclusions, but considerable detail of the evidence itself. The vast majority of the text of these sections has been disclosed. A number of footnotes have been redacted. Chapter 10 also cross-refers extensively to "further details" contained in the Appendices, including the underlying evidence in Appendices E and F. Appendix E "provides further details on the evidence gathered from competitors". Appendix F "provides further details regarding the evidence gathered from airlines".

14. The Disclosure Application comprises 17 pages of submissions which cross-refer to a 54-page annex ("Annex 1") setting out 38 separate disclosure requests, each covering a substantial number of individual redactions.

15. According to the Disclosure Application, the key parts of the FR for the purposes of Sabre's substantive application are Chapters 5, 7, 8, 10 and 11 (the "Relevant Chapters").

16. The CMA has given disclosure of various materials to Sabre since the CMC, in accordance with the process directed by the Tribunal.[4] As far as the Relevant Chapters and the Appendices on which those Chapters rely are concerned, the CMA had, prior to the filing of the Disclosure Application,

[4] See footnote 1 above.

largely disclosed to Sabre the main text of the Relevant Chapters but not all of the footnotes. Appendix E is largely redacted. Appendix F is partially redacted; in some sections, substantial parts have been disclosed.

17. By the Disclosure Application, Sabre requests specific disclosure of the following additional material:

(1) The supporting footnotes in the Relevant Chapters as identified in Annex 1 to the Disclosure Application. Almost 500 such footnotes were identified in Annex 1.

(2) Appendices E and F of the FR.

(3) The text of certain remaining redacted paragraphs in Chapters 7, 8, 10 and 11 as identified in Annex 1 to the Disclosure Application. Approximately 50 such paragraphs were identified in Annex 1.

In relation to categories (1) and (2), in its main submission document, Sabre set out its reasons for disclosure, referring to particular examples in support.

18. In its written response to the Disclosure Application, the CMA confirmed that it would disclose the supporting footnotes in the Relevant Chapters in whole or in part where they simply identified the source of the information in the main text of the FR ("Source References"), albeit that it proposed to exclude a small number of Source References on confidentiality grounds.[5] Subject to that concession, the CMA submitted that the Disclosure Application should be refused on the basis that Sabre had engaged in an unfocussed "fishing expedition". The CMA had complied with its duty of candour and had disclosed all material which was relevant and necessary for the determination

[5] On this basis the CMA fully disclosed 55 further footnotes and partially disclosed 302 further footnotes. In a further letter to the Tribunal dated 4 August 2020 Sabre confirmed that it maintained its request for unredaction of the partially disclosed footnotes, expanded upon its case in relation to category (3) and gave further examples.

of Sabre's substantive application and to ensure that Sabre understood the gist of the case against it.

D. SPECIFIC DISCLOSURE: GOVERNING PRINCIPLES

19. The Tribunal's power to order specific disclosure is set out in rule 19(1) and (2)(p) of the Tribunal Rules, to be read in conjunction with the governing principles in rule 4.

20. The relevant principles governing the Tribunal's approach to specific disclosure in judicial review proceedings have been considered in two recent cases: *Tobii AB (Publ) v CMA* [2019] CAT 25 ("*Tobii*") and *Ecolab Inc v CMA* [2020] CAT 4 ("*Ecolab*"). Those rulings contained a thorough review of the relevant case law, starting from the leading decision by the House of Lords in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 ("*Tweed*").

21. In *Ecolab* the President of the Tribunal distilled from the case law the following principles (at [17]):

> "(1) The principles to be applied are those appropriate to disclosure in applications for judicial review.
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> (2) The decision maker in responding to the substantive application to challenge its decision is under a duty of candour. Where a particular document or documents are significant to a contested decision and relevant to the grounds of challenge, they should normally be disclosed at the outset rather than a deponent attempting to summarise them in a witness statement. But in particular where the decision is lengthy and detailed, the decision maker is not under a more general obligation to disclose all the material referred to in the decision or which it collected in the course of its investigation.
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> (3) Disclosure in such cases is never automatic and an order for specific disclosure will usually be unnecessary. This is because the issue is usually the lawfulness of a body's decision-making process rather than the correctness of its substantive decision or because the decision-maker has complied with its duty of candour.
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> (4) In every case, the Tribunal must be satisfied that the disclosure sought is relevant, proportionate and necessary in order to determine the issues before it fairly and justly.

(5) The need for the requested disclosure must be examined in the light of the circumstances of each individual case. Prominent amongst those circumstances are likely to be: the nature of the decision challenged; the grounds upon which the challenge is being made; the degree of evidence already provided in the decision, in the course of the prior investigation and in the response to the substantive application before the Tribunal; and the nature and extent of the disclosure being sought.

(6) Even in cases involving issues of proportionality and Convention rights, orders for disclosure are "likely to remain exceptional"; and such disclosure should be "carefully limited to the issues which require it in the interests of justice". In that regard, the greater the alleged interference with Convention rights, the stronger the justification for scrutiny of the evidential basis relied upon.

(7) Mere 'fishing expeditions' "for adventitious further grounds of challenge" will not be allowed.

(8) Where provision of the disclosure sought will be burdensome or the disclosure is voluminous, that is a factor to be weighed but is not in itself decisive."[6] (emphasis added)

22. As regards the second part of principle (2) above, and disclosure of third party evidence contained within a CMA report, there is no general obligation to disclose this material or other material collected by the CMA in its investigation "so that a party can test for itself whether the evidence is reliable". Nor is there any requirement that the CMA is required to disclose "more than the gist of their case"[7]. Where the final report contains the gist of the competitor evidence, the starting point is that disclosure of the competitors' underlying responses is not necessary. In *Ecolab* the President stated at [10] that:

> "The decisions of the CMA which are subject to challenge by way of judicial review before the Tribunal are typically lengthy and detailed. They generally involve consideration of a very wide range of material received from, or obtained by interviewing, participants in the relevant market, whether as customers, suppliers or competitors. It has never been the case that all such documents must be disclosed in response to an application under s. 120 EA."

23. Further, as regards principle (7) above, disclosure will not be ordered for the purpose of finding some unsuspected error. The error, or ground of challenge,

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[6] The quotations in (6) and (7) are from Lord Brown's speech in *Tweed* at [56] and Lord Carswell's speech in *Tweed* at [32]; also cited in *Tobii* at [13], [14] and [17].
[7] *Tobii* at [48] and [53].

must already have been identified by the applicant. Disclosure will be given to make good an arguable case which has *already* been set out and advanced[8].

24. As regards consideration of the relationship between the grounds of challenge and the material sought (principles (2) and (5) above), in applying the principles to the facts in *Ecolab*, the President considered that it was not enough that the challenge was as to the CMA's *interpretation* of the evidence (when set against other evidence relied upon the applicant) or that the evidence should not have been accepted or should have been more rigorously tested. On the other hand, disclosure will or might be granted if the ground of challenge is that the evidence is not reliable or robust or, perhaps, where there are grounds for thinking that the body of the report does not correctly summarise the underlying evidence.[9] Further where specific material sought is "critical" to the CMA's particular findings which are the specific subject of the ground(s) of challenge, then disclosure is more likely to be granted. It is thus important to consider the way in which the applicant has pleaded its case in the notice of application.[10]

E. ANALYSIS

Preliminary

25. Upon a limited review of the many redactions in the Main Report and Appendices E and F, it appears that there may be a number of inconsistencies in what has, and has not, been unredacted; both within the Main Report and as between the Main Report and the Appendices. Any such inconsistencies may have arisen as a result of the CMA having unredacted different parts at different points in time. The Tribunal will be writing separately to the CMA identifying some possible inconsistencies and inviting the CMA to conduct a

[8] *Ecolab* at [13] (citing *HCA International Ltd v CMA* [2014] CAT 11 ("*HCA")* at [30]-[31]), and at [32]; *Tobii* at [20].
[9] *Ecolab* at [22], [23], [26], [27].
[10] *Tobii* at [39].

review of all such possible inconsistencies. The ruling which follows is subject to any further disclosure made following such a review.

26. In the following paragraphs, we consider, first, the Disclosure Application in the round, before turning to the three categories of material sought.

The application in the round: the asserted basis for disclosure

27. Whilst we recognise that an application for disclosure for such a large number of items of different pieces of evidence must necessarily summarise the relevant material, we have not found the manner in which this application has been presented to be helpful to its efficient and speedy resolution. Such an application must be focussed, consistent and clear. Here the application, in its various parts, is diffuse, and at times, contradictory. There is a lack of clarity as to the basis upon which disclosure is said to meet the "necessity" test[11] (as well as lack of clarity in the terminology used). The Annex is overcomplicated and repetitive; it applies, to each entry and without distinction, an across the board "basis for disclosure". When it comes to Appendices E and F; the main submission has five distinct reasons for disclosure – and then, under each, yet further formulations or reasons are put forward. The Annex contains a further different formulation.

28. As regards the asserted basis for disclosure, in the main submission, the Annex and the 4 August letter, Sabre has put forward a number of different formulations. We do not set them all out here. They include the following: "required…to fairly understand the CMA's case"; "important to fairly understand the CMA's reasoning and evidence base" or "the evidential sufficiency and rationality"; "material to the CMA's decision"; "may expand upon, materially caveat or deviate from the CMA's reasoning in the main text"; may "reveal" "procedural errors" by the CMA"; may contain "material discrepancies between the main text and the appendices"; "essential … to

[11] In the remainder of this ruling, "the necessity test" and "necessary" are used as shorthand for the test of "relevant, proportionate and necessary" set out in paragraph 17(2) of *Ecolab.*

review … in order to properly advance its case"; "likely to be highly relevant"; "may be relevant".

29. However, importantly, there is no allegation that the evidence itself in Chapter 10 or any particular part of it, is unreliable, inaccurate or otherwise not robust. Secondly Sabre does not allege, nor put forward any cogent basis to believe that, in general, the descriptions of the evidence (including but not limited to summaries) in Chapter 10 do not accurately reflect the further detail in the Appendices or the underlying evidence itself. Unlike the position in *HCA* and in *Tobii*, at no point does Sabre make a case, in the NoA, disputing the accuracy or reliability of a particular piece of evidence relied upon by the CMA. That is of critical importance. Thirdly, as the CMA has pointed out, relevance (or possible relevance) is not sufficient. The test is ultimately one of "necessity"; almost by definition, the contents of the Main Report and of the Appendices are "relevant" to the CMA's conclusions; but relevance alone is not the test; disclosure of the material must be "necessary" to enable the Tribunal to resolve the issues before it; those issues being defined by Sabre's grounds. At no point does Sabre seek evidence which is necessary to make good the case that it has already pleaded; rather a number of the bases for disclosure suggest that disclosure is being sought to identify further, as yet unpleaded, grounds; that is impermissible.

30. The CMA is required to disclose the gist of its case and is further required, under its duty of candour, to disclose "exculpatory" material which might assist Sabre's pleaded case or undermine the CMA's case on this appeal. As to the former, in our judgment, given the detail of the FR and the detail of the material which has been disclosed, it cannot be doubted that the CMA has "disclosed the gist of its case" i.e. the gist of the basis of the decision under challenge. If understanding "the case against it" is a reference to the decision in the FR as a whole (rather than the CMA's defence), then seeking disclosure on this basis amounts to impermissible fishing. In any event we do not accept that Sabre is unable to understand the CMA's case from the Main Report and those parts of the Appendices which have been disclosed. As to the latter, the CMA has stated, in its responses to the Disclosure Application, that it has

given careful consideration, pursuant to its duty of candour, as to what it should disclose to enable Sabre to advance its case and to understand the case against it. It has reviewed the FR on a number of occasions and, as a result, has made further disclosures (by way of unredaction) in the light of Sabre's pleaded case. The CMA considers that its duty of candour does not require disclosure of further material. Whilst the CMA's view cannot be conclusive as to whether further disclosure is necessary, there is nothing to suggest that the CMA has not complied with its duty and withheld necessary material. In these circumstances, disclosure will not be ordered merely to check the accuracy of the material disclosed, and in particular the descriptions or summaries in Chapter 10.

31. As to confidentiality, Sabre contends, in relation both to the footnotes and to Appendices E and F, that there is no reason why the redacted material cannot, and should not, be disclosed into the existing confidentiality ring, into which certain, previously redacted, material has been disclosed. It is the case that the CMA has redacted material from the FR as a whole on the basis of concerns about third party confidentiality. However, in respect of any redaction, regardless of such issues of confidentiality, Sabre must establish that disclosure of the material in question meets the test of necessity i.e. disclosure is relevant, proportionate and necessary to resolve the issues. That is a prior question. In the present case, we are not satisfied, for the reasons set out above and below, that that test has been satisfied. We do not need therefore to address confidentiality issues.

The NoA: grounds 5 and 6 in more detail

32. The Disclosure Application has to be considered by reference to how Sabre has pleaded its case. It is essentially based on Grounds 5 and 6. It is therefore necessary to examine these Grounds in more detail to assess the need for disclosure for the resolution of the issues raised by these grounds.

33. In Grounds 5 and 6, there is very little specific reference to evidence provided by competitors and airlines.

Ground 5: SLC in merchandising

34. By Ground 5, Sabre challenges the CMA's conclusion (as described by Sabre at NoA §175) that absent the Merger, Amadeus and Farelogix would remain strong competitors and Sabre would enter with a new product, expand significantly and successfully to become another strong competitor, while other competitors would not be a material constraint and there would be no material new entry. The specified legal grounds of challenge include the contentions that the CMA reached a conclusion that was unreasonable and unsupported by the evidence and failed to have due regard to the evidence (NoA, §§197 c and d). On the facts, the challenge is made under two heads.

35. First, the CMA failed to apply the correct legal standard to appraisal of the evidence (NoA §§176 to 189). That in turn refers to a series of findings made by the CMA (NoA §172). Of those findings, steps f to i seek to summarise the findings as to the competitive threat posed by "other suppliers". Those findings in the FR are based, in part, on material in Appendices E and F (but largely on the detailed narrative and detailed summaries in Chapter 10). To that extent, material in the Appendices is relied upon by the CMA for these findings. However under this head, Sabre's challenge is as to the manner in which the CMA aggregated those findings.

36. Secondly, Sabre contends, that, applying the correct approach to the standard of proof, and a proper assessment of the evidence before it, the CMA could not rationally have found an SLC in the merchandising market. This is addressed at NoA §§190 to 196. In making this argument, Sabre itself positively relies on "key evidence" which is contained within the FR. The argument is in two parts.

37. First, (at §§192 to 193) Sabre submits that the CMA could not rationally conclude that, absent the Merger, Sabre would become a significant competitor. In this regard, Sabre relies largely on findings and evidence relating to its own behaviour, set out in Chapter 9. At §192 f Sabre itself positively relies on material disclosed in Appendix F relating to airlines'

evidence. However, there is no challenge to findings based on evidence in Chapter 10 and thus Appendices E and F. There is no allegation in these paragraphs that what is in Appendix F is unreliable, or inconsistent with the Main Report nor that Chapter 10 does not fairly summarise the evidence in Appendix E or F. If and in so far as it might be said that Sabre's reliance upon Appendix F material is reliance upon "exculpatory" material and thus there might be further such exculpatory material in the redacted parts, the CMA would be under a duty to disclose such material under its duty of candour; and there is no basis to suggest that the CMA has breached that duty.

38. Then, secondly, at NoA §§194 and 195 Sabre seeks to impugn the CMA's findings in relation to "the future activities of other competitors". Sabre contends that the CMA could not rationally conclude that other suppliers would not provide a competitive constraint to prevent an SLC arising from Sabre not pursuing its own plans and that in reaching its conclusion, the CMA failed to have due regard to specific evidence. The specific evidence is set out at NoA §194 and is evidence of future activities of competitors. This includes evidence set out in Chapter 10 and in Appendices E and F; and is evidence which Sabre contends the CMA failed to take into account; evidence that: competitors are market leaders in adjacent product lines; independent suppliers enjoyed a competitive advantage because airlines prefer the merchandising supplier to be independent of the GDS/PSS provider; and airlines considered other providers to provide a competitive constraint. Much of that evidence is already disclosed. Sabre positively refers to, and relies upon, §10.85 which in turn refers to further details in Appendix F and also refers to other parts of Chapter 10. But Sabre's case here is that CMA "failed to have due regard to" and/or "failed to take into account" other evidence within the FR which supports Sabre's case and which Sabre identifies. Sabre does not contend that the evidence relied upon by the CMA is unreliable or that the summarised evidence relied upon by the CMA is an inaccurate summary.

39. In the Annex, Sabre states (as the basis of disclosure in relation to merchandising): "The only apparent evidential source for the Final Report's counterintuitive conclusions is therefore third party material as to the current

perceptions of merchandising suppliers and their plans. This section of the Final Report contains evidence of those perceptions and plans in relation to the main merchandising suppliers". This is not correct. The CMA's conclusions on merchandising are based, in large part, on material in Chapter 9, and in particular on Sabre's own internal documents. In any event such a statement does not assist in determining whether disclosure of that material is necessary to determine the issues raised by the grounds.

Ground 6: SLC in distribution

40. By Ground 6, Sabre contends that the CMA's conclusion that the loss of Farelogix as a competitor would lead to a reduction in innovation and would lead to higher prices was unsupported by sufficient evidence or analysis. The specified legal grounds include failure to have due regard to the evidence (NoA §§235 a and 235 c b) and reaching a conclusion that was unreasonable on the evidence (NoA §235 e). On the facts, Sabre's case is made under two heads: first the CMA failed to conduct a sufficient analysis of the competitive dynamic (NoA §§208 to 230); and secondly there was a lack of basis for any finding in relation to pricing (NoA §§231 to 234).

41. As regards the first head, Sabre makes four contentions: (1) the threat of GDS bypass (from Farelogix) has changed (NoA §§212 to 214); (2) GDSs are subject to incentive from other GDSs (NoA §§215 to 221); (3) GDSs are subject to the threat and opportunity provided by airline.com (NoA §§222 to 228); (4) GDSs are subject to the threat from self-supply by airlines (§§229 to 230). As regards each of these contentions, the evidence which Sabre contends that the CMA failed to have regard to is evidence and materials provided by Sabre itself and in the Batchelor witness statement. There is little or no reference to evidence provided by third party competitors or airlines[12] and certainly no challenge to any such evidence. Whilst §11.110 of the Main Report itself does refer to Amadeus redacted documents, Sabre does not contend that these documents did not say what the CMA says they said nor

[12] Save in respect of self-supply: NoA §229 referring to §11.121 Main Report.

that they do not support the conclusion or that they are unreliable. In any event, the redacted material may have been disclosed elsewhere in the Main Report.[13]

42. As regards the second head, Sabre's case is that the CMA failed to carry out any sufficient analysis of alleged price effects, contending that such evidence as there is did not support a finding that Farelogix plays an important role in price competition, and that there were other sources of price competition (as the FR found). In this way, Sabre makes no reference to, let alone challenges, third party competitor or airline evidence and materials in Appendices E and F. It is the case that in its Defence, the CMA refers to, and relies upon, such evidence; namely at §§10.101(a) and 10.102 of the Main Report (Defence §§279 and 281). §10.102 of the Main Report sets out the evidence relied upon. §10.101(a) may not directly refer to material in Appendix F. But in any event, the relevant material in this connection in Appendix F is almost wholly unredacted (see Appendix F §§178-187).

43. In the Annex Sabre states, (as the basis of disclosure in relation to distribution): "Sabre understands the Final Report bases this alleged finding [effectively at 11.110] in large part upon third party evidence. This includes airline, agency, and competitor evidence on suppliers of distribution services, perceptions of the current suppliers and their plans. This section of the Final Report contains such evidence". Whilst this is correct, it does not assist in determining whether disclosure of that material is necessary to determine the issues raised by the grounds.

(1) Footnotes

44. In the main submission, Sabre makes two points, illustrated by an example in each.

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[13] Footnote 1612 refers to §§10.42-10.44 and 10.55-10.56. Those latter paragraphs have now been fully disclosed. Further consideration of the redaction in §11.110 might be required (see paragraph 25 above).

45. First, Sabre appears to contend that redacted footnotes contain or may contain highly relevant caveats or limitations to the main text. By way of example, it refers to disclosed footnote 110 as containing an interpretational statement which indicates the meaning of the term "markets" as used by the CMA. However one example only is given, and there is no basis to extrapolate the general proposition from this. This is a general argument that Sabre should be able to check the CMA's work; the argument is not connected with any particular ground of challenge. This basis for disclosure amounts to impermissible fishing.

46. Secondly, Sabre contends that the redacted footnotes will or may reveal procedural errors on the part of the CMA. To make good this contention, it relies upon disclosed footnote 137 which, it says, reveals that the CMA asked airlines the wrong question about "distribution channels". Sabre's contention seems to be that error in one footnote means there must be or are likely to be procedural errors in other footnotes. The CMA denies that any such error is revealed. In any event, this is not a basis for disclosure of all other redacted footnotes. It is not connected with any particular ground of challenge. The mere possibility that another footnote might reveal an arguable, but as yet unidentified error, amounts to impermissible fishing.

47. In its letter of 4 August 2020, Sabre gives two examples of footnotes which, it submits, are likely to contain important substantive material and which it contends "may well materially change, caveat or deviate from the content of the sentence to which it relates".

48. First, at §7.12 the CMA relies on airlines' internal documents to show their wish to enhance retailing capabilities. Footnote 316 to §7.12(d) refers to further submissions made by Lufthansa, the content of which is redacted. Sabre submits that this is relevant for Sabre to understand the base and rationality of the CMA's assessment that Sabre will enter in five years with a new product. Secondly, at §10.9 the CMA refers to, and relies upon, PROS's detailed competitive analysis reports, including relating to Farelogix and how it compares with other competitors. Footnote 976 to that paragraph refers to

further detail of what PROS submitted, the content of which submission is redacted. Sabre submits, again, that this is relevant for Sabre to understand the evidential sufficiency and rationality of the CMA's case, said to be that all competitors except Sabre/Farelogix and Amadeus will fail, and the competitive strength of PROS and further that it "may also be relevant to Sabre's case on procedural fairness" relating to the sensitivity test.

49. The application in relation to these two footnotes does not satisfy the test of necessity for disclosure. The contention that the contents "may" modify the particular sentence of the text or "may" be relevant is not sufficient; indeed there is no particular reason advanced as to why the redacted parts would modify the text. This amounts to impermissible fishing. Sabre does not, in the NoA, dispute the propositions or evidence in the main text to which the footnotes relate. As to footnote 316, Sabre does not dispute that airlines will wish to enhance their retailing capabilities. As to footnote 976, the text to which it relates refers to the technical capabilities of Farelogix, Amadeus and Sabre and does not relate to the competitive strength of other competitors, nor of PROS itself.

50. In conclusion, the disclosure sought of redacted footnotes is not necessary to dispose of the issues raised in the NoA fairly and justly.

(2) Appendices E and F

51. Sabre seeks disclosure of the entirety of Appendix E and of the remaining redacted parts of Appendix F on the basis that it is said to be necessary, in general terms, in relation to Sabre's challenge in Grounds 5 and 6, putting forward reasons under five headings[14]. Considering the position in general, on the basis of the analysis of Grounds 5 and 6 in paragraphs 32 to 43 above, there is nothing to demonstrate that disclosure of these Appendices is necessary to dispose fairly of the issues raised by these Grounds. We turn to address the first four headings.

[14] The fifth heading, confidentiality, is addressed in paragraph 31 above.

(i) The unredacted Final Report is the best evidence of what it says

52. Sabre contends that disclosure of Appendices E and F might reveal an error in the main text and relies upon two such examples where evidence from disclosed Appendix D has revealed such an error.

53. First, Sabre contends that the evidence at Appendix D §178 reveals an error in §9.16 of the Main Report, concerning Sabre's internal discussion of the importance of NDC standard 17.2. The CMA denies that there is such an error. More importantly, the alleged error is not even referred to in the NoA. The alleged error does not relate to any ground of challenge.

54. Secondly, Sabre contends that evidence in Appendix D reveals an error at §9.184 of the Main Report concerning Sabre's investment decisions not being influenced by airline.com. This in turn goes to the issue of airline.com not creating innovative pressure, and is relevant to Ground 6 of the challenge and is referred to at NoA §228. The CMA denies that this is an error. The Main Report finds that airline.com does impose some competitive constraint, but that the threat from airline.com was not a material driver for Sabre investment in NDC and the documents in Appendix D do not establish to the contrary.

55. In any event, the foundation for this basis of disclosure is that further disclosure of Appendices "may reveal errors". This amounts to impermissible fishing. There has been disclosure of the gist of the CMA's case and material relevant to the pleaded grounds; and there is no basis to conclude that the CMA has not complied with its duty of candour.

(ii) The main text does not provide a sufficient summary to allow Sabre to fairly understand the case against it

56. Sabre submits that the third party evidence in Appendices E and F is of central importance in the Main Report because the CMA states it has placed greater reliance upon it than on market share data (§11.23). However, first, as is clear from consideration of §§11.17 to 11.31 the evidence upon which the CMA placed greater reliance was not just the third party evidence, but also,

importantly, the parties' internal documents. Secondly Sabre is able to make its case in the NoA on the substantial third party evidence disclosed in Chapter 10 and in the disclosed parts of Appendix F. As conceded in its main submission, Sabre's case on Ground 5 is that the conclusion could not have been reached on the evidence before it (i.e. the evidence which Sabre can see now) (and not that that evidence was not reliable or robust); and Ground 6 is based on a failure to have due regard to other evidence in the Report (and not on the unreliability of evidence which the CMA relies upon) .

(iii) The main text refers directly to the appendices to explain its decision

57. Sabre contends that in many paragraphs of the conclusions in Chapter 11 of the Main Report, the CMA refers directly to the underlying material in the Appendix, and as such that material is a basis for, and part of, the CMA's decision. It gives four examples of such direct references[15].

58. First, §11.101 at footnote 1583 refers directly to paragraphs 5 to 26 of Appendix E. Sabre contends it needs disclosure of these paragraphs "to understand the evidence base" for the conclusion that the loss of Sabre in merchandising would lead to less innovation. This is said to be "directly relevant" for its case in "NoA 162-197" i.e. the entirety of Ground 5. Disclosure of this material is not "necessary"; regardless of whether it is "relevant". First, footnote 1583 primarily cites at length multiple paragraphs from Chapter 10 itself, where detailed (disclosed) evidence about the position of competitors is set out. In particular §§10.17 and 10.18 contain substantial evidential detail. There is no contention that that evidence is unreliable. Secondly, this material is not relevant to the pleaded grounds. Sabre's pleaded case in the NoA does not dispute the CMA's conclusion in footnote 1583 itself; it does not contend that Sabre and Amadeus do not monitor other competitors, nor is it saying that there is no evidence that they do monitor other competitors. Thirdly, in the NoA itself, Sabre does not directly

[15] In fact, only the first two are direct references from Chapter 11 to the Appendices.

challenge the CMA's conclusion that the loss of Sabre would lead to a loss of innovation. There is no challenge to §11.101 at all in the NoA.

59. Secondly, §11.110 at footnote 1614 refers directly to §§5 to 24 of Appendix E. Sabre contends that it needs disclosure of these paragraphs "to evaluate the CMA's evidence base" for its conclusion that, on SLC in distribution, GDS bypass had played a significant role in pushing GDSs to improve services. This is said to be "directly relevant "to Ground 6 – referring, without distinction, to the entirety of its case at NoA §§198-235. Disclosure of this material is not necessary; regardless of whether it is "relevant". First, footnote 1614 primarily cites at length multiple paragraphs from Chapter 10 itself, where detailed (disclosed) evidence setting out the content of Amadeus' document is set out. In particular §§10.42, 10.44 and 10.55 to 10.56 contain substantial evidential detail. There is no contention that that evidence is unreliable or not robust. Secondly, the link to Sabre's pleaded case is made only in the widest and most general terms.

60. Thirdly §10.75 at footnote 1126 refers to specific sections of Appendix F (in fact §§ 9 to 59 of Appendix F and in particular §§ 24 to 32). Sabre contends that the statement in §10.75 that "this informs our understanding" is a reference to Appendix F and is a "conclusion" which "is directly relevant" to Grounds 5 and 6, referring, without distinction, to the entirety of its case on both grounds. It submits that the "conclusion" is particularly relevant to Sabre's argument (Ground 6) that Farelogix was a unique competitive constraint. Disclosure of this material in Appendix F is not necessary. First, Sabre misstates the effect and purpose of §10.75 in its entirety; what "informs [the CMA's] understanding" is primarily the material in the section of Chapter 10 itself which immediately follows; i.e. §§10.76 to 10.78 which are fully disclosed and available to Sabre. Those paragraphs provide a detailed and adequate summary of the evidence on airlines' adoption of the NDC standard and airline content distribution strategies. Footnote 1126 expressly states that the Appendix contains "further details" only. Secondly and in any event the relevant content of Appendix F had been disclosed to a significant extent; the redactions are limited. Sabre has not explained why the disclosed

material at §§10.75 to 10.78 together with the unredacted parts of Appendix F are unclear, or do not establish the evidential base for conclusion, nor that those paragraphs are not an accurate summary of the airline evidence. Thirdly, the asserted relevance to Sabre's pleaded case in Grounds 5 and 6 is made only in the widest and most general terms.

61. Fourthly, §10.92 at footnote 1203 cross-refers to specific sections of Appendix F (in fact §§33 to 44 of Appendix F) to support its conclusion that both airline.com and GDS bypass gained shares from the GDS for *British Airways and Lufthansa*. Sabre contends that this conclusion "is directly relevant" to Ground 6, referring, without distinction, to the entirety of its case on Ground 6. The evidence from airlines on their use of distribution channels is important for the CMA's conclusion that Farelogix is a unique and innovative disrupter and an important means for airlines to be able to exercise competitive pressure. Disclosure of this material in Appendix F is not necessary. As regards British Airways and Lufthansa, much of the content of §§33 to 44 of Appendix F, relevant to British Airways and Lufthansa, is now disclosed in §§10.92(a) and (b)[16]. Thirdly, the wider contention of Sabre about the use by airlines in general of different channels is met by the substantial disclosure in Appendix F §§33 to 55.

(iv) The main text does not sufficiently or adequately summarise the appendices

62. Sabre contends that the main text does not sufficiently summarise the Appendices to enable Sabre to judge whether there is a proper evidentiary basis. It gives two examples.

63. First, at §10.24 the CMA refers to OpenJaw's documents concerning […][✂] the near term. Footnote 1018 then refers to redacted §§82 to 91 of Appendix E. Sabre contends that it is not clear from this what "near term" means and that it might not exclude OpenJaw's ability to compete over a 3 to

[16] In fact more is disclosed in §10.92 than in Appendix F, and to this extent the CMA should consider whether further paragraphs of Appendix F should be unredacted (see paragraph 25 above).

5 year period. The CMA's conclusion is said to be "directly relevant" to Ground 5; and on this occasion, Sabre refers directly to §§192-194 NoA. Disclosure of these paragraphs of Appendix F is not necessary. As to whether OpenJaw is currently a strong competitor, the Main Report makes clear, in some detail, that the CMA does not consider it to be a strong competitor and the reasons why: §§10.24 to 10.27 (particularly §10.26) and §§10.35 to 10.37[17]. As to whether OpenJaw might be able to compete in a 3-5 year time frame, Sabre has not put forward any reason why OpenJaw will be able to do so. The CMA is not contending that OpenJaw might not compete in that time frame, even if the reference to "near term" is a reference to one year. Even if OpenJaw did have plans in the 3-5 year term, the CMA's conclusion is that OpenJaw is not likely to grow, and §§10.24 to 10.26 set out in some detail the evidential basis and clear reasons for that conclusion.

64. Secondly at §10.30, the CMA summarises the effect of PROS's strategy documents that […][✂], and refers to a detailed review of those documents at Appendix E. Sabre contends that these documents in Appendix E may show that PROS is likely to be a strong competitor in the future, contrary to the CMA's conclusions that only Sabre/Farelogix and Amadeus will be strong rivals in the future. The CMA's conclusion is said to be "directly relevant" to Ground 5; and on this occasion, Sabre refers directly to §§185, and 194(a) NoA. Disclosure of these paragraphs of Appendix F is not necessary. It is clear from §§10.28 to 10.30 as a whole that the evidence is that PROS is not likely to be a strong competitor in the future; §10.28 refers to PROS' evidence that […][✂] and §10.29 identifies a number of difficulties which PROS itself had drawn to the CMA's attention. There is no arguable foundation for Sabre's suggestion that there is or may be evidence that PROS is likely to be a strong competitor. No such case is made in the NoA. The application here amounts to impermissible fishing.

[17] It may be that in fact some of part of the contents of Appendix E has now been effectively disclosed in §§10.24 to 10.27 and to this extent the CMA should consider whether further paragraphs of Appendix E should be unredacted (see paragraph 25 above).

65. Sabre makes three further arguments under this head. First, Sabre contends that it is not reasonable or appropriate to expect it to understand the basis for the CMA's conclusion, in relation to merchandising, that rivals will fail or diminish in appeal so as to cease to be relevant competition "without further disclosure" of Appendices E and F. It gives by way of example, §10.85, which sets out the evidence on airlines' views on merchandising suppliers' competitive strength and then cross-refers to Appendix F and in particular views on Farelogix at §10.85(a) and the cross reference in footnote 1146. Disclosure of Appendix F on this basis is not necessary. First, §§10.85 and 10.86 and then §§11.69 to 11.92 set out in some detail the relevant evidence relied upon by the CMA in reaching its conclusions about the competitive strength of merchandising rivals, including summarising in detail the airlines' views of these rivals. This provides more than "the gist" of the evidence relied upon. Secondly, as regards Farelogix in particular, the CMA does not rely merely on material to be found in Appendix F; but, even more significantly, the evidence in Appendix F relating to airlines' views of Farelogix is almost fully disclosed in any event at §§110 to 113.

66. Secondly, at §194(a) NoA, Sabre contends that merchandising rivals had more natural competitive entry points than Sabre, because they had strength in related areas. The CMA denies this allegation in its Defence, contending that it is unsupported by evidence. Sabre contends that it cannot understand this denial "without understanding the evidential basis for the Final Report including [the Appendices]". Disclosure of Appendices E and F on this basis is not necessary. The application here amounts to seeking evidence to support Sabre's positively pleaded case, for which there is little evidence. The basis of the pleaded case is, and must be, that the CMA's conclusion on this issue failed to take account of relevant evidence to the contrary; it is for Sabre to identify the "relevant evidence" which it is referring to; and not to seek evidence from CMA to support its asserted case.

67. Thirdly, at §196 NoA Sabre contends that it should have had the opportunity to comment on which rivals should have been included in the CMA's "sensitivity test" referred to at §11.98 of the Main Report. Appendices E and

F are "likely to be directly relevant to this appraisal". There may or is likely to be relevant material as to how many, and which, rivals should have been included. Disclosure of Appendices E and F on this basis is not necessary. "Relevance" (let alone "likely relevance") is not the test. The speculative manner in which this request is made confirms the conclusion that this is also a "fishing expedition". In any event, Sabre's self standing procedural fairness argument can be made; disclosure is not necessary to enable it to advance such a procedural ground.

68. In conclusion, disclosure of Appendix E and the redacted parts of Appendix F is not necessary to dispose of the issues raised in the NoA fairly and justly.

(3) The Main Report

69. Sabre seeks disclosure of redactions made in 52 paragraphs of the Main Report. All but one are paragraphs in Chapters 8, 10 or 11. In the main submission, this category was not referred to at all in the headline summary; it was addressed very briefly at the end; Sabre contended, somewhat opaquely, that there should be disclosure "for the same reason as the other paragraphs in the relevant chapters". The Tribunal sought clarification. In its response letter of 4 August 2020, Sabre submitted that the entirety of the text required disclosure for Sabre to fairly understand the CMA's case and for the Tribunal to justly dispose of the matter. However Sabre did not provide reasoning for specific redacted paragraphs, stating that that would not be possible or practicable on a line-by-line basis. Sabre contends that the material is "likely to be highly relevant because of the wider context of the section of the FR's text for which it seeks disclosure".

70. First, the 52 redactions are grouped together under 17 different lines of Annex 1. In each case, the relevant ground for which disclosure is said to be necessary is either or both of the whole of Ground 5 and the whole of Ground 6, summarised in the same general words. The Annex does not however explain why, in respect of any (let alone each) particular redaction, disclosure of the material is necessary to resolve any one or more specific issue arising

on the pleadings. Sabre's acceptance that this is not "possible or practicable" demonstrates it cannot establish that disclosure of a particular redaction is necessary to dispose of a particular issue. The general assertion of "likely to be highly relevant" is not a sufficient basis.

71. Secondly, the CMA explains that the redactions in question are "targeted redactions", concerning matters such as names, observations by third parties or in some instances specific sentences containing commercially sensitive information. Perusal of the 52 redactions confirms this description; in general they are specific redactions, rather than wholesale redaction of passages in the text; for example the identity of specific suppliers or customers. Sabre has not established why disclosure of the particular identity of a third party or a particular sentence meets the necessity test. The substantial bulk of the text in the Main Report, contains detailed evidence, summarised evidence and reasoning and, together with disclosed footnotes and Appendices, sufficiently explains the CMA's reasoning. Moreover, the CMA has re-considered these particular redactions under its duty of candour; and has concluded that they are not required to be disclosed. Absent any specified and clear basis for disclosure, in our judgment, these limited redactions from the text are not necessary for the Tribunal to resolve the issues.

72. Finally, in this regard, it may be that the material in some of the 52 redactions has been effectively disclosed in other parts of the FR[18]. If that is so, then, it may be that following review by the CMA that material will be disclosed (see paragraph 25 above).

73. In conclusion, subject to paragraph 72, disclosure of the identified redactions in the Main Report is not necessary to dispose of the issues raised in the NoA fairly and justly.

[18] See for example the redactions at §§10.37, 10.58, 10.59, 10.61, 10.62 and 11.110 (at lines 10, 11 and 26 of Annex 1).

F. CONCLUSION

74. For the foregoing reasons, disclosure of the remaining redacted footnotes, of the redacted parts of Appendices E and F and of certain passages in the Main Report is not necessary in order to determine fairly and justly the issues before the Tribunal on this application.

75. Accordingly, Sabre's application for specific disclosure is refused.

76. In the absence of agreement between the parties as to the costs of the Disclosure Application, such costs will be considered at the conclusion of the proceedings.

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

Charles Dhanowa OBE, QC (*Hon*) Date: 19 August 2020
Registrar