

**RESPONSE TO PROVISIONAL FINDINGS**

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**Case No. ME.6806.19  
SABRE CORPORATION / FARELOGIX INC.**

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**SLAUGHTER AND MAY**

**MACFARLANES**

**CJ/WJT/LMRC/VJXM/CAZE**

**27 February 2020**

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## 1. EXECUTIVE SUMMARY

- 1.1 The potential acquisition of Farelogix Inc. ("**Farelogix**") by Sabre Corporation ("**Sabre**") (together the "**Parties**") (the "**Transaction**") is pro-competitive and will bring significant benefits to customers and end-travellers. This is apparent from the results of the CMA's own survey of travel agents, the vast majority of whom confirmed that they have no concerns about the merger.
- 1.2 As explained in this Response to the CMA's Provisional Findings dated 7 February 2020, the Transaction will not result in the creation of a relevant merger situation in the UK and will not, and may not be expected to, result in a substantial lessening of competition ("**SLC**") in the UK. In both merchandising and distribution solutions, the Parties do not compete with each other to any significant degree. By contrast, they do face intense and increasing competitive constraints from rivals which will far outweigh any limited loss of competition between the Parties which would result from the Transaction.
- 1.3 In finding otherwise, the CMA's provisional conclusions suffer from fundamental methodological and evidential flaws and are based on a distortion of market realities and a failure to adequately analyse the market evidence provided to the CMA in the round, in particular the quantitative evidence. This is also confirmed by the recent testimony in the proceedings before the Delaware Court in *United States v. Sabre* (the "**Delaware Proceedings**").<sup>1</sup>

*The CMA does not have jurisdiction to review the Transaction*

- 1.4 In the Provisional Findings, the CMA attempts to assert jurisdiction on an entirely new basis, which — like the previous three bases put forward but now abandoned by the CMA — is wrong in law and on the facts.
- 1.5 The CMA's new Relevant Description of Services (the "*supply [by third-parties] of an IT solution to airlines for the purposes of airlines providing travel services information to travel agents to enable travel agents to make bookings*") is inappropriate, unreasonable, and flawed.
- 1.6 Even on its own terms, it fails when applied to the facts of this case since Farelogix does not supply any services fitting that description in the UK. First, the IT solution implemented by Farelogix almost a decade ago which the CMA alleges triggers jurisdiction was provided to American Airlines, not British Airways. Second, this technology relates to information flows between airlines, and on its face falls outside of the CMA's 28-word definition which relates to flows to travel agents. Further, the CMA has without justification excluded a wide range of other service providers that, to the extent Farelogix's services are in-scope, should also be in-scope.
- 1.7 It is common ground that **Farelogix generates no revenue from UK customers**. Faced with this reality (and the reality that in over 12 months of investigation it has been unable to find any other share "cut" in which the 25% threshold is met) the CMA is forced to

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<sup>1</sup> No. 19-cv-01548-LPS (D. Del. Sep. 10, 2019), ECF No. 24 (27 January – 6 February). Trial transcripts were provided to the CMA by email on 17 and 19 February 2019.

introduce the arbitrary concept of “revenues receivable” as opposed to actually received (i.e. actually existing) and/or attribute to British Airways fees that were actually paid by American Airlines (“AA”). Even on the CMA’s own tenuous methodology, the increment which results from this approach is so trivial (even less than the USD 174 hypothetical revenues which the Parties calculated based on the Farelogix interlining booking numbers) that it only serves to emphasise the absurdity of the CMA’s repeated attempts to find a basis for jurisdiction in this case. The CMA’s approach is all the more extraordinary given the risk of the CMA’s findings cutting across the ongoing Delaware Proceedings, where the jurisdictional *nexus* is clear and the Delaware Court is better placed to assess the effects of the Transaction.

*The Provisional Findings are characterised by fundamental evidentiary deficiencies*

1.8 The CMA does not have an adequate evidential foundation for its factual conclusions. The Provisional Findings are characterised by a number of overarching errors which fundamentally undermine the CMA’s assessment of the evidence and mean that it fails to meet the relevant legal and evidentiary standards. In particular, the CMA:

- (i) unjustifiably favours selective and outdated, historic documentary evidence over quantitative and other more recent market evidence;
- (ii) assesses forward-looking evidence in an asymmetric and inconsistent manner as between the Parties and third-parties;
- (iii) cherry-picks and mischaracterises documents and statements, often taking them out of context, to support its own theory of harm;
- (iv) fails to ask itself how actual and potential competitors would respond to any lessening of competition following the Transaction;
- (v) unjustifiably buries its finding that Sabre’s purchase price for Farelogix did not contain a “market power premium” in an Appendix, making no attempt to explain how this clear evidence can be reconciled with its theories of harm which posit Farelogix as an expanding force and existential threat that would surely be able to command a higher valuation; and
- (vi) unjustifiably dismisses important feedback from the travel agent side of the market. The CMA dismisses travel agents’ feedback on the spurious basis that travel agents may be defending their own economic interests (as they receive incentive payments from the GDSs) — while at the same time relying on largely self-serving submissions from airlines and failing to address the Parties’ arguments that airlines may oppose the merger because they wish to avoid the price competition which comes with comparison shopping on the GDSs. It is incumbent on the CMA to undertake a fair and impartial assessment of the evidence. Instead, the CMA has engaged in an asymmetric treatment of the evidence from the two sides of the market. This asymmetry in the treatment of the evidence is biased and wrong — all the more so given that travel agents’ interests are more aligned with those of end-travellers, as they favour lower cost

and higher quality airline content, whereas the airlines likely have the opposite agenda.<sup>2</sup>

*No substantial lessening of competition*

- 1.9 As regards the substantive assessment, the CMA's provisional findings of an SLC in both merchandising and distribution solutions are fundamentally flawed.

Merchandising solutions

- 1.10 The CMA's provisional finding of an SLC in merchandising solutions disregards the framework of assessment required by its own Guidance, namely an assessment based on market data and closeness of competition. By contrast, the CMA's provisional finding is based on a highly speculative theory of harm which is contradicted by the market evidence. The CMA concedes that "*Sabre is not a significant provider of merchandising solutions today and has not been competing closely with Farelogix in the provision of these services*".<sup>3</sup> The CMA's concerns are therefore focused on the alleged forward-looking counterfactual: namely, the CMA's expectation that, absent the Transaction, Sabre would develop a credible PSS-agnostic and NDC-compatible merchandising solution within the next three to five years and would become a uniquely strong competitor to Farelogix and Amadeus in merchandising. However, this assessment is entirely fantastical and fundamentally flawed for the reasons set out below.
- 1.11 The CMA's analysis is asymmetric and inconsistent in its treatment of the potential for innovation and expansion by Sabre, on the one hand, and by rivals on the other:
- (i) the CMA finds that Sabre would have the incentive to substantially improve its merchandising solution absent the Transaction, but fails to assess properly, or at all, the incentives that other players (who are already — by the CMA's own admission — [X]) will also have to innovate and expand (both generally and particularly in response to the Transaction going ahead and any resulting lessening of competition<sup>4</sup>);
  - (ii) the CMA finds that Sabre would have the ability to build a credible product within three to five years, but the market evidence shows that the CMA's assessment of what constitutes a credible product and/or a competitive timeframe is incorrect in the industry context. Multiple airlines have told the CMA that [X]<sup>5</sup> Moreover, it is fantastical for the CMA to assume that other IT providers, in particular strong

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<sup>2</sup> The Parties note that up until the Provisional Findings, it was the CMA's position that travel agents were crucial in driving demand for FLX OC. It is only following the CMA's change in its approach to jurisdiction, which no longer relies on UK travel agents, that the CMA disregards the role of travel agents in its substantive assessment.

<sup>3</sup> Provisional Findings, para.11.43. The Parties have also provided detailed, evidence-based submissions and bidding data to demonstrate this point, e.g. see the Phase 2 Initial Submission paras. 4.7 *et seq.* and the Parties' Response to the Issues Statement paras. 4.2 *et seq.*

<sup>4</sup> As required by the Merger Assessment Guidelines, para. 5.4.11.

<sup>5</sup> Provisional Findings, Appendix F, paras. 110-111.

players with extremely competitive products such as Google/ITA, would cease to continue to grow and develop and would fall behind Sabre; and

- (iii) the CMA's analysis is also logically flawed. Players with existing GDS businesses are deemed to have fewer incentives to compete in merchandising, but the CMA fails to explain how this can be reconciled with Amadeus being a market leader currently and with the notion that Sabre would push on dramatically relative to the existing standalone providers listed above, all of whom have [REDACTED].
- 1.12 The CMA's analysis of the competitive position of Farelogix *vis-à-vis* other market players is also asymmetric and inconsistent and its findings are not supported by its own evidence and assessment:
- (i) the CMA fails to establish why being "independent" (i.e. not having a PSS or GDS) makes Farelogix a uniquely strong competitor in merchandising, citing no concrete evidence for this proposition, and fails to justify its dismissal of the constraint exerted by other well-resourced and successful competitors; and
  - (ii) the CMA's own market investigation shows that Amadeus is a very strong competitor in merchandising (separate and apart from its GDS business) and that Datalex, PROS, OpenJaw/Travelsky, Google/ITA and others are stronger competitors than Sabre on all relevant metrics (including market share, bidding data, airlines' evaluations and Farelogix's and third-party internal documents).
- 1.13 As a result of these various errors, the CMA concludes that the Transaction will result in a reduction of major competitors in merchandising going forward from three to two. This conclusion is unsupported and wrong.
- 1.14 On the CMA's own account, Sabre currently [REDACTED]. The CMA presents no evidence to justify its conclusion that Sabre would be able to leapfrog these rivals absent the Transaction, when it has conspicuously failed to do so previously and notwithstanding significant investment by Sabre. To the contrary, the CMA's own assessment is that "*fundamental shifts in the competitive landscape are, absent significant developments / events with respect to individual competitors (see e.g. Datalex), likely to be incremental.*"<sup>6</sup>
- 1.15 In short, the CMA's theory of harm about a fundamental change in Sabre's market position in merchandising going forward is so implausible that it would require overwhelming evidence for the CMA to show that this is a likely outcome in the counterfactual. There is no such evidence and accordingly the CMA's finding of an SLC with respect to merchandising solutions should be reversed.

#### Distribution solutions

- 1.16 The Provisional Findings accept a number of key facts about the market for distribution solutions including: (i) Sabre's closest competitors are its two GDS rivals, Amadeus and Travelport, not Farelogix; (ii) Sabre competes with airline.com; and (iii) the Transaction will only result in a *de minimis* increase in market share. Given these accepted facts the

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<sup>6</sup> Provisional Findings, para. 9.11(b).



bar for the CMA to find an SLC should be an extremely high one. Nonetheless, despite this, the CMA goes on to a provisional finding of an SLC in distribution solutions, disregarding its own Guidance requiring an assessment of market data and closeness of competition. Instead, the CMA has disregarded actual market data, approached its assessment of the market evidence in a selective and inconsistent way, failed to apply its own Guidance, and failed to properly analyse the dynamic nature of the market. In particular:

- (i) the Transaction does not eliminate a significant competitive force — the market share increment from Farelogix is *de minimis* ([<]%) and would remain insignificant. Even the overly ambitious projections from Farelogix, which the CMA relies upon to conclude that there will be “*strong growth*”, show a miniscule increment of no more than [<]% by 2021. The CMA also fails to conduct any closeness of competition analysis (as required under its own Guidance), which would have demonstrated that Farelogix and Sabre are not close substitutes for one another;
- (ii) the CMA fails to properly investigate that both Parties [<]which undermine the case for an SLC. The CMA fails to take into account [<]and fails to properly investigate[<]. The CMA’s counterfactual analysis also errs in not adequately analysing the ability and incentive of other competitors to innovate and expand;
- (iii) the CMA’s assessment of Farelogix as a particularly strong competitive constraint is not supported by the facts. The CMA reaches this conclusion only by cherry-picking selective and outdated internal documents, accusing Sabre (without any evidence whatsoever) of sanitising its more recent documents, and disregarding clear quantitative evidence that shows that Farelogix is one of several players active in the NDC API space and that the role of Direct Connect solutions is minor as compared to other constraints faced by the GDSs:
  - (a) the CMA’s own NDC API bidding data in the Provisional Findings clearly shows that the vast majority of airlines ([<]% by count and [<]% by passengers boarded (“**PB**”)) procuring an NDC API since 2014 have used a provider other than Farelogix;
  - (b) the CMA provides no convincing evidence to support its claim that GDS bypass will grow significantly, despite having remained largely stagnant over the past five years. By contrast, the Sabre projections that the CMA itself relies on show that [<], a fact which is confirmed by industry experts and testimony from the Delaware Proceedings. Furthermore, the main driver behind these projections is the growth of Farelogix’s GDS pass-through solution;<sup>7</sup>
  - (c) the CMA wrongly focusses on unsupported feedback from certain airlines, while dismissing the views of travel agents who consider that Direct Connect is and will remain an inferior technology compared to the GDS and have no concerns about the merger. This dismissal of the

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<sup>7</sup> See e.g. *United States v Sabre* Tr. 736:1-3; 274:20- 275:2; 1572:6-9. See further Section 5, below.

evidence from travel agents is wrong given that, by the CMA's own admission, "[i]t is the travel agents, not airlines, which choose the GDS or channel to make a booking on behalf of passengers."<sup>8</sup>;

- (d) the CMA purports to carry out a forward-looking, dynamic assessment of Farelogix's competitive potential while in reality the CMA's finding that Farelogix is a "threat" and key innovator is based on a static and historical analysis of the position of Farelogix (which fails to take into account the quantitative evidence, including actual Farelogix sales over time, bidding data and the forecasts used for the purposes of valuation of the Transaction) and which relies on a limited selection of historic, outdated statements in internal documents which the more recent market developments have proven to be wrong; and
  - (e) in particular, the CMA fails to reconcile its speculative predictions with the hard financial data. The CMA accepts the Parties' submissions on valuation in their entirety (albeit relegating this key evidence to an annex) but fails to consider the implications for its case. If Farelogix were the growing competitive threat implied by the CMA's provisional findings it would surely have commanded a purchase price far in excess of USD 350m. Either sophisticated market participants are "leaving money on the table" or the CMA's speculation is incorrect and certainly short of the legal and evidential thresholds at Phase 2;
- (iv) the CMA's analysis of rival NDC API competitors similarly focusses on static, backward-looking metrics and fails to take into account the recent market evidence as required for a dynamic assessment:
- (a) the CMA ignores the most recent market evidence (in particular, the bidding data, responses to the CMA's questionnaires and witness evidence from the Delaware Proceedings) which shows that at least four other NDC API providers, Amadeus, Datalex, DXC Technology and OpenJaw/Travelsky, are already as strong or stronger than Farelogix; and
  - (b) the CMA fails to take into account properly or at all the potential of other significant competitors to expand or enter the market and provide distribution solutions that are directly competitive with Farelogix's offering, both generally and particularly in response to the Transaction going ahead and any resulting lessening of competition<sup>9</sup>;
- (v) in addition, the CMA fails to take into account in its competitive assessment the important competitive constraints from in-house supply of NDC APIs, airline.com

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<sup>8</sup> Provisional Findings, para. 7.6(d).

<sup>9</sup> As required by the Merger Assessment Guidelines, para. 5.4.11.

and the other GDSs, both generally and particularly in response to the Transaction going ahead and any resulting lessening of competition<sup>10</sup>:

- (a) the CMA ignores the clear market evidence of the constraint exercised by in-house supply of NDC APIs, including self-supply by major airlines such as British Airways and low cost carriers such as EasyJet, and also ignores evidence that both AA and United Airlines have contemplated building their own NDC API and have both threatened to do so in the past, and that United Airlines has again threatened to do so following the Transaction;<sup>11</sup>
- (b) the CMA's assessment of the constraint from airline.com is internally inconsistent. The CMA accepts that airline.com is part of the relevant market but then fails to give any significant weight to it as a competitive constraint, despite the fact that on the CMA's own analysis airline.com accounts for around 50% of bookings (compared to merely [X%] for Farelogix, and [Y%] for Direct Connect overall) and, contrary to the CMA's selective analysis, will continue to draw volume away from the GDSs. Testimony during the Delaware Proceedings,<sup>12</sup> the Parties' own internal documents and airline responses to the CMA's own questionnaires confirm that airline.com is a more important lever in negotiations than GDS bypass but the CMA fails to take this evidence into account in its assessment. The CMA also does not ask itself whether airlines would act differently if the merged group sought to lessen competition following the Transaction; and
- (c) the CMA fails to give any weight to the competitive constraint on Sabre from the other GDSs, which each account for a much higher share of bookings than Farelogix or Direct Connect in total, and are more similar and closer competitors to Sabre. Instead, the Provisional Findings are predicated on an entirely unverified and unsupported assumption that the incentives of the GDSs are wholly aligned, that there is no real competition between them, and that only external threats are capable of causing a competitive response from the GDSs. The CMA cannot proceed on the basis of what amounts to an assumption of coordinated effects amongst the GDS without having undertaken any proper, let alone material, enquiries in this regard, and having disregarded this at Phase 1. This is all the more so in circumstances where multiple submissions (by both the Parties and third-parties) demonstrate intense competitive interactions between the GDSs, including significant levels of travel agent switching, and the significant negotiating leverage that airlines have from the threat to remove content from a GDS which can be used to play one GDS off against the other, including through creating private channel arrangements. Indeed, the CMA also confirms that airlines are able to

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<sup>10</sup> As required by the Merger Assessment Guidelines, para. 5.4.11.

<sup>11</sup> *United States v Sabre*, Post-Trial Brief at para. 36, and Findings of Fact, paras. 166, 209, 211.

<sup>12</sup> See e.g. *United States v Sabre* Tr. 1438:4-6; 1726:2-15; 860:21-22. See further Section 5, below.

negotiate substantial discounts off GDS rack rates (the average Sabre payment from airlines is [x] vs. rack rates of upwards of [x]), and that GDS fees are a very small proportion of typical ticket prices (approximately [x]%).

- 1.17 In short, despite purporting to undertake a dynamic assessment, the CMA fails to do so. In particular, the CMA fails to properly investigate and take account of recent market evidence, including hard economic data and quantitative evidence, which shows that Farelogix is not a significant competitive constraint and that the merged firm will be effectively constrained by competition from a wide range of other suppliers both generally and particularly in response to the Transaction going ahead and any resulting lessening of competition.<sup>13</sup> Accordingly, the CMA's finding of an SLC with respect to distribution is unsupported and wrong and should also be reversed.
- 1.18 In short, the CMA is required to prevent consumer harm and to undertake a careful, evidence based assessment. It has failed in the Provisional Findings to do either.

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<sup>13</sup> As required by the Merger Assessment Guidelines, para. 5.4.11.

## 2. THE CMA DOES NOT HAVE JURISDICTION

### *The CMA does not have jurisdiction over the Transaction*

- 2.1 The CMA's repeated and varying attempts to assert jurisdiction over the Transaction (of which this is the fourth iteration) are wrong in law and cut across both the principle of legal certainty and the intentions of Parliament. The CMA does not have jurisdiction over the Transaction.
- 2.2 As the Parties have made clear previously (at paragraph 3.10 *et seq.* of the Phase 2 Initial Submission, and paragraphs 2.3 and 2.8 of the Parties' Response to the Issues Statement), the share of supply test is not concerned with whether there is any loss of competition that might harm UK consumers; it asks whether there is an appropriate territorial connection between the Transaction and the UK. Parliament could have afforded the CMA jurisdiction over any transaction, anywhere in the world, that gave rise to the prospect of an SLC that might harm UK consumers, but it did not. Instead, Parliament legislated so as to strike a balance between the powers granted to the CMA and the need to respect the principle of international comity and business certainty. As a result, transactions must be directly relevant to the UK. This is clear from both contemporaneous Parliamentary debate around the Enterprise Act 2002 (the "**Act**") and from statements by the Court of Appeal.<sup>14</sup> If the CMA wishes to intervene in transactions with no, or no sufficient, *nexus* to the UK, then the proper course is to ask the Government to introduce legislation to amend the Act and allow Parliament to consider whether this is a proper use of scarce public resources.
- 2.3 The fact that — more than a year into the investigation — the Provisional Findings assert a brand-new, lengthy, and contorted description of services, a fictional supply relationship, and an unprecedented approach to revenue calculation which relies on entirely hypothetical revenue flows, is fundamentally at odds with these policy considerations. This new basis for jurisdiction has been raised by the CMA at an extremely late stage. It was not included in the Working Papers, so the Parties have had no chance to address this pre-Provisional Findings.
- 2.4 Moreover, the Parties have had no access to the granular data and documentary evidence on which the CMA's supply shares are based, thereby preventing the Parties from being able to respond effectively. As outlined in Appendix B to the Provisional Findings, the CMA has gathered information from airlines on their costs of Direct Connect and aggregators. Having access to this data is of critical importance, particularly given the apparent flaws in data provided by airlines to the CMA at the Working Paper stage, which significantly understated their volume of indirect bookings relative to actual data on GDS bookings from the more reliable MIDT data (see paragraph 14.2 of the Parties' response to the Jurisdiction Working Paper). Therefore, it is very possible that such errors persist in the CMA's quantitative analysis. The CMA has also unduly curbed the Parties'

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<sup>14</sup> House of Commons Standing Committee B, Tuesday 30 April 2002, Hansard Record at Column 329, and *Akzo Nobel v Competition Commission* [2014] EWCA Civ 482 at [26], by reference to s. 86 of the Act.

rights of defence by not even providing the Parties with the (presumably non-confidential) formulations of data requests sent to third-parties.<sup>15</sup>

- 2.5 The CMA's repeated reformulation of the grounds for jurisdiction in this case also demonstrates that the CMA is collapsing the distinction between jurisdiction and substance. As the Parties have made clear previously (at paragraph 3.9 of the Phase 2 Initial Submission and paragraph 2.3 of the Parties' Response to the Issues Statement), there is no basis in the Act for collapsing the two distinct tests which must be satisfied pursuant to section 33 of the Act, namely whether there is a relevant merger situation on the one hand, and whether there is a realistic prospect of an SLC in the UK, on the other. The CMA cannot gerrymander jurisdiction on the basis that it wishes to further investigate the substance.

***The Relevant Description of Services is inappropriate, unreasonable, and flawed***

- 2.6 In formulating its new basis for jurisdiction, the CMA effectively acknowledges that none of the three potential grounds put forward in the Working Paper on Jurisdiction was adequate. However, the CMA's proposed, new, 28-word long "Relevant Description of Services" remains inadequate. It is neither appropriate nor reasonable; it is arbitrary, artificial, and flawed.
- 2.7 As the Parties have made clear previously (at paragraph 3.16 of the Phase 2 Initial Submission, paragraph 2.7 of the Parties' Response to the Issues Statement and page 4 of the Parties' response to the Working Paper on Jurisdiction), any description of services must be "*appropriate*" and "*reasonable*" under the Act and the CMA's own Guidance.<sup>16</sup> The CMA accepts that the description of services must be "*reasonable*",<sup>17</sup> but what is "*reasonable*" must be determined taking into account all the circumstances at the time. The description of services that the CMA has devised falls well short of what "*reasonable*" means at this stage in the investigation.
- 2.8 It is common ground that the CMA does not need formally to define a relevant economic market in order to identify its description of services for the purposes of the share of supply test. However, in identifying a reasonable description of services for the purposes of applying the share of supply test, it is necessary for the CMA to take account of the circumstances in which the finding is made. Ordinarily, the share of supply test is applied at the outset of a Phase 1 inquiry when the CMA is seeking to determine whether it has jurisdiction and may have very limited factual information, and then reapplied at the outset of a Phase 2 inquiry when the Panel has just been appointed and is commencing its inquiry also with limited factual information. Indeed, Parliament's intention at the time of debating section 23 of the Act was to ensure that the share of supply test was quick, easy and would not necessitate lengthy, detailed analysis. Parliament wanted to ensure business certainty.<sup>18</sup> Further, in consulting on the Act the Department of Trade and

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<sup>15</sup> The Parties have not been given access to this granular data in order to determine this, although they requested it by letter dated 21 February 2020.

<sup>16</sup> CMA2 Mergers: Guidance on the CMA's Jurisdiction and Procedure, para. 4.56.

<sup>17</sup> Provisional Findings, para. 5.23.

<sup>18</sup> House of Commons Standing Committee B, Tuesday 30 April 2002, Hansard Record at Column 329.

Industry noted that the benefits of the share of supply test were that it could be applied “*quickly and easily*” and that “*detailed analysis*” was “*not appropriate for a jurisdictional threshold*” which requires a “*reasonably effective and quick method*” of establishing jurisdiction.<sup>19</sup> The clear purpose, intention, and justification for the share of supply test being retained over a market share test was expressly to avoid the type of extensive, detailed, “more economic” analysis, that has been undertaken by the CMA in this case in order to manufacture an arbitrary share of supply. It is therefore clear that the approach adopted by the CMA in this case is unreasonable and entirely outside of the contemplation of Parliament when the share of supply test was retained in section 23 of the Act.

- 2.9 The CMA in its Provisional Findings has by implication disavowed all of its previous attempts to identify a basis to assert jurisdiction through Phase 1 and in the Working Papers at Phase 2. Thus, the share of supply test falls to be applied at a point at which the CMA has (or should have) an exceptionally detailed understanding of the market: all, or almost all, of its detailed evidence gathering has been completed. If the CMA is to define the description of the services using reasoning based on an informal assessment of functional substitutability (falling short of a formal market definition exercise) as it appears that the CMA is doing,<sup>20</sup> in the particular circumstances of this case, a reasonable definition must be grounded in the actual evidence from the CMA’s detailed inquiry, not verbal contortionism. It must also be grounded in the policy and objectives of the Act. Yet the CMA refers to very little actual evidence from its detailed inquiry and has no regard for the policy of the Act, as outlined above at paragraph 2.2.<sup>21</sup> Moreover, the application of the SLC test in the Provisional Findings tellingly makes no use of the cumbersome 28-word long description of the relevant services.
- 2.10 Nor does the CMA’s definition correspond to how competition takes place, or any recognised commercial or industry standard. Business and commercial people do not use 28-word long definitions to refer to groups of services in which they are interested.
- 2.11 None of the CMA’s three reasons<sup>22</sup> for claiming that the Relevant Description of Services is reasonable and appropriate stands up to scrutiny.
- (i) First, the CMA continues to make the same fundamental errors that it did with its previous attempts to assert jurisdiction. The CMA states that it “*captures the key third-party services involved in an important airline distribution channel*” [emphasis added].<sup>23</sup> But once the CMA has settled on a description of services it is incumbent upon it to include all services matching that description; it cannot

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<sup>19</sup> Paragraph 6.20 of the Department of Trade and Industries Paper “Mergers: The Response to the consultation on proposals for reform” (2000) available from <https://web.archive.org/web/20030226235302/http://www.dti.gov.uk/cp/mergerresp/index.htm>.

<sup>20</sup> As made clear in the Provisional Findings, footnotes 112 and 114 (for example, finding that non-GDS aggregators should be included because “*their functions are very similar to a GDS*”).

<sup>21</sup> Neither in para. 5.29(b) or footnote 114 of the Provisional Findings. The only exception is a brief reference to the CMA’s airline questionnaire at footnote 115.

<sup>22</sup> Provisional Findings, para. 5.29 and footnote 115.

<sup>23</sup> Provisional Findings para. 5.29(a).

cherry-pick and gerrymander the services and service-providers that it includes in the description (as outlined further at paragraph 2.23 *et seq.* below).

- (ii) Second, the CMA seeks to justify the Relevant Description of Services on the basis that it “*encompasses IT solutions that allow airlines to connect to travel agents*”.<sup>24</sup> However, this reasoning is entirely circular: the CMA cannot logically justify its use of a particular description of services by saying that it “*encompasses*” the services that the CMA has included within it.
- (iii) Finally, the CMA attempts to draw support from responses provided by airlines to a question in a CMA questionnaire, posed in a different context (as part of the CMA’s substantive merger investigation). Whilst it is not possible to fully understand the context of the question, given the lack of disclosure (see paragraph 3.2, below), the question in the CMA’s questionnaire relates to the airlines’ own booking estimates via booking channels specified by the CMA,<sup>25</sup> rather than all potential supply of “*IT solutions to airlines for the purposes of airlines providing travel services information to travel agents to enable travel agents to make bookings*”. Accordingly, these questionnaire responses cannot be relied upon to determine the service providers that should be included in the Relevant Description of Services.

***Farelogix has no UK revenue. The CMA cannot claim jurisdiction on the basis of hypothetical revenues which, even on its calculations, would amount to less than USD 200***

- 2.12 The CMA’s jurisdiction claim is based on a non-existent increment generated by technical arrangements put in place almost a decade ago. Farelogix has generated no revenue from the *de minimis* number ([<]) of AA bookings which included an interline segment on a British Airways flight. Even if Farelogix had (entirely hypothetically) asked for payment, it would have amounted to less than USD 174 or [<] of Sabre’s revenue and an even smaller percentage of the total market revenue. This confirms the highly inappropriate and unreasonable nature of the CMA’s approach to jurisdiction.
- 2.13 Rather than being appropriate and reasonable, the Relevant Description of Services strives — through a convoluted series of qualifiers — for a form of words that captures what the Parties do whilst seeking to minimise the extent to which any other providers are included. As such, it is arbitrary and artificial. It also fails on its own terms.

***Farelogix does not provide a service meeting the CMA’s description, while other providers who do meet the description and provide such services are excluded***

- 2.14 Even if the Relevant Description of Services were appropriate and reasonable (which the Parties dispute), the CMA errs in determining which service providers fall in- and out-of-scope. The CMA asserts, without justification, that the definition would capture the following closed list of suppliers: “*[each of the Parties and] the other main GDSs (Amadeus and Travelport), smaller GDSs (e.g. Host Direct) and other Direct Connect*

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<sup>24</sup> Provisional Findings, para. 5.29(b).

<sup>25</sup> Provisional Findings, footnote 115.



*providers and non-GDS aggregators*".<sup>26</sup> There are two main flaws in this approach. Farelogix provides no service meeting this description to UK airlines and other services who do provide these services are excluded.

*(l) Farelogix does not supply any services falling within the Relevant Description of Services to UK airlines, and as such is not itself in-scope*

- 2.15 As outlined at paragraph 2.9 above, to the extent that the CMA is relying on an informal substitutability assessment (falling short of a formal definition of the relevant economic market) to determine its description of the relevant services,<sup>27</sup> it is illogical and inconsistent to group Farelogix's services, and, in particular, any "services" the CMA claims it might have supplied to British Airways, with GDSs, given the CMA's provisional finding that "*Travel agents appear to have a preference for accessing content through their GDSs...Nevertheless travel agents do appear willing to access content through direct connects if not available through the GDS*".<sup>28</sup> This is a finding of complementarity (from a travel agency perspective) and does not support an informal (or any) finding of substitutability, meaning Farelogix should not be included.
- 2.16 The CMA's attempt to argue that Farelogix supplies services within the Relevant Description of Services to UK airlines also fails both in terms of the actual functioning of the agreements and technical connections in question, and in terms of the intentions of both parties, as set out below. The FLX Service (which the CMA defines for these purposes as FLX OC and FLX NDC API) falls within the Relevant Description of Services as Farelogix is providing an IT solution to airlines for the purposes of airlines providing travel services information to travel agents. However, Farelogix only provides the FLX Service to its airline customers, none of which are located in the UK.

#### **Farelogix does not provide the FLX Service to British Airways**

- 2.17 First, it is simply not correct that Farelogix "*directly supplies the Relevant Description of Services to British Airways*".<sup>29</sup> As the Parties have previously explained in detail (see the response to Question 10 of Farelogix's response to the section 109 notice dated 16 October), [REDACTED]. To the extent that what Farelogix did *vis-à-vis* British Airways constitutes a service at all, it is not of the Relevant Description of Services. Further, any service to BA was also [REDACTED], long before the point at which jurisdiction is to be established. By way of analogy, a builder who tarmacked your driveway in 2011 did not provide you with a service in 2019 by virtue of the fact that you continue to park your car on that driveway.
- 2.18 Second, on any reasonable construction and interpretation of the British Airways Agreement, it is clear that Farelogix does not supply the FLX Platform Services<sup>30</sup> to British

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<sup>26</sup> Provisional Findings, para. 5.27.

<sup>27</sup> Provisional Findings, footnotes 112 and 114.

<sup>28</sup> Provisional Findings, para. 3.48.

<sup>29</sup> Provisional Findings, para. 5.34 (sub-heading).

<sup>30</sup> Defined in the British Airways Agreement as "[REDACTED]".

Airways; [redacted].<sup>31</sup> It is not open to the CMA to “interpret” this relationship as a direct supply relationship between Farelogix in respect of services falling within the Relevant Description of Services when it is clear on the face of the agreement that this is not the case. The service in question is not an “*IT solution to airlines for the purposes of airlines providing travel services information to travel agents to enable travel agents to make bookings*”.

- 2.19 This is demonstrated clearly in Annex 2 and Confidential Annex 3, which provides a detailed explanation of the separate communications flows and IT providers involved in each occurrence of a booking.

**Farelogix did not intend to supply British Airways and British Airways did not intend to receive a supply and exercised no relevant procurement decision**

- 2.20 The CMA is wrong to conclude that Farelogix intends to supply the FLX Service to British Airways.<sup>32</sup> Farelogix only intended to supply the customer with whom it contracted under the Direct Connect Services Agreement and who was responsible for payment, namely AA. The fact that Farelogix understood that AA intended to use the contracted services in the context of its interlining activities in no way alters the fact that the supplies were intended to be made to AA. If Farelogix intended to supply its FLX Service to British Airways then, given US and UK contractual law on privity, the overwhelming likelihood is that British Airways would have been added as a party to the Direct Connect Services Agreement, so that Farelogix could agree with British Airways the terms and conditions on which the service would be provided. Of course, Farelogix would have been delighted to win British Airways as a new customer and, had there been any prospect of establishing a commercial relationship with British Airways and actually supplying services to British Airways, Farelogix would have jumped at it.<sup>33</sup> The obvious and only inference to be drawn from the fact that British Airways is not a party to the contract is that Farelogix was not supplying and did not intend to supply relevant services to British Airways.

- 2.21 The evidence cited by the CMA that British Airways exercised a “relevant procurement decision” by taking “*active and conscious steps, and made a clear choice, to receive supply of the FLX Service*”<sup>34</sup> does not in fact demonstrate this. British Airways intended to receive a supply of the relevant services from AA, not from Farelogix. If British Airways had intended to receive supplies from Farelogix of relevant services, then, given US and UK contractual law on privity, the overwhelming likelihood is that British Airways would have been added as a party, so that British Airways could actually benefit from the provisions of the contract. As discussed above, there is no doubt that Farelogix would have been delighted to add British Airways to its customer list and that British Airways therefore could have been added as a party to the agreement had it asked (and had any services actually been supplied to British Airways). The obvious and only inference to be

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<sup>31</sup> See further explanation in Annex 2 and Confidential Annex 3.

<sup>32</sup> Provisional Findings, para. 5.32.

<sup>33</sup> The contracts being considered by the CMA were all open for negotiation. Contrast, for example, Facebook’s terms and conditions for users, which are not open for negotiation and may therefore be less informative of the parties’ true intentions.

<sup>34</sup> Provisional Findings, para. 5.42.

drawn from the fact that British Airways is not a party to the contract is that British Airways was not receiving supplies and did not intend to receive supplies of NDC API services from Farelogix. All that British Airways intended to receive from Farelogix itself under the British Airways Agreement [§<]. See further explanation in Annex 2 and Confidential Annex 3.

- 2.22 Jurisdiction therefore cannot arise on the basis of the Relevant Description of Services, as there is no overlap between the Parties.

*(II) The CMA is inconsistent in the service providers that it includes in the Relevant Description of Services*

- 2.23 Even if the CMA were correct to include Farelogix and Sabre within the Relevant Description of Services, which the Parties disagree with, there is no basis on which to exclude a wide range of other service providers from the Relevant Description of Services.

- 2.24 First, the CMA's approach in including aggregators but excluding metasearch is highly asymmetric. The CMA includes aggregators, expressly stating that "*we do not think that the fact that they do not necessarily connect directly to an airline affects our view as they are still a necessary and important component to the transfer of airline content to the travel agent*".<sup>35</sup> However, this reasoning could equally be applied to metasearch sites, which are expressly excluded,<sup>36</sup> when they do a similar job to aggregators by aggregating content from multiple airlines and comparing it, whilst not directly connecting to an airline. The role of metasearch in facilitating the aggregation and shopping of airline content was explained by Google/ITA in its hearing with the CMA on 15 October 2019.<sup>37</sup> In particular, Google explained that Google Flights (a metasearch engine) connects to OTAs in order to facilitate the booking of the airline content. On this basis, metasearch should be included within the Relevant Description of Services.

- 2.25 Second, the CMA wrongly excludes non-VITOs from the Relevant Description of Services. In provisionally finding that the activities of non-VITOs are outside the Relevant Description of Services,<sup>38</sup> the CMA asks itself whether the activities of non-VITOs are "*comparable*" to those of the suppliers whom the CMA considers to fall within the Relevant Description of Services.<sup>39</sup> It is illogical and inconsistent to base the Relevant Description of Services on a test of functional similarity (as described above at paragraph 2.9) but to apply a different test when considering the same question as regards non-VITOs, namely whether the activities are "*comparable*" to the activities of suppliers of the Relevant Description of Services, focussing on what is done, rather than the purpose that is served. If the test applied by the CMA to non-GDS aggregators (functional similarity) were applied to non-VITOs, then non-VITOs would need to be included in the description of the relevant

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<sup>35</sup> Provisional Findings, footnote 112.

<sup>36</sup> Provisional Findings, footnote 113.

<sup>37</sup> Summary of Hearing with Google ITA held on 15 October 2019.

<sup>38</sup> Provisional Findings, Appendix B, Part B, para. 2.

<sup>39</sup> See also Provisional Findings, para. 5.55(a).

services. Non-VITOs aggregate content from several airlines, which can then be browsed and compared (as accepted by the CMA<sup>40</sup>). Even if non-VITOs often initially access airline content through a GDS or aggregator, non-VITOs are still a necessary and important component for the transfer of airline content to travel agents who may be selling their holiday packages.

- 2.26 The CMA is also acting illogically and inconsistently in another respect when excluding non-VITOs from the Relevant Description of Services. The CMA excludes non-VITOs because they “do not provide an IT solution to airlines” and accords decisive weight to the contractual counter-party in excluding non-VITOs from its chosen definition (there is no contract with the airline).<sup>41</sup> However, the CMA then collapses the contractual relationships in provisionally finding that Farelogix has supplied British Airways even though the only contract between them was not for the provision of relevant services (see further above at paragraph 2.17).<sup>42</sup> If Farelogix is treated as supplying British Airways with relevant services (which the Parties strongly deny), despite the absence of contractual relationship which so provides, then non-VITOs must be included by parity of reasoning: the existence of a contractual relationship either matters or it does not.
- 2.27 Third, the CMA has also made an error by incorrectly conflating NDC Exchange and ATPCO.<sup>43</sup> NDC Exchange is an NDC API provider, through ATPCO in partnership with SITA, which provides NDC API connectivity to customers, including Southwest.<sup>44</sup> NDC Exchange should not be excluded from the Relevant Description of Services, as it is a direct competitor to Farelogix. The CMA seeks to do so on the basis that NDC Exchange does not enable bookings. However, this is contrary to ATPCO’s website which boasts that NDC Exchange is a “one-stop shop” where “[e]verything is in one place: fares, routes, seats, booking, ticketing, baggage....”
- 2.28 Fourth, the CMA also errs in excluding ATPCO from the Relevant Description of Services. In particular, ATPCO provides information to Farelogix without which it would not be possible to deliver the FLX Service. ATPCO’s services of collecting and distributing airline data by APIs and other connections including to GDSs and Travel Agents are a “necessary and important component” for the overwhelming majority of GDS bookings, and therefore the overwhelming majority of bookings in the indirect channel. ATPCO’s own description of its services is also consistent with the Relevant Description of Services: ATPCO provides an IT solution to airlines (namely collecting and distributing airline data) for the purposes of airlines providing travel services information to travel agents to enable bookings to be made, as without the ATPCO service it would not be possible for airlines to provide travel services information to travel agents using certain distribution solutions such as GDS bookings. This is demonstrated by ATPCO’s public

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<sup>40</sup> See Provisional Findings, Appendix B, Part B, para. 1.

<sup>41</sup> Provisional Findings, footnote 113(ii).

<sup>42</sup> Provisional Findings, paras. 5.36 *et seq.*

<sup>43</sup> Provisional Findings, footnote 113(iii): “NDC Exchange (e.g. ATPCO) (an information tool which is limited to collection of fare information from airlines and distribution of that fare information to travel agents but does not allow travel agents to make bookings).”

<sup>44</sup> Travel Weekly, *Southwest Joins NDC Exchange*, (17 July 2019), <https://www.travelweekly.com/Travel-News/Travel-Technology/Southwest-joins-NDC-Exchange>. See further para. 5.53(i) below.

statements: in its “About” section on its website, ATPCO describes itself as providing leading technology, pricing and shopping data to airlines, GDSs, travel agents and technology companies.<sup>45</sup> It does this variously by blending data, systems and innovative IT solutions, and ATPCO provides an extensive list of customers on its website to which it provides these services (including OTAs, travel agents, TMCs, Meta-search, and non-GDS aggregators), a number of which are also connected to FLX customer airlines using an FLX powered NDC API.

- 2.29 Fifth, whilst the Parties contend that any service provided by Farelogix to British Airways does not fall within the Relevant Description, if the CMA is to include it, the CMA is clearly obliged to include all other providers of similar services. For example, this would at least include API providers who provide both NDC APIs and non-NDC APIs, and the providers who facilitate interline bookings (ARINC, SITA). The CMA’s “*IT solutions*” Relevant Description of Services could arguably include many other service providers outside the CMA’s contemplation, such as IT companies that create airline travel agency portals for travel agencies and IT companies that build airline websites.
- 2.30 This omission covers both third-party IT providers that facilitate the provision of in-house APIs, as well as those third-party IT providers that develop non-NDC APIs and other Direct Connects. As the Parties made clear in the Parties’ Response to the Issues Statement (paragraph 2.25(ii)), as the NDC messaging standard has only been adopted relatively recently, there are many circumstances in which the connection between an airline’s PSS and a downstream distributor relies on a non-NDC API (often a pre-NDC API), that may have been developed by the airline itself or supplied by another technology provider. If any service provided by Farelogix to British Airways falls within the Relevant Description then so too do the services provided by such IT providers as they provide an IT solution to airlines (namely providing the connection between the airline PSS and downstream distributor) for the purposes of airlines providing travel services information to travel agents to enable bookings to be made. Furthermore, their revenues are clearly significant and would need to be investigated and collated by the CMA.
- 2.31 The CMA has also ignored other intermediaries that provide services equivalent to the interconnection between British Airways and AA upon which the CMA bases its jurisdictional analysis. For example, the CMA ignores core-PSS providers such as IBM (for Air Canada) that are understood to provide interconnectivity between Air Canada’s core PSS and the British Airways core PSS to enable the booking of interline bookings with British Airways through Air Canada. This would necessarily include all other providers of the type supposedly considered by British Airways to facilitate the interlining within AA.
- 2.32 Annex 4 provides a non-exhaustive list of IT providers that the Parties consider would need to be included within the Relevant Description of Services if applied consistently. Again, their revenues are clearly significant and would need to be investigated and collated by the CMA, along with other providers of the Relevant Description of Services.

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<sup>45</sup> <https://www.atpco.net/about>.

- 2.33 The CMA has not therefore established jurisdiction on the basis of the Relevant Description of Services, as the denominator used by the CMA does not correspond to the numerator (see further paragraph 2.43 below).

***There is no increment and the share of supply is not above 25%***

- 2.34 The CMA considers that the share of supply test is satisfied by reference to “*annual revenue received and receivable*”,<sup>46</sup> on the basis that (i) the Transaction gives rise to an increment and (ii) Sabre’s share is above 25%. Neither proposition is supported by the evidence.

- 2.35 First, even on the CMA’s approach to the Relevant Description of Services (which the Parties do not consider to be appropriate or reasonable), and even if Farelogix did supply the Relevant Services in the UK (which the Parties do not accept), there is no increment on a revenue basis. The CMA erred in law in finding that the 25% threshold “*prevails to a greater extent*” on at least one of the two alternative bases identified by the CMA,<sup>47</sup> both of which are flawed.

- 2.36 In respect of revenue received, as the CMA has acknowledged from the very start of its process (including at paragraph 61 of the Issues Letter, paragraph 26 of the Phase 1 Decision and paragraph 11 of the Issues Statement), Farelogix did not receive any revenue in the UK. Even if Farelogix did provide the Relevant Services in the UK (which the Parties dispute), Farelogix did not receive any revenue as a result. It is not appropriate to notionally attribute to the UK a portion of fees that were actually paid to Farelogix in the US by a US customer (AA) under a US contract. The fee paid by AA to Farelogix cannot as a matter of law be treated as money paid by British Airways because the money was not paid by AA for or on behalf of British Airways, and Farelogix has no recourse against British Airways in respect of such sums. As outlined previously (see the response to Question 10 of Farelogix’s response to the section 109 notice dated 16 October), Farelogix receives no incremental revenue in respect of British Airways interlining segments. Farelogix receives revenue on a per booking basis, not a per segment basis, and receives no additional revenue from AA as a result of the addition of an interline segment. For example, [§<]. Further, neither Farelogix nor presumably AA will have prepared their accounts or tax filings on the basis that part of the sums paid by AA was actually attributable to British Airways for the very good reason that British Airways was not a party to the contract and could not derive any benefits in law from it, nor be subject to any burdens. Farelogix accounted for the whole of the sums received by AA as US revenues and paid applicable US taxes on them.

- 2.37 Moreover, with respect to revenue receivable, the CMA enjoys a degree of discretion to apply different criteria when determining whether the 25% share of supply threshold is satisfied in any given case. That discretion does not extend, however, to attributing to any merger party a share of supply by value in circumstances where no such value is received and the share must necessarily be nil. The Act makes clear that whatever criterion is chosen must be “*appropriate*” (section 23(5)). The CMA has never previously used revenue receivable (either as opposed to, or in addition to, revenue actually

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<sup>46</sup> Provisional Findings, para. 5.53.

<sup>47</sup> Provisional Findings, para. 5.61.

received) for these purposes, and it would certainly not be appropriate to do so for the first time here, to conjure up an increment where none exists.

- 2.38 In any case, it is common ground that Farelogix did not collect any revenue for interline bookings from British Airways, because the administrative resources necessary to collect these receivables would have exceeded any potential amount formally owed to Farelogix. By forgoing collecting any amount due over a period of several years, Farelogix has demonstrated that these claims have zero value. Consistently, Farelogix over several years has never activated any claim in its accounts receivables nor recognised any profits. In line with standard accounting principles, Farelogix would have recognised profits had there been any prospect of collecting the claims against British Airways at some point in the future. Having to rely on purely hypothetical revenue in order to establish an increment on a revenue share basis cannot provide appropriate or reasonable grounds to establish jurisdiction in circumstances where the hypothetical revenue was never invoiced or collected. Further, any hypothetical sums are so extremely small (less than USD 200) that it is not worth Farelogix monitoring, invoicing, or collecting them. It is highly inappropriate for the CMA to adopt this basis for jurisdiction, especially when the consequence of treating hypothetical, trivial sums that have demonstrably zero value to the creditor as qualifying for the purposes of the share of supply test is that the Parties are subject to a lengthy merger investigation and risk the imposition of costly remedies. The CMA also makes no attempt to factor in revenue receivable (but not actually received) by third-parties (despite expressly noting that these do exist).
- 2.39 It should also be noted in this regard that the CMA has been forced into this contorted and flawed hypothetical revenues analysis because, on the basis of bookings, even if one were to assume that there could be an overlap of functionality, which there is not, the Parties fall well below the 25% threshold. This underlines the illogical and gerrymandered nature of the CMA's approach to jurisdiction.
- 2.40 Second, the payments that were contractually payable by British Airways to Farelogix were, on the CMA's own findings, for the provision of a service that "*enables the supply of the FLX Service*" (emphasis added), namely the creation of infrastructure and performing set-up services to create a messaging interface to send Type B messages described further at paragraphs 2.17 *et seq.* above and at Annex 2, and not the provision of services within the Relevant Description of Services.<sup>48</sup> It is an error of law to include in the share of supply calculation fees for services that fall outside the Relevant Definition of Services.
- 2.41 Third, even on the CMA's approach to the Relevant Description of Services (which the Parties do not consider to be appropriate or reasonable), and focussing on shares in terms of revenue, the CMA continues to make fundamental arithmetic errors in its calculations.
- 2.42 There is no basis on which to exclude from the denominator a wide range of other service providers (see paragraphs 2.23 – 2.32 above). While data on the revenues generated by

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<sup>48</sup> Provisional Findings, para. 5.41. Importantly, Type B messages are similar to EDIFACT communications (which are excluded from the Relevant Description of Services at footnote 113(vi)). Accordingly, the Parties presume that Type B messages would also be excluded from the Relevant Description of Services.

such other providers is not available to the Parties, it is incumbent upon the CMA to collect this information to determine whether the 25% threshold is met.

- 2.43 The CMA states that “*In circumstances where a booking requires the services of both a GDS and third-party direct connect, both revenues are represented in both our numerator and denominator to the extent these are supplied by a third-party*”,<sup>49</sup> but then fails to include most of these service providers in the calculations provided in Table 1 of Section 5 of the Provisional Findings. In circumstances where a booking requires the services of other service providers, the respective revenues must be included in the denominator. In particular, the revenue of other third-party IT providers, as outlined in Annex 4, must be included in the CMA’s calculations since they are clearly potentially material to the application of the 25% threshold.
- 2.44 Overall, the CMA’s new, revised approach to jurisdiction continues to be wrong in law and fact. The CMA should therefore, at this point in its investigation, reverse the Provisional Findings on jurisdiction and instead conclude that the Transaction will not result in the creation of a relevant merger situation.

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<sup>49</sup> Provisional Findings, Appendix B Part B, para. 9.



### 3. OVERVIEW OF EVIDENTIARY DEFICIENCIES IN THE PROVISIONAL FINDINGS

- 3.1 The substantive aspects of the Provisional Findings are characterised by a number of overarching and serious errors in the CMA's assessment of the evidence which fundamentally undermine the CMA's conclusions. In particular, the CMA's assessment of the evidence is one-sided and relies disproportionately on a highly selective use of historic documentary evidence, while disregarding more recent market evidence (including hard economic data and quantitative evidence) which is highly probative of recent and likely future developments. The little quantitative analysis relied upon is presented out of context or otherwise flawed.
- 3.2 Further, the CMA's lack of disclosure of the documents underlying its provisional conclusions has prevented the Parties from effectively responding to the Provisional Findings. As the CMA's case rests on potentially subjective readings of third-party internal documents and submissions (the importance of which, the CMA argues, displaces the empirical evidence, including market shares and bidding data) the only way for the Parties to effectively understand the "gist" of the case against them is to review the underlying evidence.<sup>50</sup> Accordingly, the Parties have responded to the CMA's case as far as they understand it, but are unable to effectively respond as to the credibility or otherwise of third-party documents/submissions and therefore reserve their rights as to the sufficiency of disclosure.

#### ***Legal and evidential standards***

- 3.3 The CMA must consider on a "*balance of probabilities*" whether a substantial lessening of competition is "*more likely than not*".<sup>51</sup> This requires a balanced and thorough investigation into the totality of the evidence. The CMA's own Guidance specifies that it must make "*evidence based decisions*", and case law has established that the CMA must take into account "*the totality of the evidence available to it*" and such evidence must be considered "*in full and in context*".<sup>52</sup>
- 3.4 In dynamic markets, a high quality and degree of evidential cogency is required to sustain findings that are by definition based on predictions of uncertain future events. As the European Court of Justice noted in *Tetra Laval*, "*first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly*

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<sup>50</sup> See further Parties' joint letter to the CMA regarding access to file dated 21 February 2020.

<sup>51</sup> Merger Assessment Guidelines, para. 2.12.

<sup>52</sup> CMA, Transparency and disclosure: Statement of the CMA's policy and approach (January 2014), para. 4.2. See also, *BAA Limited v Competition Commission* [2012] CAT 3 at [20]: "*it is a rationality test which is properly to be applied in judging whether the [Competition Commission] had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did.*"; and *Stagecoach Group plc v Competition Commission* [2010] CAT 14 at [131] where the CAT found that the third-party evidence on which the Competition Commission relied "*did not, when read in full and in context, support [the conclusion drawn]*".

*discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced ... is particularly important.*<sup>53</sup>

3.5 The CMA's recent paper on Merger Control in Dynamic Markets also recognises that, due to the forward-looking nature of dynamic markets, it is particularly important for the CMA to draw on a robust evidence base when forming a view on future competition, both with and without the effects of the merger. The CMA made the following relevant observations:<sup>54</sup>

(i) *"In dynamic markets, historical data is likely to be less informative about how competition is likely to develop in the near future since firms are continuously looking to bring more innovative products or features to market."*

(ii) *"When assessing internal documents, the CMA attempts to place evidential weight on the document based on the context surrounding it. In particular, the CMA will take account of the author(s) and the intended audience of the documents."*

(iii) *"The CMA believes internal documents produced by the parties are likely to be a key source of evidence. However, the CMA will weigh the importance of these documents against their context as well as the internal documents of third-party competitors, industry forecasts, investment analyst reports, and consultations with industry experts."*

3.6 The Provisional Findings fall short of these legal and evidential standards. The CMA fails to observe its own Guidance and stated best practices leading to a number of fundamental flaws in its assessment of the available evidence as described below and substantiated in further detail in Annex 1.

***Unjustifiable favouring of outdated, historic documentary evidence over quantitative and other more recent evidence***

3.7 The CMA's assessment focusses overwhelmingly on outdated, historic documentary evidence, whilst other evidence, including more recent internal documents, quantitative evidence such as market share data, bidding data, and valuation evidence, are disregarded. As a result, the CMA fails to investigate and/or properly consider important, recent market evidence and instead favours outdated, selective, and often speculative documentary evidence which has been proven by subsequent market developments to be wrong.

3.8 This approach is wrong because it fails to take into account the totality of the evidence, including more recent evidence which is of a higher probative value because it directly reflects the way in which the competitive environment is actually evolving. For example, the CMA quotes predominantly from Sabre's earliest internal documents dealing with its

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<sup>53</sup> Case C-12/03 P *Commission of the European Communities v Tetra Laval BV* [2005] ECR I-987 at [44] (emphasis added).

<sup>54</sup> CMA, Merger Control in Dynamic Markets – Contribution from the United Kingdom (6 December 2019), paras. 60, 67 and 70.

NDC strategy considerations, the vast majority of which pre-date its first live testing in NDC, by over two years in some cases. As set out in Annex 1 paragraph 1.8, the CMA refers to 22 internal documents in Chapter 9 of the Provisional Findings, of which more than 65% are over 18 months old – a very significant period given what the CMA considers to be the fast-paced nature of change in this industry.

3.9 It is wrong for the CMA to treat such historic evidence as decisive, in particular where – as is repeatedly the case here – it is undermined or contradicted by:

- (i) **What has actually occurred in the market — as seen in the empirical evidence.** For instance, recent market developments confirm that the concerns expressed in early internal documents about the potential for significant growth in GDS bypass were misplaced and wrong. The CMA's own evidence from the top 20 airlines shows that Direct Connect is <5% of bookings for all carriers. Importantly, of that <5%,<sup>55</sup> [ $\ll$ ], demonstrating how small a player Farelogix is within Direct Connect. Figure 5.1 below shows that, based even on the Farelogix management forecasts provided to Sabre (which are accepted by the CMA to be overly ambitious), FLX OC (in both GDS bypass and GDS pass-through modes) would be at most a niche share of indirect distribution. Figure 5.5, below, and Table 7 of Appendix H, also confirm that [ $\ll$ ]. Further, other recent market developments in NDC have also overtaken what is described in the documents that the CMA seeks to rely on from 2017. For example, there has been a significant rise since 2017 in the number of Level 3 and 4 IATA certified NDC providers (as outlined in Figure 1, Annex 4) and there have been significant developments in the NDC standard since then, including the introduction of the first scalable and workable schema, version 17.2.
- (ii) **Clear and compelling economic evidence.** For example, although the CMA devoted a lot of time trying to prove the contrary, it accepts that Sabre's valuation methodology and purchase price do not contain a "market power premium" and so are inconsistent with the CMA's theories of harm. The bidding data also confirms that the Parties face strong and growing constraints from alternative suppliers, including independent suppliers, in merchandising (see paragraph 4.27 below) and distribution (see paragraph 5.51 below)).
- (iii) **More recent documentary evidence.** For example, Sabre's recent internal documents confirm that [ $\ll$ ].<sup>56</sup> They also show Sabre's changing perspective on issues raised in earlier documents, for example around GDS bypass (see further Annex 1, paragraphs 1.14 – 1.16).

The CMA seeks to sweep aside these more recent internal documents that do not support its narrative on the basis that they may have been "tainted" in some (unspecified) way by the merger negotiations: *"the competition reviews of the Merger in the UK and the US may have influenced the content of documents*

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<sup>55</sup> Provisional Findings, paras. 3.32 and 8.53(d) (Table 4).

<sup>56</sup> As acknowledged by the CMA at Provisional Findings, para. 9.33(c).

*produced after the Merger was agreed*".<sup>57</sup> However, the CMA does not provide any evidence to support this serious (and untrue) allegation, which is entirely speculative, involves the implausible hypothesis that an entire company might choose to, and be able to, carry on its normal business for a lengthy period on the basis of an assumption about its core markets that was generally known to be false, would fly in the face of the fiduciary duties owed by Sabre's directors, and is directly contradicted by important real-world evidence. The CMA risks making the same mistake that it made in *Preston Bus* where it disregarded Stagecoach's conduct during the 18 months leading up to the merger and the Tribunal found that there was no evidence to support that conclusion (see further Annex 1, paragraphs 1.24 *et seq.*).<sup>58</sup>

- (iv) **Recent testimony in the Delaware Proceedings.** Recent testimony from senior executives at Sabre, Farelogix and third-parties in the Delaware Proceedings also cuts across a number of the CMA's findings which are based on outdated internal documents. For example, testimony from the Delaware Proceedings confirms that future growth will be in GDS pass-through not bypass,<sup>59</sup> NDC has stimulated competition by lowering the barriers to entry,<sup>60</sup> and that Farelogix, with its now legacy technology, is disadvantaged as against new entrants.<sup>61</sup> This begs the question why the CMA persists in relying on outdated, historical documents when more recent evidence is more probative evidence. As expressed by Judge Stark (following eight days of detailed examination, including of the same documents upon which the CMA seeks to rely):

*"...why shouldn't I view all of that as history, as Ms. Carter said, ancient history. Surely, the government is not here to say that, you know, until the end of time we're going to challenge any effort to acquire Farelogix because, you know, they invented NDC back in 2005. Right?"*<sup>62</sup>

***Assessment of forward-looking evidence is asymmetric and inconsistent as between the Parties and third-parties***

- 3.10 The CMA takes an inconsistent approach in assessing the Parties' and their competitors' documentary evidence, and, as a result, over-represents the progress that the Parties are likely to achieve over the next three to five years relative to their competitors. For example, forward-looking and aspirational statements made in Sabre's internal documents are generally taken out of context and misrepresented in order to bolster the CMA's arguments, whilst, in respect of competitors' documents, the CMA is more willing to accept explanations and contextualisations. Further, when assessing the Parties' documents, the CMA typically focusses on evidence of their *incentives* or *intentions* to

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<sup>57</sup> Provisional Findings, para. 9.10.

<sup>58</sup> *Stagecoach Group plc v Competition Commission* [2010] CAT 14 at [106].

<sup>59</sup> *United States v Sabre* Tr. 711:8-16 (Menke), 545:17 – 546:1 (Boyle), 442:6-10 (Davidson).

<sup>60</sup> *United States v Sabre* Tr. 1327:7-20 (Reiz) and 418:19 – 419:4 (Davidson).

<sup>61</sup> *United States v Sabre* Tr. 420:14 – 421:10 (Davidson) and 279:7-16 (Carter).

<sup>62</sup> *United States v Sabre* Tr. 1861:5-10 (Judge Stark).

innovate. By contrast, when assessing competitors' documents, the CMA focusses on evidence of their *ability* to innovate.<sup>63</sup> This asymmetric approach gives the erroneous impression that the Parties will be more successful than their competitors going forward on the basis that they had ambitious plans. The CMA skirts over evidence relating to Sabre's ability to achieve such plans, and ignores recent internal documents demonstrating that Sabre does not have the ability to do so: a recent internal document (produced around [redacted] and submitted to the CMA), for instance, which summarises Sabre's "[redacted]" and cites [redacted].<sup>64</sup> However, as explained in paragraphs 4.4 *et seq.* below, an incentive, or intention to innovate does not necessarily translate into an ability to do so. Further detail is provided at Annex 1, paragraphs 2.4 *et seq.*

***Documents are cherry-picked, mischaracterised or taken out of context to support the CMA's theory of harm***

- 3.11 The Provisional Findings contain multiple instances of the CMA having quoted selectively or misrepresented the documentary evidence. The CMA often takes statements out of context to support its own case, for example by failing to refer to the relevant timeframe, author, or surrounding content. For example, the CMA cherry-picks documents to give the impression that NGR and NGD are treated within Sabre as an integrated solution. The CMA also mischaracterises the Parties' development timeframes as definitive rather than merely aspirational, for example Sabre's internal timetable for the implementation of NGD. Further examples are provided at Annex 1, section 3.

***Feedback from one side of the market is unjustifiably dismissed, with too little attention given to the views of travel agents***

- 3.12 Further, the CMA's analysis relies heavily on the feedback of airlines whilst largely dismissing feedback from travel agents, thereby erroneously focussing on only one side of the market.<sup>65</sup> This is inappropriate for the following reasons. Further detail is provided at Annex 1, section 4.
- (i) The two-sided nature of the distribution market makes travel agents' views invaluable.

The CMA's reasons for according greater weight to airline evidence focus on the fact that airlines make the purchasing decisions.<sup>66</sup> However, the CMA accepts elsewhere that "*it is the travel agents, not airlines, which choose the GDS or channel to make a booking on behalf of passengers*",<sup>67</sup> and, importantly, in any two-sided market (which the CMA accepts Sabre operates in<sup>68</sup>) there is

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<sup>63</sup> As clearly demonstrated by the CMA's asymmetric treatment of [redacted] and Datalex's supposed financial problems (see para. 5.55(ii)).

<sup>64</sup> [redacted].

<sup>65</sup> Provisional Findings, para. 11.17.

<sup>66</sup> Provisional Findings, para. 11.17(b).

<sup>67</sup> Provisional Findings, para. 7.6(d).

<sup>68</sup> Provisional Findings, para. 7.26.

interconnected demand between both sides, and one side of the market cannot exist without the other.<sup>69</sup> The CMA therefore errs in dismissing the travel agent evidence, which is vital evidence from one side of the market that cannot be ignored.

- (ii) Through indirect distribution, travel agents have direct relationships with final customers; airlines do not.

While the CMA disregards travel agents' feedback as they are not Farelogix's customers, by the same logic it should place less weight on airlines' feedback as final customers have no relationship with them when booking via the indirect channel. In this context, travel agents' preferences are the best available proxy for final customer welfare.<sup>70</sup>

- (iii) It is highly inconsistent for the CMA to dismiss the views of travel agents on the basis that they receive incentives from the GDSs, whilst ignoring the motives of airlines which have an obvious interest in maintaining and protecting higher fares and the fact that airlines also pay incentives to travel agencies.

Throughout, the Provisional Findings are entirely credulous towards the submissions of airlines. For example, the CMA takes as axiomatic that consumers would benefit from a greater ability on the part of airlines to gather data on their customers and generate individually-targeted prices and offers.<sup>71</sup> The possibility that airlines would use such functionality to try to limit the price comparison, transparency, and competition that have been the hallmark of the GDSs is ignored.

Importantly, as travel agents have to find the most competitive fares for consumers, they will not use an uncompetitive distribution service and ultimately are more closely aligned with the needs of end-travellers. Conversely, the use of Direct Connect by an airline shields that airline from comparison with competing airlines, thereby incentivising the airline to use the Direct Connect channel in order to circumvent the price competition that results from comparison. This asymmetry in incentives must be taken into account when considering feedback from both airlines and travel agents. Such asymmetry makes airline welfare a poor proxy for consumer welfare and means that travel agent evidence should be given as much, if not more, emphasis than airline evidence.

The failure to consider evidential context is particularly egregious when the CMA states that agents' incentives may skew the evidence (Provisional Findings, paragraph 11.17(d)). Agents' incentives lower their costs of distribution. The unchallenged evidence is that the GDS is a lower cost and higher quality means of distribution for travel agents, and incentives are less important to travel agents

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<sup>69</sup> *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018).

<sup>70</sup> Parties' Response to the Issues Statement, Annex 13 Section 6. We also note that up until the Provisional Findings, it was the CMA's position that travel agents were vital in driving demand for FLX OC. It is only now that the CMA is unable to establish jurisdiction on the basis of travel agents that the CMA considers them unimportant.

<sup>71</sup> Provisional Findings, para. 3.62.

than the benefits of the richness of content and comparison shopping via the GDSs, as well as the mid- and back-office support offered by the GDSs.<sup>72</sup> Direct Connect is prohibitively expensive and typically only forced through by dominant incumbent airlines to their domestic travel agency base (as described in further detail at paragraphs 5.21 - 5.29 below). Travel agents' evidence as to precisely the parameters of competition the CMA seeks to analyse (better quality and lower cost distribution) should therefore outweigh that of airlines (seeking to perpetuate higher cost, lower quality means of serving the indirect channel). Yet the Provisional Findings perversely invert the proper evidential context.

Moreover, the Provisional Findings drastically overstate the importance of incentive payments from GDSs to travel agents, and ignore the fact that airlines also pay incentives to travel agents. As the Provisional Findings make clear, incentive payments received from airlines account for 25% of a travel agent's revenue on average, GDS payments only for 18%.<sup>73</sup> It is therefore simply wrong to assume that travel agents would be biased towards the GDS model because of incentive payments. Further, and as the Provisional Findings note, travel agents' feedback shows that they prefer the GDS model for a variety of reasons relating to its wider functionality: dismissing these genuinely-held views as being motivated by financial incentives is unfair, asymmetric, and unsupported by the evidence.<sup>74</sup>

- (iv) The fact that TAs do not procure merchandising solutions is not a reason to dismiss their views on issues relating to distribution.

The Provisional Findings' assessment of the weight to place on travel agents does not differentiate between distribution and merchandising. While it is true that travel agents will have limited visibility on merchandising solutions, this has no relevance for their role (and evidence) in respect of distribution where they are just as critical to determining which technologies will succeed and at least as invested in competitive outcomes as are the airlines.

The Parties note that, up until the Provisional Findings, it was the CMA's position that travel agents were crucial in driving demand for FLX OC.<sup>75</sup> It is only following the CMA's change in its approach to jurisdiction, which no longer relies on UK travel agents, that the CMA considers the role of travel agents unimportant. Further, the Provisional Findings finds airlines' desire to display differentiated products through effective merchandising as desirable for consumers, for which travel agents are the nearest proxy. Moreover, if the CMA's premises are correct, effective merchandising through the indirect channel should increase agents' booking volumes. So agents have a direct commercial interest in a successful and competitive merchandising market. Travel agents' universally positive views

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<sup>72</sup> Provisional Findings, paras. 10.122 - 10.125.

<sup>73</sup> Provisional Findings, para. 3.45.

<sup>74</sup> Provisional Findings Summary, para. 86.

<sup>75</sup> See e.g. Phase 1 Decision, para. 200 *et seq.*, and Issues Statement, para. 55(g).

of the merger — whether as to merchandising or distribution — are therefore of at least equal importance.

- 3.13 Further, evidence which came to light in relation to AA and United Airlines during the Delaware Proceedings casts significant doubt on the credibility of their evidence – further reinforcing the Parties’ view that over-reliance on the feedback of airlines, who may have ulterior motives, risks exposing the CMA to an asymmetric and distorted view of the market and the evidence. The Parties have no visibility as to the weight which the CMA has attached to individual airlines’ feedback, including AA’s and United Airlines’s. However, the Parties strongly suspect from the detail in Chapter 10 that these airlines feature prominently in the CMA’s assessment.<sup>76</sup> The CMA should exercise caution when reviewing this material as both airlines have strong incentives to oppose the Transaction for reasons having nothing to do with competition law. In particular, [REDACTED].<sup>77</sup> [REDACTED].<sup>78</sup>
- 3.14 The CMA’s focus on the airline-side of the market therefore cannot be the right way to determine the welfare effects of the Transaction when travel agents (which are closer to, and better aligned with, end travellers) have expressed near universal support for the Transaction.

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<sup>76</sup> Provisional Findings, App. F, para.7.

<sup>77</sup> *United States v Sabre* Tr. 321:14- 322:7 (Racliffe). Defendants’ Findings of Fact, para. 182.

<sup>78</sup> [REDACTED]; Post-Trial Brief, p.28.



#### 4. NO SLC IN THE SUPPLY OF MERCHANDISING SOLUTIONS

4.1 The CMA has failed to demonstrate to the requisite legal and evidential standards that an SLC in merchandising is likely. In particular:

- (i) the CMA fails to establish that the *status quo* (where the CMA accepts that Sabre is not a significant competitor to Farelogix) will change in the counterfactual. The real-world evidence demonstrates that Sabre is not a significant provider of merchandising solutions and this is unlikely to change in the future;
- (ii) the CMA fails to take into account the dynamic nature of the market when addressing Sabre's ability to develop a credible merchandising product;
- (iii) the CMA fails to establish that Farelogix would be a uniquely strong competitive constraint and cites no evidence to back-up this assertion. In particular Farelogix is not uniquely placed to be a competitive constraint due to its position as a non-core PSS provider, and in any event Farelogix's growth has now stalled;
- (iv) the CMA's analysis is unduly asymmetric when it assesses the incentives and ability of Sabre to innovate and expand *versus* its competitors; and
- (v) the evidence cited by the CMA demonstrates that there are several credible alternatives to Farelogix, and one of the strongest competitors remains Amadeus, even when unbundled from the core-PSS.

4.2 The CMA's analysis overall errs in overstating the potential competitive threat from Sabre going forward and understating the potential competitive threat from, currently far stronger, rivals. The theory of harm that the CMA advances is improper and unduly speculative in nature and would require overwhelming evidence for the CMA to show that this is a likely outcome. There is no such evidence and accordingly the CMA's finding of an SLC with respect to merchandising is unsupported and wrong. Importantly, the DOJ did not even entertain any theory of harm around merchandising solutions, either during the Second Request or at trial.

***The CMA accepts that Sabre is not a significant competitor currently and fails to establish that the status quo may be expected to change in the counterfactual***

4.3 The CMA concedes that "*Sabre is not a significant provider of merchandising solutions today and has not been competing closely with Farelogix in the provision of these services*".<sup>79</sup> The CMA's concerns are therefore focused on the alleged counterfactual: namely, the expectation that, absent the Transaction, Sabre would have the incentive, intention and ability to develop a credible PSS-agnostic and NDC-compatible

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<sup>79</sup> Provisional Findings, para.11.43. The Parties' have also provided detailed evidence-based submissions and bidding data to demonstrate this point, e.g. see the Phase 2 Initial Submission paras. 4.7 *et seq.* and Parties' Response to the Issues Statement paras. 4.2 *et seq.*

merchandising solution within the next three to five years.<sup>80</sup><sup>81</sup> However, the CMA's counterfactual assessment is flawed for a number of reasons.

*The CMA adopts an erroneously static view of the market when assessing Sabre's ability to develop a credible product*

4.4 The CMA errs in finding that Sabre would have the ability to develop a "credible" merchandising solution within three to five years absent the Transaction. The CMA's view of what constitutes a credible product and/or a competitive timeframe is incorrect in the industry context. It is apparent from the CMA's characterisation of Sabre's timeframe as "relatively short" that it has not given due consideration to how quickly the market is developing.<sup>82</sup>

- (i) As [X] has explained, the [X].
- (ii) Further, [X]<sup>83</sup> [X]. As explained in previous submissions and recognised by the CMA, Sabre has [X] (see further paragraph 3.4 of the Parties' Response to the Issues Statement and the CMA's own evidence at paragraph 23 *et seq.* of Appendix D to the Provisional Findings). A projection of three to five years is highly speculative, in particular because:
  - (a) Greater investment will not necessarily translate into a workable product. It is not simply a case of diverting more resources to the task — [X]<sup>84</sup> [X]<sup>85</sup> Given the limitations in what financial investment can achieve in this context, Sabre's investment plans provide poor evidence of its likely counterfactual position. Examples of the CMA's overreliance on this type of evidence are provided in Annex 1 paragraph 1.8 *et seq.*
  - (b) As recognised by the CMA, reputation is also a key factor.<sup>86</sup> [X].<sup>87</sup>
  - (c) Moreover, despite investing significant resources, Sabre has, over the past years, failed to develop a competitive merchandising product.

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<sup>80</sup> Provisional Findings, paras. 11.24 *et seq.* and 11.44.

<sup>81</sup> Notably, the CMA's approach regarding its analysis of Sabre's incentive to improve and its subsequent conclusions on the counterfactual is drastically different to the conclusion reached in *PayPal/iZettle* when faced with a similar fact pattern. In its Final Report the CMA concluded that PayPal had the incentive and intention to grow its pre-existing product, but the CMA went on to "*recognise the limitations of what PayPal could achieve in the shorter term to enhance PayPal [product] competitive position*" (Final Report, para. 8.102). Such an observation is warranted regarding Sabre's position, however the CMA does not reach this logical conclusion.

<sup>82</sup> Provisional Findings, para. 9.51. and 11.28.

<sup>83</sup> Sabre Hearing Transcript, p. 31.

<sup>84</sup> Dave Moore (Sabre Senior VP Global Product and Platform Development) deposition transcript, p. 141 (18 December 2019).

<sup>85</sup> *United States v Sabre* Tr. 713: 15-18 (Menke).

<sup>86</sup> Provisional Findings, para. 114.

<sup>87</sup> Provisional Findings, Appendix F, paras. 110-111.

[REDACTED].<sup>88</sup> [REDACTED]<sup>89</sup> [REDACTED] rivals such as Datalex, Google/ITA, and PROS are proven leaders in airline.com and revenue management support respectively, experience which can be leveraged into merchandising.<sup>90</sup>

*The CMA takes an asymmetric approach to assessing the incentives and intentions of Sabre and its competitors to grow*

- 4.5 It is also arbitrary and internally inconsistent for the CMA to focus on Sabre's incentives in a vacuum. Even if Sabre could develop a PSS-agnostic and NDC-enabled merchandising product within three to five years, a gap in capabilities would remain as Sabre's competitors will also have moved forward in that time. There is no reason, let alone evidence, to believe that competitors, in particular one of the strongest competitors, Amadeus, will stand still and not react to the competitive actions of their rivals. The CMA cannot simply ignore these basic competitive dynamics. In undertaking a dynamic, forward-looking assessment, as it purports to do, the CMA must, on the contrary, also take into account the incentives that other players will have to innovate and expand in merchandising over the same period.
- (i) Any incentive Sabre may have to develop a stronger merchandising product in order to (i) protect the value of its GDS and (ii) ensure continued value and relevance of the PSS, would apply equally to Travelport (in respect of its GDS), and OpenJaw/Travelsky, and Amadeus (in respect of both).<sup>91</sup>
  - (ii) Independent providers would also have strong incentives to innovate and differentiate their merchandising solutions from those offered by integrated providers, particularly if there is a perception that Sabre, Amadeus and OpenJaw/Travelsky benefit from having established customer relationships.<sup>92</sup> Moreover, if the CMA's theory of harm is correct that it is only an independent GDS or PSS provider that creates competition (a theory which has no credibility and which the Parties strongly deny), then the Transaction will change the intentions, ability and incentive for the remaining independent providers of merchandising solutions to expand, creating an obvious opportunity for them to satisfy the demand currently being met by Farelogix, and an incentive for airlines to support such growth (in circumstances where there is nothing unique or

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<sup>88</sup> [REDACTED], provided at Annex 7 of the Parties' Response to the Issues Statement.

<sup>89</sup> See further the Parties' Response to the Issues Statement, paras. 4.6 *et seq.*

<sup>90</sup> Farelogix Oral Hearing Transcript, pp. 28, 66.

<sup>91</sup> The CMA dismisses Travelport from its counterfactual analysis on the basis that it does not actively market merchandising solutions to airlines (Provisional Findings, para. 11.47). However, [REDACTED]. Regardless of whether Travelport currently has plans to develop its merchandising capabilities, it is in an [REDACTED] than Sabre to do so (especially given that Sabre's progress has [REDACTED], see para. 4.4(ii)(a) above, and is at least [REDACTED] away from developing a credible product).

<sup>92</sup> Provisional Findings, para. 10.11(b) and (e).

unrepeatable about the position Farelogix has developed, see further paragraphs 4.8 – 4.12 and 4.18 *et seq.* below).<sup>93</sup>

- 4.6 The CMA's failure to recognise the incentives and intentions of other players to also grow in merchandising is a result of its asymmetric treatment of the evidence. The CMA focusses on Sabre's internal documents without taking into account the fact that internal documents describing its aspirations to launch a new merchandising product will naturally give greater attention to the launch of a new (or entirely reconstructed) product than to incremental improvements to a current one. These incremental improvements by existing providers of NDC-enabled PSS-agnostic merchandising solutions will occur in the ordinary course year on year, however the investment sums required will be far smaller and will therefore receive less attention in internal documents. Further examples of the CMA's asymmetric approach to assessing the documentary evidence provided by Sabre and its competitors are provided at Annex 1.
- 4.7 The CMA does not seek to investigate these central factual issues. Instead, the Provisional Findings consider the positions of Sabre's channel-agnostic competitors, other than Farelogix, by reference to (i) their current competitive positions and (ii) their current intentions, ability and incentive to expand.<sup>94</sup> This is entirely inadequate in the context of a dynamic market. The Merger Guidelines state "*The potential response of other suppliers to any attempt by the merged group to increase price can also have an effect on pricing incentives.*"<sup>95</sup> This is a crucial issue that is wholly overlooked in the Provisional Findings.
- 4.8 The CMA's own evidence confirms that a number of competitors, including independent players, are already [redacted] and there is no reason to expect this to change absent the Transaction. The CMA's own evidence confirms that the following suppliers are technologically superior to Sabre:
- (i) Amadeus, Datalex, OpenJaw/Travelsky and Google/ITA all already offer NDC-compatible merchandising solutions. Datalex, OpenJaw/Travelsky and Google/ITA also offer merchandising solutions on a PSS-agnostic basis.<sup>96</sup> With respect to Amadeus, see Confidential Annex 5, paragraph 1.
  - (ii) Airline responses to the CMA's questionnaire also highlight the superior functionality of other suppliers' products. For example, [redacted] and another airline noted that "*Amadeus has the best capabilities with a complete suite of products that have already developed Full Enterprise Merchandising functionality.*" Etihad also submitted that "*PROS is building unique Merchandising capabilities with*

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<sup>93</sup> Google/ITA also acknowledged this, stating "*it is difficult to predict how its merchandising services will grow*" (Summary of Hearing with Google/ITA held on 15 October 2019).

<sup>94</sup> Provisional Findings, paras. 11.48 and 11.49.

<sup>95</sup> Merger Guidelines, para. 5.4.11.

<sup>96</sup> Provisional Findings, paras. 8.33 and 8.96.

*Machine Learning powered recommendation engine which is unlike most of the other Merchandising (rule base) engines in the market place.”<sup>97</sup>*

- (iii) Sabre’s comparative weakness in merchandising is also recognised by other suppliers. For example, [REDACTED]<sup>98</sup> [REDACTED].<sup>99</sup>

4.9 The CMA fails to provide evidence that, absent the Transaction, Sabre would innovate at a faster pace than these other players. On the contrary, and most importantly, **only six out of 19 airlines responding to the CMA’s questionnaire expected Sabre to become stronger in merchandising absent the Transaction, whilst 17 out of 19 expected Amadeus to become stronger.**<sup>100</sup> The responding airlines also identified a number of other players as credible alternatives, including Datalex, OpenJaw/Travelsky, Google/ITA, PROS, JR Technologies, and TP Connects. In respect of each of these, at least some of the responding airlines noted that they expected to see growth in their merchandising solutions. Throughout the Provisional Findings the CMA defers to the views of airlines; it is therefore particularly important to give here due regard to the fact that airlines’ views do not support the CMA’s provisional conclusion on Sabre’s position in merchandising absent the Transaction.

4.10 To further illustrate the point, Figure 4.1 shows how just three of these competitors – Amadeus, OpenJaw/Travelsky and PROS – have developed and refined their airline merchandising offerings over the past 12 months, adding further features to their existing products. Figure 4.1 is non-exhaustive and contains only selective examples, but already clearly demonstrates the highly dynamic nature of the market. There is nothing to suggest that these players will not continue along the same trajectory.

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<sup>97</sup> Provisional Findings, Appendix F, paras. 113(a) and 126; [REDACTED].

<sup>98</sup> [REDACTED].

<sup>99</sup> Provisional Findings, para. 9.61(b).

<sup>100</sup> Provisional Findings, Appendix F, para. 113.

**Figure 4.1**  
**Examples of competitors' advancements in airline merchandising in 2019**

**Amadeus:**



**OpenJaw/Travelsky:<sup>101</sup>**



**PROS:**



Source: Public information and the Parties' market insights.<sup>102</sup>

4.11 The CMA's own evidence suggests that those other competitors will not only maintain their current trajectories, but in fact accelerate their investment and pace of development in merchandising in the near term. PROS, in particular, is expected to invest further in merchandising because this is a relatively new offering for the company. Five airlines responding to the CMA's questionnaire identified PROS as a player that will become stronger in merchandising, highlighting its recent acquisition of a shopping tool, and current efforts to improve solution and revenue optimisation capabilities.<sup>103</sup> The CMA has also been informed of another player's significant and imminent development plans in this space – see Confidential Annex 5, paragraph 1.

4.12 Fundamentally, the CMA fails to establish how Sabre, a company [X], and which the CMA accepts is still today a [X], is likely not only to succeed where it has failed to do so previously in developing an NDC-enabled PSS-agnostic solution in the next three to five

<sup>101</sup> 15below is a technology company specialising in automated passenger communications for the travel industry.

<sup>102</sup> For Amadeus: <https://amadeus.com/content/dam/amadeus/documents/en/travel-industry/infographic/travel-content-in-amadeus-2019-highlights-Infographic.pdf>; for OpenJaw/Travelsky: <https://www.openjawtech.com/openjaw-announces-new-customers-new-platforms-new-partnerships-new-products-at-annual-global-travel-summit-in-lisbon/>; For PROS: <https://resources.pros.com/artificial-intelligence/elton-d-souza-tap-air-portugal-customer-testimonial/>; <https://resources.pros.com/case-studies-testimonials/european-airline-industry-trends-2019/>; <https://pros.com/news/pros-launches-integrated-retail-platform-for-airlines-shift-to-digital-selling/>; On-stage announcement at an ATPCO Conference on 1 October 2019.

<sup>103</sup> Provisional Findings, Appendix F, para. 126.

years, but also [redacted] its multiple competitors in other respects in merchandising. This is simply not credible: as Sabre's VP for NDC Solutions, [redacted], testified to the DOJ: "[redacted]".<sup>104</sup>

*The CMA should not pursue a long-term and speculative theory of harm*

- 4.13 As demonstrated in paragraph 4.4 above, the CMA's theory of harm rests on a series of highly speculative assumptions. The CMA's three to five year counterfactual period is also longer than the two to three year period typically considered in forward-looking theories in a merger control context.<sup>105</sup> Further, taking into account a realistic time-to-market, the CMA's concerns would only crystallise, if at all, towards the end of the three to five year period.
- 4.14 While merger review is necessarily a prospective assessment,<sup>106</sup> that is not to say that competition authorities should speculate without limitation as to hypothetical or theoretical potential consequences of a merger that may arise at some point in the future. The CMA bears a crucial responsibility to execute its analysis with great care: it should reach its conclusions only on those chains of cause and effect which are the most likely to occur, as outlined above at paragraph 3.4.<sup>107</sup> That necessarily requires limiting the merger analysis to a finite timeframe within which the CMA can reasonably predict, assess, and substantiate with some degree of certainty, the likely positive or negative effects of a merger.
- 4.15 The CMA itself confirms this approach for other elements of its merger analysis. For instance, the CMA will only consider merger-specific efficiencies that are timely, likely, and sufficient to prevent an SLC.<sup>108</sup> Similarly, the CMA will only deem customer benefits to be relevant if they have accrued or are expected to accrue to relevant customers in the UK within a reasonable period from the merger.<sup>109</sup> If the CMA has identified a specific timeframe for certain elements of its analysis, that timeframe should be applied to its analysis of the merger as a whole: it would be inappropriate for the CMA to adopt different timeframes depending on the effect that it seeks to establish in any given part of its merger review.
- 4.16 Given the dynamic nature of the market for merchandising solutions where: (i) new or improved capabilities are launched every few months;<sup>110</sup> and (ii) the market appears to be susceptible to disruption (for example, airline retailing changed dramatically after

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<sup>104</sup>[redacted], p. 154.

<sup>105</sup> J. Parker and A. Majumdar, *UK Merger Control* (2<sup>nd</sup> ed. 2016) at 9.3.1, typically the period that the CMA can consider when looking at what future events are likely to occur "on the balance of probabilities".

<sup>106</sup> Merger Assessment Guidelines, para. 4.1.3: The CMA will "*consider any merger in terms of its effect on rivalry over time in the market or markets affected by it*" (emphasis added).

<sup>107</sup> Case C-12/03 P, *Commission v Tetra Laval* [2005] ECR I-987, para. 43 and Case C-413/06 P, *Bertelsmann and Sony Corp v Commission* [2008] ECR I-4951, para. 47.

<sup>108</sup> Merger Assessment Guidelines, para. 5.7.4(a).

<sup>109</sup> Section 30(2) and (3) of the Act.

<sup>110</sup> For example, the IATA Passenger Standards Conference approves new NDC standards at least twice a year (Michael Tye Radcliffe (United Airlines), Day 1 Trail Transcript, p. 194); see also Figure 4.1 above.

ancillary products took popularity in 2010, and again following the publication of IATA's NDC standard in 2015 and the introduction of the first scalable and workable schema version 17.2 in 2017), no more than a short to medium-term timeframe is appropriate to consider the likely effects of this Transaction. Beyond that, the likely chains of cause and effect become too uncertain and difficult to establish (as evidenced by the divergent predictions of in-market experts, namely airlines and travel agents). Accordingly, any potential effects falling outside this timeframe should have lesser weight attached to them, and the later the effect is expected to materialise, the lesser that weight should be.

- 4.17 In any event, the CMA should attach negligible weight to a theory of harm that is only expected to arise for a very short period (if at all) at the very end of the CMA's three to five year time period for examination of the competitive effects of the Transaction, given in particular that it cannot adduce sufficient evidence to support that theory. Further, a speculative theory of harm of this nature would require overwhelming evidence for the CMA to show that this is a likely outcome. There is no such evidence.

***The CMA fails to establish that Farelogix would be a uniquely strong competitive constraint***

- 4.18 The CMA finds that the Transaction would “*remove the only significant independent, channel-agnostic, provider of merchandising solutions, which [it] considers to be an important attribute in driving innovation in ... NDC-compatible merchandising*”.<sup>111</sup> However, the CMA fails to establish that being “independent” would make Farelogix a uniquely strong disruptor or that, among independent players, Farelogix would be expected to perform materially better than others in the three to five year period which the CMA has adopted for the purpose of its counterfactual. The CMA also errs in finding that Farelogix would be the only significant independent supplier despite the fact that a number of airlines recognise other independent suppliers as credible alternatives (see paragraph 4.27 below).

***Being a non-GDS supplier does not make Farelogix more disruptive***

- 4.19 The CMA erroneously concludes that a key driver for Sabre to improve its merchandising solution is the need to protect the value of its GDS.<sup>112</sup> The CMA also asserts that Sabre and Amadeus have weaker incentives to develop products that will diminish the value of their existing GDS businesses than channel-agnostic providers, such as Farelogix.<sup>113</sup> However, these conclusions are based on the flawed premise that NDC-enabled merchandising is somehow connected to and capable of diminishing the value of Sabre's GDS. This is not correct:

- (i) It is self-evidently wrong that GDSs develop merchandising products that prefer their own route to market.<sup>114</sup> Sabre's Dynamic Retailer was developed in 2013-2014, and was developed as entirely independent from indirect distribution and

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<sup>111</sup> Provisional Findings, para. 11.51.

<sup>112</sup> Provisional Findings, para. 11.25.

<sup>113</sup> Provisional Findings, para. 11.46.

<sup>114</sup> Provisional Findings, para. 11.46.



NDC, and only works with the direct channel and not the indirect channel via the GDS. On the CMA's theory, Sabre should have done the opposite. Sabre instead was only concerned with providing a technology product to airlines to allow airlines to sell their products and services across different channels. Moreover, to have any credibility, this theory would have to show there was no effective competition to provide merchandising via the direct channel. Rather, it is precisely the direct channel that has pioneered the offering of differentiated products and there is ample airline in-house and third-party expertise serving that segment. By contrast, it is the GDSs that need to catch up by NDC adoption to enable consumption of differentiated product offerings or risk losing further volume to airline.com.

- (ii) If the GDS self-preferencing theory had any credibility then providers of PSS solutions and GDS distribution would have had the same, if not greater, incentives to bundle their propositions or engage in self-preferencing. Yet none have done so. Airlines do not procure on the basis of a single integrated solution and, therefore, the value of the GDS and merchandising solution do not affect each other. As explained at paragraphs 2.18 *et seq.* of the Parties' response to the Working Paper on NDC-enabled retailing and distribution, the procurement processes for an airline's GDS and its non-core modules are distinct, with separate negotiations and contract cycles. Airlines have also confirmed this. For example, [REDACTED]<sup>115</sup>
- (iii) To pose a threat to the value of the GDS, an NDC-enabled merchandising module would have to be capable of replacing the functionality of the GDS. This is plainly not the case, even if, as the Provisional Findings postulate, NDC solutions could lead to "*shifting control of offer creation to the airline.*"<sup>116</sup> As explained in previous submissions, there is no doubt that GDSs will remain important to airlines, given the scale of their networks and their offerings in terms of fulfilment and after-sales support.<sup>117</sup>
- (iv) The CMA's premise is not supported by the documentary evidence. The CMA quotes selectively from internal documents to attempt to demonstrate that Sabre considered the value propositions of its merchandising and distribution solutions as interlinked. However, as explained in detail in Annex 1, the CMA misrepresents Sabre's position by relying on outdated documents (see paragraph 1.7 *et seq.* of Annex 1) or failing to contextualise the relevant statements (paragraph 3.19 of Annex 1). In fact, as explained in one strategy presentation, Sabre's view was that "[REDACTED]".<sup>118</sup>
- (v) Once again, the Provisional Findings fail to reconcile their theory of harm with the price paid for Farelogix. Sabre valued the merchandising component of FLX in a standard manner using Discounted Cash Flow (DCF) or comparator analysis. If

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<sup>115</sup> [REDACTED].

<sup>116</sup> Provisional Findings, para. 9.23.

<sup>117</sup> See the Response to the Working Paper on NDC-enabled Retailing and Distribution, para. 3.3.

<sup>118</sup> [REDACTED], (SABR-002048511), dated 15 August 2017, p. 8.

the need to build a merchandising solution were as existential as claimed by the CMA for protecting Sabre's GDS business one would have expected evidence of a "market power premium" that the CMA accepts does not exist.

4.20 For Sabre, the incentive to develop NGR (including merchandising) alongside NGD [REDACTED] (as outlined further at paragraph 4.19(i) above). [REDACTED]<sup>119</sup> Therefore, the fact that Sabre considered it advantageous to develop NDC-enabled merchandising and NDC-enabled distribution in parallel does not support the proposition that it considered either one capable of diminishing the value of the other. The fact that Amadeus has already established a strong position in NDC-enabled merchandising also contradicts the CMA's theory that integrated players would have weaker incentives to develop merchandising solutions.

4.21 The CMA fails to establish, therefore, that the removal of Farelogix as a channel-agnostic supplier would reduce the pace of innovation in merchandising relative to the counterfactual scenario. On the contrary, the Parties have demonstrated in their previous submissions that the Transaction will stimulate innovation both in NDC generally and merchandising specifically.<sup>120</sup> This view is also shared by Sabre's competitors – for example, see Confidential Annex 5, paragraph 2.

*Being a non-PSS supplier does not make Farelogix more disruptive*

4.22 The CMA also fails to establish that being independent from the core PSS makes Farelogix a uniquely strong innovator. Similarly, there is no evidence that integrated players like Sabre and Amadeus have weaker incentives to develop their merchandising technology. The core PSS is distinct in terms of functionality and value from the merchandising solution (which is, in any case, just one of dozens of components that make up an airline's broader retailing solution and is not capable of generating unique competitive strength):

(i) The future is one of "best-of-breed" procurement. As [REDACTED].<sup>121</sup> Sabre's PSS is interoperable with third-party merchandising modules, so airlines may switch away from Dynamic Retailer. The value of Sabre's core PSS is not diminished as a result. Chris Boyle, Vice President of Corporate Development at Sabre, described the independence of the two products during his DOJ testimony:

*"Q. And is it fair to say that part of what's happening in the marketplace is someone like Farelogix developing merchandising engines and other offer management systems that replace functionalities of the PSS? A. ...we think of sort of core PSS and then things that surround it, so it doesn't replace things that are in the core PSS."<sup>122</sup>*

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<sup>119</sup> [REDACTED].

<sup>120</sup> See e.g. the Response to the Working Paper on NDC-enabled retailing and distribution, para. 1.4(v); Phase 2 Initial Submission, paras. 1.11 *et seq.*

<sup>121</sup> Travelport's response to Question 11 of the CMA's questionnaire.

<sup>122</sup> [REDACTED] deposition transcript, p. 98 (21 May 2019).

- (ii) Even if the value propositions of Sabre’s core PSS and merchandising solution were interlinked (which the Parties deny), the merchandising solution is such a small component of the non-core PSS commercial stack that its impact on a supplier’s broader retailing solution is negligible. The CMA comes to a different view by mischaracterising Sabre’s evidence. The CMA should not conflate “NGR” or “retailing”, which is a broader concept, with “merchandising”. Merchandising is just one of dozens of components that make up an airline’s retailing solution and relates only to the *packaging* of products for sale.<sup>123</sup> Nor is it a critical component for airlines, some of which obtain very limited value-add from use of the product. As [REDACTED] explained:

“[REDACTED].”<sup>124</sup>

- 4.23 As a core PSS has standalone value that is not diminished by third-party NDC merchandising, integrated players do not have weaker incentives to develop such technology. In fact, post-Transaction, Sabre would have both: (i) a strong incentive to preserve the interoperability of FLX M (and the CMA itself accepts that a compelling reason for obtaining a PSS-agnostic solution is to allow Sabre to target non-core PSS customers)<sup>125</sup>; and (ii) the resources to develop FLX M [REDACTED] than in the counterfactual scenario, [REDACTED] (see further below).

*Farelogix’s [REDACTED]*

- 4.24 [REDACTED]. Detailed submissions on this point have been made in the Phase 2 Initial Submission (paragraphs 5.12 *et seq.*), the Parties’ Response to the Issues Statement (Annex 2) and at paragraphs 5.96 – 5.99 below.
- 4.25 The CMA’s finding that FLX M would continue to improve and compete effectively absent the Transaction is unsupported by evidence, and contradicted by information received during its investigation:
- (i) The CMA misrepresents the comments made by Jim Davidson at Farelogix’s hearing when it notes that Farelogix’s [REDACTED] would only affect FLX OC.<sup>126</sup> [REDACTED].<sup>127</sup>
- (ii) The CMA makes inaccurate statements, e.g. [REDACTED].<sup>128</sup> This statement is made in reference to a single opportunity that is not closed, and which Farelogix has not therefore “won”, as has been explained to the CMA on several occasions.

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<sup>123</sup> As demonstrated by Sabre in its Site Visit Presentation, slides 39-42.

<sup>124</sup> [REDACTED] deposition transcript, pp.23-24 (13 December 2019).

<sup>125</sup> Provisional Findings, para. 9.25.

<sup>126</sup> Provisional Findings, paras. 11.32 and 11.33.

<sup>127</sup> Farelogix hearing transcript, p. 19.

<sup>128</sup> Provisional Findings, para. 11.42.

- (iii) The CMA also asserts that “to the extent that Farelogix was [redacted] did not prevent it from competing for new customers”.<sup>129</sup> The evidence clearly shows that Farelogix’s [redacted] (according to feedback from the airline customer in question).<sup>130</sup> Farelogix has had also [redacted].<sup>131</sup>

4.26 Further, the statement in the Provisional Findings that Farelogix supplies FLX M to the majority of the 20 largest network carriers in the UK is selective and misleading.<sup>132</sup> This analysis excludes five of the largest UK airlines including EasyJet (top 2), Ryanair (top 3), Jet2 (top4), Flybe (top 5) and Wizz Air (top 8), [redacted]; the majority use the market leading PSS provider, Amadeus. These airlines account for 54% of total passengers within the top-20 list. Therefore, the CMA’s statement that FLX provides merchandising to the “next [after IAG] five largest airline groups with operations in the UK” is wrong and overstates FLX’s actual position: [redacted]. Overall [redacted]% of UK bookings made by top-20 airlines is accounted for by IAG Group and four main low-cost airlines, all of which do not use FLX for merchandising (or distribution).

***The CMA fails to establish that Farelogix is the only significant independent supplier – its own evidence demonstrates there are credible alternatives***

4.27 In any case, there are a number of other strong independent providers of merchandising solutions, including Datalex, OpenJaw/Travelsky,<sup>133</sup> Google/ITA, PROS, JR Technologies, and TP Connects. The CMA’s market evidence confirms that [redacted], and (as explained at paragraph 4.4 above) there is no evidence to suggest that Sabre would have the ability, in the next three to five years, to catch up and overtake them as the CMA suggests.

- (i) The CMA’s market share estimates for merchandising put a number of competitors above Sabre (0-5%) on the basis of PBs excluding self-supply, including: Amadeus, OpenJaw/Travelsky, Google/ITA and Datalex (all 5-10%).<sup>134</sup> On the basis of revenue shares these suppliers were also each comparable to or larger than Sabre.
- (ii) The CMA’s own bidding data demonstrates that Sabre is [redacted]:
  - (a) According to the CMA’s bidding analysis, between 2014 and September 2019, the Parties together won [redacted]% of unbundled merchandising bids – [redacted]. Datalex, Google/ITA and PROS each won a [redacted] on a weighted by PBs basis, and PROS won a [redacted].<sup>135</sup> Indeed, the CMA’s own data

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<sup>129</sup> Provisional Findings, para 9.133.

<sup>130</sup> See [redacted].

<sup>131</sup> See [redacted].

<sup>132</sup> Provisional Findings, para. 8.46.

<sup>133</sup> OpenJaw is owned by Travelsky, which operates a PSS.

<sup>134</sup> Provisional Findings, Appendix H, Table 11.

<sup>135</sup> Provisional Findings, Appendix H, Table 1.

shows that Farelogix's closest competitor was [redacted] (present in [redacted]% of all bids and winning [redacted]% of them). Moreover, all of the other players listed by the CMA (Datalex, Google/ITA, OpenJaw/Travelsky, Pros/Vayant, and DXC) [redacted]. Further, these competitors' shares are likely to be understated because [redacted]% is assigned to the "Unknown" winner category, none of which will be attributable to the Parties. This is consistent with the bidding data presented by the Parties<sup>136</sup> where, combining the datasets of Sabre and Farelogix, it is clear that Datalex, Google/ITA, and PROS are the most frequent other bidders and are exercising the greatest competitive constraint in merchandising. Further detail regarding the merchandising bidding data in the Provisional Findings is included in Confidential Annex 5, paragraph 3.

- (b) Moreover, as outlined by the Parties in the Response to the Issues Statement (paras 4.10 *et seq.*), Amadeus is also one of the strongest competitors for merchandising, even when unbundled from the core-PSS, and Farelogix has recorded competing head-to-head against Amadeus in a number of RFPs.
- (iii) Responses to the CMA's customer questionnaire show that airlines also recognise other strong independent players. As explained in paragraph 4.9 above, respondents identified Datalex, OpenJaw/Travelsky, Google/ITA, PROS, JR Technologies, and TP Connects as credible alternatives to the Parties. Anecdotal evidence from airlines also shows that Google/ITA and PROS are, in particular, seen as very credible players by major airlines (see paragraph 4.8(ii) above). PROS in particular offers Travelaer, a component which enables PROS to offer an airline retailing platform along with an integrated e-commerce platform, increasing their position as a strong independent and highly credible player. If the Transaction resulted in a worsening of the merged group's offering, these independent players would have every reason to expand into the opportunity presented to them, and airlines would have every reason to support those players.<sup>137</sup>
- (iv) Further, as explained in Sabre's Response to the Working Paper on Current Competition in Merchandising (page 49) and the Response to the Issues Statement (paragraphs 4.42 *et seq.*) most of these alternative suppliers are significantly better placed than the Parties to drive forward innovation in merchandising. [redacted].<sup>138</sup>

4.28 Further, the CMA cannot disregard the significant competitive constraint posed by Amadeus both currently and in the counterfactual scenario. The fact that Amadeus operates a GDS and PSS does not render it any less disruptive — see paragraph 4.23 above. As the CMA acknowledges, the strength of Amadeus is supported by the fact that "*most competitors, including the Parties, monitor and identify it as a main competitive*

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<sup>136</sup> Parties' Response to the Issues Statement, para. 4.30.

<sup>137</sup> See Merger Assessment Guidelines, para. 5.4.11.

<sup>138</sup> Provisional Findings, para. 9.61(a)-(b).

*threat, and nearly all airlines consider it to be one of the leading providers of merchandising solutions.”<sup>139</sup>*

- 4.29 There is simply no evidence that these competitors would suddenly fall behind the Parties. Even if independence were an important attribute, many strong alternatives would remain on the market and would surely seek (with support from airlines) to expand to fill the gap created by Farelogix ceasing to be “independent”.

***Conclusion – SLC finding in merchandising is wrong***

- 4.30 The CMA has failed to demonstrate to the requisite legal and evidential standards that an SLC in merchandising is likely and, in particular, has approached the dynamic assessment of competition in an asymmetric and inconsistent way which, contrary to the CMA's assertions that its analysis is cautious and risks overstating the importance of competitors, has instead resulted in it overstating the potential competitive threat from Sabre going forward and understating the potential competitive threat from rivals both generally and in response to any post-Transaction SLC.
- 4.31 In short, the CMA's theory of harm which rests on a fundamental reversal in Sabre's and the competing merchandising providers' market position going forward, is so implausible that it would require overwhelming evidence for the CMA to show that this is a likely outcome in the counterfactual. There is no such evidence and accordingly the CMA's finding of an SLC with respect to merchandising solutions is unsupported and wrong.

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<sup>139</sup> Provisional Findings, para. 11.45.

## 5. NO SLC IN THE SUPPLY OF DISTRIBUTION SOLUTIONS

- 5.1 The CMA's finding of an SLC in the supply of distribution solutions is fundamentally flawed.
- 5.2 The Parties do not compete in the indirect distribution channel. A GDS and an API enabling an airline to offer a Direct Connect are fundamentally different products which are, for all practical purposes, not substitutable with one another (as outlined previously in, for example, the Phase 2 Initial Submission, paragraph 5.1 *et seq.* and the Parties' Response to Issues Statement paragraphs 5.1 - 5.8). The Parties therefore reserve their position as to the correct relevant product market. However, even on the CMA's proposed relevant market, the CMA's finding of an SLC in the supply of distribution solutions is fundamentally flawed.
- 5.3 The CMA has failed to demonstrate that an SLC in distribution is likely, in particular because it has approached its analysis of the competitive constraints from the Parties on the one hand, and from rivals on the other hand, in an asymmetric and inconsistent way.
- 5.4 The evidence is clear that (i) Farelogix's share of bookings is, and will remain, *de minimis* and the Parties are not close competitors; (ii) the counterfactual is unlikely to be significantly different from the *status quo* (save to the extent that Farelogix's relevance as an NDC API provider is only likely to decrease); (iii) Farelogix is not a significant competitive constraint; (iv) Farelogix has many NDC API competitors; and (v) other important competitive constraints exist.

### ***Farelogix's market share is de minimis currently and the Parties are not close competitors***

- 5.5 The CMA itself accepts that "*unilateral effects are more likely where the merger eliminates a significant competitive force or where customers have little choice of alternative suppliers*".<sup>140</sup> However, in this case: (i) Farelogix is not a significant competitive force in the supply of distribution solutions to airlines; and (ii) customers have many options for alternative suppliers.
- 5.6 The CMA's own Guidance states that "*The combined market shares of the merging business, when compared with their respective pre-merger market shares, can provide an indication of the change in market power resulting from the merger*".<sup>141</sup> In this case, as the CMA recognises,<sup>142</sup> the Transaction results in only a negligible increase in share from [x] % to [y] %. This is *de minimis* and cannot on any reasonable interpretation be expected to result in the elimination of a significant competitive force and, by extension, an SLC. Tellingly, the CMA does not refer at all to market shares in its "*Assessment of distribution*" section of the Provisional Findings.<sup>143</sup> It is clear that Farelogix's market share in distribution is tiny, and the bidding data and qualitative evidence confirms competition

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<sup>140</sup> Provisional Findings, para. 7.23.

<sup>141</sup> CMA18, *A Quick Guide to UK Merger Assessment* (March 2014), at 3.8.

<sup>142</sup> Provisional Findings, Table 9.

<sup>143</sup> Provisional Findings, paras. 11.54 - 11.66.

from multiple suppliers other than the Parties. As a result, the CMA's own indication of unilateral effects does not apply.

- 5.7 Further, the CMA also does not refer to its Guidelines discussing loss of competition in mergers between providers of differentiated products, which identify closeness of substitution as the first relevant factor for consideration.<sup>144</sup> The CMA rightly recognises that the GDSs are closer competitors to one another than Farelogix and Sabre (*"the documents indicate that the GDSs primarily monitor each other"*);<sup>145</sup> that Sabre does not offer the same type of distribution product which Farelogix offers (and *vice versa*);<sup>146</sup> and that Sabre and Farelogix are not close substitutes for one another.<sup>147</sup> However, the CMA does not factor this conclusion on the lack of closeness of competition between the Parties into its competitive assessment as required by its own Guidance.
- 5.8 The CMA's approach in this case is notably inconsistent with the position it has recently taken in *Roche Holdings/Spark Technologies*, a merger between providers of differentiated pharmaceutical products.<sup>148</sup> Although it is only a Phase 1 decision, there are direct parallels between it and this case. The CMA found that Spark was not a particularly close or significant constraint on Roche, as there were other relevant pharmaceutical treatments that competed more closely with Roche's product.<sup>149</sup> The CMA reached this conclusion through the analysis of the views of consumers of the relevant products, as well as an analysis of relevant competing products. The CMA expressly stated, as in the Provisional Findings for the Transaction, that *"unilateral effects are more likely where customers...have little choice of alternative supplier"*, then went on to identify a number of alternative suppliers *"taking a forward-looking approach"* regarding the constraint that they would pose, and compared to the constraint that Spark would pose on Roche.<sup>150</sup> This analysis led the CMA to conclude that there were multiple alternative suppliers and that customers did not view the merging parties' products as close competitors.
- 5.9 The CMA in this case is faced with empirical evidence demonstrating the persistently low rate of growth of Direct Connect over the last decade, significant evidence of a large number of alternative suppliers (many more than in *Roche Holdings/Spark Technologies*), and testimony from the Parties, competitors, and customers (in particular, travel agents) that Farelogix and Sabre are not close competitors. Nonetheless, the CMA chooses to disregard this information, preferring instead to focus on selective historic documents —

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<sup>144</sup> CC2, *Merger Assessment Guidelines* (September 2010), at 5.4.9.

<sup>145</sup> Provisional Findings, para. 10.39.

<sup>146</sup> Provisional Findings, para. 6.30.

<sup>147</sup> Provisional Findings, para. 11.56. The criteria set out in the CC's *Merger Assessment Guidelines* (September 2010), at para. 5.2.15 also imply that the Parties' relevant services are not close substitutes. The Parties' relevant services differ in terms of product characteristics, price, development of sales volumes etc.

<sup>148</sup> CMA Phase 1 Decision in *Roche Holdings/Spark Technologies* (10 February 2020), [https://assets.publishing.service.gov.uk/media/5e3d7c0240f0b6090c63abc8/2020207 - Roche Spark - non-confidential\\_Redacted-.pdf](https://assets.publishing.service.gov.uk/media/5e3d7c0240f0b6090c63abc8/2020207_-_Roche_Spark_-_non-confidential_Redacted-.pdf).

<sup>149</sup> *Ibid.* at paras. 9, 130 – 142 and 187 – 190.

<sup>150</sup> *Ibid.* at para. 189.



despite purporting to undertake a dynamic, forward-looking assessment and despite the fact that subsequent market developments have shown the statements relied upon by the CMA from these old documents to be wrong (see further below at paragraphs 5.34 *et seq.* and Section 3, above). The CMA was comfortable in *Roche Holdings/Spark Technologies* to rule out the reasonable prospect of an SLC in Phase 1 based on a smaller number of competitors. In this case, after being presented with substantial evidence of a diverse field of strong and growing competitors, the CMA apparently considers it reasonable to entirely disregard such competitors despite the higher standard of proof required to find an SLC at Phase 2.

***Farelogix is not a strong competitive constraint***

5.10 The CMA finds that the Transaction would remove Farelogix as a “*material competitive threat to the GDSs*”, in particular because “*GDS bypass products will grow, and there is scope for this growth to be significant*”.<sup>151</sup> However, the CMA’s analysis of Farelogix as a material competitive constraint is flawed for a number of reasons:

- (i) the potential growth of GDS bypass products is not borne out by its own market investigation;
- (ii) the CMA refers to Sabre projecting “*strong growth*” for Farelogix’s distribution business, but fails to put this into proper context, as even on the most optimistic forecast Farelogix would remain a miniscule player and even “*significant*” growth, would be insufficient to give rise to any more than a trivial overlap. Farelogix would need to grow exponentially, which it has never achieved in the past ten years;
- (iii) the CMA ignores feedback from travel agents demonstrating that neither Farelogix nor Direct Connect exert a significant competitive constraint; and
- (iv) the CMA overstates the importance of Farelogix relative to other NDC API rivals and fails to justify why Farelogix will be a particularly strong future competitive constraint on Sabre when compared to other, potentially more significant, players.

***Limited constraint from Direct Connect overall***

5.11 The CMA fails to evidence any of its claims that Direct Connect (and in particular GDS bypass) will grow to any material extent, and the CMA fails to put any of its claims of growth into context.

5.12 As the Parties have demonstrated previously, Direct Connect has been in the market for over a decade without gaining any significant market share, and there is no indication that this will change going forward (see paragraphs 5.26 – 5.29 of the Phase 2 Initial Submission, paragraphs 5.21 - 5.22 of the Parties’ Response to the Issues Statement, and pages 2-3 of the Parties’ Response to the Working Paper on Current Issues in Distribution). The share attributable to Direct Connect, across all providers, is minimal —

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<sup>151</sup> Provisional Findings, para. 11.57.

estimated to be approximately 3% by T2RL.<sup>152</sup> This is consistent with the views of industry experts, and is also consistent with the CMA's own evidence in the Provisional Findings. Notably, the CMA's own evidence from the top 20 airlines shows that Direct Connect is <5% for all carriers.<sup>153</sup> Importantly, of that <5%, Farelogix [ $\times$ ]. For further analysis of the views of competitors regarding Direct Connect see Confidential Annex 7.

5.13 To the extent that NDC API usage is likely to increase going forward, it is clear from the Parties' documents and sworn testimony in the Delaware Proceedings that GDS pass-through represents the vast majority of the growth. The reality is that the industry is now moving towards greater adoption of GDS integration of NDC capabilities (see para. 5.36(i) below).

5.14 Testimony from the Delaware Proceedings also makes it clear that Sabre does not view Direct Connect as a constraint. For example, Sabre's CEO Sean Menke testified:

(i) *"You know, FLX OC when I look at direct connect, I haven't seen that as a threat".*<sup>154</sup>

(ii) *"When I look at Direct Connect, I do not see that as competitive at all. That's something that has been around for a long period of time. The traction isn't there."*<sup>155</sup>

(iii) *"THE COURT: Was there any time that you came to Sabre that you viewed Farelogix as a competitor in any way other than with respect to merchandising? WITNESS: No."*<sup>156</sup>

5.15 Direct Connect has limited effect as a constraint on the GDS, primarily because transactions through Direct Connect are significantly more expensive for travel agents and lack functionality compared to transactions through the GDS. As Susan Carter (Senior VP of Marketing, Farelogix) explained in the Delaware Proceedings: *"the only way that the airlines could drive volume through the Direct Connect pipe was to get travel agencies to want to use it, and that just wasn't happening. [...] we actually looked back on it and realized it was kind of naïve to think it would work [...] because the travel agency simply just didn't want it. They wanted to stay in their GDS."*<sup>157</sup> Similarly, expert economist Professor Murphy testified that *"Direct connects have not grown in popularity*

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<sup>152</sup> Sabre's response to Question 12 of the CMA's Section 109 Request dated 3 September 2019 (Annex 12).

<sup>153</sup> Provisional Findings, paras. 3.32 and 8.53(d) (Table 4).

<sup>154</sup> *United States v Sabre* Tr. 673:3-5 (Menke).

<sup>155</sup> *United States v Sabre* Tr. 736:1-3 (Menke).

<sup>156</sup> *United States v Sabre* Tr. 737:11-14 (Menke). This is further supported by Sean Menke's answers to questions from Judge Stark: "THE COURT: At any time that you have been at Sabre, have you been concerned that GDS bypass is a threat to Sabre? / WITNESS: No. I've been in this industry for a long period of time ... I understand from the agency side, and I hear this time and time again, that the best way for this model to work is to evolve the GDS, actually integrating NDC capabilities into it. Specifically your question, do I see it as a threat? No." (Tr. 737: 18-25; 738: 1-7).

<sup>157</sup> *United States v Sabre* Tr. 274:20- 275:2 (Carter).

*... because the travel agents didn't want it."*<sup>158</sup> Further, Kurt Ekert (Carlson Wagonlit Travel (CWT) CEO) gave a detailed description of the various inefficiencies of Direct Connect, including testimony that: *"if we were to pursue an individual direct connect or multiple direct connects, the consequence would be we would have to spend a lot of capital upfront. Our operating cost would rise substantially, exponentially on a unit basis. User experience would be degraded. [...] we would be basically taking a massive step backwards into a world where we would have to deal with fragmentation of content."*<sup>159</sup>

- 5.16 Further, most growth that is occurring in GDS bypass to-date is attributable to airlines that are dominant in particular markets which have been able to persuade the largest, most dependent, and most technologically capable travel agents to use Direct Connect, for example, Lufthansa Group.<sup>160</sup> This is not a model that is scalable to all airlines and all travel agents, and incremental growth in Direct Connect can be expected to become increasingly more difficult. The airlines most capable of supporting a shift to GDS bypass are those with the most countervailing power, sophistication and resources, These airlines are the least likely to need to rely on Farelogix or another third-party provider to build an NDC API (for example, Air France/KLM and IAG have opted to develop their NDC APIs in-house). Indeed, as the Parties have made clear (page 19 of the Parties' Response to the Working Paper on Dynamic Competition in Distribution), [§<].
- 5.17 Moreover, the CMA refers to Sabre projecting "strong growth" for Farelogix's distribution business,<sup>161</sup> but fails to put this into proper context, as even on the most optimistic forecast Farelogix would remain a miniscule player. Table 5.1 below shows that Sabre's projections for Farelogix imply a total share (encompassing both bypass and pass-through) of approximately [§<]% based on the CMA's product market definition, with no material increase over the next two years.

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<sup>158</sup> *United States v Sabre* Tr. 1572:6-9 (Murphy).

<sup>159</sup> *United States v Sabre* Tr. 1196:3- 21.

<sup>160</sup> This position was made clear by [§<]'s testimony during the Delaware Proceedings: [§<].

<sup>161</sup> Provisional Findings, para. 11.38.

**Figure 5.1**  
**Share of supply of distribution solutions to airlines based on Sabre projections for Farelogix**

Vendor	2017	2018	2019	2020	2021
Sabre	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Farelogix	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Amadeus	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Travelport	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Other GDS (Host Direct)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Direct Connect	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Airline.com	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Total</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

Source: CRA analysis

5.18 As previously explained, Farelogix itself has repeatedly overestimated its forecast growth.<sup>162</sup> Its share has in fact remained persistently flat over several years, as shown in Figure 5.2 below. Nevertheless, it is clear that even on Farelogix’s unrealistically optimistic projections, Farelogix would remain a *de minimis* part of the overall distribution picture. This is essential context which the CMA ignores in its analysis of Farelogix’s projected growth.

**Figure 5.2**

[REDACTED]

5.19 Further, the CMA ignores the fact that the bulk of this anticipated growth relates to GDS pass-through and not GDS bypass. Sabre projected that around [REDACTED]% of Farelogix bookings would be pass-through by 2021 (and Farelogix projected an even higher proportion of around [REDACTED]%).<sup>163</sup> As such, the Farelogix “Direct Connect” share is projected to be somewhere in the region of [REDACTED]% by 2021. The Provisional Findings completely ignore this quantitative data which demonstrates that Farelogix is not, and cannot be expected to become, a significant competitor of Sabre.

5.20 It is clear, therefore, that the CMA has erred in a failure to substantiate its assertion that Direct Connect will grow, let alone significantly. Direct Connect is not a meaningful constraint on GDSs given its negligible market position.

*CMA unjustifiably ignores feedback from travel agents*

5.21 Further, as outlined in further detail in Section 2 above, the CMA’s analysis relies heavily on the feedback of certain airlines when analysing the constraint exerted by Direct

<sup>162</sup> E.g. Parties Initial Submission, para. 5.30 *et seq.*

<sup>163</sup> Document 4c-4. See Figure 5.3 below.

Connect and Farelogix,<sup>164</sup> whilst ignoring or inappropriately rejecting the feedback from travel agents, thereby erroneously focussing on only one side of a two-sided market.

- 5.22 Airlines are unable to shift volume to Direct Connect unilaterally. Although airlines are the customers purchasing a GDS bypass distribution solution, this is only effective if travel agents will use it. Multiple travel agents have provided the CMA with evidence that GDS bypass solutions are both costly and less effective and therefore travel agents prefer using GDSs, a fact which is acknowledged by the CMA.<sup>165</sup> Further evidence was also presented to the CMA during its hearing with one travel agent, which stated that it had “*experienced problems*” using a Direct Connect, including with “*incorrect fares, incorrect rules, missing VFR fares and other booking errors*” as well as issues with “*the speed at which it [the travel agent] can use direct connect to make its bookings, compared with GDS*”.<sup>166</sup>
- 5.23 The Parties have demonstrated previously that travel agents find one-to-one connections like Direct Connect to be prohibitively expensive and limiting due to the lack of comparison shopping and integration with travel agents’ essential mid- and back-office functions. This was further demonstrated during the Delaware Proceedings, with travel agents testifying that Direct Connect is not a competitive solution compared to the GDSs. For example, Kurt Ekert (Carlson Wagonlit Travel (CWT) CEO) described GDSs as “*similar to the utility that Bloomberg provides to the financial services professional*” and gave a detailed description of the various inefficiencies of Direct Connect, including testimony that:
- (i) “*if we were to pursue an individual direct connect or multiple direct connects, the consequence would be we would have to spend a lot of capital upfront. Our operating cost would rise substantially, exponentially on a unit basis. User experience would be degraded. [...] we would be basically taking a massive step backwards into a world where we would have to deal with fragmentation of content.*”<sup>167</sup>
  - (ii) “*When the expectation of the user is they become accustomed to millisecond response time, whether it is through us or through consumer shopping sites, we would have a degraded user experience versus what we offered today. So that would be material both in terms of the cost of the operation and the user experience which is so important today.*”<sup>168</sup>
- 5.24 Mr. Ekert also estimated that a Direct Connect transaction would be around USD 15 less efficient than a GDS transaction for CWT.<sup>169</sup> This demonstrates that Direct Connect can result in higher prices for end-consumers, due to cost inefficiencies raising the service fees that travel agencies apply to offset the increase Direct Connect causes to their

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<sup>164</sup> Provisional Findings, para. 6.35(a).

<sup>165</sup> Provisional Findings, para. 3.48.

<sup>166</sup> CMA Summary of Hearing with Travel Agent 2 held on 23 October 2019.

<sup>167</sup> *United States v Sabre* Tr. 1196:3- 21 (Ekert).

<sup>168</sup> *United States v Sabre* Tr. 1192:11-18 (Ekert).

<sup>169</sup> *United States v Sabre* Tr. 1197:1-2 (Ekert).

operational costs. It is clear from this statement, therefore, that travel agents are more closely aligned to the interests of end-consumers (as further described at paragraph 5.28 below).

- 5.25 Similarly, Rose Stratford of BCD testified in the Delaware Proceedings that: *“in order to do a direct connect [...] I have to have an agent point of sale. I have to have somewhere to connect that content, which today we don’t have. [...] You have to be able to aggregate the content which, again, very costly, so you have to have shopping engine that’s shopping multiple sources of content. [...] you have to be able to store that information to, again, connect and develop connectivity between your mid office, your back office, your reporting, your invoicing [...] all of the different services and security and safety.”*<sup>170</sup>
- 5.26 Werner Kunz-Cho (Fareportal CEO) also testified that: *“a request to a large number of providers naturally has a tendency to cause delays and latencies. In the e-commerce space, speed is very essential to drive conversions. Without efficient speed, we lose conversion and we measure speeds in sub-seconds which makes a difference. So calling in one pipe for all the requests for a specific search as opposed to a call to several different providers through direct connect could and has and does delay a response time by seconds. Seconds is a large unit for us to lose conversion.”*<sup>171</sup>
- 5.27 It is clear that travel agents have the greatest insight into the functionalities and practicalities of Direct Connect. The CMA is entirely ignoring these realities in its decision to inappropriately reject evidence from travel agents. Moreover, the evidence strongly indicates that a lack of appetite from travel agents has been extremely relevant in the limited uptake of Direct Connect to date.<sup>172</sup> The CMA thus fails to place evidence in its proper context, as its Guidance requires. It purports to prefer the evidence of dominant domestic airlines exercising market power to impose on agencies an over-expensive and technically deficient product as probative of healthy competition. It perversely downweighs, relative to airlines, the evidence of travel agents who have a greater interest in an effective and competitive means of selling air content to consumers. The CMA, in discounting travel agent views, is ignoring an essential aspect of the forward-looking position of Direct Connect. If travel agents generally oppose Direct Connect, this is highly relevant evidence that Direct Connect will not grow significantly in future.
- 5.28 Further, it is highly inconsistent for the CMA to dismiss the views of travel agents on the basis of the fact that they receive incentives,<sup>173</sup> whilst ignoring the motives of airlines. Importantly, as travel agents have to find the most competitive fares for consumers, they will not use an uncompetitive distribution service and ultimately their interests are closely aligned with the needs of end-travellers. Conversely, the use of Direct Connect by an airline potentially shields that airline from comparison shopping with competing airlines, thereby incentivising the airline to use the Direct Connect channel in order to circumvent

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<sup>170</sup> *United States v Sabre* Tr. 1236:21-1237:17 (Stratford).

<sup>171</sup> *United States v Sabre* Tr. 1298:24-1299:8 (Kunz-Cho).

<sup>172</sup> For example, Jeffrey Lobl (Delta) testified in the Delaware Proceedings: “We had a lot of conversations with our travel agency partners and the overwhelming majority of them want to continue working through the GDS.” (*United States v Sabre* Tr. 1157:22-24 (Lobl)). See also Parties’ Response to Issues Statement, para. 5.76.

<sup>173</sup> Provisional Findings, para. 11.17(d).

the price competition that results from comparison. This makes airline welfare a poor proxy for consumer welfare.<sup>174</sup> In fact, as incentives lower agents' distribution costs in a way that may be expected to be passed onto consumers, their views as to whether they prefer a higher cost, lower quality Direct Connect over a lower cost, higher quality GDS distribution service should be particularly relevant. This asymmetry in incentives must be taken into account when considering feedback from both airlines and travel agents.

- 5.29 In any event, the CMA's analysis fails to recognise that travel agents also receive incentives directly from airlines for Direct Connect bookings (and, indeed, these can often be sizeable in order to encourage travel agents away from the GDS). The existence of incentive payments from the GDSs is therefore not relevant to the reliability of travel agents' evidence about Direct Connect.
- 5.30 The CMA's approach towards the respective views of travel agents and airlines is all the more indefensible in the face of evidence which has emerged in the Delaware Proceedings which clearly undermines the reliability of airline submissions in this case.
- 5.31 First, it has become clear that some airlines are not well informed about the competitive environment in the airline IT space. Both United and AA, despite claiming that Farelogix was in some respects unique, admitted that they have not carried out an RFP process for an NDC API nor investigated the capabilities of the other IATA certified NDC providers:
- (i) United stated that it "*seriously*" considered DXC (previously HPE) for United's NDC API in 2017.<sup>175</sup> [redacted]. This alone calls into question whether Farelogix may reasonably be described as unique. Outside of the bids from DXC and Farelogix, United did not ask for proposals from any company in 2017 and has not issued an RFP since.<sup>176</sup>
  - (ii) Cory Gardner testified that AA has never issued an RFI or RFP to other providers of NDC APIs and was not aware of the offerings of other important competitors in the market.<sup>177</sup>
- 5.32 This recent evidence seriously undermines the credibility of some of the airline feedback relied upon by the CMA, and underscores the need for the CMA to appropriately probe

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<sup>174</sup> See further Section 6 of Annex 13 to the Parties' Response to the Issues Statement.

<sup>175</sup> *United States v Sabre* Tr. 213:3-9 (Radcliffe).

<sup>176</sup> *United States v Sabre* Tr. 215:6-12 (Radcliffe).

<sup>177</sup> *United States v. Sabre* Tr 166:8 – 167:8 (Garner): "Q. So...you did not ask for an RFP for any one of the 21 companies that are certified as NDC API compliant with the standard; correct? A. We did not... Q. You didn't ask for an RFP for Unisys who is one of the companies; right? A. I don't know that they're one of the companies, but we did not ask Unisys. Q. Let me go off the list. You didn't ask for an RFP from SAP either; Right? A. We did not. Q. And you know who SAP is; right? A. Yes, and I don't know if they offer a solution or not. Q. You don't. You know they're one of the largest software companies in the world; right? A. They are. Q. And you don't know whether they offer a solution at all, NDC API compliant solution; right? That's what you just said. A. I don't know. To my knowledge. Q. But you told the Court you know there is nobody else in the world that can do what my client [Farelogix] can do. Right? A. That's correct." See also [redacted].

the airline submissions, particularly to the extent that they are entirely at odds with objective market evidence such as the market shares and the bidding data.<sup>178</sup>

- 5.33 Second, the Delaware Proceedings have cast serious doubt on the motives behind certain airline complaints. Notably, both United and AA have sought to purchase Farelogix in the past, and United believes one of the benefits of the DOJ lawsuit against the Transaction would be that [§<].<sup>179</sup>

*The CMA's approach to evidence from internal documents analysis is selective and static and this evidence has been demonstrably overtaken by more recent market developments*

- 5.34 As set out in Section 2, above, the CMA's analysis of the Parties' internal documents is highly selective and fails to take into account the dynamic nature of the market. Although the CMA finds that *"the dynamic context in which this Merger takes place means that the competitive conditions are likely to evolve as airlines continue to change their business models, passengers' needs evolve, and airline technology develops"*,<sup>180</sup> the CMA nevertheless prefers to concentrate on historic documents from 2017/18. This is despite the Parties' previous submissions which make clear that the market has moved on significantly since 2017 and an undue focus on old documents is therefore not appropriate.<sup>181</sup> This is also supported by the following testimony during the Delaware Proceedings:

(i) "Q. In your experience, sir, is the competitive landscape that you face changed in the last couple of years since [the] beginning of '18? A. It changed significantly [...] it's completely different than it was a couple years ago."<sup>182</sup>

(ii) "The industry has completely changed, especially in '18."<sup>183</sup>

- 5.35 This is also consistent with third-party submissions to the CMA. For example, Datalex submitted a 2019 document to the CMA which sets out that *"airline distribution is rapidly changing"*.<sup>184</sup> A dynamic assessment of an industry which is changing rapidly (in 2019) cannot reasonably be undertaken by the CMA on the basis of 2017/18 documents, and especially documents which have been proven to be wrong by events in the market.

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<sup>178</sup> See para. 5.40 *et seq.* below.

<sup>179</sup> *United States v Sabre* Tr. 321:14- 322:7 (Radcliffe). Defendants' Findings of Fact, para. 182.

<sup>180</sup> Provisional Findings, para. 11.13.

<sup>181</sup> See e.g. Parties Response to Issues Statement, para. 5.84 *et seq.*

<sup>182</sup> *United States v Sabre* Tr. 419:5-16 (Davidson).

<sup>183</sup> *United States v Sabre* Tr. 623:4 (Kruijssen).

<sup>184</sup> Provisional Findings, para. 10.43(b).



5.36 Moreover, the CMA fails to take into account the context of the individual internal documents that it cites, preferring instead to rely on a superficial and misleading reading of the documents. Notably:

(i) The CMA fails to take into account the evolving market, including the shift to GDS pass-through and the impact that this has had on Sabre's thinking regarding the competitive constraint from Farelogix. As the Parties have demonstrated previously (see paragraphs 5.78 *et seq.* in the Parties' Response to the Issues Statement) the market is moving to GDS pass-through, rather than GDS bypass. This shift was also clearly evident in testimony during the Delaware Proceedings. For example:

(a) Jim Davidson (CEO, Farelogix) testified in the Delaware Proceedings that the "*Holy Grail*" has been "*to have the NDC going through the GDSs as GDS passthrough*". Because of the reach of the GDSs, Farelogix expects "*pretty much all*" future growth in FLX OC volumes to "*come from GDS passthrough*."<sup>185</sup>

(b) Farelogix is now working on 26 different GDS integration projects, compared to just six in the beginning of 2018, and "*the number one thing that we [Farelogix] hear from airlines now is about plugging into a GDS*."<sup>186</sup>

(c) Farelogix teaches its own employees that the old Direct Connect strategy is "*ancient history*."<sup>187</sup>

(d) United's Tye Radcliffe also testified that [REDACTED].<sup>188</sup>

(e) This is consistent with projections made by both Sabre and Farelogix, as shown in Figures 5.3 and 5.4 below, which show that pass-through is the real driving force behind projections of future growth:

**Figure 5.3**

[REDACTED]

**Figure 5.4**

[REDACTED]

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<sup>185</sup> *United States v Sabre* Tr. 442:6-10 (Davidson). See further testimony of Sean Menke: "Q. Mr Menke, what's your view on what airlines are seeking with respect to whether it's GDS integration or GDS bypassing? A. The trend is very much on GDS integration. Passing through what's taking place. Those where the conversations are ... they [the Sabre team] are spending an enormous amount of time with airlines around the world, how do we integrate this into GDS." *United States v Sabre* Tr. 711:8-16 (Menke).

<sup>186</sup> *United States v Sabre* 285:7-10 (Carter).

<sup>187</sup> *United States v Sabre* 274:5-11 (Carter).

<sup>188</sup> *United States v Sabre* Tr. 336:2-5 (Radcliffe).

The CMA accepts that Sabre's internal documents indicate [REDACTED],<sup>189</sup> however the CMA does not take this into account in any of its analysis or conclusions. As the Parties have outlined in significant detail in previous analysis of airline contract negotiations (see paragraphs 5.36 *et seq.* in the Parties' Response to the Issues Statement), Direct Connect is not used as leverage in the majority of airline GDS negotiations that Sabre has participated in, as Direct Connect simply is not capable of disintermediating the GDS to any meaningful extent. Instead, negotiations revolve around content and price, and airlines use the direct channel and other distribution models such as Private Channel as the main levers in negotiations.<sup>190</sup> Therefore, particularly in recent years, the competitive pressure which Direct Connect provides is minimal and to the extent that Direct Connect represents any sort of a "threat" at all, this can only realistically relate to almost negligibly small booking volumes, rather than a substantive threat to Sabre's GDS business.

5.37 The lack of significant pressure from FLX OC during GDS negotiations was confirmed during the Delaware Proceedings:

- (i) Shane Tackett (Alaska) testified that he had never used Farelogix to negotiate lower GDS fees.<sup>191</sup>
- (ii) [REDACTED].<sup>192</sup>
- (iii) Jeffrey Lobl (Delta) accepted that Direct Connect was "*never expressly discussed at all*" in negotiations with GDSs.<sup>193</sup>
- (iv) Tye Radcliffe (United) accepted that United had never specifically mentioned Farelogix in negotiations with Sabre regarding United's GDS contracts.<sup>194</sup>

5.38 There is therefore no justifiable reason at all for the CMA to favour this outdated historical documentary evidence over later factual and documentary evidence demonstrating the market realities — Direct Connect in general and Farelogix in particular are not significant competitive constraints on Sabre.

*Farelogix is neither a "threat" nor a unique innovator*

5.39 The CMA's assessment of the position of Farelogix relative to other providers of NDC APIs is asymmetric and inconsistent. The CMA fails to justify why Farelogix will be a particularly strong competitive constraint on Sabre when compared to other players. The

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<sup>189</sup> Provisional Findings, para. 9.96.

<sup>190</sup> See para. 5.70 *et seq.* below.

<sup>191</sup> *United States v Sabre* Tr. 1714:13-15 (Tackett).

<sup>192</sup> *United States v Sabre* Tr. 1139:13-23 (Sealed).

<sup>193</sup> *United States v Sabre* Tr. 1155:1-3 (Lobl).

<sup>194</sup> *United States v Sabre* Tr. 230:16-18 (Radcliffe).

evidence, particularly the quantitative evidence, clearly shows the market reality is that Farelogix is not a “threat” to Sabre or a unique or significant innovator in the market.

- 5.40 First, the quantitative evidence shows that Farelogix is not a significant competitive constraint. Farelogix has fewer wins in the bidding data in recent years ([REDACTED]), a fact which is accepted by the CMA<sup>195</sup> (see Figure 5.5 below). In the same period, both Amadeus and OpenJaw/Travelsky have had multiple wins.<sup>196</sup> Most notably, in the context of a market which has evolved rapidly in the space of the last few years, Farelogix has [REDACTED] since NDC version 17.2 was published – the first published schema to be accepted as scalable and sufficiently defined to be the “foundation” schema.<sup>197</sup>

**Figure 5.5**

[REDACTED]

- 5.41 [REDACTED] In that period, [REDACTED].<sup>198</sup> [REDACTED].<sup>199</sup>
- 5.42 The CMA treats the Farelogix bidding data highly selectively, and refers to [REDACTED]<sup>200</sup> [REDACTED].<sup>201</sup> Additional submissions relating to the CMA’s analysis of NDC API bidding data are provided in Confidential Annex 8.
- 5.43 [REDACTED]<sup>202</sup> [REDACTED].
- 5.44 Second, the CMA’s assessment that Farelogix will be a material competitive threat to the GDSs as it will capture a significant share of increased GDS bypass volumes fails to take into account Farelogix’s customer history. As shown in Figure 5.5 above, Farelogix acquired the majority of its customer base almost 10 years ago, including some of its [REDACTED]<sup>203</sup> [REDACTED].<sup>204</sup>
- 5.45 Third, the CMA ignores submissions and testimony by other distribution solutions providers (and individual managers) regarding the position of Farelogix in the market. Notably, [REDACTED]. [REDACTED].<sup>205</sup> Amadeus also made it clear in its submission to the CMA in

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<sup>195</sup> Provisional Findings, Appendix H at para. 19.

<sup>196</sup> *Ibid*, Table 6.

<sup>197</sup> *United States v Sabre* Tr. 639:21-640:2 (Davidson). Defendants’ Findings of Fact, para. 136.

<sup>198</sup> Parties’ Response to Bidding Working Paper, page 8. See also *United States v Sabre* Tr. 481:24-482:6 (Davidson).

<sup>199</sup> Overview of Third Party Depositions, para. 6.

<sup>200</sup> Provisional Findings, para. 11.37.

<sup>201</sup> Provisional Findings, para. 8.85 and Appendix H at Table 6.

<sup>202</sup> [REDACTED]

<sup>203</sup> See para. 5.32 above.

<sup>204</sup> See Annex 2 submitted on 6 November 2011 in the Parties’ Response to the CMA’s Issues Statement, para 3.11 and underlying documents.

<sup>205</sup> [REDACTED].

Response to the Issues Statement that Farelogix is not a particularly strong or unique rival in the distribution space, stating:

- (i) *“Based on Amadeus’ market experience, Farelogix should not be characterised as ‘an important innovator’ or ‘significant disruptive force’.”*<sup>206</sup>
- (ii) *“Farelogix was established in 1998: it has existed for over twenty years without offering any ground breaking or unique IT solution in the distribution space.”*<sup>207</sup>
- (iii) *“As regards NDC, it is true that Farelogix donated a schema to IATA in 2012 and that this was the starting point for the development of NDC. However, since then, Farelogix has not played a particularly special role in the development of NDC. Moreover, in the meantime, the original schema has been changed beyond almost all recognition.”*<sup>208</sup>
- (iv) *“many providers of direct connect and airlines themselves will be equally well positioned to develop new technologies ‘on top’ of the NDC standard. Farelogix has not been particularly prominent in the development of any such technology.”*<sup>209</sup>

5.46 Fourth, the CMA also ignores the evidence from Farelogix stating that it does not characterise itself as an innovator in NDC and that any advantage it originally had arising from its early involvement in the development of the NDC standard has long since evaporated. Instead, newer entrants are far better placed to innovate in this space, meaning Farelogix is, if anything, in a disadvantaged position rather than a unique one. For example:

- (i) Susan Carter (Farelogix Senior VP of Marketing) testified in the Delaware Proceedings: *“Q. Since Farelogix created the baseline schema for NDC, in your position as head of marketing at Farelogix, do you believe that that gives Farelogix a competitive advantage over newer entrants? A. I think it did in the beginning when the standard was approved because we were already in production with very similar tech following. Now all of these years later, you could almost argue that it’s a disadvantage because we’re the guy with the older technology that has to retrofit to the latest version of the standard”.*<sup>210</sup>
- (ii) Jim Davidson (Farelogix CEO) explained at the Farelogix Main Party Hearing: *““Farelogix has nothing to do with the schema today, no more than any other*

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<sup>206</sup> Amadeus’ response to the Issues Statement, para 3.2.

<sup>207</sup> Amadeus’ response to the Issues Statement, para 3.3(a).

<sup>208</sup> Amadeus’ response to the Issues Statement, para 3.3(b).

<sup>209</sup> Amadeus’ response to the Issues Statement, para 3.3(c).

<sup>210</sup> *United States v Sabre* Tr. 278:18 – 279:16 (Carter).

*technology company does. It is controlled by IATA; it is controlled by the airline industry.”*<sup>211</sup>

- (iii) Mr. Davidson testified during the Delaware Proceedings: “Q. Do you believe that that is the case, sir, that Farelogix’s NDC API FLX OC product is uniquely available from your company? / A. No, not today. No.”<sup>212</sup>
- (iv) Tim Reiz (Farelogix Chief Technology Officer) testified during the Delaware Proceedings that any programmer could become “level 4” IATA certified,<sup>213</sup> and that Farelogix is not unique in its ability to develop an NDC API.<sup>214</sup>
- (v) This testimony is consistent with other submissions made by Farelogix during the Phase 2 Site Visit Presentation<sup>215</sup> and Farelogix Main Party Hearing<sup>216</sup> regarding [REDACTED].

5.47 Finally, the CMA’s analysis is also based on a fundamental mischaracterisation of the rationale for the Transaction and a disregard for the quantitative evidence supporting this. This is not a “killer acquisition” designed to take out a threat in the market, as the Parties’ valuation analysis shows.<sup>217</sup> Indeed, the CMA accepts the Parties’ overall valuation analysis, but chooses instead to focus only on the Farelogix revenue projections (which make up a small part of the valuation analysis) in order to bolster the CMA’s view of Farelogix’s potential to increase as a competitive constraint in the market.<sup>218</sup> In fact, as explained at para. 5.36 above, the correct interpretation of the revenue projections is that any growth is tiny, only from a very low base, and overwhelmingly in pass-through rather than bypass.

5.48 There is no economic incentive for Sabre to shut down FLX OC, limit its innovation, or raise its prices. It is clear from a range of third-party submissions to the CMA that this is not a likely outcome.<sup>219</sup> As outlined at paragraph 5.36(i) above, the future for NDC APIs is primarily GDS pass-through, for which collaboration between GDSs and NDC API providers is necessary, therefore that Farelogix is a complement to Sabre’s GDS. Further, as demonstrated below at paragraphs 5.96 *et seq.*, there is no possibility that Farelogix could evolve into a major competitor to Sabre, because of the insurmountable economic and technological limitations of Direct Connect as well as Farelogix’s [REDACTED]. Sabre is not entering into this transaction in order to remove Farelogix as a competitor: Sabre needs

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<sup>211</sup> Farelogix Main Party Hearing Transcript, p. 5:16-18.

<sup>212</sup> *United States v Sabre* Tr. 417:16-24 (Davidson).

<sup>213</sup> *United States v Sabre* Tr. 1328:4-5 (Reiz).

<sup>214</sup> *United States v Sabre* Tr. 1328:6-11 (Reiz).

<sup>215</sup> [REDACTED].

<sup>216</sup> [REDACTED].

<sup>217</sup> See Parties Response to the Issues Statement, section 6.

<sup>218</sup> Provisional Findings, Appendix C paras. 42-44.

<sup>219</sup> For example, [REDACTED] told the CMA that “[REDACTED].

Farelogix to accelerate its development of NDC distribution. Sabre has publicly committed to continue to offer and support Farelogix NDC APIs and Direct Connect capabilities for airlines who wish to use them to connect to Sabre, other GDSs, other distribution partners, or directly to travel agents, as well as making commitments to continue to offer and support FLX M on a PSS-agnostic basis so airlines will have access to all of its features and capabilities regardless of whether the airline is a Sabre PSS customer. Such commitments have been made directly by Sabre's CEO Sean Menke to 36 airlines, and this commitment was reinforced by Sean Menke publically during the Delaware Proceedings.<sup>220</sup>

- 5.49 Overall, it is clear that the Transaction would not remove a strong competitive constraint. Direct Connect exerts a limited competitive constraint overall, and there is no evidence that this will increase. The vast majority of FLX OC growth and NDC API growth is expected to be in GDS pass-through. Further, Farelogix is not a "threat" nor a unique player in the market. The CMA has failed to adequately prove otherwise and its conclusion is inconsistent with the market realities as is apparent from the quantitative data, recent documents, testimony in the Delaware Proceedings and feedback from travel agents.

***The CMA's analysis of other competitors is static and asymmetric***

- 5.50 The CMA finds that although there are "*a few other suppliers of distribution solutions based on the NDC API, the evidence makes clear that they are weaker than Farelogix and would not replace the constraint it imposes on the GDSs*".<sup>221</sup> Once again, this conclusion is based on a failure to assess properly the competitive threat from rivals as part of the CMA's purported dynamic assessment, and also what third-parties would do in response to any potential SLC in the market.
- 5.51 The CMA recognises in the Provisional Findings that there are numerous other suppliers of distribution solutions beyond Farelogix and Sabre.<sup>222</sup> However, the CMA errs in its analysis of these competing suppliers as well as other competitors for three reasons: (i) the CMA fails to assess the dynamic constraint posed by current rivals, including how they could expand; (ii) the CMA's analysis of competitors is highly asymmetric compared to the CMA's analysis of Farelogix; and (iii) the CMA either fails to include in its analysis, or inadequately focusses on, potential entrants, particularly large and reputable IT providers which could expand into this space.
- 5.52 First, the CMA fails to assess properly the dynamic constraint posed by the Parties' largest current rivals, including whether they could advance their capabilities going forward. As the Parties have described previously,<sup>223</sup> Farelogix is only one of a growing number of

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<sup>220</sup> *United States v Sabre* Tr. 721:8 – 724:7 (Menke).

<sup>221</sup> Provisional Findings, para 11.60.

<sup>222</sup> Provisional Findings, paras. 8.18 – 8.44.

<sup>223</sup> At paragraph 5.41 of the Phase 2 Initial Submission, paras. 5.27 *et seq.* of the Parties' Response to the Issues Statement and pages 106 – 111 of the Parties' Response to the Working Paper on Current Competition in Distribution.

providers of NDC API technology, many of whom are developing more innovative products than Farelogix.

5.53 In particular, the CMA's reliance on the IATA Leaderboard is inconsistent with its analysis of a dynamic market.<sup>224</sup> The IATA Leaderboard and numbers of customers that any provider has obtained are static metrics and do not reflect ongoing developments in the market. The Leaderboard is biased towards early-movers in NDC, and [redacted] of the airlines are Farelogix customers. The Leaderboard airlines were announced in April 2018 (after IATA put out a request in October 2017 for airlines to join), and so necessarily this focusses on airlines which procured their NDC API provider several years ago. As a result, the Leaderboard is not a reliable indicator of the competitive conditions in the market today. It is highly selective for the CMA to focus on the IATA Leaderboard; as the Parties have pointed out previously,<sup>225</sup> Farelogix does not identify the 21 IATA NDC Leaderboard airlines as being in any sense a relevant market, and the CMA should not draw inferences about current competitive dynamics from this list. Farelogix currently considers its addressable market to be at least the 93 largest airlines by booking volumes.<sup>226</sup> As the market evolves, there are 300+ airlines in the world which may choose to use a vendor to provide NDC services in the future.<sup>227</sup>

5.54 Further, as outlined in more detail in Section 2, above, the CMA's interpretation of the Parties' internal documents is entirely static. This is despite the fact that even the documents cited by the CMA demonstrate the evolving thinking of the Parties regarding other competitors. Focussing on just two examples:

- (i) The slide referred to by the CMA which describes Amadeus and Farelogix as the [redacted] This is cited by the CMA, but the CMA does not draw the obvious conclusion from this regarding the dynamic nature of the market.<sup>228</sup>
- (ii) Similarly, the CMA recognises that a September 2018 slide, which calls out [redacted].<sup>229</sup>

5.55 Second, the CMA also takes a highly asymmetric view of competitors' potential for expansion as compared with the position of Farelogix. There are numerous examples of this inconsistency in the CMA's reasoning:

- (i) The CMA fails to give appropriate attention to the dynamic competitive threat posed by NDC Exchange. While NDC Exchange provides a slightly different service than Farelogix (operating as a "translation layer"), it nevertheless represents an existential risk to Farelogix's FLX OC business because it removes

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<sup>224</sup> See e.g. Provisional Findings, paras. 8.51 and 8.97(b).

<sup>225</sup> Parties' Response to the Working Paper on Current Competition in Distribution, p. 26.

<sup>226</sup> See Attachment P.21 of the Merger Notice, originally provided as Annex 54 of Farelogix's response to the CMA's Section 109 Request dated 26 March 2019.

<sup>227</sup> Parties' Response to the Working Paper on Current Competition in Distribution, p. 26.

<sup>228</sup> Provisional Findings, para. 9.33(e).

<sup>229</sup> Provisional Findings, para 9.105(a).

the need for an airline to actually use an NDC API. NDC Exchange simply uses an airline's existing non-NDC API (i.e. any API out of the core PSS) and translates that into NDC, which can then be connected to whichever distribution channel the airline chooses. In other words, an airline's use of NDC Exchange renders Farelogix's NDC API essentially redundant. The competitive constraint posed by NDC Exchange was evidenced by Southwest choosing to partner with NDC Exchange, despite initially considering using Farelogix.<sup>230</sup>

- (ii) The CMA rejects Datalex as an effective competitor due to its ongoing financial problems,<sup>231</sup> but at the same time the CMA continues to assert that Farelogix is an effective and important competitive constraint, despite the documented operational issues that Farelogix is experiencing (which, unlike Datalex's financial issues, directly impact product capabilities).<sup>232</sup> Jim Davidson (Farelogix CEO) testified that "*I believe those [financial troubles] are behind them based on what we're hearing in the market.*"<sup>233</sup> Notably, Datalex has not lost any customers since details of its financial irregularities emerged (nor is there any evidence that any existing customers have issued new RFPs as a result). Meanwhile, Datalex has won recent NDC API tenders against Farelogix for major airlines (for example, [X]). Further, Lufthansa Group also told the CMA that it is working with Datalex for its e-commerce platform.<sup>234</sup> It is therefore not correct for the CMA to conclude that Datalex has not won customers since it started to experience financial problems.<sup>235</sup> This asymmetric reasoning prevents the CMA from adequately considering Datalex as an important competitor.
- (iii) The CMA also fails to adequately recognise OpenJaw/Travelsky as a significant competitive force in the market, not referring to it at all as an alternative to Farelogix.<sup>236</sup> In particular, the CMA appears to concentrate on limited feedback from "three airlines" stating that OpenJaw/Travelsky will "*become weaker*" and does not have as good technology as Farelogix.<sup>237</sup> Importantly, the CMA fails to acknowledge the feedback from other airlines which state that other competitors can offer the same technical functionality and services as Farelogix, including OpenJaw/Travelsky which airlines considered as being equally as competitive as Farelogix.<sup>238</sup> Moreover, OpenJaw/Travelsky has in fact been more successful than Farelogix recently, beating Farelogix to supply both TAP Portugal and [X],

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<sup>230</sup> *United States v Sabre* Tr. 448:24-449:7 (Davidson).

<sup>231</sup> Provisional Findings, para 8.22.

<sup>232</sup> Provisional Findings, paras. 9.130 – 9.136. See *also* paras. 5.94 – 5.97 below.

<sup>233</sup> *United States v Sabre* Tr. 476:11-13 (Davidson).

<sup>234</sup> Summary of Hearing with Lufthansa held on 10 October 2019.

<sup>235</sup> Provisional Findings, para 8.22 and footnote 313 showing that the CMA's assertion is based upon *merchandising* bidding data, not distribution bidding data.

<sup>236</sup> Provisional Findings, para. 10.112(d).

<sup>237</sup> Provisional Findings, para. 10.100(e).

<sup>238</sup> Provisional Findings Appendix F, paras. 111-127.



and its customer base includes a number of large carriers from around the world (including British Airways, Comair and Cathay Pacific).<sup>239</sup>

- (iv) The CMA does not address Google/ITA as a competitor in this space. However, Google/ITA has a significant pedigree in the airline IT sector, with the CMA acknowledging that it has a market-leading shopping module.<sup>240</sup> Given the CMA is arguing that cross-selling as between merchandising and distribution is important in respect of Farelogix,<sup>241</sup> it is entirely inconsistent to dismiss Google ITA as a significant competitor in the market for distribution solutions when its shopping module (and other non-core PSS capabilities) provides just as much scope for cross-selling. Significantly, Google/ITA told the CMA that it currently provides a non-NDC API, builds and operates APIs for airlines such as Delta and AA to support their NDC content distribution, and has plans to launch its own NDC API in response to customer demand. It therefore has the potential to be a significant competitor to Farelogix.<sup>242</sup> It has access to large amounts of capital and many of the world's best software engineers. Further analysis of Google/ITA is also contained in Confidential Annex 7.
- (v) The CMA also fails to adequately analyse other competitors as significant competitive constraints, most notably DXC Technology and JR Technologies, despite including them in its list of IT providers in the market. DXC Technology has a track record of meeting airline demands in this space. DXC designed an Open API for Lufthansa in 2014<sup>243</sup> and IATA records DXC as provider of NDC APIs for both Direct Connect and for Aggregators.<sup>244</sup> DXC has the capacity, experience, and reputation to easily expand in this space. Notably, [X]. JR Technologies also has a proven track record with major airlines including the Lufthansa Group, IAG, and AA. JR's retailing platform offers a multi-version NDC API (which supports a newer schema than Farelogix's API).<sup>245</sup> Airlines using JR's retailing platform do not therefore need to tender separately for an API provider.

5.56 Third, the CMA fails to appropriately investigate the competitive potential of other established companies known to be currently supplying NDC APIs to large airlines, such

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<sup>239</sup> See Parties' Response to the Working Paper on Current Competition in Distribution, p. 109.

<sup>240</sup> Provisional Findings Appendix F para. 165.

<sup>241</sup> Provisional Findings, para. 9.139.

<sup>242</sup> See CMA Summary of Hearing with Google ITA held on 15 October 2019. See also, *The Beat, Google ITA to Launch NDC APIs*, 10 February 2020.

<sup>243</sup> [https://www.dxc.technology/travel\\_and\\_transportation/case\\_studies/140341-lufthansa\\_accelerates\\_the\\_progress\\_of\\_travel\\_innovation](https://www.dxc.technology/travel_and_transportation/case_studies/140341-lufthansa_accelerates_the_progress_of_travel_innovation).

<sup>244</sup> <https://www.iata.org/en/programs/airline-distribution/ndc/registry/>.

<sup>245</sup> <https://www.jrtechnologies.com/oursolutions/ourndcplatform/>

as IBS and RAMAX. The CMA acknowledges that these companies currently supply NDC APIs to major airlines,<sup>246</sup> but conducts no further examination of these competitors.

- 5.57 Finally, the CMA also fails to take into account the potential of a number of other competitors to grow in this area, including if there was to be any potential SLC in the market. There is nothing intrinsically difficult about developing an NDC API product.<sup>247</sup> 22 IT providers, other than Farelogix, are IATA NDC Level-4 capable, including multiple providers not discussed by the CMA in the Provisional Findings, such as Sirena Travel, AirSky Information, Caravelo, ISO Software, Maureva Ltd, On Travel Solutions, Pribas Airline Solutions, Skywide Network Technology, and Kiu System Solutions. There are also dozens more firms with some lower form of NDC accreditation from IATA who could operate in this space - for example, Farenexus and Travel Technology Interactive were both added as Level-3 providers in February and March 2019.<sup>248</sup> Indeed, there are multiple examples of airlines using new or recent entrants for their distribution solutions.<sup>249</sup>
- 5.58 Beyond the IATA certification lists, there are multiple other technology providers in the market, including many who could potentially enter the market for distribution solutions. Notably, Lufthansa has recently published a list of 27 technology partners for NDC<sup>250</sup> and IAG has listed 20 non-GDS aggregators to help expand its distribution of IAG NDC API content.<sup>251</sup> This demonstrates that the market in which FLX OC operates is clearly vibrant, and that airlines can choose from many providers for their IT solutions.
- 5.59 Amadeus also cited multiple additional technology providers who could be potential competitors for distribution solutions including Airkiosk, Avantik, Genius, Multicom, and Worldticket. Amadeus also notes that the NDC API technology is actually a return to solutions that IT providers – including the above-mentioned players – have been offering for many years.<sup>252</sup> The following are examples of such potential competitors to Farelogix which the CMA has failed to address:
- (i) Airkiosk was one of the first providers of an API, having developed its AirXML API in 2006. Airkiosk is now developing an NDC API similar to its existing non-NDC

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<sup>246</sup> Provisional Findings, para. 8.38 and 8.43.

<sup>247</sup> This was supported by Jim Davidson's testimony: ""Q. Do you have any reason to believe that, for example, SAP, if it wishes to develop a product that is consistent with the schema and does all the things your product does, that there is some obstacle to them doing that? / A. None whatsoever. / Q. How about a company like Unisys? / A. There is actually no obstacle. It is an open schema that is publish (sic). / Q. And Hewlett-Packard, for example? / A. They're called DXC now, but no." (U.S. v Sabre Corp et al. Tr. 418:19 – 419:4 (Davidson)).

<sup>248</sup> <https://www.iata.org/en/programs/airline-distribution/ndc/registry/>.

<sup>249</sup> This was conceded by the DOJ's economic expert during the Delaware Proceedings: "Q. Now, as a factual matter here, we know entry already has occurred in 2018 and 2019; correct? A. To some degree, yes. (United States v. Sabre Tr: 1048:1-2 (Nevo)).

<sup>250</sup> [https://www.lufthansa.com/content/dam/lh/documents/discover-lufthansa/partners/direct-connect/Tech\\_Provider\\_EN.pdf](https://www.lufthansa.com/content/dam/lh/documents/discover-lufthansa/partners/direct-connect/Tech_Provider_EN.pdf)

<sup>251</sup> <https://www.thebeat.travel/News/Parent-of-BA-And-Iberia-Touts-NDC-Gains-A-Year-After-GDS-SurchargeLaunch>

<sup>252</sup> Amadeus response to Issues Statement, para. 3.2.

offering.<sup>253</sup> Airkiosk is therefore a potential entrant who could compete with Farelogix in the future.

- (ii) Advantik is the PSS offering from Bravo, which offers an API interface with the GDSs for multiple carriers globally.<sup>254</sup> Therefore, Advantik could easily offer an NDC-enabled API in the future.
- (iii) Paxport/Multicom's PaxFAB technology is a content aggregator which integrates over 220 suppliers in a wide range of travel content and offers connection via an API for its users. Given that Paxport/Multicom is already offering aggregation technology which, as exemplified by providers like Travelfusion, AirGateway and TP Connects, has the capability to become NDC-enabled, it could compete directly with FLX OC in the future. Indeed, in a 2018 interview discussing the acquisition of Multicom, Paxport CEO Tony Barker highlighted the "huge opportunity" that NDC offers for airlines and resellers,<sup>255</sup> indicating that there is at least an interest and incentive to enter this space.

5.60 There are also multiple other potential entrants in the market, particularly numerous major systems integrators that are currently working with airlines (for example, Accenture, Tata Consulting Services, NIIT Technologies, Mindtree, Bits in Glass, Wipro and Cognizant) and are all capable of building an API using the NDC standard based on their existing airline offer technology. Notably, T2RL considers these (and others) to be current competitors to FLX OC.<sup>256</sup>

5.61 Aggregators operating in this sector also have the capability to exert competitive pressure on Farelogix. The CMA recognises Travelfusion and TPConnects as players in this space,<sup>257</sup> however, the CMA fails to recognise either company as a significant competitive threat to Farelogix. However, Travelfusion markets itself as an NDC API provider in addition to offering its aggregation product.<sup>258</sup> The Parties note that Travelfusion's aggregation service lists NDC connections with 13 airlines which are not Farelogix customers. These 13 airlines must use an NDC API that is developed by one of Farelogix's competitors (either Travelfusion or another third-party) to connect to Travelfusion's aggregation platform. While Travelfusion's focus to date has been primarily to connect airlines to its aggregation platform, there is nothing stopping Travelfusion from pivoting to offering APIs on a standalone basis should Travelfusion determine there is market demand. Further detail of the potential for Travelfusion to enter the market and compete strongly against Farelogix is included in Confidential Annex 7.

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<sup>253</sup> <https://www.airkiosk.com/bookings/xr-info.php?agent=200113113630.195.171.106.132.5209&page=airxml-intro.html&lang=EN>.

<sup>254</sup> <https://www.bravo.aero/robust-apis/>.

<sup>255</sup> <https://www.travolution.com/articles/107290/big-interview-the-foundations-are-laid-to-industrialise-merchandising-in-travel-says-paxport>

<sup>256</sup> T2RL "Farelogix Open Connect Product: Role and Competitive Environment" p. 10 *et seq.*

<sup>257</sup> Provisional Findings, paras. 8.39 – 8.40.

<sup>258</sup> <https://www.travelfusion.com/corporate/page/tf-ndc-api>. See also Confidential Annex 7.

- 5.62 Further, AirGateway is also an NDC-certified content aggregation platform that has relationships with at least two Farelogix customers (including AA and WestJet) and intends to compete with FLX OC and SPRK. The CMA fails to refer to AirGateway in the Provisional Findings. Notably, AirGateway recently announced and launched an agency interface that enables TAs to connect to AirGateway's 14 participating NDC airlines and will handle entire workflows, including servicing, ticketing, cancellations, and refunds.<sup>259</sup>
- 5.63 Overall, it is clear that the CMA's analysis of alternative suppliers of distribution solutions is inadequate and lacking in detail and consistency. FLX OC is not "unique" because numerous competitors already exist and successfully compete with Farelogix for airlines' NDC API business. Any incumbency advantage that Farelogix may once have had has long evaporated, and the standardisation of NDC, particularly after the introduction of the first scalable and workable schema version 17.2, has enabled many other IT companies, including new entrants, to compete for and win NDC API bids. New entry is expected to continue because NDC is an open-source technology with no particular technological or intellectual property barriers to entry.

***The CMA ignores other important constraints***

- 5.64 Finally, the CMA also fails to pay due attention to other important constraints on the Parties, in particular: (i) in-house supply; (ii) airline.com; and (iii) other GDSs.

*In-house supply*

- 5.65 In-house supply is an extremely relevant constraint on the Parties, particularly on Farelogix's ability to sell its NDC API product. In rejecting this, the CMA, again, takes a highly static and asymmetric view of the market.
- 5.66 As the Parties have outlined previously (paragraphs 5.46, 5.51 of the Parties' Response to the Issues Statement), an increasing number of larger airlines are fulfilling their NDC API requirements in-house. The importance of in-house supply was further explained by the Parties' expert economist during the Delaware Proceedings: "*One is in-house NDC API implementations...there are a number of airlines that have gone down that route, including people like British Airways, Air France...I found that is a good alternative to what Farelogix offers.*"<sup>260</sup> Notably, [§<].<sup>261</sup> AA has also considered self-supply, and both United and AA have threatened to switch to self-supply in negotiations with Farelogix.<sup>262</sup> [§<].<sup>263</sup> Moreover, both Delta and Virgin Atlantic also use in-house solutions, as was made clear to the CMA in its hearing with Virgin Atlantic.<sup>264</sup>

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<sup>259</sup> The Company Dime, *Freshly Funded AirGateway Brings Its NDC Pipes to Life Through Agent Interface*, 7 February 2019, <https://www.thecompanydime.com/airgateway-ndc/>.

<sup>260</sup> *United States v Sabre* Tr. 1444:6-13 (Murphy).

<sup>261</sup> *United States v Sabre* Tr. 329:5-11 (Sealed).

<sup>262</sup> *United States v Sabre* Tr. 635:22-636:8 (Davidson).

<sup>263</sup> *United States v Sabre* Tr. 113:2-5 (Sealed).

<sup>264</sup> Summary of Hearing held with Virgin Atlantic on 28 October 2019.

- 5.67 The CMA, however, ignores these ongoing market developments as more airlines develop in-house supply, and does not acknowledge the consequences of the data cited in the Provisional Findings in this regard, including the fact that airline self-supply is the preferred option for many of the top airlines operating in the UK. British Airways, in particular, has repeatedly decided against using Farelogix in favour of using in-house self-supply.
- 5.68 Further, the CMA's claim that in-house supply is only viable for the largest airlines<sup>265</sup> is not borne out by the evidence included within the Provisional Findings. Notably, this is at odds with the CMA's own findings that large and mid-size airlines have already developed or are developing their NDC APIs in-house.<sup>266</sup> The CMA also finds that seven airlines which ultimately outsourced their API to a third-party provider nevertheless told the CMA that they would consider in-house development.<sup>267</sup> Therefore, even where airlines have decided not to choose in-house supply, this does not mean that in-house is not a competitive constraint.
- 5.69 Moreover, the CMA also fails to draw the obvious conclusion that, if multiple airlines have developed or have considered developing NDC APIs in-house, this is strong evidence that the barriers to entry for a third-party IT provider with sufficient resources are low.

*Airline.com*

- 5.70 The CMA's view of the constraint from airline.com is also highly asymmetric, and mischaracterises how airline.com is positioned in the market. Airline.com comprises around 42% of the market (compared to Farelogix's [X]%), therefore it is illogical to characterise Farelogix as a greater constraint than airline.com which accounts for far more than [X] the booking volumes.
- 5.71 As the Parties have previously demonstrated, airline.com is a significant constraint on the Parties in negotiations with airlines (paragraph 5.22 of the Phase 2 Initial Submission and paragraphs 5.16 – 5.18 of the Parties' Response to the Issues Statement). As Professor Murphy testified during the Delaware Proceedings, the fear of not having content that is otherwise available on airline.com is "*a major concern for GDSs which accounts for why it is a very big competitive constraint on the fees that GDSs charge.*"<sup>268</sup> Derek Adair (Delta) testified that "*Delta.com now has internal channels roughly 50 percent of our distribution, [and] that volume has come away directly from GDSs.*"<sup>269</sup>
- 5.72 Similarly, Chris Wilding testified that "*Airline.com is one of the primary competitors that we face as a GDS.*"<sup>270</sup> This is because airlines frequently use airline.com (and the direct channel more generally) as a lever in negotiations by threatening to remove content from

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<sup>265</sup> Provisional Findings, paras. 10.104.

<sup>266</sup> Provisional Findings, para. 10.101.

<sup>267</sup> *Ibid.*

<sup>268</sup> *United States v Sabre*. Tr. 1438:4-6 (Murphy).

<sup>269</sup> *United States v Sabre* Tr. 1726:2-15 (Adair).

<sup>270</sup> *United States v Sabre* Tr. 860:21-22 (Wilding).

the GDSs in favour of airline.com. This was clearly demonstrated by the Parties in paragraphs 5.37 *et seq.* of the Parties' Response to the Issues Statement, outlining how airlines including IAG, Air France/KLM and Lufthansa Group were referenced in the Parties' internal documents as having used airline.com as a lever during contract negotiations. This was also echoed by [REDACTED], which told the CMA: "[REDACTED]."<sup>271</sup>

5.73 It should be noted in this regard that a particular reason airline.com is a threat to GDS revenues is because diversion to airline.com also affects OTAs, as a removal of content from the GDS will affect GDS-served OTAs, which represent a third of Sabre's GDS volume.<sup>272</sup> In particular, airline.com is a significant competitive constraint in relation to the distribution of tickets to OTAs, as they are both well-placed to serve leisure travellers.<sup>273</sup> This competition has increased since the rise of metasearch sites that provide direct channel results alongside OTA results.<sup>274</sup> Metasearch sites may direct the consumer to the OTA website or the airline's website - in that scenario, the airline considers the ultimate booking on its website to be a direct channel sale.<sup>275</sup> Expedia's 2018 Annual Report notes that "*Our brands are facing increasing competition from travel supplier direct websites....*"<sup>276</sup> Similarly, Priceline's 2018 Annual Report highlights that "*Travel service providers, including hotel chains, rental car companies and airlines with which we conduct business, compete with us in online channels to drive consumers to their own platforms in lieu of third-party distributors such as us. Travel service providers may offer lower prices and, in some instances, offer advantages such as loyalty points or special discounts...., any of which could make their offering more attractive to consumers than our services.*"<sup>277</sup> Testimony from the Delaware Proceedings also confirms this competition between OTAs and the direct channel (via metasearch sites).<sup>278</sup> The CMA's failure to analyse this constraint is all the more important since the Provisional Findings allege that OTAs will form the most likely area of growth for Direct Connect.<sup>279</sup> It is precisely here where the airline.com competition is strongest. Airline.com volumes, and consequently its power to constrain the GDS, are over ten times that of Direct Connect (in total, not just Farelogix).

5.74 Importantly, the CMA itself acknowledges its finding that 14 airlines (out of a total of 24), stated that they use airline.com as a lever in negotiations. Indeed, more airlines stated

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<sup>271</sup> [REDACTED].

<sup>272</sup> Provisional Findings, para. 11.56.

<sup>273</sup> *United States v Sabre* Tr. 1552:14-24 (Murphy).

<sup>274</sup> *United States v Sabre* Tr. 1109:14-1109:17 (Larson).

<sup>275</sup> *United States v Sabre* Tr. 1702:1-11 (Tackett). A metasearch engine will often permit a consumer to book from the airline's direct channel on the metasearch site without being directed to the airline website. In that scenario, the airline transaction is still being completed by the airline's website, but the consumer never leaves the metasearch website.

<sup>276</sup> <https://ir.expediagroup.com/static-files/20cec441-9273-4645-891d-f77f8ace034f> p. 7.

<sup>277</sup> <https://www.sec.gov/Archives/edgar/data/1075531/000107553119000009/bkng1231201810k.htm> p. 12.

<sup>278</sup> For example, Mr. Kunz-Cho testified, "*we compete with the sorts of Google Flights because the speed to which we respond to a search is highly critical for us to grow our business and satisfy our customers.*" (*United States v Sabre* Tr. 1300:19-25 (Kunz-Cho).)

<sup>279</sup> Provisional Findings, para. 11.56.

to the CMA that they used airline.com as a lever in negotiations than those that said they used Direct Connect as a lever.<sup>280</sup> Further, the CMA recognises that “*nearly all of 29 responding airlines plan to grow their share of bookings through airline.com*”.<sup>281</sup> Amadeus also made it clear to the CMA that there is a significant structural shift in bookings from the indirect to the direct channel, and a clear correlation between these shifts and the imposition of surcharges or withdrawal of content from other channels.<sup>282</sup> Further, [REDACTED].<sup>283</sup>

- 5.75 However, despite this evidence and the Parties’ previous submissions, the CMA disregards any potential constraint from airline.com on the basis that this growth will be limited. This is a clear analytical error and disregards the well documented efforts of airlines to increase their bookings on airline.com and to use this as a lever in negotiations with the GDSs.
- 5.76 The CMA also fails to recognise that airline.com is a key driver behind NDC development, as airlines want to be able to display the same rich content and differentiated bundles in the indirect channel that they are already able to offer in the direct channel. This is clear from various internal documents cited by the CMA.<sup>284</sup> However, the CMA does not make the connection between these two pieces of information as to how airline.com is a significant driver of the development of distribution solutions.
- 5.77 The CMA dismisses airline.com on the basis that the majority of customers are individuals as opposed to, for example, business travellers who rely on mid- and back-office support. Yet the same is also true for bookings through Farelogix, the vast majority of which are passed through major consumer facing portals such as Priceline and other OTAs. Accordingly, the travellers benefitting from any credible constraint posed by Farelogix are precisely the customers that would readily switch to airline.com in the event of any post-merger price increases. As Professor Murphy explained during the Delaware Proceedings: “*if you are in OTA, a mouse click away is Airline.com, and that clearly has been the alternative that has been relevant.*”<sup>285</sup>
- 5.78 Moreover, there is evidence that airlines have recently been changing their distribution strategies to facilitate corporate travel through the direct channel. Delta, for example, has taken a stake in NuTravel as part of an omni-channel strategy to facilitate corporate travellers buying through Delta’s direct channel.<sup>286</sup> Further, there are corporate tools being rolled out in order to facilitate better use of the direct channel for business bookings including Concur, TripLink, Traxo, and Shep which act as workarounds to allow data to

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<sup>280</sup> Provisional Findings, paras. 6.35 and 6.51.

<sup>281</sup> Provisional Findings, para. 10.97.

<sup>282</sup> Summary of Hearing held with Amadeus IT Group SA on 18 October 2019.

<sup>283</sup> [REDACTED].

<sup>284</sup> See e.g. Provisional Findings, para. 9.117.

<sup>285</sup> *United States v Sabre* Tr. 1434:1-9 (Murphy).

<sup>286</sup> The Beat, *Delta Taps NuTravel to Enhance Managed Travel Capabilities in Direct Channel*, (24 January 2020).

be gathered about bookings made on the direct channel or allow corporate travellers to get corporate rates when using the direct channel.<sup>287</sup>

- 5.79 The CMA is therefore, again, undertaking an asymmetric assessment, favouring selective evidence that bolsters its theories of harm rather than focussing on the market realities backed up by the majority of the evidence which shows that airline.com is a much stronger constraint on Sabre than Farelogix is.
- 5.80 Finally, the CMA's analysis of airline.com suffers from basic factual errors.
- 5.81 First, the CMA claims that airline.com "*appears to have slowed in recent years*".<sup>288</sup> This is based on a single year of data, and glosses over the fact that airline.com has gone from around 35% of global bookings in 2014 to more than 40% of bookings in 2018 during a time when total bookings have also been increasing according to the same T2RL dataset relied upon by the CMA. Notably, the same dataset also shows that the share for Direct Connect has decreased during the same period. This is, once again, an example of the CMA's selective, asymmetric analysis, which arbitrarily places weight on share trends when it supports the CMA's desired findings, but not when it contradicts them.
- 5.82 Second, the CMA claims that "*the growth of airline.com has principally been at the expense of another direct channel (call centres) and appears to have slowed down in recent years*".<sup>289</sup> This is a *non-sequitur* with no supporting evidence.
- 5.83 First, Figure 5.6 below demonstrates that the increase of airline.com is almost perfectly mirrored in a decrease in the share of bookings made through GDSs. As such, the CMA's own logic would equally support the claim that the growth of airline.com is at the expense of the GDSs. Second, as submitted in the Parties' Response to the Working Paper on Current Competition in Distribution, but not addressed in the Provisional Findings, the average penetration of airline.com masks substantial differences in penetration at individual airlines (up to 90% in some cases).<sup>290</sup> There is no doubt that the threat to remove content to airline.com is an extremely powerful one given this room to grow airline.com further or, indeed, even if airline.com remains at similar levels. At 40% it is a threat to GDS volumes over 10 times greater than Direct Connect (in total). Third, the claim that, because airline.com bookings have gone up and call centre bookings have gone down there must be substitution between these channels is simply a *non-sequitur*. It could be that some of these phone bookings have gone to the GDS channel and that the flow of bookings from GDS to airline.com is even larger than the Figure below would suggest. This hypothesis would be more consistent with the other evidence on the CMA's file which shows airline.com is a hugely important constraint.

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<sup>287</sup> See Amadeus's Initial Submission following CMA Reference Decision, para. 4.5(b).

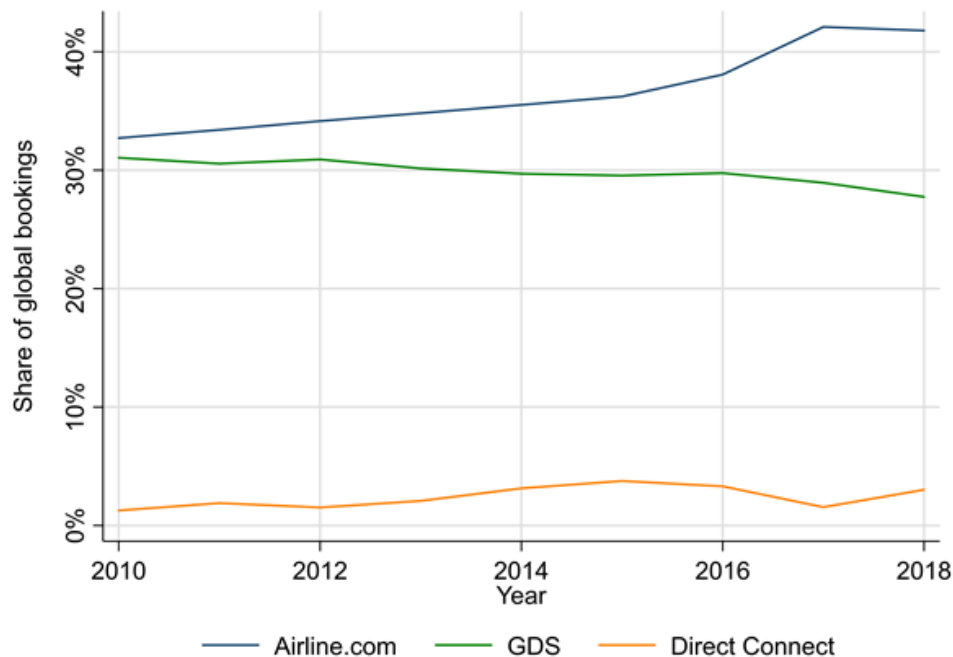
<sup>288</sup> Provisional Findings, para. 11.61.

<sup>289</sup> Provisional Findings, para. 6.54.

<sup>290</sup> Parties' Response to Current Competition in Distribution Working Paper, p. 5.



**Figure 5.6**  
**Share of global bookings made through airline.com, GDSs, and Direct Connect – 2010 to 2018**



Source: T2RL data

#### Other GDSs

- 5.84 The CMA also wrongly dismisses competition between GDSs, stating that “*historically, competition between the three GDSs has been muted*”.<sup>291</sup> This conclusion is entirely at odds with the CMA’s own findings, and with economic logic.
- 5.85 The CMA accepts that the GDSs are each other’s closest rivals, and that they monitor each other closely in internal documents: “*The documents indicate that the GDSs primarily monitor each other (and other aggregators to a lesser degree)*”.<sup>292</sup> It is selective and asymmetric to base these aspects of the competitive assessment almost exclusively on internal documents (to the extent that they support the CMA’s preferred outcome), but to simultaneously ignore internal document evidence when the findings point in a different direction.
- 5.86 As Professor Murphy explained in the Delaware Proceedings, because of the two-sided nature of Sabre’s GDS, the primary competitors for Sabre on the distribution side are “*the rival GDSs. In this case, Amadeus and Travelport*”, going on to explain that if Sabre does

<sup>291</sup> Provisional Findings, para. 11.55.

<sup>292</sup> Provisional Findings, para. 10.39.

not provide the airline content that customers want, it will “lose travel agencies to Amadeus and Travelport.”<sup>293</sup>

- 5.87 Similarly, Kurt Ekert (Carlson Wagonlit Travel (CWT) CEO) testified that “if, for example, Sabre was to lose content or enable content but on a noncompetitive basis to how another GDS provides that, then we have the ability to shift business away from them to another GDS.”
- 5.88 All of the market evidence points to intense competition between the GDSs for travel agent customers which airlines can take advantage of to exert leverage. The Parties have evidenced travel agent switching rates of approximately [X]% at the point of contract renewal.<sup>294</sup>
- 5.89 It is also clear that airlines can in turn leverage the travel agent dynamic to apply pressure to the GDSs in negotiations. Airlines are aware that, if they provide less content to one GDS than the others, this will lead to travel agents switching away and undermining that GDS’s market position. This dynamic provides a powerful “threat point” in negotiations. The fact that all airlines ultimately tend to work with all GDSs does not change the fact that airlines can play the GDSs off against one another via this travel agent dynamic. Indeed, and as explained above at para. 0, airlines can and do use this dynamic to play GDSs off against one another, most notably [X].
- 5.90 Further, the trend in GDS fees over time is indicative of strong competition between the GDSs. The Provisional Findings report that airlines are able to negotiate significant discounts from GDS rack rates (with the average fee being \$[X] versus rack rates over \$[X])<sup>295</sup>, and GDS fees have historically decreased substantially, currently accounting for around [X]% of an average ticket price. This decrease is clearly unconnected to Direct Connect (see Figure 5.7 below) and the low level of fees strongly refutes the notion of muted competition between GDSs. If competition between GDSs were indeed deficient, much higher GDS fees would be expected.

**Figure 5.7: Booking fees over time**

[X]

- 5.91 Finally, the CMA’s position that the GDSs “will not have an incentive to compete aggressively in order to bypass their own GDS”<sup>296</sup> is premised on obvious factual errors. The GDS has no ability to control how airlines use an API. An API is interface software provided to the airline. It is the airlines’ choice, not the GDSs’, as to how an API is deployed across direct and indirect channels. To take the obvious point, if a GDS did not adapt to consume particular API-delivered content then it would accelerate, rather than retard, GDS bypass for that content. All the evidence, unsurprisingly, points in the other direction, as the current market behaviour of the GDSs on the airline IT side shows. Amadeus already offers an NDC API, and regularly competes with a range of IT providers.

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<sup>293</sup> *United States v Sabre* Tr. 1433:5-13 (Murphy).

<sup>294</sup> Parties’ Response to the Issues Statement, Annex 11.

<sup>295</sup> Provisional Findings, para. 3.27.

<sup>296</sup> Provisional Findings, para. 11.55.

There is no evidence that Amadeus, as a GDS, is not “competing aggressively” in the market, not least because if Amadeus was not offering a good enough solution, airlines would simply choose a different provider instead. In a competitive market with no intellectual property barriers to entry, there is no economic incentive to “not compete aggressively” because GDSs would simply lose business.

- 5.92 Competition between the GDSs is extremely relevant, both in terms of competing for price and content, and in innovation competition.<sup>297</sup> An assessment which dismisses the competition between Sabre and its closest rivals is fundamentally flawed and removed from market realities.

***The CMA fails to prove the counterfactual will be significantly different from the status quo***

- 5.93 The CMA asserts that Sabre has the “*intention, incentive and ability*”, absent the Transaction, to continue its planned investment in NDC distribution solutions, and remain one of the three major distributors of airline content.<sup>298</sup> The CMA also asserts that, alongside this, Farelogix would continue to bid for NDC solutions and grow to become a “*leading provider and developer of NDC distribution solutions*”.<sup>299</sup> The CMA’s counterfactual is flawed for a number of reasons.
- 5.94 First, the CMA takes note of several Sabre internal documents discussing its future plans for NDC distribution.<sup>300</sup> However, the CMA fails to document Sabre’s ongoing difficulties in developing its NDC distribution solutions at the speed required to keep pace with the market, particularly the position of Amadeus.
- 5.95 As the Parties have made clear previously [§].<sup>301</sup> [§]. As Amadeus outlined in its response to the CMA’s Reference Decision, it is the biggest investor in NDC and is ahead of other competitors, noting that “*the extent of its commitment to NDC has been underrepresented in the review to date*”. Further, Lufthansa also told the CMA that Sabre

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<sup>297</sup> Indeed, even if (which the parties deny) competition were muted on other parameters (Provisional Findings para. 11.55), economic theory indicates that it is particularly difficult to sustain an oligopolistic outcome in relation to innovation competition, with which the CMA is purportedly concerned here. Innovation has long lead times, involves large sunk costs and is non-transparent to other market participants. Reaching a tacit consensus on innovation competition is therefore inherently unlikely. As we see in this market, once one participant, in this case Amadeus, introduces innovative products, there is substantial pressure on other market participants to adapt or rapidly lose business. Further, the CMA has already assessed any risk of coordination on innovation between the three main GDS providers and found that it is implausible because coordination will not be internally sustainable (Phase 1 Decision paras. 22 and 364 *et seq.*). It is well accepted that coordination is only sustainable if the coordinating parties have no incentive to cheat. It is particularly hard to coordinate on reduced innovation, as it is simply too tempting to cheat: innovation cannot be effectively monitored and once a party has successfully innovated, it is too late for the others to catch up with the cheating party. The CMA’s assessment has already confirmed that there is a time lag between developing and agreeing an NDC strategy (eg the budget allocation) and the actual launch and implementation of NDC-enabled capabilities with carriers (Phase 1 Decision para. 378). The CMA found that this could incentivise deviation because rivals are likely to be unable to accelerate their development sufficiently swiftly to catch up, preventing enforcement of any coordination.

<sup>298</sup> Provisional Findings, paras. 11.35 – 11.36.

<sup>299</sup> Provisional Findings, paras. 11.37 – 11.40.

<sup>300</sup> Provisional Findings, paras. 9.91 – 9.99.

<sup>301</sup> [§].

“has far less advanced NDC technology and features than Amadeus” and absent the Transaction “Sabre would be several years behind Amadeus should Sabre begin to invest in NDC”.<sup>302</sup> The CMA takes note of Amadeus’s submissions in this regard,<sup>303</sup> although not of Lufthansa’s, however the CMA does not draw the logical conclusion from these submissions: Amadeus will continue to excel and lead in the development of NDC. Rather, the CMA continues to asymmetrically analyse the position of Sabre without reference to its competitors.<sup>304</sup>

- 5.96 Second, the CMA simply asserts that Farelogix would continue to develop its NDC API and remain an important player in that market. In making this finding, the CMA has failed to properly investigate the recent evidence regarding Farelogix’s [REDACTED] which limit Farelogix’s ability to grow its business and service its existing customer base. [REDACTED]<sup>305</sup> [REDACTED]. Therefore, it is inappropriate for the CMA to disregard the evidence previously provided by Farelogix (see paragraphs 5.13 – 5.15 of the Phase 2 Initial Submission and paragraphs 3.5 *et seq.* in the Parties’ Response to the Issues Statement) regarding its [REDACTED].
- 5.97 Further, contrary to the CMA’s repeated suggestions throughout both its Phase 1 and Phase 2 review that Farelogix has [REDACTED]. For example, in correspondence of 13 February 2020,<sup>306</sup> [REDACTED].
- 5.98 The evidence before the CMA shows [REDACTED]<sup>307</sup>[REDACTED].”<sup>308</sup>
- 5.99 Whilst Farelogix is taking steps to try to resolve these issues, these have not yet solved the problem and Farelogix’s plan to resolve such issues has to date been unsuccessful. Therefore, going forward, whilst Farelogix would continue to exist in the market for NDC APIs, it will certainly not be a uniquely strong competitor in the market.
- 5.100 Third, the CMA fails to take proper account of the dynamic nature of the market and the ability and incentive for other competitors to innovate and expand (both generally and particularly in response to any post-Transaction worsening of the merged group’s offering), despite asserting that Sabre and Farelogix would continue to grow and develop.
- 5.101 The CMA is logically inconsistent when finding that “*Farelogix’s current market share may not fully reflect its competitive potential*” and acknowledging itself that “*there are recent and ongoing changes to the market*”,<sup>309</sup> while failing to undertake any such forward-looking analysis for other current competitors. The CMA considers the positions of other

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<sup>302</sup> CMA Summary of Hearing with Lufthansa on 10 October 2019.

<sup>303</sup> Provisional Findings, paras. 10.18 *et seq.* and paras. 10-51 – 10.54.

<sup>304</sup> E.g. Provisional Findings, para. 11.36.

<sup>305</sup> Provisional Findings, para. 9.133.

<sup>306</sup> See Annex 6.

<sup>307</sup> Farelogix Main Party Hearing Transcript, p. 24:17

<sup>308</sup> Farelogix Main Party Hearing Transcript, p. 17:11-16.

<sup>309</sup> Provisional Findings, para. 8.95.

suppliers of distribution systems, however it focusses heavily on their current and historical positions: “*they are weaker*” than Farelogix, “*they have fewer and less significant customers*” and they “*are seen*” as less of a competitive threat.<sup>310</sup> The CMA has not sufficiently addressed the question of whether other existing competitors and emerging entrants have already caught up with Farelogix (such that its current customer base reflects past competitive performance) and could further advance their capabilities going forward, and has not obtained sufficient evidence from other providers to draw reliable conclusions as to their likely future market position and capabilities. In particular, the CMA takes a highly asymmetric view of competitors’ potential for expansion as compared with the position of Farelogix, including largely ignoring the Parties’ bidding data,<sup>311</sup> and failing to address a number of IT providers that have the potential to become significant competitive constraints in distribution (for example, Google/ITA which the CMA has largely glossed over in its analysis).<sup>312</sup>

5.102 Furthermore, if the CMA’s theory of harm is correct (which the Parties strongly deny) then the completion of the Transaction would increase the ability and incentive for the remaining suppliers of distribution systems to expand, creating an obvious opportunity for them to satisfy the demand currently being met by Farelogix and an incentive for airlines to support such growth (in circumstances where, as demonstrated by the Parties, there is nothing unique or unrepeatable about the position Farelogix has developed). The Provisional Findings do not seek to investigate these central factual issues.<sup>313</sup>

5.103 Finally, the CMA’s analysis of incentives is internally inconsistent and asymmetric as regards competition from the other GDSs. The CMA asserts that Sabre would have the incentive to develop its own NDC distribution solutions, whereas the other GDSs (Travelport and Amadeus) “*will not have an incentive to compete aggressively in order to bypass their own GDSs*”.<sup>314</sup> This is logically inconsistent with the CMA’s finding on the counterfactual, where Sabre is expected to continue to develop an NDC API (see paragraph 5.93 above); it cannot be the case that Sabre can be expected to continue to develop an NDC API while other GDSs are not expected to compete aggressively. The CMA’s Provisional Findings further conflate the incentive to build an NDC API to deliver richer content to the GDS (which all of the GDSs are currently doing) and connect with other distribution channels such as airline.com, with a fictional, imputed incentive to conduct GDS bypass. NDC API development and GDS bypass are not synonymous — NDC APIs can be used to connect airlines with GDSs, with other content aggregators and airline.com. Amadeus and Travelport have demonstrated that they are already able to develop NDC APIs and are heavily investing in this; they will continue to compete aggressively as NDC API goes beyond GDS bypass.

5.104 Overall, the CMA has failed to adequately prove its dynamic counterfactual, and only pays lip service to the dynamic nature of the market while: (a) ignoring the potential for

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<sup>310</sup> Provisional Findings, para. 11.60.

<sup>311</sup> See para. 5.42 *et seq.* above and Confidential Annex 8.

<sup>312</sup> See paragraphs 5.55(iv) *et seq.* above.

<sup>313</sup> As required by Merger Assessment Guidelines, para. 5.4.11.

<sup>314</sup> Provisional Findings, para. 11.55.

expansion and innovation by rivals, both generally and particularly in response to the Transaction going ahead;<sup>315</sup> and (b) relying heavily on a static analysis of selective historic documents belonging to the Parties from 2017/18 (see further Section 3, above) while disregarding recent market evidence which shows that these historic documents are speculative and wrong. This error is pervasive across its analysis.

***Conclusion – SLC finding in distribution is wrong***

- 5.105 The CMA has failed to demonstrate that an SLC in distribution is likely and, in particular, has approached the dynamic assessment in an asymmetric and inconsistent way which has resulted in it overstating the potential competitive threat from Farelogix going forward and understating the potential competitive threat from rival providers of NDC APIs as well as other distribution channels, both generally and in response to the Transaction.
- 5.106 The CMA's assessment unreasonably rejects recent market evidence, particularly market shares and bidding data, in favour of out-of-date internal documents, and despite clear evidence that the market has changed significantly in the last two years. The CMA also wrongly rejects travel agent evidence in favour of airline evidence, although the former is far more likely to align with pro-competitive, pro-consumer outcomes.
- 5.107 The totality of the evidence clearly demonstrates the absence of an SLC in this case. Whatever the position may have been several years ago, Farelogix is not unique today, nor is an independent Farelogix a source of significant innovation or other competitive pressure in the market today.
- 5.108 In short, the CMA's theory of harm is fundamentally flawed and the provisional finding of an SLC with respect to distribution solutions is unsupported and wrong.

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<sup>315</sup> As required by the Merger Assessment Guidelines, para. 5.4.11.

## 6. CONCLUSION

- 6.1 The CMA's provisional conclusion that the Transaction gives rise to a relevant merger situation is wrong in law and in fact. Further, the CMA's provisional conclusions that the Transaction may be expected to result in an SLC within the supply of merchandising solutions and the supply of distribution solutions on a worldwide basis are fundamentally flawed and based upon asymmetric analysis, logical inconsistencies, significant evidentiary deficiencies and a backwards-looking view of the market. In particular, the CMA has concentrated on selective historical documents which have been demonstrably overtaken by market realities.
- 6.2 The Transaction is pro-competitive and will benefit consumers and the wider industry. Sabre has significant scale and expertise in distribution and fulfilment, but it lacks competitive NDC-enabled retailing capabilities to integrate with its GDS offering. Farelogix has NDC retailing capabilities, but it lacks the ability and resources to achieve competitive scale. Combining Farelogix's merchandising and NDC expertise with Sabre's global distribution scale will enable the combined entity to distribute NDC content at scale globally, allowing Sabre to better serve the industry (airlines, travel agents, and end-travellers) and to close the gap on market leader Amadeus, who has NDC-integrated solutions already. Prohibiting the transaction could cause adverse effects on third-parties and impose potential costs, for example on Farelogix's customers who continue to experience [redacted] and on Sabre's customers who demand NDC functionality. Further, it would be highly improper given the *nexus* between the Transaction and the UK is peripheral at best, the impact on UK consumers is very limited, and the Transaction is being subject to detailed scrutiny in the US, the jurisdiction which has by far the greatest connection with the Transaction.