

**Annex 1**  
**Overview of the evidentiary deficiencies in the Provisional Findings**

The CMA does not have an adequate evidential foundation for its factual conclusions. The Provisional Findings are characterised by a number of serious and overarching errors in the CMA's assessment of the evidence. In particular, the CMA relies disproportionately on a highly selective use of documentary evidence, consisting frequently of excerpts from outdated historic internal documents, while attaching limited weight to and often disregarding entirely hard economic data and quantitative evidence reflective of actual competitive dynamics and which is therefore by its very nature more probative of recent and likely future developments. The CMA also unacceptably dismisses more recent documents on the inappropriate, untrue, and unsubstantiated allegation that they have been tainted as a result of the Transaction.

**1. UNJUSTIFIABLE FAVOURING OF HISTORIC DOCUMENTARY EVIDENCE OVER QUANTITATIVE AND OTHER EVIDENCE**

***Focus on documentary evidence over quantitative evidence***

- 1.1 The CMA's assessment focusses overwhelmingly on historic documentary evidence, whilst quantitative evidence such as bidding data, market share data and valuation evidence introduced by the Parties (and collected by the CMA from other sources) which shows that the CMA's SLC findings are wrong, are dismissed or largely disregarded. The CMA justifies this on the basis that such data (for example market shares) are "*imperfect indicators*",<sup>1</sup> yet, contrary to its own assertion, the CMA instead favours historic, speculative and often internally inconsistent documentary evidence. The CMA's approach leads to serious errors in its characterisation of the markets for both merchandising and distribution solutions.

Distribution solutions

- 1.2 In the assessment of distribution solutions, one particularly significant misunderstanding borne from the CMA's overreliance on historic documentary evidence is its allegation that GDS bypass will grow to become an effective competitive constraint on the GDSs. The CMA cherry-picks its evidence by, for example, quoting the Parties' aspirational comments around growth and the "risk factors" in Sabre's 2018 Annual Report.<sup>2</sup> However, the CMA dismisses the quantitative evidence presented in the same internal documents the CMA seeks to rely on, which shows that Farelogix would [X<] even on the basis of the Parties' most aggressive forecasts and that the main driver to its growth is, in any event, its GDS pass-through solution.
- 1.3 The CMA finds that Farelogix "*continues to compete for NDC distribution solutions*"<sup>3</sup> and that "*Farelogix is well placed to capture a significant share of [...] increased GDS bypass*

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<sup>1</sup> Provisional Findings, para. 11.16.

<sup>2</sup> Provisional Findings, paras. 6.36(a) and 9.95.

<sup>3</sup> Provisional Findings, para. 11.37.

volumes”.<sup>4</sup> However, in reaching these views the CMA wholly disregards empirical evidence which does not support these conclusions. Specifically:

- (i) Bidding data shows that Farelogix has only won [REDACTED], in the most recent 12-month period. Farelogix has only won [REDACTED] of its NDC API bids in the last five years (and [REDACTED]) and it has lost bids to provide NDC API services to several competing suppliers, including [REDACTED]<sup>5</sup>[REDACTED]– see [REDACTED]
- (ii) **Figure 1** and Figure 2 below. [REDACTED].[REDACTED]

**Figure 1**  
[REDACTED]

**Figure 2**  
**Today: Farelogix has more than 20 competitors**



Source: Sabre’s final closing slides presented during the Delaware Proceedings, as produced on 8 February 2020

- (iii) The Parties have also obtained further bidding information indicating that Amadeus is becoming stronger and that in-house is a viable alternative:<sup>6</sup> [REDACTED]<sup>7</sup> [REDACTED]

<sup>4</sup> Provisional Findings, para. 11.57.

<sup>5</sup> Provisional Findings, Appendix H, Table 6.

(i) <sup>6</sup> This recent market intelligence is not yet included in [REDACTED]

**Figure 1.**

<sup>7</sup> These three opportunities were previously reported to the CMA to be lost by Farelogix to unknown winners.

- (iv) Farelogix's [§<] compared to its projection of [§<] for 2018, processing only [§<] in 2018 ([§<]).<sup>8</sup> Farelogix also significantly revised its GDS bypass revenue projections [§<] for 2019 and from [§<] to [§<] for 2020.<sup>9</sup>
- (v) Farelogix's Direct Connect accounted for just [§<] of booking volumes in 2018, even based on Farelogix's [§<], FLX OC (including both pass-through and bypass modes) would constitute only a [§<] of indirect distribution – [§<] for 2019, [§<] for 2020 and [§<] for 2021. Farelogix's share of supply would be [§<] if direct distribution is included: constituting only [§<]% for 2019 – 2021. Further, the Provisional Findings ignore that the bulk of this anticipated growth relates to GDS pass-through and not GDS bypass. Sabre projected that around [§<]% of Farelogix bookings would be GDS pass-through by 2021, with Farelogix projecting even higher proportions of around [§<]%. As such, even the shares above will overstate the role of GDS bypass as opposed to the complementary GDS pass-through solution.
- (vi) Overall growth in GDS bypass ticket volumes remains modest [§<].<sup>10</sup>

#### Merchandising solutions

- 1.4 The CMA's suggestion that Sabre will grow to compete effectively with Farelogix is also borne from an overreliance on Sabre's aspirational comments in internal documents and flies in the face of the empirical evidence. The CMA dismisses the bidding and market share data that demonstrates the decline of Sabre's Dynamic Retailer and the depth of the competitive field. The empirical evidence shows that:
- (i) Sabre is not growing in merchandising. According to the CMA's own bidding analysis, since 2014, Sabre has only won [§<] bids for merchandising solutions when not bundled with its core PSS.<sup>11</sup> As demonstrated in previous submissions, Sabre has also failed to grow its market share, which has declined from an (already negligible) [§<] in 2016 to just [§<] in 2018.<sup>12</sup>
  - (ii) Other competitors are growing in merchandising. Datalex, Google/ITA and PROS each won a [§<] on a weighted by PBs basis, and PROS won a [§<].<sup>13</sup> This is consistent with the bidding data presented by the Parties<sup>14</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. The Parties' market share estimates, as previously

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<sup>8</sup> Document 4c-4.

<sup>9</sup> Dynamic Competition in Distribution Working Paper, slide 9.

<sup>10</sup> Parties' Response to the Dynamic Competition in Distribution Working Paper, p. 19.

<sup>11</sup> Provisional Findings, Appendix H, Table 2.

<sup>12</sup> Parties' Response to the Issues Statement, Annex 6.

<sup>13</sup> Provisional Findings, Appendix H, Table 1.

<sup>14</sup> Parties' Response to the Issues Statement, para. 4.30.

submitted, also show growth between 2016 and 2018 in the share of merchandising solutions provided by [REDACTED].<sup>15</sup>

- (iii) Once again, the Provisional Findings fail to reconcile their theory of harm with the price paid for Farelogix. [REDACTED]. If 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.

***The CMA's approach to valuation evidence is a clear and unjustifiable oversight***

- 1.5 The CMA accepts that *"the agreed purchase price appeared to be justified by a commercial valuation exercise"* with no evidence of a *"market power premium"*. Notwithstanding the huge attention this issue received during the evidence gathering process and the fact that multiple commentators (including the CMA's own report on digital mergers) point to valuation analysis as a key source of evidence to assess mergers in dynamic industries, the CMA sees fit to brush aside this evidence, burying it in Annex C and stating that *"We do not consider that the absence of the payment of a so-called "market power premium" is probative of an absence of competition concerns by itself...we have considered the evidence...in the round"*.
- 1.6 This is deficient. Valuation evidence is of clear evidential value and the CMA needs to explain how it can reconcile a view that £350m constitutes *"fair value"* with a view that Farelogix would become an increasingly powerful player and a potential existential threat to the GDS model. Indeed, evidence submitted by CRA on behalf of the Parties shows that Sabre would be willing to pay an incremental \$500m-\$1,1bn on top of the standalone value of Farelogix to avoid a 5% reduction in the EBITDA generated by its GDS business. It is not enough for the CMA to prefer other evidence it needs to explain why multiple sophisticated investors "left money on the table" and why the CMA's speculation as to future market developments was not shared by this investor community.

***Over-reliance on historic documents and failure to take into account internal developments within Sabre and external market developments***

- 1.7 The CMA also errs in attaching so much weight to historic evidence because, in doing so, it closes its mind to Sabre's evolving and changing view of the commercial possibilities enabled by NDC and relatedly, Sabre's revised view of the competitive constraint posed by Farelogix. By focussing on internal documents from 2017 and 2018, the CMA also largely ignores other recent developments, such as the resource constraints that have delayed Sabre's NDC strategy and Farelogix's [REDACTED].<sup>16</sup>

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<sup>15</sup> Parties' Response to the Issues Statement, Annex 6.

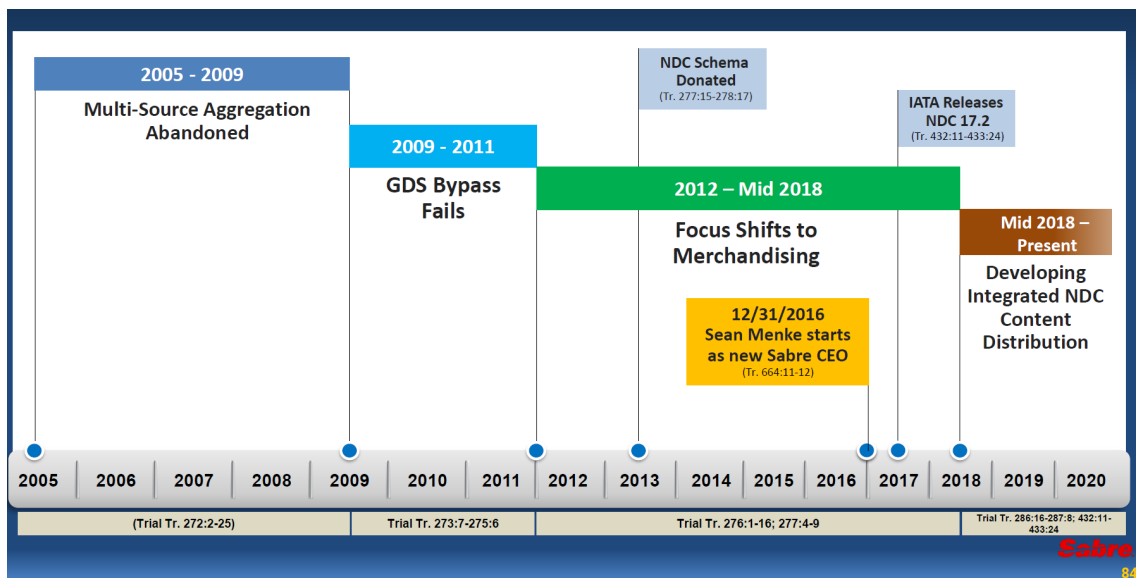
<sup>16</sup> The CMA's overreliance on historic internal documents has been discussed in detail in the Parties' previous submissions. See in particular the Response to the Issues Statement and the Response to the Working Paper on Dynamic Competition in Distribution, p. 35.

The CMA quotes heavily from Sabre's earliest internal documents dealing with NDC

- 1.8 The CMA quotes predominantly from NDC strategy documents which pre-date Sabre's first live testing in NDC. As can be seen from the timeline in Figure 3 below, of the 22 internal documents referred to in Chapter 9 of the Provisional Findings (discussing the development and investments made in the development of Sabre's merchandising and distribution NDC solutions) more than 65% are over 18 months old.
- 1.9 In fact, all but three of the NDC development/investment documents discussed in Chapter 9 pre-date Sabre's first live NDC API test with United Airlines. [REDACTED]. Further detail is provided at paragraphs 3.7 et seq. of the Parties' response to the Provisional Findings.
- 1.10 Figure contextualises Sabre's own NDC development timeline as against the evolution of NDC more generally, [REDACTED].

Figure 3  
[REDACTED]

Figure 4  
Evolution of the NDC standard



[REDACTED] Source: Sabre's final closing slides presented during the Delaware Proceedings, as produced on 8 February 2020

*Early presentations were used to brainstorm ideas – such presentations are by definition preliminary and have since been shown to be overly ambitious*

1.11 As previously explained, Sabre launched its internal NDC initiative in [REDACTED]. [REDACTED].<sup>17</sup> The CMA confirms at paragraph 9.16 of the Provisional Findings that it has placed substantial weight on such documents. Specifically:

- (i) [REDACTED];
- (ii) [REDACTED];
- (iii) [REDACTED]; and
- (iv) [REDACTED],

together, the “[REDACTED]”.

*The CMA fails to take into account evidence of Sabre’s evolving thinking since the [REDACTED] were produced*

1.12 The CMA bases its understanding of Sabre’s future strategies on the outdated [REDACTED] (and other documents over 18 months old). As has been pointed out previously,<sup>18</sup> these do not provide an accurate representation of the market. The industry changed radically in the subsequent period, in particular following the publication of version 17.2 of the NDC standard in late 2017 (see Figure below) and the SteerCo Presentations do not take account of [REDACTED].


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<sup>17</sup> [REDACTED]

<sup>18</sup> [REDACTED]


**Figure 5**  
**Testimony on how the industry changed following NDC standardisation**

**IATA NDC Version 17.2 was First Commercially Viable Standard**


  
Jim  
DAVIDSON  
Farelogix

"A. There's more bids we've put out and lost and there's actually more airlines using NDC, a hundred the last time I checked the IATA website. It's significantly different. And the GDSs are openly taking the NDC API from a number of airlines.  
Q. And when did you see that change occur, sir, really take hold in the marketplace?  
A. So the -- it really occurred when the schema version 17.2, which was released I believe in late 2017..."  
Trial Tr. 432:19-433:16


**UNREBUTTED**

  
Tye  
RADCLIFFE  
United

"Q. You would agree with the statement that a lot of people in the industry thought the 17.2 version was really the first one fit for its purpose?  
A. Yes, sir.  
Q. And that came out in late '17; right?  
A. Yes, sir.  
Q. It was the first iteration of the standard that the industry players really started to invest in?  
A. Yes, sir."  
Trial Tr. 208:22-209:5

  
Theo  
Kruijssen  
Farelogix

"A. The industry has completely changed, especially in '18. It started with the IATA version...17.2 at the end of '17 and then mid-2018 we started to work with, closely with the GDSs and the airlines on the GDS implementations, GDS passthrough implementations."  
Trial Tr. 622:22-623:8



Source: Sabre's final closing slides presented during the Delaware Proceedings, as produced on 8 February 2020

- 1.13 There is documentary evidence of the Parties' positions having subsequently evolved on a number of issues, including for example on the risk presented by GDS bypass/Direct Connect, or lack thereof.
- 1.14 It is clear from recent documents that Sabre no longer perceives GDS bypass to be a "threat":
- (i) The presentation on [REDACTED] notes that "[REDACTED]" and perceives pass-through as an opportunity: "[REDACTED]".<sup>19</sup>
  - (ii) The draft presentation titled [REDACTED].<sup>20</sup>
- 1.15 This documentary evidence is supported by testimony from the Delaware Proceedings. For example, Sean Menke (CEO, Sabre) explained that:
- "The trend is very much on GDS integration. Passing through what's taking place. Those [are] 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."*<sup>21</sup>
- 1.16 Airline and travel agent testimony from the Delaware Proceedings corroborates this view – see Figure and Figure below.

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

<sup>21</sup> *United States v. Sabre* Tr. 711:8-16 (Menke).

**Figure 6**  
**Airlines value the reach provided by the GDS**

The screenshot shows two slides of testimony. The first slide features Cory Garner of American Airlines, with a question and answer about the value of GDS reach. The second slide features Tye Radcliffe of United Airlines, with a question and answer about the value of GDS relationships with travel agents. Both slides include the Sabre logo and a slide number (20).

**Slide 1:**  
Cory GARNER  
American  
“Q. **One of the big benefits is that the number of the travel agencies that American is able to reach** through them are travel management companies affectionately known as TMCs in this industry; right?  
A. Yes.  
Q. Yes?  
A. In almost all cases, a GDS is the only way to reach travel management companies.”  
Trial Tr. 145:1-8

**Slide 2:**  
Tye RADCLIFFE  
United  
“Q: [Y]ou agree that Farelogix is not a GDS, right?  
A. Yes, sir, I agree.  
Q. It is not providing the services to United, that a GDS provides?  
A. Yes, sir. I agree.  
Q. So, for example, GDSs have relationships with travel agents; right?  
A. Yes, sir.  
**Q. And those [GDS] relationships with travel agents provide value to United?**  
**A. Yes, sir.**  
**Q. And Farelogix doesn't provide that value or service?**  
**A. That's correct, sir.”**  
Trial Tr. 202:8-21

Source: Sabre's final closing slides presented during the Delaware Proceedings, as produced on 8 February 2020

**Figure 7**  
**GDS services and Direct Connect are not interchangeable**

The screenshot shows three slides of testimony. The first slide features Jeff Lobl of Delta, discussing the difficulty of replicating GDS relationships. The second slide features Kurt Ekert of CWT, discussing the value proposition of GDSs. The third slide features Rose Stratford of BCD Travel, discussing the ability to shop and compare products and services. All slides include the Sabre logo and a slide number (102).

**Slide 1:**  
Jeff Lobl  
Delta  
“Q. What's your understanding as to why most agencies are committed to GDS relationships and unwilling to direct connect?  
A. As discussed earlier, because the GDSs are providing a technology service, it's very difficult for agencies to replicate on their own.”  
Trial Tr. 1170:1-6

**Slide 2:**  
Kurt EKERT  
CWT  
“[T]he GDSs have been characterized by some as the plumbing of the travel industry. So we simply could not deliver our value proposition to our clients without the GDSs being part of our ecosystem. They're fundamental to our mission..”  
Trial Tr. 1187:3-7

**Slide 3:**  
Rose STRATFORD  
BCD Travel  
“They provide us the ability to shop, compare, provide our customers transparency. They also provide us products and services as it relates to reissues, repricing, also different products and services”  
Trial Tr. 1242:5-8

Source: Sabre's final closing slides presented during the Delaware Proceedings, as produced on 8 February 2020

The CMA adopts a static interpretation of internal documents and unjustifiably dismisses important evidence that the Parties' initial strategies were [X]

#### CMA analysis of selected Sabre internal documents

- 1.17 At paragraph 24 of Appendix D of the Provisional Findings, the CMA cites a number of documents demonstrating that Sabre is facing significant delays in implementing its NDC strategy. The CMA then dismisses this evidence in favour of seemingly contradictory 2018-19 documents which it takes, erroneously, as evidence that [X]<sup>22</sup> In reaching this view, the CMA errs by interpreting the evidence in isolation. It fails (to Sabre's detriment)

<sup>22</sup> Provisional Findings, App. D, para. 26.



to take into account how quickly the market is moving. As regards the documents quoted by the CMA, Sabre observes the following:

- (i) 26(a) – Although [§<] stated in March 2018 that “[§<]”, she goes on later in the email to say “[§<]”. This is precisely what happened. In October 2018, Travelport became the first GDS operator to manage a live NDC flight booking.<sup>23</sup> Amadeus followed in November 2018.<sup>24</sup> Sabre was the last GDS to do so, and only began testing live NDC bookings in April 2019 as part of its United Airlines implementation (see timeline at Figure 3 above).
- (ii) 26(b) – In April 2018, at the date of this presentation, it may have been true that Sabre’s distribution capabilities were, at least outwardly, “[§<] However, Travelport and Amadeus were [§<] as they proceeded to test live bookings shortly thereafter, and some six months ahead of Sabre.
- (iii) 26(c) – Sabre may indeed have been [§<], however – with hindsight – [§<]. As explained in Sabre’s Response to the Issues Letter,<sup>25</sup> Amadeus would, within two months, go on to launch a full NDC-enabled offer and order management solution with Cathay Pacific. [§<]

1.18 Sabre’s recent documents confirm that its [§<]<sup>26</sup> As [§<] has testified in the Delaware Proceedings, Sabre gets “further behind every quarter” in building “very basic NDC capabilities”.<sup>27</sup>

CMA analysis of selected Farelogix internal documents

1.19 The CMA cites internal communications made by Farelogix’s marketing team as evidence for its conclusion that its “[§<] *are not substantially affecting its business.*”<sup>28</sup> The CMA misconstrues this evidence to fit its own narrative. The reality is that these internal communications demonstrate [§<].

1.20 The CMA has been provided with [§<]<sup>29</sup> As outlined at paragraph 5.94 of the Parties’ Response to the Provisional Findings, the CMA has failed to place the documents into context. [§<] This is an entirely unreasonable and unjustified approach, far removed from a balanced assessment of the evidence.

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<sup>23</sup> [§<]

<sup>24</sup> <https://www.travix.com/press/amadeus-and-travix-strengthen-partnership-as-live-ndc-bookings-gain-momentum/>

<sup>25</sup> Response to the Issues Letter, para. 5.19(ii).

<sup>26</sup> See [§<]

<sup>27</sup> [§<] deposition transcript, p.154. (14 June 2019).

<sup>28</sup> Provisional Findings, para. 9.132.

<sup>29</sup> Provisional Findings, para. 9.132(a).

1.21 Further, the CMA relies heavily on a limited number of Farelogix’s internal distribution-related documents<sup>30</sup> to conclude “*that it considered the GDS companies to be closer competitors than other NDC API providers such as Datalex and OpenJaw*”. The proposition that the GDS companies are closer competitors than other NDC API providers is not supported by the bidding data (see paragraph 1.3, above). Moreover, the documents cited as evidence for this conclusion were each discussed at length in the Farelogix Oral Hearing and in Jim Davidson’s deposition to the DOJ on 13 and 14 May 2019.<sup>31</sup> Despite its professed desire during the Oral Hearing to be told about “[redacted],”<sup>32</sup> the CMA’s assessment simply proceeds to ignore Farelogix’s detailed explanations and expansions. It is unclear why the CMA has not given proper weight to the representations made by Farelogix at the Oral Hearing, particularly when the CMA’s theory of harm is predicated on this being a dynamic market that can change quickly. Specifically:

(i) The CMA quotes a reference in the [redacted] certain non-PSS competitors as being a “*low to medium threat*”<sup>33</sup> but ignores important context provided by Jim Davidson on this document. When questioned on this document, Jim Davidson stated “[redacted]”.<sup>34</sup>

(ii) Jim Davidson went on to explain: “[redacted]”.<sup>35</sup>

1.22 The CMA goes on to set out the document’s discussion of various competitors, absent the explanation and nuance provided at the Hearing.<sup>36</sup> At the Oral Hearing, Jim Davidson explained the shift to web services and how this influenced the views expressed in the documents:

“[redacted]”<sup>37</sup>

1.23 In the same section discussing the competitive constraints on Farelogix within distribution, the CMA also overstates the relevance of an internal note regarding [redacted].<sup>38</sup> The assumptions in this note have been disproven by significant advances in the NDC Exchange platform’s development, contemporaneous with the CMA’s investigation. These important developments (elaborated upon further in 5.53(i) of the Parties’ Response to the Provisional Findings) were brought to the CMA’s attention on more than one occasion, including during the Farelogix Site Visit Presentation given to the CMA on

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<sup>30</sup> Provisional Findings, para. 9.121 *et seq.*

<sup>31</sup> See in particular pages 344-442 of the Transcript of Jim Davidson Deposition 13 and 14 May 2019.

<sup>32</sup> [redacted].

<sup>33</sup> Provisional Findings, para. 9.121(a).

<sup>34</sup> [redacted].

<sup>35</sup> [redacted].

<sup>36</sup> Provisional Findings, para. 9.121(b).

<sup>37</sup> [redacted]

<sup>38</sup> Provisional Findings, para. 9.121(d).

9 October 2019, but the CMA has again simply proceeded to ignore them in the Provisional Findings without any real explanation.

*No reasonable basis to ignore more recent documentary evidence*

- 1.24 The CMA seeks to sweep aside more recent internal documents that do not support its case because it alleges that these documents are somehow tainted in light of the Transaction. As noted in the Parties' Response to the Provisional Findings at paragraph 3.9(iii), the CMA has no evidence to support this serious allegation.
- 1.25 The directors of Sabre owe a fiduciary duty of care under the Delaware General Corporate Law.<sup>39</sup> This duty of care requires directors to be informed of the business including strategies and corporate plans. Any implication by the CMA that presentations made to the board were tainted because the company had entered into the Transaction could lead to the incorrect conclusion that Sabre's Board had failed to exercise its fiduciary duties in managing the company. Moreover, because Sabre is a listed company, the board could also be liable if it was found to have made false or misleading statements to its shareholders arising from the Transaction. There is no evidence that the board made any such false or misleading disclosures.

## **2. ASSESSMENT OF FORWARD-LOOKING EVIDENCE IS ASYMMETRICAL AND INCONSISTENT AS BETWEEN THE PARTIES AND THIRD-PARTIES**

- 2.1 The CMA takes an inconsistent and one-sided approach in assessing the Parties' and their competitors' documentary evidence. This leads the CMA to overstate the progress which the Parties are likely to achieve over the next three to five years relative to their competitors. This can be seen in the way that the CMA:
- (i) does not contextualise aspirational statements made in the Parties' internal documents, while it accepts competitors' explanations and contextualisations of their equivalent evidence; and
  - (ii) focusses on the Parties' *incentives* or *intentions* to innovate whereas, when assessing competitors' documents it focusses on their *ability* to innovate.

*The CMA fails to place in their proper context the forward-looking statements made in the Parties' internal documents. Third-party evidence is given very different treatment.*

- 2.2 The CMA ignores the Parties' previous submissions which contextualise the forward-looking statements made in their internal documents as being ambitious and aspirational in nature.<sup>40</sup> The CMA takes the opposite approach when assessing competitors' documentary evidence, often taking account in its competitive assessment of any mitigation or contextualisation that is offered. The Parties find that this is consistently the

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<sup>39</sup> S. 141 Securities and Exchange Act 1934.

<sup>40</sup> See for example, the Parties' Response to the Working Paper on NDC Enabled Retailing and Distribution, para. 3.4.

case across the CMA's assessment of competitors evidence on both merchandising and distribution solutions. For example, the CMA:

- (i) Does not place "*significant*" weight on an internal document submitted by OpenJaw, because "*OpenJaw told [the CMA] that the document did not necessarily represent the current view of the company.*" <sup>41</sup>
- (ii) Takes note of Datalex's statements made in the context of its development of NDC capabilities that it underwent "*substantive reorganisation in the past twelve months and that it was reviewing its entire business with a view to breaking even in 2019 before aiming for growth from 2020 onwards*".<sup>42</sup> Meanwhile, similar statements (backed by evidence) adduced by the Parties to demonstrate, e.g. Farelogix's significant scaling issues and resourcing constraints are almost entirely disregarded by the CMA – see paragraph 1.19 *et seq.* above.
- (iii) Again, in relation to Datalex, notes how it has "*taken into account recent developments which may impact each supplier's strength*", including "*we have taken into account Datalex's recent financial difficulties and its own customers concerns about its future viability.*"<sup>43</sup>
- (iv) Accepts Amadeus' submission that a significant investment would be required to integrate new content sources including NDC, with their GDS.<sup>44</sup> Amadeus is clearly ahead of Sabre in its development of NDC. The required investment would apply at least equally, if not to a greater extent, to Sabre.
- (v) Contends that "*Amadeus is not a constraint in supplying merchandising to Sabre PSS airlines*" because Amadeus' merchandising solution is not PSS-agnostic.<sup>45</sup> In contrast to the Farelogix marketing materials, the CMA has no qualms in dismissing Amadeus marketing materials for its Anytime Merchandising product where they contradict Amadeus statements.<sup>46</sup> Yet Amadeus is clearly a strong constraint in this space, and its marketing statements evidence an intention and incentive to compete with PSS-agnostic merchandising modules. Amadeus described itself as an "*innovator and technology champion in respect of PSS, including non-core PSS modules such as merchandising*" in its response to the CMA's Opening Decision and gave lengthy examples of where it had "*invested*

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<sup>41</sup> Provisional Findings, para. 10.10.

<sup>42</sup> Provisional Findings, para. 10.22.

<sup>43</sup> Provisional Findings, para. 11.16.

<sup>44</sup> Provisional Findings, para. 10.54.

<sup>45</sup> Provisional Findings, para. 8.96(a).

<sup>46</sup> As set out in the Parties' Response to the Working Paper on Merchandising, at slide 16 the link provided at that time; <https://amadeus.com/documents/en/airlines/white-paper/the-evolution-of-airline-merchandising.pdf> explains that the product is available to Altea and non-Altea customers.

*heavily to ensure that any upgrades to its PSS system, Altea [...] include integration of merchandising.”<sup>47</sup>*

- 2.3 On the strength of these statements among others, the CMA finds that competitors will not constrain the Parties in distribution and merchandising post-Transaction.<sup>48</sup> Yet by contrast, in assessing the Parties’ competitive strength and capabilities in the counterfactual, the CMA ignores the clear evidence in the Parties’ recent documents [§].

*The CMA focusses on the Parties’ intentions to innovate whereas, when assessing competitors’ documents, its focus is on their ability to innovate*

- 2.4 In order to support any finding of SLC, the CMA must demonstrate that the Parties have both the incentive **and** the ability to engage in conduct that would result in less competitive outcomes than in the counterfactual (and that the other market participants would not be able to respond in such a way that the outcomes remain competitive). As noted in paragraph 3.9 of the Parties’ Response to the Provisional Findings, the Provisional Findings focus on evidence demonstrating the Parties’ development plans, noting for example that developing a PSS-agnostic merchandising solution remains a strategic imperative for Sabre, leading it to conclude that absent the Transaction Sabre would have “developed and offered a credible PSS-agnostic and NDC-compatible merchandising solution to airlines within the next three to five years”.<sup>49</sup>

- 2.5 By contrast, the CMA skirts over evidence relating to Sabre’s ability to achieve such plans. In paragraphs 9.45 *et seq.* of the Provisional Findings the CMA considers the evidence on Sabre’s progress to date and, in two short paragraphs, dismisses the numerous [§]. For example, the CMA fails to take into account:

- (i) a recent internal document (produced around [§] and submitted to the CMA), which summarises Sabre’s “[§]”;<sup>50</sup>
- (ii) [§];<sup>51</sup> and [§] submissions made at the Sabre Main Party Hearing that [§], and in relation to the possibility of Sabre building a “viable”[§]merchandising solution, that [§]<sup>52</sup>

- 2.6 As previously explained, a key rationale for the Transaction is the acquisition of Farelogix’s PSS-agnostic merchandising module. Sabre has been [§] is a large part of what prompted its M&A discussions with Farelogix. The existence of the Transaction is

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<sup>47</sup> Amadeus Response to the CMA’s Opening Decision, para. 5.5.

<sup>48</sup> See Provisional Findings, paras. 10.36 and 10.59 in relation to competitors’ development of merchandising and distribution solutions.

<sup>49</sup> Provisional Findings, para. 9.55.

<sup>50</sup> [§].

<sup>51</sup> [§] p.154 (14 June 2019).

<sup>52</sup> Sabre Main Party Hearing, pp. 30-31.

itself evidence that Sabre does not consider it possible to build, organically, a PSS-agnostic merchandising solution within a competitive timeframe.

2.7 Similarly, the CMA gives cursory treatment to Farelogix's [REDACTED] – see further paragraphs 1.19 and 1.20 above. In the Provisional Findings, the CMA references the information provided to it throughout the course of its investigation in a single paragraph,<sup>53</sup> and cherry-picks a single document produced by Farelogix's marketing team [REDACTED].<sup>54</sup>

2.8 In stark contrast, when discussing the Parties' competitors, the CMA accepts that they may have the "*intention to expand*" or "*plans to improve*", but focusses on: (i) their current stage of development; and (ii) their ability to invest in future developments, and does not hesitate to attach significant weight to any limitations or difficulties which those competitors may currently face.<sup>55</sup> On this basis, the CMA asymmetrically dismisses the likelihood of such players to innovating and expanding in the future and fails to consider how the Parties' respective competitors would respond to any putative lessening of competition following the Transaction. The CMA's approach is at odds (by analogy) with its own Merger Assessment Guidelines which note that "[t]he potential response of other suppliers to any attempt by the merged firm to increase price can also have an effect on pricing incentives."

### 3. DOCUMENTS ARE CHERRY-PICKED, MISCHARACTERISED OR TAKEN OUT OF CONTEXT TO SUPPORT THE CMA'S THEORY OF HARM

3.1 The CMA has seized on select documents and overemphasised isolated extracts from emails and presentations (including drafts) to erroneously contend they are representative of the Parties' latest views on competition. The CMA also cherry-picks quotes from ordinary course documents that were produced long ago to contend that these are indicative of current competition.

#### ***Cherry-picking and selective quoting from documents to support the CMA's own theory of harm***

3.2 The CMA seizes on a single slide (among other documents) in [REDACTED] to support its conclusion that Farelogix is "*a strong competitor as against other available alternatives across retailing and distribution generally as well as with regard to its merchandising capabilities*" – see Figure 8.<sup>56</sup> The CMA uses this slide to assert that Farelogix is "[REDACTED]" and that the competition lags far behind, being "[REDACTED]"<sup>57</sup>

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<sup>53</sup> Provisional Findings, para 9.131. The Parties submitted copious evidence to the CMA in the form of a White Paper requested by and provided to the DOJ, the documents underlying the White Paper, and Annex 2 submitted on 6 November 2011 in the Parties' Response to the CMA's Issues Statement, which updated the CMA with further contemporaneous documentary evidence of [REDACTED].

<sup>54</sup> Provisional Findings, para. 9.132.

<sup>55</sup> See, for example, Provisional Findings, paras. 10.22, 10.29-30 and 10.32-34.

<sup>56</sup> Provisional Findings, para. 9.35(c).

<sup>57</sup> Provisional Findings, para. 9.35(c).

**Figure 8**

[REDACTED]

- 3.3 However, this selective approach over-states Farelogix’s competitive strength in offer management as a whole (which is broader than merchandising). Specifically, [REDACTED]
- 3.4 The CMA also homes in on a single bullet point in a draft presentation dated [REDACTED] to substantiate its claim that Sabre’s rationale for the Transaction was to “[REDACTED]” (see Figure 9). Yet the facts do not support this narrative. The CMA knows, but neglects to point out, that this bullet point was omitted from the final version of the presentation submitted to Sabre’s Board of Directors in November 2018 to approve the Transaction because Chris Boyle, the lead drafter of the document, did not concur with the statement.

**Figure 9**

[REDACTED]

- 3.5 Chris Boyle testified on this very point in the Delaware Proceedings. He explained that the bullet point was inserted by two lower-level employees during a hectic period before the Transaction was announced; he clarified that the bullet point cuts across the rest of the document as well as an earlier deal rationale document from February 2018; and pointed out that he deleted the bullet point after he noticed it in the slide deck.<sup>58</sup> Sean Menke corroborated that the bullet point does not accurately convey one of the Transaction goals.<sup>59</sup>
- 3.6 The anticipated benefits that Sabre actually perceived from the Transaction, as recommended to the board,<sup>60</sup> are shown in Figure below.

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<sup>58</sup> *United States v. Sabre Tr.* 544:5-23; 553:21-25; 554:1-25; 555:1-25; 556:1-25; 557:1-8; 516:21-25; 517:1 (Boyle).

<sup>59</sup> *United States v. Sabre Tr.* 715:25; 716:1-25; 717:1-16 (Menke).

<sup>60</sup> *United States v. Sabre Tr.* 560:7-14 (Boyle).

**Figure 10**  
**Sabre's rationale for entering into Project Marlins**

**Sabre's Board Approved The Transaction Based On Sean Menke's Vision**

PRIVILEGED AND CONFIDENTIAL

Accelerating NDC-enabled strategy: anticipated benefits

Accelerates plans aligned to Travel Solutions strategy for end-to-end Retailing, Distribution and Fulfillment

Marlins is the clear leader in Merchandising, in a still immature market.

Marlins Open Connect incl the NDC API and this has evolved from historical GDS Bypass.

In-house integration will enable us to bring at scale distribution of this content to the market.

PSS + GDS + Marlins

Airline Value

- Fully integrated, end-to-end solution across all distribution channels

Sabre Value

- Accelerates retailing, distribution, and fulfillment strategy
- Deepened customer relationships

DX 145 at 5

Sabre

61

[redacted] Source: Sabre's final closing slides presented during the Delaware Proceedings, as produced on 8 February 2020

3.7 Further examples of the CMA's selective approach in the Provisional Findings include:

- (i) At paragraph 11.20(d), the CMA relies on its own Table 1 in Chapter 5 as evidence of the scale of services supplied by the Parties in the UK. The CMA's statement that "UK airlines paid booking fees of around \$220 million in the indirect channel" is supposedly in support of the impact of the Transaction in the UK, but does not mention that none of the booking fees paid were paid to Farelogix.
- (ii) At paragraph 11.37, the CMA claims that Farelogix "has won bids for new customers in the recent past", relying on its own paragraph 8.85 as support for its conclusion that in the counterfactual, Farelogix would "continue to be a leading provider and developer of NDC distribution solutions".<sup>61</sup> Paragraph 8.85 in fact states that Farelogix has won a [redacted] bid, and that "it is difficult to draw any firm conclusion from this".

*Cherry-picking of documents to understate competition in merchandising*

3.8 The CMA cherry-picks documents and quotes to make it appear as though Sabre considered there to be few competing providers of merchandising solutions and that Farelogix, in particular, was strong. There is no evidential basis for this when the age and context of the documents, as well as other quantitative evidence and testimony is factored in. Sabre has confirmed in its previous detailed submissions that it also records a number

<sup>61</sup> Provisional Findings, para. 11.40.



of other players as competitors in merchandising, including Amadeus, OpenJaw, Datalex, PROS, ITA, IBS, SierenaTravel and SITA.<sup>62</sup>

- 3.9 The CMA claims that Sabre attributes [REDACTED].<sup>63</sup> However later strategy presentations relied on by the CMA [REDACTED].<sup>64</sup>

*Evidence relating to airline.com*

- 3.10 The CMA cites a single document, dating from [REDACTED], [REDACTED].<sup>65</sup> In reaching this view, the CMA avoids the facts as reported in more recent documents and its own empirical evidence.

- 3.11 The CMA relies on the “risk factors” identified in Sabre’s 2018 Annual Report to draw its preferred conclusions on the threat which Sabre perceives from GDS bypass.<sup>66</sup> However, the very same extract identifies as the first, and most significant, risk the fact that airline customers are moving traffic to airline.com. The CMA completely ignores this reference. The CMA also overlooks the underlying purpose of “risk factors” in companies’ securities filings when attributing weight to this statement. Risk factors typically seek to identify *any* risks, including those that are most unlikely ever to arise, on the basis that making the disclosure in the filing protects the company from securities litigation should the risk ever transpire. It is therefore wrong to infer from the inclusion of an issue in a list of “risk factors” that the relevant ‘risk’ is likely to occur, or even that it has a realistic prospect of ever occurring. The CMA also ignores the other sections on competition in the Annual Report which note that the “*travel distribution market is highly competitive and [Sabre is] subject to competition from other GDS providers, direct distribution by travel suppliers and new entrants or technologies that may challenge the GDS model*” and that “[a]ny inability or failure [by Sabre] to adapt to technological developments or the evolving competitive landscape could harm [Sabre’s] business operations and competitiveness.”<sup>67</sup>

- 3.12 It is clear from the evidence provided in the Delaware Proceedings that the market views airline.com as a real and significant constraint on Sabre. As Dr. Kevin Murphy, Sabre’s economic expert retained for the Delaware Proceedings put it:

*“The way I like to think about it, direct channel is a mouse click away. If you are [an] OTA, a mouse click away is Airline.com, and that clearly has been the alternative that has been relevant. The testimony of Mr. Garner, for example, talked about how in negotiations with*

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<sup>62</sup> Parties’ Response to the Issues Statement, in particular Tables 4.1 and 4.2.

<sup>63</sup> Provisional Findings, para. 1.11(iii).

<sup>64</sup> Provisional Findings, App. D para 42 *et seq.*

<sup>65</sup> Provisional Findings, para. 9.98.

<sup>66</sup> Provisional Findings, para. 9.95.

<sup>67</sup> Sabre Corp. Form 10-K 2018, p.9.

*Expedia, he can engage in those negotiations, because Airline.com was that mouse click away.*<sup>68</sup>

- 3.13 Chris Wilding (Senior Vice President of Airline Solutions at Sabre) also explained that “Airline.com is one of the primary competitors that we [Sabre] face as a GDS”<sup>69</sup>; Sabre “continue[s] to see with a point of share shift from the GDS channel to the dot com.”<sup>70</sup>

**Mis-statements and mischaracterisations**

*The CMA misrepresents evidence provided by Sabre as to its ability to offer a credible PSS-agnostic and NDC-compatible merchandising module to airlines in the next three to five years*

- 3.14 The CMA characterises as a concrete assertion a comment in the Merger Notice that Sabre could [REDACTED].<sup>71</sup> The language actually used in the Merger Notice was far more equivocal. [REDACTED] but the CMA elects to ignore this important (and more recently presented) material. In that later submission, Sabre made clear that “[REDACTED].” (emphasis added)

This topic was also discussed at the Sabre Main Party Hearing. In response to a question regarding how long it would take for Sabre to develop equivalent merchandising functionality to Farelogix today, [REDACTED] explained that the “[REDACTED]” [REDACTED] “[REDACTED] [REDACTED]”<sup>72</sup> (emphasis added) [REDACTED] *The CMA mischaracterises Sabre’s position in relation to its commercial arrangements with airlines (including [REDACTED]) to suggest that Sabre competes head-to-head with Farelogix*

- 3.15 The CMA cites Sabre’s response to a [REDACTED] RFP to erroneously suggest that [REDACTED].<sup>73</sup> This is wrong. As Figure below shows, the RFP actually concerned merchandising. Direct Connect was only relevant in so far as it would be the delivery method for the merchandising solution.<sup>74</sup>

**Figure 11**  
[REDACTED]

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<sup>68</sup> *United States v. Sabre* Tr. 1434:2-9 (Murphy).

<sup>69</sup> *United States v. Sabre* Tr. 860:21-22 (Wilding).

<sup>70</sup> *United States v. Sabre* Tr. 864:16-17 (Wilding).

<sup>71</sup> Provisional Findings, para. 9.52(a).

<sup>72</sup> Sabre Main Party Hearing, para. 18-22, p. 30.

<sup>73</sup> Provisional Findings, para. 9.100.

<sup>74</sup> See further *United States v. Sabre* Tr. 761:1-11 (Gilchrist).

- 3.16 The CMA also incorrectly contends that “[redacted].”<sup>75</sup> As [redacted] explained [redacted] Yet the CMA ignores this reality, preferring instead to present the evidence in a way that serves its narrative. In doing so, the CMA also closes its mind to the fact that [redacted].<sup>76</sup>
- 3.17 The CMA makes the same misrepresentation in respect of the response to an [redacted] RFP. The CMA ignores the context for the document, which was [redacted]. [redacted]<sup>77</sup>[redacted]<sup>78</sup> [redacted]

*The CMA mischaracterises retailing NDC capability for distribution NDC capability*

- 3.18 At paragraph 9.35, the CMA attempts to show that Farelogix is a competitive threat to Sabre “as a consequence of the complementarity between NDC merchandising solutions and NDC distribution solutions”. However, half of the documents cited as evidence show no connection or complementarity between NDC merchandising solutions and NDC distribution solutions.
- (i) Regarding the evidence at paragraph 9.35(b), the CMA mischaracterises this evidence by suggesting that the slide also pertains to NDC distribution solutions. [redacted]
- (ii) Similarly in the evidence under paragraph 9.35(d), [redacted].

*Failures to report accurately on important facts which have been provided in previous submissions and hearings*

- 3.19 The CMA distorts the evidentiary record by omitting important facts which have a significant bearing on the competitive assessment:
- (i) The CMA contends that “Amadeus is not a constraint in supplying merchandising to Sabre PSS airlines” because Amadeus’ merchandising solution is not PSS-agnostic.<sup>79</sup> The Amadeus Anytime Merchandising product is able to compete directly with Farelogix across all PSS providers as it is in fact PSS-agnostic.<sup>80</sup> The reality is that Farelogix has no option but to regard Amadeus as a competitor across all merchandising opportunities.
- (ii) The CMA states that in merchandising, Farelogix has “continued to win major contracts recently (eg. [redacted])”.<sup>81</sup> The CMA does not explain why this [redacted] is

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<sup>75</sup> Provisional Findings, para. 9.51.

<sup>76</sup> Sabre Main Party Hearing transcript, pp. 31-32.

<sup>77</sup> Sabre Main Party Hearing transcript, pp. 63-64.

<sup>78</sup> [redacted] deposition transcript p. 384 (8 November 2019).

<sup>79</sup> Provisional Findings, para. 8.96(a).

<sup>80</sup> This was explained to the CMA in the Response to the Working Paper on Merchandising, at slide 16. The link provided at that time (<https://amadeus.com/documents/en/airlines/white-paper/the-evolution-of-airline-merchandising.pdf>) explains that the product is “available to Altea and non-Altea customers”.

<sup>81</sup> Provisional Findings, para. 11.42.

characterised as “*major*”, nor why it is represented as more than one contract. In addition, Farelogix has repeatedly explained to the CMA that [redacted] The CMA acknowledges Farelogix’s explanation in a footnote to paragraph 8.67, but still treats the [redacted] as a concluded bid in its data.<sup>82</sup>

- (iii) The CMA notes that “*most of the unknown bids relate to tier 2 and tier 3 airlines*”.<sup>83</sup> This is untrue: the “unknown” bids included two tier 1 airlines: [redacted], an airline with 97 million passengers in 2017, which is not fairly characterised as “*tier 2 or tier 3*”. The CMA implies that it need not give significant consideration to such airlines. This is at odds with its own assertion that certain of these airlines, including China Southern, Aegean and Qatar are members of the IATA’s NDC Leaderboard and are, according to the CMA, “*industry leaders in migrating to NDC solutions*”.<sup>84</sup>

*Evidence relating to the severity of Farelogix’s [redacted]*

- 3.20 The CMA fails to undertake a proper and balanced assessment of the evidence regarding Farelogix’s [redacted], and its reasons for dismissing these problems do not stand up to scrutiny.
  - (i) The Parties submitted copious evidence to the CMA in the form of a White Paper requested by and provided to the DOJ, the documents underlying the White Paper, and Annex 2 submitted on 6 November 2011 in the Parties’ Response to the CMA’s Issues Statement, which updated the CMA with further contemporaneous documentary evidence of the [redacted]<sup>85</sup> Instead of evaluating this body of evidence as a whole, the CMA has seized upon the latter correspondence, the content of which has been taken out of context to claim that the “[redacted] *issues are not substantially affecting its business*”.<sup>86</sup>
  - (ii) As discussed in paragraphs 5.94 to 5.96 of the Parties’ Response to the Provisional Findings, the significant constraints faced by Farelogix as a result of [redacted] are not addressed in the Provisional Findings, notwithstanding clear evidence [redacted].<sup>87</sup> Instead of investigating these lost opportunities, the CMA focusses on the fact that Farelogix continues to identify future sales opportunities.<sup>88</sup> The CMA appears to place more weight on prospective “moon

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<sup>82</sup> Provisional Findings, Ch. 8, Table 5.

<sup>83</sup> Provisional Findings, para. 8.69.

<sup>84</sup> Provisional Findings, para. 8.14.

<sup>85</sup> Provisional Findings, para 9.132(a).

<sup>86</sup> Provisional Findings, para 9.132.

<sup>87</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>88</sup> Provisional Findings, para 9.133.

shot” opportunities (i.e. opportunities Farelogix considers itself unlikely to win) than hard evidence of known lost opportunities.<sup>89</sup>

3.21 In its conclusion dismissing the severity of Farelogix’s [REDACTED],<sup>90</sup> the CMA conflates Sandler’s fiduciary duty to its members (to achieve the best possible sales price for the asset) with Sandler’s belief that Farelogix has, or [REDACTED]. These are separate concerns. Simply put, the fact that Sandler desires to obtain the best possible price for Farelogix (in accordance with the fiduciary duty which it owes to its members) does not mean that Farelogix [REDACTED]. Of greater relevance in this regard is that [REDACTED].<sup>91</sup>

3.22 The response that Sandler provided to the CMA on 21 October 2019 acknowledged that “[REDACTED].” Accordingly, in any alternate scenario contemplated by the CMA, it is not reasonable to assume that [REDACTED] and as noted in paragraph 5.94 *et seq.* of the Response to the Provisional Findings, [REDACTED]. The CMA has no evidence to conclude that Sandler’s valuation, or refusal to accept a lower price for Farelogix, is based on confidence regarding the resolution of the [REDACTED].

**4. FEEDBACK FROM ONE SIDE OF THE MARKET IS UNJUSTIFIABLY DISMISSED, WITH TOO LITTLE ATTENTION GIVEN TO THE VIEWS OF TRAVEL AGENTS**

***Feedback from one side of the market is unjustifiably dismissed, with little or no weight given to the views of travel agents***

4.1 The CMA states that it gives “*greater weight to airline evidence than that of travel agents.*” This erroneous focus on just one side of the market is not the right way to determine the welfare effects of the Transaction.<sup>92</sup> Indeed, it is travel agents who serve end travellers (and would have to pass on higher costs resulting from distribution inefficiencies) and have expressed near universal support for the Transaction. For example:

(i) Fareportal testimony: the Transaction will “*likely help innovation and allow Sabre to provide better content in ways that airlines wish to see that content displayed, what they will call merchandising. This will reduce complexity and cost for us and any travel agent that uses Sabre. Smaller travel agents, ones that could not afford to implement direct connections will have access to more content, meaning they can provide better options for consumers and better price comparison.*”<sup>93</sup>

(ii) [REDACTED].”<sup>94</sup>

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<sup>89</sup> Provisional Findings, para. 9.133(c).

<sup>90</sup> Provisional Findings, para. 9.134.

<sup>91</sup> Sandler Capital response to the CMA’s s 109 notice dated 21 October 2019.

<sup>92</sup> As submitted previously. See further, CRA’s paper titled ‘Is Farelogix a Dynamic Threat to Sabre An Economic Perspective’, submitted as Annex 13 to the Response to the Issues Statement (the “**CRA Paper on the dynamic threat posed by Farelogix to Sabre**”).

<sup>93</sup> *United States v. Sabre Tr.* 1307:6-14 (Kunz-Cho).

<sup>94</sup> [REDACTED].

- (iii) BCD travel testimony: *“the idea that the GDS would therefore have faster, easier capabilities of bringing NDC to scale benefits a good percentage [of] [...] the travel industry.”*<sup>95</sup>
- (iv) T&T response to Q36 of the CMA’s questionnaire: *“This merger should help get greater content at a competitive price.”*

4.2 The CMA dismisses travel agents’ views on the basis that: (i) airlines drive the purchasing decisions in this industry; and (ii) travel agents are not customers of Farelogix.<sup>96</sup> Yet, as discussed in paragraphs 5.19 to 5.31 of the Parties’ Response to the Provisional Findings, the CMA does not explain, or even address, why it no longer gives the weight to the views of travel agents that it once did. The CMA *used to* attach significant weight to these views – why would it have commissioned a questionnaire inviting the views of 45 travel agents on the Transaction otherwise?<sup>97</sup> This approach is particularly remarkable given that up until the Provisional Findings, travel agents were considered a crucial driving force behind the take up of Direct Connect.

***The CMA ignores the reality that Sabre, like other GDS providers, operates in a two-sided market (as will the merged entity). It provides no explanation why travel agents’ evidence now carries little or no weight***

4.3 The Parties do not recognise the CMA’s assessment that *“airline decision making”* drives the competitive process in the airline ticketing distribution industry. In reality, Sabre operates in a two-sided market which relies both on airlines feeding content into the distribution channel and travel agencies distributing it to the end consumer – see Figure 13 below.

**Figure 13**  
[X]

4.4 [X] Indeed, the CMA has also acknowledged that there are two sides to the GDS industry. For example:

- (i) In the Phase 1 Decision, the CMA observed that *“The supply of indirect distribution airline content has two-sided features, with services provided to both airlines and travel agents”*.<sup>98</sup>
- (ii) In the Provisional Findings, the CMA states that it is *“mindful”* that *“Sabre’s GDS serves both airlines and travel agents and balances the demands between the*

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<sup>95</sup> *United States v. Sabre* Tr. 1232:18-22 (Stratford).

<sup>96</sup> Provisional Findings, para. 11.17.

<sup>97</sup> See also: (i) the Phase 1 decision where the CMA found (at para. 124) that *“the success of the Farelogix Direct Connect product also depends critically on the commercial choices of a travel agent to use its product (over other services facilitating the indirect distribution of airline content)”*; and (ii) the Travel Agents Working Paper where the CMA observed that *“the significance of Farelogix as a competitor rests to some degree on the likelihood of travel agents utilising direct connect”* (p. 3).

<sup>98</sup> Phase 1 Decision, para. 112.

*two on a two-sided platform*".<sup>99</sup> 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>100</sup>

4.5 Case law also shows that in any two-sided market there is interconnected demand between both sides, and one side of the market cannot exist without the other.<sup>101</sup> Recent UK studies into online platforms and digital markets further support this view. For example, the government-sponsored study of competition in digital markets led by Jason Furman observed that "*multi-sided markets have prices which are dependent between sides*"<sup>102</sup> and the CMA's interim report into Online Platforms and Digital Advertising notes that search engines "*are two-sided platforms that compete for both consumers and advertisers. Consequently, the main way in which search engines compete for advertisers is indirect, ie through attracting customer attention*".<sup>103</sup>

4.6 It is clear in these circumstances that the CMA has done a U-turn at a late stage of the case and no longer sees travel agents' views as important because they do not suit its agenda.

***Travel agents have more visibility of final customer welfare and their views therefore cannot be dismissed***

4.7 The CMA relies on evidence from airlines to support its view that use of GDS bypass will grow significantly – yet it completely ignores the established fact that airlines need travel agents to drive volumes to most alternative distribution channels, including Direct Connect. The CMA explains its reliance on airline evidence on the basis that "*airlines are therefore well placed to comment on their preferences for different types of solutions and the capabilities of suppliers*".<sup>104</sup> While it is true that airlines are the purchasers of GDS bypass distribution solutions, the solution cannot operate unless both the airline and travel agent independently agree to use it. The CMA previously acknowledged this fact in the Phase 1 Decision<sup>105</sup> and in the Provisional Findings it maintains that "*it is the travel agents, not airlines, which choose the GDS or channel to make a booking on behalf of*

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<sup>99</sup> Provisional Findings, para. 7.26.

<sup>100</sup> Provisional Findings, para. 7.6(d).

<sup>101</sup> *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018).

<sup>102</sup> Report of the Digital Competition Expert Panel chaired by Jason Furman, titled 'Unlocking digital competition', para. 3.27.

<sup>103</sup> CMA's interim report into Online Platforms and Digital Markets, para. 5.52.

<sup>104</sup> Provisional Findings, para. 11.17(a).

<sup>105</sup> In the Phase 1 Decision, the CMA found (at para. 124) that "*the success of the Farelogix Direct Connect product also depends critically on the commercial choices of a travel agent to use its product (over other services facilitating the indirect distribution of airline content)*".

*passengers.*"<sup>106</sup> It follows from this that travel agents' evidence should carry at least the same weight as airlines' when assessing the competitive effects of the Transaction.

4.8 The CMA appears to discount the importance of the GDSs to both travel agents and end-travellers, despite the unchallenged evidence that GDSs offer a lower cost and higher quality means of distribution for travel agents.<sup>107</sup> Travel agents rely on the GDSs to provide travellers with a suite of fare and ancillary options, as well as the mid- and back-office services such as comparison shopping and a duty of care. Travel agent evidence, which disparages any claim that there will be significant growth in GDS bypass in the future, fully supports this position. For example:

- (i) Travel agents state that the GDSs are a critical platform for their operations, with one travel agent finding that GDSs "*have been characterized by some as the plumbing of the travel industry. So we [CWT Travel] simply could not deliver our value proposition to our clients without the GDSs being part of our ecosystem. They're fundamental to our mission.*"<sup>108</sup>
- (ii) Travel agents also favour the GDS for their distribution solutions to access the full range of content, with one travel agent noting that "*we [BCD Travel] prefer to use the GDS. Just from an efficiency standpoint, we dont want to go to multiple places to access content.*"<sup>109</sup>
- (iii) Travel agents consider that Direct Connects are a constraint on financial and other resources, citing that "*establishing a direct connect is laborious and costly to build and also to maintain.*"<sup>110</sup> Travel agents also make clear that switching to Direct Connect would mean having to "*spend a lot of capital upfront*" and that "*operating cost would rise substantially, exponentially on a unit basis*", estimating that the cost for moving from the GDS to Direct Connect would be about "*\$15 more or less efficient per transaction*".<sup>111</sup>

4.9 Sabre's economic expert substantiated these views during the Delaware Proceedings, noting that "*travel agencies and their customers demand the services that are provided by the GDSs*".<sup>112</sup>

4.10 In fact, as the Parties have already made clear to the CMA, the views and preferences of airlines are unlikely to represent what is best for consumer welfare. In contrast, to be competitive, travel agents must be able to find the most competitive fares for end-travellers, which in turn implies that they will use the most efficient and cost-effective

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<sup>106</sup> Provisional Findings, para. 7.6(d).

<sup>107</sup> Provisional Findings, para. 10.122 *et seq.*

<sup>108</sup> *United States v. Sabre* Tr. 1187:3-7 (Ekert).

<sup>109</sup> *United States v. Sabre* Tr. 1255:13-15 (Stratford).

<sup>110</sup> *United States v. Sabre* Tr. 1287:10-11 (Kunz-Cho).

<sup>111</sup> *United States v. Sabre* Tr. 1196:12-14; 1197:1-2 (Ekert).

<sup>112</sup> *United States v. Sabre* Tr. 1459:22-23 (Murphy).



distribution solution — i.e it is the travel agents, and not the airlines, whose interests are most closely aligned with the consumer welfare of end travellers. This reality is underlined by travel agents' responses to the CMA's questionnaire: availability of content and ease of comparison shopping were the most highly ranked features, both of which lead to lower fares for end-travellers.

***It is highly inconsistent of 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 relating to higher fares and the fact that they also pay travel agents incentives***

*The CMA does not weigh up the airlines' motives to receive higher fares or the fact that airlines make incentive payments to travel agents in its analysis*

- 4.11 The CMA (i) acknowledges that costs for travel agents go up with the growth of GDS bypass; and (ii) dismisses travel agent evidence on the basis that their incentive payments would be threatened if airlines shift to other distribution channels.<sup>113</sup> It is irrational for the CMA to dismiss the views of travel agents on the basis that they receive incentives, whilst ignoring airlines' incentives to receive higher fares. In any event, incentives lower travel agents distribution costs (and this might in turn be expected to be passed onto end-travellers). Given the real weight that travel agents attach to quality and cost of distribution (these being the parameters of competition which the CMA seeks to analyse in its review of the Transaction), it is perverse for the CMA to play down travel agents' views in the Provisional Findings.
- 4.12 The CMA also drastically overstates the importance of the incentives paid to travel agents in its analysis. In particular, the Provisional Findings also ignore the fact that airlines 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>114</sup> It is therefore wrong to assume that travel agents would be biased towards the GDS model because of incentive payments.
- 4.13 This was confirmed in the Delaware Proceedings:
- (i) *"GDSs reduced incentives will not keep us from doing business" and in any case that "GDS incentives are still relatively small compared to the overall revenue we [Fareportal] take".<sup>115</sup>*
  - (ii) Incentives also do not stop travel agents from switching GDSs, further confirming that a travel agent does not feel stuck to a GDS because of its financial interest in it.<sup>116</sup>

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<sup>113</sup> Provisional Findings, para. 11.17(d).

<sup>114</sup> Provisional Findings, para. 3.45.

<sup>115</sup> *United States v. Sabre Tr.* 1313:13-14; 1281:2-3 (Kunz-Cho).

<sup>116</sup> *United States v. Sabre Tr.* 1253:13-16 (Stratford).

- 4.14 Further, 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 which is clearly unrelated to incentive payments: dismissing these genuinely-held views as being motivated by financial incentives is unreasonable, unfair, asymmetric, and unsupported by the evidence.<sup>117</sup>

*Direct Connect shields airlines from competition*

- 4.15 If the CMA considers that travel agents' evidence in this case is somehow tainted by the incentive payments they receive from the GDSs, it should also take into account airlines' financial incentives.
- 4.16 Direct Connects shield airlines from comparison with other airlines. They can also result in higher prices for end-travellers due to cost inefficiencies raising the service fees that travel agencies apply to offset the increase Direct Connect causes to their operational costs. By contrast, comparison shopping via the GDSs intensifies inter-airline competition and induces downward pricing pressure on airlines.<sup>118</sup> This reality has been noted by travel agents, who have complained that they were "*disappointed*" in an airline "*restricting customer choice [...] but not surprised by the airline's decision as it reflects a further move to reduce transparency in airfare shopping.*"<sup>119</sup> It is asymmetric to discount even views of travel agents, which are clearly unrelated to incentive payments, and on the other hand not discount airlines' views which are driven by a desire to limit the scope for comparison shopping.
- 4.17 In this context, as noted above and at paragraph 3.12 of the Parties' Response to the Provisional Findings, travel agents' preferences are the best available proxy for final customer welfare.<sup>120</sup>

***The fact that travel agents do not procure merchandising solutions is not a reason to dismiss their views on issues relating to distribution.***

- 4.18 While it is true that travel agents have limited visibility on merchandising solutions this has no relevance for their role in respect of distribution where they are just as critical to determining which technologies will succeed and just as invested in competitive outcomes as are the airlines.

***The CMA fails to consider that airlines may have other motivations to oppose the Transaction***

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<sup>117</sup> Provisional Findings Summary, para. 86.

<sup>118</sup> CRA Paper on the dynamic threat posed by Farelogix to Sabre, para. 95.

<sup>119</sup> This quote is from the SVP of global network and technology partners of CWT in reaction to Lufthansa's removal of Light economic and Business Saver business class fares through GDSs in several European countries. The quote is taken from a Beat article titled, "CWT Reluctantly Taps Travelfusion for Lowest Lufthansa Fares", available at <https://www.thebeat.travel/News/CWT-Reluctantly-Taps-Travelfusion-For-Lowest-Lufthansa-Fares>. The article is provided at Annex 14 and cited in para. 5.82 of the Response to the Issues Statement.

<sup>120</sup> Parties' Response to the Issues Statement, Annex 13 Section 6.

- 4.19 Evidence brought in relation to [REDACTED] during the Delaware Proceedings casts further 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 a fundamentally biased, asymmetric, and distorted view of the market.
- 4.20 The Parties have no visibility on the weight which the CMA has attached to individual airlines’ feedback, least of all [REDACTED]. However, the Parties strongly suspect from the detail in Chapter 10 that these airlines feature prominently in the CMA’s assessment.<sup>121</sup> If this is true, then the CMA should exercise caution when reviewing this evidence as both airlines have a strong incentive to oppose the Transaction.
- 4.21 It is clear that these incentives are not driven by competitive concerns. This was set out in the Delaware Proceedings, as follows (see further Figure and Figure below):
- (i) [REDACTED].<sup>122</sup> [REDACTED].<sup>123</sup>
  - (ii) [REDACTED].<sup>124</sup>
- 4.22 The CMA is required to perform an objective assessment, free from bias. If it takes into account the views of the airlines then there is no reasonable basis to ignore travel agents’ views, whose interests are more aligned with the end-travellers.

**Figure 13**  
[REDACTED]

**Figure 14**  
[REDACTED]

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<sup>121</sup> Provisional Findings, Appendix F, para.7.

<sup>122</sup> *United States v. Sabre* Tr. PX 299.

<sup>123</sup> *United States v. Sabre* Defendants’ Proposed Findings of Fact, paras. 177-182.

<sup>124</sup> *United States v. Sabre* Tr. 158:14-22; Defendants’ Post-Trial Brief, p.28.