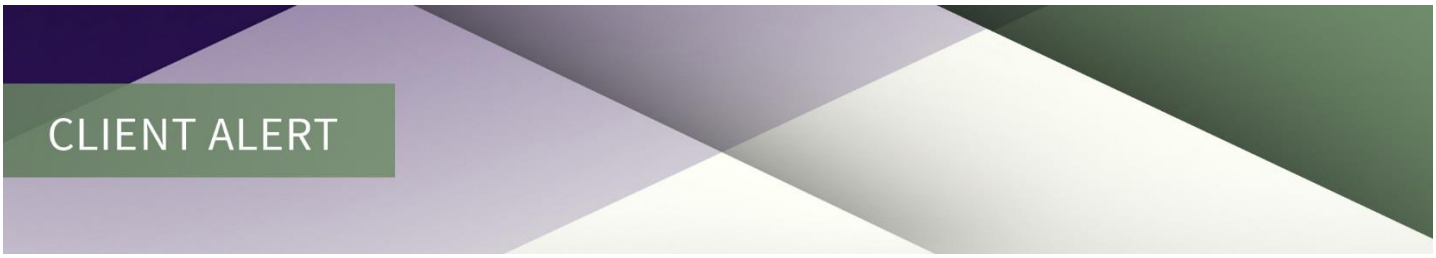

U.S. and UK Merger Law in Conflict: Sabre's Acquisition of Farelogix

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Following Brexit on January 31, 2020, the UK Competition and Markets Authority ("CMA") has wasted no time in forging its role on the global stage alongside the European Commission, the U.S. Department of Justice ("DOJ"), and the U.S. Federal Trade Commission. Last month, the CMA issued a ruling opposite to that of the U.S. District Court for the District of Delaware (the "U.S. court") on the likely competitive impact of the proposed acquisition by Sabre Corporation ("Sabre") of Farelogix Inc. ("Farelogix") (the "Transaction").[1]

On April 7, 2020, the U.S. court rejected the DOJ's challenge to the Transaction. Three days later, on April 10, 2020, the CMA reached the opposite conclusion and blocked the Transaction. Although the CMA focused on UK consumers and the U.S. court on U.S. consumers, that difference alone does not explain the opposite rulings.

Since the decisions, the parties have allowed their acquisition agreement to lapse.[2] Still, Sabre has announced that it will appeal the CMA decision on the ground that the CMA exceeded its jurisdictional powers.[3] On May 12, 2020, the DOJ filed a motion to vacate the U.S. court ruling in light of the termination of the Transaction, arguing that the case and the

1 *United States v. Sabre Corp.*, No. CV 19-1548-LPS, 2020 WL 1855433, at *32 (D. Del. Apr. 7, 2020).

2 *See* Press Release, Sabre Corporation, Sabre Corporation Issues Statement on its Merger Agreement with Farelogix (May 1, 2020), here.

3 *See Sabre Corporation v. Competition and Markets Authority*, Competition Appeal Tribunal (Apr. 30, 2020), here.

DOJ's subsequent appeal are now moot, pointing out in particular that the U.S. court decision "could affect antitrust enforcement beyond the instant case."[4]

Given the importance of the conflicting U.S. and UK decisions and their implications for cross-border transactions, we summarize both decisions below.

Summary of the Differences

The CMA found that the Transaction would harm "innovation," a ground that the U.S. court rejected. The U.S. court instead relied primarily on a lack of direct horizontal competition between Sabre and Farelogix – Sabre competes in a two-sided booking market, and Farelogix competes in a one-sided software supply market. No European competition authority, including the CMA, has yet recognized that companies operating in two-sided antitrust markets do not compete with companies that operate only on one side of those markets.

Sabre/Farelogix is one of the rare cases in which a European authority has prohibited a merger between two U.S.-headquartered businesses after the transaction had been permitted under U.S. law. The last similar, headline-grabbing case was the European Commission's prohibition of the *GE/Honeywell* transaction in 2001 after the DOJ had decided to allow the transaction to proceed. The interesting twist in the current case is that the CMA and the DOJ are aligned in their opposition to the Transaction, while the U.S. court rejected the DOJ's bid to block the Transaction.

The U.S. Court Decision

The U.S. court found that the DOJ failed to meet its burden of proof as to market definition and anticompetitive harm. Particularly important was the DOJ's failure to address adequately the legal rules regarding two-sided platforms that were established by the U.S. Supreme Court's 2018 *Ohio v. American Express* ("*Amex*")[5] decision.

A. Two-Sided Markets

The U.S. court found that Sabre is a two-sided transaction platform connecting "a large number of travel suppliers, such as airlines, hotels, and car rental companies, to a large number of travel agencies."[6] It does so through a global distribution system ("GDS") that is operated by its Travel Network business unit, which aggregates content from travel suppliers, creates and offers packages, and distributes them to travel agents.[7]

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4 Motion to Vacate at 5, *U.S. v. Sabre Corp.*, No.20-1767 (3d Cir. May 12, 2020).

5 138 S. Ct.] 2274 (2018).

6 *Sabre Corp.*, 2020 WL 1855433, at *6-7.

7 *Id.* at *3, *6-7.

By contrast, Farelogix "sells a suite of IT solutions for airlines."[8] It has no travel agency customers and no commercial relationship with travel agencies.[9] Farelogix operates an application programming interface ("API") for a New Distribution Capability ("NDC") product called "Open Connect," or "FLX OC."[10] NDC is a communication standard that facilitates a more efficient airline distribution system by enhancing communication between airlines and travel agents.[11] Farelogix, the U.S. court found, "indisputably only interacts with airlines and is not a two-sided platform."[12]

Having found that Sabre was a two-sided platform and Farelogix was not, the U.S. court relied on the Supreme Court's decision in *Amex* to find that the two companies "do not compete in a relevant market."[13] In that case, the Supreme Court held that "'[o]nly other two-sided platforms can compete with a two-sided platform for transactions.'"[14] While the DOJ argued that the "booking services portion" of Sabre's platform competes "in a one-sided booking market," the U.S. court found that, per *Amex*, "two-sided transaction platforms such as the Sabre GDS supply 'only one product': the transactions that link both sides of the market."[15] The court also cited a recent Second Circuit Court of Appeals decision that also found that Sabre was a two-sided platform.[16]

B. The Product and Geographic Markets

The U.S. court further rejected the DOJ's proposed "booking services" product market, finding that the "Sabre GDS platform performs several different functions, including aggregating and normalizing content, automating rules set by corporate travel policies, and creating offers for travel agencies."[17] The U.S. court agreed with the defendants that "the subset of Sabre services DOJ labels booking services are not a separate product but, instead, have no independent economic significance."[18]

The U.S. court found that the DOJ had also failed to prove a geographic market. "[T]he relevant geographic market must be based on where airlines [customers] look to purchase these services."[19] The DOJ argued that "the relevant geographic market is 'U.S. point of sale,'" but the defendants successfully argued that point-of-sale competition did not focus on

8 *Id.* at *10.

9 *Id.*

10 *Id.* at *8, *10.

11 *See New Distribution Capability*, INT'L AIR TRANSPORT ASS'N, here (last visited May 18, 2020).

12 *Sabre Corp.*, 2020 WL 1855433, at *32.

13 *Id.*

14 *Id.* (quoting *Amex*, 138 S.Ct. 2274, 2287 (2018)).

15 *Id.* at *33 (quoting *Amex*, 138 S.Ct. at 2286).

16 *Id.* at *33-34.

17 *Id.* at *36.

18 *Id.* (quotations omitted).

19 *Id.* at *38.

Farelogix's customers, the airlines, but on the customers of those customers, travel agencies.[20] Moreover, the U.S. court found, "the evidence shows that airlines do not look only within the United States to purchase booking services."[21] As with the product market, the U.S. court found that the"DOJ's proposed U.S.-based geographic market is at odds with commercial realities."[22]

C. Failure to Prove Anticompetitive Harm

Even assuming that the DOJ had adequately alleged a relevant market, the court found that it had failed to establish anticompetitive harm in that market. The U.S. court rejected the DOJ's HHI (concentration) analysis because it "excluded airline.com,"[23] a competitor, and improperly included internal pass-through sales.[24] Correcting those errors led to a different HHI calculation that did not give rise to a presumption of anticompetitive harm.

The U.S. court also found that the DOJ had failed to establish barriers to entry: "[O]ther suppliers have also enjoyed success, demonstrating that new entrants can develop a good reputation and track record despite Farelogix's established position in the market."[25]

The U.S. court found no likely reduction in output or innovation: "[The] evidence does not suggest that Sabre is acquiring Farelogix to eliminate FLX OC from the marketplace. . . . Sabre intends to continue offering FLX OC by integrating it into the Sabre GDS platform, allowing Sabre to better meet the demands of airlines and travel agencies."[26] Nor would the merger lead to higher prices: "[B]ecause Sabre competes with rival GDS providers Amadeus and Travelport for travel agency customers, it faces constraints on the prices it can charge."[27]

Finally, and importantly, the DOJ failed to show that the Transaction would stifle innovation. The U.S. court observed that Farelogix has not introduced any recent innovative products or services and that Sabre is likely to integrate, not eliminate, FLX OC.[28] The U.S. court further found that witness testimony supported the conclusion that the combination of resources could lead to increased innovation.[29]

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20 *Id.*

21 *Id.*at *39.

22 *Id*.

23 *Id.* at *40.

24 *Id.*

25 *Id.* at *41.

26 *Id.*

27 *Id.* at *42.

28 *Id.* at *42-43.

29 *Id.*

The CMA's Final Report

On the other side of the Atlantic, the CMA's prohibition decision, which mirrors the DOJ complaint, indicates that the CMA will not resist blocking a transaction between companies headquartered overseas that nonetheless affects UK commerce. Businesses seeking to acquire smaller businesses that may be viewed as innovators or disruptors, particularly in technology markets, will face significant regulatory hurdles in the UK.

A. Jurisdiction

The issue of whether the CMA had jurisdiction to examine the Transaction has been a key point of contention since the beginning of CMA's investigation in 2019 and appears to be the primary basis of Sabre's appeal. CMA jurisdiction requires that one of the following two tests must be met: (i) the value of sales of the target business that were generated in the UK must exceed £70 million in the last financial year (the "Turnover Test"); or (ii) the merging parties' combined share of supply of goods or services must be 25% or more in the UK or any substantial part of it (the "Share of Supply Test").

In addition, the merger must increase the companies' combined share of supply, requiring that both parties be present in the UK. The CMA has wide discretion in applying the Share of Supply Test. Given that the Share of Supply Test is for jurisdictional purposes, it need only be based on a reasonable description of goods and activities, which need not reflect a cognizable antitrust market.[30]

Sabre and Farelogix are U.S. businesses with a minimal presence in the UK. Farelogix had no revenues directly attributable to a UK customer and no direct contracts for its services with UK customers. Farelogix did enter into a "technical agreement" with American Airlines and British Airways, a UK airline, to allow Farelogix to facilitate the booking of "interline" (i.e., code share) tickets involving American Airlines and British Airways.[31] Although British Airways did not directly contract with Farelogix for services to be rendered to British Airways, the technical agreement was sufficient for the CMA to conclude that Farelogix provided services to a UK airline in the UK.[32]

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30 See for example our Client Alert of February 19, 2020 on the CMA's merger review in *Roche/Spark*, where Spark generated no revenues in the UK, but the CMA asserted jurisdiction on the basis of the parties' share of employment of workers in the UK who are engaged in activities related to Spark's pipeline products. This trend is likely to continue, as the CMA has stated at para. 5.59 of the Final Report that the Competition Act 1998 does not provide specific rules on when an enterprise's activities should be deemed to be in the UK for the purposes of the share of supply test, and that the CMA will apply the test in a "flexible and purposive way." Philipp Girardet, Rahul Saha, and Kyle Le Croy, "*CMA Merger Review in Roche/Spark Signals More Interventionist Approach*" WILLKIE.COM (Feb. 19, 2020).

31 The CMA's Final Report ("Final Report"), at 5.20.

32 *Id*. at 5.43-5.58.

The CMA thus concluded that both Sabre and Farelogix were active in the "supply of IT solutions to UK airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings" (the "Relevant Description of Services").[33] As Sabre alone supplied more than a 25% share of the Relevant Description of Services, Farelogix's *de minimis* share led to an increment in the combined share of supply and satisfied the Share of Supply Test.[34]

The CMA's approach to jurisdiction in this case, following its recent decision in *Roche/Spark*, is interventionist and has prompted the announcement of the Sabre appeal even though the transaction with Farelogix has been terminated.

B. Relevant markets

The CMA focused on overlaps in the markets for the supply of merchandising and distribution solutions to airlines.

i. *Merchandizing Solutions*

Airlines use IT solutions within their booking system IT stack (the "PSS"). Merchandising solutions are a subset of PSS modules that allow airlines to offer ancillary services such as extra luggage allowances, seat upgrades, in-flight purchases, airport parking, or meal options. Both Sabre and Farelogix provide merchandising solutions, though Sabre's solutions work exclusively within Sabre's own core PSS while Farelogix's solutions are PSS-agnostic.

ii. *Distribution Solutions*

Airlines can distribute content to travel agents via a Global Distribution System, such as Sabre or Amadeus, or use technology solutions to bypass a GDS (a "GDS bypass"), for example, the API provided by Farelogix to airlines. Contrary to the U.S. court, the CMA found that GDSs compete with distribution solutions that enable GDS bypass, notwithstanding the fact that GDSs compete in a two-sided market and GDS bypass solutions are provided only to airlines.

In both merchandizing and distribution solutions, the CMA acknowledged that the parties were not *currently* close competitors. In merchandising, while Farelogix is an established provider, Sabre is not a significant provider and its solutions work only with Sabre core-PSS modules. In distribution, Farelogix's GDS bypass solutions are not a "perfect substitute" for the Sabre GDS, making the two only "differentiated competitor[s]." Still, the CMA found that, absent the Transaction, the parties would have become closer competitors.

[33] *Id*. at 5.28.

[34] *Id*. at 5.83.

The CMA found that Sabre would have developed NDC-compatible distribution capabilities, including GDS bypass solutions.[35] The Transaction would have eliminated the incentive for Sabre to proceed with that development.[36] With the exception of Amadeus, according to the CMA, none of Sabre's competitors had the same intent, incentive, and ability to expand into such merchandising solutions.[37] Consequently, the CMA concluded that the Transaction would remove Sabre as a third significant competitor to Amadeus and Farelogix.

The CMA also found that, while Farelogix has a small market share[38] and is a differentiated competitor to GDSs,[39] the availability of GDS bypass solutions had forced GDSs to develop new capabilities to retain airline customers.[40] The acquisition of Farelogix would reduce innovation in the development of GDS bypass capabilities with the prospect of increases in GDS prices.

C. Interaction with the U.S. Decision

While the CMA's Final Report refers to, and even relies on, evidence from the U.S. court proceedings, the CMA did not engage with the U.S. court's reasoning or findings and noted that it was "not incumbent on the CMA . . . to come to the same substantive outcome as other jurisdictions."[41] Indeed, the CMA adopted the very position of the DOJ that the U.S. court rejected.

In Sabre's appeal to the UK's Competition Appeals Tribunal ("CAT"), the CAT will apply a more deferential standard to the CMA's decision than the U.S. court did in evaluating the DOJ's complaint. The CAT can overturn the decision only on "judicial review" grounds, i.e., on the grounds of "illegality, irrationality [or] procedural impropriety."[42]

The CMA has thus put down a marker that it will scrutinize transactions that have any contact with the UK market and that threaten to reduce innovation or potential competition, especially in the tech sector.

35 Final Report at 11.38-11.48.

36 *Id*. at 11.95.

37 *Id*. at 11.97, 11.120.

38 *Id*. at 11.110.

39 *Id*. at 11.107.

40 *Id*. at 11.108.

41 *Id*. at 14.195.

42 *Merger Action Group v. Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36; *Tobii AB (publ) v. Competition and Markets Authority* [2020] CAT 1, at para49.

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