14 April 2020

CMA Prohibits Merger That DOJ Tried – But Failed – To Block

In an unusual turn of events, the CMA prohibited the Sabre/Farelogix merger only two days after a U.S. federal court rejected the DOJ's attempt to block the transaction

SUMMARY

On 9 April 2020, the UK Competition and Market's Authority ("**CMA**") issued its final report prohibiting the proposed acquisition of Farelogix, Inc. ("**Farelogix**") by Sabre Corporation ("**Sabre**") (the "**Transaction**"). The CMA's decision comes only two days after Judge Leonard Stark of the U.S. District Court in Delaware dismissed a lawsuit brought by the Antitrust Division of the U.S. Department of Justice ("**DOJ**") seeking to block the Transaction.

The CMA's decision is notable because it demonstrates the CMA's willingness to take a bold stance even when reviewing a merger that lacks an obvious jurisdictional link to the UK, and in the face of a conflicting litigated outcome in a U.S. court. Sabre/Farelogix also serves as a stark reminder of the increased focus by antitrust regulators on the importance of innovation in the technology sector, and on the protection of "nascent competition", as well as the practical impact of the antitrust conceptions of "two-sided markets" in the UK and in the U.S.

BACKGROUND

Sabre and Farelogix

Sabre and Farelogix both supply software solutions to facilitate the booking of airline travel. Sabre does this predominantly through its Global Distribution System ("**GDS**"), which receives fare and flight schedule information from various airlines, aggregates that data, and uses it to enable travel agents to put together ticket offers for passengers, by packaging different aspects of travel (*e.g.*, the route, type of seat, schedule, availability and price). The large majority of booking volumes from travel agents are made through a GDS.

Farelogix has been developing new solutions, based on the so-called New Distribution Capability ("**NDC**") standard, that airlines can use to create more dynamic and personalised offers for customers that travel agents can access from the airline in real-time. The NDC standard was first launched by the International Air Transport Association in 2012. Implementation of the NDC standard is still at a nascent stage, with airlines only slowly beginning to adopt and use NDC-based solutions.

Involvement of the antitrust authorities in the U.S. and the UK

On 14 November 2018, Sabre announced that it had entered into an agreement to acquire Farelogix for $360 million in order to expand its airline technology portfolio and enhance and accelerate its innovative capabilities.

After conducting its initial 30-day review of the Transaction under the Hart-Scott-Rodino Act, the DOJ issued a Second Request in February 2019 in order to conduct a more in-depth review of the Transaction. Across the Atlantic, the CMA announced the launch of its merger inquiry a few months later, on 21 June 2019. Shortly thereafter, on 12 August 2019, the CMA issued an initial enforcement order prohibiting the parties from integrating the businesses, or otherwise impairing the ability of Sabre and Farelogix to compete independently. The CMA's in-depth "phase 2" investigation commenced on 2 September 2019. In light of the *"complexity of the investigation"*,[1] the CMA decided to extend the phase 2 investigation period by a further eight weeks on 19 December 2019 so that it would have until 12 April 2020 to issue its final report.

Following its own in-depth review, the DOJ filed a lawsuit on 20 August 2019 in the U.S. District Court in Delaware to block the Transaction, arguing that it *"would eliminate [a] disruptive competitor, leading to higher prices as well as reduced quality and innovation in airline booking services"*.[2] In particular, the DOJ asserted that Farelogix had *"injected much-needed competition and innovation into stagnant booking services markets"*, that it had *"pioneered the development of new technology [(NDS)]"*, and that the Transaction was just another attempt by Sabre to *"neutralize"* its competitors to *"stifle competition"*.[3] Sabre announced its intention to fight the lawsuit on the same day and the case went to trial on 27 January 2020.

On 7 February 2020, one day after the trial ended in the U.S., the CMA published its provisional findings, which closely mirrored the views of the DOJ, concluding that the Transaction could result in *"less*

---

1 CMA, Notice of extension of inquiry period under section 39(3) of the Enterprise Act 2002 (19 December 2019), available at https://www.gov.uk/cma-cases/sabre-farelogix-merger-inquiry.

2 DOJ Press Release dated 20 August 2019, available at https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix.

3 DOJ Press Release dated 20 August 2019, available at https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix.

innovation, higher fees and more limited choice of supplier for airlines" and that as a consequence *"UK passengers would be worse off"*.[4]

U.S. District Court Judge Stark handed down his decision on 7 April 2020, dismissing the DOJ's lawsuit on the basis that the DOJ had failed to show that the Transaction would harm competition in violation of Section 7 of the Clayton Act. The DOJ filed a notice of appeal the next day. On 9 April 2020, the CMA published its Final Report prohibiting the Transaction entirely.

ANALYSIS

Continuing the trend towards liberal assertion of jurisdiction through the "share of supply" test

The CMA's decision demonstrates again the CMA's willingness to liberally assert jurisdiction over non-UK mergers by adopting a creative approach to the so-called "share of supply" test. Under the Enterprise Act 2002, the CMA has jurisdiction to review mergers not only if the target's UK turnover meets certain turnover thresholds ("turnover test"), but also if the parties have overlapping activities in the UK and a combined 25% "share of supply" in the UK of goods or services of any description ("share of supply test").

Stressing its *"broad discretion to describe a specific category of goods or services"* for the purposes of the share of supply test,[5] and that it was entitled to apply the rules relating to a UK-specific link *"in a flexible and purposive way"*,[6] the CMA found the share of supply test to be satisfied merely by virtue of Farelogix's sales to a *single* customer in the UK (British Airways). This basis for asserting jurisdiction was strained because Farelogix arguably has no customers or revenue in the UK given that its direct customer is American Airlines, not British Airways (which has an interline arrangement with American Airlines).

As in its recent decision in the acquisition of Spark Therapeutics, Inc. by Roche Holdings, Inc., the CMA's jurisdictional analysis is highly detailed, spanning over 90 paragraphs. The CMA dismissed the parties' objections and arguments without further discussion,[7] emphasising its (seemingly unlimited) *"wide discretion"*[8] in defining all aspects of the share of supply test: (i) the relevant category of goods or services to be used as benchmark (this does not necessarily have to amount to a relevant economic

---

4 CMA Press Release dated 7 February 2020, available at https://www.gov.uk/government/news/cma-provisionally-finds-competition-concerns-in-airline-booking-merger.

5 Paragraph 5.22 of the CMA's Final Report in Sabre/Farelogix. The CMA used almost identical language in paragraph 76 of its recent decision opposing the acquisition of Spark Therapeutics, Inc. by Roche Holdings, Inc.

6 Paragraph 5.59 the CMA's Final Report in Sabre/Farelogix. The CMA used almost identical language in paragraph 77 of its recent decision in the acquisition of Spark Therapeutics, Inc. by Roche Holdings, Inc.

7 This includes dismissive statements such as *"[w]e consider the Relevant Description of Services reasonably reflects the outcome of a comprehensive investigation by the CMA […[to understand the commercial reality […]"* (paragraph 5.31 of the CMA's Final Report in Sabre/Farelogix).

8 Paragraph 5.62 of the CMA's Final Report in Sabre/Farelogix.

market); (ii) the identification of the customers or recipients of the goods or services; (iii) the scope of the geographic nexus to the UK; (iv) the method of calculating whether the 25% share of supply threshold is met (*e.g.*, value, cost, price, quantity, capacity, number of workers employed); and (v) the increment in that share of supply (the size of which is irrelevant and need not be specified).[9]

Clashing outcomes or procedural peculiarity?

Antitrust authorities generally actively work to avoid conflicting outcomes through regular and increasingly close cooperation between the CMA in the UK and the DOJ and the Federal Trade Commission ("**FTC**") in the U.S. For example, the CMA and the DOJ collaborated closely in their separate reviews of the Sabre/Farelogix Transaction. When announcing its provisional findings of prohibition on 7 February 2020, the CMA sought to rely on the fact that the DOJ had *"taken Sabre and Farelogix to court to block the merger due to its concerns"*.[10] Indeed, the conclusions reached by the CMA on the one hand, and the DOJ on the other, closely mirror each other, with both antitrust authorities displaying concern that the Transaction would lead to a stifling of innovation and a reduction of Sabre's incentives to independently develop NDC-based solutions.

Because the DOJ must persuade a federal court that a merger is anticompetitive, while the CMA has power to prohibit a transaction unilaterally, the outcome on the two sides of the Atlantic Ocean were markedly different. The DOJ was unable to persuade Judge Stark of the correctness of its position, but the CMA, on the basis of its analysis of the evidence it had gathered during its investigation, exercised its power to prohibit the Transaction on its own.

While the CMA and the DOJ reached the same conclusion regarding the Transaction – each alleging that it was unlawful – it is unusual for an antitrust authority in Europe to issue a decision that is in direct conflict with a judgment in a fully litigated case in the U.S. This is particularly true since the failed GE/Honeywell merger, which was conditionally cleared by the DOJ on 2 May 2001 (subject to certain divestitures), only to be prohibited by the European Commission in its entirety on 3 July 2001 (the decision was appealed but upheld by the Court of First Instance of the European Court of Justice on 14 December 2005). For example, following a U.S. federal court judgment on 9 September 2004 ruling that Oracle could proceed with its hostile bid for PeopleSoft. The European Commission cleared the merger one month later, on 26 October 2004.

Likely with this background in mind, Sabre asked Judge Stark to render a decision before the CMA's review period ended on 12 April 2020, presumably in the hope of favorably influencing the CMA's final report. This strategy did not succeed. Sabre/Farelogix therefore serves as a reminder to merging parties

---

[9] Paragraph 5.83 of the CMA's Final Report in Sabre/Farelogix (*"This is because the 25% share of supply threshold is met on the basis of Sabre's share alone and it is sufficient that we can identify some increment for Farelogix's supply of the Relevant Description of Services."*).

[10] CMA Press Release dated 7 February 2020, available at https://www.gov.uk/government/news/cma-provisionally-finds-competition-concerns-in-airline-booking-merger.

not to underestimate the CMA's willingness to prohibit a merger – even when that merger has been cleared in another high-profile antitrust jurisdiction.

Two-sided markets and protecting "nascent competition"

Both the CMA and the DOJ placed significant emphasis on protection of innovation and Farelogix as a nascent competitor. The CMA's theory of harm, which ultimately led it to prohibit the Transaction, was heavily influenced by changes the airline industry is currently undergoing. Competition among airlines, especially low-cost airlines, requires them to differentiate their retail offers by creating more personalised services and travel experiences. This, in turn, requires them to make greater use of dynamic and personalised pricing and to take greater control on their customer relationships relative to what is possible using GDS. The CMA concluded that innovative solutions, including NDC-based solutions, are an *"important driver"* and that Farelogix's products enable airlines to evolve their business models to adapt to the underlying change in the airline industry. Although implementation of the NDC standard is still "*relatively nascent"*, and its adoption will be "*lengthy, complex and far-reaching"*,[11] the CMA nevertheless considered NDC to be crucial to its analysis. The CMA concluded that, absent the Transaction, Sabre would likely develop its own NDC-based solution, thus increasing competition, but that after acquiring Farelogix, Sabre would have no incentive to do so. Similarly, the DOJ in its lawsuit alleged that the Transaction is "*a dominant firm's attempt to eliminate a disruptive competitor"*, an *"innovator that threatens to erode Sabre's dominance*" and that *"pioneered a next-generation technology standard"*. Further, the DOJ argued that as the airline industry *"continues to shift to NDC, Farelogix is poised to grow significantly"*, showing the strong focus placed on protecting growing, or "nascent", competitors.

Judge Stark, however, reached a different conclusion. Rather than viewing GDS and NDC-based solutions as direct competitors, he concluded that they were not in the same market because of the "two-sided" features of Sabre's GDS platform. A "two-sided" market is one involving an intermediary platform, like a GDS, that serves two distinct customer groups—here airlines and travel agents—that derive network benefits because they both use the platform. Judge Stark emphasised that Farelogix's NDC-based solutions are not "two-sided" platforms at all, but rather are products airlines can use to market their services directly (*i.e.*, without the use of an intermediary). Relying on the recent *Amex* decision[12] (which concerned a lawsuit under §1 of the Sherman Act), Judge Stark concluded that the DOJ could not argue that GDS and NDC-based products compete with one another because *"only other two-sided platforms can compete with a two-sided platform for transactions"*. Given the absence of head-to-head competition between Sabre's GDS and Farelogix's NDC-based solutions, Judge Stark determined that the DOJ failed to show that the Transaction would harm competition.

The CMA dismissed this line of reasoning, finding that Sabre's GDS and Farelogix's NDC-based solutions compete primarily on the airline-facing side of the market, stressing that *"the option that NDC*

---

11 Paragraph 11.12 of the CMA's Final Report in Sabre/Farelogix.

12 *Ohio et al. v American Express Co. et al.*, 138 S.Ct. 2274 (2018).

[solutions] give airlines to directly manage the travel agent relationship, as an alternative to the GDS performing this role, is an important part of the competitive dynamic between these products".[13] In contrast to Judge Stark the CMA did not accept that GDS and NDC-based solutions are in two different markets, one two-sided and the other not. The CMA's clear stance is that a two-sided platform like a GDS platform (which faces both airlines and travel agents) can compete with NDC-based solutions that are only airline-facing.[14]

As opposed to the U.S. Supreme Court in *Amex*, which adopted a bright-line rule, other competition authorities, including the European Commission, have also taken a case-by-case approach in deciding whether two-sided platforms compete with single-facing products – with differing results. In *Travelport/Worldspan*, for example, the European Commission devoted 18 paragraphs to analyse the substitutability of GDS (two-sided) with direct booking options *via* an airline's website (one-sided) before concluding that the relevant product included GDS only (the decision predated the introduction of NDC).[15] The Competition Commission of India determined that black and yellow taxis in Kolkata compete with two-sided ride-hailing apps like Uber that connect drivers and passengers.[16] In contrast, the Spanish and Singaporean competition authorities have found that there is no substitutability between traditional taxi services and ride-hailing apps, concluding that they are not part of the same market and thus do not compete.[17] In a similar vein, the *Bundeskartellamt* in Germany has found that hotel booking platforms (two-sided) do not compete with a hotel's own website or other offline channels (one-sided).[18] In short, decisions are not consistent across jurisdictions.

Outlook for merging parties going forward

With an increased focus of competition authorities on the technology sector, a strong desire to protect nascent competition and the rise of innovative tech-companies across all sectors, the treatment of two-sided platforms for antitrust purposes will undoubtedly continue to receive attention across jurisdictions. Sabre/Farelogix serves as a reminder that "one size does not fit all" and that until a global consensus is reached – if that ever happens – a positive outcome in one jurisdiction does not guarantee success in another. Moreover, as noted in our previous publications,[19] the CMA's trend of liberally asserting

---

13 Paragraph 6.45 of the CMA's Final Report in Sabre/Farelogix.

14 The CMA previously rejected the *Amex* approach adopted by Judge Stark in finding that traditional taxi services (one-sided) compete with two-sided ride-hailing apps (like Uber and Gett). ME/6548-15, *Sheffield City Taxis Limited/Mercury Taxis (Sheffield) Limited* (2015).

15 Case M.4523 *Travelport/Worldspan* (2007), paragraphs 39-57.

16 Case No. 25-28, *Meru Travel Solutions Pvt. Ltd. v M/s ANI Technologies Pvt. Ltd. and others* (2017).

17 Case C/0802/16 *Daimler/Hailo/MyTaxi/Negocio Hailo* (2016), paragraphs 37-41 (*Comisión Nacional de la Competencia*); Case 500/001/18, *Uber/Grab* (2018), paragraphs 138-144 (Competition and Consumer Commission of Singapore).

18 Decree B9-66/10 *HRS-Hotel Reservation Service* (2013), paragraphs 71 ff.

19 Sullivan & Cromwell LLP, "Biopharma Mergers Remain in Global Antitrust Spotlight" (6 January 2020), available at https://www.sullcrom.com/files/upload/SC-Publication-Biopharma-Mergers-Remain-in-Global-Antitrust-Spotlight.pdf; Sullivan & Cromwell LLP, "UK Merger Control" (19

jurisdiction is likely to continue. Following the CMA's provisional findings in its review of the Illumina/Pacific BioSciences transaction (which amounted to a provisional prohibition) and the parties' subsequent decision to abandon the merger on 2 January 2020, Sabre/Farelogix is the second example within the span of only a few months where the CMA prohibited a merger with hardly any link to the UK. The prohibition decision in Sabre/Farelogix marks a further step in the CMA's path to become a prominent competition authority as the UK prepares for its exit from the EU. This may have onerous consequences for merging parties, depending on the industry involved.

As Sabre/Farelogix illustrates, the CMA review process is frequently lengthy and burdensome for merging parties, and may require them to significantly delay closing their merger.[20] Moreover, the CMA review requires special attention and adherence to UK-specific rules, in particular its rules relating to legal privilege. In Sabre/Farelogix, the CMA imposed a penalty of £20,000 on Sabre for initially withholding and failing to provide in a timely manner certain documents that were responsive to a request from the CMA. These documents, which were privileged under U.S. law and therefore initially withheld from production, were not privileged under English law. Sabre's withholding of them was consequently found to constitute a breach of the UK Enterprise Act 2002.

Sabre/Farelogix shows that the CMA not only barks, but is also prepared to bite. Appreciating the risk and timing considerations of a CMA review, devising a successful strategy early on, and maintaining regular contact and a good rapport with the authority are key to enable merging parties to weather the storm of multinational merger review.

* * *

February 2020), available at https://www.sullcrom.com/files/upload/SC-Publication-UK-Merger-Control-Increased-Scrutiny-of-Non-UK-Transactions.pdf.

[20] Similarly, under the merger agreement in Roche/Spark, Roche's offer for Spark was originally scheduled to expire on 10 December 2019. In order to provide additional time for the FTC and CMA to complete their reviews, Roche and Spark extended the offer period until 16 December 2020. In Illumina/BioPac, the parties originally intended to consummate the merger around 31 November 2019, but extended the completion date to 31 December 2019, and then to 31 March 2020, in order to accommodate the CMA and the FTC review timeline.

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York

Werner F. Ahlers	+1-212-558-1623	ahlersw@sullcrom.com
Francis J. Aquila	+1-212-558-4048	aquilaf@sullcrom.com
Audra D. Cohen	+1-212-558-3275	cohena@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Scott B. Crofton	+1-212-558-4682	croftons@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitelm@sullcrom.com
John Evangelakos	+1-212-558-4260	evangelakosj@sullcrom.com
Sergio J. Galvis	+1-212-558-4740	galviss@sullcrom.com
C. Andrew Gerlach	+1-212-558-4789	gerlacha@sullcrom.com
Matthew B. Goodman	+1-212-558-4995	goodmanm@sullcrom.com
Dustin F. Guzior	+1-212-558-4482	guziord@sullcrom.com
Brian E. Hamilton	+1-212-558-4801	hamiltonb@sullcrom.com
Steven L. Holley	+1-212-558-4737	holleys@sullcrom.com
Matthew G. Hurd	+1-212-558-3122	hurdm@sullcrom.com
Stephen M. Kotran	+1-212-558-4963	kotrans@sullcrom.com
Mark J. Menting	+1-212-558-4859	mentingm@sullcrom.com
Scott D. Miller	+1-212-558-3109	millersc@sullcrom.com
Keith A. Pagnani	+1-212-558-4397	pagnanik@sullcrom.com
Richard A. Pollack	+1-212-558-3497	pollackr@sullcrom.com
George J. Sampas	+1-212-558-4945	sampasg@sullcrom.com
Melissa Sawyer	+1-212-558-4243	sawyerm@sullcrom.com
Alan J. Sinsheimer	+1-212-558-3738	sinsheimera@sullcrom.com
Krishna Veeraraghavan	+1-212-558-7931	veeraraghavank@sullcrom.com
Benjamin R. Walker	+1-212-558-7393	walkerb@sullcrom.com

Washington, D.C.		
Renata B. Hesse	+1-202-956-7575	hesser@sullcrom.com
Joseph J. Matelis	+1-202-956-7610	matelisj@sullcrom.com
Los Angeles		
Eric M. Krautheimer	+1-310-712-6678	krautheimere@sullcrom.com
Rita-Anne O'Neill	+1-310-712-6698	oneillr@sullcrom.com
Adam S. Paris	+1-310-712-6663	parisa@sullcrom.com
Alison S. Ressler	+1-310-712-6630	resslera@sullcrom.com
Palo Alto		
Scott D. Miller	+1-650-461-5620	millersc@sullcrom.com
Sarah P. Payne	+1-650-461-5669	paynesa@sullcrom.com
London		
John Horsfield-Bradbury	+44-20-7959-8491	horsfieldbradburyj@sullcrom.com
Jeremy Kutner	+44-20-7959-8484	kutnerj@sullcrom.com
Ben Perry	+44-20-7959-8477	perryb@sullcrom.com
Richard A. Pollack	+44-20-7959-8404	pollackr@sullcrom.com
Juan Rodriguez	+44-20-7959-8499	rodriguezja@sullcrom.com
Paris		
Olivier de Vilmorin	+33-1-7304-5895	devilmorino@sullcrom.com
Frankfurt		
Carsten Berrar	+49-69-4272-5506	berrarc@sullcrom.com
Krystian Czerniecki	+49-69-4272-5525	czernieckik@sullcrom.com
York Schnorbus	+49-69-4272-5517	schnorbusy@sullcrom.com
Brussels		
Michael Rosenthal	+32-2896-8001	rosenthalm@sullcrom.com
Tokyo		
Keiji Hatano	+81-3-3213-6171	hatanok@sullcrom.com
Hong Kong		
Garth W. Bray	+852-2826-8691	brayg@sullcrom.com
Kay Ian Ng	+852-2826-8601	ngki@sullcrom.com
Beijing		
Gwen Wong	+86-10-5923-5967	wonggw@sullcrom.com
Melbourne		
Waldo D. Jones Jr.	+61-3-9635-1508	jonesw@sullcrom.com
Sydney		
Waldo D. Jones Jr.	+61-2-8227-6702	jonesw@sullcrom.com