COMMENT

CAT's Sabre judgment

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Competition and Markets Authority; Cross-border mergers; Investigations; Jurisdiction; National competition authorities; United States

On 21 May 2021, in a unanimous ruling,[1] the UK's Competition Appeal Tribunal (CAT) dismissed in its entirety Sabre's appeal against the UK Competition & Markets Authority's (CMA) prohibition in April 2020 of the planned merger between the US corporations Sabre and Farelogix. The CAT's judgment contains a number of important statements and guidance regarding the jurisdictional issues highlighted by this case. This article summarises the CAT's findings and analyses its potential implications, in the light of other recent policy developments in the UK.

1. Sabre's grounds of appeal

Sabre had challenged the CMA's prohibition on six grounds of appeal, (the final two of which it dropped on 20 November 2020, before the start of the CAT's hearing, and will therefore not be discussed any further in this article):

- **Ground 1:**

  The CMA erred in law in that its Relevant Description of Services (RDS) is not a lawful basis on which to apply the share of supply test to two highly disparate supplies in the absence of any underlying rationale.

- **Ground 2:**

  The CMA erred in its approach to the requirement for "*supply in the UK*", by conflating supply to American Airlines (AA) of "*FLX Services*" (as defined by the CMA) with a direct supply to British Airways Plc (British Airways or BA).

- **Ground 3:**

  The CMA erred in its application of the share of supply test, in that it (i) misconstrued s.23 of the Act in relying upon an increment that was both hypothetical and vanishingly small, and (ii) irrationally and in error of law applied different, and inconsistent, methodologies in respect of Sabre and Farelogix and so failed to compare like with like.

- **Ground 4:**

  The CMA erred in its calculation of the total supply of RDS services in the UK by failing to apply its own definition of RDS consistently or rationally to third party providers.

- **Ground 5:**

  On a correct application of the standard of proof and a proper assessment of the evidence, the CMA could not lawfully have found a SLC in the merchandising market.

- **Ground 6:**

  The CMA's SLC finding in relation to distribution was irrational and unsupported by the evidence.[2]

2. The CAT'S findings

The CAT considered the correct standard of judicial review in this case, before scrutinising the various grounds of appeal. After considering the parties' arguments, statutory construction[3] and the relevant case law, the CAT ruled that their review had to be on standard judicial review principles and not a matter for fresh determination by the CAT. The CAT stated that where the CMA's assessment involves matters of expert economic judgment, the CAT "must show deference to the CMA's assessment, being that of an expert tribunal". On the other hand, where the CMA's assessment does not involve matters of expert

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[1] See *Sabre Corp v Competition and Markets Authority*, Case No: 1345/4/12/20; [2021] CAT 11, 21 May 2021, at *https://www.catribunal.org.uk/sites/default/files/2021-05/1345_Sabre_Judgment_210521.pdf* [Accessed 1 November 2021]. The case had been heard remotely on 24–26 November 2020.

[2] See CAT judgment at [4].

[3] The principally relevant statute being the Enterprise Act 2002, as amended (the Act).

economic judgment, the CAT must review that assessment in accordance with standard principles of judicial review, comprising a "normal level of intensity of review".[4]

Ground 1

The CAT cited s.23(8) of the Act, which provides the CMA with a "broad discretion" as to the setting of criteria which identify services of a particular description and distinguish them from services of a separate description.[5] The CAT found that the CMA's approach to defining the RDS by reference to "functionality" and "common functionality" could not be regarded as irrational.[6] There was no need for the RDS to be "commercially recognisable" or an "industry standard".[7] The fact that Sabre served a "two-sided" market, and Farelogix did not, was not relevant.[8] The share of supply test can include services which mix both vertical and horizontal relationships between the parties, just as long as those relationships are not wholly vertical: some horizontal overlaps must exist.[9] The CMA's exclusion of self-supply by airlines from the RDS at the jurisdictional stage was within s.23 of the Act and therefore not irrational.[10] The CAT found that, even though the CMA had put forward at least four, earlier and different versions of the RDS, this was not irrational—although the CAT "shared some of this concern" which might "demonstrate a lack of certainty or clarity," the CMA's "iterative process" included a "fair and rational assessment" of the parties' submissions during the investigation.

Ground 2

The CAT noted BA's comments that the relevant UK supply agreement that it had previously signed was "obsolete" and that "its existing team did not know that the BA Agreement was in place, and secondly, that it had little practical implications for BA. No fees were being paid. It involved no active management and BA did not monitor relevant bookings".[11] However, the CAT's review focused on para.5.50 of the CMA's final report, which referred to the relevant BA agreement creating a technical connection between BA and Farelogix, which allowed BA to "use and receive" FLX services.[12] The CAT held that "the distinction between benefiting from the supply of a service and receiving a supply of the service is more apparent than real".[13] The CAT pointed to BA's own contemporaneous procurement documents to characterise the services under the BA agreement.[14] The CAT held that

> "the final message sent by BA constitutes the provision of travel services information all the way through to the travel agent and not just the provision of information to the Farelogix FLX OC. To break the transmission into two parts and to treat the sending of the message to the FLX OC as being a communication to AA is artificial".[15]

The CAT consequently ruled that "the technical connection under the BA Agreement enables BA to provide travel services information for its interline segments to travel agents through the FLX services [and the CMA's decision therefore] was, in our view, justified and in any event, not irrational. That conclusion served the purpose of the jurisdictional test of share of supply, namely to capture for consideration cases where there is an overlap of supply in the UK".[16]

Ground 3

The CAT noted BA's point that there was no evidence that "any sums under the BA Agreement were ever even invoiced or that there were any contractual payments or that there was any realistic or practicable route to enforcing any such payments. To collect them would have been uneconomic. The cost of collection would have exceeded any amount owed". Hence Farelogix saw such sums as having "zero value".[17]

As regards those payments, the CAT took a different approach to the parties, whose analysis focused on "revenue received" and "receivable". Instead, the CAT held that the CMA had quite properly applied to all parties the "value derived from the supply" of the RDS.[18]

The CAT rejected the argument that revenue received in the US could not be seen as UK revenue

> "if it can be established with sufficient certainty that it is revenue received by Farelogix referable to, or in respect of, the supply in the UK by Farelogix to BA of the RDS. The question is whether any part of the fee which it in fact receives from AA is referable to the fact of its UK supply to BA. The physical location of where that fee is paid is not determinative

[4] See CAT judgment at [85].
[5] See CAT judgment at [141].
[6] See CAT judgment at [149].
[7] See CAT judgment at [154].
[8] See CAT judgment at [155].
[9] See CAT judgment at [156].
[10] See CAT judgment at [158].
[11] See CAT judgment at [175]–[176].
[12] See CAT judgment at [215].
[13] See CAT judgment at [226].
[14] See CAT judgment at [228] and also [239].
[15] See CAT judgment at [233].
[16] See CAT judgment at [235].
[17] See CAT judgment at [250].
[18] See CAT judgment at [295].

> of that question. The point is not from which jurisdiction the actual payment is made, but to which service(s) the transfer of value relates."[19]

Turning to the increment itself, the CAT held that each party's share of supply must be quantified and that all that was required was an increment of some real value. However, it was not a valid objection to the CMA's analysis that it did not, nor was able, to identify a "specific numerical value to the part of that fee which it found to be referable to the supply to BA".[20]

The CAT held that the notion of "value" had to relate to Farelogix, and not BA.[21] Further, there was no de minimis threshold when assessing the increment in the share of supply resulting from the merger, although there still had to be some increment, and in this case some increment in value. That increment in value must be capable of quantification, i.e. it must have some numerical value.[22]

As regards the question of the increment, which was at the heart of the case, it is worth quoting in full the CAT's findings, which it admitted had not been

> "easy to resolve. Nevertheless we are satisfied that the existence of the contractual right to payment gives rise to a quantitative measure of 'value'. As considered under Ground 2 above, there was a supply of a service between commercial parties. The question is how to measure the value of that supply. The parties have ascribed such a value in terms of a contractual fee payable. If that fee had been billed, but not paid, then it represents revenue receivable and a representation of the value of supply. We consider that a fee which is billable, but has not been billed is equally capable of being a fair representation of the value of the supply by Farelogix to BA, and that the CMA's decision to measure the value of that supply by reference to such receivable amount was not irrational. Sabre's argument that the value is only 'hypothetical' is based purely on the fact that Farelogix has not enforced the right to payment because the practical costs of collection outweigh the sums receivable. That is in reality a de minimis argument i.e. the sums are too trivial to collect. But that does not mean that there is no supply of value."[23]

The CAT noted that there were points in the CMA's final report where it had appeared that the CMA was referring to value being provided by Farelogix to BA, where no such payments had ever, or would ever, be made. However, as Sabre had alleged "substantial irrationality", rather than a failure to give sufficient reasons, the CAT held that the CMA's reasoning had not been sufficiently "seriously awry" to justify quashing the decision on such a ground.[24]

Ground 4

As regards the exclusion of third party suppliers from the RDS, and in particular, "non-vertically integrated tour operators" ("non-VITOs"), the CAT accepted that "at certain points in the Final Report, the reasons given by the CMA for excluding non-VITOs are confused, not clearly expressed and/or vague".[25] However, the CAT held that this was not irrational, and as Sabre's challenge to the exclusion of non-VITOs was one of "substantive irrationality", and not based on a failure to give sufficient reasons, therefore Sabre's challenge was not made out. In any event, if a reasons challenge had been made, the CAT would not have been satisfied that the expression of the reasoning was sufficiently "seriously awry" to justify quashing the decision on such a ground.[26] Any error as regards the non-VITOs had not been material and even if the non-VITOs had been included, the share of supply test would still have been satisfied.[27] Similarly, as regards all of the CMA's other exclusion decisions, the CAT held that they were not irrational and had a rational basis.[28] Nor did the CAT agree that there had been an inadequate evidential base[29] or an error in relying on responses received to a CMA survey questionnaire.[30]

3. Potential implications

The CAT judgment has confirmed the CMA's extensive and unfettered statutory jurisdictional powers, particularly as regards the application of the share of supply test and the understanding of the "increment" required to fulfil that test.[31] Non-UK merging parties with limited or indirect links to UK businesses or customers cannot presume that their transactions do not fall under the CMA's jurisdiction as a matter of principle. Detailed factual analyses and/or informal guidance from the CMA will be necessary to understand the jurisdictional picture for each individual transaction.

[19] See CAT judgment at [300].
[20] See CAT judgment at [302]. Note the CAT's statement in fn.38, that "the position would be different where neither party has an existing share of less than 25%. In that event, it would be necessary to quantify more precisely the numerical value of each party's supply." In this case, one party's share was already over 25%.
[21] See CAT judgment at [305].
[22] See CAT judgment at [306]–[307].
[23] See CAT judgment at [310].
[24] See CAT judgment at [311].
[25] See CAT judgment at [375].
[26] See CAT judgment at [375].
[27] See CAT judgment at [376].
[28] See CAT judgment at [378], [379], [380], [381], [382], [383], [384], [385], [386], and [387].
[29] See CAT judgment at [389] to [393].
[30] See CAT judgment at [394] to [399].
[31] See Victoria Ibitoye, MLEX Comment: "Sabre's failed appeal confirms UK regulator's long reach over merger control" 24 May 2021, *https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/mergers-and-acquisitions/sabre-faces-uphill-battle-to-get-cmas-farelogix-merger-block-quashed* [Accessed 1 November 2021].

The CMA has understandably welcomed the CAT's judgment, stating that "the Tribunal confirmed that the application of the share of supply test is a matter of judgement for the CMA and it has a broad discretion in determining the criteria used".[32]

Sabre did not bring any further appeals against the CAT's judgment, having lost on all four grounds before the CAT on a unanimous basis.[33]

As a result, international deal-makers and their UK competition law advisors will need to continue taking fully into account the CMA's activist approach to international merger control in the post-Brexit environment.

4. The Penrose Report

The CAT's judgment in the *Sabre* proceedings may be the final word on that specific case, absent any further appeals, but it may not be the final word on UK merger control and its jurisdictional rules. In February 2021, John Penrose MP, the Conservative MP for Weston-Super-Mare, presented his independent report to the British Government on the future of UK competition policy.[34] That report contains a number of proposals as regards speeding up the CMA's merger review process, so that the CMA would be allowed to accept legally-binding undertakings at any stage in a Phase 1 or 2 merger review. Penrose notes that "the new National Security and Investment regime moves some cases closer to the kind of 'mandatory notification and suspension' regime which is already common in other jurisdictions".[35]

It is unclear when, how, or, indeed, if, the UK Government may legislate in response to these proposals by one of its own MPs.[36] However, should the UK merger control regime move towards the mandatory notification model alluded to by the Penrose Report, as well as some of the reports cited below, which have also considered this option, it could render moot the debates both in the *Sabre* proceedings and in these articles. The likelihood would be that any tests used in a mandatory UK regime would incorporate "bright line" thresholds, giving both merging parties and the CMA far greater clarity on the CMA's jurisdiction. Any such clarity would likely significantly assist international dealmakers and their UK competition law advisors.

[32] See CMA Press Release, "CMA welcomes Tribunal judgment in Sabre case: The CMA welcomes today's Competition Appeal Tribunal judgment, dismissing Sabre's challenge of the CMA's decision to block its proposed acquisition of Farelogix", 21 May 2021, at *https://www.gov.uk/government/news/cma-welcomes-tribunal-judgment-in-sabre-case* [Accessed 1 November 2021].

[33] Under Rule 107(1) of the CAT's rules, an appeal against the CAT's ruling must be brought within three weeks, which elapsed on 11 June 2021. See also para.8.24 of the CAT's guidance. See "The Competition Appeal Tribunal Rules 2015" at *https://www.catribunal.org.uk/sites/default/files/2017-11/The_Competition_Appeal_Tribunal_Rules_2015.pdf* [Accessed 1 November 2021]. See the CAT's "Guide To Proceedings" at *https://www.catribunal.org.uk/sites/default/files/2017-12/guide_to_proceedings_2015.pdf* [Accessed 1 November 2021]. Note also under a costs order, Sabre is bound to pay the CMA's "reasonable costs". See "Consent Order" of 11 June 2021, at *https://www.catribunal.org.uk/sites/default/files/2021-06/1345_Sabre_Order_110621.pdf* [Accessed 1 November 2021].

[34] See "The Penrose Report: Power To The People: Stronger Consumer Choice and Competition: So Markets Work Well for People, Not The Other Way Around" (the Penrose Report) at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961665/penrose-report-final.pdf* [Accessed 1 November 2021]. In September 2020 John Penrose MP had been asked to write an independent report on how the UK's approach to competition and consumer issues could be improved in future. That report aimed to build on prior, recent efforts such as the March 2019 Furman Review, at *https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel* [Accessed 1 November 2021]; former CMA Chairman Lord Tyrie's proposals of February 2019, at *https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy?utm_source=b10c433a-0ace-4dca-9ca5-af1fd8ca2879&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate* [Accessed 1 November 2021]; and the CMA's November 2020 report on the "State of Competition" in the UK at https://www.gov.uk/government/publications/state-of-uk-competition-report-2020 [Accessed 1 November 2021].

[35] The Penrose Report, *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961665/penrose-report-final.pdf* [Accessed 1 November 2021] at pp.19–20. On 2 November 2021, John Penrose MP gave evidence at a hearing with Parliament's Business, Energy and Industrial Strategy Committee in which he argued that the UK's competition regime needed a "*core process redesign*" to stop it being unnecessarily burdensome for companies. He warned that it takes too long to get decisions from the CMA, and the CAT, and that alternative processes should be considered to help give businesses and investors more certainty. See Victoria Ibitoye, "UK competition regime needs faster processes fit for digital world, Penrose says", MLEX, 2 November 2021.

[36] On 20 July 2021, the UK Government published two consultations which, if enacted, could substantially expand the CMA's powers, by enabling the CMA to have jurisdiction to "call in" mergers for investigation, even if the acquirer and target do not compete, where (i) the acquirer has over £100 million in UK revenue, and (ii) one party has over 25% share of supply. There would be enhanced scrutiny for tech M&A, involving mandatory prior notice to the CMA of all mergers, plus the CMA being able to investigate any deals with a UK nexus that exceed a certain global value threshold, e.g. between £100 million–£200 million. The consultation also suggests a de minimis safe harbour for acquisitions where acquirer and target each have less than £10 million in global revenues. See Department for Business, Energy & Industrial Strategy, "Reforming competition and consumer policy", 20 July 2021, at *https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy* [Accessed 1 November 2021]. See Department for Digital, Culture, Media & Sport and Department for Business, Energy & Industrial Strategy, "A new pro-competition regime for digital markets", 20 July 2021, *https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets#history* [Accessed 1 November 2021]. See also CMA press release, Department for Business, Energy & Industrial Strategy, Competition and Markets Authority, Department for Digital, Culture, Media & Sport, The Rt Hon Kwasi Kwarteng MP, and Paul Scully MP, "Ministers seek to stamp out rip-offs with new consumer protections", 20 July 2021, *https://www.gov.uk/government/news/ministers-seek-to-stamp-out-rip-offs-with-new-consumer-protections* [Accessed 1 November 2021]. Both of those consultations closed on 1 October 2021 and the UK Government is said to be analysing the feedback. On 4 October 2021, the CMA published its responses to the two Government consultations, enhancing its ability to tackle breaches of competition and consumer law, and empowering the Digital Markets Unit (DMU). See the CMA press release at *https://www.gov.uk/government/news/cma-welcomes-government-proposals-on-new-powers* [Accessed 1 November 2021].