

Sabre/Farelogix and the jurisdiction of the UK's Competition & Markets Authority to review international transactions

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As the Brexit process unfolds, the question of the jurisdictional powers exercised by the UK's Competition & Markets Authority (CMA) as regards merger control¹ has become more pressing.² The recent *Sabre/Farelogix* transaction has raised important questions about the CMA's exercise of those jurisdictional powers, which were heard on appeal before the UK's Competition Appeal Tribunal (CAT) in November 2020. This article explains the transaction's importance and in particular why it may have significant effects on the exercise of the CMA's jurisdictional powers in the future. As a result, the outcome of the case is likely to be of direct interest to international deal-makers and their competition law advisers, in the US, UK and elsewhere.

1. The UK's share of supply test

There are two alternative jurisdictional tests in the UK, the satisfaction of which allows the CMA to review any transaction affecting the UK market³:

- First, whether the target has turnover in the UK of £70m or more.

- Secondly, whether the parties create or enhance a 25 per cent "share of supply" on any market in the UK or in a "substantial part" of the UK (which in purely geographic terms could be as narrow as a regional town such as Slough).

Jurisdictional guidance from the CMA and its predecessor bodies has previously indicated that this share of supply test is distinct from a standard economic market share test, as the CMA can draw the relevant "supply" as narrowly as it wishes, rather than having to define a market in relation to the economic reality of a given sector.⁴ This is the most important issue which is under scrutiny in the case before the CAT.

2. Sabre/Farelogix

In November 2018, Sabre Corporation announced a \$360 million takeover of Farelogix Inc. Both are US corporations, providing IT systems helping airlines to sell tickets, plus related add-ons such as on-board WiFi, meals and seats with extra legroom, through travel agents, to businesses and consumers.

Both the US and UK authorities reviewed the transaction. After a contested hearing with arguments presented by the US Department of Justice (DoJ) and the parties, a US district judge allowed the transaction to proceed. However, in June 2020, the CMA ultimately issued an order prohibiting the transaction,⁵ subject to Sabre's pending appeal against that decision ultimately succeeding in the English courts. Given the attention focused on these contested proceedings on both sides of the Atlantic, this transaction is fast emerging as the leading UK case on the CMA's current, highly purposive approach to its jurisdictional powers. This article focuses equally on what has already happened in the US and the UK. It also looks ahead to the issues which are likely to be contested before the CAT and their significance for competition law practitioners and their clients.

US proceedings

In August 2019, the US DoJ's Antitrust Division sued to block the deal, citing competition concerns in the market for booking services, which airlines use to sell tickets and

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¹ See cases such as *Amazon/Deliveroo*, in which the CMA analysed Amazon's prior exit from the UK online restaurant platform business and the likelihood of its re-entry, absent the transaction: <https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry> [Accessed 17 February 2021]; *Takeaway.com/Just Eat*, where the CMA again analysed Takeaway.com's prior exit from the UK market and the likelihood of its re-entry, absent the transaction: <https://www.gov.uk/cma-cases/takeaway-com-n-v-just-eat-plc-merger-inquiry> [Accessed 17 February 2021]; the CMA's joint referral of *Mastercard/Nets* to the European Commission under art.22 EUMR, where the parties argued that Nets had no UK business: https://www.gov.uk/cma-cases/mastercard-nets-merger-inquiry?utm_source=f7f9a6b2-732f-4545-9771-e89cfe68a044&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate [Accessed 17 February 2021]; pharmaceutical cases such as *Decbra/Osurnia*: https://assets.publishing.service.gov.uk/media/5f0ecadfd3bf7f039e9b5580/Decbra_Elanco_decision.pdf [Accessed 17 February 2021]; *Roche/Spark*, in which the target had no sales or revenue in the UK: https://assets.publishing.service.gov.uk/media/5e3d7c0240f0b6090c63abc8/2020207_-_Roche_Spark_-_non-confidential_Redacted-.pdf [Accessed 17 February 2021]; and *Illumina/Pacific Biosciences*: <https://www.gov.uk/cma-cases/illumina-inc-pacific-biosciences-of-california-inc-merger-inquiry> [Accessed 17 February 2021].

² See, e.g. "UK exit from the EU: Guidance on the functions of the CMA under the Withdrawal Agreement", 28 January 2020, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/861449/EU_Exit_guidance_CMA_web_version_final_---.pdf [Accessed 17 February 2021].

³ Section 23A of the Enterprise Act 2002 has been amended to create a special national security regime for companies in certain sensitive industries, reducing the turnover test to £1m.

⁴ See CMA2 para.4.56, "Mergers: Guidance on the CMA's jurisdiction and procedure" (January 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2_Mergers_Guidance.pdf [Accessed 30 January 2021].

⁵ On 19 June 2020, the CMA gave notice of the making of "The Sabre and Farelogix Merger Inquiry Order 2020". See https://assets.publishing.service.gov.uk/media/5eeb488d3bf7f7fe7a46359/Notice_of_making_the_Order_-_Sabre_Farelogix.pdf [Accessed 30 January 2021]; https://assets.publishing.service.gov.uk/media/5eeb489bd3bf7f7fe7a4635a/Merger_Inquiry_Order_-_Sabre_Fairlogix.pdf [Accessed 30 January 2021]; https://assets.publishing.service.gov.uk/media/5eeb486fe90e076451739848/Explanatory_Note_-_Sabre_Fairlogix.pdf [Accessed 30 January 2021].

other products via travel agencies and various online booking sites. The case was heard before US District Judge Leonard Stark in Wilmington, Delaware, at a trial stretching over eight days in late January 2020, ending on 6 February 2020, with the judge's expedited ruling dated 7 April 2020.⁶

The DoJ did not win the case, although the judge recognised in his conclusions that

"the outcome here may strike some, including the litigants, as somewhat odd. On several points that received a great deal of attention at trial [...] the Court is more persuaded by DoJ than by Defendants. [...] Despite these findings and conclusions, however, Defendants have won this case. This is because the burden of proof was on DoJ, not Defendants. [...] Instead, it is DoJ which, under the law, has the obligation to prove its contention that the Sabre-Farelogix transaction will harm competition in a relevant product and geographic market. DoJ failed. It based its case on the expert [economic] analysis of Dr. Nevo, but that analysis—including Dr. Nevo's explanation and defense of it—was simply unpersuasive. Unlike Defendants' evidentiary failings, DoJ's are dispositive. [...] If DoJ is to get the Court to enjoin such a transaction, it must meet its burden of proof. Here, the government has not done so. Accordingly, the Court must enter judgment for Defendants."⁷

The DoJ had attempted to argue, via its expert economic witness, Dr Nevo, that a stand-alone "booking services" market existed within the US, in which both parties were present and competed against each other. That argument was scrutinised on day four of the hearing, when, under cross-examination by defence attorneys, inter alia, Dr Nevo could not place a value or price on such "booking services". The judge found that no one in the industry knew of such standalone "booking services",

as opposed to Sabre's wider bundle of overall travel services. The judge held that Dr Nevo's "analysis was flawed and, ultimately, unpersuasive".⁸

The judge ruled that as a matter of "binding precedential law", the DoJ's case had to fail. He held that the US Supreme Court's decision in 2018 in the *Amex* case,⁹ and the decision of the Court of Appeals of the Second Circuit in 2019 in the *US Airways* case,¹⁰ meant that Sabre operated on a two-sided market involving, respectively, airlines and travel agents. Conversely, Farelogix only served airlines on a one-sided market. As the case law had previously held, only those active on two-sided markets could compete with one another, Sabre and Farelogix were not therefore competitors on the same product or geographic market.

The DoJ released a statement regretting the judge's findings,¹¹ which the DoJ indicated that it might appeal.¹² Sabre welcomed the judge's decision in a press release.¹³ This case followed another US court ruling in 2019 which rejected the DoJ's attempts to block AT&T's acquisition of Time Warner. The *Sabre/Farelogix* case, which the DoJ filed in August 2019, was the first such merger case which the DoJ had brought since that loss. The parties to *Sabre/Farelogix* told the US court in late March 2020 that they were still committed to the deal despite the impact which the coronavirus has had on the travel industry.¹⁴ However, the parties ultimately terminated their merger agreement, which expired at midnight on 30 April 2020. The parties stated their belief that

"the transaction was not anti-competitive, a result confirmed by the U.S. federal district court's decision in Sabre's favor. Unfortunately, the [CMA] acting outside the bounds of its jurisdictional authority—has prohibited the transaction. We strongly disagree with the CMA's decision".¹⁵

In a letter to Judge Stark of 14 April 2020, the DoJ asked the US District Court to keep the case open, pending any further application for equitable relief or stay of the transaction because the DoJ may have appealed,

⁶ See *U.S. v Sabre Corp. et al.*, case number 1:19-cv-01548-LPS (D. Del. Sep. 10, 2019), ECF No. 24 (27 January-6 February), in the U.S. District Court for the District of Delaware.

⁷ See Judge Stark's ruling of 7 April 2020, Conclusions, pp.91–92.

⁸ See Judge Stark's ruling of 7 April 2020, para.192.

⁹ See *Ohio et al. v American Express Co. et al.*, 138 S.Ct. 2274 (2018).

¹⁰ See *US Airways v Sabre Holdings Corp.*, 938 F.3d 43, 48-49 (2d Cir. 2019).

¹¹ See "Statement from Assistant Attorney General Makan Delrahim on District Court Decision in *U.S. v. Sabre Corp. and Farelogix Inc.*" (8 April 2020): "At trial, the Antitrust Division argued that Sabre's acquisition of Farelogix would extinguish a crucial constraint on Sabre's market power and would result in higher prices and less innovation. While we are disappointed with the court's decision, we appreciate the court's thoughtful consideration of this important case. We will closely review the court's opinion and consider next steps in light of our commitment to preserving competition for the benefit of the American consumer". See <https://www.justice.gov/opa/pr/statement-assistant-attorney-general-makan-delrahim-district-court-decision-us-v-sabre-corp> [Accessed 30 January 2021].

¹² On 8 April 2020, the DoJ filed a notice of appeal to the US Court of Appeals for the Third Circuit against the ruling allowing the *Sabre/Farelogix* merger to proceed. The government filed the notice "to protect its appellate rights, and to give the Solicitor General time to review the decision and determine whether to authorize the appeal, and whether to seek interim equitable relief".

¹³ See "This federal court ruling supports our view that the Sabre-Farelogix acquisition is not anti-competitive. We appreciate the consideration the court gave to these important issues." Also see "Sabre statement on the U.S. District Court decision in the Farelogix acquisition case" (7 April 2020), <https://www.sabre.com/insights/releases/sabre-statement-on-the-u-s-district-court-decision-in-the-farelogix-acquisition-case/> [Accessed 30 January 2021].

¹⁴ Both the US ruling and the CMA's final report discussed the fact of the Coronavirus crisis but as the parties had not particularly dwelled on it in evidence, they did not do so in their findings. See fn.2, p.2 of the US ruling, and in the CMA's final report, Summary, para.55, p.16; para.11.6, p.276; and para.11.36, p.287.

¹⁵ See Sabre press release, "Sabre Corporation Issues Statement on its Merger Agreement with Farelogix" (1 May 2020), <https://www.sabre.com/insights/releases/sabre-corporation-issues-statement-on-its-merger-agreement-with-farelogix/> [Accessed 30 January 2021]. Note that Farelogix has since received an offer to acquire it from Accelya, a provider of airline revenue management and logistics technology; see <https://www.farelogix.com/accelya-to-acquire-farelogix/> [Accessed 30 January 2021]. That offer prompted the DoJ to write to the appeal court on 17 June 2020, arguing that "this new development underscores the fact that Sabre's and Farelogix's May 1 decision to terminate their merger agreement mooted this case challenging that prior agreement as well as the resulting appeal".

pending authorisation to do so by the US Solicitor-General. The parties said that as regards the CMA's final report, they were "evaluating options".¹⁶ Following the parties' abandonment of the deal, Assistant Attorney General Makan Delrahim of the DoJ's Antitrust Division said

"we were disappointed with the District Court's application of *Amex* to this merger case. We already had filed a protective notice to appeal to preserve our appellate options and now are considering whether to move to vacate the District Court's opinion in light of the Defendants' decision to terminate their deal".¹⁷

On 12 May 2020, the DoJ filed a motion before the US Court of Appeals for the Third Circuit to vacate the lower court's ruling, arguing there was a particular need to do so, given the interpretation of the *Amex* case which had been applied, which "could have an outsized effect on cases involving competition in the digital economy, where it is not uncommon for multi-sided platforms to face competition from one-sided rivals".¹⁸

The parties alleged that

"the DOJ coordinated extensively with the CMA in the UK regulatory body's investigation of and decision to block the Sabre-Farelogix merger [and in] so doing, the DOJ achieved through the CMA what it could not achieve under American law. [...] the most logical explanation for the CMA's decision to review the merger at all is the DOJ's prodding. [...] This type of gamesmanship is part of the process by which both the CMA and the DOJ coordinated to bring about a result that neither could legitimately achieve on its own—the DOJ lost a full trial on the merits and the CMA acted, at least in Appellees' view, without jurisdiction".

The parties also argued that the CMA even sent a "principal case officer" to "attend the trial to monitor part of Appellees' rebuttal case".¹⁹

On 29 May 2020, the DoJ filed a reply, rejecting the parties' arguments, and maintaining their request to vacate the judge's ruling.²⁰ The DoJ stated that the "Appellees' baseless accusations that the United States somehow improperly coordinated with the CMA are false and nonsensical". The DoJ also provided emails which it argued showed that it was the CMA that first contacted the DoJ about the merger in January 2019, after the CMA was "informed by the Parties' lawyers that the transaction

is being notified" in the US, and it was the CMA which in February 2019 first "asked [the Parties] to provide [it] and [DoJ] with waivers". The DoJ also argued that they did not know how the CMA would rule beforehand.

On 20 July 2020, the US Court of Appeals for the Third Circuit agreed to vacate the district court's decision, finding that Sabre had mooted the parties' dispute by terminating its acquisition of Farelogix. Circuit Judge David J. Porter wrote that

"We also express no opinion on the merits of the parties' dispute before the District Court. [...] As such, this Order should not be construed as detracting from the persuasive force of the District Court's decision, should courts and litigants find its reasoning persuasive."²¹

In the meantime, attention now turns to the UK angle of the case.

UK proceedings

Separately, in June 2019, the CMA launched its own inquiry into the merger, after its "mergers intelligence" function had identified the transaction as warranting an investigation.²² The CMA imposed a "freeze" order in August 2019, preventing further integration between the parties. Later in August 2019, the CMA issued its Phase I decision, identifying competition concerns which required a further, in-depth Phase II inquiry. That Phase II inquiry started in early September 2019, after the CMA held that the parties had not provided sufficiently acceptable "undertakings in lieu" of a Phase II reference to address the CMA's concerns. Further, in October 2019 the CMA also imposed a £20,000 fine on Sabre for incomplete responses to statutory information requests. In December 2019, given the complexity of the issues, the CMA extended its Phase II review by a further eight weeks until 12 April 2020; i.e. around 10 months after the launch of the CMA's initial merger inquiry in June 2019.

¹⁶ In a further letter to the US Court of Appeals for the Third Circuit, dated 27 April 2020, the DoJ asked the court to stay the issuance of a briefing schedule in the *Sabre/Farelogix* case, so the Solicitor General could decide whether to approve the appeal. The parties were opposed.

¹⁷ See DoJ press release "Statement from Assistant Attorney General Makan Delrahim on Sabre and Farelogix Decision to Abandon Merger" (1 May 2020), <https://www.justice.gov/opa/pr/statement-assistant-attorney-general-makan-delrahim-sabre-and-farelogix-decision-abandon> [Accessed 30 January 2021].

¹⁸ See "Sabre-Farelogix decision could have 'outsized effect' on online economy cases, US DOJ says, seeking vacatur", by Jenna Ebersole, MLEX (12 May 2020), and Appeal No. 20-1767 from the US District Court for the District of Delaware, No. 1:19-cv-01548-LPS.

¹⁹ See "Sabre, Farelogix oppose US DOJ vacatur request on their courtroom merger win", MLEX (22 May 2020) by Jenna Ebersole, plus "Appellees' Response to Appellant's Suggestion of Mootness and Motion to Vacate the District Court's Decision and Order Granting Judgment to Defendants."

²⁰ See "The United States' Reply on its Vacatur Motion", filed on 29 May 2020.

²¹ See "Sabre-Farelogix US win vacated, but judge's decision could still be persuasive in other cases, appeals court says", by Jenna Ebersole, MLEX (20 July 2020).

²² The CMA's merger intelligence function is reportedly very active: in February 2020, one of the CMA's directors of mergers told a conference that it reviewed 600 to 700 cases a year. See "Smaller mergers on CMA's radar for their outsize effects, agency official says", by Simon Zekaria, MLEX (27 February 2020), quoting Sorcha O'Carroll, UK Competition Law 2020 (Informa Connect, 27 February 2020), <https://informaconnect.com/uk-competition-law/> [Accessed 30 January 2021].

The CMA's arguments

In its Phase I reference decision of August 2019, the CMA stated that the turnover test had not been met, as Farelogix did not have UK turnover exceeding £70m.²³ Instead, it found a "Relevant Description of Services" involving "the indirect distribution of airline content to travel agents in the UK for flights" to various international destinations, including Ireland, Hungary, Sweden, Luxembourg, Israel, Puerto Rico, and Kazakhstan.²⁴ The CMA noted that it had a broad discretion as regards the application of the "share of supply" test, which in this case it held could relate to a single UK airline customer, British Airways, reasoning that "bookings by British Airways represent a substantial portion of all UK airline bookings. British Airways is the flag carrier airline of the United Kingdom, and its procurement choices are liable to have a material impact on UK consumers".²⁵ As regards travel agents, although Sabre had direct links with UK travel agents, the CMA rejected the parties' argument that Farelogix had no UK travel agent customers, holding instead that it operated in a two-sided market where its technology meant that "the Parties in practice compete to distribute content to travel agents (including UK travel agents)". Consequently, "Sabre and Farelogix supply services that facilitate the indirect distribution of airline content to travel agents in the UK".²⁶

On 7 February 2020, the CMA's Phase II inquiry group announced its provisional findings. The CMA identified a number of substantive concerns, meaning that "its current view is that blocking the merger may be the only way of addressing these competition concerns". The CMA publicly stated that "it has worked with the US [DoJ] on this case as the DoJ carried out a separate review into the deal and has taken Sabre and Farelogix to court to block the merger due to its concerns".²⁷ Specifically as regards the disputed jurisdictional points, the CMA stated that, having closely reviewed the relevant commercial agreements with both British Airways (BA) and American Airlines (AA), the 25 per cent threshold was met on the

basis that Sabre's share alone exceeded 2 per cent of revenue from the provision of the relevant services to UK airlines, and the CMA had identified some increment from Farelogix's supply of the relevant services to UK airlines. The CMA held that it had identified "two possible means" by which to identify relevant revenue streams to establish jurisdiction.²⁸

Although the CMA's provisional findings were subject to further consultation, the CMA fully upheld its adverse findings in its final report. Prior to that, Sabre publicly responded to the provisional findings, stating that they "strongly believe that no action should be taken by the CMA in this case, which is, at best, at the margins of its jurisdiction", and that the transaction remains "resoundingly pro-competitive" on the merits.²⁹ On 28 February 2020, having previously offered behavioural remedies in Phase I, in lieu of a Phase II reference, the parties proposed what they termed a "comprehensive remedy package" of behavioural commitments. The CMA did not accept those proposed remedies. The parties continued to dispute strongly the CMA's jurisdiction and described the CMA's findings as "erroneous" and prohibition as not "proportionate".³⁰

The CMA released its final report prohibiting the merger on 9 April 2020, two days after the US judge allowed the merger to proceed.³¹ The report and its appendices ran to nearly 500 pages. The facts of the case centred on the contractual nexus between Farelogix, BA and AA, with the parties maintaining that Farelogix did not have any customers or revenues in the UK, as it had only contracted with AA in the US. The CMA's jurisdictional analysis stretched to 90 paragraphs, in which it stressed its "broad discretion to describe a specific category of goods or services" for the purposes of the share of supply test, and that it was entitled to apply the rules relating to a UK-specific link "in a flexible and purposive way".³² The CMA maintained that it held a potentially unlimited "wide discretion" to determine whether the 25 per cent threshold could be met, so as to trigger the CMA's jurisdiction.³³ Its analysis repeatedly

²³ See Case ME/6806/19, paras 88–130, "Anticipated acquisition by Sabre Corporation of Farelogix Inc: Decision on relevant merger situation and substantial lessening of competition" decision dated 16 August 2019, https://assets.publishing.service.gov.uk/media/5d8cd7d4e5274a2fb83b92d4/---_Decision_-_For_publication_.pdf [Accessed 30 January 2021].

²⁴ Case ME/6806/19, para.138, citing para.136.

²⁵ Case ME/6806/19, para.110.

²⁶ Case ME/6806/19, paras 129–130.

²⁷ See CMA Press release, "CMA provisionally finds competition concerns in airline booking merger: An in-depth investigation has provisionally found that Sabre's proposed takeover of Farelogix raises competition concerns" (7 February 2020), <https://www.gov.uk/government/news/cma-provisionally-finds-competition-concerns-in-airline-booking-merger> [Accessed 30 January 2021].

²⁸ See paras 25–37 of CMA's "Summary of Provisional Findings" (7 February 2020), https://assets.publishing.service.gov.uk/media/5e3d334940f0b6090b845d11/Sabre-Farelogix_-_Provisional_Findings_Summary_Final_002_.pdf [Accessed 30 January 2021].

²⁹ In a subsequent, revised statement, Sabre stated that "the CMA lacks jurisdiction".

³⁰ See para.5.2, arguing that "prohibition will (depending on the outcome of the US litigation) prevent the merger from being implemented anywhere in the world, when the CMA's concern is of course focused on a small part of the world, namely the Transaction's effects on UK customers". See "Response to Remedies Notice" at https://assets.publishing.service.gov.uk/media/5e57e7fed3bf7f06f9175bb8/Response_to_Remedies_Note_-_Confidentiality_requests_-_with_redactions.pdf [Accessed 30 January 2021].

³¹ See "Anticipated acquisition by Sabre Corporation of Farelogix Inc.—Final report" (9 April 2020), https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf [Accessed 30 January 2021] and https://assets.publishing.service.gov.uk/media/5e8f1807e90e071a158134da/Appendices_and_glossary_-_for_publication_.pdf [Accessed 30 January 2021]. See also the accompanying press release "CMA blocks airline booking merger: Following an in-depth investigation, the CMA has blocked Sabre's proposed takeover of Farelogix" (9 April 2020), <https://www.gov.uk/government/news/cma-blocks-airline-booking-merger> [Accessed 30 January 2021].

³² See para.5.22, p.59 for the first quotation, and para.5.59, p.75 for the second quotation, in "Anticipated acquisition by Sabre Corporation of Farelogix Inc.—Final report" (9 April 2020), https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf [Accessed 30 January 2021]. (Both quotations mirror language in paras 76 and 77 in the Phase I Spark/Roche decision at https://assets.publishing.service.gov.uk/media/5e3d7c0240f0b6090c63abc8/2020207_-_Roche_Spark_-_non-confidential_Redacted-.pdf) [Accessed 30 January 2021].

³³ See "Anticipated acquisition by Sabre Corporation of Farelogix Inc.—Final report" para.5.62, p.76.

pointed to “the effect of this agreement, when considered in the context of a number of other related arrangements [...]”³⁴; “the CMA’s well-established approach [...] is to consider the commercial realities and results of transactions, focussing on the substance rather than the legal form of the relevant arrangements”³⁵; and “it is necessary to consider the significance of commercial relationships in the round and having regard to all of their various component parts”.³⁶ With that approach, and citing the facts of the case, the CMA determined that Farelogix did indeed supply the “Relevant Description of Services” to BA in the context of “interline bookings” in partnership with AA—and that BA had consciously decided to procure Farelogix’s services in this way, after looking at other rival options. The CMA further held that the revenues behind this contractual nexus could include both revenues “received” and “receivable”³⁷—whether or not Farelogix had ever in fact collected the “trivial” “receivable” revenue.³⁸

This brings us to the crucial issue of the required increment under the share of supply test. The CMA was clear throughout its decision that

“the [Enterprise] Act [2002, as amended] does not prescribe a minimum increment and the [CMA’s own published] Guidance explicitly recognises that where an enterprise already supplies or acquires 25% of any particular goods or services, the test is satisfied so long as its share is increased as a result of the merger, regardless of the size of the increment”.³⁹

For authority on this proposition, the CMA inserted a footnote at this point, referring to prior merger control decisions taken 10 years ago by its predecessor agency, the Office of Fair Trading (OFT), in the retail sector, involving the acquisition of single stores.⁴⁰

The decision clearly takes account of the US court ruling, but reaches its own conclusions based on the particular facts of the UK market:

“although in general terms there may be good reasons for agencies investigating the same merger in a global market to coordinate, where they can, on evidence gathering and investigatory steps, as well as to harmonise on remedies in the event both jurisdictions have identified the same or largely similar competition concerns, it is not incumbent on the CMA (and nor in some cases will it be legally

or practically possible, or desirable from a policy perspective) to come to the same substantive outcome as other jurisdictions, or vice versa. This is because: [...] different jurisdictions might operate under materially different legal systems, which may involve different substantive legal tests, jurisprudence, decisional practice or guidance; and/or may involve fundamentally different enforcement models. In this regard, the UK has adopted an administrative system of decision making whereas some other jurisdictions, such as the US, have adopted a prosecutorial system. [...]”⁴¹

The parties’ responses

It is evident from the Phase I reference decision, the parties’ subsequent published submissions to the Phase II merger review, the CMA’s provisional findings, and the final report, that the parties strenuously objected to the CMA’s jurisdictional reasoning, in both Phases I and II. Drawing the relevant share of supply as narrowly as a single airline, even one as significant as BA, has been a major point of contention. The parties continued to argue that Farelogix had no customers and no revenue in the UK. The parties’ published submissions were particularly striking for their robust drafting: the parties repeatedly criticised the CMA for the “gerrymandered nature of this approach”⁴² to jurisdiction. They also criticised the CMA’s discretion to exercise jurisdiction in novel ways:

“this discretion is not unfettered and does not permit the CMA to gerrymander any arbitrary set of services until it finds a share above 25%, regardless of how irrelevant that set of services may be to the commercial realities of how services are in fact supplied in the sector in question”.⁴³

The parties also included in both their initial Phase II submissions and their responses to the CMA’s issues statement numerous references to the CMA’s allegedly “arbitrary”, “artificial”, “unreasonable” and “irrational” jurisdictional analysis, which was “wrong in law”. Similarly, the parties’ response to the CMA’s provisional findings stated that the CMA’s new Relevant Description of Services “is inappropriate, unreasonable, and flawed

³⁴ See “Anticipated acquisition by Sabre Corporation of Farelogix Inc.—Final report” para.5.16, p.55.

³⁵ See “Anticipated acquisition by Sabre Corporation of Farelogix Inc.—Final report” para.5.24, p.60.

³⁶ See “Anticipated acquisition by Sabre Corporation of Farelogix Inc.—Final report” para.5.44, p.68.

³⁷ See “Anticipated acquisition by Sabre Corporation of Farelogix Inc.—Final report” para.5.66, p.77.

³⁸ See “Anticipated acquisition by Sabre Corporation of Farelogix Inc.—Final report” fn.210, p.82.

³⁹ See “Anticipated acquisition by Sabre Corporation of Farelogix Inc.—Final report” para.5.72, pp.79–80. See also para.5.73, p.80: “Accordingly, any increment to Sabre’s share of supply by Farelogix would satisfy the share of supply test.” Paragraph 5.83, p.84 stated that: “In this case, we do not consider it necessary to specify precisely how much revenue is received or receivable [...] and it is sufficient that we can identify some increment for Farelogix’s supply of the Relevant Description of Services”.

⁴⁰ See fn.199, p.80. See Case No.ME/4162/09, “Anticipated acquisition by Tesco plc of a Spar grocery store in Wroughton from Capper & Co Limited” (14 July 2009) at <https://www.gov.uk/cma-cases/tesco-spar-store-in-wroughton> [Accessed 30 January 2021] and Case No.ME4570/10, “Completed acquisition by Carpetright plc of four Allied Carpet stores” (13 September 2010) at <https://assets.publishing.service.gov.uk/media/555de33ced915d7ae500006c/Carpetright.pdf> [Accessed 30 January 2021].

⁴¹ See “Anticipated acquisition by Sabre Corporation of Farelogix Inc.—Final report” para.14.195, pp.382–383.

⁴² See “Response to Issues Statement” para.2.22, p.13, https://assets.publishing.service.gov.uk/media/5dfa5a9fed915d54a89bd4b8/IS_response_-_Sabre-Farelogix_-_web----.pdf [Accessed 30 January 2021].

⁴³ See “Initial Phase 2 Submission” para.3.13, p.14, https://assets.publishing.service.gov.uk/media/5da8380940f0b659825a48bc/sabre_farelogix_initial_submission.pdf [Accessed 30 January 2021].

[...] [which] only serves to emphasise the absurdity of the CMA's repeated attempts to find a basis for jurisdiction in this case".⁴⁴

This robust language indicates that from an early stage, the parties were minded, particularly given the CMA's outright prohibition, to appeal to the CAT, both on the merits (if allowed), and, pursuant to the Enterprise Act 2002 s.120(4), on traditional "judicial review grounds".⁴⁵ In light of the divergence of outcomes between the US and UK proceedings, the decision to appeal to the CAT went ahead.⁴⁶ As of 9 April 2020, the date of the CMA's prohibition decision, the parties had four weeks to bring any such appeal before the CAT, with initial indications already pointing in that direction.⁴⁷ Following the parties' abandonment of the deal, Sabre continued to publicly reject the CMA's findings.⁴⁸ The CMA reportedly responded to the parties' abandonment of the deal by stating that "we never take decisions to block mergers lightly, but in this case the evidence of a negative impact was clear".⁴⁹ On 6 May 2020, the CAT published an order dated 30 April 2020, extending the time period for filing the appeal notice to 21 May 2020, citing the "exceptional" circumstances, in which "the demands placed on relevant individuals at Sabre, particularly as it is engaged in the travel industry, and on its legal representatives by reason of the Covid-19 pandemic have impeded the effective co-ordination and preparation of the notice of application". The CMA also consented to the extension.⁵⁰

The summary of the notice of appeal, published on 1 June 2020, indicated that Sabre was indeed challenging the CMA's jurisdiction over the deal, which Sabre argued was "unlawful" and therefore sought an order quashing the CMA's decision in its entirety, plus costs in the case.⁵¹ Specifically as regards jurisdiction and the share of supply test, Sabre initially challenged the CMA's decision on four principal grounds:

- first, including "two highly disparate supplies" within the CMA's relevant description of services;
- secondly, challenging the CMA's approach to "supply in the UK" by treating supply to an American airline to be equivalent to supply to British Airways;
- thirdly, "relying upon an increment that was both hypothetical and vanishingly small"; and
- fourthly, wrongly calculating the total supply of relevant services in the UK.

The main hearing of the application took place on 24–26 November 2020. Judgment is still pending, as of February 2021.⁵² As the case progresses through the CAT process, and potentially any higher UK courts, it promises to become one of the leading cases on the correct application of the share of supply test, with high stakes for all of the parties involved, including the CMA in particular.

⁴⁴ See "Executive Summary" paras 1.5 and 1.7, p.1, https://assets.publishing.service.gov.uk/media/5e6a50b7d3bf7f269e22a159/PF_response_-_The_Parties_-_pdf [Accessed 30 January 2021]. See generally paras 2.1–2.44, pp.9–20, disputing the CMA's jurisdiction over the transaction. Paragraph 2.6 states that "the CMA's proposed, new, 28-word long 'Relevant Description of Services' remains inadequate. It is neither appropriate nor reasonable; it is arbitrary, artificial, and flawed". In para.2.17, the parties argued that "by way of analogy, a builder who tarmacked your driveway in 2011 did not provide you with a service in 2019 by virtue of the fact that you continue to park your car on that driveway". In their conclusions, the parties argued in para.6.2 that prohibiting the transaction "would be highly improper given the nexus between the Transaction and the UK is peripheral at best, the impact on UK consumers is very limited, and the Transaction is being subject to detailed scrutiny in the US, the jurisdiction which has by far the greatest connection with the Transaction".

⁴⁵ As discussed later in this article, "judicial review" requires the parties to demonstrate that, as a public body, the CMA took an "irrational" and/or "unreasonable" decision, or the CMA's procedures were flawed, which ought therefore to be overturned. The published summary of the parties' notice of appeal refers to the CMA's decision as "unlawful", the CMA "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", the CMA's findings were "vitiated by error" and those findings were "irrational and unsupported by the evidence". See https://www.catribunal.org.uk/sites/default/files/2020-06/1345_Sabre_summary_010620.pdf [Accessed 30 January 2021].

⁴⁶ See MLEX, "Sabre, Farelogix, DOJ tell judge UK's provisional decision should have no impact on US court's timing, ruling" by Curtis Eichelberger on 12 February 2020. According to the transcript of the hearing dated 17 January 2020, counsel for Sabre told the judge that a CMA prohibition decision "would be a regulatory decision that then would be subject to litigation and I think that there would then be litigation in the U.K. [...] I think the client's intention would be to move forward with the litigation in the U.K. [...] our expectation is we'll get clearance from the U.K. authorities, but if we don't, it will be a litigation path".

⁴⁷ Sabre provided MLEX with a statement stating that it was "disappointed by the CMA's finding, particularly in light of the US federal court's ruling, which found that Sabre's acquisition of Farelogix is not anticompetitive and should not be prohibited. We are reviewing the CMA's findings and will carefully consider our options". See "Comment: Sabre-Farelogix court challenge would try limits of CMA's jurisdiction test" by Victoria Ibitoye, MLEX (9 April 2020).

⁴⁸ In a press release dated 1 May 2020, Sabre stated: "Sabre and Farelogix have agreed to terminate the parties' merger agreement, which expired at midnight on April 30. We continue to believe that the transaction was not anti-competitive, a result confirmed by the U.S. federal district court's decision in Sabre's favor. Unfortunately, the United Kingdom's Competition and Markets Authority (CMA)—acting outside the bounds of its jurisdictional authority—has prohibited the transaction. We strongly disagree with the CMA's decision". See <https://www.sabre.com/insights/releases/sabre-corporation-issues-statement-on-its-merger-agreement-with-farelogix/> [Accessed 30 January 2021].

⁴⁹ See "Sabre to appeal CMA's jurisdiction over Farelogix deal despite merger's collapse" by Victoria Ibitoye, MLEX (1 May 2020).

⁵⁰ See Case 1345/4/12/20 *Sabre Corporation v Competition and Markets Authority*, Order of the President (Extension of time to file notice of application), at https://www.catribunal.org.uk/sites/default/files/2020-05/Sabre_Order_extending_time_to_file_NoA_060520.pdf [Accessed 30 January 2021].

⁵¹ For the summary of the notice of appeal, published on 1 June 2020, see https://www.catribunal.org.uk/sites/default/files/2020-06/1345_Sabre_summary_010620.pdf [Accessed 30 January 2021]. See also "Sabre files appeal over CMA's 'unlawful' Farelogix merger block" by Victoria Ibitoye, MLEX (1 June 2020).

⁵² See <https://www.catribunal.org.uk/sites/default/files/2020-06/134541220-sabre-corporation> [Accessed 30 January 2021]. See also "Sabre secures expedited disclosure ahead of UK CMA court challenge" by Victoria Ibitoye, MLEX (16 June 2020). Note the Case Management Conference on 16 June 2020 at which the American Association of Travel Advisors (ASTA) unsuccessfully sought permission to intervene in the proceedings in support of Sabre and to express its members' views as travel agents and customers of the merging parties. ASTA also disputed the CMA's jurisdiction over the merger. See ruling dated 25 June 2020 at https://www.catribunal.org.uk/sites/default/files/2020-06/1345_Sabre_Ruling_250620.pdf [Accessed 30 January 2021].

As regards the appeal's prospects of success, it is worth noting, however, that two prior challenges to the UK regulators' jurisdiction over merger control in 1993 and 2015 failed before the highest court in the UK.⁵³

The CMA has also had some success defending the parties' appeals against its more recent merger control decisions.⁵⁴

3. Conclusions

This article has sought to highlight the importance of *Sabre/Farelogix* to the future of UK merger control by identifying the issues at stake before the CAT in November 2020. Any CAT decisions may of course be appealed to higher courts before the issues are finally determined. The final outcome is therefore likely to make parties to future transactions with UK aspects approach their UK merger control risk analysis more cautiously. International deal-makers and their competition law advisers should closely observe proceedings in this case and draw their own conclusions accordingly.

⁵³ See *South Yorks Transport in the House of Lords, Monopolies and Mergers Commission Ex p. South Yorkshire Transport Ltd* [1993] 1 W.L.R. 23 and *Eurotunnel in the Supreme Court, Société Cooperative De Production Seafrance SA v CMA* [2015] UKSC 75. See also "Comment: Sabre faces uphill battle to get CMA's Farelogix merger block quashed" by Victoria Ibitoye, MLEX (8 June 2020).

⁵⁴ In August 2019 the CMA decided to block the attempted acquisition by Tobii AB of Smartbox Assistive Technology Ltd and Sensory Software International Ltd. See <https://www.gov.uk/cma-cases/tobii-ab-smartbox-assistive-technology-limited-and-sensory-software-international-ltd-merger-inquiry> [Accessed 30 January 2021]. Tobii challenged the CMA's findings before the CAT and was unsuccessful on most grounds, bar one. Even so, the CAT decided not to remit those limited grounds back to the CMA for further review or permit further appeals. See *Tobii AB (publ) v CMA* [2020] CAT 1 and *Tobii AB (publ) v CMA* [2020] CAT 6 at https://www.catribunal.org.uk/sites/default/files/2020-01/1332_Tobii_judgment_%5B2020%20CAT%201%5D_100120.pdf [Accessed 30 January 2021] and https://www.catribunal.org.uk/sites/default/files/2020-02/1332_Tobii_Ruling_%5B2020%5D_CAT_6_170220.pdf [Accessed 30 January 2021].