



## COMPETITION APPEAL TRIBUNAL

### SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

#### CASE No. 1345/4/12/20

Pursuant to rules 14 and 26 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the “Rules”), the Registrar gives notice of the receipt on 21 May 2020 of an application for review under section 120 of the Enterprise Act 2002 (the “Act”) by Sabre Corporation (“Sabre”) against a decision of the Competition and Markets Authority (the “CMA”) to prohibit Sabre’s proposed acquisition (the “Transaction”) of Farelogix Inc (“Farelogix”) in its entirety (the “Decision”). The CMA’s Decision is set out in its Final Report dated 9 April 2020 (the “FR”). Sabre is represented by Skadden, Arps, Slate, Meagher & Flom (UK) LLP of 40 Bank Street, Canary Wharf, London E14 5DS (Reference: Bill Batchelor / Bruce Macaulay / Jonathon Egerton-Peters / Melissa Healy).

According to the Notice of Application (the “NoA”), both Sabre and Farelogix (together, the “Parties”) are US corporations. Sabre is a leading technology and software provider to the global travel industry. It distributes airline and other travel services through its global distribution system. Farelogix is an IT provider which supplies software to airlines.

On 14 November 2018, a subsidiary of Sabre entered into an agreement to acquire Farelogix for approximately US \$360 million.

In the US, the agreement was opposed by the US Department of Justice, which sought a court order prohibiting it. Following an eight-day trial before the US District Court in Delaware, however, the US District Court found in favour of Sabre.<sup>1</sup>

The Parties, at the CMA’s request, notified the CMA of the proposed acquisition by Sabre of Farelogix in a Merger Notice dated 19 June 2019. Following a Phase 1 investigation, the CMA decided to refer the Transaction for a Phase 2 investigation on the basis that, on the information available to the CMA at that time, (i) the Transaction, if carried into effect, would result in the creation of a relevant merger situation, and (ii) it was or may be the case that the Transaction may be expected to result in a substantial lessening of competition (“SLC”) within a market or markets in the United Kingdom.

Following the Phase 2 process, the CMA issued its FR on 9 April 2020. The CMA concluded that, contrary to the submissions of the Parties, (i) the Transaction “will result in the creation of a relevant merger situation” and it therefore had jurisdiction, and (ii) the Transaction “may be expected to result in a [SLC] within the supply of merchandising solutions on a worldwide basis and the supply of distribution solutions on a worldwide basis.” On that basis, the CMA decided to prohibit the Transaction in its entirety.

Sabre submits that the Decision is unlawful in: (i) asserting jurisdiction over the Transaction; and/or (ii) in respect of its substantive findings.

As to jurisdiction, the NoA states that the CMA asserts jurisdiction over the Transaction on the basis of the share of supply test in section 23 of the Act. In doing so, it relies on three core findings:

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<sup>1</sup> *United States v Sabre et al* C.A. No. 19-1548-LPS (Del.).

- (a) First, that Sabre and Farelogix each supply services which can properly be included in a single “description of services” for the purposes of section 23 of the Act;
- (b) Second, that Farelogix supplies relevant services within that description in the UK; and
- (c) Third, that the Transaction increases a share of supply in such services of 25% or more in the UK.

Sabre contends that each of these findings, and therefore the Decision, is unlawful for the following alternative or cumulative Grounds, which, in summary, are:

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 1**).
2. The CMA erred in its approach to the requirement “*supply in the UK*”, by conflating supply to an American airline of “FLX Services” (as defined by the CMA) with a direct supply to British Airways (**Ground 2**).
3. The CMA erred in its application of the share of supply test, in that it (i) misconstrued section 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 3**).
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 4**).

As to the substantive Decision, the CMA found that the proposed acquisition would lead to an SLC in each of merchandising and distribution. Sabre submits that both of these findings are vitiated by error:

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 5**).
6. The CMA’s SLC finding in relation to distribution was irrational and unsupported by the evidence (**Ground 6**).

Sabre seeks:

- (a) An order quashing the CMA’s Decision and FR;
- (b) Costs;
- (c) Further or other relief.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

Please note that: (i) a direction of the President is currently in place as to the electronic filing of documents (see paragraph 2 of the [Practice Direction](#) relating to Covid-19 published on 20 March 2020); and (ii) pursuant to the Order of the President of the Tribunal abridging time for applying for permission to intervene (made on 29 May 2020) any request for permission to intervene should be sent to the Registrar electronically, by email to [registry@catribunal.org.uk](mailto:registry@catribunal.org.uk), so that it is received **no later than 5pm on 8 June 2020**.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at [www.catribunal.org.uk](http://www.catribunal.org.uk). Alternatively, the Tribunal Registry can be contacted by telephone (020 7979 7979) or email ([registry@catribunal.org.uk](mailto:registry@catribunal.org.uk)). Please quote the case number mentioned above in all communications.

*Charles Dhanowa OBE, QC (Hon)*

Registrar

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