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The UK Competition Appeal Tribunal, in a merger case involving two companies providing technology solutions to the travel industry, confirms the Competition Authority's broad discretion to review deals with limited UK nexus *(Sabre / Farelogix)*

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UK Competition Appeal Tribunal, *Sabre / Farelogix*, Case no 1345/4/12/20, 21 May 2021

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In a continuing trend of increased regulatory intervention in deals globally, the UK's Competition Appeal Tribunal (**Tribunal**) has confirmed that the Competition and Markets Authority (**CMA**) has broad discretion to claim jurisdiction over mergers, even where one party has very limited and indirect UK sales. In its much-anticipated *Sabre Corporation v Competition and Markets Authority judgment*, the Tribunal unanimously dismissed Sabre's appeal, concluding that the CMA had not erred in applying the 'share of supply' test during its assessment of Sabre Corporation's proposed acquisition of Farelogix Inc.

The judgment serves as a reminder that parties should:

- **closely assess upfront** whether the CMA may have the ability (and incentive) to intervene in light of its increasingly broad interpretation of the 'share of supply' test, its current policy priorities and its recently updated merger assessment guidelines;
- consider **engaging the CMA early** (if only to explain why they do not consider a filing is necessary) – the CMA can and has recently intervened in global deals post-closing despite the deals being centred outside the UK; and

- factor in a possible **CMA review** when considering deal timeline and possible remedies to ensure that any remedies agreed with other authorities also satisfy the CMA's concerns.

The Tribunal's validation of the flexibility that the CMA has increasingly afforded itself in relation to jurisdiction will also lend support to the CMA's current focus on transactions involving **innovative, fast-paced markets** – reinforcing the CMA's ability to intervene in deals involving targets with very low (or even no) turnover, which can be the case where valuable R&D or technology is being acquired. Similar trends are taking place in the EU, following the Commission's new guidance on its *broadened Member State referral process*.

In this blog post, we discuss the implications of the Tribunal's decision in the *Sabre* case and the CMA's flexible 'share of supply' test for parties considering a merger in a post-Brexit world.

The CMA's broad jurisdiction

The 'share of supply' test allows the CMA to assert jurisdiction where the merging parties supply or acquire at least 25 per cent of any goods or services in the UK (or a substantial part of it), and where the transaction results in an increment to the share of supply or acquisition. The CMA can have regard to 'any reasonable description' of a set of goods or services and may have regard to value, cost, price, quantity, capacity, number of workers employed or 'any other criterion' in determining whether the 25 per cent threshold and the increment requirements are met.

The CMA has framed the definition of the relevant goods or services flexibly to satisfy the 25 per cent threshold and increment requirements (and assert jurisdiction) in a *number of cases* recently.

Sabre/Farelogix background

Sabre and Farelogix are both US technology and software businesses, providing technology solutions to the travel industry. At Phase 1, the CMA claimed jurisdiction on the basis that:

- the parties accounted for 30-40 per cent of services facilitating indirect distribution of airline content to one UK customer (British Airways); and
- separately, the parties supplied services that facilitated indirect distribution of airline content to UK travel agents with respect to bookings for certain specific non-UK flights/travel destinations (e.g. Kazakhstan, Sweden and Puerto Rico).

Following an in-depth Phase 2 review, the CMA concluded that the share of supply test was met on a different basis, namely that:

- the parties supplied 'IT solutions to UK airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings' and both 'derive value' from that supply. Although the parties' IT solutions operated in different ways, both types of services 'ultimately allow travel agents to access relevant flight information and make bookings on behalf of passengers';
- Sabre's share of the relevant services to UK airlines was already above 25 per cent pre-merger; and
- Farelogix supplied the relevant services to one UK customer (British Airways) in respect of one type of itinerary only (interline segments), in the context of an agreement Farelogix had with American Airlines. Farelogix also

had an agreement with British Airways to allow British Airways to use and receive supply of Farelogix's services. The necessary 'increment' was provided because a small number of tickets (62 tickets) including a British Airways interline segment were processed through Farelogix's services. Farelogix **derived value** from the services provided to British Airways, even though the revenue **received** (e.g. the fees paid by American Airlines to Farelogix for interline bookings with a British Airways segment) or **receivable** (e.g. the fees owed by British Airways to Farelogix under the British Airways agreement) by Farelogix was small and no fees were actually paid by British Airways to Farelogix. There is **no requirement for a minimum increment**.

Although the US District Court had ruled that the transaction could proceed in the US, the CMA decided to prohibit it – making this another recent example of a global deal with a limited UK nexus being abandoned due to CMA intervention.

Tribunal unanimously dismisses Sabre's appeal

Sabre appealed to the Tribunal, arguing that the CMA had incorrectly applied the share of supply test by: (a) applying the test to two highly disparate supplies in the absence of any underlying rationale; (b) erring in its approach to 'supply in the UK' by conflating supply to American Airlines with direct supply to British Airways; and (c) ignoring the fact that the increment was both hypothetical and *de minimis*.

The Tribunal reviewed the CMA's assessment of jurisdiction in accordance with standard principles of judicial review (e.g. not reviewing the merits of the case) and dismissed all of Sabre's remaining grounds of appeal. The key conclusions from the Tribunal's decision are *inter alia* as follows:

- The purpose of the share of supply test is to **identify mergers where the turnover thresholds are not met but which are 'worthy of consideration'**, including, for example, Sabre's acquisition of Farelogix. The Tribunal reiterated that the share of supply test is focused on identifying these transactions and is not to be equated with a market share test which comes into play only as part of the CMA's substantive investigation.
- The CMA has **broad discretion** as to the setting of the criteria which identify goods or services of a particular description. There is no requirement that the relevant description of services corresponds to an industry standard (which the CMA has emphasised in its updated jurisdiction and procedure guidance revised in December 2020). Nor does it have to be a 'commercially recognisable' description, provided that there is evidence of common functionality between the relevant goods or services and perception of them as commercial alternatives.
- The CMA **can refine its view on jurisdiction** during its Phase 2 inquiry. It is not beholden to the preliminary decision reached on jurisdiction in Phase 1 – or, crucially, the rationale adopted to arrive at that preliminary decision.
- Once the CMA has chosen the relevant criteria to apply to determine whether the 25 per cent threshold and increment requirements are met, the CMA must apply the same criteria to both parties. The Tribunal concluded that the CMA used the **value derived from the supply of the relevant services** to UK airlines by considering 'revenues received and receivable' for all providers. Revenues 'received and receivable' were therefore not *different* methodologies, but rather the application of the same criterion the CMA decided to measure: **value**.
- When identifying an increment:
  - the CMA does not need to identify a specific numerical value to the part of the fee referable to the supply of

services to British Airways. It was sufficient that some proportion was referable to that supply; and

- although there is no de minimis threshold for the increment, it must still be capable of quantification. The Tribunal concluded that the existence of the contractual right to payment gives rise to a quantitative measure of 'value' even if the sum will never be collected.

Consequences for parties considering a global merger

- **Parties should expect a robust approach to jurisdiction if the case looks interesting to the CMA**: the Tribunal has affirmed the broad discretion afforded to the CMA in applying the share of supply test. Even in cases with limited UK nexus, it is more important than ever for parties to assess carefully and upfront the likelihood of CMA intervention rather than fixate on the question of jurisdiction. This is especially the case in relation to innovation-focused markets.
- **Consider CMA engagement**: in line with the CMA's revised guidance on jurisdiction and procedure, parties may consider engaging with the CMA in advance to gain greater clarity over the timing of any filing. The revised guidance also provides that the CMA may decide not to open an investigation if remedies in other jurisdictions may be likely to address any UK competition concerns (e.g. where all relevant markets are broader than national in scope). In these cases, the CMA encourages early engagement via a briefing paper.
- **Timing implications and aligning reviews**: if the CMA claims jurisdiction, this will affect transaction timing, including in relation to remedies. Parties should prepare to align reviews across jurisdictions particularly with authorities in the EU and US, where possible.