

# Client Alert

## Antitrust Divergence on Mergers in Two-Sided Platform Markets: UK Authority Blocks While US Court Permits the Sabre/Farelogix Merger

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How should potential anticompetitive effects of a proposed merger be assessed in a “two-sided” market, when the target only participates in one side of the market? In decisions issued one day apart, the US District Court for the District of Delaware and the UK Competition & Markets Authority (“CMA”) reached opposing conclusions on this issue. In the US, the District Court allowed the merger to proceed after concluding that the US Department of Justice (“DOJ”) failed to prove that Sabre Corporation’s proposed acquisition of Farelogix Inc. was likely to substantially lessen competition in a two-sided market. The District Court found that Sabre, which operates a two-sided airline ticket platform serving airlines and travel agents, does not compete with Farelogix, since Farelogix only provides services to airlines.<sup>1</sup> The CMA, by contrast, examined the impact of the merger on ticket merchandizing and distribution services that Sabre and Farelogix each supply to airlines on one side of the market and found that the merger was likely to substantially lessen competition for those services. As a result, the CMA blocked the transaction.<sup>2</sup> Following the issuance of the conflicting decisions, Sabre and Farelogix terminated their proposed transaction.

### KEY POINTS

- In the US, DOJ’s loss suggests that antitrust enforcers challenging a “two-sided” platform’s acquisition of a firm that only participates on one side of the platform market may face a heavy burden in court to demonstrate that the acquisition is likely to substantially lessen competition.
- The UK approach focused less on the fact that one of the parties operated a two-sided platform and, instead, examined the competitive effects on the side of the market where both parties compete. It also utilized “counterfactual” analysis (*i.e.*, what the merging companies likely would do with their businesses absent the deal) to assess whether the transaction would result in a substantial lessening of competition.

<sup>1</sup> *United States v. Sabre Corp.*, Case No. 1:19-cv-01548-LPS, 2020 WL 1855433 (D. Del. Apr. 7, 2020).

<sup>2</sup> Competition & Markets Authority, Anticipated Acquisition by Sabre Corp. of Farelogix Inc.: Final Report (Apr. 9, 2020) (UK),

[https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final\\_Report\\_-\\_Sabre\\_Farelogix.pdf](https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf) [hereinafter CMA Report].

- Consequently, the analysis of mergers in two-sided markets may be diverging in the US and UK. Merging parties in cross-border transactions should be prepared to tailor their arguments in defense of the merger to be responsive to the potentially different legal standards for defining relevant product markets and analysis of the merger's competitive effects.

### *Background to the Merger*

Sabre and Farelogix both provide airlines with technology to sell seats and services to travelers. Farelogix's advanced merchandizing software allows airlines to create personalized packages of seats and ancillary services (e.g., in-flight internet access, lounge access), and its distribution software then allows airlines to market these content packages on their own websites as well as to third parties, such as online and traditional travel agencies. Sabre also provides merchandizing and distribution solutions, but by different means: Sabre operates a platform called a global distribution system ("GDS"), which both creates, aggregates, and distributes ticket offers from multiple airlines to online and traditional travel agencies, and then communicates travel agents' booking selections to airlines for customer ticketing. Unlike Farelogix's product, which is marketed only to airlines, Sabre's products are marketed to both airlines and travel agents, and Sabre provides travel agents with incentive payments for each booking. Sabre's GDS has been the leading platform for airlines to transact with travel agents for several decades, but in recent years some airlines have used Farelogix's technology either to bypass Sabre's and other provider's GDSs entirely (i.e., GDS "bypass") or to create their own ticket offers with ancillary services while using GDSs as a distribution service (i.e., GDS "passthrough").<sup>3</sup> One major US airline estimates that its cost to book tickets is 80%-90% less when it distributes ticket offers directly to travel agents through Farelogix's software and bypasses Sabre's GDS.<sup>4</sup> Using Farelogix, some airlines have sought to eliminate their dependence on the GDS software ecosystem, which they claim is antiquated, or to use the threat of bypassing the GDSs with Farelogix to constrain the GDSs in contract and price negotiations.<sup>5</sup> Sabre announced its intention to acquire Farelogix in November 2018, stating that it planned to leverage Farelogix's technological advances to improve its own products.<sup>6</sup> In August 2019, DOJ filed suit to block the merger, arguing that Sabre's goal in fact was "to eliminate a disruptive competitor after years of trying to stamp it out."<sup>7</sup> The CMA launched its own review of the transaction shortly thereafter, finding it had jurisdiction over the matter based on the UK's 25% "share of supply" test. The CMA determined that Sabre's services represented over 25% of the value of merchandizing and distribution services provided to airlines in the UK and, somewhat tenuously, that the acquisition would result in an incremental increase in the supply of these services because—although Farelogix does not generally market its services to UK airlines—at least one UK airline receives interline ticket segment bookings through an agreement with a US airline that contracts with Farelogix. The UK airline has a contract with Farelogix to use its technology as part of the limited interline agreement.<sup>8</sup>

### *The District Court Extends the Supreme Court's Reasoning in Amex to Mergers*

Following an eight-day bench trial, the US District Court found that DOJ had failed to show that Sabre's acquisition of Farelogix was likely to substantially lessen competition and declined to enjoin the merger. The District Court found that DOJ failed to demonstrate that Farelogix and Sabre compete in the same relevant product market because Farelogix only serves airlines while Sabre provides services to both airlines and travel agents.<sup>9</sup>

<sup>3</sup> See *Sabre Corp.*, 2020 WL 1855433 at \*3-19; see also CMA Report ¶¶ 9-24.

<sup>4</sup> *Sabre Corp.*, 2020 WL 1855433 at \*11.

<sup>5</sup> *Id.* at \*11-12.

<sup>6</sup> Press Release, Sabre Corp., Sabre Enters Agreement to Acquire Farelogix (Nov. 14, 2018), <https://www.sabre.com/insights/releases/sabre-enters-agreement-to-acquire-farelogix-expanding-its-airline-technology-portfolio-and-accelerating-its-strategy-to-deliver-next-generation-retailing-distribution-and-fulfillment-capabilities/>.

<sup>7</sup> Complaint at 1, *United States v. Sabre Corp.*, Case No. 1:19-cv-01548-LPS (D. Del. Aug. 20, 2019).

<sup>8</sup> CMA Report ¶¶ 25-35.

<sup>9</sup> *Sabre Corp.*, 2020 WL 1855433 at \*32.

In reaching this conclusion, the District Court relied on the Supreme Court's 2018 decision in *Ohio v. American Express Company* ("Amex"), a case that considered the application of Section 1 of the Sherman Act to American Express's contractual non-discrimination provisions with merchants.<sup>10</sup> In *Amex*, the Supreme Court opined that "[o]nly other two-sided platforms can compete with a two-sided platform for transactions," and held that "competition cannot be accurately assessed by looking at only one side of the platform in isolation" because of the undivided nature of the product two-sided transaction platforms sell – i.e., transactions.<sup>11</sup> The District Court was persuaded that Sabre's GDS platform constitutes such a two-sided "transaction platform" based on the US Court of Appeals for the Second Circuit's findings in an unrelated lawsuit against Sabre.<sup>12</sup> The District Court found that DOJ had made no attempt to show how Farelogix and Sabre competed for travel agents, having only presented evidence related to the companies' services to airlines. Because the District Court determined that Farelogix only competes on one side of this two-sided market, DOJ failed to meet its burden to demonstrate that competition would be affected on both sides of the market as the District Court believed was required by *Amex*.<sup>13</sup>

The District Court reached this conclusion even though it recognized that Sabre's acquisition of Farelogix could harm airline customers by reducing their leverage when negotiating their contracts with Sabre. Farelogix offers an alternative ticket distribution model with advanced merchandizing functionality that, while not a perfect substitute, acts as a competitive constraint on Sabre.<sup>14</sup> Notably, the Court recognized that airlines have been able to invoke Farelogix as an alternative to extract price concessions from Sabre.<sup>15</sup>

#### *The District Court Finds that the Acquisition Will Be Procompetitive Rather than Eliminate an Innovative Competitor*

The District Court determined that the evidence before it suggested that the acquisition would result in procompetitive benefits. It credited Sabre's and Farelogix's argument that the acquisition would allow Sabre to better develop advanced merchandizing services using Farelogix's technology, even though Sabre already was developing similar software and internal documents suggested that Sabre viewed Farelogix as a competitive threat.<sup>16</sup> In reaching this conclusion, the District Court did not credit DOJ's argument that the acquisition would harm innovation largely due to the fact that Farelogix utilizes open source software that has been adopted by several of its competitors and to whom Farelogix had lost contract bids.<sup>17</sup>

#### *The CMA Finds that a Substantial Lessening of Competition on One Side of Sabre's Platform is Sufficient to Block the Acquisition*

In contrast to the US District Court's approach, the CMA recognized that Sabre operates a two-sided platform but did not find that fact dispositive. Instead, the CMA investigated competitive effects on the side of the market that serves airlines. It found that Sabre's merchandizing and distribution services for airlines should be viewed as distinct product markets, and it analyzed how Farelogix competes with Sabre in each of those markets.<sup>18</sup> Furthermore, unlike the District Court, the CMA utilized a "counterfactual" mode of analysis through which it compared likely future competition with respect to each service with

<sup>10</sup> *Id.* at \*32, \*34 (citing *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2287 (2018)).

<sup>11</sup> *Amex*, 138 S. Ct. at 2286-87.

<sup>12</sup> *Sabre Corp.*, 2020 WL 1855433 at \*33-34 (citing *US Airways v. Sabre Holdings Corp.*, 938 F.3d 43 (2d Cir. 2019)). In *US Airways*, the Second Circuit concluded that, like credit cards, Sabre's GDS is a two-sided transaction platform because it "offer[s] different services to different groups of customers—to airlines, access to travel agents; to travel agents, flight and pricing information—and [it] connect[s] travel agents to airlines in simultaneous transactions." *US Airways*, 938 F.3d at 58.

<sup>13</sup> *Sabre Corp.*, 2020 WL 1855433 at \*33-34. The Court briefly noted that it may be possible under *Amex* for an acquisition of a competitor on one side of a two-sided market to cause anticompetitive harm on both sides of that market, but it then further found that DOJ had failed to make such a showing. *Id.* at \*34.

<sup>14</sup> *Id.* at \*31.

<sup>15</sup> *Id.* at \*11-12.

<sup>16</sup> *Id.* at \*41-42.

<sup>17</sup> *Id.* at \*42-43.

<sup>18</sup> See CMA Report ¶¶ 6.14-6.17, 6.44-6.46.

and without the proposed acquisition.<sup>19</sup> The CMA found that the acquisition would diminish choice and innovation in both the merchandizing and distribution markets and would cause competitive harm to airlines.<sup>20</sup>

### *The CMA Finds that the Acquisition Will Harm Merchandizing Innovation and Eliminate Sabre as a Nascent Merchandizing Competitor*

In its assessment of efficiencies and consumer benefits, the CMA's analysis again diverged from the District Court. The CMA found that the integration of Sabre's and Farelogix's merchandizing software was likely to harm airline customers in the merchandizing market. The CMA found that the existence of Farelogix as an independent competitor has sparked improvements in GDS offerings, as Farelogix's advanced merchandizing and distribution capabilities allow airlines to offer customers the personalized travel experiences they seek and also enable airlines to avoid having to transact through a particular GDS, because Farelogix's software can distribute these offers through any GDS or even without a GDS.<sup>21</sup> The CMA utilized counterfactual analysis to assess the likely effect on merchandizing competition in the absence of the proposed merger. It found that, absent the merger, Sabre had plans to develop an "open" merchandizing solution based on the industry's emerging NDC computer messaging standard, a product similar to the merchandizing software offered by Farelogix. If the merger were to take place, by contrast, Sabre no longer would be incentivized to develop its own merchandizing solution, depriving airlines of choice and potentially new, innovative software features.<sup>22</sup>

### *Impact of the Conflicting Decisions*

On May 1, 2020, Sabre announced that the merger agreement with Farelogix had expired, and that the parties had agreed to terminate the transaction.<sup>23</sup> Notwithstanding, Sabre also indicated that it intends to challenge the CMA's decision based on lack of jurisdiction.<sup>24</sup> Also as a result of the termination of the merger, on May 12, 2020, DOJ moved to vacate the District Court's decision in the US Court of Appeals for the Third Circuit.<sup>25</sup> In its motion, DOJ emphasized that, although the District Court recognized that Sabre and Farelogix compete "as a matter of real-world economic reality," it nevertheless extended *Amex's* holding that only two-sided platforms can compete for transactions 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."<sup>26</sup>

These diverging decisions raise a number of important questions on the treatment of mergers involving two-sided platforms in the US and internationally:

- **Will mergers involving two-sided markets be more difficult to challenge in the US?** Although the District Court's opinion is likely to be vacated, it still leaves open the question whether the Supreme Court's decision in *Amex* should govern US antitrust analysis of mergers involving two-sided platform markets. *Amex* was a conduct case not a merger case, and its requirement that the competitive effects of contractual provisions be analyzed on both sides of a two-sided market was not necessarily intended to predict the competitive

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<sup>19</sup> See generally *id.* at ¶¶ 11.34-11.130.

<sup>20</sup> *Id.* at ¶¶ 11.95-11.102, 11.127-11.130.

<sup>21</sup> See *id.* at ¶¶ 11.7-11.12.

<sup>22</sup> *Id.* at ¶¶ 11.40-11.48, 11.62.

<sup>23</sup> Press Release, Sabre Corp., Sabre Corporation Issues Statement on its Merger Agreement with Farelogix (May 1, 2020), <https://www.sabre.com/insights/releases/sabre-corporation-issues-statement-on-its-merger-agreement-with-farelogix/>.

<sup>24</sup> Victoria Ibitoye, Sabre to appeal CMA's jurisdiction over Farelogix deal despite merger's collapse, MLex.com (May 1, 2020, 4:30 PM), <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1183604&siteid=190&rdid=1>.

<sup>25</sup> The United States' Suggestion of Mootness and Motion to Vacate the District Court's Decision and Order Granting Judgment to Defendants, *United States v. Sabre Corp.*, No. 20-1767 (3d Cir. May 12, 2020).

<sup>26</sup> *Id.* at 6.

consequences of a transaction where the parties compete in one, but not both, sides of the relevant market. While the District Court's extension of *Amex* to the merger context is a significant development, it is important to recognize that, at present, it solely represents the view of one district court regarding one DOJ merger challenge. Further guidance from future cases is needed to confirm whether *Amex* should apply to mergers in two-sided markets in the US. In the meantime, merging parties involving two-sided markets should be prepared to advocate for clearance by demonstrating that their transaction does not substantially lessen competition in either or both sides of a two-sided market.

- **Did the District Court, in failing to engage in counterfactual analysis, commit error?** Unlike the CMA, the District Court did not employ counterfactual analysis when evaluating the evidence. Although US antitrust enforcers do not use the term “counterfactual analysis,” the 2010 Horizontal Merger Guidelines make clear that their analysis considers whether a merger is likely to diminish innovation competition below the level that would prevail in the absence of the merger.<sup>27</sup> Had the District Court focused on this question, it might have identified cognizable harms to competition resulting from the transaction. By way of example, the District Court did not address whether the loss of the merchandizing service Sabre was developing to compete with Farelogix could degrade the quality and choice of services enjoyed by both airlines and travel agents.
- **Did the CMA have jurisdiction to review and block the merger?** Although the companies have abandoned their transaction, Sabre is still planning to challenge the CMA's decision to assert jurisdiction over the transaction. The UK 25% share of supply jurisdictional test requires that a merger create or enhance a 25% share of supply of a good or service in the UK. The CMA found that the acquisition of Farelogix would enhance Sabre's existing 25% share of supply for merchandizing and distribution services, even though Farelogix does not generally contract with UK airlines. If the appeal proceeds, the Competition Appeal Tribunal will need to determine whether it was sufficient for the CMA to establish jurisdiction where one party arguably did not actively market its services in the UK.<sup>28</sup>

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<sup>27</sup> US Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 6.4 (2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf> (“Th[e] curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products. The first of these effects is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm.”).

<sup>28</sup> The CMA rejected Sabre's and Farelogix's contention that Farelogix does not provide its merchandizing and distribution services to UK airlines and merely provides a technical connection that allows one UK airline to receive interline segment bookings through an arrangement with a US airline. See CMA Report ¶¶ 5.38-5.58.

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