

# Anticipated acquisition by Sabre Corporation of Farelogix Inc

## Decision to refer

**ME/6806/19**

### INTRODUCTION

1. Sabre Corporation (**Sabre**) has agreed to acquire, through its subsidiary Sabre GLBL Inc, Farelogix Inc (**Farelogix**) (the **Merger**). Sabre and Farelogix are together referred to as the **Parties**.
2. The Parties overlap in the supply of non-core Passenger Service System (**PSS**) merchandising modules. Non-core PSS merchandising modules sit within an airline's overall IT system and allow it to create travel offers for corporations and end consumers.
3. The Parties also both supply services that facilitate the indirect distribution of airline content. Sabre supplies these services through its global distribution system (**GDS**), which collects and aggregates information from airlines and other third parties so as to distribute offers to travel agents. Farelogix supplies these services through a product (FLX OC, which includes a New Distribution Capability Application Programming Interface (**NDC API**)) that allows airlines to connect to travel agents directly.
4. On 16 August 2019, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).<sup>1</sup>
5. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, in order to

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<sup>1</sup> See <https://www.gov.uk/cma-cases/sabre-farelogix-merger-inquiry>.

allow the Parties the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision.

6. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so before the end of the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that the CMA would refer the Merger for a phase 2 investigation pursuant to section 33(1), and in accordance with section 34ZA(2) of the Act, if no undertakings for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period (ie by 23 August 2019); if the Parties indicated before this deadline that they did not wish to offer such undertakings; or if the undertakings offered were not accepted.
7. On 23 August, Sabre offered the CMA the following behavioural undertaking (the **Proposed Undertaking**). Sabre offered to:
  - (a) Retain current pricing, service levels and investment for the Farelogix products which facilitate the indirect distribution of airline content (namely its NDC APIs and FLX OC) for a period of time to be mutually agreed upon with the CMA. Sabre would offer existing FLX OC customers and Sabre GDS customers the option of extending their contracts on current terms for a period of at least three years past their termination date;
  - (b) Make Farelogix's NDC APIs and FLX OC available to airlines which wish to use them to connect to Sabre or to any third party, including other GDSs, aggregators, or travel agents directly on an agnostic basis, for a period of time to be mutually agreed upon;
  - (c) Continue to make Farelogix's non-core PSS merchandising module - FLX Merchandise - agnostic for use with any core PSS; and
  - (d) Appoint and compensate a Monitoring Trustee to monitor and ensure compliance with the Proposed Undertaking, should the CMA have reasonable grounds for believing that Sabre would not implement all or any part of the Proposed Undertaking.
8. In the SLC decision, the CMA concluded that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in:
  - (a) the supply of non-core PSS merchandising modules worldwide; and

- (b) the supply of services that facilitate the indirect distribution of airline content worldwide.
9. The SLC Decision states that if, pursuant to section 73A(2) of the Act, the CMA decides that there are no reasonable grounds for believing that it might accept any undertaking offered by the Parties, or a modified version of it, then the CMA will refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Act.
  10. The CMA has an obligation under the Act in the phase 1 stage of its review to have regard, when accepting undertakings in lieu of a reference (**UILs**), to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it (section 73(3) of the Act). Accordingly, the remedies proposed must be clear-cut and capable of ready implementation.<sup>2</sup> This means, amongst other things, that the CMA must be confident that, if the UILs are accepted, there is no material doubt about their overall effectiveness; and that all potential competition concerns that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation.<sup>3</sup>
  11. The CMA's starting point in deciding whether to accept a proposed UIL is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC (rather than accepting a remedy that simply mitigates the competition concerns).<sup>4</sup>

## **ASSESSMENT OF THE PROPOSED UNDERTAKING**

12. At phase 1, the CMA is generally unlikely to consider that behavioural undertakings will be sufficiently clear-cut to address the identified competition concerns.<sup>5</sup>
13. In addition, the design of any behavioural remedy should seek to avoid four particular risks:
  - (a) Risks that the conduct required to address the SLC or its adverse effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance, and thus may be insufficiently specific to allow effective enforcement (**specification risk**);

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<sup>2</sup> CMA Guidance, [Merger Remedies of 13 December 2018 \(CMA 87\)](#), paragraph 3.27.

<sup>3</sup> CMA 87, paragraph 3.27.

<sup>4</sup> CMA 87, paragraphs 3.30 and 3.31.

<sup>5</sup> CMA 87, paragraph 3.32.

- (b) As behavioural remedies generally do not deal with the source of an SLC, risks that other adverse forms of behaviour may arise if particular forms of behaviour are restricted (**circumvention risk**);
  - (c) Risks that the remedy may create market distortions that reduce the effectiveness of the measures and/or increase their effective costs (**distortion risk**);
  - (d) Risks that the remedy may be ineffectively monitored or enforced, for example, as a result of the complexity of information required to monitor compliance; limitations in monitoring resources; and asymmetry of information between the monitoring agency and the business concerned (**monitoring and enforcement risk**).<sup>6</sup>
14. In the present case, the CMA assessed: (i) the effectiveness of the Proposed Undertaking to address the relevant identified SLCs; and (ii) whether the Proposed Undertaking is capable of ready implementation. Having carefully considered the Proposed Undertaking, the CMA does not believe that it is a comprehensive and clear-cut solution to the concerns identified in the SLC Decision for the reasons set out below.

#### ***Effectiveness of the Proposed Undertaking to address the SLCs***

15. For a remedy to be comprehensive and clear-cut, there must be no material doubts about the overall effectiveness of the remedy in relation to the substantive competition assessment.<sup>7</sup>
16. The CMA is not confident that the Proposed Undertaking would comprehensively address the SLCs identified, as it has the following material doubts about its scope and effectiveness.
17. First, as set out in the SLC decision the CMA found a realistic prospect of an SLC based on horizontal unilateral effects. The CMA believes that there is material competitive interaction between the Parties. The Proposed Undertaking would not, however, restore competition to existing pre-Merger levels as it does not in any way attempt to replicate the significant constraint that Farelogix, as an independent competitor with an innovative business model, would continue to exert on Sabre absent the Merger. In particular, it does not create, partially or fully, any kind of alternative offering independent of Sabre for existing or potential customers.

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<sup>6</sup> CMA 87, paragraph 7.4.

<sup>7</sup> CMA 87, paragraph 3.28 (a).

18. Second, the CMA believes that the Proposed Undertaking would be ineffective to address the potential effects of the SLC as it raises significant circumvention, specification and distortion risks for the reasons set out below.

*Sabre's offer to retain price, service levels and investment in Farelogix's indirect distribution products*

19. In its SLC Decision, the CMA concluded that horizontal unilateral effects could result in a number of adverse effects, including higher prices (including higher GDS fees); slower NDC implementation and/or cessation of implementation of NDC innovations after an initial minimum integration; reduction of innovation; and the imposition of disadvantageous contract terms.
20. The Parties offered to retain current pricing, service levels and investment for Farelogix's NDC APIs and FLX OC for a period of time to be mutually agreed upon, and to offer existing FLX OC customers and Sabre GDS customers the option of extending their contracts on current terms for a certain period.
21. The Parties submitted that the commitments in relation to pricing and the option to extend the contract terms would address the CMA's concern that the Merger would lead to higher prices. However, it is not clear that these commitments would adequately replicate the pricing and service levels that customers might have benefited from through continued competition between the Parties over time absent the Merger, particularly in the context of the dynamic and evolving markets in which competition concerns have been identified. In addition, the maintenance of existing service levels would be particularly difficult to specify appropriately. Farelogix is a dynamic and evolving competitor and its service performance is evolving on an ongoing basis. Pre-determined contractual thresholds may not replicate the service levels that customers would have enjoyed absent the Merger. Finally, such static measures are particularly likely to dampen competitive incentives and distort market outcomes in the context of a dynamic and evolving markets.
22. The Parties also submitted that retaining investment for Farelogix's indirect distribution products would ensure that there was no loss of innovation. However, committing to a given level of investment would not, by itself, necessarily maintain the existing levels of innovation. Innovation in these markets is primarily driven by competition and without the competitive constraint imposed by Farelogix the CMA believes that Sabre's incentives to innovate may be dampened.
23. In addition, outcomes relevant to innovation are inherently difficult to specify. It is therefore not possible to assess whether any commitment to retain

investment would result in a level of innovation that would replicate that which would be expected absent the Merger.

*Sabre's offer to allow access to Farelogix's indirect distribution products and merchandising module*

24. The offer to allow access to Farelogix's indirect distribution products to third parties and to allow access to Farelogix's merchandising product on a PSS agnostic basis does not address the risk that access would be available on worse terms than would be the case absent the Merger. The offer also does not preclude Sabre from imposing onerous or prohibitive terms or inhibiting access through other means.

***Whether the proposed undertaking is capable of ready implementation***

25. The CMA believes that the Proposed Undertaking raises significant monitoring and enforcement risks and is therefore not capable of ready implementation. As noted above, the Proposed Undertaking is complex and seeks to effect outcomes which are not easy to assess and monitor. There is also likely to be significant asymmetry of information between the CMA and Sabre around, for example, customer negotiations and discussions on service level compliance.
26. The CMA notes the offer to appoint and compensate a Monitoring Trustee to monitor and enforce compliance with the Proposed Undertaking (paragraph 7(d)) but has material doubts that such a Monitoring Trustee would be able to effectively identify breaches of the Proposed Undertaking. In any event, the appointment of a Monitoring Trustee would not relieve the CMA of its statutory duties under section 92 of the Act to monitor compliance with the Proposed Undertaking, with the resultant burden that this imposes.

**DECISION**

27. For the reasons set out above, after examination of the Proposed Undertaking, the CMA does not believe that it would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.
28. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept UILs.
29. Therefore, pursuant to section 33(1) and in accordance with section 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the

constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

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**2 September 2019**