Penalty notice under section 110 of the Enterprise Act 2002

Anticipated acquisition by Sabre Corporation of Farelogix Incorporated

Case ME/6806/19

Addressed to:
Sabre Corporation

27 September 2019

The Competition and Markets Authority has excluded from this published version of the penalty notice information which it considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. [Some numbers have been replaced by a range. These are shown in square brackets.] [Non-sensitive wording is also indicated in square brackets.]

Case ME/6806/19

Anticipated acquisition by Sabre Corporation of Farelogix Inc

Notice of a penalty pursuant to section 112 of the Enterprise Act 2002

1. The Competition and Markets Authority ('CMA') gives notice under sections 110 and 112 of the Enterprise Act 2002 ('EA02') of the following:

   (a) on 27 September 2019, the CMA imposed a penalty on Sabre Corporation ('Sabre') under section 110 EA02 because it failed, without reasonable excuse, to comply with the requirements imposed on it by the notices served on it under section 109 EA02 on 26 March 2019 (the 'March s.109 Notice') and 23 April 2019 (the 'April s.109 Notice') (together the 'Notices') by the required date;

   (b) the penalty is a fixed amount of £20,000;

   (c) Sabre is required to pay the penalty in a single payment, by cheque or bank transfer, to an account specified to Sabre by the CMA; by close of banking business on the date which is 28 days from the date of service of this notice on Sabre;

   (d) Sabre may pay the penalty earlier than the dates by which it is required to be paid;

   (e) under section 112(3) EA02, Sabre has the right to apply to the CMA within 14 days of the date on which this notice is served on Sabre for the CMA to specify a different date by which the penalty is to be paid;

   (f) under section 114 EA02, Sabre has the right to apply to the Competition Appeal Tribunal against any decision the CMA reaches in response to an application under section 112(3) EA02, within the period of 28 days starting with the day on which Sabre is notified of the CMA's decision;

   (g) under section 114 EA02, Sabre has the right to apply to the Competition Appeal Tribunal within the period of 28 days starting with the day on which this notice is served on Sabre in relation to:

      i. the imposition or nature of the penalty;

      ii. the amount of the penalty; or

iii. the date by which the penalty is required to be paid;

(h) where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal under section 114 EA02, the CMA may recover the penalty and any interest which has not been paid; in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA.

Structure of this document

2. This document is structured as follows:

a) section A sets out an executive summary of this notice;

b) section B sets out the factual background to this notice;

c) section C sets out the legal assessment and considers the statutory requirements for imposing a penalty under section 110 EA02 and sets out the reasons for the CMA's finding that Sabre has failed to comply with the Notices without reasonable excuse; and

d) section D sets out the CMA's reasons for finding that a fixed penalty of £20,000 is appropriate and proportionate in this case.

A. Executive Summary

Failures to comply with section 109 Notices

3. The CMA is reviewing the anticipated acquisition by Sabre of Farelogix Inc ('FLX') under the merger control provisions of the EA02 (the 'Inquiry'), beginning in February 2019 when its Merger Intelligence Committee identified this transaction as warranting an investigation.

4. The CMA finds that Sabre failed to produce certain responsive materials in relation to both of the Notices and therefore has failed to comply with the requirements of these Notices.

5. On 28 June 2019, Sabre produced a large volume of documents (amounting to 444 documents in total) that had previously been either withheld completely from the CMA or provided to the CMA in a more redacted form. These documents (or certain information in the documents previously produced to the CMA in redacted form) had originally been designated as privileged but transpired, by Sabre's own admission, not to contain any legally privileged information. As these documents (or less extensively redacted versions of

these documents) were responsive to the Notices, they were ultimately produced to the CMA around two months after the required statutory deadlines.

6. Taking into account that certain of the documents were responsive to both of the Notices and/or were duplicates of documents previously provided, a total of 188 unique documents were provided late (the 'Relevant Documents').

7. This late production of documents required to be produced by the deadline prescribed in the Notices had an adverse impact on the conduct of the Inquiry.

No reasonable excuse

8. The CMA finds that Sabre has no reasonable excuse for its failure to comply with the Notices.

9. The CMA has carefully considered Sabre's submissions that it acted reasonably. The CMA does not find that the explanations provided by Sabre (including, in particular, its reliance on its US counsel to carry out appropriate redactions) amount to a 'reasonable excuse' for the purpose of section 110(1) EA02. The CMA finds the errors which led to the Relevant Documents being provided late were negligent and not caused by an event beyond the control of Sabre, or the result of a significant and genuinely unforeseeable or unusual event (and would not otherwise amount to a reasonable excuse).[1]

Decision to impose a penalty

10. The CMA finds that it is appropriate and proportionate to impose a penalty because the failure to comply adversely affected the conduct of the Inquiry and in the interests of specific and general deterrence.

11. The CMA does not dispute Sabre's submission that its failure was not intentional and that Sabre has not attempted to conceal the failure from the CMA. The CMA has also taken into account that the documents produced late were ultimately only of limited relevance to the CMA's Phase 1 investigation.

12. The failure was, however, significant. A substantial number of documents were provided late, around two months after the applicable deadlines had expired, and at a relatively advanced stage of the Inquiry. The failure gave rise to a material risk that the CMA's Phase 1 decision would be taken on the

[1] The Guidance at paragraph 4.4.

basis of incomplete evidence. Sabre's initial failure was also exacerbated by a significant delay in taking steps to resolve the failure.

13. The imposition of an administrative penalty under section 110 EA02 is also necessary to impress the seriousness of a failure to comply adequately with a section 109 notice, without a reasonable excuse. Complete and accurate information is crucial to enable the CMA to make evidence-based decisions and generally for the quality and effectiveness of its work in the public interest. Requests for information and documents are therefore a key tool for the CMA to collect the information it needs to carry out its merger investigations. For this reason, the CMA considers that it is of utmost importance to the CMA's ability to conduct effective investigations that merger parties have due regard to the requirements imposed on them by, among other things, section 109 EA02, and adopt adequate approaches to complying with those obligations.

14. In all the circumstances, the CMA finds that a penalty of £20,000 (which is below the statutory maximum of £30,000 for a penalty in a fixed amount) is an appropriate and proportionate penalty.

B. Factual Background

15. Sabre and FLX both provide IT systems that enable airlines to sell tickets, as well as related add-ons such as on-board WiFi, meals and seats with extra legroom, through travel agents, to businesses and consumers.

16. Sabre began the pre-notification process after the CMA's Merger Intelligence Committee identified this transaction as warranting an investigation. On 21 June 2019, the CMA gave notice under section 34ZA(3) EA02 that the initial period in relation to the anticipated acquisition had commenced. On 2 September 2019, the CMA referred the anticipated acquisition for an in-depth investigation.

17. Sabre and FLX have been engaged in parallel merger proceedings with the United States Department of Justice ('DOJ'). The CMA has taken into account steps taken in those parallel proceedings when framing requests for documents under section 109 EA02.

The March s.109 Notice

18. Under section 109 EA02, the CMA has the power to issue a notice requiring a person to provide documents and information for the purpose of assisting the CMA in carrying out any functions in connection with a matter that is the subject of a possible reference under section 33 EA02.

19. During the pre-notification period, Sabre provided the CMA with a draft of its merger notice in respect of its anticipated acquisition of FLX on 18 March 2019 (the 'Draft Merger Notice'). Beforehand, on 22 February 2019, Sabre provided the CMA with 22 documents for the purpose of responding to questions 9 and 10 of the Draft Merger Notice.

20. The CMA served Sabre with the March s.109 Notice on 26 March 2019 with a deadline to respond of 5pm, 2 April 2019. Question 33 provided:

> Please describe and explain the methodology for producing the documents provided in response to Question 8(e), Question 9 and Question 10 of the Draft Merger Notice. Please provide all additional documents responsive to Question 8(e), Question 9 and Question 10 of the Draft Merger Notice.[2]

21. Following email correspondence in early April 2019, including regarding the search methodology to be applied, the deadline to respond to question 33 was extended until 25 April 2019. Sabre's explanation of its search methodologies, submitted on 2 April 2019, noted that it had searched within the documents:

> previously produced to the [DOJ] on the basis of the review process already carried out by Sabre in connection with the investigation by the [DOJ].

The explanation of search methodologies provided by Sabre also noted that of the 510,782 total items responsive to the DOJ's document request, a total of 81,838 items were searched, of which 9,974 items were fully withheld on the basis of US attorney-client privilege or US work product protection and placeholder slip sheets were produced in their place.

22. Sabre responded to question 33 of the March s.109 Notice on 25 April 2019, providing a total of around 1,117 documents that it indicated were responsive to question 10 of the Draft Merger Notice. Sabre also noted in an index that certain of the documents had been partially redacted on the basis of privilege.

The April s.109 Notice

23. A teach-in meeting took place between the CMA and Sabre on 3 April 2019. Following discussion at the teach-in, the CMA sent a draft section 109 notice to Sabre on 5 April 2019. Following consultation on the draft notice with Sabre, FLX, and the DOJ, the CMA served Sabre with the April Notice on 23 April 2019, with a deadline to respond of 5pm, 30 April 2019. The questions in the April Notice were specifically tailored to take account of the document requests which had taken place in the DOJ's parallel merger proceedings.

---

[2] See the Annex for the wording of the relevant questions of the Draft Merger Notice.

Questions 6, 8, 9 and 10 requested the production of documents related to the Merger, various pre-merger and post-merger strategy documents and various documents regarding the adoption and implementation of certain technologies.[3]

24. On 25 April 2019, Sabre's legal advisers for the purposes of the CMA's proceedings, Slaughter and May, wrote (in relation to Sabre's envisaged approach to responding to the April Notice):

> In response to these questions, we propose to search the existing universe of documents produced [to the DOJ], using tailored sets of custodians and search terms specific to each question. […]

25. Sabre responded to the April s.109 Notice on 30 April and 3 May 2019,[4] providing a total of around 5,000 documents. Again, Sabre noted that certain of the documents had been partially redacted on the basis of privilege. Sabre's search methodologies, also submitted on 30 April 2019, noted that certain files had been withheld from production to the DOJ on the basis of privilege under US law and that slip sheets had been produced in lieu.

The Merger Notice

26. Sabre submitted the final version of the Merger Notice on 19 June 2019.

Sabre's email of 28 June 2019

27. On 28 June 2019, Slaughter and May sent an email to the CMA stating that:

> As part of its compliance with the Second Request from the DOJ, Sabre and its prior counsel Axinn identified more than 500,000 responsive documents. Prior to production, Sabre counsel made a good faith effort to review the documents for privilege, identifying 36,543 documents to be partially or fully withheld. These documents were entered into a privilege log which Sabre counsel shared with DOJ.
>
> As is common with Second Request review, document reviewers tend to be conservative with their privilege calls and over designate certain documents that are privileged when in fact they are not. For example, contract attorneys would designate documents as privileged simply because they had a "Privileged and Confidential" header or if an attorney was copied on the correspondence. DOJ believed Sabre's privilege log was over inclusive and that they had improperly withheld documents that were not privileged. In addition, they requested more detailed descriptions of these documents on the

---

[3] See the Annex for the wording of the questions 6, 8, 9 and 10 of the April s.109 Notice.
[4] Sabre responded to questions 1-5 and 11 to 16 of the April s.109 Notice on 3 May 2019, three working days after the deadline in the notice had expired. The CMA wrote to Sabre on 5 July 2019, stating that it had decided not to prioritise enforcement proceedings in relation to this suspected breach. The relevance of this suspected breach to this decision is described further in paragraph 77 below.

privilege log. Skadden negotiated an agreement to re-review a third of the documents on the privilege log (approximately 12,000 or so documents) based on select custodians and the topics those documents pertain to, as outlined in the attached June 3, 2019 letter to DOJ.

After completing this review, Skadden determined that an additional 6,740 documents could be produced entirely or in a redacted format, which were produced to the DOJ on June 3rd and June 5th.

We were informed about the additional document production on June 20th. As part of Sabre's ongoing cooperation with the CMA, and to ensure that the document productions that we previously provided you with are comprehensive and include relevant documents from the universe provided to the DOJ, we have run the searches that were run previously for Questions 6-10 of Sabre's Second Section 109 Response and for Question 10 of the Merger Notice across the additional 6,740 documents, following the same methodology as described previously for each of those productions. This has produced:

343 documents responsive to Question 10 of the Merger Notice [i.e. documents which were requested under question 33 of the March s.109 Notice];

52 documents responsive to Question 6 of the [April s.109 Notice];

24 documents responsive to Questions 8 and 9 of the [April s.109 Notice]; and

25 documents responsive to Question 10 of the [April s.109 Notice].

[…]

Please do not hesitate to let us know if you have any questions.

28. A copy of a letter dated 3 June 2019 from Sabre's US counsel to the DOJ was attached to this email. This letter set out further details of the re-review of certain documents listed on the original privilege log that Sabre had conducted and also made reference to a revised privilege log that Sabre had prepared and submitted to the DOJ. The letter also referred to telephone conversations concerning the re-review process which had taken place between Sabre's US counsel and the DOJ on 24, 25 and 28 May 2019.

Subsequent interaction between the CMA and Sabre

29. On 28 August 2019, the CMA sent a letter to Sabre informing it that the CMA was considering whether to make a provisional decision that Sabre, in failing to produce certain responsive documents by the prescribed deadlines had failed to comply with the Notices served on it without reasonable excuse and, if so, whether to impose a penalty and in what amount. The CMA invited Sabre to make initial comments ahead of the CMA making a provisional decision.

30. On 5 September 2019, Sabre sent its response (the 'Response'). In its Response, Sabre submitted that it had complied with the Notices. Sabre submitted that its explanations of search methodologies had stated clearly that it would run its searches against the universe of documents produced to the DOJ. Sabre therefore considered that, on the dates upon which it provided its original responses, it was complying fully with the document requests contained in the Notices. When the universe of documents produced to the DOJ expanded following the review exercise, Sabre submitted that it again fully complied with the Notices by supplementing its original responses with the additional 444 documents. Sabre submitted, therefore, that there had been no misapplication of its intended methodology, in contrast to other cases where the CMA had found failures by addressees to comply with section 109 notices.

31. Sabre also submitted, in the alternative, that it had a reasonable excuse for not complying with the Notices. In this regard, Sabre submitted that:

a) first, it was reasonable for Sabre to rely on an approach (to confine searches to the universe of documents initially provided to the DOJ) that had been explained to the CMA and to which the CMA had not objected; and

b) second, it was reasonable for Sabre to rely on the results of the privilege review performed by its previous US counsel.

32. Sabre also submitted that, in any event, it would not be appropriate to impose a penalty in respect of any breach of the Notices. Sabre submitted that it had promptly and proactively provided the Relevant Documents to the CMA once it had been advised that this was necessary. It also submitted that no aggravating factors were present, that any failure had not adversely affected the Inquiry, and that a fine was inappropriate as it had relied 'in good faith' on the privilege review performed by its previous US counsel.

33. Having considered Sabre's submissions, on 13 September 2019, the CMA sent Sabre a copy of its provisional penalty decision (the 'Provisional Decision').

34. On 20 September 2019, Sabre provided its written representations on the Provisional Decision. Sabre developed those representations orally with the Decision-Maker via teleconference on 23 September 2019. In these representations, Sabre submitted that:

a) it had complied fully with the Notices, in particular because the search parameters had been 'agreed' with the CMA and it was not required to

produce documents outside the 'universe' of documents that had been provided to the DOJ;

b) in the alternative, it had a reasonable excuse for any failure to comply, in particular because it was reasonable for Sabre to rely on a methodology that had 'not been queried or challenged in any way by the CMA';

c) it was, in any case, not appropriate for the CMA to impose a fine in this case, in particular because there was no adverse impact on the CMA's Inquiry and no need to deter the conduct at issue in this case;

d) finally, if any penalty were imposed, the amount of any penalty should be significantly lower than those imposed in *Hungryhouse* (£20,000)[5] and *AL-KO* (£15,000),[6] on the basis that the breaches in those cases were far more egregious.

35. After making its oral representations on 23 September 2019, Slaughter and May sent an email to the CMA, on 25 September 2019, making further submissions in relation to the period that elapsed between the submission of additional documents emerging from the privilege re-review exercise to the DOJ, on 5 June 2019, and the submission of documents to the CMA, on 28 June 2019.

36. In accordance with paragraphs 5.2 and 5.9 of the CMA's Guidance: *Administrative penalties: Statement of Policy on the CMA's Approach* (CMA4, January 2014, the 'Guidance'), the CMA consulted with the CMA's General Counsel's Office on the reasons for, and level of, the penalty set out below.

C. Legal Assessment

Relevant legislation

37. Section 110(1) EA02 provides that where the CMA considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice under section 109 EA02, it may impose a penalty of such amount as it considers appropriate (in accordance with section 111 EA02).

[5] Penalty notice under section 110 of the Enterprise Act 2002 addressed to Hungryhouse Holdings Limited, Case ME/6659/16. Decsion of 24 November 2017 ('*Hungryhouse*').
[6] Penalty notice under section 110 of the Enterprise Act 2002 addressed to AL-KO Kober Holdings Limited, Case ME/6776/18. Decsion of 21 May 2019 ('*AL-KO*').

38. The CMA concludes that the statutory requirements for imposing a penalty under section 110 EA02 are met, and that the imposition of a penalty of £20,000 is appropriate and proportionate in this case.

Statutory requirements for imposing a penalty under section 110 EA02

39. The CMA finds that Sabre is a person within the meaning of sections 109 and 110 EA02 and Schedule 1 of the Interpretation Act 1978 and has failed to comply with a requirement of a notice issued under section 109 EA02, as set out below:

    a) The March s.109 Notice required Sabre to produce responsive documents within an extended deadline of 25 April 2019. On 28 June 2019, Sabre produced 343 further documents in response to the notice. This was over two months after the extended deadline prescribed by the notice and so constituted a failure to comply with that notice.

    b) The April s.109 Notice required Sabre to produce responsive documents by 30 April 2019. On 28 June 2019, Sabre produced 101 further documents in response to the April s.109 Notice. This was nearly two months after the deadline prescribed by the April s.109 Notice and constituted a failure to comply with that notice.

    c) As noted at paragraph 6 above, a total of 188 unique files were provided late.

40. The CMA does not accept Sabre's argument that it complied fully with the Notices because the Relevant Documents were outside the universe of documents provided to the DOJ at the time the deadline for the Notices expired.

41. A plain reading of the Notices makes clear that Sabre's position that it was not required to provide documents 'beyond the universe of documents already provided to the DOJ' is not correct. The Notices were not framed so as to require Sabre to produce all documents responsive to a particular methodology. Rather, the Notices required Sabre to produce categories of documents responsive to the questions in those notices. While the CMA was aware that Sabre intended to draw on material previously produced to the DOJ in responding to the Notices, the CMA was not aware that these productions wrongly excluded large volumes of materials that had been incorrectly classified as privileged (but were clearly responsive to the Notices).

42. The CMA also disagrees with Sabre's suggestion that Sabre complied fully with the CMA's document requests because there was 'no misapplication by Sabre of the agreed methodology.' While the CMA did not object to the

methodology that Sabre intended to apply, the CMA was not aware, at this time, of the extensive erroneous privilege claims that would be made in the application of this methodology.

43. Sabre suggested in the Response that the present case is 'far' from situations in previous cases in which there was a 'misapplication' of agreed methodology. Sabre further elaborated this position in its in response to the Provisional Decision, suggesting that any dispute as to Sabre's compliance with the Notices was a dispute 'over the adequacy of the methodology in principle', which Sabre considered to be 'clearly different' to a circumstance in which a given methodology is misapplied.

44. The CMA does not agree with this position. The CMA had no reason to consider that the proposed approach to responding to the Notices was not 'sensible and practical' in the circumstances (and therefore did not object to that methodology). The CMA notes, in this regard, that the methodology put forward by Sabre at this time did not suggest in any way that document reviewers would systemically over-designate documents as privileged beyond legitimate claims (as is suggested in Slaughter and May's 28 June 2019 email).[7] As Sabre was entitled to make legitimate redactions (or withhold documents) for privilege, the CMA considers that the over-designation of these documents is, in effect, the misapplication of a methodology that, on its face, raised no objections (or, in the alternative, that Sabre failed to properly disclose that its methodology, in principle, envisaged systemically over-designating documents as privileged beyond legitimate claims).

45. In any case, as explained in the CMA's Internal Documents Guidance: 'It is ultimately the parties' responsibility to ensure that relevant material is produced in response to a document request. The CMA may engage with merging parties on whether the proposed approach is sensible and practical. […] The CMA will not, however, be able to pre-emptively give assurances that no breach of the section 109 notice would occur in the event that relevant material later comes to light which parties could and should have provided.'[8]

---

[7] Slaughter and May's 28 June 2019 email states: 'As is common with Second Request review, document reviewers tend to be conservative with their privilege calls and over designate certain documents that are privileged when they are not. For example, contract attorneys would designate documents as privileged simply because they had a "Privileged and Confidential" header or if an attorney was copied on the correspondence.' While Sabre disputes the position that documents were 'systemically' over-designated, the CMA notes that it is well-established that such categories of documents are not necessarily legally privileged, that very large volumes and proportions of documents were wrongly designated (as described further in paragraph 56(b) below) and that Sabre has not provided any evidence of steps taken (such as the instructions given to document reviewers or quality control processes) to guard against erroneous privilege designations of this nature. The CMA therefore believes that these errors should be considered as systemic, rather than as isolated incidences of incorrect practice.

[8] *Guidance on requests for internal documents in merger investigations* (15 January 2019, CMA100), paragraph 28 (the 'Internal Documents Guidance').

In the present case, the CMA gave no assurance to Sabre (whether explicitly or implicitly) that applying the methodologies it had proposed would ensure that Sabre's response had complied with the relevant questions in the Notices. Moreover, Sabre has (by its own admission) withheld large volumes of materials that were erroneously classified as privileged that clearly could and should have been provided in response to the Notices.

46. Following on from the submissions set out above, Sabre also submitted, in response to the Provisional Decision, that, absent bad faith, 'the extent to which a document production complies with a request must and can only be judged in the light of any agreed methodology'. Sabre further developed this point in its oral representations, emphasising that the construction of a methodology is an iterative process involving an inevitable compromise between comprehensiveness and practicality. Suitable search terms and custodians are agreed so that a workable process is put in place. This is done in the knowledge that it is inevitable that some technically responsive documents may not be caught by the agreed search parameters but that there is no breach of a section 109 EA02 notice in such circumstances. Sabre submitted that in this case it was obvious and logical to confine the searches in response to the Notices to those documents produced to the DOJ, and it could not be criticised for having done so.

47. In the CMA's view, this submission mischaracterises the factual position in this case and, more broadly, does not properly reflect the obligations incumbent on the addressee of a statutory information request.

48. First, no description of the approach that had been adopted to identifying privileged materials was provided within the explanations of methodology submitted by Sabre. These explanations contained only a plain factual statement regarding the number of documents that had been withheld or redacted but did not provide any description of the review process that had been adopted (or details of any quality assurance process). Sabre did not provide any privilege log to the CMA to describe, in non-privileged terms, what materials had been withheld (despite privilege logs having been prepared and submitted to the DOJ). There was, in particular, no indication in these explanations that Sabre intended to make (or had made) extensive privilege claims beyond those justified by the ordinary rules of legal privilege.

49. Second, Sabre's submissions ignore that the CMA is not, for the reasons set out in paragraph 45 above, able to pre-emptively give an assurance that no breach will occur where relevant material later comes to light which parties could and should have provided. A proposed approach that raises no objections in principle may ultimately transpire to be inadequate in practice

(where, for example, large volumes of documents that could and should have been provided are erroneously classified as privileged, as was the case here).

50. For the reasons set out above, the CMA finds that Sabre has failed to comply with certain of the requirements of the Notices served on it.[9]

Without reasonable excuse

51. Section 110 EA02 provides that penalties can be imposed if a failure to comply is 'without reasonable excuse'. The Competition Appeal Tribunal has considered the concept of 'without reasonable excuse' in the Electro Rent judgment finding it is 'an objective test as to whether the excuse put forward […] was reasonable' (*Electro Rent* [69]).[10]

52. The Guidance provides at paragraph 4.4:

> The circumstances that constitute a reasonable excuse are not fixed and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. However, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond [a person's] control has caused the failure and the failure would not otherwise have taken place.

53. The CMA does not accept Sabre's submissions that it had a reasonable excuse for not complying with the Notices.

54. First, the fact that Sabre had provided the CMA with its methodology, and that the CMA did not contest or raise any questions in relation to this methodology, does not provide a reasonable excuse for essentially the same reasons (as set out above) that these facts do not support the position that Sabre did not fail to comply with the Notices. In particular, these facts clearly do not amount to a 'significant and genuinely unforeseeable or unusual event and/or an event beyond [a person's] control',[11] which the Guidance envisages the CMA will consider when assessing whether a party has a reasonable excuse.[12]

---

[9] On the facts of this case, where the cause of failure to comply with both of the Notices, the submissions on 'reasonable excuse', and the consequences of the failures on the CMA Inquiry, were closely correlated, the CMA has decided to exercise its discretion to enforce against both failures in a single notice and to impose a single penalty for the failure to comply with each of the Notices.

[10] *Electro Rent Corporation* v *CMA* [2019] CAT 4 ('*Electro Rent*').

[11] The Guidance, paragraph 4.4. The Guidance provides the example of a significant and demonstrable IT failure (which could not reasonably have been foreseen or avoided) as a potential example of a reasonable excuse for the purposes of the EA02, depending on the surrounding cicrumstances.

[12] Sabre submitted, in response to the Provisional Decision, that considering whether a given set of circumstances were significant and genuinely unforeseeable 'may be a relevant exercise in some cases […], but need not be relevant in all cases – and is not relevant here.' The CMA notes that this ignores the other circumstance that paragraph 4.4. of the Guidance states that the CMA will consider – ie whether the failure was caused 'by an event beyond [a person's] control.' For the reasons set out in detail in this decision, the CMA considers that the facts that give rise to the failure were clearly not events that were beyond Sabre's control (and

Sabre clearly had control over the approach adopted to complying with the request, and its approach to the identification of privileged materials resulted in a significant number of failures.

55. Moreover, Sabre's envisaged approach to the identification of privileged materials was not, in any case, communicated in any detailed way to the CMA. In particular, as noted above, there was no suggestion at any point that Sabre intended to make (or had made) extensive privilege claims beyond those justified by the ordinary rules of legal privilege. Accordingly, while Sabre suggested, in response to the Provisional Decision, that it was 'reasonable for Sabre to consider that its approach had been properly understood and to proceed accordingly', the CMA considers that Sabre had no reasonable grounds to take this position, particularly given that extensive privilege claims beyond those justified by the ordinary rules of legal privilege were made. The CMA's Internal Documents Guidance also indicates that the approach taken to privileged materials is ultimately liable to be assessed following the final production (notwithstanding any earlier engagement on the approach that is proposed to be taken).[13]

56. Second, the CMA considers that reliance on external US counsel to conduct a privilege review does not give rise to a reasonable excuse within the meaning of the Guidance. In particular:

a) It is ultimately the responsibility of the party to which a statutory request for information is addressed to ensure that its external advisers' approach is appropriate. The CMA's Guidance explains clearly that the CMA expects a person on whom a Notice is served to be responsible for ensuring requirements to produce documents 'are fully understood and that the CMA's powers are complied with, even when, for example, using external advisers to assist them in their response'.[14]

b) The evidence available to the CMA indicates that the initial review was manifestly inadequate. As noted above, Slaughter and May's 28 June 2019 email explained that document reviewers would 'over designate certain documents as privileged when in fact they are not' for example 'simply because they had a "Privileged and Confidential" header or if an attorney was copied on the correspondence,' notwithstanding that it is

---

were, in addition, not unforeseeable given the inadequate process that was followed). Moreover, while Sabre is correct that the circumstances that might consistute a reasonable excuse are not fixed, the CMA does not consider – for the reasons explained in this decision relating to the nature of the failures at issue – that any of the circumstances put forward by Sabre would otherwise give rise to a reasonable excuse for the purposes of the EA02.

[13] Internal Documents Guidance, paragraph 24.

[14] The Guidance, paragraph 4.5.

well-established that such categories of documents are not necessarily legally privileged. The CMA considers that the errors that arose out of the initial review were so extensive that the failings were systemic in nature (rather than isolated incidences of incorrect practice). Following concerns raised by the DOJ, Sabre agreed to re-review approximately 12,000 documents and determined that privilege claims were not justified in 6,740 of them (ie over half of all of the re-reviewed documents). As a result of this process, Sabre found that 444 documents had not been produced to the CMA (or had been overly-redacted in production). In its oral representations, Sabre emphasised that the assessment of privilege is not always 'black-and-white'. The CMA accepts that the assessment of privilege claims is not always straightforward. Nevertheless, the CMA considers that such a high proportion and volume of erroneous privilege claims indicate that the process followed by Sabre in verifying whether these claims had originally been made correctly was manifestly inadequate.

c) While the CMA holds no objection in principle to the same privilege review process being applied for a UK production as in other jurisdictions, it is ultimately the responsibility of the party to which a statutory request for information is addressed to ensure that whatever process is chosen is fit-for-purpose for the UK proceedings. In particular, the fact that an initial review is conducted in good faith by suitably-qualified staff does not negate the need for suitable quality assurance measures to be put in place. Similarly, Sabre's suggestion that a 're-review is by no means unusual' in DOJ proceedings does not negate the need to ensure that process used is also suitable for UK proceedings. (For example, had Sabre wished to, it could have engaged with the CMA regarding a suitable quality assurance process to be adopted that would have ensured that any over-designation of documents in the initial review could have been identified and rectified in a way that was compatible with the efficient conduct of the CMA's investigation.) As explained in detail above, the CMA considers that the process applied in this case was manifestly inadequate for the purposes of the UK proceedings and resulted in a significant volume of responsive documents not being produced to the CMA by the required statutory deadline.

57. The CMA therefore considers that outsourcing document review to external US counsel, without verifying whether the processes to be applied would be adequate for the purposes of complying with the Notices, was not a 'significant and genuinely unforeseeable or unusual event and/or an event beyond [Sabre's] control.' Putting in place a process that appears to have

been manifestly inadequate in assessing whether claims made by first-line reviewers had been made correctly cannot be described as either unforeseen or unforeseeable.[15]

58. The CMA therefore finds that Sabre's failure to adopt a quality control process that was adequate to ensure compliance with the requirements of the Notices was a foreseeable error.

D. Appropriateness of imposing a penalty at the level proposed

Appropriateness of imposing a penalty

59. Having had regard to its statutory duties and the Guidance, and having considered all relevant facts, the CMA finds that the imposition of a penalty is appropriate. In reaching this view, the CMA has considered the adverse impact of the failure on the Inquiry, as well as having regard to the need to achieve deterrence.

Seriousness / Adverse impact on the Inquiry

60. The failure was significant. Even taking into account a degree of duplication within the documents ultimately produced, a substantial number of unique documents (188) was submitted around two months after the applicable deadlines had expired, and at a relatively advanced stage in the CMA's Inquiry (ie over four months after the CMA had opened its investigation).

61. Sabre submitted that the failure was not significant, particularly when considered within the universe of over 500,000 documents that were subject to review for the purpose of the DOJ proceedings. The CMA notes, however, that Sabre ultimately submitted around 6,000 documents in response to the Notices, of which 444 were incorrectly withheld or redacted. The CMA therefore considers that the failure was substantial in absolute terms, and also represented a significant proportion of Sabre's entire production to the CMA. In any case, the failings within the universe of all documents as a whole were, as noted in paragraph 56(b) above, considerably more extensive than the 188 unique documents that Sabre failed to provide (or provided with incorrect redactions) to the CMA.

[15] In particular, Slaughter and May's statement in its email of 28 June 2019 that it 'is common with Second Request Review [that] document reviewers tend to be conservative with their privilege calls and over designate certain documents that are privileged when in fact they are not' indicates that the over-designation of documents as privileged was an issue which Sabre could clearly have foreseen.

62. Sabre's failure did not ultimately necessitate an extension to the statutory timetable, but it nevertheless caused some disruption to the CMA's Inquiry, at public expense. Sabre suggests that the CMA had 'adequate opportunity' to review the materials submitted before both the Issues Letter and the Phase 1 Decision. However, this ignores the fact that the review and analysis of a significant volume of materials, provided significantly later than these materials should have been produced, is by its nature liable to have an adverse impact on the effective running of a CMA investigation.

63. Sabre also noted in its Response that the CMA will 'have the opportunity to review and put questions to Sabre in relation to the Relevant Documents during the Phase 2 process' such that there is 'no risk of the CMA's final decision being taken on the basis of incomplete evidence.' This ignores the fact that the failure gave rise to a risk that the Phase 1 decision would be taken on the basis of incomplete evidence. The CMA therefore considers that the fact that a Phase 2 investigation has now commenced does not mean that Sabre's failure to comply cannot be considered to have had an adverse impact on the CMA's investigation.

Deterrent effect of the penalty

64. The CMA requires a wide range of information to discharge its functions. The availability and receipt of complete and accurate information is crucial to enable it to make evidence-based decisions and, more generally, for the quality and effectiveness of its work. Requests for information and documents are therefore a key tool for the CMA to collect the information it needs to carry out its merger investigations.

65. The CMA therefore considers that it is of utmost importance to the CMA's ability to conduct effective investigations that parties have due regard to the requirements imposed on them by, among other things, section 109 EA02. The imposition of an administrative penalty under section 110 EA02 is critical to achieve deterrence; to impress both on Sabre in this specific case, and more widely to those who may be subject to investigatory requirements in future, the seriousness of a failure to comply with a section 109 notice, without a reasonable excuse.

66. Sabre submited that no penalty was required for deterrence. In particular, Sabre suggested that none of the general factors identified in the Guidance that the CMA will take into account when deciding whether or not to impose a

penalty were present in this case.[16] This is not correct. For the reasons set out in detail in this decision, the CMA considers that the breach was significant (which is one of the general factors set out in the Guidance).

67. Sabre also suggests that the conduct at issue in this case 'hardly seems to be the sort from which the CMA would want to deter either Sabre or others.' Again, this is not correct. Sabre's conduct (more specifically, the systemic over-claiming of legal privilege) resulted in a substantial number of documents being provided late, around two months after the applicable deadlines had expired, and at a relatively advanced stage of the Inquiry. The failure gave rise to a material risk that the CMA's Phase 1 decision would be taken on the basis of incomplete evidence. Given the importance of avoiding future failures of this nature, the CMA considers that the imposition of a penalty is justified in the interest of both specific and general deterrence.

68. Accordingly, for the reasons set out above the CMA finds that it is appropriate to impose a penalty in this case.

Appropriateness of the amount of the penalty imposed

69. Consistent with its statutory duties and the Guidance, the CMA has assessed all relevant circumstances to determine the appropriate level of penalty in this case.

Aggravating/mitigating factors

70. Sabre initially submitted that there is an absence of any aggravating factors in this case and therefore that the CMA should exercise its discretion not to impose a penalty. In its reponse to the Provisional Decision, Sabre also submitted, without prejudice to this position, that the proposed penalty of £20,000 was inappropriate. The CMA considers that it is appropriate to impose a penalty in this case (for the reasons set out above), and has therefore taken Sabre's submissions in this regard into account in determining the appropriate level of the penalty.

71. The CMA does not dispute Sabre's submission that its failure was not intentional and that Sabre has not attempted to conceal the failure from the

[16] The five factors referred to at paragraph 4.2 of the Guidance are: the likelihood of an adverse impact on the CMA's investigation; whether the failure was significant and/or flagrant (whether committed negligently or intentionally); whether the party in question had previously failed to comply with an information request; whether a penalty is required to encourage (swift) compliance; and whether the party sought to obtain an advantage or derive a benefit from the failure.

CMA. The failure was therefore negligent rather than intentional.[17] The CMA also agrees that Sabre's failure to comply was not flagrant, and that the documents produced late were ultimately only of limited relevance to the statutory questions that the CMA was required to answer at the end of its Phase 1 investigation (albeit that, as explained above, the failure nevertheless had an adverse impact on the effective running of the CMA's investigation). Finally, the CMA is satisfied that Sabre did not seek to obtain an advantage or derive benefit from the its failure to comply. All of these factors have been taken into account in setting the level of the penalty in this case.

72. The CMA notes, however, that Sabre's initial failure was exacerbated by a significant delay in taking steps to resolve the failures. In particular, potential errors in the privilege designations of the documents submitted to the DOJ (some of which Sabre ought to have been aware were responsive to the Notices) were first discussed with the DOJ no later than 24 May 2019.[18] While the re-review was completed on 5 June 2019, it was not until 28 June 2019 that the CMA was informed by Slaughter and May that Sabre's submissions in response to the Notices were incomplete and all of the responsive documents were finally submitted. Slaughter and May's 28 June 2019 email appears to suggest, in particular, that Sabre took no action between 5 June 2019 (when all additional documents were produced to the DOJ) and 20 June 2019 (when Slaughter and May was informed about the additional production) to bring the fact that significant deficiencies had been identified in the original production to the attention of the CMA (or to address the deficiencies in the UK production). Even after Slaughter and May had been informed about these deficiencies, it was a further eight days before the matter was raised for the first time with the CMA.

73. In its representations following the Provisional Decision, Sabre explained that it needed to investigate the extent of the overlap with the CMA's requests, instruct Sabre's third party vendor to re-run searches, convert hundreds of documents into searchable PDFs with load files, and transfer the files to a UK server. On this basis, Sabre considers that submitting the relevant documents to the CMA 'within three weeks' was 'a reasonable time frame considering the work involved.'

74. However, in the course of its teleconference with the Decision-Maker, Sabre confirmed that the work it had described to produce these additional

---

[17] As explained at footnote 36 of the Guidelines a failure is 'negligent' if the relevant person ought to have known that its conduct would result in a failure to comply with a regulatory requirement. For the reasons set out in detail in this decision, in this case the CMA considers that Sabre could and should have foreseen that processes put in place for the UK production were manifestly inadequate to comply with the requirements of the Notices.
[18] See paragraph 28 above.

documents to the CMA only began after 20 June 2019 (ie at least around a month later than these matters had first been discussed with the DOJ and over two weeks after all additional documents had been produced to the DOJ).

75. Accordingly, while Sabre rectified the failures identified in this penalty decision and ultimately brought the matter to the attention of the CMA (absent which action the penalty imposed would have been higher), the CMA believes that Sabre cannot be considered to have 'promptly' and 'proactively' submitted these documents to the CMA (as Sabre suggests in its Response and representations on the Provisional Decision). While the CMA accepts that this may have been a particularly busy period for Sabre's UK and US legal advisers (as Sabre stated in follow-up submissions to the teleconference with the Decision-Maker), the CMA considers that the delays in commencing any work on the additional UK production, or in even making the CMA aware of the errors that had been uncovered, are wholly inconsistent with Sabre's position that its response was prompt and proactive.

76. Moreover, the CMA can also not accept Sabre's submission that it has sought to 'engage transparently and constructively with the CMA throughout' the CMA proceedings.

77. The CMA previously wrote to Sabre on 5 July 2019 to express concerns about Sabre's failure to comply with other questions in the April s.109 Notice. As that letter sets out, Sabre did not, on that occasion, respond at all to a statutory request for information by the required deadline. While Sabre subsequently told the CMA that it was aiming to provide a response within the specified timeframe 'right up to the last minute', the CMA considered that there was no credible basis to suggest that the circumstances cited by Sabre as delaying its response were not known to Sabre well in advance of the deadline for that notice. The CMA's 5 July 2019 letter noted that this failure to comply raised 'very serious concerns'. While the letter also explained that the CMA was not minded to pursue any formal action under section 110 EA02 in relation to the events described in that letter, it also reminded Sabre of the importance of full compliance with its statutory obligations. While the CMA has not treated this incident as a case of recidivism, it nevertheless considers that the fact that the matters to which this decision relate were not isolated incidents of non-compliance is relevant to the nature of Sabre's approach to engagement with the CMA throughout the investigation and therefore to the appropriate level of a fine. In particular, the CMA cannot apply a lower fine than otherwise would have been the case as a result of Sabre's 'transparent and constructive' approach to the CMA's investigation, where the record shows other, very serious, concerns about the nature of Sabre's compliance with its statutory obligations during the course of the investigation.

78. Sabre also submitted that any penalty imposed should be substantially lower than the penalties imposed in the *Hungryhouse* and *AL-KO* cases. The CMA notes that the Competition Appeal Tribunal has observed, in relation to Competition Act 1998 infringements, that previous penalty decisions have limited precedent value, other than in matters of legal principle, because each case is very dependent on its facts (*Ping v CMA* [2018] CAT 13 [233] and *Kier Group Plc v OFT* [2011] CAT 3 [116]). The CMA's position is consistent with the Guidance, which provides that the CMA will decide whether to impose an administrative penalty, and at what amount, on a case-by-case basis, having regard to the Guidance and taking into account all relevant circumstances. The CMA has adopted this approach in this case and has reached a view in the round as to what level of penalty is appropriate and proportionate.

79. In any case, the CMA notes that the breach in this case was significant (for all the reasons set out in detail in this decision), in common with the breaches that have previously been found in other cases. The CMA therefore does not accept Sabre's suggestion that the breaches in those cases were 'far more egregious'.

Financial resources available to Sabre

80. Consistent with the Guidance, the CMA has also had regard to certain of the financial indicators relating to the financial resources available to Sabre:[19]

(a) Adjusted Gross Profits – US$1,521,408,000;

(b) Cash and cash equivalents – US$509,265,000; and

(c) Wordwide Turnover – US$3,866,956,000.

81. These indicators show that Sabre has significant resources available in respect of the imposition of a penalty of £20,000 for the failure to comply in question in this case.

82. In addition, the CMA considers that it is appropriate to impose a penalty at this level, having regard to Sabre's size and financial position.

[19] Sabre's Form 10-K containing full accounts made up to 31 December 2018, available at: https://investors.sabre.com/static-files/19809198-7b67-40bb-8415-8b8ddaa274e9.

Conclusion on the imposition of a penalty

83. Although the CMA has the power to impose a penalty of up £30,000 the CMA does not consider that the breaches in this case are so serious as to warrant a penalty at the upper end of the scale.

84. In all the circumstances, the CMA considers that the imposition of a penalty of £20,000 is appropriate on the basis that it: (i) would reflect the seriousness of the breaches, and the adverse impact on the CMA's Inquiry, (ii) would act as a deterrent to Sabre and other persons in the future, and (iii) is substantially below the statutory maximum of £30,000 for a penalty in a fixed amount and is not disproportionate in this case.

Signature: 

Colin Raftery, Senior Director of Mergers

Date: 27 September 2019

Competition and Markets Authority

ANNEX

The Template Merger Notice and Draft Merger Notice

The Questions 8(e), 9 and 10 of Sabre's Draft Merger Notice were identical to those contained in the CMA's template merger notice. The questions provided as follows:

> **Question 8(e):**Provide […] copies of the most recent business plan of the acquirer and acquirer group (if relevant) and the target (or merger parties in the case of a full merger). Where a horizontal overlap or vertical relationship involves, for example, a specific division or brand of one or both of the merger parties, the most recent business plan for the relevant division or brand should be provided as well.
>
> **Question 9:**Provide copies of any documents in either of the merger parties' possession which:
>
> (a)have been prepared by or for, or received by, any member of the board of directors (or equivalent body) or senior management or the shareholders' meeting of either merger party (whether prepared internally or by external consultants), and
>
> (b) either: (i) set out the rationale for the merger (including but not limited to the benefits of, and/or investment case for the acquisition), or (ii) assess or analyse the merger with respect to competitive conditions, competitors (actual and potential), potential for sales growth or expansion into new product or geographic areas, market conditions, market shares and/or the price to be paid. This should include but not necessarily be limited to post-merger business plans or strategy (including integration plans and financial forecasts) and Information Memoranda prepared by or for the merger parties that specifically relate to the sale of the target. If no such Information Memoranda exist, explain what information or document(s) given to any of the merger parties is meant to serve the function of an Information Memorandum.
>
> Indicate (if not contained in the document itself) the date of preparation and the identity and role of the author(s) within the merger parties or external consultants.
>
> **Question 10:** Provide copies of documents (including, but not necessarily limited to, reports, presentations, studies, internal analyses, industry/market reports or analysis, including customer research and pricing studies) in either merger parties' possession and prepared or published in the last two years which:
>
> (a) have been prepared by or for, or received by, any member of the board of directors (or equivalent body) or senior management of either merger party (whether prepared internally or by external consultants), and
>
> (b) set out the competitive conditions, market conditions, market shares, competitors, or the merging parties' business plans in relation to the

product(s) or service(s) where the merger parties have a horizontal overlap […].

The March s.109 Notice

Question 33 of the March s.109 Notice provided as follows:

> Please describe and explain the methodology for producing the documents provided in response to Question 8(e), Question 9 and Question 10 of the Draft Merger Notice. Please provide all additional documents responsive to Question 8(e), Question 9 and Question 10 of the Draft Merger Notice.

The April s.109 Notice

Questions 6, 8-9 and 10 of the April s.109 Notice provided as follows:

> **Question 6**:Please provide all Relevant Documents (including for the avoidance of doubt attachments sent to Sabre via email) produced by third party advisors in the context of the Merger.
>
> **Question 8**: Please provide all Relevant Documents produced [since January 2015][20] on Sabre's [future strategy] [✂].
>
> **Question 9:** Please provide all Relevant Documents produced in the last three years which discuss the adoption and implementation of NDC technology in airline bookings in the industry generally.
>
> **Question 10:** Please provide all Relevant Documents on Sabre's post-Merger plans regarding GDS by-pass functionality.
>
> The April s.109 Notice defined 'Relevant Documents' as documents in any form (including, but not necessarily limited to, reports, presentations, studies, internal analyses, industry/market reports or analysis, including customer research and pricing studies) but excluding emails which have been prepared by or for, or received by, any member of the board of directors (or equivalent body) or senior management of Sabre.

[20] The question originally required documents produced 'in the last five years'. Sabre and the CMA case team agreed to amend this period via an email exchange in April 2019.