

ANTICIPATED ACQUISITION SABRE HOLDINGS CORPORATION OF FARELOGIX INC.

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups¹

Introduction

1. On 2 September 2019, the Competition and Markets Authority (CMA), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the Act), referred the anticipated merger between Sabre Corporation (Sabre) and Farelogix Inc. (Farelogix) (the Merger), for further investigation and report by a group of CMA panel members (the Inquiry Group).
2. In its provisional findings on the reference notified to Sabre and Farelogix (the Parties) on 7 February 2020, the CMA provisionally concluded that the Proposed Merger if carried into effect was expected to result in the creation of a relevant merger situation and that the creation of that situation may be expected to result in a substantial lessening of competition (SLC) in the markets in the UK for:
 - (a) The supply merchandising solutions; and
 - (b) The supply of distribution solutions to airlines.
3. The CMA's analysis provisionally indicates that these SLCs within a market or markets in the UK may be expected to result in adverse effects, for example in the form of higher prices and/or worse terms for airlines in merchandising. Moreover, the CMA has provisionally found that the Merger may be expected to result in less innovation in the development and supply of merchandising and distribution solutions for airlines.
4. This Notice sets out the actions the CMA considers it might take for the purpose of remedying the SLCs and/or any resulting adverse effects identified in the Provisional Findings Report.²
5. The CMA invites comments on possible remedies by **21 February 2020**.

¹ CMA Rules of Procedure for Merger, Market and Special Reference Groups (CMA17, 2014).

² <https://www.gov.uk/cma-cases/sabre-farelogix-merger-inquiry>

Criteria

6. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.³
7. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.
8. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.⁴

Possible remedies on which views are sought

9. This section sets out options for potential remedies. At this stage, the only remedy that CMA has identified as being likely to be effective would be prohibition of the Proposed Merger. This is the CMA's initial thinking. However, the CMA will consider any other practicable remedies that the main parties, or any interested third parties, may propose that could be effective in addressing the SLC and/or any resulting adverse effects.
10. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC or any resulting adverse effects that have been provisionally identified.
11. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of any such combination of measures on the SLC or any resulting adverse effects.

Prohibition

12. Prohibition of the Proposed Merger would prevent an SLC from arising in any relevant market. The CMA therefore takes the provisional view that prohibition would represent a comprehensive solution to all aspects of the SLCs it has provisionally found (and consequently any resulting adverse effects) and that the risks in terms of the effectiveness are very low.

³ Section 36(3) of the Act.

⁴ *Merger Remedies: CMA87* (December 2018), paragraph 3.3 and 3.4. This has been adopted by the CMA board.

Partial Divestiture

13. In evaluating possible divestitures of part of the Parties' businesses as a remedy to the provisional SLCs it has found, the CMA will consider the likelihood of achieving a successful divestiture and the associated risks.
14. To be effective in remedying the provisional SLCs, any divestiture package would need to be appropriately configured to enable a purchaser to operate effectively as an independent competitor and be attractive to potential purchasers.
15. The CMA's current view is that although both Parties carry on business in the UK, the part of their businesses that takes place in the UK does not appear to be separable from the rest of their operations. Competition is global in nature, as are the Parties' operations and software development. The CMA therefore considers that a divestiture of any UK-based operations is not likely to be effective at addressing the provisional competition concerns.
16. The CMA has initially considered whether it would be possible to carve out a business unit or units from either Party to form the basis of a divestiture package. The large part of Sabre and all of Farelogix is involved in the markets in which we have found an SLC. In addition, any partial divestiture of Sabre may risk breaking the synergies between its business units that CMA considers to be important to future competition.
17. Accordingly, the CMA's initial view is that it appears unlikely that the divestiture of a smaller part of either business would be effective at addressing the provisional competition concerns. However, the CMA invites views on:
 - (a) whether a structural divestiture short of full prohibition would be effective, and if so what would need to be included in this package of assets to attract a suitable purchaser and allow them to operate as an effective competitor in the market; and
 - (b) who might be a suitable purchaser⁵ for such a package of assets.

⁵ The CMA will wish to be satisfied that a prospective purchaser is (a) independent of the main parties; (b) has the necessary capability to compete; (c) is committed to competing in the market; and (d) will not create further competition concerns.

Divestiture or licensing of software or IP

18. The CMA has considered whether divestiture or licencing of software or other IP rights could be an effective remedy.
19. The licensing or assignment of IP, including patents, licences, brands and data, may be viewed generally as a specialised form of asset divestiture. However, in certain cases, the terms of a licence may contain ongoing behavioural elements such that the remedy is a structural / behavioural hybrid. The key element is the extent to which any material link between licensor and licensee will exist following award of the licence.⁶
20. A remedy that requires an assignment or licence of an IP right that is exclusive, irrevocable and non-terminable with no performance-related royalties will effectively be treated by the CMA as structural in form and subject to similar consideration and evaluation as an asset divestiture. A licence that requires a licensee to rely on the licensor for updates of the technology or continuing access to specialist inputs or know-how will be regarded as a behavioural commitment, which is subject to significant further risks of not being an effective remedy.⁷
21. The CMA guidance also notes that it will generally prefer to divest a business, or standalone business unit, including IP rights, where this is feasible, rather than rely on licensing IP alone. This is because divestiture of a business including IP rights is more likely to include all that the purchaser needs to compete effectively with the merging parties (such as technical expertise).⁸ By contrast divestiture of IP rights involves significant additional composition and purchaser risks. The CMA's experience of implementing IP remedies has also found that they may occasionally be effective, but generally have higher risk than a straightforward business divestiture.⁹
22. Consequently, the CMA currently considers that an IP remedy is be unlikely to represent an effective approach to remedy, mitigate or prevent the SLCs provisionally identified. However, the CMA invites views on:
 - (a) whether an IP remedy is likely to be effective in this case, and if so, how it might be specified; and

⁶ *Merger Remedies: CMA87* (December 2018), paragraph 6.1. This has been adopted by the CMA board.

⁷ *Merger Remedies: CMA87* (December 2018), paragraph 6.2. This has been adopted by the CMA board.

⁸ *Merger Remedies: CMA87* (December 2018), paragraph 6.3 and 6.4. This has been adopted by the CMA board.

⁹ *Merger remedy evaluations: CMA109* (June 2019), paragraph 1.5(c).

- (b) who might be a suitable purchaser¹⁰ for any IP to be licensed or divested under such a remedy.

Behavioural remedies

- 23. The CMA prefers structural remedies, such as divestiture or prohibition, over than behavioural remedies, because:
 - (a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
 - (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and
 - (c) structural remedies rarely require monitoring and enforcement once implemented.¹¹
- 24. In its recent evaluation of past merger remedies, the CMA found that behavioural remedies were 'higher risk, more complex and resource-intensive to design than divestiture remedies'. The evaluation also found that 'with painstaking and intensive implementation, they can operate satisfactorily for a limited period in narrowly defined circumstances. This is more likely to be the case where the company already operates in a regulated environment and where the CMA is able to delegate aspects of monitoring to an expert third party.' Furthermore, the evaluation said that 'it is very unlikely to be possible to design behavioural remedies that will be effective indefinitely without creating substantial distortion risks.'¹²
- 25. In Phase 1, Sabre offered a set of behavioural undertakings to the CMA in lieu of a Phase 2 reference. These undertakings included an offer 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;

¹⁰ The CMA will wish to be satisfied that a prospective purchaser is (a) independent of the main parties; (b) has the necessary capability to compete; (c) is committed to competing in the market; and (d) will not create further competition concerns; *Merger Remedies: CMA87* (December 2018), paragraph 5.21

¹¹ *Merger Remedies: CMA87* (December 2018), paragraph 3.46.

¹² *Merger remedy evaluations: CMA109* (June 2019), paragraph 1.5(b)

- (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.¹³
26. In its Decision to Refer, the CMA found that the undertakings offered by Sabre would be ineffective to address the potential effects of the SLC(s) as they raised significant circumvention, specification and distortion risks.¹⁴ It also found that the undertakings raised significant monitoring and enforcement risks and were not capable of ready implementation.¹⁵
27. Given the dynamic nature of the market and the importance of innovation and non-price competition, any behavioural remedy would face acute specification and circumvention risks that would be likely to render it ineffective. In addition, the SLCs that the CMA has provisionally identified are not time limited. Based on this, and the CMA's experience of implementing behavioural remedies set out in paragraph 27 above, the CMA's current view is that a behavioural remedy on its own is very unlikely to be an effective remedy to the SLC and/or any resulting adverse effects that it has provisionally identified.
28. Consequently, the CMA will consider any behavioural remedies put forward as part of this consultation, but absent any such submission, the CMA is currently minded to not pursue behavioural remedies any further.

Cost of remedies and proportionality

29. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLCs and their adverse effects. Between two remedies that the

¹³ [Decision to Refer](#), paragraph 18.

¹⁴ [Decision to Refer](#), paragraph 18.

¹⁵ [Decision to Refer](#), paragraph 25.

CMA considers equally effective, it will choose that which imposes the least cost or restriction.¹⁶

30. The CMA invites views on what costs are likely to arise in implementing any remedy options.

Relevant customer benefits

31. In deciding the question of remedies, the CMA may have regard to the effect of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.¹⁷
32. Relevant customer benefits are limited by the Act to benefits to customers in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom ... or
 - (b) greater innovation in relation to such goods or services.'¹⁸
33. For these purposes, the relevant customers are direct and indirect customers (including future customers) of the merger parties at any point in the chain of production and distribution – they are not limited to final consumers.¹⁹
34. The Act provides that a benefit is only a relevant customer benefit if:
- (a) it accrues or may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and
 - (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.²⁰
35. The Parties have put to the CMA that there a number of customer benefits that will arise as a direct result of the Proposed Merger. The CMA welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits.

¹⁶ Merger Remedies, paragraph 3.6

¹⁷ Section 36(4) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraphs 3.15 and 3.16.

¹⁸ Section 30(1)(a) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.17.

¹⁹ Section 30(4) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.18.

²⁰ Section 30(3) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.19.

Next steps

36. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by **21 February 2020** (see Note (i)).
37. A copy of this notice will be posted on the [CMA website](#).

Martin Coleman
Inquiry Group Chair
7 February 2020

Note

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC and/or any resulting adverse effects is made having regard to the Provisional Findings announced on 7 February 2020. The main parties have until 28 February 2020 to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its Provisional Findings, in which case the CMA may consider other possible remedies, if appropriate.

Comments should be made by email to Sabre.Farelogix@cma.gov.uk or in writing to:

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