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SABRE/FARELOGIX: INNOVATION, TWO-SIDED PLATFORMS, AND THE RISKS OF MULTIJURISDICTIONAL MERGER REVIEWS

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Over the past several years, competition enforcers around the world, including in the United States and Europe, have expressed increasing levels of concern about protecting nascent and potential competition, especially in technology markets. These enforcers question whether dominant firms are harming competition by acquiring nascent rivals in an effort to preempt a growing or potential threat to their incumbent positions. Setting aside government investigations of consummated transactions (which may provide evidence of actual anticompetitive effects), most merger analysis is predictive. Enforcers must assess the evidence in a legally defensible antitrust market and demonstrate that the proposed transaction is likely to harm competition by increasing prices, reducing output, or diminishing quality or innovation.

Enforcers have relatively more experience—and success—challenging transactions between head-to-head competitors in a market with few rivals and high barriers to entry. The sands can shift dramatically, however, when enforcers seek to challenge transactions between potential competitors, firms that are in a vertical relationship, or firms that supply complementary products or services. Further, the transaction may be subject to review by enforcers in multiple jurisdictions that have different enforcement policies, legal standards, and precedent. These dynamics are front and center in a pending transaction involving technologies used in the airline industry.

In April 2020, over the course of three days, Sabre Corporation and Farelogix,

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Inc. received directly opposing reactions in two jurisdictions to the likely competitive effects of their proposed transaction. In the United States, the DOJ lost its attempt to block the transaction when the U.S. District Court for the District of Delaware held that the government failed to meet its burden of proof.[1] The court concluded that Sabre and Farelogix did not compete as a matter of antitrust law because Sabre is a two-sided platform and Farelogix is not. The parties' victory, however, was short-lived. Days later, the United Kingdom's Competition and Markets Authority ("CMA") blocked the transaction. The CMA focused on competitive effects in two markets (rather than one, two-sided market) and concluded that the transaction would result in harm in each.

Although the DOJ indicated it would appeal the district court decision, the parties abandoned the transaction on April 30 when their merger agreement expired. In a press release, Sabre cited the CMA's decision, noting that it believes the CMA was "acting outside the bounds of its jurisdictional authority." According to public reports, Sabre intends to appeal the CMA's exercise of jurisdiction. The transaction provides a number of important lessons for companies considering a merger with a competitor or potential competitor. Following a short discussion of the industry and the decisions in the U.S. and UK, we discuss five key takeaways.

Airline Travel Booking Industry

Sabre and Farelogix both provide technology that facilitates airline bookings made through travel agencies. Airlines sell tickets through two kinds of travel agencies: online travel agencies, such as Expedia and Priceline, and traditional travel agencies. Sabre operates a Global Distribution System ("GDS"), which allows travel agencies to search for and book flights across multiple airlines. Sabre's GDS is a two-sided platform facilitating transactions between airlines and travel agencies. Sabre's GDS is the largest in the United States, with around 50% of the airline bookings made through travel agents. Sabre competes with other GDSs, Amadeus and Travelport, as well as the airlines' direct distribution channels (*i.e.*, their own websites and

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airline.com.) According to the court, these alternatives are an important constraint on Sabre's GDS fees.

Farelogix does not operate a GDS but developed a separate data transmission standard, New Distribution Capability ("NDC"), which allows airlines to bypass a GDS and connect directly to travel agencies for bookings. Farelogix only sells its solution, Farelogix Open Connect ("FLX OC"), to airlines. While NDC enables airlines to distribute more complex and personalized offers than GDS can support, GDS allows travel agencies to conduct less frequent, broader searches than with NDC. In the direct channel, airlines can use FLX OC to distribute directly to travel customers, including through the airline's own website. Airlines can also use FLX OC in the indirect channel through direct connects with travel agencies and non-GDS aggregators (both a form of "GDS bypass") and through "GDS pass-through," by which Farelogix's product shares NDC content to travel agencies using GDS aggregation.

The antitrust issues involve the parties' core products. In 2018, Sabre's revenues were approximately $3.9 billion. Most of the company's revenues and profits come from GDS booking fees paid by Sabre's airline customers. FLX OC generates more than half of Farelogix's revenues. Farelogix has no travel agency customers and no commercial relationship with travel agencies. Farelogix earned roughly $42 million in revenues in 2018.

DOJ and CMA Investigations and Challenges

In November 2018, Sabre agreed to acquire Farelogix for approximately $360 million. The transaction required the parties to file and observe mandatory premerger waiting periods under the Hart-Scott-Rodino Act. Following a preliminary inquiry, in February 2019, the DOJ issued a "Second Request," a significant document, data and information discovery request. Unlike in the United States, the UK has a voluntary merger filing regime, meaning that merging parties are not obliged to notify the antitrust authority of their transaction for merger clearance. Sabre did not voluntarily notify the acquisition in the UK. Despite the lack of a notification, the CMA opened a merger investigation in June 2019. At the end of its Phase 1 review, in August 2019, the CMA identified substantive concerns with the transaction. Later that month the DOJ filed suit under the U.S. merger laws (Clayton Act, Section 7) in the U.S. District Court for the District of Delaware to block the parties from closing.

The DOJ's August 2019 complaint alleged that the transaction would reduce competition in "airline booking services" and lead to higher prices, reduced quality, and less innovation.[2] The complaint opens with this statement: "Sabre's proposed acquisition of Farelogix is a dominant firm's attempt to eliminate a disruptive competitor after years of trying to stamp it out."[3]

Then, in early September 2019, the CMA opened an in-depth Phase 2 review, which is the UK equivalent of the U.S. Second Request process. The Phase 2 referral triggered UK law prohibiting the parties from closing the deal before obtaining clearance from the CMA.

The U.S. District Court Rules Against the DOJ

On April 7, 2020, the court denied the DOJ's request for an injunction to block the transaction.

The decision is notable for a number of reasons, but principally because of the court's holding that the DOJ failed to identify a proper relevant market in which the parties compete: "As a matter of antitrust law, Sabre, a two-sided transaction platform, only competes with other two-sided platforms, but Farelogix only operates on the airline side of Sabre's platform."[4] The court reached this decision based on a combination of the Supreme Court's 2018 *American Express* decision and the Second Circuit's 2019 finding that Sabre GDS is a two-sided platform.

In *Ohio v. American Express*,[5] the Supreme Court considered whether American Express violated Section 1 of the Sherman Act by requiring merchants to agree to "anti-steering" contract provisions. These provisions prohibited merchants from steering customers to use credit cards with lower transaction fees than the American Express card. The Court evaluated the market and concluded that credit card networks are two-sided platforms involving entities that offer different products or services to two different groups who both depend on the platform. Such platforms "cannot raise prices on one side without risking a feedback loop of declining demand."[6] The two sides are interdependent. Therefore, "courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market."[7]

In *US Airways v. Sabre Holdings Corp.*,[8] US Airways claimed that contractual provisions in its contracts and monopolization of the distribution of system services violated the antitrust laws (Sections 1 and 2, Sherman Act). On appeal, the Second Circuit vacated the jury verdict for US Airways and held that the Sabre GDS is a two-sided transaction platform. Citing *Amex*, the court held that the jury's verdict "was erroneous because the Sabre GDS is a transaction platform, and the relevant market for such a platform must as a matter of law include both sides."[9]

The court concluded that both cases applied to the Sabre/Farelogix transaction, *Amex* because "there is no meaningful distinction between" claims based on unreasonable restraints in an agreement and a merger challenge, and *US Airways* because the Second Circuit applied *Amex* "to the very same Sabre GDS platform." Based on this precedent and authority, the court held that Sabre and Farelogix do not compete as a matter of law because Sabre is a two-sided platform and Farelogix is not.[10]

Despite the court's dispositive ruling as a matter of law, the court also assessed the government's attempt to meet its burden on the assumption that Farelogix and Sabre could be found to compete in the same market. The court explained its reasoning for doing so, including because, "as is clear from the findings of fact, the Court has found as a matter of real-world economic reality that Sabre and Farelogix do compete to a certain extent, so resting a decision in this case entirely on a determination of law that [the parties] cannot compete in a relevant market is not a comfortable result." A few examples from the decision of this "real-world economic reality":

- "Notwithstanding [the merging parties'] repeated denials at trial . . . a preponderance of the evidence shows that Sabre and Farelogix do view each other as competitors, although only in a limited fashion."
- "Sabre contends that it does not view NDC, even when used for GDS bypass, as a threat. Sabre further contends that the principal

reason it wants to acquire Farelogix is for its FLX M product, not for FLX OC or to address the risk of GDS bypass and passthrough. The Court does not believe Sabre."

- "The Court does not find credible the Sabre witnesses' testimony that none of the uses of Farelogix technology is viewed as a threat to Sabre. It would be irresponsible for Sabre's leadership not to understand that GDS bypass, and even GDS integration and the wholesale model, are threats to Sabre's traditional revenue flow."

Regardless of this and other evidence, the court concluded that DOJ nevertheless failed to meet its burden of proof, even assuming the parties competed in the same market. "DOJ has failed to produce evidence that the anticompetitive impact of the merger on the airline side of the GDS platform would be so substantial that it would sufficiently reverberate throughout the Sabre GDS to such an extent as to make the two-sided GDS platform market, overall, less competitive." The government and its economic expert, according to the court, "did not even try to meet this burden," focusing instead on one side of the Sabre GDS "in isolation."

The court considered opinions from industry participants and concluded that "[m]ost of the players in the airline travel ecosystem—including especially travel agencies and airlines—support the proposed transaction." "Several of those who do not, American Airlines and United Airlines, have obvious interests in seeing the deal die" because they had "previously attempted to acquire Farelogix."

The court also considered letters from Sabre's CEO to current Sabre and Farelogix airline customers. Those letters, which were intended to address DOJ's concerns, reflected Sabre's commitments to customers post-closing, including to provide, support, and price Farelogix products "at industry competitive rates that are no greater than they are today." While the court believed that Sabre's CEO intended to abide by the commitments, it also agreed with the government that none of the commitments had been conformed to a legally binding agreement and that "CEOs—and even firm cultures—can change."

In its final analysis, the court concluded "the most likely impact on pricing is that prices will remain the same or be reduced following the transaction."

The DOJ filed a notice of appeal with the Third Circuit the day after the decision. The DOJ subsequently asked the appellate court to stay the issuance of a briefing schedule until the government "either (1) notifies this Court that the Solicitor General has approved this appeal or (2) moves to withdraw the appeal. . ." The merging parties opposed a stay, and maintained that the DOJ's request was "pretext to further delay this litigation."

CMA Blocks the Deal

Two days after the U.S. court ruled against DOJ, the CMA blocked the transaction.[11] Before turning to the substance, the CMA had to justify its jurisdiction over a transaction involving two non-UK companies. UK rules provide for jurisdiction if the target business meets a UK revenue threshold or if the parties have overlapping business in the UK and account for a combined 25% "share of supply" in the country. Farelogix has a negligible presence in the UK, with only one

British Airlines contract as a result of British Airlines' interline partnership with American Airlines, so it fell short of the revenue test. This left the share of supply test. The CMA adopted what could be considered a creative framework to describe a category of services in the UK in which both parties overlapped and had an aggregate share exceeding 25% share of supply. Ultimately, the CMA settled on "IT solutions to UK airlines for the purpose of airlines providing travel services information to travel agents to enable travel agents to make bookings."[12]

The CMA focused on two markets (rather than one, two-sided market) and concluded there would be competition harm in each: (1) supply of merchandising solutions (non-core passenger service systems for merchandising modules) on a worldwide basis, and (2) supply of distributions solutions to airlines (services that facilitate indirect distribution of airline content) on a worldwide basis. The CMA based its decision on a number of factors.

First, despite Farelogix's current small share in the UK, the CMA focused on its role as an innovator: "The importance of the competitive constraint imposed by Farelogix is better demonstrated by its role in driving the GDSs to enhance their offering to airlines, in particular by adopting NDC and enabling GDS pass-through."[13] The CMA considered that Farelogix's continued independence would encourage this innovation, giving airlines more choice and enhanced service offerings, whereas a merger would reduce competitive pressures and likely lead to higher prices in the short run and weaker service offerings in the long run. The CMA also stated that Sabre's own standalone innovation pipeline remained important, finding that, absent the merger, Sabre likely would develop into a third significant competitor within three to five years through the development of its own product that would compete more closely with Farelogix. Notably, this period is longer than the CMA's standard two-year period for assessing potential competition.

Second, the CMA assigned significant weight to the opinions of industry participants. While there was not evidence of widespread concern among travel agents about the merger, half of the airlines that the CMA contacted expressed concerns about the deal. The airlines asserted that the transaction would eliminate a successful and growing innovator that has been an alternative to the GDSs, ultimately setting back progress in developing NDC-enabled solutions.

Third, the CMA rejected the parties' argument that the merger would enhance Sabre's ability to compete with competitors, particularly Amadeus, leading to more compelling solutions to airlines. The CMA concluded that, absent the transaction, Sabre possessed the ability and incentive to achieve these objectives, so there was insufficient evidence that the merger would enhance market rivalry. When the parties' efficiencies arguments failed, they offered a number of behavioral remedies, which the CMA also rejected.

Public reports indicate that Sabre intends to appeal CMA's exercise of jurisdiction. If Sabre elects to continue the fight, the company has four weeks from the date that the prohibition decision was made available to the parties to appeal to the Competition Appeal Tribunal.

Five Lessons for Merging Parties

1. Beware of Scrutiny from Competition Authorities Regardless of Purchase Price

By the standards of many transactions that are reviewed by competition authorities, this one was small. Despite a purchase price of $360 million and target 2018 revenues of $42 million, this case provides a reminder that competition authorities may investigate and challenge a relatively small acquisition if they believe it will lead to substantial anticompetitive effects. This is especially true if there are active complainants.

Antitrust enforcers such as the DOJ and CMA regularly solicit feedback from a variety of industry participants when evaluating the competitive impact and potential harms of a transaction. For example, the U.S. agencies' *Horizontal Merger Guidelines* state that "[t]he conclusions of well-informed and sophisticated customers on the likely impact of the merger itself can also help the Agencies investigate competitive effects, because customers typically feel the consequences of both competitively beneficial and competitively harmful mergers."[14] Of course, whether a U.S. court assigns the same significance to such concerns as the DOJ during an investigation is by no means guaranteed, as the *Sabre* decision confirms. Courts have dismissed customer complaints for a variety of reasons, including, for example, because customers were ill-informed about the marketplace (such as in *U.S. v. Oracle*), or, as is the case here, if they had conflicting motives.

2. Watch Out for "Voluntary" Filing Jurisdictions and Aggressive Assertions of Jurisdiction

More than 130 countries and multinational agencies have rules empowering a local competition authority to review transactions. These regimes can be divided between "mandatory" and "voluntary" filing jurisdictions. In mandatory jurisdictions, like the United States, merging parties whose transactions meet certain criteria are obligated to notify the FTC and DOJ and abide by statutory waiting periods prior to closing. In voluntary jurisdictions, like the UK, there is no statutory bar to closing a deal without submission of a merger clearance notification. Doing so, however, risks a "last minute" ban on closing imposed by the relevant competition authority. This ban can occur either directly (for example, in the case of the CMA), via a court order (for example, in the case of Australia), or through a post-closing merger investigation which, worst case, could result in the entire deal being unwound.

Sabre/Farelogix was subject to a mandatory filing in the U.S. and a Phase 2 investigation in the UK. This meant that the parties were barred under the respective merger statutes in both jurisdictions from closing until they obtained regulatory clearance or the relevant waiting periods lapsed. It appears the parties concluded that the acquisition was reportable under the Hart-Scott Rodino Act. The parties then exhausted the HSR process and waiting periods, put the DOJ to its burden of proof and prevailed in litigation at the district court level.

In the UK, Farelogix had a negligible presence, and arguably no presence. The CMA nevertheless asserted jurisdiction based on its characterization of the parties' "share of supply" in the country. This is not the first time that the UK has adopted an aggressive stance on jurisdiction. Recent cases include *Roche/Spark* and *Hunter*

Douglas/247 Home Furnishings. In the former case, involving gene therapy and non-gene therapy Hem A treatments, even though Spark had no revenues in the UK, its presence in the UK through a handful of employees conducting marketing activities in respect of a product that remains at the clinical trial stage was deemed enough of a basis to assert jurisdiction. This was established purely on the grounds that Roche and Spark together accounted for more than a 25% share of full time equivalent employees in the UK who were engaged in activities relating to the same category of goods. In the latter case, the CMA used 2019 data to assert jurisdiction over a transaction entered into in 2013, on the grounds that the parties did not put material facts about the 2013 deal into the public domain until 2019.

3. Different Jurisdictions Often, But Do Not Always, Agree on Outcomes

Merging parties should keep in mind that, while competition authorities often rely upon the similar information produced by the parties (via confidentiality waivers), each jurisdiction operates under different standards and precedents, and they are under no obligation to follow one another. Here, the CMA relied on much of the same evidence as the DOJ, including transcripts from U.S. depositions and the U.S. trial, but also collected its own information. As described above, the CMA and the U.S. district court often reached opposite conclusions on key issues, including market definition and the relative importance of Farelogix as an innovator.

Before the parties abandoned the transaction, the DOJ was evaluating what, if any, relief to seek pending the resolution of its appeal. In any event, the parties could not have closed their transaction unless and until the CMA's decision was overturned. This case highlights the difference in procedural rules in the U.S. and the UK. In the U.S., the DOJ cannot unilaterally block parties from closing a transaction; the government must convince a federal judge that the transaction violates the U.S. merger laws. In the UK, by contrast, the CMA is vested with this unilateral authority. If the parties ignore a CMA prohibition order, the CMA could seek a court order enjoining completion of the deal. Such a step has never been taken in the UK given the serious consequences, including fines and, potentially, criminal proceedings.

This dynamic, in part, explains why merging parties that are subject to multijurisdictional reviews and closing conditions often do not litigate in the United States if the DOJ or FTC seeks to enjoin the transaction. Why go through the time, expense and uncertainty of U.S. litigation when, even if the parties prevail, closing remains subject to clearance in one or more other jurisdictions? It is not uncommon for U.S. and European competition agencies to review the same transaction and reach different conclusions at the (relative) margins that account for agency/country-specific concerns. (See, for example, the different remedies obtained by DOJ versus the European Commission in *Bayer/Monsanto*.) However, although not unprecedented, it is very rare for a foreign agency to oppose a transaction involving the same fundamental evidence that has been cleared unconditionally by a U.S. enforcer (FTC, DOJ) or a U.S. court. Sabre and Farelogix no doubt expected (hoped) that the CMA would allow their transaction to proceed (perhaps with a negotiated remedy) if they convinced the U.S. district court that the DOJ failed to meet its burden of proof.[15] The CMA, however, did not follow suit.

4. Market Definition Matters

Under U.S. law, market definition is a threshold requirement in any merger challenge. The DOJ alleged that Sabre and Farelogix are current and potential competitors as a matter of law and fact. By characterizing the parties' business as "horizontal," the government sought to rely on market concentration figures to establish its prima facie case. If the government could show that the transaction would lead to undue concentration in the market, it would be entitled to a presumption of competitive harm. The parties, however, maintained that this is a vertical transaction in which Sabre and Farelogix sell products at different stages of the distribution chain. This is a critical distinction because there is no presumption of harm in vertical mergers since the transaction does not increase concentration levels.[16]

On this important question of market definition, the court ruled that, consistent with the Supreme Court's *Amex* decision, the parties could not compete as a matter of law. Yet the court also cited contrary evidence—the "real-world economic reality"—that the parties do compete. The DOJ argued that *Amex* does not apply, and there is some language in the decision that not all two-sided platforms require an evaluation of overall competitive effects. According to the Supreme Court, "it is not always necessary to consider both sides of a two-sided platform." "A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor."[17] By way of example, the Court distinguished the newspaper industry, where the indirect network effects operate only in one direction (because readers care less about the amount of advertising), from "two-sided transaction platforms," which facilitate a "single, simultaneous transaction between participants."[18] Despite this language, the court found the DOJ's arguments unpersuasive. Sabre GDS supplies one product (transactions that link airlines and travel agencies) and "Farelogix indisputably does not."[19]

Amex was controversial when decided and remains so. Many question how U.S. government enforcers and courts will apply its holding to popular technology platforms brought under the Sherman Act involving claims of potential collusion or monopolization. The *Sabre/Farelogix* decision formally extends the debate to the Clayton Act (mergers). The DOJ provided notice of its intention to appeal the decision to the Third Circuit. The appropriate application of *Amex* likely would have been a key issue on appeal.

5. "Hot" Documents Provide Important Evidence in Antitrust Cases, But Are Not Always Dispositive

The DOJ complaint described various Sabre and Farelogix "hot" documents, depicting close competition between the parties, Sabre's concern with future competition from Farelogix, and Farelogix's complaints about Sabre business practices. In its decision, the district court reviewed a substantial history of the industry and the interactions between the parties and found that "a preponderance of the evidence shows that Sabre and Farelogix do view each other as competitors, although only in a limited fashion."[20]

Yet despite evidence "that Sabre will have the incentive to raise prices, reduce availability of FLX OC, and stifle innovation," the court held that "[n]evertheless, DOJ has not persuaded the Court that Sabre will likely act consistent with its

history or these incentives and actually harm competition if it is permitted to complete the acquisition of Farelogix."[21] This conclusion is striking. The court seemed to acknowledge this as well, at several points juxtaposing conflicting evidence and ultimately resolving the figurative "tie" in favor of the parties:

> Even though the Court rejects Sabre's story about not perceiving GDS bypass as a threat and about acquiring Farelogix principally for FLX M, the Court does find credible Sabre's representations to the market that it intends to hold or even lower prices for FLX OC if it succeeds in acquiring Farelogix. Doing so would be consistent with the internal financial modeling Sabre used in deciding to pursue the transaction. . . . The record is not devoid of contrary evidence. . . . Still, on the whole, the Court is persuaded that the most likely impact on pricing is that prices will remain the same or be reduced following the transaction.[22]

To avoid or minimize the risk of extended merger investigations or challenges in the first instance, company employees and executives should seek to avoid unhelpful exaggerations or hyperbole in their public statements and ordinary-course documents that do not accurately characterize the marketplace. This guidance applies with particular force when describing competitive alternatives or the rationale or impact of a proposed transaction. Documents should be drafted assuming they will be reviewed by government antitrust enforcement authorities (or plaintiffs in private actions). We recognize that this is often easier said than done. Nevertheless, this type of qualitative evidence plays an important role during merger investigations. In the technology sector and other dynamic industries, the competitive landscape can and does change rapidly. The more a company's files acknowledge this dynamism and avoid provocative statements about, or a singular focus on, the competitive significance of a would-be merger partner or acquisition target, the better.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]*United States v. Sabre Corp.*, Civil Action No. 1:19-cv-01548-LPS, Dkt. No. 277 (D. Del. Apr. 8, 2020) (hereinafter "*Sabre* Decision").

[2]Complaint, *United States v. Sabre Corp.*, (Aug. 20, 2019), *available at* https://www.justice.gov/opa/press-release/file/1196816/download (hereinafter "*Sabre* Complaint").

[3]*Sabre* Complaint, at 1.

[4]*Sabre* Decision, at 68.

[5]*Ohio v. American Express Co.*, 138 S. Ct. 2274, 201 L. Ed. 2d 678, 2018-1 Trade Cas. (CCH) ¶ 80427 (2018).

[6]*Amex*, at 2285.

[7]*Id.*

[8]*US Airways, Inc. v. Sabre Holdings Corporation*, 938 F.3d 43, 2019-2 Trade Cas. (CCH) ¶ 80921 (2d Cir. 2019).

[9]*Id*. at 58.

[10]*Sabre* Decision at 72.

[11]*See* CMA, "Sabre/Farelogix merger inquiry," https://www.gov.uk/cma-cases/sabre-farelogix-merger-inquiry.

[12]CMA, "Anticipated acquisition by Sabre Corporation of Farelogix Inc.: Final Report" at 58 (Apr. 9, 2020), *available at* https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf (hereinafter "CMA Final Report").

[13]*Id.* at 21.

[14]*Horizontal Merger Guidelines* at § 2.2.2 (2010).

[15]CMA Final Report at 382 (quoting the Parties as stating that "it would be inappropriate for the CMA to continue its investigation, including consideration of remedies, without taking into account the implications of the Delaware Court judgment and ensuring that the outcomes of the US and UK processes are appropriately aligned" before explaining that "it is not incumbent on the CMA (and nor in some cases swill it be legally or practically possible, or desirable from a policy perspective) to come to the same substantive outcome as other jurisdictions, or vice versa.").

[16]*United States v. AT&T, Inc.*, 916 F.3d 1029, 1032, 2019-1 Trade Cas. (CCH) ¶ 80685 (D.C. Cir. 2019).

[17]*Amex* at 2286.

[18]*Id.*

[19]*Sabre* Decision at 70-71.

[20]*Id.* at 31.

[21]*Id.* at 87-88 (citing *U.S. v. Baker Hughes Inc.*, 908 F.2d 981, 988, 991 1990-1 Trade Cas. (CCH) ¶ 69084 (D.C. Cir. 1990)).

[22] *Id.* at 63-64.

VOIGT V. METCALF: DELAWARE COURT OF CHANCERY ADOPTS INNOVATIVE APPROACH TO ASSESSING ALLEGATIONS OF EFFECTIVE CONTROL

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In February, just before the M&A markets paused, the Delaware Court of Chancery left dealmakers and their lawyers with reading material. In *Voigt v. Metcalf*,[1] Vice Chancellor Laster described a sale process that would make a good issue-spotting law school exam, addressing issues of control, director independence, special committee process, recusal, exculpation, disclosure, standards of review, and the incorporation of books and records on a Rule 12(b)(6) motion.

Some of the Court's rulings offer a helpful review of core M&A doctrine. The Court's ruling that a 35% stockholder with certain governance rights under a Stockholders Agreement had effective control of the corporation deserves more careful study. The quantitative analysis of block size and its relationship to effective control, and the nuanced way in which the Court addressed various levers that a stockholder might use to exert power, may foreshadow an important trend. This article discusses those issues.[2]

Transactional Facts

CD&R acquires control of NCI, then separates its ownership from its control. Clayton, Dubilier & Rice ("CD&R") acquired a controlling stake in NCI Building Systems in 2009 and entered into a Stockholders Agreement in connection with that investment.[3] The Stockholders Agreement overlaid a contractual governance scheme on top of the default governance structures supplied by the company's charter, bylaws, and the DGCL.[4] In some respects, the Stockholders Agreement supplemented the default rules of board-centric, representative corporate democracy by giving CD&R the power to participate directly as a stockholder in corporate decisions.[5] As a majority stockholder, CD&R controlled all board and stockholder-level decisions.