

UK CMA Continues to Pursue Penalties for Incomplete Document Production

Decision highlights the need to coordinate document production in parallel cross-border merger control proceedings.

Key Points:

- Heightened CMA use and enforcement of statutory requests for information call attention to the importance of effective and efficient document production processes in both Phase 1 and Phase 2 merger inquiries, given the increasing informational requirements of UK merger control review.
- The CMA's increased willingness to penalise companies for procedural infringements underlines the importance of engaging early with competition agencies to define a detailed, but workable, methodology for document review and production, particularly in the context of parallel cross-border merger control proceedings.
- The CMA's enforcement position arguably overlooks significant practical challenges that arise in coordinating large-scale document reviews across multiple jurisdictions, which are exacerbated where merging parties work with multiple local counsel or global agencies' investigative timetables are not aligned.

On 27 September 2019, the UK Competition and Markets Authority (CMA) fined Sabre Corporation (Sabre) £20,000 for failing to produce certain documents in response to statutory information requests issued during the CMA's Phase 1 merger inquiry of Sabre's proposed acquisition of Farelogix Inc (FLX). (The [penalty notice](#) was published on 11 October 2019.) The penalty forms part of a broader pattern of CMA enforcement, which has sought to make greater use of its considerable procedural powers, both in terms of information-gathering and "hold-separate" orders aimed at preventing integration between the merging parties whilst the CMA is investigating a transaction. The CMA's recent practice has important implications for complex cross-border transactions that trigger UK merger control proceedings.

Background

In November 2018, Sabre announced it had agreed to acquire FLX. Both Sabre and FLX operate software platforms that connect travel agents with airlines and other providers of airline tickets (and ancillary content). Sabre notified the proposed transaction to the US Department of Justice (DOJ) in early January 2019, but did not notify the CMA. However, through its mergers intelligence function, the CMA subsequently identified the proposed transaction as warranting investigation. The CMA is currently undertaking a Phase 2 merger investigation into Sabre's proposed acquisition of FLX.

In March and April 2019, several months prior to launching its Phase 1 merger inquiry, the CMA issued notices under Section 109 of the Enterprise Act 2002 (the Enterprise Act) (Section 109 Notices). The CMA has the power formally to require companies (and/or individuals) to provide information (including internal company documents) or to give evidence in person. The Section 109 Notices to Sabre sought, among other materials, technical information and various pre-acquisition and post-acquisition strategy documents. The CMA and other competition agencies generally view internal documents (including strategy plans, board presentations, and internal correspondence) as reliable evidence of the merging parties' understanding of the relevant markets, their rivals' competitive position, and the possible effects of the transaction.

In response to the Section 109 Notices, Sabre provided around 6,000 internal company documents, a subset of the universe of documents produced in order to comply with the DOJ's second request. Subsequently, Sabre became aware that it had incorrectly classified certain documents submitted to the DOJ as legally privileged. Some of these documents had also been produced in response to the Section 109 Notices. In late June 2019, Sabre then submitted almost 450 additional documents to the CMA that had either not previously been provided or had been provided in a more redacted form.

Document Production Methodology

The CMA concluded that the additional documents had been produced almost two months late and issued a penalty notice for breach of the Section 109 Notices. The CMA rejected Sabre's submissions that it had complied with the Section 109 Notices or that it had a "*reasonable excuse*" for failing to comply, holding that:

- The Section 109 Notices required Sabre to produce all documents responsive to the Section 109 Notices, rather than all documents responsive to a particular review methodology.
- While the CMA is willing to discuss review methodology with merging parties, it cannot pre-emptively assure them that a methodology would elicit all potentially responsive materials and thereby discharge the parties' statutory obligations.
- Outsourcing the legal privilege review of internal documents to external US counsel was not a "*reasonable excuse*" for Sabre's omissions, as merging parties were obliged to ensure that a third-party review process was also suitable for UK proceedings. On the facts, Sabre's document review process was "*manifestly inadequate*", resulting in the over-designation of documents as legally privileged under UK disclosure rules.

Level of Penalty

Under the Enterprise Act, the CMA has discretion to set an appropriate and proportionate penalty, up to a statutory limit of £30,000, based on its view of the relevant circumstances. The £20,000 penalty imposed on Sabre — which was towards the upper end of the statutory scale — is the second-highest of the four penalties issued by the CMA for failure to provide information under the Enterprise Act. The first-ever penalty for failure to comply with a Section 109 Notice imposed by the CMA was in late November 2017, signalling what has become a pronounced shift towards more extensive use and enforcement of the CMA's information-gathering powers, particularly in Phase 1 merger inquiries. While a statutory right to appeal such penalties exists, it has never been exercised.

In setting the £20,000 penalty imposed on Sabre, the CMA appears to have attributed significant weight to deterrence, (*i.e.*, any procedural penalty must deter non-compliance by both the addressee, taking into

account its resources, and businesses generally), and to have been unconvinced by Sabre's explanation of the practical complexities and delays inherent in managing large-scale document reviews in complex transactions involving multi-jurisdictional merger control filings. In particular, the CMA was critical of Sabre's apparent failure to rectify the deficiencies promptly, informing the CMA only a month after the issue was first raised with the DOJ.

Implications and Practical Guidance

The CMA's decision, and the broader trends identified above, have important implications for merging parties and the CMA's role in global merger control investigations. In particular, these developments highlight:

- The increasingly stringent informational requirements of UK merger control review
- The CMA's increasing willingness to penalise companies for procedural infringements, especially for breaches of mandatory information requests
- The need for merging parties to limit the risk of inadvertent omissions by engaging early with the CMA (and, in parallel, with other reviewing agencies) to define a detailed, but workable, methodology for document review — including by preparing a UK-specific legal privilege log explaining, in non-privileged terms, which materials have been withheld

The CMA's enforcement position arguably overlooks significant practical challenges that arise in coordinating large-scale document reviews across multiple jurisdictions, which are exacerbated where merging parties work with several different local counsel or global agencies' review timetables are not aligned. These challenges include:

- Jurisdictional differences in legal privilege rules (the interpretation of which, even within a single jurisdiction, may evolve over time)
- Different approaches to the disclosure of materials in first- and second-phase reviews among competition agencies (who may also clarify the focus of their inquiries only at an advanced stage of the investigation, leading to the re-review of a large universe of potentially responsive materials)

Ideally, reviewing agencies will come to acknowledge these challenges and credit merging parties' good faith efforts to comply with burdensome requests. In the meantime, however, parties in parallel cross-border merger control proceedings would be prudent to coordinate their production of documents and engage pro-actively with competition agencies.

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