The UK Competition and Markets Authority: Outlier or Canary in the Coal Mine?

By John D. Harkrider

The UK Competition and Markets Authority’s (CMA) investigations into three recent technology mergers involving U.S. companies—Illumina/PacBio, Sabre/Farelogix, and Thermo Fisher/Roper—have drawn attention from antitrust practitioners on both sides of the Atlantic. Two of the mergers were abandoned before a final CMA decision and the other is still pending final CMA review and facing a litigation challenge in the United States. These cases are interesting both because they involve tech companies acquiring smaller rivals and because they indicate the CMA’s willingness to challenge transactions between U.S. companies where the UK has a relatively limited connection.

In all of these cases, the CMA publicly expressed a concern about the deals in advance of the Federal Trade Commission or Department of Justice. This may give the impression that the CMA is more aggressive than U.S. regulators. In reality, the procedural rules of the CMA—namely its requirement to publish a decision to move to Phase 2 relatively early in the merger review process—cause it to take public positions in advance of other regulators. But this does not necessarily mean that the CMA is taking more aggressive positions than other regulators. Indeed, the U.S. agencies ultimately sued to block both Illumina/PacBio and Sabre/Farelogix.

If the CMA is not a regulatory outlier, careful consideration of CMA merger review is useful to antitrust practitioners for a number of reasons:

- First, because the CMA is quite transparent as to the data it collects and its analysis of that evidence, it is possible to gain considerable insight into how the CMA can and potentially other regulators process market feedback, especially when customer reactions to the deal are mixed.
- Second, because filing with the CMA is voluntary, the decision on whether to include the CMA as a closing condition plays a prominent role in merger negotiations as the CMA typically permits parties to close into a hold separate, especially when the transaction is in Phase 1.
- Third, because it will be challenging to litigate a merger with the FTC or DOJ knowing that, even if one prevails, it will still be necessary to obtain clearance from the CMA. This means that CMA review potentially removes a very important, and in many respects foundational, component of American antitrust review—namely, independent de novo judicial review of merger decisions by the FTC or DOJ. While this may be a reasonable byproduct of parallel review where a regulator has a strong jurisdictional claim to review a merger—such as where a merger has an EC dimension—it seems less appropriate under principles of comity and fairness where the merger’s connection to a non-U.S. regulator is more tenuous.

I review the CMA’s investigations of these transactions below, with a particular focus on jurisdiction, the views of third parties, and the extent of coordination and convergence with U.S. agencies.

Illumina/PacBio

On November 1, 2018, Illumina, Inc. and Pacific Biosciences of California, Inc. signed an agreement for Illumina to acquire PacBio for approximately $1.2 billion. Illumina and PacBio are both “global suppliers of DNA sequencing systems” and associated peripherals to universities, laboratories, and research institutes. Illumina manufactures and sells short read DNA sequencing systems. PacBio manufactures and sells native long read DNA sequencing systems, which are materially more expensive than short read systems. The CMA announced the launch of its merger inquiry on April 17, 2019, and issued its Phase 1 decision on June 18, 2019.

In its Phase 1 decision, the CMA found that the merger should be referred to Phase 2 because it may result in a substantial lessening of competition (SLC) within UK markets, driven by horizontal unilateral effects related to “the supply of [next generation] DNA sequencing [(NGS)] systems worldwide.” The CMA combined short and long read systems into a single market because “the majority of third party submissions, industry reports and many of the Parties’ internal documents, all indicated a material (and increasing)

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The CMA pointed to the parties’ very high combined share (projected at 90–100 percent in the UK and 80–90 percent worldwide) in NGS systems as “prima facie raising competition concerns.”11 It acknowledged that Illumina’s existing market position accounted for the vast majority of the parties’ combined share, but found that PacBio’s current share failed to capture its competitive significance following the launch of its (faster and less costly) sequencing system a few months earlier.12 The CMA further found high barriers to market entry and expansion, also noting that alternative suppliers had relatively low market penetration compared to Illumina and less developed offerings than PacBio.13

The CMA referred the merger investigation to Phase 2 on June 27, 2019, and issued its Provisional Findings on October 24, 2019.14 In its Phase 2 Provisional Findings, the CMA found that the merger would result in a SLC due to horizontal competition concerns in the market for the supply of NGS systems in the UK.15 The CMA cited customer evidence that short and long read sequencing systems “are currently substitutable for at least some projects,” with customers noting “areas where long read sequencing had already displaced short read sequencing in their work.”16 The CMA also pointed to evidence from the parties’ internal documents, customers, and competitors that the parties would compete more closely in the future because of improvements to PacBio’s technology.17

On November 13, 2019, the parties responded to the CMA’s notice of possible remedies with a remedies offer, which Illumina revised on November 20, 2019.18 The CMA’s Remedies Working Paper provisionally concluded that prohibition of the merger would be “the least onerous effective remedy and [that it was] not disproportionate to the SLC and its adverse effects.”19

**Jurisdiction.** The CMA found jurisdiction to review the merger between the two U.S. companies on the basis of the share of supply test set out in section 23 of the 2002 Enterprise Act.20 Significantly, “the share of supply test is not an economic assessment [and] . . . the group of goods or services to which the jurisdictional test is applied need not amount to a relevant economic market . . . .”21 This gives the CMA significant flexibility to find that the share of supply test is met even when there are significant disputes on the issue of market definition. The transaction failed to meet the alternative ground for jurisdiction—the turnover test—as PacBio’s UK turnover did not exceed £70 million.22

Of some note, the parties did not contest jurisdiction in their merger notice, noting that the share of supply test was met. They conceded that even though they were “not active on the same product market, they [were] both suppliers of sequencing systems” in the UK, with a combined share of more than 25 percent, although PacBio’s share in the UK was “de minimis.”23

**Third-Party Views of the Merger.** Because the CMA’s process is transparent, we can see that the CMA is willing to block deals even when customer reaction is decidedly mixed.24 For example, the parties noted:

The CMA states that “roughly half of the customers we spoke to said that short read and long read are currently substitutable for at least some projects.” This is simply not true. . . . [O]ut of the 21 customers interviewed by the CMA for whom call notes were provided to the Parties’ counsels, 15, i.e., more than 70%, clearly stated that short read and native long read systems are not interchangeable for any project, application, or use case.25

The CMA’s decision acknowledged that “most customers . . . felt that PacBio’s offering would improve under Illumina.”26 Some customers, however, expressed concerns to the CMA about the merger, including that “Illumina could ’slow down’ development of PacBio’s technology, fail to develop PacBio’s technology fully, or be slow to release new technology.”27 Others “had mixed views [of the merger] as they felt that there may be a loss of competition, but that Illumina may be well-placed to develop PacBio’s technology.”28 Several third parties also submitted responses to the CMA’s Phase 1 Decision to Refer and Phase 2 Provisional Findings. One third party commented that the CMA’s view that short read and native long read technologies can be used interchangeably is “definitely not my experience or the experience of anyone in my extensive network.”29

The parties commissioned third party DeciBio to conduct a customer survey, which they submitted to the CMA as “evidence that short read and long read technologies are not interchangeable for any [of 41 identified] ‘use case[s].’”30 The CMA did not “place material weight on the survey in [the] provisional assessment, highlighting that, in its view, the quotes the parties shared did not reflect the nuance of the interview notes.”31 The CMA further stated that there were methodological issues with the survey, including that the aim of the survey was leading and the response rate was low (5 percent) and potentially not representative. In addition, the CMA noted that it was not contacted prior to the survey being conducted and had therefore been unable to comment on the survey’s methodology.32

**Coordination and Convergence with the United States?** Until December 2019, the CMA was the only regulator who had taken a position on the transaction, and a number of commentators found that the CMA’s conclusions seemed unusually broad.33 But on December 17, 2019, the FTC authorized an action to block the transaction, making it clear that the CMA was not alone in its concerns.34
Notably, the FTC complaint alleged not only a violation of Section 7 but also that Illumina had violated Section 2 of the Sherman Act by seeking unlawfully to maintain its NGS monopoly power by eliminating the nascent threat posed by PacBio. The complaint described Illumina as a monopolist in the NGS systems market with a U.S. market share exceeding 90 percent. According to the FTC Statement, “When a monopolist buys a potential rival, it can harm competition. These deals help monopolists maintain power. That’s why we’re challenging this acquisition.”

On January 2, 2020, the parties announced that they had terminated the merger agreement, “considering the lengthy regulatory approval process the transaction ha[d] already been subject to and continued uncertainty of the ultimate outcome.” Upon the parties’ abandonment of the merger, the CMA noted that it had been closely cooperating with the FTC throughout the regulators’ respective investigations.

**Sabre/Farelogix**

On November 14, 2018, Sabre GLBL Inc., a subsidiary of Sabre Corp., a technology and software provider to the global travel industry, announced its intent to acquire Farelogix, Inc., an airline technology solutions supplier, for approximately $360 million. Sabre distributes airline content to travel agents through its global distribution system (GDS), which aggregates flight pricing, availability, and other information from airlines and other third parties. “Farelogix supplies these services through a product that allows airlines to connect to travel agents directly.” Farelogix was instrumental in developing an XML messaging protocol called New Distribution Capability (NDC) that allowed airlines to provide travel agencies with real-time delivery of personalized ancillary offers for travelers, such as club access, wi-fi, and extra legroom. When Farelogix implemented NDC, the airlines’ fares typically were not compared against rivals. Sabre and other GDSs also offered NDC capabilities but, unlike with Farelogix, the GDS implementation of NDC typically compared one airline’s fares and ancillaries against competing airlines.

Sabre claimed that the deal would drive faster innovation in the highly competitive airline IT space. “The CMA’s mergers intelligence function identified [the] transaction as warranting an investigation,” and it announced the launch of its merger inquiry on June 21, 2019. The transaction was referred to Phase 2 on September 2, 2019.

In its Phase 1 decision, the CMA wrote that it believed that the merger may result in a SLC in the supply of services that facilitate the indirect distribution of airline content worldwide and the supply of non-core Passenger Service System (PSS) merchandising modules. The CMA’s Issues Statement provided that its inquiry at Phase 2 would focus on these areas and noted that its theories of harm centered on “the removal of Farelogix as a current and/or growing competitive threat to other providers, as well as an independent innovator in the industry.”

The CMA further noted that it would consider with respect to both theories of harm whether the merger would lead to “[h]igher prices and/or worse terms for airlines; and/or [s]lower rates of innovation and product development[,] [and] reduced product range or quality (compared to the situation without the merger).”

Responding to the CMA’s Issues Statement, the parties argued that the CMA mischaracterized the markets’ competitive conditions “by overestimating the Parties’ current and future development capabilities” and underweighting the innovative potential of an increasing number of competitors, including Amadeus and Travelport, among others. Sabre and Farelogix emphasized the transaction’s negligible increase in combined share and cited product descriptions and bidding data to show that the parties did not currently compete with one another at any significant level. Finally, they pointed to internal documents, industry participant statements, and economic data to argue that there was no realistic prospect of Farelogix achieving sufficient scale so that it could replace Sabre’s GDS services to any significant degree; that Farelogix is a complement rather than a potential substitute to market GDSs; and that therefore the CMA had no basis on which to find the merger anticompetitive.

As of the middle of January 2020, the CMA has not yet released its Phase 2 Provisional Findings. The transaction is pending and the review period has been extended to April 12, 2020.

**Jurisdiction.** Sabre and Farelogix are both U.S. companies. Farelogix has no revenues in the UK. The parties took the position that the CMA’s share of supply test had not been met—the only potential avenue for jurisdiction given the turnover test was not met—and the CMA therefore had no jurisdiction over the merger. At Phase 1, however, the CMA provisionally found that “it is or may be the case” that the test would be met based on (1) the share of “supply of services to British Airways that facilitate the indirect distribution of airline content,” and (2) “the Parties’ supply of services that facilitate the indirect distribution of airline content to travel agents in the UK.” With respect to the latter, the CMA considered that “because travel agents’ views (including those of UK travel agents) on the Parties’ products will ultimately affect the success of such products, the Parties in practice compete to distribute content to travel agents (including UK travel agents).”

The parties argued that it was “inappropriate for the CMA to determine whether the share of supply test is met based on the Parties’ proportion of sales to a single airline customer” and that Farelogix did not have any travel agent customers in the UK. The CMA justified its approach, noting that:

Within this context, the CMA will have regard to any reasonable description of a set of goods or services to determine whether the share of supply test is met . . . . [T]he CMA has a wide discretion in describing the relevant goods or services and . . . in applying the share of supply test, the CMA may have regard to value, cost, price, quantity, capacity, number
of workers employed and any other criterion in determining whether the 25% threshold is met. . . . [T]he share of supply test is not an economic assessment of the type used in the CMA’s substantive assessment and need not amount to a relevant economic market. 57

The CMA’s Issues Statement provided that it would consider the question of jurisdiction in the Phase 2 inquiry. 58 In their response to the Issues Statement, the parties pushed back strongly on the initial determination, describing the CMA’s application of the share of supply test in this case as “wrong in law, arbitrary and irrational.” 59 Commentators have noted the CMA’s “assertive” and “unusual” approach to jurisdiction. 60

Third Party Views of the Merger. The CMA’s Phase 1 decision acknowledged that “third parties[ . . . ] views on the [potential] impact of the Merger on the supply of non-core PSS merchandising modules were mixed.” 61 It explained that “some airlines did not have concerns regarding the . . . Merger on non-core PSS solutions and considered that there would be sufficient other providers left to constrain the merged entity.” 62 Still, “Others expressed concerns regarding the impact of the Merger if Sabre were to stop making Farelogix’s merchandising solution available on a PSS-agnostic basis . . . or were to stifle Farelogix’s capabilities more generally.” 63

Based on the CMA’s summary of third-party feedback, it appeared that views were similarly mixed on the impact of the merger on the supply of services that facilitate the indirect distribution of airline content were similarly mixed. The CMA noted that “a few airline IT services providers thought that non-GDS suppliers would be able to provide an effective constraint on the Parties post-Merger and that Farelogix did not have a ‘unique innovative capability.’” 64 On the other hand, several airlines expressed doubts about whether the non-GDS suppliers could replicate the competitive constraint on the merged entity that is currently exercised by Farelogix on Sabre. 65 Half of the travel agents consulted by the CMA considered the parties to compete closely or moderately and half considered them to compete weakly or not at all. 66

Most travel agents believed that the merger would allow for at-scale NDC technology distribution through Sabre’s GDS, satisfying travel agents’ expressed “interest in consuming NDC content through their existing GDS[s],” and “some airlines considered that the additional funding provided to Farelogix by Sabre could benefit innovation. Several third parties raised concerns regarding the removal of Farelogix as an independent competitor on innovation generally.” 67 However, the CMA also noted that “[m]ost air lines and service providers raised concerns that, post-Merger, the Parties would slow down NDC implementation and/or cease implementing NDC innovations after an initial minimum integration.” 68

While the CMA has not published its Phase 2 Provisional Findings as of this writing, Amadeus, a “strong competitor to both Parties” and one of the three largest GDSs in the global market, 69 submitted a public response to the CMA’s Issues Statement that is notable in its criticism of the regulator. Indeed, in its response, Amadeus argued that “[t]he Issues Statement contains fundamental errors of fact in respect of the innovation and technology landscape, including with respect to the role of Amadeus” 70 and noted that Amadeus did not recognize the CMA’s characterization of Farelogix “as an important innovator and significant disruptive force[].” 71

Coordination and Convergence with the United States? Again, the CMA in its Phase 1 decision was the first regulator to formally express detailed concerns about the deal. But on August 20, 2019, the DOJ sued to block the acquisition, 72 alleging that the transaction would allow Sabre “to eliminate a disruptive competitor.” 73 These concerns echoed those raised by the CMA. A bench trial began on January 27 in the U.S. District Court for the District of Delaware and the parties were awaiting a ruling as of the date of this writing. 74

Thermo Fisher/Roper

On April 24, 2018, Thermo Fisher Scientific, Inc., a manufacturer of transmission electron microscopes (TEMs), agreed to acquire Gatan from Roper Technologies, Inc. for $925 million. 75 Gatan manufactures peripherals for use with microscopes, including direct detection cameras (DD cameras) and filters for use with TEMs, and supplies them to Thermo Fisher and other TEM manufacturers. Thermo Fisher also manufactures DD cameras solely for use with its own TEMs. 76

The CMA announced it was opening a Phase 1 investigation into the merger of the two U.S. companies on October 24, 2018, and referred the investigation to Phase 2 on January 7, 2019. 77 In its Phase 1 decision, the CMA found that the merger gave rise to a “realistic prospect of a SLC” 78 due to vertical effects, arising from the merged entity foreclosing the supply of Gatan peripherals to Thermo Fisher’s TEM competitors. 79 The CMA indicated that “[t]he effect of this foreclosure would be to enhance Thermo Fisher’s market position in TEMs, where it is already very strong, reducing its incentive to innovate, increasing prices and reducing service and quality for customers.” 80

Its Phase 1 decision was also concerned with a SLC as a result of horizontal unilateral effects in the supply of DD cameras for use with TEMs worldwide. 81 The CMA found that the merged entity would “have a high combined share in the supply of DD cameras ([70–80]%, including Thermo Fisher’s self-supply), with only one other supplier of DD cameras remaining after the Merger,” noting “post-Merger[,] the Parties may have less incentive to innovate.” 82

The CMA published its Provisional Findings on April 17, 2019. 83 These included findings that the transaction may result in a SLC in the market for the sale of DD cameras and in the market for the sale of filters, and in foreclosure and information sharing in the supply of Gatan peripherals to TEM suppliers. 84 The CMA noted that Thermo Fisher and Gatan were the two largest suppliers of DD cameras, looking
to evidence from internal documents and third parties which “show[ed] that the Parties [were] close competitors.” The CMA found that the competition between the parties had driven quality improvements benefiting Thermo Fisher and non-Thermo Fisher TEM users. The parties argued that the merger—integrating a system supplier with a component supplier—would broaden their customer base and unlock important benefits for customers and scientific research, including increased and faster innovation than achievable absent the merger and less expensive and more user-friendly microscopes. They insisted that the deal would “allow more customers in the UK and globally to access [TEMs] to support their scientific research.” The parties described Gatan as “a supplier to Thermo Fisher rather than a significant competitor,” noting that there was very limited horizontal competition between the parties. They also argued that there could be no ensuing vertical effects of the deal because Thermo Fisher had already negotiated long-term supply agreements with its rivals that used Gatan peripherals, leaving “no scope for input foreclosure.”

On May 7, 2019, Thermo Fisher responded to the CMA’s Provisional Findings with a remedy proposal, including a divestment of Thermo Fisher’s DD camera business to a third party in the form of a technology license and a vertical remedy package. The parties argued that the proposal addressed the CMA’s provisional SLC findings while maintaining important customer benefits that would result from the merger. On June 10, 2019, however, the parties abandoned the deal.

**Jurisdiction.** As with Illumina/PacBio and Sabre/Farelogix, Thermo Fisher/Roper failed to meet the CMA’s turnover test for UK jurisdiction. The CMA again found jurisdiction over the merger on the basis of the share of supply test.

The parties’ initial submission at Phase 2 highlighted the transaction’s “limited UK nexus.” Both Thermo Fisher and Gatan are companies based in the US and the TEM market is global in geographic scope. Gatan’s other TEM customers (JEOL and Hitachi) are both based in Japan. Gatan’s annual UK turnover is only [REDACTED] and the Transaction is only caught by UK merger control on the basis of the share of supply test if Thermo Fisher’s internal (captive) sales of DD cameras are taken into account.

**Efficiencies.** While there is no final decision—since the parties abandoned the deal before one was issued—the Provisional Findings’ treatment of the efficiencies offered by the parties is instructive.

The CMA’s Merger Assessment Guidelines provide that “[e]fficiencies arising from a merger may enhance rivalry, with the result that the merger does not give rise to an SLC.” The parties argued that the merger would lead to customers benefiting from a number of efficiencies, including: (1) lower TEM prices for consumers, due to elimination of double-marginalization (EDM); (2) better products (as a result of better integration of peripherals) and reductions in the total costs of ownership (TCO) for Gatan filter users; (3) improved customer maintenance and support; (4) greater variety of products available to customers (due to product repositioning and improved product choice); and (5) sales expansion because Thermo Fisher would be able to offer cheaper and more accessible microscopes.

The CMA wrote that the parties’ cited efficiencies were not “timely, likely and sufficient to prevent an SLC” and also that some lacked evidentiary support that they were merger-specific. It also concluded that Thermo Fisher lacked “strong incentives to pass-on price reductions or quality improvements to end-customers” and had in fact a stronger incentive to improve its customer maintenance absent the merger.

Further, in the CMA’s view, there was insufficient evidence submitted by the parties to demonstrate that the merger would result in a substantial expansion of TEM sales.

The parties argued to the CMA that, post-merger, Thermo Fisher’s acquisition of peripherals from Gatan at cost would lead to cost savings that the company would pass through to customers as lower prices. The parties’ economists argued that the “reasonably conservative” “standard result [of EDM in a merger] is that a monopolist facing linear demand will pass through 50% of cost reductions.”

The CMA nevertheless rejected the parties’ assertion of EDM, noting that “Thermo Fisher [lacked] . . . a strong incentive to pass through a large share of cost savings to end-customers.” The CMA pointed to a lack of sufficient evidence from Thermo Fisher’s business plans of such an incentive and highlighted Thermo Fisher’s high market share in important downstream customer segments, high barriers to entry, and the lack of customer price sensitivity in the supply of TEMs. In the CMA’s view, all of this evidence suggested that Thermo Fisher had “limited incentive to pass-through a substantial portion of cost savings.”

Third Party Views of the Merger. The parties submitted to the CMA a customer survey as evidence that “the benefits identified by the Parties . . . would be valued by customers.” The customer survey was conducted by a third party, DJS Research. The CMA, however, criticized the survey for its small sample size, labeling its findings as “too limited to draw any broad conclusions regarding the set of potential TEM customers.” In assessing customer views of the merger, the CMA acknowledged that while “[there was] evidence that end-customers would value an integrated service and maintenance offering,” some customers expressed concerns about the deal.

**Coordination and Convergence with the United States?** Many believed that the CMA’s position in this case was out of step with the FTC, with one commentator reporting that “[it was] striking . . . that US regulators waved the deal through in June 2018 without any concerns[.]” But it is not clear that is actually what happened. Indeed, the FTC does not actually “clear” deals, and there may be situations where the FTC allows the HSR period to expire because the parties are unable to close. This could occur, for instance,
Is the CMA out of Step with Other Regulators?

While the CMA is viewed as a tough regulator that has led the charge in investigating a number of high-profile transactions, that perception may simply result from an expedited procedural timetable and publication obligation that causes the CMA to state its conclusions in advance of other regulators in many cases. Indeed, there is no evidence in any of the three deals profiled in this article that the positions of the CMA were out of step with the positions of the FTC or DOJ.

The more interesting observation is that the review of these and similar cases provide important insights into how the CMA (and potentially other regulators) think about arguments offered by the merging parties, especially in the context of high tech and “nascent” rivals (the latest focus of agencies worldwide). All three deals involved large companies with high market share acquiring smaller rivals that the CMA viewed as especially innovative. In all three cases, the parties argued that the purpose of the transaction was to help the acquiring company better serve its customers. While certain customers seemed to agree, others did not.

Though there was evidence in all three cases that the motivating factor behind the deal was to improve product quality, the CMA did not accept these arguments. It is particularly striking that the CMA credited economic evidence that the merger would create incentives to increase price, but did not credit economic evidence that reduced costs, through the integration of efficiencies, would create incentives to decrease price. The CMA noted in 

Thermo Fisher/Roper, for example, that there may not be an economic incentive to pass on efficiencies given the alleged lack of market competition, but this contention ignores the economic evidence that “the minimum amount of marginal cost savings passed on by a monopolist in terms of lower price is one-half of the cost savings,” a point argued unsuccessfully by the economists on behalf of the parties. This skepticism towards economic incentives to pass on efficiencies is likewise reflected by the views of U.S. regulators. The recently released draft DOJ and FTC Vertical Merger Guidelines provide that the agencies will not challenge a merger if the net effect of EDM means that the merger eliminates double marginalization, it is significant that the discussion of EDM is not included in the efficiencies section of the Draft Guidelines. This suggests perhaps that EDM may still have a place in the agencies’ equation to determine whether a price effect is likely in the first place.

Impact on Merger Agreements

The perception that the CMA raises unique deal risks is significant because the UK is a voluntary filing jurisdiction, which means that sellers will put some pressure on buyers not to have UK approval as a closing condition in deals where there is any risk of CMA review. This puts buyers in a difficult position because the CMA often investigates transactions proactively when no voluntary filing is initially submitted.

In the absence of a closing condition, the buyer may otherwise be forced to close, in all likelihood into a hold separate. This would put buyers at risk because the CMA has the ability to unwind transactions that it concludes create a SLC that cannot be otherwise remedied. Thus, it would not be advisable for the parties to neglect to put in a UK closing condition if they believe that the UK would have or assert a claim for jurisdiction, however tenuous. One possible solution is to consider a provision that states that only if the CMA contacts the parties and requests information or opens an investigation, will UK clearance become a closing condition.

Comity, Fairness, and De Novo Judicial Review

The role of the CMA also must be considered when thinking about a litigation strategy. Although it is difficult to litigate with the FTC or DOJ, it is at least possible to do so, and in some cases the merging parties have prevailed. Indeed, the U.S. agencies have not won a vertical merger challenge in over 40 years. Litigation is especially important where the agency is considering a theory that may appear novel to a court or where complainants have motivations that are different from those of consumers.

Generally, litigation is an option in a deal involving U.S. companies where there are no significant sales outside of the United States. But this is complicated by CMA review in a transaction where the parties meet a UK share of supply test, even where the target has very low (or no) sales in the UK. In such a case, even if the parties prevail in the U.S. courts, they will still need to resolve the regulatory concerns raised by the UK in order to complete their transaction.

In this context it should remembered that comity should not simply mean deference and consideration to the views of international agencies. Comity should include due consideration of the evidentiary and procedural rights of the parties. Vertical mergers and mergers involving the acquisition of an innovative company generally involve credible claims of product improvements, especially where the seller makes a complementary product or an important input. In such cases, it is very important to obtain and assess third-party discovery as to the reasons market participants oppose a deal. In
Thermo Fisher/Roper, for example, there is a fair question whether competing TEM manufacturers were genuinely concerned over input foreclosure or mostly concerned with competing against a more innovative post-merger rival.

Full discovery of all industry players is especially important in the case of two-sided markets. For example, in Sabre/Farelogix, are airlines genuinely concerned with losing negotiating leverage or are they instead concerned that the comparison shopping resulting from a GDS implementation of NDC would cause airlines to compete against each other on ancillaries? Will an independent Farelogix allow the airlines to negotiate lower rates that they will pass on to consumers or will it allow the airlines to pass costs onto travel agencies, which are ultimately passed on to consumers?

While the CMA seeks information from market participants, it is different in kind and scope than the information sought from the merging parties. In particular, it typically is a sampling of documents, as opposed to the broad document requests submitted to the parties. The view may be that the parties have an incentive to self-select documents to support their case, but the same is certainly true of competitors or, in the case of Sabre/Farelogix, airlines. Such questions can best be answered through full discovery of internal documents and cross-examination. While the U.S. process permits parties to conduct such third-party discovery, the CMA does not.

It should also be acknowledged that this concern over comity may not appear to be unique to the CMA in the sense that most jurisdictions do not have de novo judicial review. The difference is that those jurisdictions either have much higher jurisdictional thresholds or, if they have relatively low jurisdictional thresholds, do not have a history of stopping deals. It is the combination of all three factors—low jurisdictional threshold (including where the target has low, or no, sales in the UK), aggressive antitrust enforcement, and the lack of de novo judicial review—that raise issues of comity.

Conclusion

Regulatory clearance of mergers has become more difficult to achieve in both the UK and the United States, and this is especially true for large companies that seek to acquire smaller, innovative companies. While the CMA has been leading the charge in reviewing such deals, this role is more likely a result of procedural timing than a reflection of substantive views that are out of step with other regulators.

It also is important to note that while the CMA’s substantive analysis may converge with the FTC and DOJ, the possibility of CMA review can have a significant impact on deals where there is a litigation option. In cases where the parties litigate with the U.S. agency, especially where the CMA has a relatively limited claim for jurisdiction, one would hope that the CMA would carefully consider whether its findings could be aligned with those of the reviewing U.S. court. This is especially important because the parties challenging the decision in U.S. court have the ability to cross-examine complainants and obtain access to discovery of complainants’ internal documents, a procedural protection that is generally absent from regulatory review and even judicial review outside of the United States. This is especially important where the underlying case involves claims of product improvement or where complainants represent just one side of a two-sided market. In such cases, complainants’ concerns may not align with those of consumers, a fact that can be revealed through cross-examination and third-party discovery.

In sum, the CMA should be commended for its transparency as to its analysis and the evidence that it considers. However, its increasingly expansive approach to asserting jurisdiction also means that it needs to be careful about respecting the principle of international comity and the importance of convergence between international merger control regimes, which in the United States includes the courts as well as the agencies. This concern will only increase post-Brexit as the CMA reviews more and more deals where other regulators have a stronger claim for jurisdiction.

1 “[M]ost everyone agrees [the CMA] present[s] a growing risk to global deals that can’t be taken likely.” Curtis Eichelberger & Victoria Ibitoye, Commentary and Analysis, Comment: UK’s Competition and Markets Authority Leaving Adolescence, Becoming More Serious Threat to US Deals, MLEX Market Insight (Jan. 10, 2020).
7 Id. ¶¶ 3.14, 7.16.
10 Id. ¶ 3.
11 Id. ¶ 4(a).
12 Id. ¶ 4(a), 13.