

Class 26 slides

16. Sabre/Farelogix

Merger Antitrust Law

Georgetown University Law Center

Dale Collins

Sabre[®]



FARELOGIX

The deal and the parties

■ The deal

- Sabre will purchase Farelogix for approximately \$360 million in cash
- Announced November 14, 2018

■ The buyer: Sabre Corporation

- Delaware corporation headquartered in Southlake, TX
- Operates the largest GDS (“global distribution system”) in the United States
 - All major U.S. airlines distribute offers to travel agencies through the Sabre GDS
- 2018 revenues: \$3.9 billion



■ The target: Farelogix

- Delaware Corporation headquartered in Miami, FL
- Majority owner: Sandler Capital Partners V, L.P. (a private equity fund)
- Licenses software to airlines
- 2018 revenues: \$42 million
- Created Open Connect
 - Powered by “NDC” technology



Airline Ticket Distribution

Airline ticket distribution: The basics

- Channels of distribution to airline passengers
 - Airline websites and call centers (“direct channel” or, more colloquially, “airline.com”)
 - Traditional brick-and-mortar travel agencies (TTAs)
 - Online travel agencies (OTAs) such as Expedia, Travelocity, Priceline
- About 40% of airline bookings in the United States are made through travel agencies
 - Including most business travelers
 - Leisure travelers tend to use the direct channel

Airline ticket distribution: The basics

- “Global distribution systems” (GDSs)
 - Collect information from all airlines that provide service between two airports (“city-pairs”) so that travel agents or their customers may compare prices, schedules, and availability across airlines and make ticket purchases
 - Also can collect information about hotel, car rentals, cruises, and railways
 - Allow airlines to—
 - Send offers to travel agencies
 - Create bookings when agencies select an offer
 - Manage any changes to those bookings
 - Also provide travel agencies additional services and technology
 - Notably mid- and back-office software

Airline ticket distribution: The basics

- “Global distribution systems” (GDSs)
 - GDS functions
 1. “Offer creation”
 - Using an airline’s fare, scheduling, and availability information, the GDS can assemble the flight options that an airline can provide in response to a travel agent’s search
 2. “Normalization”/“Aggregation”
 - Aggregate offers created by different airlines into a unified display—key to comparison shopping
 3. “Offer acceptance”/“Booking”
 - Allows travel agent to accept an offer on behalf of a ticket purchaser
 4. Booking modification
 - Allows travel agent to make and manage changes to bookings
 - “Traditional” payment model
 - Airline pays GDS a “booking fee” for each flight the passenger takes
 - GDS pays travel agency an “incentive fee”
 - $\text{GDS net fee} = \text{Booking fee} - \text{incentive fee}$

Airline ticket distribution: The basics

■ “Global distribution systems” (GDSs)

□ There three major GDSs:

■ Sabre

- Established: 1964 (became independent in 2000)
- Main regions of operation: Americas
- 2018 Revenues: \$3.9 billion
- Global market share: 36.6%
 - Controls about 50% of airline bookings made through travel agents in the United States

The Sabre logo is written in a bold, red, italicized sans-serif font.

■ Amadeus

- Established: 1987
- Main regions of operation: Europe, Middle East, and Africa
- Global market share: 40.7%

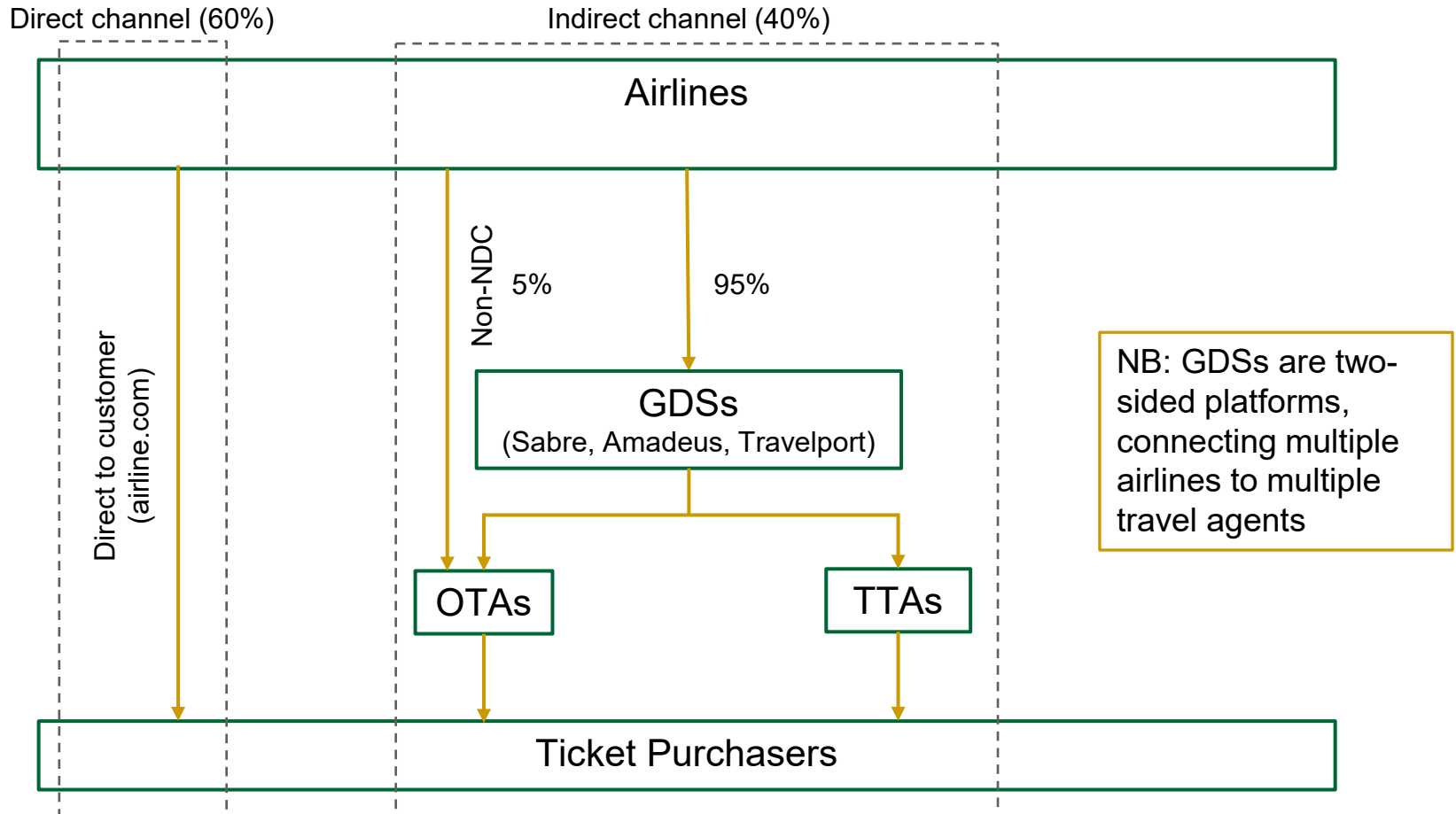
The amadeus logo is written in a blue, lowercase, serif font.

■ Travelport (the majority owner of Galileo, Apollo, and Worldspan)

- Established: 1997
- Main regions of operation: North America, Europe, Middle East, Africa, Asia-Pacific
- Global market share: 22.6%

The Travelport logo features the word "Travelport" in a blue, italicized sans-serif font, followed by a stylized graphic of a blue and green arrow pointing to the right.

Airline ticket distribution: The basics



Airline ticket distribution: The basics

■ Competition

- GDSs compete with each other for airlines and travelers
 - BUT competition is constrained: High costs of equipment/systems training/switching result in—
 - Most travel agencies use single GDS
 - Travel agency switching is rare
 - Implications
 - Travel agencies only infrequently play one GDS off another to get better incentive fees
 - Airlines must distribute through all three GDSs and cannot play one off another to get lower booking fees
- GDSs also compete with the direct channel (airlines.com)
 - May be the more important channel of competition

“New Distribution Capability” (NDC)

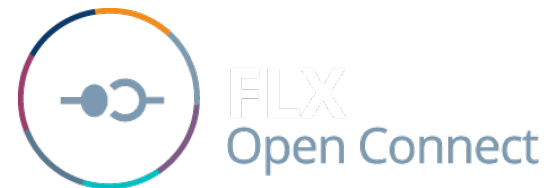
■ Problem

- The traditional GDS model only permits airlines to display prices and schedules and book reservations
 - Do not handle extra services such as upgraded seats, upgraded meals, extra baggage, or baggage insurance (called “ancillaries”—very important to airline profitability)
 - Do not allow airlines to make offers personalized to the particular traveler
 - Disintermediate airlines from information about customers

“New Distribution Capability” (NDC)

■ NDC

- Creates a new XML-based communications protocol for data exchange between airlines and booking platforms that allows airlines to send rich content and enable the sale of ancillaries and personalized offers by travel agencies either—
 - Directly from the airlines
 - Indirectly through GDSs
- Initially developed by Farelogix
 - Donated to the International Air Transport Association (IATA) in 2012
- IATA launched in 2015 as a public and open standard
 - IATA releases two versions on its website every year
 - First “commercially viable” version launched in late 2017
 - Available to any company to implement and use
 - More than 160 companies are “NDC certified”
- Farelogix
 - Sells an NDC product to airlines called “Open Connect” (also called “FLX OC”)
 - But holds no patents and has no trade secret protection covering FLX OC

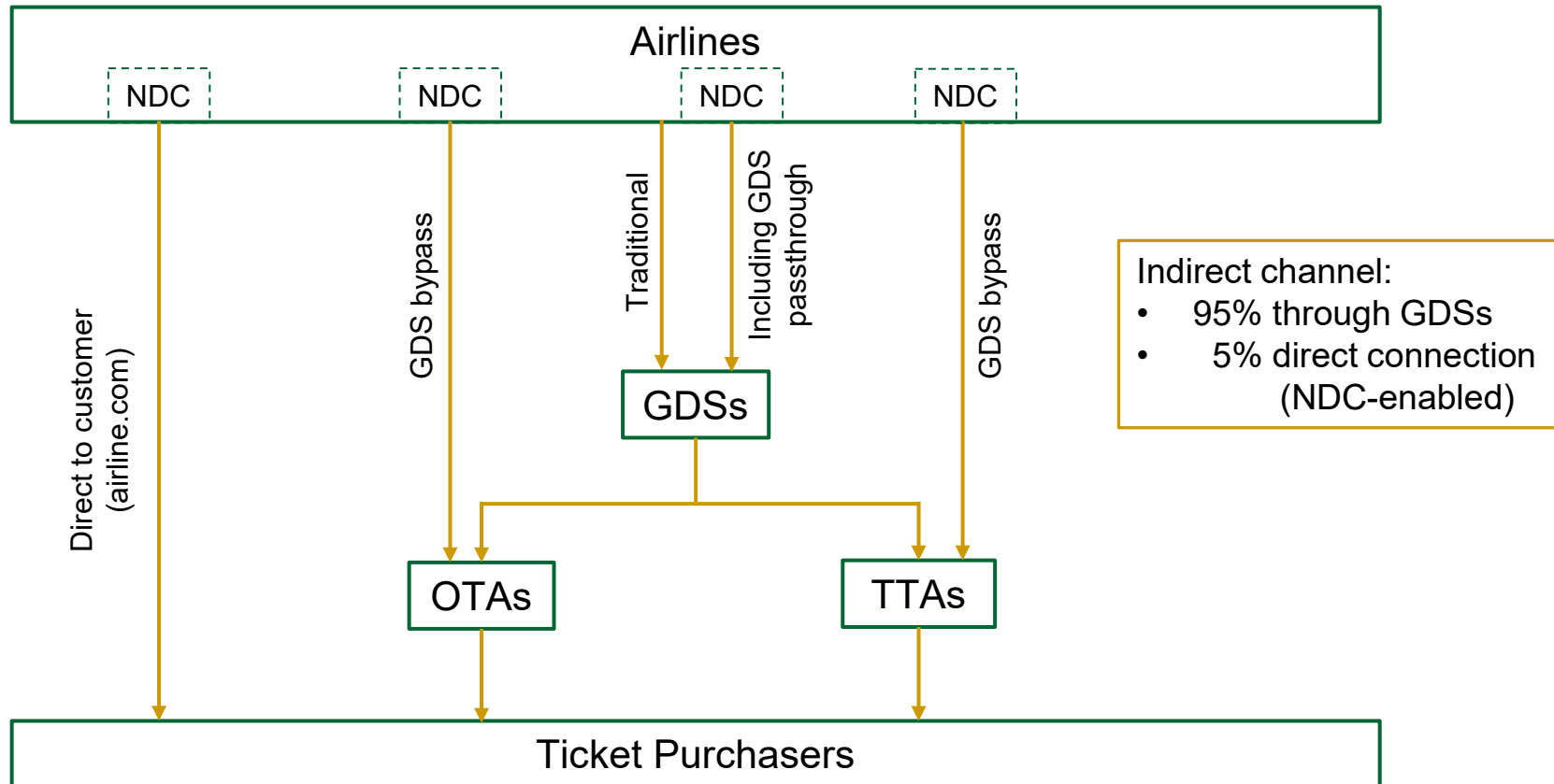


“New Distribution Capability” (NDC)

- NDC potential
 1. Can enhance ability of airlines to communicate attractive, personalized offers to travelers through GDSs
 2. Can be use by airlines to bypass GDSs

Airline ticket distribution: The basics

With “New Distribution Capability” (NDC)

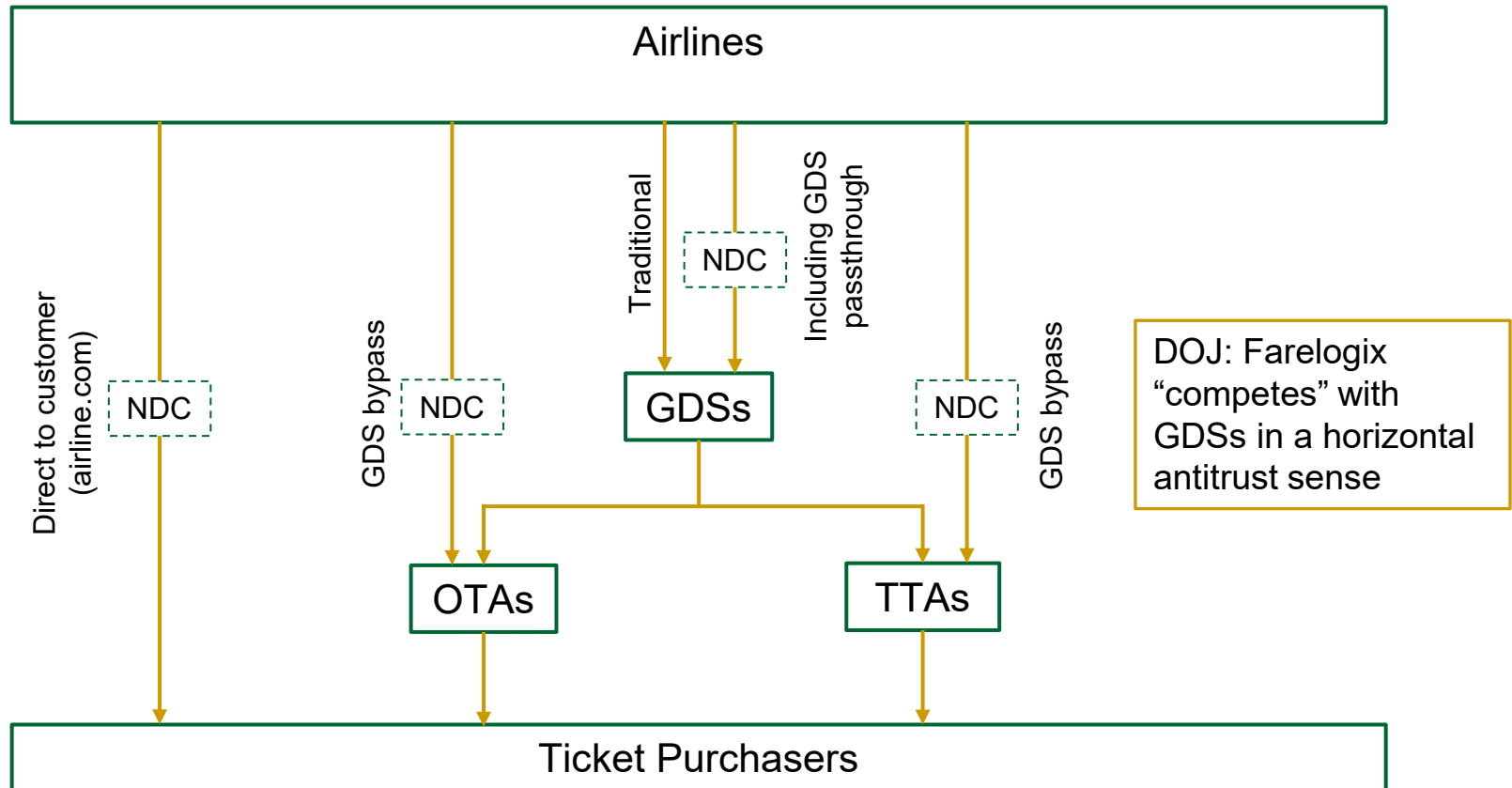


Note: NDC data may be sent to travel agencies either:

1. Directly (“GDS bypass”) → Allows for disintermediation of GDSs
2. Indirectly through GDSs (“GSD passthrough”)

Airline ticket distribution: The basics

DOJ Conception for Litigation

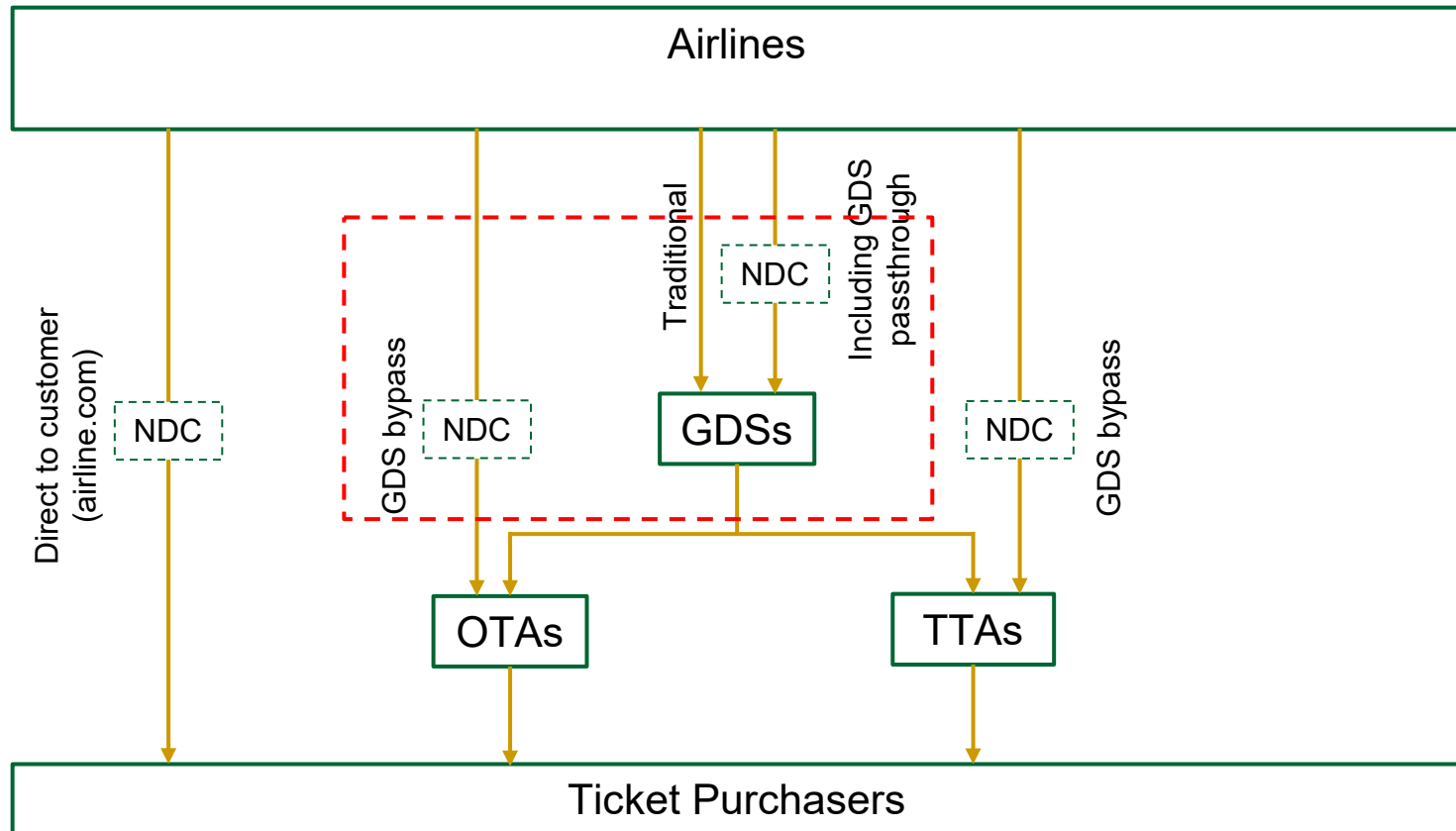


Note: NDC data may be sent to travel agencies either:

1. Directly (“GDS bypass”) → Allows for disintermediation of GDSs
2. Indirectly through GDSs (“GSD passthrough”)

Airline ticket distribution: The basics

DOJ Relevant Product Market: Booking Services Sold through OTAs

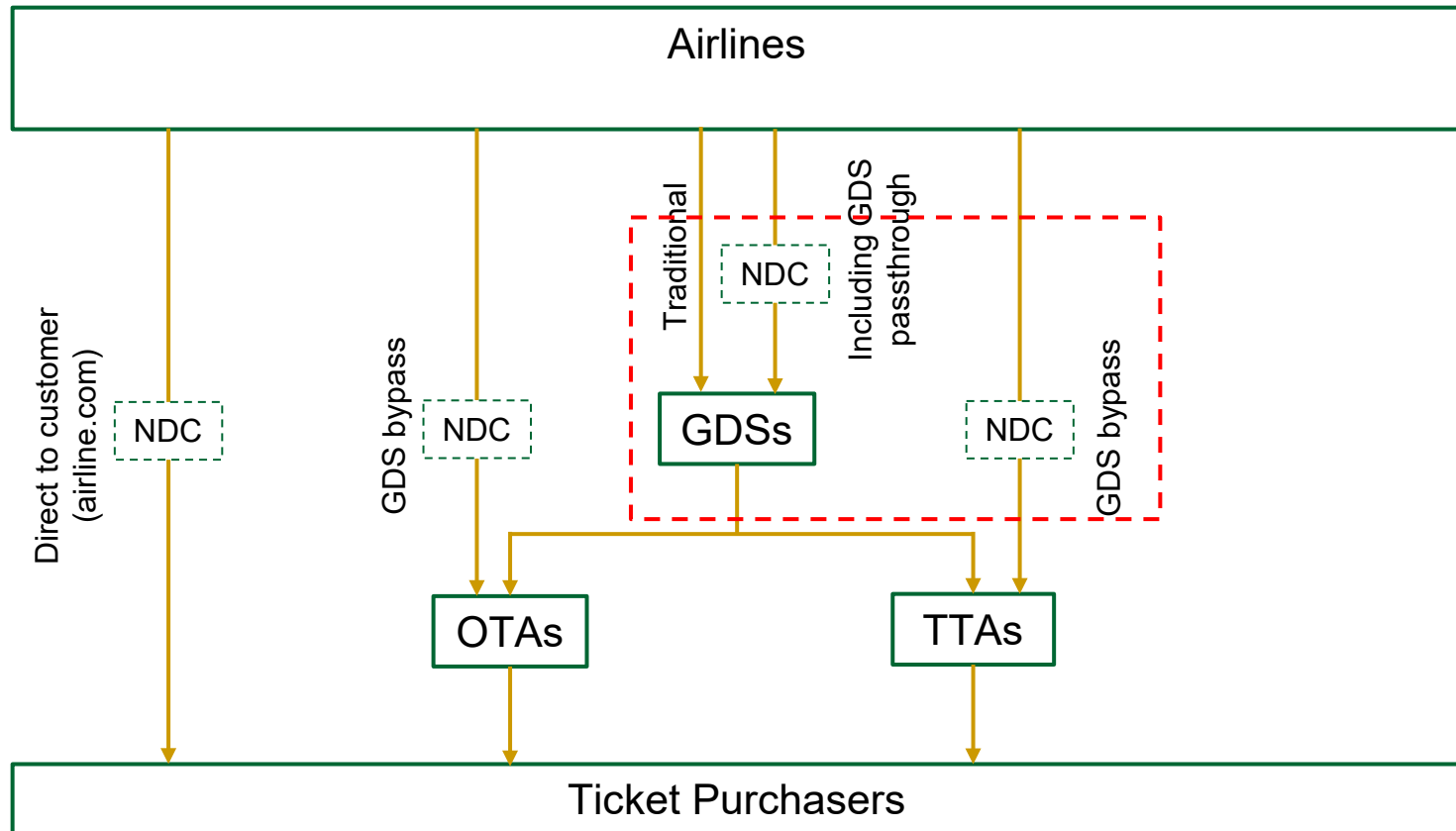


Note: NDC data may be sent to travel agencies either:

1. Directly ("GDS bypass") → Allows for disintermediation of GDSs
2. Indirectly through GDSs ("GSD passthrough")

Airline ticket distribution: The basics

DOJ Relevant Product Market: Booking Services Sold through TTAs

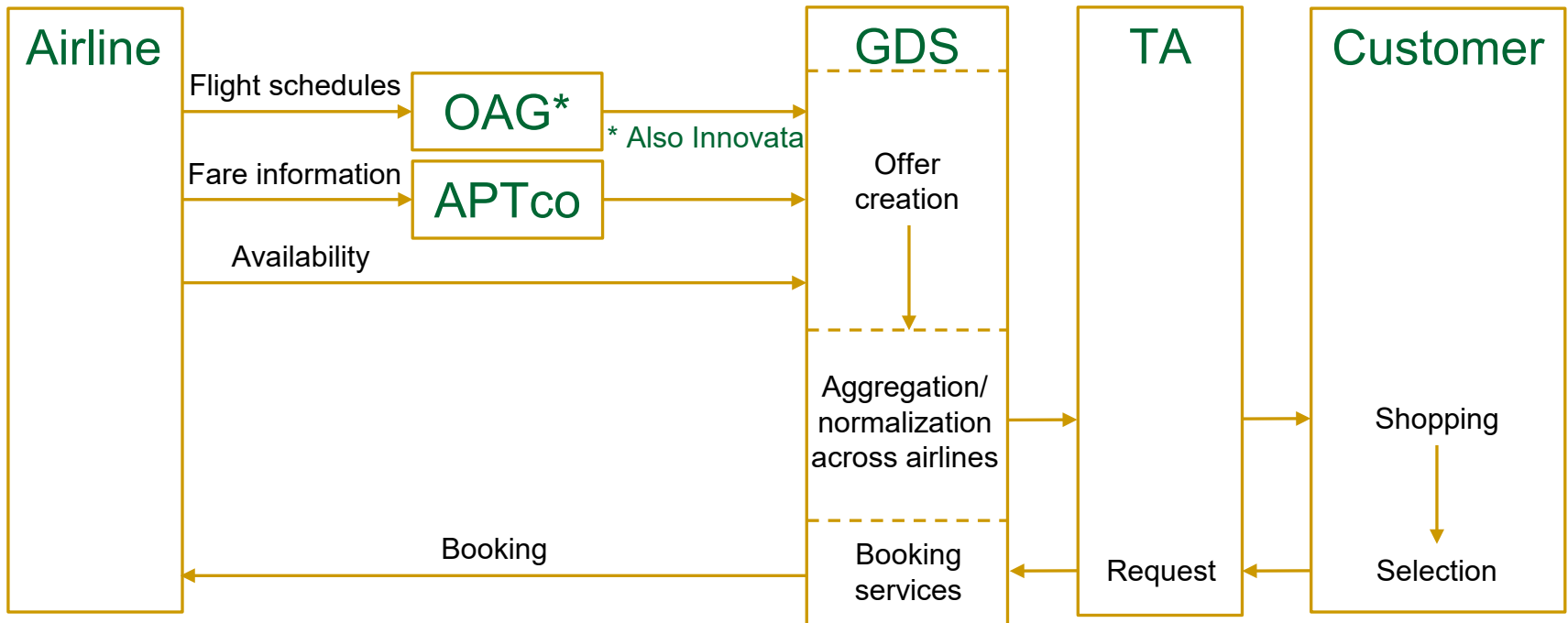


Note: NDC data may be sent to travel agencies either:

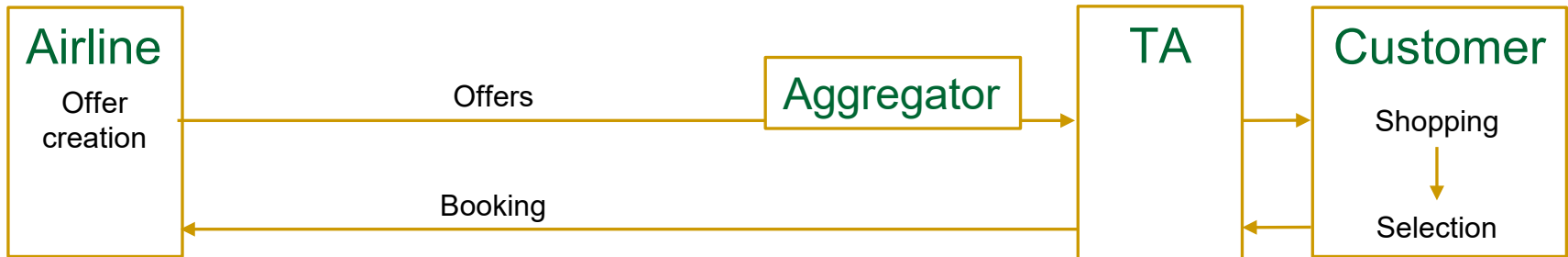
1. Directly (GDS bypass”) → Allows for disintermediation of GDSs
2. Indirectly through GDSs (“GSD passthrough”)

Traditional GDS v. NDC

Traditional GDS



NDC



The Complaint

The DOJ action

- Filed in the District Court of Delaware
 - Filed: August 20, 2019
 - Eight-day bench trial
 - Started: January 27, 2020
 - 25 hours allocated to each side
 - Finished: February 6, 2020
 - DOJ witnesses
 - 13 fact (many adverse)
 - 1 expert
 - Defense witnesses
 - 9 fact
 - + direct examinations of the adverse DOJ witnesses
 - 1 expert

Case 1:19-cv-01548-UNA Document 1 Filed 08/20/19 Page 1 of 21 PageID #: 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, <i>Plaintiff,</i> v. SABRE CORPORATION, SABRE GLBL INC., FARELOGIX, INC., and SANDLER CAPITAL PARTNERS V, L.P., <i>Defendants.</i>	Civil Action No.:
---	-------------------

COMPLAINT

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. Sabre, the largest global distribution system in the United States, and Farelogix, an innovative technology firm, compete to provide booking services to airlines. Sabre is the dominant provider of booking services in the United States, and Farelogix represents a significant and growing threat to Sabre's dominance. Farelogix has spurred innovation and brought more competitive pricing to an industry that has for decades been plagued by tepid competition and outdated technology. As Farelogix explains on its website: "The airline industry is undergoing core disruption," and "Farelogix and its technology solutions are at the center of this disruption." The proposed acquisition would wipe out this competition and innovation, harming airlines and American travelers.

District court

- Filed in the District Court of Delaware
 - Judge Leonard P. Stark
 - Born: July 5, 1969
 - Education:
 - University of Delaware (B.A., B.S., M.A.)
 - Magdalen College, Oxford (D. Phil.) (Rhodes Scholar)
 - Yale Law School (J.D.)
 - District court (D. Del.)
 - Magistrate judge: 2007-2010
 - District court judge: 2010-2014
 - Nominated by President Barack Obama
 - Chief judge: 2014-present



Parties

- Plaintiff: The United States
 - Through the Antitrust Division of the Department of Justice



Makan Delrahim
Assistant Attorney General

- Defendants:
 - Sabre Corporation
 - Sabre GLBL Inc.
 - Sabre's principal operating subsidiary and a signatory to the merger agreement
 - Farelogix, Inc.
 - Sandler Capital Partners V, L.P.
 - Owner of Farelogix and a signatory to the merger agreement

Experts

■ DOJ

□ Aviv Nero

- Professor of Economics, University of Pennsylvania
- Former DAAG for economics
- Experienced testifying antitrust economist
 - Frequently testifies for the government
- Affiliated with Cornerstone Research (economics consulting firm)



■ Sabre

□ Kevin Murphy

- Professor of Economics at the University of Chicago Booth School of Business
- MacArthur Fellowship, John Bates Clark Medal
- Experienced testifying antitrust economist
 - Frequently testifies for defendants
- Affiliated with Charles River Associates (CRA) (economics consulting firm)



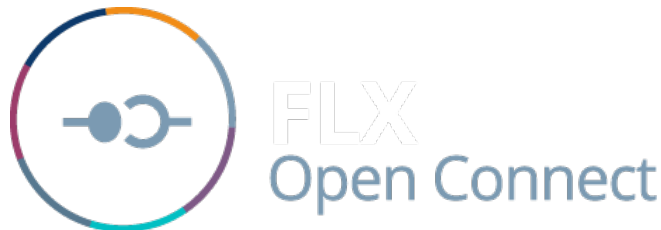
DOJ narrative

■ Sabre: The dominant firm

- The dominant provider of airline “booking services” in the United States
- Forms a three-firm oligopoly with Amadeus and Travelport
- All three GDSs have resisted innovation, are not responsive to changing demands for increased functionality, and charge airlines high prices
 - Sabre initially opposed adoption of NDC
 - Sabre now ostensibly accepts NDC and seeks to incorporate it into its GDS, but in fact continues to “slow roll” the technology

■ Farelogix: The disruptive competitor

- Threatens to erode Sabre’s dominance by offering NDC-based Open Connect
 - Allows airlines to bypass GDSs and connect directly to travel agencies
 - Provides airlines with a means to sell ancillaries and offer personalized passenger packets through travel agencies
 - By offering airlines an alternative, gives airlines leverage to negotiate better terms with GDSs



DOJ narrative

- The deal rationale (according to the DOJ)
 - For years, Sabre tried to limit Farelogix's ability to gain airline customers
 - Nonetheless, Farelogix managed to grow its booking services customer base to 15 airlines today
 - Faced with an increasing competitive threat from Farelogix, Sabre decided to acquire it
- Likely competitive effect of acquisition
 - Airlines will pay *higher prices* for GDS booking services
 - Airlines and ticket customers will face *lower quality* (less functional) and *less innovation* in booking services

DOJ case: Section 7 elements

1. Relevant product markets

- Booking services for airline tickets sold through traditional travel agencies
- Booking services for airline tickets sold through online travel agencies

Definition: “Booking services” are “IT services that allow airlines to communicate their fares and seat availability to travel agencies and to process the resulting orders.” (DOJ Compl. ¶ 1)

- Booking services traditionally have been provided by the GDSs

2. Relevant geographic market

- United States

3. PNB presumption

- Booking services for airline tickets sold through online travel agencies in the U.S.
 - Delta: >350
 - Postmerger HHI: >4000
- Booking services for airline tickets sold through traditional travel agencies in the U.S.
 - Delta: Not alleged
 - Premerger HHI: >3500

DOJ case: Section 7 elements

4. Supporting theories of likely anticompetitive harm

1. Farelogix's market share understates its competitive significance (DOJ Compl. ¶ 51)
 - Artificially low because of efforts by the GDSs to freeze it out
 - Will grow in the future as industry shifts from legacy to NDC technology
2. Unilateral effects
 - Farelogix's availability as an alternative has enable airlines to obtain lower prices from Sabre for booking services from TTAs and OTAs
3. Innovation effects
 - Farelogix has been a driver of innovation generally and in next-generation booking services in particular
 - In response, Sabre and other GDSs have adopted NDC and are developing next-generation booking services

5. No countervailing factors

- Barriers to entry and expansion preclude an entry defense
- No verifiable, transaction-specific efficiencies in the relevant markets sufficient to outweigh the transaction's likely anticompetitive effects

The District Court's Analysis

The framework

- Section 7 governs: Requires—
 1. Relevant product market
 2. Relevant geographic market
 3. Anticompetitive effect
 - Effect of the acquisition in the relevant market “may be to substantially lessen competition, or tend to create a monopoly”
- Incipency standard: “Reasonable probability”
 - Government not required to prove anticompetitive effects “with certainty”
 - “[B]ut it is ‘not enough’ to show ‘[t]he mere possibility of the prohibited restraint.’”
- Allocation of the burden of proof: Standard *Baker-Hughes* approach

Conclusions

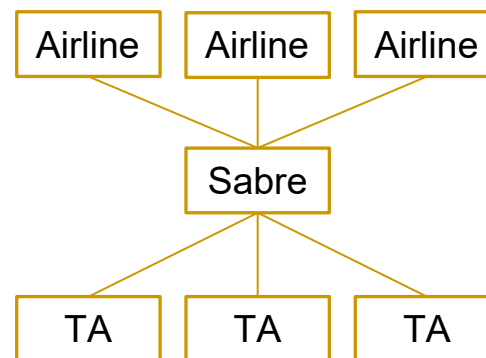
1. As a matter of antitrust law, Sabre and Farelogix do not compete in a relevant market
2. Even if Sabre and Farelogix competed in some sense, the DOJ's market analysis did not relate to proper relevant product and geographic markets and so failed to make out a prima facie case
3. Even if the DOJ had made out a prima facie case, Sabre/Farelogix rebutted it

One of the notable features of the trial was the juxtaposition of invariably excellent legal skill demonstrated by the attorneys combined with numerous witnesses who were not credible and/or not persuasive on multiple key points, as further explained below in the Court's findings of fact.¹

¹ United States v. Sabre Corp., 452 F. Supp. 3d 97, 105 (D. Del. 2020), *vacated*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

1. Sabre and Farelogix do not compete

- Under *Amex*, Sabre is a two-sided platform
 - A *two-sided market* or *platform* is an intermediary entity between two distinct user groups that—
 - allows the two groups to deal with one another, *and*
 - provides each group with network benefits
 - Here, Sabre facilitates transactions between airlines and travel agencies
 - Has standard cross-market demand features
 - Airline demand increases with the number of travel agencies using Sabre
 - Travel agency demand increases with the number of airlines using Sabre
 - Two-sided “transactions” platform under *Amex*
 - “[F]acilitate[s] a single, simultaneous transaction between participants”¹
 - In a prior case, the Second Circuit found that Sabre is a two-sided “transactions” platform²
 - DOJ agrees that Sabre is a two-sided platform



¹ *Sabre*, 452 F. Supp. 3d at 136 (quoting *Ohio v. American Express Co.*, 138 S.Ct. 2274, 2286-87 (June 25, 2018)).

² *US Airways v. Sabre Holdings Corp.*, 938 F.3d 43, 48-49 (2d Cir. 2019).

1. Sabre and Farelogix do not compete

- No contention that Farelogix is a two-sided platform
 - Only interacts with airlines
 - DOJ does not contend that Farelogix is a two-sided platform
- *Amex* governs
 - *Amex rule*: “Only other two-sided platforms can compete with a two-sided platform for transactions.”¹
 - Rejects DOJ arguments:
 1. *Amex* not limited to the credit card market
 2. The factual record—including the analysis of the defendants’ expert economist—showing that GDSs faces competition from one-sided services (the direct channel) “cannot change the binding precedential law issued by the Supreme Court”

¹ *Sabre*, 452 F. Supp. 3d at 138 (quoting *Ohio v. American Express Co.*, 138 S.Ct. 2274, 2287 (June 25, 2018)).

1. Sabre and Farelogix do not compete

- Interesting footnote
 - Judge Stark noted that, although the *Amex* rule was dispositive, he would continue the analysis:

The Court does so for multiple reasons, including the present lack of guidance from the Third Circuit on applying *Amex*, the possibility of appellate review in this case, the expedited nature of this litigation, and the enormous resources the parties and the Court have devoted to this case. **Additionally, 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 Sabre and Farelogix cannot compete in a relevant market is not a comfortable result.¹

¹ *Sabre*, 452 F. Supp. 3d at 139 n. 16 (emphasis added).

1. Sabre and Farelogix do not compete

- Separate point
 - *Court*: Even if Sabre and Farelogix compete—

Amex provides that if the government seeks to stop a GDS from buying a “one-sided competitor,” it must show that this purchase **will harm competition on both sides of the two-sided market**—i.e., the market for travel services to airlines and the market for travel services to travel agencies. Here, however, the government only attempted to demonstrate harm to the airlines side of the two-sided market. It has, thus, failed to meet its burden.¹

WDC: No authority was cited for this proposition and it is not the law. The *net effect* across both sides of platform must be anticompetitive, but there does not need to be harm on both sides of the market

- I read nothing in *Amex* that requires this conclusion
- So, for example, Amex’s anti-steering restraints could harm merchants (higher merchant discount fees) but benefit cardholders (greater rewards), but in some sense hurt merchants more than benefiting cardholders and so be anticompetitive
- On the other hand, it appears that at least some justices in *Amex* would have found the anti-steering restraints unlawful if and only if the *number* of Amex credit card transactions declined as a result of the challenged restraints
 - If the number of transaction declined, this would suggest that cardholders were harmed as well

¹ *Sabre*, 452 F. Supp. 3d at 138 (emphasis added).

2. The DOJ did not prove a prima facie case

- Court:
 1. The DOJ failed to prove a relevant product market as a matter of fact
 2. The DOJ failed to prove a relevant geographic market as a matter of fact
 3. The DOJ was not entitled to the *PNB* presumption

2. The DOJ did not prove a prima facie case

A. The DOJ failed to prove a relevant product market as a matter of fact

- Legal standards
 - *Brown Shoe* “outer boundary” and “practical indicia” tests
 - Recognizes HMT as informative but not essential
- Burden of proof on the government
 - Proof of a proper relevant product market is an essential element of the government’s prima facie case
- Court: DOJ’s “bookings services” product market “fails to correspond to the commercial realities”
 - i. Improper disaggregation of Sabre’s GDS offering into component parts
 - ii. OTA market fails to include closest close substitutes

2. The DOJ did not prove a prima facie case

A. The DOJ failed to prove a relevant product market

- i. *Improper disaggregation*: “DOJ failed to show that the Sabre’s GDS ‘booking services’ is a distinct product that generates separate demand”¹
 - Adopted the *Jefferson Parish* two-product “separable demand” test used in tying arrangements²
 - Nevo (DOJ’s expert) acknowledged that—
 - “Booking services” are not sold separately by GDSs, are available from them only as part of a bundle, and have no identifiable price
 - He did not quantify the “value” of the Sabre “booking services”

Fundamentally, Dr. Nevo gave the Court no solid basis to conclude that “booking services” is a product customers are demanding from Sabre.³

- *WDC*: If airlines that had adopted NDC-enabled applications (such as FLX Open Connect) were able to displace GDS booking services—or even were able to credibly threaten to displace GDS booking services—isn’t this ipso facto proof of separable demand?

¹ See *Sabre*, 452 F. Supp. 3d at 140.

² *Id.* at 140 n.17; see *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21-22 (1984) (“Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.”) (footnote omitted).

³ *Sabre*, 452 F. Supp. 3d at 140.

2. The DOJ did not prove a prima facie case

A. The DOJ failed to prove a relevant product market

ii. *Fails to include all close substitutes:*

Substantial evidence supports the Court's conclusion that **airline.com** is reasonably interchangeable with the travel services the Sabre GDS offers through OTAs. End-user travelers switch back and forth between OTAs – like Expedia and Priceline – and airlines' own websites. Defendants' expert, Dr. Murphy, persuasively explained how airline.com is the "closest alternative consumers can see" to OTAs. He added that airline.com is the "most important short-term constraint" on GDS fees, because airline.com is only "a mouse click away" from OTAs.¹

- Further, evidence showed that airlines view OTAs as competitors with airline.com and believe they can steer at least a substantial portion of OTA sales to their own direct sales channels
- *Court:* Under *Brown Shoe's* "outer boundary" and "practical indicia" tests, airline.com must be included in relevant product market with GDS booking services sold to OTAs

Court: DOJ failed to make out a prima facie case of its alleged product market definition

¹ *Sabre*, 452 F. Supp. 3d at 141 (emphasis added; record citations omitted).

2. The DOJ did not prove a prima facie case

B. The DOJ failed to prove a relevant geographic market

- ❑ Legal standard
 - “The relevant geographic market is comprised of the area where customers look to buy a seller’s products or services.”
- ❑ Burden of proof on the government
 - Proof of a proper relevant geographic market is an essential element of the government’s prima facie case
- ❑ The DOJ’s alleged geographic market
 - Dr. Nevo: The relevant geographic market is “U.S. point of sale” for booking services, that is,
 - ❑ For TTAs, those travel agencies located in the U.S., and
 - ❑ For OTAs, those travel agencies having an IP address in the U.S.

2. The DOJ did not prove a prima facie case

B. The DOJ failed to prove a relevant geographic market

- Court:
 - Under the DOJ's theory, the relevant geographic market should related to where suppliers sell booking services to airlines, not to travel agents
 - Airlines purchase "booking services" worldwide
 - Farelogix also sells Open Connect worldwide
 - Of Farelogix's 15 customers, 13 are located outside the United States
 - No evidence that Farelogix price discriminates depending on location of airline customer
 - Farelogix competes with foreign competitors in bidding to supply U.S. airlines with "booking services"

Court: DOJ failed to make out a prima facie case of its alleged geographic market definition

- WDC: What is the logic here?
 - No real explanation provided in the opinion
 - One likely possibility stems from the DOJ's position that the transaction is horizontal:
 - Although travel agencies buy "booking services" from Sabre,
 - Farelogix does not sell to TAs, and
 - the relevant market in an allegedly horizontal merger requires the products of both parties to be in the market
 - Therefore, sales of booking services to TAs cannot be the basis for finding the relevant market

2. The DOJ did not prove a prima facie case

C. Assuming its alleged market definitions, the DOJ failed to prove the requisite anticompetitive effect

1. The DOJ failed to predicate the *PNB* presumption

- DOJ's evidence of market shares
 - 2018 market share data
 - Sabre's projections for Farelogix's growth
 - Farelogix's own projections
- *Court*: Rejected market shares
 - Two errors
 - a. DOJ failed to include airline.com in its "OTA booking services" market
 - b. DOJ attributed revenues generated by GDS passthrough to Farelogix rather than the GDS in the "TTS booking services" market even though the GDS controls the sale and the commercial relationship
- *Court*: DOJ not entitled to *PNB* presumption
 - When market share are recalculated after correcting these errors, HHIs fail to predicate the *PNB* presumption in either alleged market

2. The DOJ did not prove a prima facie case

C. Assuming its alleged market definitions, the DOJ failed to prove the requisite anticompetitive effect

2. DOJ failed to prove that barriers to entry prevent competition to Farelogix

- DOJ identified three barriers to entry
 - a. The technological challenge of building an “NDC booking services solution”
 - b. The “need for a good reputation and track record serving major airlines;” and
 - c. GDS contract provisions that discourage airlines and travel agencies from switching to “new entrants”
- Court: Rejected
 - No technological barrier
 - Open standard
 - Not difficult to program
 - Datalex and Amadeus have successfully built and marketed NDC API services for airlines
 - Delta, British Airways, and Air France have built NDC APIs for themselves
 - Farelogix competes with at least eight other companies to supply NDC API services
 - “The large number of suppliers who have won bids further suggests that GDS contract provisions have not shut out new NDC API providers.”¹

¹ *Sabre*, 452 F. Supp. 3d at 145-46.

2. The DOJ did not prove a prima facie case

C. Assuming its alleged market definitions, the DOJ failed to prove the requisite anticompetitive effect

3. DOJ failed to prove that Sabre would foreclose competitors or increased prices of Farelogix

- DOJ's evidence
 - Sabre viewed Farelogix as a competitive threat
 - Some at Sabre viewed the acquisition of Farelogix as a way to neutralize that threat
 - Other evidence suggested that Sabre would have an incentive postmerger to—
 - Increase Farelogix's prices
 - Reduce access by airlines to Farelogix
 - Reduce the rate of innovation
- Court: Rejected on the weight of the evidence
 - Sabre intends to continue offering Open Connect
 - Sabre has publicly committed to continue offering Open Connect to airlines at current or reduced prices
 - No evidence that anyone at Sabre or Farelogix has taken steps to increase prices postmerger
 - In any event, prices are constrained by competition and threat of airline self-supply
 - Will also integrate Open connect into Sabre GDS platform
 - The future of airline ticket distribution is more likely to be characterized by GDS passthrough than by GDS bypass
 - Several industry participants have applauded the deal for this reason

2. The DOJ did not prove a prima facie case

C. Assuming its alleged market definitions, the DOJ failed to prove the requisite anticompetitive effect

4. DOJ failed to prove that the merger will harm innovation

- DOJ's evidence

DOJ offers nothing more in support of its contention than vague theories from Dr. Nevo, who testified that the merger involves “taking an innovative firm that has been driving, driving ahead, creating the industry shakeup, and putting that under a firm that does not have the same incentive.”¹

- Court: Rejected on the weight of the evidence

- While it is undisputed that Farelogix developed the original NDC schema and has been an innovator, no party offered evidence that Farelogix has more recently created or introduced innovative products or services
- No evidence that Sabre is purchasing Farelogix to reduce innovation
- Some industry witnesses predicted that the deal will increase the rate of innovation in GDS platforms
- Farelogix CTO credibly predicted that the merger will allow him to develop new projects using artificial intelligence, because he would have access to Sabre's resources, including data, the lack of which was previously a “roadblock”
- The public availability of the NDC schema has allowed (and will continue to allow) new firms to enter the market and compete successfully with Open Connect

¹ *Sabre*, 452 F. Supp. 3d at 145-46.

Conclusion

The Court recognizes that the outcome here may strike some, including the litigants, as somewhat odd. On several points that received a great deal of attention at trial— whether Farelogix is a valuable company enjoying relative success in the market, whether Sabre and Farelogix compete, whether Sabre understands GDS bypass is a threat, whether Sabre stands to lose revenue even from the expansion of GDS passthrough, and Sabre’s motivation for its proposed acquisition of Farelogix—the Court is more persuaded by DOJ than by Defendants. This is largely due to the surprising lack of credibility on these points of certain defense witnesses, including Sabre CEO Menke, Sabre deal leader Boyle, and Farelogix CEO Davidson.

Despite these findings and conclusions, however, Defendants have won this case. This is because the burden of proof was on DOJ, not Defendants. Defendants opted to tell the Court a story that is not adequately supported by the facts, but it was their *choice* whether to do so, and their failing does not determine the outcome of this case. Instead, it is DOJ which, under the law, has the obligation to prove its contention that the Sabre-Farelogix transaction will harm competition in a relevant product and geographic market. DOJ failed. It based its case on the expert analysis of Dr. Nevo, but that analysis—including Dr. Nevo’s explanation and defense of it— was simply unpersuasive. Unlike Defendants’ evidentiary failings, DOJ’s are dispositive.¹

Judgment entered for Defendants and against Plaintiff—April 7, 2020

¹ *Sabre*, 452 F. Supp. 3d at 148-49.

Aftermath

■ DOJ

- April 8, 2020: Filed notice of appeal “to protect its appellate rights, and to give the Solicitor General time to review the decision and determine whether to authorize the appeal, and whether to seek interim equitable relief.”

■ UK Competition & Markets Authority

- April 9, 2020: Issued its final report finding a violation
 - Found that Sabre’s GDS and Farelogix’s NDC-based solutions compete primarily on the airline-facing side of the market, stressing that “the option that NDC [solutions] give airlines to directly manage the travel agent relationship, as an alternative to the GDS performing this role, is an important part of the competitive dynamic between these products”
 - Concluded that the merger may be expected to result in a substantial lessening of competition in the supply of distribution solutions to airlines on a worldwide basis (including in the UK) in violation of the Enterprise Act 2002
- June 19, 2020: Final prohibition order (for 10 years)
 - Sabre has filed an appeal on jurisdictional and substantive grounds

■ Sabre/Farelogix

- May 1, 2020: Sabre and Farelogix terminate their merger agreement
- June 16, 2000: Accelya agrees to buy Farelogix

Aftermath

- DOJ appeal
 - July 20, 2020: Third Circuit finds the DOJ's motions to dismiss for mootness and to vacate the district court's decision

The Motion to Vacate the District Court's Decision and Order Granting Judgment to Defendants is granted because Sabre Corporation mooted the parties' dispute by terminating its acquisition of Farelogix, Inc. See *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (explaining that vacatur is merited "when mootness results from unilateral action of the party who prevailed below"). By granting this motion, we do not hold that the government's direct or indirect action can never cause mootness in merger-abandonment cases. We also express no opinion on the merits of the parties' dispute before the District Court. See *id.* at 28 ("We again assert the inappropriateness of disposing of cases, whose merits are beyond judicial power to consider, on the basis of judicial estimates regarding their merits."). As such, this Order should not be construed as detracting from the persuasive force of the District Court's decision, should courts and litigants find its reasoning persuasive.¹

¹ Order, *United States v. Sabre Corp.*, No. 20-1767 (3d Cir. July 20, 2020), *vacating* 452 F. Supp. 3d 97, 105 (D. Del. 2020).