



The Future of Airline Booking: A Bumpy Ride for the Sabre-Farelogix Merger

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Advances in airline booking technology are bringing major changes to how air carriers and their passengers book air travel. Today, most airline bookings are made utilizing decades-old systems known as global distribution systems (GDSs). However, technological changes in the last decade have created alternatives to the old way of booking

air travel through GDSs. Airlines are generating a growing percentage of travel bookings outside GDSs through their own websites and through direct connections with travel agents and passengers using an alternative solution called New Distribution Capability (NDC). Farelogix Inc. is the leader in the emerging NDC industry and sells its solutions only to airlines. This article discusses the unsuccessful efforts of Sabre Corporation to acquire Farelogix.

Sabre is a leading GDS, along with Amadeus and Travelport. In November 2018, Sabre agreed to buy Farelogix for \$360 million. The U.S. Department of Justice (DOJ) and the United Kingdom's Competition and Market Authority (CMA) both challenged the merger, believing it likely the combination would harm competition.

DOJ's challenge was unsuccessful. In early April 2020, a federal district court in Delaware concluded that, as a matter of antitrust law, Sabre and Farelogix did not compete in the same relevant market because Sabre operates as a "two-sided platform" and Farelogix only serves one side of the platform. That federal court ruling, *United States v. Sabre Corp.*, would have permitted the merger to proceed.¹ But two days later, the U.K. CMA blocked the merger. The CMA focused on the anticompetitive effects in two markets and found that the merger would cause harm to both markets. Sabre and Farelogix abandoned their deal at the end of April, when their merger agreement expired. Sabre has appealed the CMA decision. DOJ originally appealed the U.S. district court decision but then filed a motion to vacate the decision on mootness grounds, and the Third Circuit agreed to vacate the decision because the merger had been terminated.

NDC technology will continue to have a strong effect on the airline booking sector generally and GDS firms specifically. As of this writing, Farelogix already is under contract to be acquired by another major leader in technology products and services for the travel and transport industry, as discussed below.

Airline Travel Booking and Emerging NDC Technology

A GDS functions as a transactional platform to connect travel suppliers such as airlines, hotels, and rental car businesses with travel agencies, and it serves as an intermediary between airlines and travel agents. A GDS is at least in part a "two-sided" platform because the GDS "offers different products or services to two different groups who both depend on the platform to intermediate between them," in the words of a recent U.S. Supreme Court decision.² GDSs allow airlines to distribute offers to travel agencies, create bookings when the travel agency selects an offer, and administer any changes to bookings. On one side, a GDS company provides distribution services to airlines, which it charges for these services; on the other, it organizes data and completes the booking connection for travel agents, which it pays to use its GDS.

There are three major GDS companies: Sabre, Amadeus, and Travelport. Sabre holds approximately 50 percent of the GDS market and generates revenues of nearly \$4 billion annually from fees charged to airlines.³

The new technological solution, NDC, permits airlines to "bypass" or pass through GDSs and allows an airline to create its own offer instead of relying on the GDS for offer creation. Using the NDC solution, airlines can give consumers greater flexibility by presenting customizable and personalized offers that include such options as bundling the fare price with early boarding, seat upgrades, early parking, and meal options. Some airlines favor NDC solutions over GDSs because NDC helps airlines increase ancillary revenues and decrease fees paid to GDS providers.⁴ It has been estimated that airline ancillary revenue grew from \$18 billion in 2011 to \$57 billion in 2017, and more since then.⁵

Farelogix offers its NDC solution only to airlines through its Open Connect (FLX OC) solution. FLX OC connects airlines directly to customers and to travel agencies, allowing airlines to bypass GDSs. Airlines use FLX OC through both distribution channels. In the direct channel, airlines use FLX OC to distribute bookings straight to travelers through, for example, the airlines' own websites. FLX OC is also used in the indirect channel, where airline content is sold through intermediaries such as travel agencies. The indirect channel allows airlines to reach travel agencies by sending offers, receiving bookings, and making changes to bookings.

An important difference between GDS and NDC service is that a GDS intermediates between two sides

in the industry, between airlines and travel agents, while NDC connects airlines directly to passengers or travel agents. This distinction between “two-sided” and “one-sided” platforms was critical to the outcome of the U.S. antitrust challenge.

U.S. District Court Rejects DOJ Challenge to Sabre-Farelogix Merger

Sabre’s agreement to acquire Farelogix, announced in November 2018, was reviewed by the DOJ Antitrust Division. After an eight-month investigation, in August 2019, DOJ brought an enforcement action to block the deal, filed in the U.S. District Court for the District of Delaware. DOJ’s complaint alleged that the merger would “wipe out this [NDC] competition and innovation, harming airlines and American travelers.”⁶ The complaint further asserted that the merger would reduce competition in “airline booking services” and lead to an increase in prices.

District Court Judge Leonard Stark held an eight-day bench trial and, in April 2020, issued his decision rejecting DOJ’s request for an injunction to block the merger.

It is striking that the court made this ruling after finding that Sabre and Farelogix do, in fact, compete. The court noted that “as a matter of real-world economic reality . . . 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.”⁷ The court cited several examples of “real-world economic reality,” including the following:

Notwithstanding Defendant’s 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. . . .

Farelogix identified Sabre as a “key competitor” in order delivery and offer management. . . .

AA [American Airlines] has described Farelogix direct connect technology as “providing a low cost substitute for GDSs” . . . (describing Farelogix as “the GDSs’ leading competitor”). . . .

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 [GDS pass-through], are threats to Sabre’s traditional revenue flow.⁸

Despite these findings, the district court ruled against the government. The court held that DOJ had failed to identify a relevant market in which Sabre and Farelogix compete. In making this determination,

Judge Stark relied heavily on recent federal court antitrust decisions on competition in “two-sided” markets that held that proving an antitrust violation requires showing anticompetitive harm on both sides of the market. As Judge Stark found, Sabre is a two-sided platform, but Farelogix is one-sided: Sabre “only competes with other two-sided platforms, but Farelogix only operates on the airline side of Sabre’s platform.”⁹

The court relied on the combination of the Supreme Court’s 2018 *Ohio v. American Express* (*Amex*) decision¹⁰ and the Second Circuit’s 2019 holding in *US Airways v. Sabre Holdings Corp.*¹¹

In *Amex*, the Supreme Court addressed “anti-steering” provisions in contracts between American Express and participating merchants in a DOJ challenge that the contract provisions violated section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade. These provisions banned merchants from steering customers to use other credit cards with lower transaction fees. The Court found that credit card networks operate as two-sided platforms and that a credit card network cannot make a sale to one side of the platform without instantaneously making a sale to the other side of the platform. Therefore, the Court held, “courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market” because evaluating both sides of the platform is necessary to accurately assess competition.¹²

In the unrelated case of *US Airways*, the Second Circuit found that Sabre’s GDS operates as a two-sided platform. US Airways had sued Sabre, asserting that certain contractual provisions between US Airways and Sabre created unlawful restraints on trade and had monopolized distribution of GDS services to Sabre subscribers in violation of the Sherman Act. The jury found for US Airways. On appeal, the Second Circuit relied on *Amex* to hold that Sabre operates a two-sided platform. The appeals court vacated the jury verdict because the district court had not instructed the jury that the relevant market as a matter of law must include both sides of the platform. This case has been remanded to the Southern District of New York for a new trial.¹³

In *Sabre*, Judge Stark determined that both *Amex* and *US Airways* applied to the Sabre-Farelogix merger. Judge Stark’s conclusion that Sabre and Farelogix do not compete in the same relevant market was based on the *Amex* finding that “only other two-sided platforms can compete with a two-sided platform for transactions” and on the *US Airways* finding that Sabre GDS operates as a two-sided platform.¹⁴ The court found the Second Circuit’s application of *Amex* to

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the very same Sabre GDS platform “highly persuasive authority and [that it] chooses to follow it.”¹⁵ Because Sabre functions as a two-sided platform and Farelogix does not, Judge Stark found that the companies do not compete as a matter of law.¹⁶

The court further concluded that DOJ failed to meet its burden even if the parties do compete in the same market because the evidence did not show “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.”¹⁷ The court found that DOJ looked at only one side of the Sabre GDS in isolation and therefore could not accurately assess the competitive effects.¹⁸

Judge Stark found it unlikely that Sabre would raise prices for its GDS platform after the merger because Sabre is constrained by its GDS competitors, Amadeus and Travelport. Judge Stark even found that the Sabre-Farelogix merger would enhance innovation and modernization: “Sabre seeks to integrate FLX OC into its platform, not eliminate it, and . . . in doing so Sabre is following the industry trend towards GDS passthrough.”¹⁹ Further, the court found that “[t]oday, and for the foreseeable future, airlines expect a major portion of NDC bookings eventually to come from GDS passthrough.”²⁰ GDS pass-through integrates NDC capabilities into the GDS platform rather than completely eliminating GDS.

In sum, although Judge Stark found Sabre’s witnesses not credible on major points, the burden of proof was on DOJ, and DOJ failed to prove that the Sabre-Farelogix merger would harm competition in a relevant product and geographic market.

The day after Judge Stark’s decision, DOJ filed an appeal with the Third Circuit. Nevertheless, Sabre and Farelogix abandoned their merger, following the CMA ruling prohibiting the deal. DOJ then sought to vacate Judge Stark’s 95-page opinion on mootness grounds. DOJ argued that “vacatur is appropriate because Appellees have deprived the United States of an opportunity to argue that the district court misapplied the law to its own factual findings by, among other things, misreading [*Amex*] as compelling it to ignore economic realities.”²¹

On July 20, in a short order, the Third Circuit did vacate the district court ruling because the merger had been terminated. This was not a complete victory for DOJ because the lower court decision retains its precedential value. The appeals court said, “We also express no opinion on the merits of the parties’ dispute before the District Court. . . . 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.”²²

DOJ argued that Judge Stark’s decision could have

an outsized effect in future cases involving the digital economy, where multisided platforms often compete with one-sided platforms. DOJ still may fear that Judge Stark’s ruling gives the operator of any GDS a clear path to buy any one-sided competitor, free from merger law scrutiny. In fact, DOJ had originally urged the Supreme Court not to hear the *Amex* case, contending that more case law should be developed in the lower courts before the Supreme Court articulated an opinion that could fundamentally impact future mergers.

U.K. CMA Blocks the Sabre-Farelogix Merger

Two days after Judge Stark ruled to allow the Sabre-Farelogix merger, the U.K. CMA blocked it. (In contrast to the U.S. system, in the U.K. and other European Union jurisdictions, the competition agency itself has the authority to block mergers without a court order, subject only to later court review.)

CMA asserted jurisdiction over this merger between the two non-U.K. companies under the provision of its competition law that allows review of overlapping businesses that together have 25-percent of goods or services in a U.K. market. In this case, CMA defined that market as “IT solutions to U.K. airlines for the purpose of providing travel services information to travel agents . . . to make bookings.”²³ This was a creative way to meet the 25 percent threshold, even though Farelogix does not directly generate any revenue from any U.K. customer; CMA relied on Farelogix’s technical agreement with American Airlines (AA) and British Airways (BA) that allows Farelogix to facilitate interline bookings between AA and BA.²⁴

CMA focused on two markets, distribution and merchandising, and found that the merger would harm competition in both markets. CMA held that the merger would have a “significant impact on airlines operating in the U.K., and therefore on the price, quality, and range of services they provide to U.K. passengers.”²⁵ Moreover, the merger potentially could decrease the availability of NDC solutions and hinder innovation in producing NDC merchandising and distribution solutions. Without the merger, CMA predicted, Sabre would have the intention and incentive to create and introduce an NDC-compatible merchandising product to compete with companies like Farelogix.²⁶

CMA recognized that Farelogix is focused solely on serving airlines, whereas GDSs operate as two-sided platforms, serving both airlines and travel agencies. However, CMA considered GDS bypass, such as the one Farelogix offers, to be an effective alternative to GDSs. Having the alternative can give airlines leverage in “negotiating commercial terms, including fees, with the GDSs.”²⁷ CMA estimated that, absent the merger, Sabre likely would have developed its own product like Farelogix’s NDC solution within three to five years.

In the CMA proceeding, some airlines expressed concern about the effect of the merger on distribution

of airline content. Airlines told CMA that the merger would eliminate this alternative to GDSs and thus increase Sabre's market power. Several airlines cited the difficulties in building NDC application programming interfaces (APIs) and the importance of Farelogix as an independent solution. CMA agreed and also found that the parties only face limited constraints from other GDSs and other NDC API suppliers. CMA determined that Farelogix provides a needed constraint: "Farelogix independence from the GDSs, valued by the airlines, acts as a factor in the competitive constraint Farelogix places on the GDSs."²⁸ CMA decided that "prohibition of the merger represents the only effective remedy" to competition concerns.²⁹

On June 1, Sabre appealed to the U.K.'s Competition Appeals Tribunal, seeking review of CMA's assertion of jurisdiction and its ruling that the merger would reduce competition. Sabre argued that the CMA findings are vitiated by error and that CMA failed to make a proper assessment of the evidence. The Tribunal can reverse CMA's decision only on the basis of "illegality, irrationality, [or] procedural impropriety."³⁰ As of this writing, a four-day hearing on Sabre's appeal was scheduled for October 13, 2020, in the Competition Appeals Tribunal.³¹

CMA increasingly has sought to block mergers of companies that do only limited business in the U.K. CMA's aggressive assertions of jurisdiction over mergers between non-U.K. businesses have yet to be challenged.

What's Next for Airline Booking?

On June 16, Farelogix made a new deal. Accelya, a leading provider of technological solutions to the global airline industry, announced an agreement to acquire Farelogix. The acquisition is subject to regulatory approvals, and DOJ has said it will review the deal, but we are unlikely to see the same roadblocks for this combination.

On June 17, DOJ notified the Third Circuit of the Accelya-Farelogix agreement: "This new development underscores the fact that Sabre's and Farelogix's May 1 decision to terminate their merger agreement mooted this case challenging that prior agreement as well as the resulting appeal."³² Sabre's counsel replied, "Appellees [Sabre] previously conceded that the appeal is moot . . . , so this development is entirely inapposite to the Government's motion and underscores only that the Government is desperate to vacate its well-earned loss below."³³

Airlines increasingly will continue to rely on NDC solutions, whether through Farelogix, in-house build solutions, or new entrants. Delta, British Airways, and Air France have built and provided their own NDC solutions. Nevertheless, according to Judge Stark, although some airlines are developing their own NDC solutions rather than buying from Farelogix, "airline own-build solutions do not appear to be a feasible, cost-effective alternative for distribution, even for large

U.S. full-service carriers."³⁴ Judge Stark noted that "it would take four to five years for AA just to replace Farelogix's existing capabilities."³⁵ AA and United Airlines executives had testified that only Farelogix can provide adequate NDC services.³⁶ United's director of distribution testified that in 2015 United considered buying Farelogix for the purpose of protecting Farelogix as an alternative distribution channel.³⁷

Acquisition of Farelogix by an airline would have presented complex contractual and antitrust issues. This would be considered a vertical merger because Farelogix and airlines function at different levels in the supply chain. Farelogix is a supplier to multiple carriers. Currently, Farelogix is implementing GDS bypass for AA, United Airlines (UA), Lufthansa, and others. AA and UA also use Farelogix direct connects to distribute their products through online travel agencies like Priceline and Orbitz. Since Farelogix performs contractual services for several airlines, other airlines might have objected to the purchase of Farelogix by a competing airline. Nevertheless, challenges of unlawful vertical mergers are exceedingly rare and notoriously difficult.

With so many moving parts and a global pandemic dampening the travel industry and the worldwide economy, the future of the airline booking sector seems farther away. The pending acquisition of Farelogix by Accelya, just a month after the Sabre-Farelogix merger was abandoned, seems likely to be allowed, paving the way for the newer NDC technology. The state of the law for other future mergers between one-sided NDC entities and two-sided GDS platforms still could be affected by the ultimate outcomes of Sabre's CMA appeal and DOJ's appeal.

Air carriers and the booking sector both will innovate to stay competitive. Given that many air carriers have contracted with companies like Farelogix for NDC technology or are attempting to implement the newer technology in-house, the NDC platform will be the next innovation for this sector.

Endnotes

1. United States v. Sabre Corp., No. CV 19-1548-LPS, 2020 WL 1855433 (D. Del. Apr. 7, 2020).
2. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280 (2018).
3. *Sabre*, *supra* note 1, at *3, *7.
4. *Id.* at *10.
5. COMPETITION & MKTS. AUTH., ANTICIPATED ACQUISITION BY SABRE CORPORATION OF FARELOGIX INC.: FINAL REPORT 7-8, 110 (Apr. 9, 2020) [hereinafter CMA FINAL REPORT], https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf.
6. Complaint at 1, United States v. Sabre Corp., No. CV 19-1548-LPS, 2019 WL 8015082 (D. Del. Aug. 20, 2019).
7. *Sabre*, *supra* note 1, at *35 n.16.
8. *Id.* at *15, *26.
9. *Id.* at *32.
10. 138 S. Ct. 2274 (2018).

11. 938 F.3d 43 (2d Cir. 2019).
12. *Amex*, 138 S. Ct. at 2280, 2285.
13. *US Airways*, 938 F.3d at 51–52, 69.
14. *Sabre*, *supra* note 1, at *12.
15. *Id.* at *34.
16. *Id.*
17. *Id.*
18. See Ryan C. Thomas, Molly M. Wilkens, Matt R. Evans & Jason A. Beer, *Sabre/Farelogix: Innovation, Two-Sided Platforms, and the Risks of Multijurisdictional Merger Reviews*, M&A LAW. (May 2020), <https://www.jonesday.com/en/insights/2020/05/sabre-farelogix-innovation-two-sided-platforms>.
19. *Sabre*, *supra* note 1, at *42.
20. *Id.* at *20.
21. Reply to Vacatur Mot. at 9–10, *United States v. Sabre Corp.*, No. CV 19-1548-LPS, 2020 WL 1855433 (May 29, 2020) (No. 20-1767), <https://www.justice.gov/atr/case-document/file/1281671/download>.
22. *United States v. Sabre Corp.*, No. 20-1767 (3d Cir. July 20, 2020).
23. CMA FINAL REPORT, *supra* note 5, at 58.
24. *Id.* at 10–12.
25. *Id.* at 15.
26. *Id.*
27. *Id.* at 21.
28. *Id.* at 22.
29. *Id.* at 30.
30. *Sabre Corp. v. Competition & Mkts. Auth.*, Case No. 1345/4/12/20 (Competition App. Trib. June 19, 2020), https://www.catribunal.org.U.K./sites/default/files/2020-06/1345_Order_of_the_Chairman_%28Directions_further_to_CMC%29_190620.pdf.
31. *Id.*
32. Letter from Nickolai G. Levin, Att’y for Appellant USA, Informing the Court That Accelya and Farelogix Reached an Agreement for Accelya to Acquire Farelogix, *United States v. Sabre Corp.*, No. CV 19-1548-LPS, 2020 WL 185543 (June 17, 2020) (No. 20-1767).
33. Response Filed by Appellees Sabre Corp. & Sabre GLOB Inc., *United States v. Sabre Corp.*, No. CV 19-1548-LPS, 2020 WL 185543 (June 22, 2020) (No. 20-1767).
34. *Sabre*, *supra* note 1, at *18.
35. *Id.*
36. *Id.* at *29.
37. Curtis Eichelberger, *American, United Airline Executives Considered Buying Farelogix to Maintain Ticketing Competition*, MLEX (Jan. 28, 2020), <https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1158498&siteid=245&rdir=1>.