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ANTITRUST

Expert Analysis

New Trial for ‘Two-Sided’ Airline Reservation Platform

By Elai Katz

Few antitrust litigations go all the way to a jury trial, but a case involving Sabre, a leading travel reservation platform, may get to a second jury trial following the U.S. Court of Appeals for the Second Circuit's opinion applying recent Supreme Court guidance on antitrust analysis of two-sided markets. The Supreme Court's decision, handed down after the *Sabre* jury verdict, determined that "transaction platforms" must be analyzed as two-sided antitrust markets, as a matter of law. The appellate court vacated the jury verdict finding that Sabre violated antitrust law because the trial court did not instruct the jury that it had to evaluate the competitive impact of Sabre's contractual restrictions on both sides of Sabre's platform: the airlines on one side and travel agents on the other. *US Airways v. Sabre Holdings*, 938 F.3d 43 (2019).

The Second Circuit also ruled that the district court should not have dismissed US Airways' monopolization claims against Sabre. The court stated that the pleadings plausibly alleged a relevant market limited to Sabre (to the exclusion of other airline reservation platforms) because travel agents were "locked in" due to high switching costs and incentive payment structures. The appellate panel's decision to accept allegations of a single-brand relevant market—typically eschewed by courts and discouraged by scholars—did not grapple with the impact of a two-sided market definition on the single-brand market alleged.

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GDS Platforms

Sabre operates an electronic platform, often called a global distribution system or GDS, used by travel agents to search for and book airline flights for their customers, mostly corporate clients. Put simply, GDS platforms facilitate ticket-purchasing transactions between airlines and travel agents. Airlines pay Sabre and other GDS platforms when a travel agent books a ticket on an airline's flight. Travel agents do not pay a fee to book a ticket; instead, they receive payment from the GDS for each ticket booked through that platform. However, Sabre requires travel agents to meet minimum booking thresholds to collect these incentive payments.

The GDS industry did not develop in an entirely organic manner. Airlines had initially developed, beginning in the 1960s, their own independent computerized reservation systems and subsequently made them available to travel agents and in some cases included other airlines' flights for a fee. In response to concerns that those fee arrangements drove up prices, the Department of Transportation enacted a "mandatory participation" rule, requiring each airline to make available the same fares offered on its in-house system to all other airlines' reservation platforms. Travel agents found it more efficient to use only one airline's platform once they got access to the same prices on all platforms.

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The airlines then divested themselves of their in-house reservation systems. (American Airlines founded Sabre in 1960 and spun it off to form an independent company in 2000, about 13 years before

American Airlines acquired US Airways.) The industry has since been deregulated and, today, three leading independent GDS platforms remain. According to the Second Circuit, Sabre has more than half of the GDS market, with the remainder divided between Travelport and Amadeus. The vast majority of travel agents use only one GDS platform—in other words, they "single-home." The court explained that the airlines must have a relationship with a given travel agent's preferred GDS to reach that agent and its corporate-traveler customers.

Challenged Provisions

US Airways brought an antitrust suit claiming that the "full content" provisions in Sabre's contracts restrained trade and monopolized the GDS market. These provisions require US Airways to make all its fares available through Sabre, prohibit US Airways from offering better fares outside of Sabre's platform and prevent US Airways from offering incentives to book directly through the US Airways' website or circumvent Sabre in other ways. The airline also alleged that Sabre conspired with its rivals to limit competition among them. The district court dismissed the monopolization claims under §2 of the Sherman Act but allowed the restraint of trade and conspiracy claims under §1 to proceed. The case was reassigned from the late Judge Miriam Goldman Cedarbaum to Judge Lorna G. Schofield.

Jury Trial

As the case was about to go to trial, the Second Circuit issued its decision in *United States v. American Express*, 838 F.3d 179 (2d Cir. 2016), holding that the lower court erred by failing to define the relevant market as "two-sided" and that the court should have evaluated competitive effects on both sides: merchants as well as cardholders. (The author of this column submitted an amicus brief on behalf of economic scholars in that case.)

Following a nine-week trial, the jury in the *Sabre* litigation returned a split verdict. It found that Sabre's "full content" provisions unreasonably restrained trade and awarded over $5 million in damages before trebling. The jury found for Sabre, however, on the conspiracy claim. The jury found that the GDS market was "one sided" but also found, in the alternative, that it would have reached the same conclusion and awarded the same damages if the market were two sided.

Appeal

After the parties appealed, the U.S. Supreme Court handed down its decision affirming the Second Circuit's opinion in *American Express*. The court ruled that lower courts must consider customers on both sides of credit card transactions—merchants and cardholders—when evaluating antitrust claims. In so doing, the court affirmed the Second Circuit's rejection of claims that anti-steering provisions in American Express's merchant agreements violated §1 of the Sherman Act. *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018). (The author also submitted an amicus brief to the Supreme Court on behalf of economic scholars. For a more in-depth review of the case, please see our August 2018 column, "Supreme Court Tackles Two-Sided Platforms.")

In the *Sabre* case, the Second Circuit solicited supplemental briefing on the impact of *American Express*. The appellate court, in a unanimous decision, vacated the jury verdict and reversed the district court's earlier dismissal of monopolization claims. The court first explained that, because the parties agreed that the full content provisions were not per se unlawful, they had to begin with a definition of the relevant market to delineate the area of effective competition, as is generally required under the rule of reason.

Transaction Platforms

The Second Circuit read the Supreme Court's decision to hold that while it is not always necessary to consider both sides of a two-sided platform in all cases, "there is a subset of two-sided platforms that must *always* receive two-sided treatment: transaction platforms." The Second Circuit stated that in cases "involving two-sided transaction platforms, the relevant market must, as a matter of law, include both sides of the platform" because, as the Supreme Court explained, evaluating both sides of a two-sided transaction platform is "necessary to accurately assess competition." A transaction platform is described as a business that cannot make a sale to one side of the platform without simultaneously making a sale to the other side. Put another way, a transaction platform supplies only one product—transactions—rather than supplying two separate products to each side of the platform. The court distinguished newspapers, which may be characterized as two-sided platforms connecting readers with advertisers. But newspapers do not sell transactions and, in many cases, the relevant market may appropriately be defined as two separate markets.

The opinion brings into sharp focus the nuanced balance between questions of fact and questions of law in defining relevant markets in antitrust cases. While the determination of the

contours of the relevant market is ultimately a question for the finder of fact, there are essential legal requirements guiding that factual determination. In addition, when facts about the nature of competition and substitution are not in dispute, a court may resolve relevant market questions as a matter of law.

The Second Circuit stated that GDS reservation businesses met the requirements of a transaction platform. The relevant product market definition for such platforms must include both parties to the transactions they facilitate: airlines and travel agents. As such, the jury's primary verdict, based on a legally erroneous finding that the relevant market was one sided, had to be vacated.

Alternative Verdict

The Second Circuit added that the alternative verdict returned by the jury, finding two-sided harm and the same amount of damages in response to a hypothetical question assuming a two-sided market, could not stand. The appellate court expressed sympathy for the predicament the district court faced when it instructed the jury to return two verdicts, a one-sided verdict and a two-sided verdict. The Second Circuit extolled the trial court's "extraordinary efforts seeking to navigate particularly vexing, shifting legal winds" and commended its desire to avoid wasting judicial resources. But the panel concluded that asking the jury to decide whether the platform was one-sided or two-sided was fundamentally at odds with the Supreme Court's subsequent ruling. The Second Circuit added that the jury's determination that the damages were identical in both a one-sided market and a two-sided market did not make sense and cast serious doubt on the reliability of the alternative verdict. The fees charged by Sabre to airlines ($3.49 per booking) would be offset by the amount paid to travel agents, effectively a negative price (-$0.85 per booking), in a two-sided market but not in a one-sided market. Without deciding the issue, the court raised doubts about the advisability of alternative jury verdicts more generally.

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The court declined to enter judgment in Sabre's favor and instead ordered a new trial, noting that the evidence presented could have supported (but did not require) a finding that the challenged restrains caused anticompetitive effects in a two-sided market.

Single-Brand Market

US Airways asserted in its original complaint that Sabre had a monopoly in a sub-market defined as "the distribution of GDS services to Sabre subscribers" and that it monopolized this Sabre travel agent sub-market in violation of §2 of the Sherman Act. The district court dismissed the claim, following the prevailing view that markets generally cannot be limited to a single manufacturer's products.

The Second Circuit reversed, relying on the Supreme Court's opinion in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992), where independent service providers challenged Kodak's refusal to sell replacement parts for its copiers to customers who used third-party providers to repair and service their Kodak machines. The Supreme Court acknowledged that Kodak faced competition for the sale of copiers but decided that in the *aftermarket* for servicing Kodak machines, customers were locked into buying Kodak parts.

The Second Circuit determined that the complaint sufficiently pleaded a Sabre-only market because it alleged that travel agents who use Sabre have no viable substitutes, face prohibitively high switching costs, and are locked into Sabre's minimum-booking incentive structures. Despite its lengthy discussion of the *American Express* decision, the appellate panel failed to grapple with the impact of the requirement that a transaction platform must be defined as a two-sided market. Even if this is one of the rare cases where a single-brand market might be sufficiently pleaded, it would have to include both airlines and travel agents and, as the Supreme Court observed, consider the feedback effects required to accurately assess competition.

The *Sabre* case serves as yet another reminder of the crucial role rigorous relevant market analysis plays in antitrust litigation. Even when the markets at issue do not involve multi-sided platforms, antitrust counselors should take a careful look at various facets of the market—different sets of market participants and suppliers in addition to the direct customer or end user—in evaluating a practice or transaction. To give just one example, antitrust enforcement agencies have recently focused on how practices and contract terms impact labor markets when evaluating mergers and other conduct.

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