The M&A LAWYER

September 2019 ▪ Volume 23 ▪ Issue 8

DOJ RATTLES THE SABRE: A TEMPLATE FOR HIGH TECH MERGER CHALLENGES?

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In the past year, senior officials at the Department of Justice, Federal Trade Commission, and various state attorneys general have focused on antitrust enforcement involving "high tech" companies. The FTC convened a "Technology Task Force." The DOJ launched a formal antitrust review of "market-leading online platforms." State enforcers are reportedly on the cusp of opening a formal antitrust investigation of technology companies. A number of U.S. politicians, including several running for president, have joined the conversation too, criticizing U.S. enforcers for lax antitrust enforcement of mergers. One prime target of this criticism: the acquisition by dominant tech firms of "nascent" and growing current and future competitors.

Against this background, the DOJ filed a lawsuit in late August to block Sabre Corporation's $360 million acquisition of Farelogix, Inc., alleging that the acquisition would reduce competition in airline booking services, leading to higher prices, reduced quality, and less innovation.[1] The DOJ alleges Sabre plans to acquire Farelogix to eliminate the competitor best positioned to challenge its "dominance" as the nation's largest provider of airline booking services.

In this article, we highlight 10 lessons from this case for parties considering a merger with a competitor or potential competitor. These lessons are particularly relevant for companies in the technology sector, given the ongoing antitrust scrutiny of Big Tech and the complaint's portrayal of Sabre as a dominant technology firm that used exclusionary tactics and, ultimately this merger, to block innovation and reduce competition.

Background: Airline Travel Booking Industry

According to the DOJ, nearly 50% of U.S. airline bookings are made through travel agencies, which include traditional brick-and-mortar travel and online travel agencies such as Expedia. To sell tickets through travel agencies, airlines require booking services. Booking services are IT solutions that facilitate delivery of airline offers to travel agencies and that also process orders. Sabre and Farelogix compete to provide booking services.

Sabre operates a global distribution system ("GDS"), which is a digital platform that allows travel agencies to search for and book flights across multiple airlines. Airlines distribute offers to travel agencies through Sabre, which typically charges fees to airlines for each flight segment booked through its service. According to the DOJ, there are just three GDS providers in the U.S. and Sabre is the largest, accounting for more than 50% of U.S. airline bookings through travel agencies.

Farelogix does not operate a GDS but has developed an innovative data transmission standard that facilitates communications between airlines and travel agents. Farelogix's "New Distribution Capability" ("NDC") allows airlines to bypass a GDS and connect directly to travel agencies for bookings. NDC also enables airlines to distribute more complex and personalized offers to travel agencies than legacy GDS systems can support. For

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example, NDC would allow an airline to offer a bundled fare that includes ancillary products or services, including priority boarding, in-flight internet, and entertainment options.

Sabre agreed to acquire Farelogix in November 2018 for approximately $360 million. Following what Sabre called a "lengthy and exhaustive review of the transaction," the DOJ filed suit to enjoin the transaction in the U.S. District Court for the District of Delaware.

Ten Lessons for Merging Parties

1. There Is No Minimum Revenue Standard for Antitrust Merger Enforcement Actions

Although it appears the transaction was reportable to the antitrust agencies under the Hart-Scott-Rodino Act, Farelogix revenues in 2018 were "just" $42 million. While U.S. antitrust authorities focus most of their merger investigation resources on larger transactions, this case provides yet another reminder that antitrust authorities will challenge a relatively small acquisition if they believe a transaction will lead to substantial anticompetitive effects. This scrutiny applies regardless of whether or not a transaction meets merger-filing thresholds.

2. Although DOJ Challenged the Sabre Transaction Under the Merger Laws, There Are Growing Calls to Challenge Tech Deals Under the Monopolization Statute

The DOJ challenged the Sabre transaction under the merger laws (Clayton Act Section 7) despite allegations that Sabre is a dominant firm. The antitrust authorities typically rely on this statute, which prohibits transactions that substantially lessen competition, when challenging mergers. The antitrust agencies, however, could also challenge a transaction under Sherman Act Section 2, which prohibits monopolization and attempted monopolization. Under Section 2, the antitrust agencies would have to prove that a transaction results in an unlawful acquisition of "monopoly power." In its complaint, the DOJ alleges that Sabre controls "over 50 percent" of traditional U.S. travel agency bookings and cites a statement from Sabre in August 2019 that the company has "over 80% share within large travel management companies" in North America. Yet the DOJ is challenging the deal based on Section 7, not Section 2.

Because many mergers do not involve firms with monopoly power, the antitrust authorities typically rely on Section 7. This was not always the case. Before passage of the Clayton Act in 1914, in two landmark antitrust cases, *Standard Oil v. United States*[2] and *United States v. American Tobacco Co.*,[3] the DOJ and the courts relied on Sherman Act Section 2 to "break up" major "trusts" that had been created by combining numerous competing firms. There are renewed calls, including from several Democratic presidential candidates, to use Section 2 to "break up" major U.S. technology firms and block acquisitions. In fact, the FTC used Section 2 in the deal context recently, albeit to challenge a transaction that had already closed. In 2017, the FTC charged that Questor had eliminated a competitive threat to its monopoly position by acquiring assets of a potential competitor.[4] Mallinckrodt (Questor's owner at the time of the complaint) settled, paying $100 million and licensing the at-issue drug to another pharmaceutical company.

In a Section 2 case, the government would have to prove (1) monopoly power and (2) anticompetitive conduct. Although there is no bright line rule, a buyer with a share greater than 50% may be

The M&A Lawyer
West LegalEdcenter
610 Opperman Drive
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(ISSN#: 1093-3255)

deemed to have monopoly power. The second element can be met by proving exclusionary or predatory conduct that eliminates competition or preserves a monopoly. This could be satisfied through a range of exclusionary practices, such as multiple acquisitions, exclusive agreements, MFNs, bundling, loyalty discounts, or tying, among other practices that can be (but certainly are not always) exclusionary.

Where the buyer does not possess monopoly power, the government will challenge transactions on the basis of Section 7, especially if it is concerned about being able to support claims that the transaction is intended to maintain or enhance the buyer's "dominance." Section 7 also provides the government with a useful procedural benefit in most cases. In mergers in which the government supports its prima facie case based on high combined market shares and concentration, the burden shifts to the parties to show the transaction does not harm competition. The FTC's challenge in 2018 of CDK Global's proposed acquisition of Auto/Mate provides a good example. That case involved digital technology platforms used by automobile dealers. The buyer, which allegedly controlled roughly 50% of the market, sought through the merger to eliminate a growing competitive threat. The FTC sued based on Section 7 and alleged that the deal was presumptively unlawful given the high combined shares and concentration levels. After the FTC filed its complaint, the parties abandoned the transaction.

Although the DOJ does not allege a Section 2 claim in the *Sabre* case, the government's claims about Sabre's shares and contracting practices (see #5 below) could potentially fit a Section 2 theory. Companies with high shares that are likely to consider tuck-in, bolt-on, or product extension acquisitions, particularly in the tech industry, should study the *Sabre*, *Mallinckrodt*, and *CDK* complaints, which may provide a template for the antitrust agencies' theories and approach in future merger reviews. Recent remarks by FTC and DOJ officials emphasize the point:

- FTC (May 2019): "The Mallinkrodt [sic] case was brought under monopolization theories. While those theories likely would not have worked in CDK/Automate (because CDK was—at most—an aspiring duopolist), it is certainly possible that other segments of the digital economy might involve firms with monopoly power. And acquisitions of competitors by those firms could potentially raise issues under Section 2 of the Sherman Act as well as under Clayton 7."[5]

- DOJ (June 2019): "[W]e're concerned about acquisitions of nascent competitors in platform industries because these markets are prone to tipping, and with tipping comes the potential for durable market power and substantial barriers to entry. Anticompetitive conduct by firms seeking to maintain or acquire monopoly power is precisely what Section 2 is intended to address."[6]

3. Mergers Involving a Dominant Firm and an Innovative Disrupter Can Raise Antitrust Risk Even If a Seller's Market Share Is Low

Although market shares and measures of concentration are the beginning rather than the end of modern antitrust analysis, these metrics have an outsized role in merger litigation. Courts and the U.S. antitrust agencies' merger guidelines presume that a merger harms competition if shares and concentration levels exceed certain thresholds. As noted, the presumption then shifts the burden to the parties to show that the merger does not harm competition. However, what if the parties' combined market share and concentration fall under the threshold because the target is small or has not yet entered the competing business?

In the *Sabre* case, the DOJ alleges harm in two markets. The government maintains the acquisition is presumptively unlawful in the market for booking services for airline tickets sold through online travel agencies. In the second market, however, the DOJ acknowledges that Farelogix's market share for airline bookings sold through traditional travel agencies is "small"; the complaint is necessarily silent about a presumption of illegality. Instead, the DOJ alleges that Farelogix's shares (in both markets) substantially understate its competitive significance:

> First, by offering airlines an alternative booking services solution to the GDSs, Farelogix has empowered airlines to negotiate lower prices and more favorable terms, even if the airline ultimately uses the GDS . . . Second, Farelogix's current market share understates its competitive significance going forward. As the industry transitions from legacy to NDC technology, Farelogix is poised to grow significantly. Defendants' internal projections reflect this.

The DOJ also alleges that Farelogix's innovations forced Sabre to improve its GDS technology and develop its own NDC capabilities. As such, the DOJ maintains that the acquisition would eliminate a disruptive entrant whose multiple innovations have already enhanced competition in a highly concentrated market and benefitted customers.

This is not the first time in recent years that the antitrust authorities have tried to block a merger under a theory of "potential competition" from a nascent rival. In 2015, the FTC lost its bid to block STERIS Corporation's acquisition of Synergy Health plc. Although the companies were not current competitors, the FTC argued that Synergy was poised to enter and disrupt the duopoly market for contract sterilization, including for many healthcare and healthcare-related products. The FTC maintained, similar to DOJ's arguments

in the *Sabre* case, that STERIS planned to acquire Synergy to maintain its dominant position and eliminate a future disruptive competitor. The court, however, denied the FTC's challenge, finding that Synergy would not have entered in the absence of the transaction. According to the court, although Synergy's board endorsed the "concept" of launching the new business, the company had not approved a business plan, the company failed to obtain customer commitments to purchase the new services, and the capital investment necessary to enter would have exceeded its budget.

Early deal analysis and diligence tends to focus on current competition between the parties with good reason—such cases make up the bulk of the antitrust agencies' casework. However, the *Sabre* and *STERIS* matters serve as a reminder that merging parties' antitrust risk analysis needs to consider the significance of potential future competition between the parties. This is a growing area of concern at the antitrust agencies, especially in the technology sector.

Future competition, of course, is not nearly as easy to quantify because the antitrust agencies will argue, as they do in *Sabre*, that current competition data, such as market share, understates the competitive significance of a nascent or growing rival. Therefore, as we explain more below, the parties' ordinary course business documents, including strategic plans, board documents, and e-mails of key executives, are often central to potential competition cases. Is the future rival really going to enter or expand and invest in a new business, and what impact does the company forecast it will have on competition? Is the incumbent market participant concerned about the rival? Has it taken steps to innovate or block the rival from making competitive inroads?

In transactions where potential competition is likely to be an issue, parties should consider an early internal "quick look" document review followed by interviews of senior personnel, perhaps even before signing, to help understand and manage the antitrust risk. Importantly, this requires an assessment of current and potential competition issues on both sides of the transaction, and so it is often advisable for buyer and seller outside antitrust counsel to share information (pursuant to a common interest agreement). This will help the parties develop common strategies to deal with the issues and get out in front of the antirust agencies.

4. Market Definition Is Often Outcome Determinative, Especially in Potential Competition Cases

The *Sabre* complaint alleges harm in two markets, as noted earlier—booking services for airline tickets sold through (i) traditional travel agencies and (ii) online travel agencies. Although the DOJ alleges that both markets are highly concentrated, the government maintains the transaction would be "presumptively unlawful" only in the online travel agency market. This is because Farelogix's market share in the traditional market is so small today that the transaction would not meaningfully increase concentration there.

Without a presumption of illegality based on the parties' combined market shares, it has been difficult in the modern era for the government to win merger challenges. The FTC's loss in *STERIS* provides a good example.[7] In *Sabre,* this dynamic puts added pressure on the government to support its view that booking through online travel agencies is a proper relevant market under the antitrust laws. The parties undoubtedly will advocate a broader market definition in which their combined share and concentration are substantially lower and do not trigger the presumption.

5. A Dominant Firm's Business Contract Terms Can Increase Deal Risk or Even Lead to a Separate Investigation

Transacting parties sometimes have the misperception that only documents "about the deal" matter for antitrust reviews. Although deal documents do matter, they are merely the starting point for the antitrust agencies. The FTC and DOJ can issue broad subpoenas for documents and data to investigate deals (known as a Second Request in deals reportable under the HSR Act). A Second Request largely calls for documents and data about how the parties compete in the ordinary course of business.

In the *Sabre* case, the DOJ alleges that Sabre uses "a broad range of contractual and technical barriers to prevent entry or expansion by suppliers that could threaten its control over bookings through travel agencies." For instance, the DOJ alleges, "Sabre's contracts include provisions that inhibit airlines' use of an alternative supplier like Farelogix," and that these practices were designed to "shut down" Farelogix. As a result, Farelogix complained in 2013 to the U.S. government: "Sabre has wielded its monopoly power in an attempt to destroy Farelogix and prevent competition." In addition, in 2018, Farelogix's CEO told the European antitrust authorities that the "GDSs"—Sabre and two others—"continue to leverage significant market power to preserve their market position and stifle innovation."

While public information does not reveal whether those complaints led to an antitrust investigation into Sabre's contracting practices, its contract terms likely increased the risk that the DOJ would investigate and challenge the Farelogix deal. In the opening sentence of its complaint, the DOJ indicates that the acquisition is "a dominant firm's attempt to eliminate a disruptive competitor after years of trying to stamp it out."

Companies with a strong position in their marketplace, and who plan to be active in M&A, should consider the potential impact of

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contract terms that potentially exclude competitors. While the business gains of such contracts may ultimately outweigh the antitrust risk to hypothetical future deals, it is better that such decisions are fully informed.

6. "Hot" Ordinary Course Documents Continue to Provide Critical Evidence for Antitrust Authorities

The DOJ complaint describes various Sabre and Farelogix "hot" documents, depicting close competition between the parties, Sabre's concern with future competition from Farelogix, or Farelogix's complaints about Sabre business practices. Hot documents often provide the basis for extended antitrust investigations, court challenges, and sometimes even the outcome in merger cases. Judges faced with a battle of economic experts may look to the parties' documents to split a tie. Ordinary course documents are especially important in future competition cases where current market data such as shares and customer win-loss reports may not tell the whole story.

Examples of harmful documents/statements from the *Sabre* complaint include:

- Farelogix website: "Farelogix and its technology solutions are at the center of [airline industry] disruption."
- Farelogix CEO to EU antitrust authorities: "GDSs continue to leverage significant market power to preserve their market position and stifle innovation."
- Sabre report to investors: Sabre has "over 80% share within large travel management companies" in North America.
- Farelogix complaint to federal government: "Sabre has wielded its monopoly power in an attempt to destroy Farelogix and prevent competition . . . ."
- Farelogix CFO: The acquisition would be "taking out a strong competitor vs. continued competition and price pressure in the market."

Company executives should avoid exaggerations or hyperbole, particularly when describing competitive alternatives or the impact of a transaction. Business personnel should draft every document assuming it will be seen by government antitrust enforcement authorities (or plaintiffs in private actions) and considering how content may be interpreted or taken out of context.

7. Employee Text Messages and Messaging Services Are Among Newer Sources of "Hot" Documents

While antitrust complaints regularly cite colorful business documents, such as emails, presentations, and handwritten notes, one of the most significant "hot" documents from the complaint is a text message exchange. According to the DOJ:

> On the day Sabre announced its proposed acquisition of Farelogix, a Sabre sales executive texted a colleague that one major U.S. airline would 'hate' it. The colleague replied, 'Why, because it entrenches us more?' The Sabre sales executive responded that Farelogix has been that airline's 'Trojan horse to f* * * us' and observed that the airline's 'FLX [Farelogix] bill is going up big time.'

As the technology becomes more common, antitrust plaintiffs will rely more on these types of exchanges during investigations and litigation. Indeed, earlier this year, Singapore's antitrust authority fined a group of four hotels for illegally exchanging competitively sensitive information related to customer prices. A number of the allegedly unlawful conversations occurred over WhatsApp, an encrypted messaging application that facilitates communications over various smartphone operating systems. Similarly, in late 2017, an e-commerce company and its president pleaded guilty as part of a DOJ investigation to price fixing through in-person meetings and communications using social media platforms and encrypted messaging applications, such as Facebook, Skype, and WhatsApp.

These examples show that employees are communicating outside of sanctioned company platforms such as corporate e-mail, and that some individuals are less formal or guarded in text messages or on social media platforms. The antitrust agencies have figured this out and these new platforms have become fertile ground for competition authorities to find hot documents. Companies should counsel employees about proper communications over text message or social media platforms and remind them about policies that prohibit employees from conducting company business outside of sanctioned channels.

8. Antitrust Authorities Are Unlikely to Give Significant Weight to Merging Parties' Voluntary Commitments Not to Raise Prices

Before the DOJ filed its complaint, Sabre publicly disclosed that it had committed to its airline customers and to the DOJ that, post-transaction, it would: "continue to offer Farelogix products at the same prices available today or lower . . . to support and invest in those products at the same level or higher" and "to extend any existing Sabre GDS or Farelogix Open Connect contract on the same terms, including price, for a period of at least three years."[8] However, it does not appear that the DOJ gave much, if any, weight to those commitments, perhaps due to (i) the limited duration of the commitments, (ii) concerns about non-price dimensions of competition such as quality, and (iii) DOJ's historic aversion to behavioral remedies, even in vertical mergers where the parties do not compete,

let alone in cases like this one where the parties allegedly compete directly.

Although the overture was not successful here, in certain mergers offering customers such pricing commitments can be an effective strategy, as doing so highlights the merging parties' dedication to their customers, reassures customers of the merger's benefits, and mitigates risk of a customer complaint to the antitrust authorities. A court also may be open to arguments that such pricing commitments mitigate competitive concerns, especially in rapidly evolving markets, where any market power from a merger likely would be short lived.

9. Merging Parties Should Be Cautious About Public "Sabre Rattling" with Antitrust Authorities During the Investigative Phase of Merger Review

Sabre, Farelogix, and the DOJ entered a timing agreement that required the DOJ to close its investigation or sue to block the merger before August 21. A timing agreement specifies obligations during the investigation and deadlines for concluding the merger review. In complex cases, where there is reasonable hope for a resolution outside of litigation, merging parties sometimes agree to extend this period. In this case, Sabre issued a press release on August 14, announcing its intent to close the transaction on August 21 and stating:

> Sabre is confident in the legal and competitive merits of the acquisition and that the transaction will ultimately completed. . . . Over the past nine months, we believe we have done all we can to address the DOJ's concerns. While we hope the DOJ will ultimately recognize that this transaction is pro-competitive, we are prepared to vigorously defend the deal in court if necessary.[9]

To be sure, merging parties sometimes need to play hardball with the antitrust agencies and force a decision. But here, if the DOJ had not yet decided to litigate, it is possible that the national news headlines that followed Sabre's press release—"Sabre Dares U.S. Justice Department to Sue It Over Farelogix Deal"[10] and "Sabre Rattling: Merging Co. Gives DOJ Lawsuit Deadline"[11]—may have emboldened the government to take action.

10. Whether Customers Adopt a Supportive, Neutral, or Negative View of the Transaction Will Be Important

Of course, the DOJ's complaint tells only one side of the story. In response to the complaint, Sabre issued a press release, stating that it "is confident of the pro-competitive nature of this transaction, that it will succeed in court, and that the transaction will ultimately be completed."[12] A few other excerpts:

- "DOJ's claims lack a basis in reality and reflect a fundamental misunderstanding of the industry."
- "Sabre and Farelogix offer complementary services," and do not "compete head to head for airline bookings."
- The "airline technology sector is highly competitive, with many companies—even airlines themselves—competing to deliver next-gen retailing solutions."
- The combination will bring efficiencies, driving "faster innovation in the dynamic, highly competitive airline technology space" and "helping airlines accelerate their growth and profitability while better serving travelers."[13]

In weighing these points against the DOJ's evidence, one critical factor for the court will be customer testimony. The complaint does not contain any direct statements from customers objecting to the merger. If customers—the entities that would be most directly harmed by the alleged effects of the deal—do not have significant concerns about the transaction, the parties' likelihood of prevailing in court increases significantly. By contrast, if key customers have legitimate concerns about the deal, and the DOJ can support those concerns through documents, data and testimony, the parties face an uphill battle.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they associated.

ENDNOTES:

[1]Complaint, *DOJ v. Sabre Corporation, et al.* (Aug. 20, 2019), https://www.justice.gov/opa/press-release/file/1196816/download.

[2]221 U.S. 1 (1911).

[3]221 U.S. 106 (1911).

[4]Complaint, *FTC, et al. v. Mallinckrodt ARD Inc. and Mallinckrodt plc*, No. 1:17-cv-00120 (D.D.C. Jan. 18, 2017).

[5]D. Bruce Hoffman, Director, Bureau of Competition, U.S. Federal Trade Commission, Antitrust in the Digital Economy: A Snapshot of FTC Issues, Remarks at GCR Live Antitrust in the Digital Economy at 6-7 (May 2019).

[6]Jeffrey M. Wilder, Acting Deputy Assistant Attorney General, U.S. Department of Justice, Antitrust Division, Potential Competition in Platform Markets, Remarks at Hal White Antitrust Conference (June 10, 2019).

[7]*FTC v. Steris Corporation, et al.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015).

[8]Press Release, Sabre Announces Intent to Close Farelogix Acquisition (Aug. 14, 2019), https://www.sabre.com/insights/releases/sabre-announces-intent-to-close-farelogix-acquisition/.

[9]*Id.*

[10]Sean O'Neill, Yahoo Finance, "Sabre Dares U.S. Department of Justice to Sue it Over Farelogix Deal" (Aug. 14, 2019).

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[11]Matthew Perlman and Bryan Koenig, Law360, "Sabre Rattling: Merging Co. Gives DOJ Lawsuit Deadline" (Aug. 16, 2019).

[12]*Id.*

[13]Press Release, Sabre Reaffirms Benefits of Farelogix Acquisition and Will Challenge DOJ Lawsuit (Aug. 20, 2019), https://www.sabre.com/insights/releases/sabre-reaffirms-benefits-of-farelogix-acquisition-and-will-challenge-doj-lawsuit/.

INTERVIEW: ASSESSING RECENT M&A ANTITRUST DEVELOPMENTS

In late August 2019, ***The M&A Lawyer*** *interviewed Jonathan Kanter, a partner in the Litigation Department and co-chair of the Antitrust Group at Paul, Weiss, Rifkind, Wharton & Garrison LLP. Kanter regularly represents clients before the FTC, Department of Justice, and State Attorneys General in matters involving antitrust and data privacy.*

M&A Lawyer: After President Trump's election, there was a lot of speculation as to possible antitrust policy changes. It's been well over two years now. Have you seen any significant changes, in either official or "unofficial" antitrust policy?

Kanter: Overall, the changes have been on the margins, and we have not seen a sea change in policy at the FTC or DOJ. While there have been significant developments at both agencies, the shift from the previous Administration is more incremental than transformative.

The DOJ's Antitrust Division and FTC remain active in their review of strategic transactions. The pace of negotiated settlements and merger challenges are roughly similar to the previous Administration. The most significant shift in policy relates to the remedies, particularly at the DOJ. The current DOJ Antitrust Division strongly favors "structural remedies" (*i.e.*, divestitures of business units) rather than "behavioral remedies" (*i.e.*, commitments relating to the ongoing conduct of the merged entity).

In terms of sectors, tech is obviously a hot button issue and one where the both the FTC and DOJ are paying close attention not only to mergers, but also to conduct that could run afoul of the antitrust laws.

MAL: What about merger review? In the early days of the new administration, there was also lots of speculation about the possible politicization of merger review. Has that happened?

Kanter: For better or worse, the antitrust agencies remain largely insulated from politics. Much of the heavy lifting is done by agency staff who tend to be highly technical in their approach and fairly immune from shifts in political winds. Decisions at the top of the agencies can be ideological and reflect differences in policy, so to some extent, politics does play a role, but not in the way most people think.

MAL: Recent reports indicate that the DOJ and the FTC may be at odds over certain aspects of antitrust enforcement, especially with respect to the tech sector. Would you agree that there is tension between the two agencies? Have you seen any of this spill over into merger review?

Kanter: Indeed, there have been a few high-profile instances where the FTC and DOJ appear to take differing views. But those differences are largely exceptions to what is mostly a cooperative relationship between the two agencies.

On balance, policy differences are small and very much on the margins. I have not seen those differences spill over into merger review.

In terms of tech, the agencies have overlapping authority and jurisdiction, so there is a need to split oversight and responsibility. This division of labor is not new. When an industry does not neatly fall into the expertise of one agency vs. another, the FTC and DOJ tend to divide up oversight as part of what they call the "clearance process."

MAL: What about global antitrust policies? Have you seen any major changes recently?

Kanter: One jurisdiction that stands out is China. Recently, the Chinese merger review authority changed from the Ministry of Commerce ("MOFCOM") to the newly formed State Administration for Market Regulation ("SAMR"). Despite the change in agency, the merger review process and standards remain generally the same.

In anticipation of Brexit, the UK's Competition & Markets Authority ("CMA") has stepped up its independent review of transactions. The CMA has been extremely inquisitive, so I would encourage merging parties to educate themselves on CMA process, both in terms of timing and substance.

MAL: Regarding China and SAMR, do you have any thoughts as to potential impacts of the ongoing trade war on cross-border M&A with China?

Kanter: We have yet to see any spillover into antitrust enforcement from the broader political environment. That said, we continue to keep an eye out for an impact going forward.