Ohio v. American Express Co.: The Supreme Court Addresses Anti-Steering

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“Anti-steering” is the practice by which a credit card company prohibits a merchant from encouraging consumer cardholders to use another credit card company's card. On June 25, the U.S. Supreme Court issued its highly anticipated decision in Ohio v. American Express Co.,[1] which dismissed 5-4 an antitrust suit against American Express Co. (“Amex”) instituted under Section 1 of the Sherman Act by the U.S. Department of Justice and a group of state attorneys general. Specifically, the Court held that the plaintiffs had not carried their burden, in the first step of the three step rule of reason analysis generally applied to vertical restraints, of making a prima facie showing that American Express's contractual anti-steering provisions result in anticompetitive effects in a properly defined market.[2]

A two-sided platform is one in which a single firm provides interrelated services to two or more groups of users. According to the Supreme Court Majority in the Amex decision, for antitrust purposes the two-sided transactional credit card network platform is a single market consisting of a merchant services side and a consumer cardholder side, and both sides must be analyzed for anticompetitive effects sufficient to establish a violation. The Court dismissed the case because the plaintiffs had limited the first step of their rule of reason analysis to a showing of competitive impact only on the merchants' side of the platform, without considering the impact on the cardholder side.

This article will summarize the Supreme Court's analysis, and will comment on what the future may hold with respect to the judicial analysis of competition involving two-sided platforms.

Background.

Before 2013, Amex, Visa, and MasterCard all had anti-steering provisions in their merchant agreements. In 2010, the DOJ and 17 state attorneys general filed suit alleging that each company's anti-steering provisions violated Section 1 of the Sherman Act because they allegedly stifled competition in the fees charged to merchants. Visa and MasterCard settled and rescinded their anti-steering provisions. Amex went forward defending the legality of its provision.
Amex's standard merchant agreement contains an anti-steering provision under which a merchant may not “indicate or imply” a preference for a non-Amex form of payment; “dissuade” a customer from using an Amex card; “persuade or prompt . . . any other method of payment”; or “promote” other forms of payment other than a merchant's private-label card, “more actively than [it] promote[s]” Amex.[3]

Following a seven-week bench trial, the Eastern District of New York ruled in favor of the Government, finding that although “the court must account for the two-sided features of the credit card industry,” the relevant market was limited to the provision of network services to merchants (as opposed to a single transaction market, which would include both merchants and consumers).[4] Evaluating the effects of Amex's anti-steering rules on the merchant side, the District Court found that the anti-steering provisions were anticompetitive because they resulted in higher merchant fees.[5]

Amex appealed, and the Second Circuit reversed the District Court's decision, holding that because of the interdependence of the two sides, the relevant market must include the provision of network services to both merchants and cardholders, meaning that the pricing analysis must consider both merchant fees and cardholder benefits.[6] Because the Government's first step analysis did not account for the “net harm” in this two-sided market, the Second Circuit directed the District Court to enter a judgment for Amex.[7]

The Supreme Court Decision.

While the DOJ did not itself appeal, a group of eleven state attorneys general did file a petition for certiorari, which the Supreme Court granted, and the DOJ then supported the states. The Court affirmed the Second Circuit decision 5-4 and ordered dismissal of the suit.

Justice Thomas, writing for the Majority, defined a “two-sided platform” as one that “offers different products or services to two different groups who both depend on the platform to intermediate between them.”[8] He added that two-sided platforms exhibit “indirect network effects,” meaning that “the value of the two-sided platform to one group of participants depends on how many members of a different group participate,” and “the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases.”[9] Therefore, “two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand.”[10]

The Court pointed out, however, that “credit-card networks are a special type of two-sided platform known as a ‘transaction’ platform,” which connects merchants and cardholders in a single, simultaneous transaction.[11] The key feature of transaction platforms is that a supplier “cannot make a sale to one side of the platform without simultaneously making a sale to the other.”[12]

The Court distinguished the relationship of merchant and cardholder in the instantaneous transaction credit-card market from that of reader and advertiser in the newspaper advertising market that was at issue in its prior Times-Picayune decision.[13] In that market, “the indirect network effects operate in only one direction”: “newspaper readers are largely indifferent to the amount of advertising a newspaper contains . . . and therefore the market behaves much like a one-sided market and should be analyzed as such.”[14]

Due to the enhanced indirect network effects in the credit card transaction market, “[t]o demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market.”[15] For these reasons, the Court concluded, two-sided transaction platforms such as the one at issue must be considered one market; “competition cannot be accurately assessed by looking at one side of the platform in isolation.”[16] Accordingly, the Court declared, “courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.”[17]

The Court further espoused that “Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price,”[18] adding that “Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions.”[19]
In sum, because the Government had failed to demonstrate in the first step of its rule of reason analysis the effect of Amex's anti-steering on both sides of the single transactional market, the Majority affirmed the Second Circuit's decision.

Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan. Largely referring to the findings of the District Court, he pointed out that:

- The services Amex offers to merchants are not substitutes for the services it offers to cardholders, the two services are complements. Accordingly, the two sides of the platform should not be lumped into a single market.[21]
- Amex's anti-steering rules have had an adverse effect on interbrand competition, because they "seek to control the terms on which merchants accept other brands' cards, not merely American Express' own."[22]
- Amex did not increase benefits or cut prices for cardholders when it increased merchant fees.[23]
- In the absence of Amex's anti-steering provisions, prices to merchants would likely have been lower, as was shown when
  the anti-steering provisions "in fact did prevent Discover from pursuing a low merchant-fee business model. . . ."[24]
- Amex "was able to raise merchant prices repeatedly without any significant loss of business, because merchants were unable to respond to such price increases by encouraging shoppers to pay with other cards."[25]
- "Merchants generally spread the costs of credit-card acceptance across all their customers . . . , while the benefits of card use go only to the cardholders."[26]
- "Merchant price increases that resulted from the nondiscrimination provisions 'were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and resulted in a higher net price.'"[27]

The Possible Future Legal Framework for Two-Sided Markets

The holding of the Supreme Court's Amex decision was limited to what the Court characterized as “a special type of two-sided platform,” known as a “transaction” platform, pursuant to which a supplier “cannot make a sale to one side of the platform without simultaneously making a sale to the other.”[28] As a result, there are some takeaways that may be applicable only to the credit card industry and similar simultaneous transaction markets. However, there may be other takeaways with broader application.

- The holding of the case was extremely narrow: by focusing only on the merchants' side of the platform, the plaintiffs did not satisfy the first step of a rule of reason analysis, because they did not carry their burden of establishing that Amex's anti-steering provisions have anticompetitive effects in the two-sided transaction market as a whole. Accordingly, a challenge to Amex's anti-steering provisions that considers its effects on both merchants and cardholders should still be possible. In fact, such an amended complaint was filed in July by a group of merchants.[29]
- The Supreme Court stressed that transaction platforms should be considered one market because of the "pronounced" indirect network effects arising from the single simultaneous transaction. *Id.* at 2286.[30] Similar simultaneous transactional two-sided platforms constituting a single market likely include: real estate and travel agents; stock exchanges; auction houses; ride share businesses; and farmers markets.
- The market definition for two-sided platforms is a factual issue. The Supreme Court noted that it is not always necessary for a court to consider both sides of a two-sided platform.[31] Rather, non-transactional two-sided platforms should be treated as separate markets when the indirect network effects are minor.[32] Such single-sided markets likely include: media markets where firms sell advertising and content, such as newspapers, magazines, television and cable, and social media networks; search engines; dating clubs; ticketing services; internet marketplaces; and health insurers (engaged in separate transactions with providers and patients).
- The issues in Amex are limited to vertical restraints—conduct involving a supplier's dealings with two or more categories of customers. The principles announced in the decision do not apply to horizontal restraints, even if the defendants also
may be otherwise engaged in vertical relationships.

Footnotes


[2] Under the three-step burden-shifting approach to rule of reason cases recognized by the Supreme Court in Amex: (1) “the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market”; (2) “[i]f the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint”; and (3) “[i]f the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. Id. at 2284 (internal citations omitted).


[4] Id. at 171-75.

[5] Id. at 195-224.


[7] Id. at 204-06.


[9] Id. at 2280-81

[10] Id. at 2285.

[11] Id. at 2280.

[12] Id.


[14] Id. at 2286.

[15] Id. at 2287.

[16] Id.

[17] Id. at 2286.

[18] Id. at 2288.

[19] Id.

[20] Id.


[22] Id. at 2303.

[23] Id. at 2293.

[24] Id. at 2304.

[25] Id. at 2294.
[26] Id. at 2301.

[27] Id. at 2301-02 (quoting 88 F. Supp. 3d at 215).


[31] Id.

[32] Id.

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