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U.S. Supreme Court Tackles Two-Sided Platforms in *American Express* Case

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Major credit card networks have traditionally imposed “anti-steering” or “non-discrimination” rules on merchants accepting their cards. The rules generally prevent merchants from treating customers differently depending on the method of payment, or credit card brand or type, that they intend to use to pay for their purchases. In particular, merchants are prevented from offering customers a discount for using cash or credit cards that are less costly to the merchants or from surcharging customers using high-cost payment cards.

History of the *Amex* Case

In 2010, the U.S. Department of Justice and several state attorneys general filed suit against Visa, MasterCard, and America Express challenging the defendants’ anti-steering rules. The plaintiffs alleged that the contractual restrictions imposed by the credit card networks on their merchants were illegal restraints on competition among rival networks in violation of Section 1 of the Sherman Act. The plaintiffs asserted that each defendant possessed market power in the general-purpose credit card network services market, and that their anti-steering policies, by prohibiting merchants from encouraging customers to use less expensive cards, effectively denied merchants the ability to foster price competition among rival card networks. Visa and MasterCard settled with the government in 2011, and agreed to alter their rules to allow merchants to offer discounts to consumers who use lower-cost forms of payment. Amex, however, did not settle and proceeded to trial.

In February 2015, the U.S. District Court for the Eastern District of New York ruled for the plaintiffs. The court held that Amex, despite its relatively low market share of 26 percent, had market power in the market for general purpose credit card network services and that its anti-steering rules prevented price competition with other networks.[1] Critically, the court accepted plaintiffs’ market definition limited to credit card network services provided to merchants and rejected Amex’s contention that the market definition should be expanded to include services provided to cardholders. Nor

[1] *U.S. v. American Express Co.*, 88 F. Supp. 3d (E.D.N.Y. 2015).

did the court countenance Amex's argument that, even in a narrower product market limited to services provided to merchants, the non-discrimination provisions have potential "pro-competitive effect in a separate, though intertwined" market for credit card services provided to consumers.

Amex appealed, and in 2016 the U.S. Court of Appeals for the Second Circuit reversed the district court's decision.[2] The appeals court found that the district court erred in defining the relevant market and took issue with the district court's focus on the interests of merchants while ignoring the interests of cardholders, an approach that "does not advance overall consumer satisfaction." A proper analysis should have included credit card services provided to consumers along with services provided to merchants as part of a "two-sided" market. In the two-sided credit card market, where card networks compete for acceptance by *both* cardholders and merchants, the merchant fees cannot be considered in isolation. Higher merchant fees may be used to fund increased cardholder rewards—which effectively reduce prices to cardholders. In turn, increased demand on the cardholder side of the platform expands the value of the card network to the merchant side. The appeals court concluded that plaintiffs had failed to prove that Amex's anti-steering provisions had a *net* adverse effect on a properly defined market that includes *both* cardholders and merchants.

The Second Circuit also rejected the lower court's finding that Amex had market power in the credit card industry, a finding that had rested primarily on the lower court's conclusion that Amex's "highly insistent or loyal cardholder base" would effectively prevent merchants from dropping Amex. The court found that cardholder insistence results from the competitive benefits and rewards that Amex offers to cardholders, not from market power. Indeed, the fact that Amex must continue to invest in cardholder rewards, which amount to price discounts to consumers, "indicates, if anything, a *lack* of market power."

The Supreme Court Decision

Several state attorneys general sought certiorari from the Supreme Court, but the DOJ declined to join. The DOJ ultimately filed an amicus brief strongly criticizing the Second Circuit's decision, but also expressly asking the Supreme Court not to hear the case. The DOJ noted that neither the Supreme Court nor any other circuit "has squarely considered the application of the antitrust laws to two-sided platforms," and therefore, "consistent with its usual practice of awaiting further percolation in the lower courts," the Court should wait before taking up such novel legal issues. Nonetheless, the Supreme Court granted certiorari.

On June 26, 2018, a 5–4 majority of the U.S. Supreme Court upheld the Second Circuit's decision finding that Amex's anti-steering rules do not violate the antitrust laws.[3] Justice Clarence Thomas's majority opinion (joined by Chief Justice Roberts and Justices Kennedy, Alito, and Gorsuch) notes that, since vertical restraints often pose no risk to competition unless the entity imposing them has market power, a court must first define the relevant market in order to assess the competitive effects of such restraints. The opinion goes on to explain that credit card networks are two-sided "transaction" platforms that exhibit "indirect network effects," where the value of the platform increases with the numbers of participants on each side of the platform. To maximize the value of their services, these platforms must strike the optimal balance of the prices charged on each side, and thus prices on each side of the platform

[2] *U.S. v. American Express Co.*, 838 F.3d 179 (2d Cir. 2016).

[3] *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018).

interact with, and may constrain, the other. Because of the "interconnected pricing and demand" on the two sides of the platform, credit card networks are best understood as supplying only one product—the transaction—that is jointly consumed by cardholders and merchants. Accordingly, the two sides of the credit card network must be analyzed together as a single market.

The Court held that, in a properly defined market including both sides of the credit card network, the plaintiffs' argument "wrongly focuses on just one side of the market," and Amex's ability to raise merchant fees is not sufficient evidence of an impermissible anticompetitive effect. Indeed, the Court noted that higher merchant fees fund Amex's robust cardholder rewards program, which supports cardholder loyalty and encourages a level of spending that makes the network valuable to merchants.

The Court also noted that credit card transaction volume expanded dramatically while Amex's anti-steering provisions were in effect—evidence that credit card competition had not been impaired by the provisions. Moreover, Visa and MasterCard also introduced high-reward cards similar to Amex's, which the Court saw as evidence that Amex had spurred innovation competition in the market.

The Court concluded that there is "nothing inherently anticompetitive" about Amex's anti-steering provisions, as they promote interbrand competition between Amex and its rivals and prevent merchants from "free riding" on Amex's brand value by drawing Amex's high-spending cardholders to their stores only to steer them to lower cost cards. This free riding would endanger the viability of the entire Amex network by discouraging investments in rewards, which would ultimately harm both cardholders and merchants.

The Court's recognition that restrictions on one side of a platform can benefit users on the other side, and thereby enhance overall consumer welfare, may have important implications for antitrust analysis in two-sided markets beyond the credit card industry. The Court's decision may impact antitrust analysis with respect to two-sided platforms that "facilitate a single, simultaneous transaction between participants," including internet platforms that enable transactions between merchants and consumers. In markets that present these characteristics, the court concluded that, absent evidence of *net* harm, "there is no reason to intervene and disturb" the functioning of the industry.

In an attempt to address concerns expressed by the four dissenting justices about "the interpretive impact of the majority's discussion of what it calls 'two-sided platforms' in an era when that term might be thought to apply to many Internet-related goods and services that are becoming ever more important," the majority cautioned that "it is not always necessary to consider both sides of a two-sided platform," and that markets should be treated as "one sided" when the impact of indirect network effects and relative pricing on the two sides of a platform are minor. For example, the Court noted that, while in the newspaper advertisements market the value of an advertisement arguably increases as more people read the newspaper, the indirect networks effects operate in only one direction, as newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. While these comments may somewhat narrow the applicability of *Amex* to other industries, the Court left it to the lower courts to determine when indirect networks effects should be considered sufficiently minor such that inclusion of both sides of a two-sided platform in the relevant market is not warranted.