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Supreme Court Rejects Government Antitrust Challenge to American Express Antisteering Provisions

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In a long-awaited decision, a closely divided Supreme Court ruled in favor of American Express (“Amex”), ending a highly publicized government challenge that has spanned nearly a decade. Writing for a five-member majority, Justice Thomas rejected the Government’s challenge and concluded that Amex’s contractual “antisteering” provisions do not violate the Sherman Act. The majority held that defining a relevant market was necessary to examining the effects of the vertical arrangement, and determined that the two-sided platform constituted a single relevant market for credit-card transactions, encompassing services offered to both card-accepting merchants and card-using consumers. The Court then concluded that, within this market, the Government had failed to demonstrate that Amex’s antisteering provisions caused anticompetitive effects.

In a detailed dissent, Justice Breyer argued that the majority’s decision was “contrary to basic principles of antitrust law” and that it “ignores and contradicts the District Court’s detailed factual findings,” which were neither challenged by the parties, nor deemed clearly erroneous by the Second Circuit.

Background

American Express provides services to merchants and consumers by processing credit-card transactions through its payment network. When a consumer uses a credit-card at a merchant, the transaction is processed through a credit-card network, which provides “separate but interrelated services to both cardholders and merchants.”¹ Cardholders obtain credit, as well as a myriad of rewards and benefits depending on the card they use. Merchants pay the credit-card company a fee to process the transaction, which also varies based on the credit card being used.² Amex’s merchant fees historically have been higher than those of its competitors, thus, absent the antisteering provisions imposed by Amex, merchants may have an economic incentive to “steer” or otherwise incentivize customers to use other credit cards with lower merchant fees.

The Department of Justice and several states sued Amex in 2010, alleging that these antisteering provisions violated § 1 of the Sherman Act.³ In 2015, the U.S. District Court for the Eastern District of New York determined the market for credit-card services to merchants should be treated separately from the market for credit-card services to consumers. The District Court further held that the antisteering provisions resulted in higher merchant transaction fees and thus were anticompetitive.⁴

The Second Circuit reversed, holding that the relevant antitrust market should encompass credit-card services to both merchants and to consumers. Considering the effects in this broader market, the Court of Appeals concluded there were no anticompetitive effects and the antisteering provisions did not violate the Sherman Act.⁵ The Supreme Court affirmed.

Court's Analysis and Ruling

Writing for a five justice majority, Justice Thomas: (1) held that the Court first must define the relevant antitrust market to determine whether the vertical restraint at issue has anticompetitive effects; (2) defined the relevant market as a single, two-sided transaction market, including credit-card services to both merchants and consumers; and (3) concluded that the Government had not shown direct evidence of an anticompetitive effect in this broader two-sided market.

The Court applied a traditional three-step burden shifting framework for evaluating an allegedly anticompetitive restraint. Plaintiffs first must show a "substantial anticompetitive effect" before the burden shifts to the defendants to establish a procompetitive rationale for the restraint, and then back to the plaintiffs to demonstrate that the procompetitive efficiencies could reasonably be achieved through less anticompetitive means.⁶ Before this balancing could begin, however, the Court concluded that it must define the relevant market in which "to measure [the defendant's] ability to lessen or destroy competition."⁷ Rejecting arguments that a market need not be defined where direct anticompetitive effects have been shown under *FTC v. Indiana Federation of Dentists*,⁸ the Court observed that "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market."⁹ *Indiana Federation of Dentists*, the Court stated in a footnote, was different because it dealt with a horizontal restraint – and not a vertical restraint like Amex's anti-steering provisions.¹⁰

The Relevant Market

Turning to market definition, the Court concluded that credit-card networks are two-sided platforms and "courts must include both sides of the [credit-card network] platform – merchants and cardholders – when defining the credit-card market."¹¹ A key underpinning of this finding was the presence of "indirect network effects" in the credit-card market. Indirect network effects, the Court explained, exist in markets "where the value of the two-sided platform to one group of participants depends on how many members of another group participate."¹² Platforms with indirect network effects "cannot raise prices on one side without risking a feedback loop of declining demand,"¹³ which is to say that raising the transaction fees that merchants pay will cause some merchants to stop accepting Amex cards. As fewer merchants accept Amex cards, the cards become less valuable to consumers, who seek cards with merchant acceptance.

The Court took care to note that "it is not always necessary to consider both sides of a two-sided platform. A two-sided platform should be treated as a one-sided market when the impacts of indirect network effects and relative pricing in the market are minor."¹⁴ It found, however, that "two-sided transaction platforms, like the credit-card market, are different" in that they "facilitate a single, simultaneous transaction between participants."¹⁵ "Because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand."¹⁶ In further support of their market definition, the Court observed that credit-card transactions are "jointly consumed" by a cardholder and a merchant, and that credit-card companies compete only with other credit-card companies operating on both sides of the two-sided platform and measure their market share in terms of number of transactions.¹⁷

Competitive Effects

Having provided guidance on the appropriate market definition, the Court could have remanded the case to the District Court to allow for further proceedings applying the rule of reason to this newly defined market. Instead, the Court moved forward to examine whether the Government had adequately demonstrated anticompetitive effects in the credit-card transaction market. The Court determined the Government had not met this burden – concluding the direct evidence of Amex’s increased merchant fees was insufficient to show anticompetitive effects in the broadly defined relevant market.¹⁸ Observing that this argument addresses only one side of a two-sided market, the Court concluded that, to establish anticompetitive effects in the correct market, the Government now needed to demonstrate that Amex’s antisteering provisions either: (1) increased the cost of transactions above a competitive level; (2) reduced the number of transactions; or (3) otherwise stifled competition in the relevant market.¹⁹

The Court determined that plaintiffs did not offer evidence that the price of transactions was higher than in a competitive market, in part because the Government “failed to offer any reliable measure of Amex’s transaction price or profit margins,” and evidence of higher prices than competitors was inconclusive.²⁰ The Court also determined that evidence showing Amex’s price increases were not entirely spent on cardholder rewards was insufficient to show anticompetitive prices because there was no evidence that the higher prices resulted from restrictions on output or that the prices were above a competitive level.²¹ Finally, the Court determined that the plaintiffs failed to show the challenged provisions stifled competition in the relevant market. Instead, the Court found that “Amex’s business model spurred Visa and MasterCard to offer new premium card categories . . . [and] increased the availability of card services including free banking and card-payment services for low-income customers who otherwise would not be served.”²²

The Dissent

Justice Breyer, joined by Justices Ginsburg, Kagan, and Sotomayor, dissented. The dissent agreed that the traditional three-step burden shifting framework should apply, but argued that the Court should have applied all three steps. The dissent primarily disagreed with the Court’s holding that: (1) market definition is always necessary to evaluate a vertical restraint; (2) the relevant market should include both sides of the two-sided platform; and (3) in light of the District Court’s detailed factual findings, the plaintiffs failed to make a threshold showing of actual anticompetitive effects.

The dissent disagreed with the Court’s holding that the vertical nature of the restraint was sufficient to distinguish Amex from *Indiana Federation of Dentists*, and instead argued the Court should focus on the direct evidence (detailed at length in the District Court’s opinion and not found to be clearly erroneous by the Second Circuit) that Amex: (1) “raised merchant prices 20 times in five years without losing any appreciable market share;” (2) that Discover’s inability to break into the business with lower merchant prices because merchants were prohibited from steering customers to Discover; and (3) testimonial evidence that many merchants would have steered shoppers away from Amex in response to price increases.²³ Breyer argued that the direct evidence of anticompetitive effects is sufficient to meet the first step of the framework without defining a relevant market.

The dissent further observed that “missing from the majority’s analysis is any explanation as to *why*, given the purposes that market definition serves in antitrust law, the fact that a credit-card firm can be said to operate a ‘two-sided transaction platform’ means that its merchant-related and shopper-related services should be combined into a single market.”²⁴ Observing that the phrase “two-sided transaction platform” is not one of “antitrust art” found in any antitrust case from the Court, Justice Breyer isolated four defining characteristics from the majority’s opinion, and rejected each in turn as being significant enough to reject the traditional market definition approach. Breyer’s characterization of the majority’s new market definition

was: “they (1) offer different products or services, (2) to different groups of customers, (3) whom the ‘platform’ connects, (4) in simultaneous transactions.”²⁵ After detailing a number of commonplace markets demonstrating some or all of these features, Breyer concluded that “[n]othing in antitrust law . . . suggests that a court, when presented with an agreement that restricts competition in any one of the markets my examples suggest, should abandon traditional market-definition approaches and include in the relevant market services that are complements, not substitutes, of the restrained good.”²⁶

Finally, the dissent declared that the majority erred in rejecting the Government’s evidence of actual anticompetitive effects and in considering Amex’s justifications, when the Second Circuit had neither weighed the two across the new relevant market, nor had it found the District Court’s extensive factual findings, which the majority “inexplicably ignores,” to be clearly erroneous.

Where do we go from here?

In many respects, the Amex decision raises more questions than it answers and, while there no doubt will be many who seek to expand the boundaries of the Court’s holding, others will seek to narrowly cabin this decision within the specific facts of the Amex case. At least the following questions arise from the Court’s decision:

- How does one define a two-sided transaction market? The definition of the majority leaves much room for argument and analysis: when is the level of indirect network effects sufficient? Is Justice Breyer’s observation that the Court has used a definition that is broader than the economic support on which it is based? The lower courts will be wrestling with this issue for many years to come as parties try to fit within or distinguish their facts from the rather amorphous standards contained within the decision.
- Will this approach to market definition be extended beyond the narrow circumstances of this single case? Surely the Court does not intend to suggest market definition is no longer statute-agnostic and some other analysis will prevail if the new-found “two-sided” market is being examined in the context of a horizontal restraint? A merger?
- How exactly will the lower courts engage in the rule of reason balancing test across both sides of a two-sided market – what is the methodology for comparing the pro- and anticompetitive effects on each side?
- Will a relevant market definition analysis now be required even in the face of actual anticompetitive effects when the restraint at issue is vertical in nature?

With each of these questions requiring further analysis and interpretation by the courts, it may be many years before the full impact of this decision is understood.



- ¹ Ohio v. American Express Co., 585 U.S. ____ (2018), slip op. at 2.
- ² *Id.*
- ³ *Id.* at 7 (citing United States v. American Express Co., 88 F. Supp. 3d 143, 151-152 (E.D.N.Y. 2015)).
- ⁴ *Id.* at 7-8.
- ⁵ *Id.* at 7-8 (citing United States v. American Express Co., 838 F.3d 179, 184 (2016)).
- ⁶ *Id.* at 9-10.
- ⁷ *Id.* at 11 (citing Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177 (1965)).
- ⁸ 476 U.S. 447 (1986).
- ⁹ *American Express*, slip op. at 11 n.7 (citing Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 898 (2007); Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L.J. 135, 160 (1984)).
- ¹⁰ *Id.* at 10-11.
- ¹¹ *Id.* at 12.
- ¹² *Id.* at 3.
- ¹³ *Id.* at 12.
- ¹⁴ *Id.*
- ¹⁵ *Id.* at 13.
- ¹⁶ *Id.*
- ¹⁷ *Id.* at 13-14.
- ¹⁸ *Id.* at 10 n.6 (The Court focused on direct evidence of anticompetitive effects noting, “[a]lthough the plaintiffs relied on indirect evidence below, they have abandoned that argument in this Court.”).
- ¹⁹ *Id.* at 15.
- ²⁰ *Id.* at 16.
- ²¹ *Id.* at 17.
- ²² *Id.* at 18.
- ²³ *Id.*, Breyer, J., dissenting, slip op. at 12.
- ²⁴ *Id.* at 15.
- ²⁵ *Id.*
- ²⁶ *Id.* at 18.

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