Platform Conduct: Navigating New Groundss

Eric Hochstadt, Yehudah Buchweitz & Eric A. Rivas

Case law concerning two-sided markets continues to develop since the Supreme Court's *Ohio v. American Express* decision. In that case, the Court defined a two-sided platform as a platform that "offers different products or services to two different groups who both depend on the platform to intermediate between them."[1] As the Federal Trade Commission explained in the *FTC v. Surescripts, LLC* complaint, these platforms are unique because they often exhibit what economists refer to as "network effects," where the two different groups find increasing value in the platform as the group on the opposite side of the platform grows.[2] Depending on the strength of these network effects, they can present significant challenges to an incumbent platform's rivals trying to compete by developing a critical mass of users on each side of the rivals' platforms.

As explained in more detail below, antitrust enforcers should be mindful of three particular aspects of antitrust law when analyzing platform conduct. First, the market should be defined clearly and accurately under existing case law concerning the substitutability of alternative products and services. Second, in analyzing harm to competition, both sides of the two-sided market should be considered if the platform at issue is a two-sided transaction platform or if it exhibits substantial indirect network effects. Lastly, in analyzing whether the platform conduct has an actionable exclusionary effect on rivals, the focus should be on whether customers are deprived of making a meaningful choice to conduct business with the allegedly dominant platform's rivals.

As large technology firms have grown over time in the digital era, they have found themselves navigating the post-*Amex II* developing area of antitrust law covering platform conduct. Meanwhile, politicians and regulators have been questioning whether the firms are unfairly using their alleged market power to compete against rivals on digital platforms. These concerns generally are framed within a "big is bad" viewpoint.[3] But antitrust law does not condemn firms for growing in scale, even to the size of having a monopoly; rather, the law condemns the acquisition or maintenance of monopoly power by means of anticompetitive conduct.[4] With the antitrust platform case law still developing, and government agency investigations still underway, the antitrust inquiry for examining platform conduct begins with defining the relevant market that is allegedly harmed by the

Eric Hochstadt is a partner in the Antitrust practice group at Weil, Gotshal & Manges LLP; Yehudah Buchweitz is a partner in the Complex Commercial Litigation practice group at Weil; and Eric Rivas is an associate in the Complex Commercial Litigation practice group at Weil.

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[1] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280 (2018) (*Amex II*).

[2] Complaint for Injunctive and Other Equitable Relief ¶¶ 23–29, FTC v. Surescripts, LLC, No. 1:19-cv-01080-JDB (D.D.C. Apr. 17, 2019), ECF No. 4 (*Surescripts*).

[3] *See, e.g.*, Astead W. Herndon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N.Y. Times (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html. (Senator Elizabeth Warren proposing a regulatory plan that would roll back some acquisitions by and split up the businesses of tech companies such as Facebook and Amazon).

[4] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power *as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.*") (emphasis added).

conduct. The analysis then proceeds to determining whether the subject firm has significant market power, and if it does, whether it is using that power to harm competition in the relevant market.

Market Definition

Defining the market is the first important step in determining whether platform conduct is potentially harmful to competition. The Supreme Court's *Amex II* decision recognizes that defining a market as two-sided is central to the inquiry because if the two-sided market is characterized as having significant indirect network effects, the plaintiff challenging the conduct cannot succeed on its claim alleging anticompetitive conduct without taking into account effects on both sides of the platform.[5]

Note that *Amex II* concerned a claim against American Express Co. under Section 1 of the Sherman Act, which condemns agreements and combinations that unreasonably restrain competition. Notably, in *Surescripts*, the court distinguished *Amex II*, noting that the case "concerned an alleged restraint in violation of Section 1" against American Express (not a monopolist) with the plaintiffs failing to offer evidence of supracompetitive prices for credit-card transactions.[6] This article assumes a court would apply *Amex II*'s two-sided market definition approach to a claim under Section 2, which prohibits the illegal acquisition or maintenance of monopoly power and attempts to monopolize.

If the market definition does not align with the commercial realities, there is a risk that these antitrust enforcers will over-estimate the platform's market power and mistakenly identify platform conduct as competitively dubious.

Courts and government regulators will also presumably be mindful of defining a relevant antitrust market that reflects commercial realities. If the market definition does not align with the commercial realities, there is a risk that these antitrust enforcers will over-estimate the platform's market power and mistakenly identify platform conduct as competitively dubious.[7] As with traditional markets, two-sided markets are defined in terms of (1) the reasonable interchangeability of the products or services at issue,[8] and (2) the geographic area in which the firm at issue competes and to which consumers can turn for alternative sources of goods or services.[9]

In *Amex II*, the Supreme Court defined the relevant market as credit-card networks connecting merchants and cardholders, which are two-sided platforms that "offer[] different products or services to two different groups who both depend on the platform to intermediate between them."[10] One important way that two-sided platforms differ from traditional markets is that the former often exhibit "indirect network effects," i.e., "where the value of the two-sided platform to one group of participants depends on how many members of a different group participate."[11] To ensure sufficient participation from these two groups, two-sided platforms must be sensitive to the prices they charge each side. Thus, two-sided platforms often "cannot raise prices on one side without risk-

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5 *Amex II*, 138 S. Ct. at 2280–86.

6 Memorandum Opinion on Motion to Dismiss at 16, No. 1:19-cv-01080-JDB, Dkt. No. 45 (D.D.C. Jan. 17, 2020). Nevertheless, the court found that even if *Amex II* applies to Section 2 claims, "the FTC still pleaded sufficient facts addressing the totality of both two-sided markets." *Id.* at 17.

7 *See Amex II*, 138 S. Ct. at 2285 ("Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition.") (internal citations omitted); *Grinnell Corp.*, 384 U.S. at 587 (Unless the relevant market is defined with "relentless clarity," "the results will be distorted in terms of the conclusion as to whether the law has been violated and what the decree should contain.").

8 *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956).

9 *See* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961).

10 *Amex II*, 138 S. Ct. at 2280.

11 *Id.* at 2280 (citing David Evans & Richard Schmalensee, Matchmakers: The New Economics of Multisided Platforms 25 (2016)).

ing a feedback loop of declining demand."[12] As a result of these indirect network effects, "the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing."[13] However, when the impacts of indirect network effects and pricing are minor (e.g., they only run in one direction), a court may consider only one side of the platform.[14] This will be a fact-specific inquiry. The Court notably labeled a subset of two-sided platforms as transaction platforms, both sides of which must be evaluated for purposes of the antitrust analysis since, by their transaction-facilitating nature, they "exhibit more pronounced indirect network effects and interconnected pricing and demand."[15]

With the DOJ's and FTC's investigations of large tech companies in their early stages, reports indicate that the agencies are conducting interviews with relevant market participants, such as merchants that use the Amazon.com Marketplace platform that connects merchants and consumers.[16] Like credit-card networks in *Amex II*, Amazon Marketplace arguably meets the four elements of a transaction platform that the dissent identified were present in the majority opinion, i.e., the platform"(1) offer[s] different products or services, (2) to different groups of customers, (3) whom the 'platform' connects, (4) in simultaneous transactions."[17] Similar to American Express, Amazon Marketplace offers different services to different groups of customers—to merchants, it offers access to prospective purchasers via the platform; to consumers, access to various products and pricing information from merchants, including Amazon itself—and it connects consumers to merchants in simultaneous transactions. In investigating Amazon's and other tech companies' digital platforms, the agencies will likely have to evaluate both sides of these platforms when they are either (1) two-sided transaction platforms or (2) two-sided platforms in which the impacts of indirect network effects and relative pricing in the market are substantial or at least more than "minor."[18]

Amex II's guidance on evaluating two-sided markets is important because a finding of a two-sided transaction platform or a two-sided platform with significant network effects likely increases the challenger's initial burden in rule of reason cases for demonstrating anticompetitive effects from the subject restraint(s). The reason is because, as *Amex II* teaches us, the challenger cannot focus on only one side of the market in arguing anticompetitive effects.[19] For example, allegations of harm to competition, such as price increases, "on one side of the platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services."[20] Indeed, as another court recognized, *Amex II* affects the overall risk

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[12] *Id.* at 2285 (citing EVANS & SCHMALENSEE, *supra* note 11, at 674–75; Evans & Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 680–81 (2005)).

[13] *Id.* at 2285–86.

[14] *See id.* at 2286.

[15] *Id.* at 2278; *see also* US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 57 (2d Cir. 2019).

[16] *See, e.g.*, Spencer Soper & Ben Brody, *Amazon Probed by U.S. Antitrust Officials over Marketplace*, BLOOMBERG LAW (Sept. 11, 2019), https://news.bloomberglaw.com/mergers-and-antitrust/amazon-probed-by-u-s-antitrust-officials-over-marketplace.

[17] *Amex II*, 138 S. Ct. at 2298 (Breyer, J., dissenting); *see also US Airways*, 938 F.3d at 58.

[18] *See Amex II*, 138 S. Ct. at 2286 ("A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor."); *see also* Complaint ¶¶ 22–28, *Surescripts* (FTC's complaint against Surescripts explains that the platforms at issue have significant indirect network effects which creates a "chicken and egg problem," as bringing more users on board on one side of the market requires more users on the other side.).

[19] *Amex II*, 138 S. Ct. at 2287.

[20] *Id.* at 2286.

assessment for the plaintiffs and government having to prove their antitrust cases involving a two-sided market, including by perhaps increasing the difficulty in proving damages.[21]

What remains to be seen is how courts would respond to a market definition allegation that digital platforms, like Amazon's Marketplace, do not compete with traditional brick-and-mortar retailers.[22] For example, does Amazon's Marketplace compete with other online platforms, like Walmart.com, as well as traditional brick-and-mortar retailers? Because courts have traditionally defined relevant antitrust markets as including products or services that are reasonably interchangeable for the same purposes, the relevant market for digital platforms likely include both competing platforms and traditional brick-and-mortar retailers that serve as reasonable substitutes. That is, in all likelihood there exists a cross-elasticity of demand between these services such that the sales of traditional retailers are responsive to price changes by their digital retail counterparts. To reach a different result would require a finding that consumers do not view traditional retailers as suitable alternatives merely because shopping with them may require a physical trip to a store, rather than the click of a button or touch on a screen. Such a finding could unreasonably shrink the interchangeability standard that governs market definition. This inquiry is important because the market definition analysis will significantly affect any determination of market power and/or whether conduct actually has the potential to substantially lessen competition.

[C]ourts evaluating the competitive effects of unilateral conduct will examine whether the subject firm even has sufficient market power to affect the relevant market in which it competes.

Market Power

The next step in the inquiry into platform conduct is typically assessing the platform's degree of market power in the defined relevant market. In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, the Court defined "market power" as "the ability to raise prices above those that would be charged in a competitive market."[23] And in *United States v. E.I. du Pont de Nemours & Co.*, the Court defined "monopoly power" as "the power to control prices or exclude competition."[24] These terms generally refer to the ability of a firm to "achiev[e] supra-competitive prices by exercising either the power to control prices or the power to exclude competition."[25] The reason that these terms will be relevant is because courts evaluating the competitive effects of unilateral conduct will examine whether the subject firm even has sufficient market power to affect the relevant market in which it competes. Generally, for such unilateral conduct to be problematic in the eyes of courts and antitrust regulators, the firm must have some appreciable degree of market power such that its alleged conduct can plausibly have an anti-competitive effect on the relevant market.

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[21] *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 330 F.R.D. 11, 38–39 & nn.35–36 (E.D.N.Y. 2019).

[22] For example, in connection with the Amazon probe, the FTC has "asked [merchants] what percentage of revenue their business derive[s] from Amazon *versus other online marketplaces* like Walmart Inc. and EBay Inc., suggesting regulators are skeptical about Amazon's claims that shoppers and suppliers have close alternatives to the Seattle-based company." Soper & Brody, *supra* note 16 (emphasis added). *See also* Spencer Soper, *Amazon Is Accused of Forcing Up Prices in Antitrust Complaint*, Bloomberg (Nov. 8, 2019), https://www.bloomberg.com/news/articles/2019-11-08/amazon-merchant-lays-out-antitrust-case-in-letter-to-congress (A merchant's "allegations propose *narrowly defining Amazon as the dominant online marketplace with few competitors*, which makes its merchant customers more susceptible to its demands.") (emphasis added). *Cf.* Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc., 985 F. Supp. 2d 612, 621 (S.D.N.Y. 2013) (dismissing complaint where plaintiffs defined the relevant market as only encompassing e-books but offered no allegations as to why print books should not be included).

[23] 468 U.S. 85, 109 n.38 (1984).

[24] 351 U.S. at 391.

[25] Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 248 (1987–1988).

One particularly noteworthy concept that arose in the wake of antitrust scrutiny of tech firms is whether their access to "big data"[26] confers upon them or otherwise enhances their market power.[27] This idea, however, is in tension with the position of some economists that access to big data cannot, in and of itself, confer upon a firm, or enhance a firm's, market power.[28] Whether a firm's access to big data has any bearing on its degree of market power is an issue that will likely be determined or litigated in future antitrust cases covering platform conduct. Suffice it to say that the inquiry will concern whether a firm's access to big data allows it (and whether it has already begun) to charge supracompetitive prices, restrict output, hinder innovation and quality, and/or exclude competition, including by erecting barriers to entry or expansion.[29]

Firm Conduct and Anti- and Procompetitive Effects

Platform conduct is among the more hotly debated topics in antitrust after *Amex II* and the commencement of government investigations into big tech firms. On one hand, conduct that has traditionally been condemned as anticompetitive, such as certain exclusive dealing arrangements, will likely continue to draw the attention of antitrust regulators.[30] On the other hand, there is a host of firm conduct that some may view as deserving of antitrust scrutiny, even though there is little or weak precedent for condemning such conduct. In any event, assuming a firm has market or monopoly power in a properly defined antitrust market, the inquiry into the firm's conduct will analyze whether the firm's conduct has caused a substantial anticompetitive effect that harms consumers in the defined market. If so, the burden shifts to the defendant, who must proffer a procompetitive rationale for the conduct. If the defendant makes the showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive benefits could have been achieved through less restrictive means. [31]

The recent *US Airways* and *Surescripts* cases offer guidance on how courts and regulators might scrutinize allegations of anticompetitive conduct in platform cases.

US Airways, Inc. v. Sabre Holdings Corp. *US Airways* concerned contracts between US Airways, an airline company, and Sabre, the largest global distribution system (GDS) in the country with a market share of more than 50%. US Airways and other airlines listed their tickets on GDSs like Sabre to reach travel agents that use the GDS platform and their traveling customers. With respect to the travel agent side of the platform, Sabre structured its contracts with travel

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[26] "Big data" generally refers to "data that contains greater variety arriving in increasing volumes and with ever-higher velocity. . . . Put simply, big data is larger, more complex data sets, especially from new data sources . . . [that] are so voluminous that traditional data processing software just can't manage them." *See* Oracle, WHAT IS BIG DATA?: *The Definition of Big Data*, https://www.oracle.com/big-data/guide/what-is-big-data.html.

[27] *See, e.g.*, Lauren Feiner, *DOJ's Antitrust Chief Said He Talks to Trump But Not About Important Mergers*, CNBC (Nov. 6, 2019), https://www.cnbc.com/2019/11/06/doj-antitrust-chief-makan-delrahim-says-he-talks-to-president-trump.html (reporting that AAG Makan Delrahim stated in an interview that "Data can give you market power. . . . And its abuse would be a violation of antitrust law.").

[28] *See, e.g.*, Anja Lambrecht & Catherine E. Tucker, *Can Big Data Protect a Firm from Competition?*, COMPETITION POL'Y INT'L (Jan. 17, 2017).

[29] *See* Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) ("If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power. . . . To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run.").

[30] *See, e.g.*, Complaint ¶ 2, *Surescripts* (FTC complaint against Surescripts alleging Surescripts illegally maintained its monopolies in the United States eligibility and routing markets for the electronic prescribing of pharmaceutical drugs).

[31] *See Amex II*, 138 S. Ct. at 2286.

agents to include minimum-booking thresholds, which did not allow the travel agents to collect incentive payments from Sabre unless they used Sabre's GDS platform for a minimum volume of bookings. Most travel agents therefore used one GDS platform, which resulted in airlines like US Airways using a particular GDS platform to reach the travel agents and their traveling customers. On the airline side of the platform, Sabre insisted on "full content" provisions that generally required airlines like US Airways to refrain from disadvantaging Sabre's platform vis-à-vis competing channels of airline ticket distribution, such as the plaintiff's own website.[32]

The Second Circuit analyzed the record evidence and determined that because Sabre was a transaction platform, under *Amex II*, US Airways had to demonstrate harm to competition by taking into account both the travel agent and airline sides of the two-sided market.[33] This determination is significant, as the court makes clear in its discussion of US Airways' theory of damages. Because its theory was that the challenged restraints in the 2011 contract with Sabre caused it to be charged supracompetitive fees, the damages had to reflect supracompetitive prices "only to the extent that the net prices charged to travel agents . . . and airlines . . . *combined* exceeded the prices that would have been charged in a competitive market."[34] Thus, the finding that the Sabre GDS was a two-sided transaction platform meant that "the payments made by Sabre to travel agents would therefore necessarily reduce any damages US Airways might receive."[35]

The case raises an interesting question as to how contractual restraints like the full content provisions insisting on equal treatment with competition can be viewed as anticompetitive. According to US Airways, it had to agree to the full content provisions out of a "fear of being removed from the Sabre GDS or being retaliated against, for example, through 'display biasing,' which means reordering search results as they appear in the system to disadvantage a particular airline."[36] In other words, US Airways feared that if it did not submit to Sabre's contractual restraints, US Airways would be subjected essentially to the same type of display bias that Sabre itself was trying to avoid.

There are a growing number of similar antitrust complaints regarding platform conduct that results in bias to a particular business.[37] The viability of these allegations of anticompetitive conduct may ultimately hinge on findings of sufficient market power and anticompetitive effects that

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[32] Specifically, there were four "full content" provisions at issue: (1) the "No Better Benefits" provision required US Airways to provide all available US Airways fares to customers through the Sabre GDS; (2) the "No Discounts" provision required any fares offered by US Airways through the Sabre GDS to be no more expensive, and no less comprehensive, than fares offered by US Airways through any other forum; (3) the "No Direct Connects" provision prohibited US Airways from requiring or inducing any travel agent to book on the US Airways website, or otherwise circumvent the Sabre platform; and (4) the "No Surcharge" provision prevented US Airways from charging higher fees to travel agents for booking through the Sabre platform than for booking through other means. *See US Airways*, 938 F.3d at 51.

[33] *Id.* at 58.

[34] *Id.* at 59.

[35] *Id.*

[36] *Id.* at 51 (quoting US Airways, Inc. v. Sabre Holdings Corp., No. 11 Civ. 2725 (LGS), 2017 WL 1064709, at *5 (S.D.N.Y. Mar. 21, 2017)). *Cf.* Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 400 (3d Cir. 2016) (no substantial foreclosure where contract term between defendant and hospitals merely required hospitals to provide unrestricted access so that the availability of the drug was not more restricted or limited than the availability of competing drugs, and the only threat of not accepting the term was a lost discount). Similarly, reports indicate similar complaints being made by merchants who choose to use Amazon's Fulfillment by Amazon logistics service in order to increase their visibility on Amazon Marketplace. *See* Spencer Soper, *Amazon Is Accused of Forcing Up Prices in Antitrust Complaint*, Bloomberg (Nov. 8, 2019), https://www.bloomberg.com/news/articles/2019-11-08/amazon-merchant-lays-out-antitrust-case-in-letter-to-congress.

[37] *See, e.g.*, Victoria Graham, *Google's Self Preference Habits To Be Subject of Senate Hearing*, Bloomberg Law (Jan. 10, 2020), https://news.bloomberglaw.com/mergers-and-antitrust/googles-self-preference-habits-to-be-subject-of-senate-hearing (discussing Senate Judiciary's intention to probe issues related to allegations that tech companies "self-preference" their own businesses to the detriment of other companies).

have no countervailing procompetitive benefits. With case law on platform conduct still in its early stages, it will be important for courts to examine closely allegations of anticompetitive conduct to avoid the risk of finding false-positive instances of anticompetitive conduct. Such false positives can stunt innovation by imposing unnecessary and excessive litigation costs on firms that primarily compete by innovating.[38]

FTC v. Surescripts, LLC. FTC Commissioner Noah J. Phillips has identified *FTC v. Surescripts, LLC* as an informative case reflecting the FTC's current position concerning platform conduct.[39] Surescripts is a health information technology company holding an allegedly dominant position in the complementary markets of electronic prescription routing and eligibility. In the routing market, Surescripts facilitates the transmission of prescription information from a prescriber to a pharmacy. And in the eligibility market, Surescripts facilitates the transmission of a patient's formulary and benefit information from a payer to a prescriber's electronic health record (EHR).[40]

In its complaint, the FTC alleges that Surescripts has illegally maintained its monopolies in both the routing and eligibility markets in three primary ways. First, Surescripts allegedly began a loyalty pricing program conditioning discounts and increased incentive payments to routing and eligibility customers on their exclusive or near-exclusive loyalty to the Surescripts platforms. Second, Surescripts allegedly engaged in non-merits-based competition, such as threatening customers that attempted to deal with Surescripts' competitors. Third, Surescripts allegedly contracted with a potential competitor in a way that required the latter to be a reseller for Surescripts rather than develop into a viable competitor.[41]

Setting the backdrop for its allegations of anticompetitive conduct, the FTC characterizes both the eligibility and routing markets as two-sided with significant indirect network effects. Under such conditions, there appears to exist a "chicken-and-egg problem." That is, to develop a viable competing platform in markets where there exists allegedly dominant platforms, the market entrant or nascent platform must develop a critical mass of customers to join one side of the network by convincing them they will be able to access enough customers on the other side. And to develop such a critical mass, new platforms rely on customers that "multi-home" (i.e., customers who use more than one platform). Customers are more likely to multi-home when they face little to no cost of doing so. This, the FTC alleges, creates a significant concern over Surescripts' conduct—it allegedly increases the costs of multi-homing for customers, thus making it virtually impossible for competitors to solve the chicken-and-egg problem.[42]

The FTC's characterization of the market as setting the stage for potentially anticompetitive conduct again raises an interesting question: how much deference and leeway should we give to the incumbent platforms? Presumably the significant indirect network effects do not come about by accident; rather, they likely are the product of brand loyalty prompted by procompetitive benefits, such as innovation, only made possible (at least initially) by the business acumen of the incumbent platform. Are we to fault these platforms for being first in time, especially when their research

[38] *See* Answer to Amended Complaint 1–4, Cameron v. Apple Inc., No. 4:19-cv-03074-YGR (N.D. Cal. Nov. 11, 2019), Dkt. No. 74 (describing how the Apple App Store "has revolutionized the way consumers find, purchase, and install software applications, and the way developers sell those software applications to consumers").

[39] *See* Noah J. Phillips, Commissioner, Fed. Trade Comm'n, Big Data & Platforms, Panel Discussion at the ABA's 2019 Antitrust Fall Forum: Tech Summit (Nov. 18, 2019).

[40] Complaint ¶ 1, *Surescripts*.

[41] *Id.* ¶¶ 3–5.

[42] *Id.* ¶¶ 26–32.

and development is the primary driver in creating and/or expanding the market in which the incumbent platforms compete? Courts will presumably be cautious in determining where they draw the line and condemn conduct as anticompetitive, at the risk of penalizing incumbent platforms for their superior business acumen and efficiency, thereby chilling the very competition that the antitrust laws were designed to encourage and stimulate.

An example of a potential false-positive identification of anticompetitive conduct may exist in *Surescripts*. There, the FTC alleges that Surescripts engaged in de facto exclusive dealing by charging discounted prices or providing increased incentive payments to customers that are loyal, while charging non-discounted prices or providing lower incentive payments to those that were not loyal. That is, the discounted prices or increased incentive payments were conditioned on the customers' exclusive or near-exclusive use of the Superscripts eligibility and routing platforms.[43] But at least one other circuit has rejected this theory in some circumstances. For example, in *Eisai*, based on the record before the Third Circuit, the court of appeals stated that "the threat of a lost discount is a far cry from" anticompetitive conduct that the court previously condemned, such as a threat to cut off supply or the bundling of rebates across a diverse line of products to foreclose competition from competitors that did not offer equally diverse product lines.[44] The Third Circuit's finding was motivated by its effort to avoid condemning loyalty discounts, which can effectively lower prices for consumers and thereby further antitrust law's consumer welfare goal.

Are we to fault these platforms for being first in time, especially when their research and development is the primary driver in creating and/or expanding the market in which the incumbent platforms compete?

The district court in *Surescripts* held that the FTC adequately stated a claim for exclusive dealing. Specifically, the court credited the FTC's allegations that:

> [T]he threat of increased prices had the "practical effect" of preventing customers from working with other e-prescribing platforms, "since doing so would trigger the massive penalty provisions in their contracts with Surescripts . . . and cost routing [and eligibility] customers millions of dollars through increased prices or, for EHRs, decreased incentive payments."[45]

Notably, this decision is in tension with *Eisai*'s rejection of the proposition that a "threat of a lost discount" prevented customers from being able to meaningfully choose between suppliers. The *Surescripts* court was persuaded by the FTC's claim that "[defendant's] loyalty programs—and the implicit threat to charge non-exclusive customers higher prices—prevented the entrance of competitors into e-prescribing markets" and led, in turn, to "increased prices for pharmacies and PBMs."[46] The "threat to charge non-exclusive customers higher prices" is simply another way of saying there existed a "threat of a lost discount." As the case moves forward with discovery, an important inquiry for the dispute should be whether Surescripts' customers had the ability to switch some or all of their business to a competing platform. In other words, the proper focus should be on whether the allegedly dominant firm has substantially foreclosed competition by "us[ing] its power to break the competitive mechanism and depriv[ing] customers of the ability to

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[43] *Id.* ¶¶ 66–82.

[44] *Eisai*, 821 F.3d at 407. However, FTC's allegations that Surescripts' contracts with customers went further than a conditional discount, requiring that non-loyal customers repay discounts previously applied, finds support under Third Circuit law as evidence of coercion. *See* ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 277 (3d Cir. 2012) (recognizing that customers were "essentially forced" to disadvantage defendant's competitor where refusal invited a risk of having to repay contractual savings or supply shortages).

[45] Memorandum Opinion on Motion to Dismiss, *supra* note 6, at 12.

[46] *Id.*

make a meaningful choice."[47] Through this lens, the standard by which the firm conduct is judged is in line with the consumer welfare prescription that guides antitrust law. Logically, under this approach, testimony from pharmacies, payers, and EHRs (i.e., Surescripts' customers) will be crucial in determining whether Surescripts' conduct has violated the antitrust laws.

However, adding a layer of complexity to this inquiry is *Amex II*'s holding that for two-sided transaction platforms (and two-sided platforms with substantial indirect network effects), courts must consider the effects on both sides of the two-sided platform. Thus, it is possible that customers on one side of a platform are perfectly content with the platform's services (e.g., consumers who use Facebook's or Google's services free of monetary charge), whereas customers on the other side might feel subject to coercion (if, e.g., advertisers using Facebook's or Google's services alleged a cognizable theory of anticompetitive conduct). Under these circumstances, courts will likely assess the significance of the effects on the relevant market, including whether the indirect network effects are so minor that both sides of the platform need not be considered for purposes of the analysis.

Conclusion

In sum, it remains to be seen how much leeway courts will give to platforms that capitalize on the existence of indirect network effects, impose switching costs on customers, or otherwise engage in efforts that promote single-homing. Nevertheless, the consumer welfare standard that has been the bedrock of antitrust law for decades dictates that the focus for judging platform conduct should be on whether customers are deprived of the ability to make a meaningful choice. As the case law develops further, the government agencies investigating platform conduct will presumably pay close attention to the options available to the customers of these firms. This should include an examination of whether indirect network effects having any impact on the growth of competitors is actually posing a threat to competition, as opposed to being the result of innovation, efficiency, and superior business acumen that the antitrust laws should encourage. ●

[47] *Eisai*, 821 F.3d at 404 (quoting *ZF Meritor*, 696 F.3d at 285). *Cf.* Jonathan M. Jacobson & Daniel P. Weick, *Countering Exclusion: The Complainant's Obligation*, 81 Antitrust L.J. 423, 440 (2017) ("[W]here the concern is that one or more exclusionary contracts have been used to increase the costs of entry/expansion, asking whether an equally-efficient rival could plausibly counter them strikes a good balance between avoiding undue condemnation of vigorous competition and having an analysis so rigid that it fails to condemn seriously anticompetitive conduct.").