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Vertical Restraints in Two-Sided Markets after *Ohio v. Amex:* Lessons from the FTC Competition Hearings

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The recent Supreme Court decision *Ohio v. Amex* ("*Amex*") elicited strong reactions from panelists throughout the Federal Trade Commission's Hearing #3 on multi-sided platforms.[2] Several panelists questioned the Court's reasoning, with one speaker's describing it as "economically illiterate."[3] Others supported the decision and encouraged the agencies to use their global stage to advocate the views in *Amex* to countries with less advanced antitrust regimes.[4] Among the criticisms, two themes emerged. This article discusses both themes and briefly surveys lower court opinions citing to the *Amex* case to see if these concerns are beginning to appear. Although there are not enough cases to establish a trend, lower courts will likely avoid undue formalism when applying *Amex* and continue to take a fact-specific approach when analyzing two-sided markets.

THE AMEX DECISION

In *Amex*, the Court concluded that Plaintiffs failed to prove that anti-steering provisions in contracts between American Express and merchants violated Section 1 of the Sherman Act.[5] The Court required plaintiffs (1) to define the market in direct-evidence cases involving vertical restraints[6] and (2) to show a net-anticompetitive effect across two sides of a two-sided transaction platform.[7]

The case turned on market definition in the credit card industry. The district court limited the relevant market to the merchant side only, concluding that "two separate yet complementary product markets" existed.[8] The Second Circuit reversed, finding that the lower court erred from the outset by not including both sides of the market in its market definition.[9] The Supreme Court agreed, reasoning that two-sided platforms differ from traditional markets in several ways, such as the presence of indirect network effects.[10] In two-sided *transaction* platforms, the Court believed, such effects are particularly strong.[11] As a result, the profit-maximizing price on one side of such platform may differ significantly from the price on the other, depending on the relative price sensitivity of each side.[12] Thus, the costs to one side of the platform should be balanced against the benefits to the other side.

Furthermore, the Court noted that vertical restraints are likely to be pro-competitive or neutral and, thus, market analysis must be conducted at step 1 of the rule of reason in vertical cases. That holds true even when the plaintiff has presented direct evidence of harm.[13] As a result, the Court concluded that plaintiffs had to show anticompetitive harm at step 1 after balancing the harms and benefits of the anti-steering restraint on both the merchant and consumer sides of the credit card market. The Court concluded that plaintiffs only articulated harm on the merchant side of the market and, thus, did not meet their initial burden of proving anticompetitive harm in the *whole* relevant market.[14]

CONCERNS ABOUT HOW LOWER COURTS WILL APPLY *OHIO V. AMEX*

The concerns of several panelists at the hearing can be summarized into two major themes. First, lower courts may use *Amex* to create special legal rules for cases involving two-sided markets that do not properly reflect the existing economics of multi-sided markets.[15] Second,

the Court's requirement that plaintiffs show net-harm across both sides of the platform at step 1 may encourage lower courts to require plaintiffs to conduct a burdensome balance of efficiencies in cases involving other multi-sided markets.[16]

The first objection reflects a lack of consensus among economists over the definition of two-sided markets and, more specifically, two-sided transaction markets, in the first place. According to one economist, two-sidedness is not a binary feature of a market but is actually a continuum.[17] Thus, if courts focus on the multi-sidedness of a market when applying legal rules they may make a mess of the economic analysis. One panelist even went so far as to question the respected definition of a two-sided market by Jean-Charles Rochet and Jean Tirole, which the Court cited approvingly in *Amex*.[18]

The second objection reflects a concern over how lower courts will balance their cost-benefit analysis on different sides of a platform. Panelists worried that requiring such balancing without clear guidance could work mischief in the lower courts. Cross-platform balancing may both result in harm to one set of consumers to benefit another set as well as make it easier for companies to appropriate rents on one side of a market and justify this appropriation by showing some benefits on the other.[19] On the other hand, not weighing the costs and benefits for both sides of the platform can result in the identification of false negatives.[20] As one speaker noted, though the *Amex* majority did not explicitly say so, a concern over type 1 errors likely influenced its approach.[21] Furthermore, there was general consensus among the panelists that cross-market effects had to factor into the economic analysis when evaluating multi-sided markets.[22] In fact, trade-offs between both sides of the market are inherent in multi-sided markets.[23] Thus, as one panelist noted, if the *Amex* decision stands for the proposition that all of the market effects need to be considered, then that would not be a serious problem.[24]

That being said, one way to read the majority's approach in *Amex* is as an effort to ensure all market effects were accounted for without overruling case law that disfavors benefits in other markets. Existing case law suggests that benefits in one market do not generally offset harm in another.[25] These cases are still good law despite the fact that, as one panelist recognized, this precedent has been strongly criticized as economically arbitrary and modern courts may view it less favorably than they once did.[26] Thus, by defining both sides of the platform as one market, the Court enabled a balancing of the total costs and benefits in the case by avoiding this negative presumption. In fact, the dissent in *Amex* recognized that under its approach American Express would find it difficult to justify any harm to the merchants by offsetting benefits to cardholders at step 2.[27] By requiring plaintiffs to show net-harm across both sides of the platform at step 1, the Court avoided this issue.

EARLY LOOK AT APPLICATIONS OF THE DECISION BY LOWER COURTS

As of the date of this article, only twelve cases cite to the *Amex* case.[28] While it is too early to state a trend, so far lower courts have not applied *Amex* to create a formalistic set of special rules for two-sided markets. Excluding continuing litigation over the *Amex* decision itself, only four of the citing decisions cite *Amex* for market definition analysis or at step 1 of the rule of reason.[29] Of those, two cite *Amex* to distinguish the treatment of horizontal versus vertical

restraints, one supports the standard articulation of step 1 of the rule of reason, and one supports the argument that balancing prices between two sides of a market is not necessarily anti-competitive. None of the cases reflect a formalistic approach to two-sided markets.

So far, the only case to apply *Amex* in-depth engages in a fact-specific analysis of the economics of the market at issue.[30] The court in *In re NCAA* applied *Amex's* test for two-sided markets to the college education market in the United States. The court rejected the argument proposed by defendant's economist that there is a multi-sided market for college education for two reasons. First, the court cited *Amex* to support its conclusion that there is "no simultaneous interaction or proportional consumption through a platform by different market participants of what essentially constitutes 'only one product.'"[31] Second, the court distinguished the case from *Amex* because it involved a horizontal restraint whereas *Amex* involved a vertical restraint.[32] Thus, the court's decision both applied the *Amex* test for two-sidedness within the unique economic context of its case and recognized that the *Amex* decision was grounded in a recognition that the risks of anticompetitive behavior fundamentally differ in horizontal versus vertical cases.

CONCLUSION

Commentators participating in the FTC Hearing expressed concern about the way lower courts will apply *Ohio v. Amex*. These negative outcomes are not, however, inevitable. As the district court in *NCAA* stated: "[n]othing in *American Express* supports the notion that a relevant market can be defined to include more than one side without performing any economic analysis. To the contrary, the law review articles cited in *American Express* indicate that the presence and degree of the economic relationships discussed in that case present 'an empirical issue.'"[33] Indeed, the Court left substantial discretion to lower courts to work out how two-sided markets should be evaluated. While not conclusive, the few available citing cases indicate that judges will apply *Amex* in the fact-specific manner that has always characterized the field of antitrust.

APPENDIX

Case Name	Citation Type
In re Am. Express Anti-Steering Rules Antitrust Litig., No. 11-MD-2221, 2018 U.S. Dist. LEXIS 165924 (E.D.N.Y. 2018)	Denying without prejudice a motion to dismiss from *Amex* based on the Supreme Court's decision.
Panhandle Cleaning & Restoration, Inc. v. Nationwide Mut. Ins. Co., No. 3:17-CV-117, 2018 U.S. Dist. LEXIS 130321, at *14 (N.D. W. Va. Aug. 3, 2018)	Citing *Amex* for two purposes. First, to describe the difference between horizontal and vertical restraints. Second, to analogize the antisteering provisions the Court upheld in *Amex* to the vertical restraint between an insurance company and unnamed contractors.
B & R Supermarket, Inc. v. Mastercard Int'l, Inc., No. 17_CV-02738, 2018 U.S. Dist. LEXIS 158979, at *24 n.3 (E.D.N.Y. Sept. 18, 2018)	Citing *Amex* to support Discover's argument that it was not motivated by the impending fall of anti-steering rules. Unrelated to legal standards articulated in *Amex*.
In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720, 2018 U.S. Dist. LEXIS 148316 (E.D.N.Y. Aug. 30, 2018)	Citing *Amex* in relation to a case involving a similar market after *Amex* was decided and whether Plaintiffs could amend their one-sided complaint to a two-sided complaint.
B&R Supermarket v. Visa, Inc., No. 17-CV-2738, 2018 U.S. Dist. LEXIS 122908 (E.D.N.Y. July 20, 2018)	Citing *Amex* for the factual finding that Discover has a small market share. This case involved an antitrust claim related to the credit card industry shift from magnetic strips to chips.
LifeWatch Servs. v. Highmark Inc., No. 17-1990, 2018 U.S. App. LEXIS 24318 (3d Cir. Aug. 28, 2018)	Citing *Amex* for three purposes. First, to support the traditional formulation that anticompetitive harm from horizontal restraints can be shown directly or indirectly. Second to support the relevant market definition in a Section One case to include the area of competition "within which significant substitution in consumption or production occurs." Third, to support the existence of a "quick look" mode of analysis.
Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018)	A First and Fourteenth Amendment case; not an antitrust case. Cited for the proposition that Supreme Court has relied on new economic theories to resolve statutory disputes.
Pulse Network, LLC v. Visa, Inc., Civil Action H-14-3391, 2018 U.S. Dist. LEXIS 148652 (S.D. Tex. 2018)	Citing *Amex* (1) for the proposition that balancing prices between issuers and merchants does not necessarily constitute anti-competitive behavior and (2) to support its description of various business models in the credit card market.
Viamedia, Inc. v. Comcast Corp., No. 1:16-cv-05486, 2018 U.S.	Citing *Amex* for the general proposition that plaintiff's burden of proof was not met because there was no evidence that price increased beyond the competitive level.

Dist. LEXIS 138661 (N.D. Ill. Aug. 16, 2018)	
Doe v. United States, 901 F.3d 1015 (8th Cir. 2018)	A case regarding the Establishment Clause; not an antitrust case.
In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., No. 14-md-02541, 2018 U.S. Dist. LEXIS 153318 (N.D. Cal. Sept. 3, 2018)	Applying *Amex's* test for multi-sided markets to reject Defendant's efforts to re-define the relevant market in the case as a multi-sided market for college education in the United States.
ANR Storage Co. v. FERC, No. 16-1285, 2018 U.S. App. LEXIS 27122, at *14 (D.C. Cir. Sept. 21, 2018)	A case under FERC that cites *Amex* for the proposition that the relevant market only includes the "arena within which significant substitution in consumption or production occurs" after taking into account "all relevant commercial realities."

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[2] FTC, *FTC Hearing #3: Competition and Consumer Protection in the 21st Century* (Session 4) (Oct. 15, 2018) [Hereinafter the "FTC Hearing"], https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century.

[3] FTC Hearing at 18:13 (Eric Citron).

[4] FTC Hearing at 22:00 (Darren Tucker).

[5] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2290 (2018) (concluding that "the plaintiffs have not satisfied the first step of the rule of reason" and "have not carried their burden of proving that Amex's antisteering provisions have anticompetitive effects").

[6] *Id.* at 2285 n.7 (distinguishing between vertical and horizontal cases, stating that "vertical restraints are different" because they "often pose no risk to competition unless the entity imposing them has market power"); *see id.* at 2297 (J. Breyer, dissenting) (stating that the majority opinion "seems categorically to exempt vertical restraints from the ordinary 'rule of reason' analysis").

[7] *Id.* at 2286.

[8] *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 171 (E.D.N.Y. 2015) (citing *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 331, 334-39 (S.D.N.Y. 2001), *aff'd,* 344 F.3d 229 (2d Cir. 2003)).

[9] *Ohio v. Am. Express Co.*, 138 S. Ct. at 2283 (affirming the Second Circuit based, *inter alia*, on the fact that "the credit-card market is one market, not two") (internal citation omitted).

[10] "Indirect network effects exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate." *Id.* at 2280-81 (citing David Evans & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* 25 (Harvard Business Review Press 2016)).

[11] The Court reasoned that two-sided *transaction* platforms have "more pronounced indirect network effects." *Id.* at 2286.

[12] *Id.* at 2281 (citing David Evans & Richard Schmalensee, *Markets With Two-Sided Platforms*, 1 Issues in Competition L. & Pol'y 667, 675, 681, 690-691 (2008); David Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 668, 691 (2005); Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L. J. 571, 585 (2006); Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 300 (2014)). The optimal price might even be below-cost for one side of the platform. *Id.* (citing Timothy Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 Colum. Bus. L. Rev. 515, 519, 550 (2005); Klein, *supra* note 12, at 579; Evans & Schmalensee, *supra* note 12, at 675; Evans & Noel, *supra* note 12, at 681).

[13] *Id.* at 2285 n.7 (stating that "vertical restraints are different" because they "often pose no risk to competition unless the entity imposing them has market power").

[14] *Id.* at 2290 (concluding that "the plaintiffs have not satisfied the first step of the rule of reason" and "have not carried

their burden of proving that Amex's antisteering provisions have anticompetitive effects.").

[15] *See* FTC Hearing at 48:15 (panelists discussing possible misuses of the *Amex* decision).

[16] *See id.* at 52:00 (Eric Citron) (discussing the decision's likelihood to confuse); *Id* at 1:19:10 (describing the need to be "extraordinarily careful" to avoid rent appropriation).

[17] *See id.* at 37:35 (Michael Salinger) (describing the challenge defining two-sided markets and referencing people who would argue Google is a 3-sided market).

[18] *Id.* at 38:25 (stating that it is "not obvious that [the Rochet and Tirole view] is the right definition"); *see Ohio v. Am. Express Co.*, 138 S. Ct. at 2281 (citing Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. Eur. Econ. Ass'n 990, 1013 (2003)).

[19] *See* FTC Hearing at 1:19:10 (Eric Citron).

[20] David Evans & Richard Schmalensee, *Applying the Rule of Reason to Two–Sided Platform Businesses*, 26 U. MIAMI BUS. L. REV. 1, 11-12 (2018).

[21] *See* FTC Hearing at 26:00 (Darren Tucker).

[22] *See* FTC Hearing at 1:43:40 (Eric Citron) (agreeing with Tucker to the degree *Amex* is applied only for the proposition that indirect network effects should be considered in the antitrust analysis).

[23] *See id.* at 1:18:30 (Michael Salinger) (illustrating this with the example of two-sided advertising markets).

[24] *Id.* at 1:43:40 (Eric Citron).

[25] "As a general matter, however, a restraint that causes anticompetitive harm in one market may not be justified by greater competition in a different market." *United States v. Am. Express Co.*, 88 F. Supp. 3d at 247 (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); *United States v. Phil. Nat'l Bank*, 374 U.S. 321, 370 (1963)).

[26] *See* FTC Hearing at 1:13:51 (Darren Tucker) (describing the holding in *Philadelphia National Bank* as something he is dubious of); Interview with Joshua D. Wright, Commissioner, Federal Trade Commission, The Antitrust Source (2014), at 15 (describing the rule in *Philadelphia National Bank* as "arbitrary" in light of modern economics); Jan Rybnicek & Joshua Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market* 2 (2014), http://dx.doi.org/10.2139/ssrn.2411270 (criticizing the relegation of out-of-market efficiencies as allowing mergers that enhance consumer welfare to be successfully challenged).

[27] *Ohio v. Am. Express Co.*, 138 S. Ct. at 2302 (J. Breyer dissenting).

[28] This is based on a LexisNexis Shepard's report on *Ohio v. American Express*.

[29] *Panhandle Cleaning & Restoration, Inc. v. Nationwide Insurance Co.* cites *Amex* to distinguish the standard of review between horizontal and vertical restraints and supports its finding of no competitive harm for a vertical restraint between insurance companies and downstream contractors. *LifeWatch Services v. Highmark Inc.* cites *Amex* to support the traditional direct evidence standard for step 1 in the case of a horizontal restraint. *Pulse Network, LLC v. Visa, Inc.* cites *Amex* for the proposition that balancing prices between issuers and merchants does not mean such conduct is anticompetitive.

[30] *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.*, No. 14-md-02541, 2018 U.S. Dist. LEXIS 153318 (N.D. Cal. Sept. 3, 2018).

[31] *Id.* at *28.

[32] *Id.* at *28-29.

[33] *Id.* at *32.