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## Supreme Court's Decision in *Amex*: Summary and Potential Implications

On June 25, the Supreme Court issued its much anticipated opinion in *Ohio v. American Express Co.*, holding that American Express's antisteering provisions do not violate federal antitrust law (5-4, Justice Breyer dissenting, with Justices Ginsburg, Sotomayor, and Kagan joining). The case presented a number of important issues, including the analysis of competitive effects in two-sided markets and the burden-shifting framework employed in the analysis of vertical restraints. Below, we summarize the decision and provide insight into potential implications of the ruling.

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### The Decision

At issue in the case were American Express's ("Amex") antisteering provisions in its contracts with merchants. These provisions prohibit merchants from discouraging customers from using their Amex cards at the point of sale. According to Amex, absent these provisions, which preserve its ability to offer cardholder benefits, merchants would otherwise have an incentive to divert customers to other payment methods because Amex's merchant fees exceed those of its primary competitors, Visa, MasterCard, and Discover.

### *Analysis of Competitive Effects in Two-Sided Markets.*

Essential to the Court's ruling was its analysis of two-sided platforms. While the District Court found anticompetitive effects when the plaintiffs proved a price increase to one side of a two-sided platform, the Second Circuit reversed and the Supreme Court affirmed, holding that in some situations, competitive effects must be analyzed on both sides of the platform. To reach this conclusion, the Court detailed the characteristics of two-sided platforms. "Two-sided platforms offer different products or services to two different groups who both depend on the platform to intermediate between them." These platforms often exhibit "indirect network effects," which exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate. A credit card, for example, is more valuable to cardholders when more merchants accept it, and is more valuable to merchants when more cardholders use it. To ensure sufficient participation, two-sided platforms must be sensitive to the prices they charge each side. The Court explained, however, that sometimes indirect network effects require two-sided platforms to charge one side much more than the other.

Ultimately, the Court held that both sides of the credit-card market must be considered in analyzing competitive effects. While the Court states that "it is not always necessary to consider both sides of a two-sided platform . . . when the impacts of indirect network effects and relative pricing in that market are minor," two-sided "transaction" platforms "exhibit more pronounced indirect network effects and interconnected pricing and demand." In a two-sided "transaction" platform, transactions affect both sides of the platform simultaneously. Credit cards are the paradigmatic transaction platform, as credit card transactions simultaneously affect users (by facilitating a purchase and accruing rewards on the user side of the platform) and merchants (by facilitating a sale and resulting merchant fees on the merchant side of the platform). Thus, the court determined that competitive effects analysis regarding Amex's steering agreements needed to take into account both interconnected sides of the platform and the collective effect of the restraint on the credit-card market, not just the merchant side of that market. In making this determination, the Court emphasized the inextricable link between merchants and cardholders and the mutual flow of indirect network effects between the two groups. The Court distinguished the relationship of merchant and

cardholder in the credit-card market from reader and advertiser in the newspaper-advertisement market. In the latter, the indirect network effects operate in only one direction, because readers are largely indifferent to the amount of advertising that a newspaper contains. Accordingly, the newspaper-advertisement market “behaves much like a one-sided market and should be analyzed as such.” In contrast, two-sided transaction platforms facilitate “a single, simultaneous transaction between participants . . . [and] are thus better understood as supplying only one product—transactions.”

### ***Plaintiffs Failed to Show Anticompetitive Effects in Both Sides of the Credit-Card Market.***

The Court further found that the plaintiffs failed to carry their burden to prove anticompetitive effects in the relevant market. In order to demonstrate anticompetitive effects in the two-sided credit-card market as a whole, the plaintiffs had to prove that Amex’s antisteering provisions either (i) increased the price of credit-card transactions above a competitive level, or (ii) otherwise stifled competition in the credit-card market.

On the first, the plaintiffs relied entirely on proving that Amex’s antisteering provisions increased merchant fees; they otherwise ignored the effect these provisions had on cardholders. Ultimately, the plaintiffs failed to show that the price of credit-card transactions was higher than the price one would expect in a competitive market. Because Amex on the one hand, and Visa and MasterCard (and Discover) on the other hand, run structurally different businesses, the Court found that variations in their allocation of fees between merchants and cardholders is not evidence that Amex acted in an anticompetitive manner. The Court also noted that Visa and MasterCard’s merchant fees were increasing at locations where Amex was not accepted, suggesting that rising merchant fees were not caused by Amex’s antisteering provisions, but rather by increased competition for cardholders and other industry-wide trends. Lastly, the Court pointed to the dramatic 30% increase in credit-card transactions from 2008 to 2013, undermining the argument that output was reduced or supracompetitive prices were charged. When higher prices are associated with higher output, the Court reasoned, higher prices alone are not evidence of anticompetitive effects.

On the second, the Court found that interbrand competition had increased since Amex imposed its vertical restraint. With respect to competition for cardholders, Amex spurred its rivals to introduce new premium card categories with higher rewards and increase the availability of credit cards to low-income customers. With respect to merchant fees, the Court submitted that fierce competition exists. For example, when Amex raised its fees between 2005 and 2010, some merchants switched to rival networks, and when its remaining merchants complained, Amex ceased raising its fees. The Court also noted that Amex’s competitors have exploited its higher merchant fees by charging lower fees and achieving broader merchant acceptance, with approximately three million more locations than Amex. Finally, the Court found that Amex’s antisteering provisions are not inherently anticompetitive. Instead, they stem negative externalities, because when a merchant shows an unwillingness to accept an Amex card at one location, a cardholder may also be dissuaded from using the card at other locations.

Finding that the plaintiffs failed to satisfy the first step in the customary three-step burden-shifting rule of reason analysis, i.e., proof of anticompetitive effect, the Court held that Amex’s antisteering provisions do not unreasonably restrain trade. In the course of this discussion, the Court appeared to foreclose reliance on a “quick look” method of demonstrating anticompetitive effects in a vertical case directly, seemingly to require proof of a relevant market.

### **Potential Implications**

***More Difficult to Make a Prima Facie Showing of Anticompetitive Effects in Certain Multi-Sided Markets.*** In two-sided transaction platforms, where one side is often benefitted at the expense of the other, plaintiffs can no longer rely on solely showing anticompetitive effects in one side, but must now functionally balance anticompetitive effects and pro-competitive benefits in their prima facie case. On the other hand, the decision makes clear that certain multi-sided platforms, such as newspapers, do not require weighing of competitive effects on all sides of the platform. The decision is likely to generate considerable debate regarding platforms that lie somewhere between multi-sided transaction platforms, where network effects are direct, and newspapers, where the link between sides of the platform is more indirect and disproportionate.

***No Vertical Quick Look.*** The Court's ruling can be read to require defining a relevant market in all vertical cases, which also could raise the bar to plaintiffs in some settings.

***Not All Two-Sided Platforms Are Created Equal.*** The Court's differentiation of the credit-card market from the newspaper-advertisement market provides valuable insight into how to analyze competitive effects in two-sided markets. The likelihood is that competitive effects on both sides of a two-sided platform will be considered increases as the impact of indirect network effects increases. The Court emphasized the inextricable link between merchant and cardholder, the platform for which facilitates a single, simultaneous transaction. Thus, both sides of transaction-based platforms that facilitate a common output are likely to be considered in the analysis of competitive effects. In our increasingly interconnected world, the existence of such transaction platforms is growing. Likely examples of two-sided transaction platforms include Uber (a ride), StubHub (a ticket transfer), and Amazon.com (a sale).