Ohio v Amex: a novel approach to relevant market definition or a Pandora's box?

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Introduction

Two-sided markets are a common feature of our daily life – be it a dating club, the insurance services market or a two-sided online platform – which connect suppliers and customers and create value through an intermediary platform. A two-sided market typically has three features: (i) two or more distinct customer groups on different sides of the market; (ii) indirect network effects such that the value obtained by a customer group on one side increases with the increase in volume of a customer group on the other side; and (iii) an intermediary that internalises the externality from both the groups.[1]

The recent decision of the United States Supreme Court ('US Court') in *Amex*[2] found that the anti-steering provisions[3] that American Express Company and American Express Travel Related Services Company (collectively referred to as 'Amex') imposed on its merchants did not violate US antitrust law. What is significant to note from the decision is its rather novel approach to market definition in credit card markets, a type of two-sided market. The crux of the five-to-four majority decision written by Justice Thomas is that certain two-sided platforms are of a special type. These platforms, popularly referred to as 'transaction' platforms, are different from other types of two-sided platforms because: (i) they facilitate a single, simultaneous transaction between participants; and (ii) the impact of indirect network effects and relative pricing in that market is more pronounced and not 'minor' or 'weak'.

The majority held that both sides of such a two-sided transaction market must be considered as a single relevant market. It reasoned that, because of the indirect network effects, the 'two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand'. Consequently, the majority then combined the merchant-related and cardholder-related services in the credit card market to define one relevant market of 'transactions'. Although being a novel approach to defining a relevant market, the ruling raises more questions than it attempts to solve, some of which are briefly discussed below.

Unintelligible differentia between transaction and non-transaction platforms

The fulcrum of the majority's reasoning behind the single market definition approach was that '[F]ocusing on one dimension of… competition tends to distort competition that actually exists among [two-sided platforms]'. Accordingly, the majority, while taking into account the merchant side of the credit card market, also noted that Amex's increased merchant fees reflect the enhanced value of services it provided to the cardholders. While we can appreciate that any antitrust analysis of a two-sided platform should consider both sides, is it the only rationale for combining them into a single market? Isn't market definition merely a tool to set the circumference within which to analyse whether there is anti-competitive harm and not use it as an end goal in itself?

If the majority had not defined the two sides of the credit card market as a single market, were they obliged to shut their eyes to the cardholder side? The general rule is that anti-competitive harm in one market cannot be offset by benefits accruing in another market, except in certain cases.**[4]** One of the crucial factors for sustaining a claim for considering another market to offset harm is that the defendant would have to show that the alleged anti-competitive conduct was reasonably necessary to secure the pro-competitive effects in the other market and that there was no better alternative.**[5]** In a similar vein, Justice Breyer, who wrote the minority and dissenting opinion, noted: 'A defendant can rarely, if ever, show that a pro-competitive benefit in the market for one product offsets an anti-competitive harm in the market for another.' However, he ruled out that Amex cannot at all justify the steering provisions by demonstrating pro-competitive benefits.

Similarly, on the other side of the Atlantic, the European Court of Justice (ECJ) has observed that 'in a card payment system that is by nature two-sided, such as that of the Grouping, the issuing and acquisition activities are "essential" to one another and to the operation of the system'.**[6]** It further noted that the General Court, while holding that balancing could not be carried out between the issuing and acquiring activities in the payment system because the relevant market was not of payment systems, confused the issue of the definition of 'relevant market' and that of the context which must be taken into account to ascertain whether there is restriction 'by object'. The ECJ made it clear that while assessing whether coordination is by nature harmful, it is necessary to take all relevant aspects into account, irrespective of whether such aspects relate to the relevant market or not. Had the US Court in *Amex* taken such a tack, perhaps there was no reason to depart from the well-established principles of defining a relevant market.

Amex also raises the question of how then should two-sided non-transaction platforms be analysed. Should we completely ignore the other side while assessing competition in one side of such markets? For example, in the case of an advertiser-supported platform, such as Google or Facebook, where consumers view content on one side for free while advertisers buy advertising on the other side, there is interaction but no transaction between the viewers and the advertisers.**[7]** Thus, they do not qualify for the *Amex* definition of a two-sided transaction platform. Contrastingly, online marketplaces, such as Amazon and Flipkart and involving simultaneous transactions, could be included within the *Amex* definition. Is there an intelligible

differentia between the two for extending different treatment to advertiser-supported and transaction platforms, especially when indirect network effects are present in both? The justification for such differential treatment is not clear.

Following the majority's opinion in *Amex*, one could argue that in the case of an advertiser-supported platform, the indirect network effects are not as strong as in transaction platforms. The US Court in *Amex* conceded that it is not always necessary to consider both the sides of a two-sided platform. However, it explained that when the impact of indirect network effects and relative pricing in a two-sided market is minor; then the market should be considered as one-sided. The important question is how strong the network effect must be to stamp a two-sided platform as a transaction platform.

The majority opinion gives no guidance except for the example of the newspaper market. The majority noted that the newspaper advertising market behaves like one-sided market since readers are largely indifferent to the amount of advertising in the newspaper, rendering the indirect network effect to be weak. But can one deny that even in the case of advertiser-supported platforms, which may be akin to a newspaper market, that the platform cannot freely raise prices on one side without risking a feedback loop of declining demand? It is also doubtful whether readers would not be sensitive to the amount of advertising in a newspaper, so as to switch to an alternative in response to an increase in the amount of advertising. In fact, when the US Court agreed that a feedback loop is possible in case of two-sided platforms, what necessitated classifying platforms with weak and strong indirect network effects?

It is true that the transaction and non-transaction platforms are characterised by different price structure and price level, where the former is the sum of the prices and the latter is the price ratio on the two sides. For a two-sided transaction market, a complete pass-through is required in a way that the side that pays more can pass the difference in price to the other side. If that happens, the platform would be unable to control the relative prices of the two sides. On the other hand, in the case of a two-sided non-transaction platform, where no transaction between the different customer groups happens, no pass-through of price is possible which allows the platform to control the relative price or price structure on the two sides. This might be of vital importance in economics or for competition analysis, but it is not clear how the existence of pass-through makes such a crucial distinction between the two types of platform.

Even if we recognise the pass-through as a critical factor in categorising the two types of markets, what tools do we have to determine the quality and quantity of the pass-through? Again, the answer is not quite clear. Some economists are of the opinion that there is no clear-cut methodology to establish the existence, nature and strength of indirect network effect which could, in turn, decide the extent of pass-through.[8] If that is the case, it might have been an easier task in *Amex* to hold the credit card network as a transaction platform, and, thereby, a single market, but that might not be the case for many other platforms. A question worth asking is, is the advantage of laying down a novel market definition approach greater than the uncertainty and difficult task it sets for the regulatory authorities? Regulatory authorities would now have to grapple with an additional factual enquiry of determining the existence and extent of indirect network effects before determining the relevant market.

A vast amount has been written about distinguishing between transaction and non-transaction platforms. One key defining characteristic of a transaction platform is facilitating a single, simultaneous transaction between two sets of groups on either side. Besides the absence of a simultaneous transaction in case of non-transaction platforms, the platform is unable to set a per-transaction fee; for example, in the newspaper market, the publishers set access prices for both sides. This, again, does not seem to be entirely true. The transaction platforms may have one price overall and cost, but they do set different access prices on both sides. *Amex* itself notes that, 'two-sided platforms must be sensitive to the *prices that they charge each sid*e' (emphasis added).

Transactions: substitutes or complements or... neither?

The majority of texts written about this explain that a relevant market is typically an 'arena within which significant substitution in consumption or production occurs'. They emphasised, however, to focus on commercial realities which may necessitate combining different products or services into a single market. One of the examples quoted in *Amex* is how burglar alarm services and fire alarm services, not being substitutable from the demand side, could still be part of the same market. This is because the commercial reality in that case was that a producer of one type of alarm services could easily produce the other in response to a price rise in that other product and thus constrain the competitor's ability to raise prices. At first glance, the logic seemingly applies to the credit card market as well. A credit card company provides both the merchant and cardholder services, so it is potentially a 'producer substitutes' market but, as Justice Breyer pointed out, the credit card companies cannot respond to the merchant-related price increase by shifting production from cardholder services to merchant services.

The majority further observed that the transaction platforms effectively supply only one product, that is, transactions, and that 'only other two-sided platforms can compete with a two-sided platform for transactions'. Does it mean that a 'transaction' is good or services to which the test of substitutability applies for determining the relevant market? Or are the merchant-related card services and shopper-related card services complementary products, as Justice Breyer opined? Some argue that they are not complementary since, as required for complementary products, the two services are not bought by the same customers.

Even if the two services do not display all the characteristics of a complementary product, is there a sufficient justification to view them as substitutes? As Justice Breyer pointed out, could we possibly say that merchants can shift to cardholder-related services while cardholders can shift to merchant-related services in response to a price rise in their respective services market? Most likely, no. It is easy to view the product as a transaction in credit card markets but the market realities of the two different and non-substitutable consumer groups cannot be overlooked. Such a logic confuses relevant market determination with actual competition analysis.

Furthermore, if the relevant product is indeed a transaction, can we account for competitive constraints imposed by non-platform markets? The US Court stated that 'only other two-sided platforms can compete with a two-sided platform for transactions'. Impliedly, this means transaction platforms compete only with other transaction platforms and we have to discount

non-platform sources of competition in the analysis. If this understanding stays, it again overlooks the market realities. For example, in the case of online taxi platforms, it cannot, unfortunately, be asserted that they face competition from offline taxi providers,[9] and cash and other digital payment would also be disregarded in evaluating the credit cards market.[10]

Obfuscating the three-step test for rule of reason

One natural corollary of the single market definition is how the rule of reason would be applied in practice. Under the three-step rule of reason test, at step one the plaintiff has to prove that the alleged restraint has anti-competitive effect; at step two the burden shifts to the defendant to show a pro-competitive objective for the restraint; and if the defendant successfully proves so, the burden shifts back to the plaintiff at step three to show that the pro-competitive efficiencies could be achieved by less harmful means.

Applying *Amex* would mean that the plaintiff has to prove not only anti-competitive harm but net anti-competitive harm after weighing the harms and efficiencies in both sides of the market. The US Court clarified that the plaintiff's initial burden under the rule of reason is not discharged by merely proving an increase in merchant fees; rather it has to show anti-competitive effects on the credit card market 'as a whole'. It then accepted *Amex's* argument that 'its higher merchant fees are based on a careful study of how much additional value its cardholders offer merchants'.

It is not understood if the plaintiff has to weigh the increase in merchant fees and the corresponding increase in cardholders' benefits in the first instance, where thus the defendant would be required to prove whether the plaintiff's analysis is faulty or whether the net harm arrived at is not appreciable. Likewise, at what stage would the plaintiff have to demonstrate that there are less harmful means? Apparently, it seems, the burden will remain steadfastly with the plaintiff who may additionally have to prove that the net anti-competitive harm, whether substantial or not, caused by the conduct of the defendant could be achieved by lesser harmful means. In such a situation, the already challenging task for regulatory authorities to prove vertical restraints as anti-competitive could become even more onerous.[11]

Implications of *Amex* in other cases

The broad implications of *Amex* are already being felt in the US. Since the US Court delivered the judgment, it has been relied upon in several pending cases involving US college football and basketball teams, US Airways and Sabre, and Apple. In an antitrust class action brought by iPhone users against Apple for deriving supra-competitive profits from the distribution of iPhone apps, Verizon, acting as *amicus*, has raised the following questions in the wake of *Amex*:

> 'If the relevant market includes both sides of a two-sided transaction platform, does that mean each is a direct purchaser of the platform? [...] Indeed, it is unclear whether the way Petitioner has structured its App Store via contractual arrangement might change

> the way the law views the market dynamics here more generally. Economic analysis of the two-sided platform suggests that both the structure of the arrangement and the conduct of the platform can morph a two-sided platform into a conventional market.'[12]

Separately, Justice Breyer cautioned that adopting such an expansive and unclear definition of a two-sided transaction platform could arguably lead to the inclusion of farmers' markets, travel agents and internet retailers that allow other producers for a fee to sell over their networks. How far *Amex* will impact the evolution of antitrust principles is yet to be seen, but it is clear that it is a handy new tool which many two-sided markets would like to assert.

Treatment of non-price related antitrust issues

Vertical restraints involving price rise is one aspect; but what about other related competition issues, such as tying one card with another card for merchants or cardholders, refusing to deal with certain merchants who do not take the tied card offer, putting unfair non-price terms on merchants, or unfairly discriminating between merchants? In the absence of an actual context, it is again difficult to ascertain the exact implication *Amex* would have in such cases, but the point is that these issues do not require combining two sides of the market. Not every restraint would require conducting an analysis for the other side of the market to arrive at the net anti-competitive harm. Combining the two sides might even shift the focus from the necessary analysis to unnecessary items which have no ultimate benefit for the overall analysis.

How are customer groups to be treated?

The two-sided platforms clearly involve two sets of customers, with different concerns and competition effects and who are not substitutable. This is not to suggest that the two customer groups are not interdependent or mutually influence each other in view of the inherent connection between the two sides of the market. If so, should they be assembled at the stage of the relevant market itself? Which customer group should be given preference over the other? Or should they be treated equally? Are they even comparable? Seemingly, these are policy issues, but an answer eventually would be needed for applying the rule of reason test.

Conclusion

Lastly, the main question, as Justice Breyer raised, remains unanswered: what is it about two-sided transaction markets that justifies a special market-definition approach for them? We perhaps have answers for *how*, but not *why*. Given the growing importance of highly-technical two-sided platforms, careful judicial guidance is required on the issues noted above. Ambiguity in antitrust case law reduces its effective implementation. Any discourse must also take into account the complexities and dynamic nature of two-sided platforms and its future implications.

Notes

[1] Alison Oldale and Elizabeth Wang, 'A little knowledge can be a dangerous thing: price controls in the Yellow Pages industry' ECLR 2004, 25(10), 607–610.

[2] *Ohio v American Express Co*, 585 US (2018).

[3] Anti-steering provisions in merchant contracts precluded them from dissuading cardholders from using Amex cards at the point of sale.

[4] Patrick R Ward, *Testing for Multisided Platform Effects in Antitrust Market Definition,* 84 U Chi L Rev 2059.

[5] Richard M Brunell, *Ohio v Amex: Not so bad after all?*, 33-FALL Antitrust 16.

[6] Case C-67/13 P, *Groupement des cartes bancaires v Commission*, EU:C:2014:2204.

[7] Jan Kupcíkand Stanislav Mikeš, Discussion on big data, online advertising and competition policy, ECLR 2018, 39(9), 393–402.

[8] Dr Lapo Filistrucchi, Market Definition in Multi-Sided Markets, DAF/COMP/WD(2017) 27/FINAL, **https://one.oecd.org/document/DAF/COMP/WD(2017)27/FINAL/en/pdf (https://one.oecd.org/document/DAF/COMP/WD(2017)27/FINAL/en/pdf)**, accessed 19 June 2019.

[9] See *Fast Track Call Cabs v ANI Technologies* (Case Nos 06 and 74 of 2015, decided on 19 July 2017), where the Competition Commission of India considered Ola and Uber as radio taxi operators and not merely platforms.

[10] Richard M Brunell, *Ohio v Amex: Not so bad after all?*, 33-FALL Antitrust 16.

[11] David Kully and Joseph Vardner, *Vertical Restraints after Amex: Quietly Imposing new burdens on Section 1 Plaintiffs,* (2018) 33-FALL Antitrust 31.

[12] Brief of Amicus Curiae Verizon Communications Inc in Support of Neither Party, Apple Inc v Robert Pepper, et al, Supreme Court of United States (17 August 2018), **www.supremecourt.gov/DocketPDF/17/17-204/59959/20180817172223352_17-204%20Brief.pdf (http://www.supremecourt.gov/DocketPDF/17/17-204/59959/20180817172223352_17-204%20Brief.pdf)**, accessed 18 June 2019.

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