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Supreme Court Holds That Government Failed to Show AmEx Anti-Steering Rules Harmed Both Sides of Two-Sided Market

Jeffrey May (Wolters Kluwer) · Tuesday, June 26th, 2018

In a five-to-four decision yesterday, the U.S. Supreme Court ruled that the Department of Justice Antitrust Division and several states failed to prove that so-called “anti-steering” provisions imposed by American Express Company on merchants that accept AmEx cards harmed competition in violation of federal antitrust law. The Court, in an opinion authored by Justice Clarence Thomas, held that the plaintiffs did not carry their burden of establishing anticompetitive effects because their argument that AmEx’s anti-steering provisions increased fees paid by merchants that accepted AmEx cards wrongly focused on just one side of the two-sided market for credit-card transactions. In reaching its conclusion, the Court followed a recent line of decisions, distinguishing between horizontal agreements between competitors and the vertical restraint at issue here. A [decision](#) of the U.S. Court of Appeals in New York City, reversing a judgment in favor of the plaintiffs, was affirmed. The case is *Ohio v. American Express Co.*

AmEx is one of the four dominant participants in the credit-card market, the Court explained. The Antitrust Division and a number of state attorneys general sued AmEx, Visa, and MasterCard in 2010, alleging that they restricted price competition at the point of sale by barring merchants from offering consumer discounts, rewards, and information about card costs. MasterCard and Visa agreed to settle the charges. The government proceeded with the action against AmEx because, despite the injunctive relief against MasterCard and Visa, merchants that accepted AmEx were still unable to influence customers’ payment methods because these merchants were still bound by the AmEx rules. After a bench trial, AmEx was found to have violated federal antitrust laws. The Second Circuit reversed on the ground that a flawed market definition was fatal to the government’s case. The Supreme Court has now affirmed that decision, holding that with the market properly defined the plaintiffs’ evidence was insufficient to carry their burden to show anticompetitive effects.

Market definition. The Court rejected the plaintiffs’ argument that the market did not need to be defined because they had offered actual evidence of adverse effects on competition. The Court said that market definition was necessary when reviewing a vertical restraint, even though a market might not need to be precisely defined when analyzing horizontal restraints. This was true, even though the plaintiffs relied exclusively on direct evidence to prove that AmEx’s anti-steering provisions caused anticompetitive effects in the credit-card market.

The Court also outlined a method for defining unique two-sided markets as they differ from traditional markets. Both merchants and cardholders had to be included when defining the credit-card market as “[t]hese platforms facilitate a single, simultaneous transaction between participants,” the Court

explained. However, both sides of the platform in an apparent two-sided market did not always have to be considered.

“A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor,” the Court stated. The newspaper-advertisement market was offered as an example of weak indirect network effects, suggesting application of a one-sided market analysis. While the value of an advertisement increases as more people read the newspaper, newspaper readers are largely indifferent to the amount of advertising that a newspaper contains, the Court explained. In the case of credit cards, on the other hand, competition could not be accurately assessed by looking at only one side of the platform in isolation, according to the court.

Market power, anticompetitive effects. The Court went on to analyze the two-sided market for credit-card transactions as a whole. The government had relied exclusively on an increase in merchant fees to establish anticompetitive effects, according to the Court. However, “[e]vidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power.” In order to demonstrate anticompetitive effects, the government had to “prove that AmEx’s anti-steering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market.” The Court concluded that the plaintiffs did not prove that increased AmEx merchant fees showed that AmEx had market power. Further, they failed to prove that the anti-steering rules stifled competition among cred-card companies.

The Court also pointed out that there was nothing inherently anticompetitive about the AmEx anti-steering rules. The other credit-card companies could continue to compete against AmEx by “offering lower merchant fees or promoting their broader merchant acceptance.”

Dissent. In a dissenting opinion joined by the more left-leaning justices, Justice Stephen Breyer took issue with treating the two sides of this market—shopper-related services and merchant-related services—as a single market.

“[O]ur precedent provides no support for the majority’s special approach to defining markets involving ‘two-sided transaction platforms,’” Breyer said. The dissent also pointed out that American Express was charged with harming competition with respect to merchant-related card services. The challenged contract provisions appeared only in the American Express contracts with merchants. The dissent suggested that the other side of the market might be considered at a later stage in the three-step rule-of-reason analysis applied to this type of vertical restraint, but not in step 1 which is where the Second Circuit and the majority focused their attention.

The parties, the majority, and the dissent seemingly accepted the application of a three-step, burden-shifting rule-of-reason analysis. Under this approach, the plaintiffs have the burden to prove that the challenged restraint has a substantial anticompetitive effect. If the plaintiff carries its burden in step 1, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

According to the dissent, the majority failed to properly follow the three-step rule of reason analysis and considered procompetitive justifications for the restraints in step 1 of the analysis. By doing so, the majority ignored the district court’s factual findings based on an extensive trial record.

In addition to rejecting the majority’s “special approach” to two-sided markets, the dissent contended

that a discussion of market definition was legally unnecessary in the first stage of rule-of-reason analysis because the district court found “strong *direct* evidence of anticompetitive effects flowing from the challenged restraint.”

Even accepting the majority’s definition of the market, the dissent contended that the decision was not justified because “the plaintiffs *made* the factual showing that the majority thinks is required.” The dissent went on to say that the majority’s statements that the anti-steering rules were procompetitive were directly contradicted by the findings of the district court.

Reaction. In a statement released by American Express, Stephen J. Squeri, the company’s chairman and CEO, called the decision “a major victory for consumers and for American Express.” He pointed to language in the decision that “Amex’s business model has stimulated competitive innovations in the credit-card market, increasing the volume of transactions and improving the quality of the services.”

A spokesperson for the Department of Justice declined to comment on the decision.

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