OHIO v. AMERICAN EXPRESS: IMPLICATIONS FOR NON-TRANSACTION MULTISIDED PLATFORMS

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I. INTRODUCTION

The Supreme Court's recent decision in *Ohio v. American Express* has important implications for the antitrust analysis of multisided platforms.[2] The Court expressly addressed two fundamental issues: (1) defining the relevant product market(s) when there are two or more "sides" to a platform; and (2) specifying the "three-step" burden shifting paradigm under a rule-of-reason analysis.[3] The Court filled an immense void as practitioners had sought antitrust guidance on these central issues involving platforms.[4] The Court also left open a number of important issues. Perhaps most critically, *American Express* limits the scope of its decision by introducing a distinction between "transaction" and "non-transaction" platforms.

The Court observes that transaction platforms, such as credit-cards, are different than non-transaction platforms, such as newspapers, since transaction platforms — as the name implies — "facilitate a single, simultaneous transaction between participants."[5] The Court further differentiates transactional and non-transactional platforms by explaining that, "[n]on-transaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform. A newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers."[6] Referencing newspapers, the Court further explains that "indirect network effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains."[7]

A critical question for antitrust practitioners, courts, and agencies is whether the underlying economic logic of the Court's analysis in *American Express* applies to non-transaction platforms as well. In Section 2, we detail the impact of the *American Express* decision on the antitrust analysis of multisided platforms. Section 3 details the similarities and differences between transaction and non-transaction platforms and argues why the economic principles detailed in *American Express* also apply to non-transaction platforms. Section 4 concludes.

2 See *Ohio v. Am. Express Co., 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018)*, hereafter "*Am. Express Co.*"

3 Broadly, the court determines in Step One whether there is harm to competition; this is the *prima facie* burden. If harm to competition is established, the burden is shifted to the defendant in Step Two to produce evidence of procompetitive efficiencies that offset the competitive harm. If such efficiencies are identified, in Step Three, the decisionmaker weighs these two countervailing effects with the ultimate burden of persuasion remaining with the plaintiff.

4 For instance, see the dueling amicus briefs from attorneys and economists on each side of *American Express* representing vastly different positions on these questions (available at http://www.scotusblog.com/case-files/cases/ohio-v-american-express-co/).

5 *Am. Express Co.* at 13.

6 *Am. Express Co.* at footnote 9.

7 *Am. Express Co.* at 12.

II. *OHIO v. AMERICAN EXPRESS*

In *American Express* the Court was asked to address the proper methodology to address antitrust issues involving multisided platform. Evans & Schmalensee (2013) state that a multisided platform "has (a) two or more groups of customers; (b) who need each other in some way; (c) but who cannot capture the value from their mutual attraction on their own; and (d) rely on the catalyst to facilitate value creating interactions between them."[8] The appeal of this definition is that it can describe both transaction and non-transaction platforms — although there are important differences between the two types.[9] Examples of transactional platforms include payment card systems, ride sharing apps, and eBay. The common thread is that there is a direct, commercial transaction between the two sides, such as cardholders and merchants, that a platform, such as American Express, facilitates. In contrast, non-transaction platforms such as newspapers and search engines, which bring together consumers and advertisers, facilitate an engagement, at some level, between the two groups that lacks a direct, commercial exchange. Importantly, as Schmalensee & Evans' definition highlights, a non-transaction platform is still a catalyst that brings together two groups and unlocks value for both.

The specific issue before the Court in *American Express* was whether the antisteering provisions in agreements between American Express and merchants violate Section 1 of the Sherman Act. When cardholders and merchants transact, there is a "swipe fee" that merchants must pay to the credit card company. American Express has a relatively high swipe fee compared to rivals such as Visa, MasterCard, and Discover; thus, merchants have an incentive to "steer" cardholders at the point-of-sale to use a rival credit card with a lower swipe fee. In order to protect against this, American Express — and others — included an antisteering provision in its contracts with merchants. The district court agreed with the U.S. Department of Justice ("DOJ") that the effect of the antisteering provision was to "restrain competition between networks."[10] The Second Circuit reversed, finding that petitioners failed to demonstrate market-wide anticompetitive harm — particularly given that there was no evidence of diminished output or quality.[11]

Importantly, a fundamental fact that the courts had to deal with is that American Express is a two-sided platform that must balance the interests of both groups due, in large part, to the presence of indirect network effects. Indirect network effects, also known as cross-group effects, occur when the size of one group, e.g. cardholders, increases the value of participating on the platform for the other group, e.g. merchants. The cross-group effect also goes from merchants to cardholders.

Within this context, the Supreme Court was asked to decide on the appropriate antitrust framework to apply to markets involving platforms including (1) whether each side of a platform constitutes a separate relevant product market for the purposes of antitrust analysis and (2) what evidence is required to satisfy a plaintiff's *prima facie* burden under the rule-of-reason in the context of platforms. Two primary schools of thought have developed around these questions. While each school appears to agree in principle upon the relevant economic considerations in evaluating the competitive effects of conduct in multisided platforms, there are critical differences between the two schools when it comes to how courts and agencies should structure and sequence their analysis.

The first school argues that platforms should be assessed in a manner similar to single-sided markets in that each side should, ultimately, be considered separately — which we can label as the "separate markets" approach.[12] Further, harm to a group of consumers on one side of a platform should be sufficient to dispel the plaintiff's *prima facie* burden and, without more, establish an antitrust violation regardless of the effects on other consumer groups. We can label this as the "separate effects" approach, as it finds that any effect that makes a group worse off

8 Evans & Schmalensee (2013), "The Antitrust Analysis of Multi-Sided Platform Businesses," NBER Working Paper No. 18783, pp. 1-72 at 7.

9 See Filistrucchi, Geradin, van Damme & Affeldt (2014), "Market Definition in Two-Sided Markets: Theory and Practice," *Journal of Competition Law & Economics* 10, pp. 293-339.

10 U.S Department of Justice, Complaint for Equitable Relief in United States v. American Express, ¶23. See also *United States v. Am. Express Co.*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015).

11 See *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016).

12 See, e.g. Katz & Sallet (2018), "Multisided Platforms and Antitrust Enforcement," *Yale Law Journal* 127, pp. 2142-2175; Conner, Gaynor, McFadden, Noll, Perloff, Stiglitz, White & Winter (2017), "Brief for Amici Curiae un Support of Petitioners in *Ohio et al. v. American Express Company*," and Brief of 28 Professors (2017), "Brief of 28 Professors of Antitrust Law as Amici Curiae Supporting Petitioners in *Ohio et al. v. American Express Company*." There is a general recognition, however, that cross-group effects must still be considered, to some degree, even if separate markets are defined. See, e.g. Katz & Sallet (2018). For a detailed overview of the two schools of thought, see Wright & Yun (2018), "Burdens and Balancing in Multisided Markets: The First Principles Approach of *Ohio et al. v. American Express*," *Review of Industrial Organization*, forthcoming.

somewhere on a platform — for example, a price increase to merchants — is generally sufficient to show antitrust harm.[13] Thus, countervailing welfare gains for consumers on the other side of a platform would only be considered a "defense," and defendants would bear the burden of proof to establish that resulting efficiencies outweigh harm to the first group.

In contrast, the second school of thought argues that platforms are inherently defined by the interrelationships between their various sides and thus, product market definitions should generally include all sides of a platform. Thus, courts and agencies must explicitly consider cross-group effects when defining markets.[14] We can label this as the "integrated market" approach. For instance, American Express would be considered a platform that operates in a single product market.[15] Given this integrated market definition, it follows that finding harm to one side of a platform is insufficient to meet the *prima facie* burden and a proper competitive effects analysis must jointly consider all sides of a platform — which we can label as the "integrated effects" approach. This approach does not simply treat the other side of a platform as a potential consideration for an "efficiencies defense," capable of rebutting a showing of harm, but rather as a fundamental part of determining whether there is competitive harm of the type proscribed by the antitrust laws — that is, the acquisition or exercise of monopoly power — in the first place.

The stakes between the two schools of thought, as it relates to competitive effects and the *prima facie* burden, cannot be understated. Central to the issue of liability in rule-of-reason cases is the idea of "harm to competition." It is well understood that harm to a specific group of consumers does not necessarily establish cognizable antitrust harm. For instance, price discrimination harms some groups of consumers but benefits others — yet, it is generally not the type of conduct that results in a restriction of market output and increase in market price.[16] Another example would be an efficient merger that drives out a less-efficient rival. In this case, consumers who preferred the differentiated product of the rival would be worse-off — although consumers, as a whole, are better off.[17] Thus, it is not extraordinary that decisions in competitive markets harm some group of consumers but benefit others. Indeed, it is a fundamental feature of competition when products are differentiated. Consequently, the focus of antitrust laws is to condemn conduct that improperly creates or maintains monopoly power. It is, thus, critical to make a distinction between harm to a group of consumers and "competitive harm" or "anticompetitive effects" cognizable by the antitrust laws. This is particularly relevant for multisided markets where there are two or more distinct group of consumers.

Within this setting, the Supreme Court fully affirmed the Second Circuit and endorsed the integrated market and integrated effects approach — as it applies to transaction platforms such as American Express. Justice Clarence Thomas, writing for the majority, observes, "[C]redit-card networks are best understood as supplying only one product—the transaction—that is jointly consumed by a cardholder and a merchant. Accordingly, the two-sided market for credit-card transactions should be analyzed as a whole."[18] Thus, "[i]n two-sided transaction markets, only one market should be defined."[19] Moreover, "[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."[20]

American Express filled a large void in the understanding how courts will analyze analytical claims of potential anticompetitive conduct involving platforms. One area, however, that the Court did not fully address is whether the principles underlying its analysis apply, and if so, to what extent, to what it describes as "non-transaction platforms." This gap in the Court's decision has not gone unnoticed — with commentators

13 See Brief of 28 Law Professors (2018) at 14.

14 See, e.g. Ratliff & Rubinfeld (2014), "Is There a Market for Organic Search Engine Results and Can Their Manipulation Give Rise to Antitrust Liability?," *Journal of Competition Law & Economics* 10, pp. 517-541.; Ward (2017) "Testing for Multisided Platform Effects in Antitrust Market Definition" *The University of Chicago Law Review* 84, pp. 2059-2012; Evans & Schmalensee (2018), "Brief for Amici Curiae Prof. David S. Evans and Prof. Richard Schmalensee in Support of Respondents in *Ohio et al. v. American Express Company*," and Sidak & Willig (2018), "Brief for Amici Curiae J. Gregory Sidak and Robert D. Willig in Support of Respondents in *Ohio et al. v. American Express Company*."

15 See Sidak & Willig (2018).

16 See Klein (1996), "Market Power in Aftermarkets," *Managerial and Decision Economics* 17, pp. 143-164 ("[M]arket power is not necessary for a firm to successfully engage in discriminatory pricing. All that is necessary is that the firm face a negatively sloped demand for its products, as all firms selling unique products do. Although such a negatively sloped demand and ability to price discriminate would not exist under the assumptions of perfect competition, it must be distinguished from the negatively sloped demand and ability to price discriminate that is present because a firm possesses a large share of the market, p. 155").

17 See Heyer (2012), "Welfare Standards and Merger Analysis: Why Not the Best?," *Competition Policy International* 8, pp. 146-172 at 155.

18 *Am. Express Co.* at 2 (Syllabus).

19 *Am. Express Co.* at 14 (citing to Filistrucchi *et al.* (2014), p. 302).

20 *Am. Express Co.* at 15.

offering speculations and conjectures as to the impact of the case on non-transaction platforms, such as Google and Facebook, in the future.[21] In the following section, we explain why there are sound economic reasons the Court's decision should apply to non-transaction platforms as well.

III. THE COMMON ECONOMIC LOGIC OF TRANSACTION & NON-TRANSACTION PLATFORMS

Early in the development of the economic literature on platforms, researchers recognized that not all platforms share the same features — particularly as it relates to the size, strength, and direction of cross-group effects and the presence of direct network effects.[22] Evans (2003) makes a distinction between three types of multisided platforms: (1) "market-makers," (e.g. eBay, shopping malls) (2) "audience-makers," (e.g. online search engines, newspapers) and (3) "demand-coordinators" (e.g. video game consoles, payment cards).[23] For market-makers, a platform such as eBay is the mediator in the direct transaction between buyers and sellers. Similarly, demand-coordinators such as video game consoles are enabling various groups, e.g. gamers, game developers, and manufacturers of peripheral devices, to interact. Evans places payment card platforms in the demand-coordinators category; although, there does not appear to be a great deal of substantive difference between market-makers and demand-coordinators other than perhaps where the direct transaction occurs. For market-makers, the transaction occurs "on" the platform itself, e.g. buyers and sellers on eBay's webpage, while for demand-coordinators the transaction does not necessarily have to physically occur "on" the platform, e.g. video game sales can occur at a third-party retailer. Finally, for audience-makers, platforms match advertisers with users, who are attracted to the platform primarily through the provision of compelling content. Examples are advertising-supported media such as online search engines, newspapers, yellow pages, and some social media.

Likely recognizing the closeness in concept between Evan's market-makers and demand-coordinators, Filistrucchi et al. (2014) use a simpler classification system: (1) transaction and (2) non-transaction platforms.[24] As the name implies, transaction platforms enable a direct transaction between two or more groups — which encompasses both Evans' "market-makers" and "demand-coordinators." Whereas, non-transaction platforms map with Evans' "audience-makers." This simpler classification is what the majority decision in *American Express* relied upon when it stated: "The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other."[25]

The question then becomes: what are the meaningful economic differences between transaction and non-transaction platforms? And from this, does the logic that the Court used in defining an integrated market for transaction platforms extend to non-transaction platforms? More importantly, even if the Court suggests that non-transaction markets should be assessed as separate, non-integrated, markets, did the Court's reasoning suggest that the competitive effects should be materially different between the two types of platforms? We address these questions below.

First, the Court identifies the following distinction, relying upon Klein et al. (2006): "'Because cardholders and merchants jointly consume a single product, payment card transactions, their consumption of payment card transactions must be directly proportional.'"[26] In other words, for a transaction platform such as credit cards, merchants and cardholders share the same "quantity" since both sides are necessary to execute a transaction. In contrast, a non-transaction platform involves advertisers engaging with some users but not others — or during certain times but not at all times. For instance, the number of newspapers sold does not match one-for-one with the number of advertising "engagements" with readers, i.e. the number of ads read by a reader. While this is an important distinction, it can be overstated. For a non-transaction platform, the level of user consumption will be highly correlated with the level of advertising engagement. For example, the number of advertising clicks on a search engine will be highly correlated with the number of search users/queries. Similarly, the number of ads viewed on a television station will be highly correlated with the number of viewers. Consequently, the larger point still holds — that in order to understand the participation level for one side of a platform, it is still necessary to understand the participation level for the other side. Profit maximization still depends on a joint

21 See, e.g. Forbes.com, "Will the Supreme Court's Amex Decision Shield Dominant Tech Platforms from Antitrust Scrutiny," July 18, 2018 (available at https://www.forbes.com/sites/washingtonbytes/2018/07/18/antitrust-enforcement-of-dominant-tech-platforms-in-the-post-american-express-world).

22 Unlike cross-group effects, direct network effects stay *within* a group and either increase or decrease the value to existing members of the group as more members join.

23 See Evans (2003), "The Antitrust Economics of Multi-Sided Platform Markets," *Yale Journal on Regulation* 20, pp. 325-381 at 334-336.

24 Klein *et al.* (2006) also made this distinction; although, they did not use the explicit nomenclature suggested by Filistrucchi *et al.*

25 *Am. Express Co.* at 1.

26 *Am. Express Co.* at 13.

assessment of the pricing and volume on both sides.[27] Whether the volume on each side is a precise one-to-one matching or something highly correlated does not change this fundamental fact.

The second critical distinction the Court highlights, using the example of a newspaper, is that "indirect network effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains."[28] In other words, for a non-transaction platform, the cross-group effects are strong from the perspective of advertisers, in that their participation depends heavily on the size of the user group, whereas the cross-group effects from the perspective of users are generally weaker, zero — or even negative, depending on user preference for ads. While this is generally true for newspapers, it does not necessarily hold for other non-transaction platforms such as yellow pages, where readers explicitly use yellow pages to find advertisers.[29] Thus, importantly, non-transaction platforms are not uniform in the strength and direction of the cross-group effects. While the Court certainly did not imply that all non-transaction platforms are the same, the sole use of newspapers to illustrate the point could create some confusion. Thus, the important economic take-away is to focus on the strength and direction of the cross-group effects rather than determining whether there is a direct transaction or not.

A third distinction that the Court identified is that "only other two-sided platforms can compete with a two-sided platform for transactions."[30] As a corollary, the Court states, "Non-transaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform."[31] As an example, the Court stated that "[a] newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers."[32] Is it correct that transaction platforms only compete with other transaction platforms? The Court appears to make an error in this distinction. For instance, Uber is a transaction platform that competes with non-platforms, to one degree or another, including taxis, subways, and buses — as well as with other platforms such as Lyft. The same holds for Airbnb, which competes with non-platforms such as hotels and owner-rentals. Even for American Express, alternative payment methods that arguably compete with payment cards include debit cards, checks, and cash, which are not multisided platforms. The Court's point regarding non-transaction platforms, however, is correct. Non-transaction platforms can involve advertisers who are relatively indifferent to the actual content of a platform — be it search results, news stories, social media feeds — as long as it has the intended effect of informing the consumer about their products. Consequently, from an advertiser's perspective, at some level search engines compete with social networks, other online sites, and even, potentially, offline advertising including newspapers, radio, and television. If this is the primary point that the Court was making, the implications could be profound for future antitrust cases involving non-transaction platforms and allegations of competitive harm to advertisers. Specifically, given this precedent, the relevant product market is credibly broader than just the specific type of media platform, e.g. a search engine-only market would be rejected as too narrow.

Given these distinctions, particularly as it relates to cross-group effects, the Court finds that "[a] market should be treated as one [or single] sided when the impacts of indirect network effects and relative pricing in that market are minor."[33] Thus, again using newspapers as an example, "the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such."[34] While the Court used newspapers to illustrate this point, again, it is not a point that solely applies to non-transaction platforms.[35] Transaction platforms could also have weak cross-group effects. A potential example is Amazon Marketplace, which brings together third-party sellers with potential buyers. It is conceivable that the cross-group effect from third-party sellers to buyers, on Amazon, is relatively unimportant — rather what is more important to buyers is the fact that Amazon itself sells many of the items that they are looking for.[36] Again, it is the strength and direction of the cross-group effects that distinguish platforms from single-sided markets; consequently, that should be the primary focus in determining whether

27 See Rochet & Tirole (2003), "Platform Competition in Two-Sided Markets," *Journal of European Economic Association* 1, pp. 990-1029.

28 *Am. Express Co.* at 12.

29 Although, some readers can be interested in advertisements in certain sections of a newspaper, e.g. classifieds, or during certain times of the year, e.g. Memorial Day sales.

30 *Am. Express Co.* at 14.

31 *Am. Express Co.* at footnote 9.

32 *Am. Express Co.* at footnote 9.

33 *Am. Express Co.* at 12.

34 *Am. Express Co.* at 12-13.

35 *Am. Express Co.* at 12.

36 Of course, it is an empirical matter to determine this with certainty. The point is that there is nothing that *conceptually* prevents the possibility that a transaction platform has weak cross-group effects going in one direction.

to define separate or integrated markets — given that both transaction and non-transaction platforms can have strong or weak cross-group effects. Wright & Yun (2018) discuss the strengths and weaknesses of the integrated or separate approach to market definition as it relates to non-transaction platforms. However, the critical implication of this distinction is not a matter of market definition, but competitive effects analysis.

Regardless of whether one or two relevant product markets are defined, an integrated approach to competitive effects analysis is the only approach that satisfies the requirements for a finding of anticompetitive harm as understood by the antitrust laws. The economic logic of the majority in *American Express* applies with as much force to non-transaction platforms, whether or not separate relevant markets are defined: "Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power."[37] The economic literature has clearly established the interrelationship between the two-sides of a platform in profit maximization.[38] Consequently, we cannot seek to assess market power when only half of the profit maximization equation is considered as relevant evidence to establish anticompetitive harm. The reason is that the very definition of the exercise of monopoly power — the reduction of market-wide output and increase in the market price — cannot be satisfied by evidence of a price effect on only one side of a given platform. Thus, the *prima facie* burden must necessarily involve an assessment of both sides of a platform. A price change on one-side of a platform can imply an increase, decrease, or neutral change in market-wide welfare. What matters is the structure of the interrelated relative prices — not the price levels themselves.[39] This interrelationship between the prices on both sides of a platform is one of the most fundamental findings in the now well-established economic literature on platforms.

Proponents of a separate market and separate effects approach suggest that potential, procompetitive effects on a specific group can be assessed in a burden shifting step two of the rule-of-reason framework. We find that severing the two halves of a platform and then, subsequently, trying to piece them back to together in terms of an efficiencies defense is inadequate and likely to generate significant error. As discussed, competitive effects analysis under the antitrust laws requires the plaintiff to show that harm to a group of consumers is caused by conduct that creates or maintains monopoly power. An approach that artificially bifurcates sides of the market for the purpose of answering that fundamental antitrust question is incapable of fulfilling this objective.

IV. CONCLUSION

The Court's guidance on multisided platforms settled a number of issues in regard to defining relevant product markets and assessing competitive effects. The Court, however, left open the potential that the ruling is narrowly aimed at specific types of platforms — namely, transaction platforms. We argue that the Court's distinctions between transaction and non-transaction platforms do not, nor should they, prohibit the application of the economic logic to the ruling on non-transaction platforms. Moreover, even if separate relevant product markets are defined for non-transaction platforms, an integrated effects analysis is the only proper approach in all platform settings, including the non-transactional platform analysis seemingly left unresolved by the Court.

37 *Am. Express Co.* at 15.

38 See, e.g. Rochet & Tirole (2003) and Klein, Lerner, Murphy & Plache (2006), "Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees," *Antitrust Law Journal* 73, pp. 571-626.

39 See Rochet & Tirole (2006), "Two-Sided Markets: A Progress Report," *RAND Journal of Economics* 37, pp. 645-667 at 646.

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