

CLIENT ALERT

Supreme Court Recognizes Multi-Sided Markets in Landmark *Amex* Case

June 28, 2018

AUTHORS

William H. Rooney | **Timothy G. Fleming**

In *Ohio et al. v. Am. Express Co. et al.*, No. 16-1454, the Supreme Court found a multi-sided market for the first time in the history of the Sherman Act. On the basis of that finding, the Court held that American Express's "antisteering provisions," which prohibit merchants from discouraging customers from using their American Express cards to pay for a transaction, do not violate antitrust law. The Court's opinion was authored by Justice Thomas and joined by Justices Roberts, Kennedy, Alito, and Gorsuch. Justice Breyer authored a dissent, which was joined by Justices Ginsburg, Sotomayor, and Kagan.

The Court found that:

- The credit-card market was a two-sided transaction platform: Each time Amex sold a "transaction's worth of card-acceptance services to a merchant," it had to "sell one transaction's worth of card-payment services to a cardholder."
- As a result, courts must evaluate the impact of the antisteering provisions on "both sides" of the market – on cardholders and merchants – to assess competitive effects.
- Because "plaintiffs stake[d] their entire case on proving that Amex's agreements increase merchant fees," they did not "carr[y] their burden to prove anticompetitive effects in the relevant market."

Supreme Court Recognizes Multi-Sided Markets in Landmark *Amex* Case

The Court summarized the new analytical paradigm that will apply to two-sided markets under the rule of reason:

Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering 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. (Citations omitted).

The Court based its finding of a two-sided market on the interdependence of demand for Amex's services between cardholders and merchants: A decrease in the number of American Express cardholders (*i.e.*, cardholder demand for Amex cards) would lead to a decrease in the merchants' willingness to pay to accept American Express cards (*i.e.*, merchant demand for Amex cards), and *vice versa*. That demand interaction underscores that Amex offers a single product (payment services) to both parties, and that the competitive effects of any aspect of the payment service must be assessed on both merchants and cardholders.

Interestingly, the impact of the antisteering provisions on cardholders would likely be opposite to the impact on merchants. The Court did not suggest how the contrary effects should be netted, particularly as the number of cardholders likely substantially exceeds the number of merchants and cardholders' "valuation" of the provisions would seem to resist quantification.

The Court noted that not all two-sided platforms operate in the same manner as credit-card networks. The Court used the newspaper-advertising market as an example of a platform that does not operate as a two-sided transaction market:

Newspapers that sell advertisements . . . arguably operate a two-sided platform because the value of an advertisement increases as more people read the newspaper. . . . But in the newspaper-advertisement market, the indirect network effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. . . . Because of these weak indirect network effects, the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such.

But two-sided transaction platforms, like the credit-card market, are different. These platforms facilitate a single, simultaneous transaction between participants. (Citations omitted).

With that guidance, the landmark *Amex* case has left to district courts the discretion to identify which transactional platforms warrant a two "two-sided" market definition and competitive-effects analysis. Considerable speculation has already been raised about the application of *Amex* to the fast-moving technology and media sectors.

Supreme Court Recognizes Multi-Sided Markets in Landmark *Amex* Case

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

William H. Rooney

212 728 8259

wrooney@willkie.com

Timothy G. Fleming

212 728 8538

tfleming@willkie.com

Copyright © 2018 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.