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**Antitrust Analysis of Two-sided Platforms  
after *AmEx*: A Transatlantic View**

**Oscar Borgogno & Giuseppe Colangelo**

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# TTLF Working Papers

**Editors: Siegfried Fina, Mark Lemley, and Roland Vogl**

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## **Abstract**

The US Supreme Court ruling in *American Express* marks a breakthrough for antitrust enforcement in two-sided markets. Not surprisingly, the ruling has sparked lively discussions in the antitrust law and economics community.

The majority of the Court argues that if both groups of players are needed to participate simultaneously for a transaction to occur, then both sides of the platform must be included when defining the relevant market. Furthermore, indirect network effects must be duly considered when carrying out antitrust analysis of transaction platforms. Hence, no inference of anti-competitive effects can be derived from price increases on one side of the platform, this being only a natural consequence of differences in the two groups' demand elasticity. Moreover, the Court stresses the relevance of the business model when carrying out the antitrust evaluation of a commercial practice.

By drawing a comparison with the EU scenario, the paper analyses how the two-sidedness of platforms may affect the definition of the relevant market, and the assessment of competitive effects and undertakings' business models.

**Keywords:** Antitrust; payment cards; two-sided platforms; market definition; business models; non-discrimination rules.

**JEL Codes:** K21; L40; L42.

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## 1. Introduction

The US Supreme Court decision in *American Express (AmEx)* was meant to be a landmark case.<sup>1</sup> The ruling has been expected to shed light on how antitrust authorities should take into consideration the two-sided nature of markets, hence its implications go well beyond the context of the credit card industry.

Unsurprisingly, the ruling has sparked lively discussions in the antitrust law and economics community. Supporters welcome the willingness of the Court to import modern industrial organisation economics into antitrust, showing sensitivity to business reality and sound economic analysis of the conduct at issue,<sup>2</sup> whereas opponents argue that the ruling devastates antitrust law by immunising two-sided business models.<sup>3</sup>

A two-sided market is generically characterised by the following distinctive traits: the presence of indirect network externalities that cannot be internalised through a bilateral exchange (usage and membership externalities); the necessity for an intermediary to intervene to resolve a transaction cost issue, thereby generating value for at least one of the interested sides; the interdependence needed between the groups that interact through the platform to bring ‘both sides on board’ as the platform has to gather a sufficient number of economic agents on every side of the market in order to reach a critical mass to foster indirect network effects; the non-neutrality of price structuring by

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<sup>1</sup> *Ohio et al. v. American Express Co. et al.*, 585 U.S. \_\_ (2018) slip opinion.

<sup>2</sup> R. Picker, ‘With Amex Ruling, Modern IO Theory Makes Important Inroads with SCOTUS’, (2018) <https://promarket.org/amex-ruling-modern-io-theory-makes-important-inroads-scotus/>; D.S. Evans and R. Schmalensee, Brief for Amici Curiae in support of Respondents, (2018) [https://www.supremecourt.gov/DocketPDF/16/16-1454/28957/20180123154205947\\_16-1454%20State%20of%20Ohio%20v%20American%20Express%20Brief%20for%20Amici%20Curiae%20Professors%20in%20Support%20of%20Respondents.pdf](https://www.supremecourt.gov/DocketPDF/16/16-1454/28957/20180123154205947_16-1454%20State%20of%20Ohio%20v%20American%20Express%20Brief%20for%20Amici%20Curiae%20Professors%20in%20Support%20of%20Respondents.pdf).

<sup>3</sup> T. Wu, ‘The Supreme Court Devastates Antitrust Law’, *The New York Times*, 26 June 2018; L.M. Khan, ‘The Supreme Court Case That Could Give Tech Giants More Power’, *The New York Times*, 26 June 2018.

the platform which, in order to bring both sides on board, needs to impose asymmetrical prices on the different groups operating on the platform (skewed pricing), so that these prices, although not reflecting the effective cost of the service offered to a given group of users, can incorporate demand elasticity. Hence, the roots of the two-sided markets are mainly grounded in the theory of network externalities and in the Coasian analysis of private bargaining as a means of addressing transaction cost problems.

These characteristics of two-sided markets have an impact on the antitrust evaluation of conduct and price strategies, in addition to being useful in understanding a possible theory of harm.<sup>4</sup> If the agents on each side are interdependent and, therefore, their welfare depends on the combination of the effects on the different sides of the platform, businesses compete to attract two demands, so that the traditional one-sided approach risks being unfit to represent both the competition dynamics occurring and also a suitable valuation of the competition impact of the platform's conducts.

Defining the relevant market in a way that can duly consider the economic features of platforms is a challenge of the utmost importance for competition law. Namely, one needs to assess whether the market's two-sidedness has to be accounted for as a whole instead of looking at only one side in isolation. In the current debate on the topic has emerged the proposal to draw a distinction based on the observability and existence of a transaction between the groups of users.<sup>5</sup> Thus, we are dealing with a transaction

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<sup>4</sup> G. Colangelo and M. Maggolino, 'Applying Two-Sided Markets Theory: The *MasterCard* and *American Express* Decisions', 14 *Journal of Competition Law & Economics* 115 (2018); G. Gürkaynak, Ö Inanilir, S. Diniz, A.G. Yasar, 'Multisided markets and the challenge of incorporating multisided considerations into competition law analysis', 5 *Journal of Antitrust Enforcement* 100 (2017); P. Solano Díaz, 'EU Competition Law Needs to Install a Plug-in', 40 *World Competition* 393 (2017); D. Auer and N. Petit, 'Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy', 60 *The Antitrust Bulletin* 426 (2015).

<sup>5</sup> L. Filistrucchi, D. Geradin, E. van Damme, P. Affeldt, 'Market Definition in Two-Sided Markets: Theory and Practice', 14 *Journal of Competition Law & Economics* 293 (2014). See also J.D. Wright and J.M. Yun, 'Burdens and Balancing in Multisided Markets: The First Principles Approach of *Ohio v.*

platform whenever, in the absence of its intermediary function, there would be a separate market for each side. Furthermore, when it comes to platforms, establishing the level of market power enjoyed by an undertaking might prove troublesome. Competition authorities would need to carry out a preliminary evaluation covering the platform's degree of diversification and the relevance of network effects as well as the possibilities enjoyed by users on each side of transacting over alternative platforms (multi-homing).<sup>6</sup> If such a phenomenon involved both sides, intensity of competition among platforms would be fostered, thereby reducing lock-in risks and hold-up problems. Finally, informative advantages enjoyed by platform owners as a result of their role as market intermediaries cannot be disregarded when investigating highly innovative industries.

Despite the economic features mentioned above, definitions and classifications provided by the literature on which markets should be considered two-sided differ. Rochet and Tirole focus on price structure by highlighting that the platform can influence the volume of transactions by applying asymmetric prices to groups working on different sides.<sup>7</sup> Hagiu and Wright emphasise the ability of the platform to enable direct interactions between two or multiple groups of users that are affiliated with the

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*American Express*, forthcoming in *Review of Industrial Organization*, arguing that the strengths of the integrated market approach are best suited for platforms that have a single level of platform output that harmonises both sides, such as payment cards and Uber, while there is a better case for a separate markets approach for advertising platforms, such as online search engines and newspapers, due to a lack of a direct transaction between the two sides.

<sup>6</sup> M. Armstrong, 'Competition in two-sided markets', 37 *The RAND Journal of Economics* 669 (2006). On the price and surplus effects of multi-homing, see recently P. Belleflamme and M. Peitz, 'Platform competition: Who benefits from multihoming?', forthcoming in *International Journal of Industrial Organization*.

<sup>7</sup> J.C. Rochet and J. Tirole, 'Two-Sided Markets: A Progress Report', 37 *The RAND Journal of Economics* 645 (2006); J.C. Rochet and J. Tirole, 'Platform Competition in Two-Sided Markets', 1 *Journal of the European Economic Association* 990 (2003).

platform.<sup>8</sup> Evans and Schmalensee point out that a hallmark of two-sided platforms is their potential for facilitating the interactions between several groups of players that would not be able to capture the value generated by their interaction if it were not for the platform and whose activity is therefore inherently enabled by the platform existence.<sup>9</sup> Armstrong and Rysman stress the role of indirect network effects, meant as positive or negative externalities arising for users on one side by the usage of the platform made by players on the other side: thus, the value of the service offered by the platform to one group increases as the other group grows larger or interacts more intensely with the platform.<sup>10</sup> Weyl identifies a group of characteristics that are common among firms considered to be multisided platforms: the firm facilitates interactions between two or more groups of users, can set distinct prices to different user groups, has market power with respect to those groups, and cross-platform network effects occur in at least one direction.<sup>11</sup> Finally, by looking at the different needs of the users who are gathered on each side, Evans lists the following types of platforms:<sup>12</sup> audience makers (eg Google and Facebook), which sell paid targeted advertisement spaces exposed to the attention of other groups of players (meant as potential consumers); market makers (eg eBay and TheFork), which smooth connections and deal between different kinds of players gathered on each side, thereby lowering transaction as well as search costs; demand co-ordinators (eg digital operative systems and payment networks), that

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<sup>8</sup> A. Hagiu and J. Wright, 'Multi-Sided Platforms', 43 *International Journal of Industrial Organization* 162 (2015).

<sup>9</sup> D.S. Evans and R. Schmalensee, *Matchmakers: The New Economics of Multisided Platforms*, Boston, Harvard Business School (2016).

<sup>10</sup> M. Rysman, 'The Economics of Two-Sided Markets', 23 *Journal of Economic Perspectives* 125 (2009); Armstrong, *supra* note 6.

<sup>11</sup> E.G. Weyl, 'A Price Theory of Multi-Sided Platforms', 100 *American Economic Review* 1642 (2010).

<sup>12</sup> D.S. Evans, 'Some Empirical Aspects of Multi-Sided Platform Industries', 2 *Review of Network Economics* 191 (2003).

harmonise and manage the aggregate demand of different customer groups, thereby avoiding duplication costs.

The lack of a universally-adopted definition of two-sided platforms is due to the fact that two-sidedness is mainly a matter of degree, hence most bright-line definitions are under- or over-inclusive.<sup>13</sup> In light of the above-mentioned differences at the definitional level, the same platform may receive different qualifications.<sup>14</sup> As correctly argued, the fragmented state of doctrinal views has consequences which go beyond semantics since it may threaten the coherent implementation of the theory of two-sided markets and lead to unsound applications of antitrust law.<sup>15</sup> Indeed, in his dissenting Opinion in *AmEx*, Justice Breyer criticises the majority for defining two-sided transaction platforms “much more broadly than the economists do.”<sup>16</sup> Namely, referring to Roche and Tirole’s works, Breyer states that, by failing to limit its definition to platforms that economists would recognise as two-sided, the majority “carves out a much broader exception to the ordinary antitrust rules than the academic articles it relies on could possibly support.”

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<sup>13</sup> E. Hovenkamp, ‘Platform Antitrust’, forthcoming in *Journal of Corporation Law*. See also M.L. Katz, ‘Platform economics and antitrust enforcement: A little knowledge is a dangerous thing’, 28 *Journal of Economics & Management Strategy* 138, 139 (2019), arguing that, in order to establish for purposes of antitrust economics when a firm should be defined as a multisided platform operating in a two-sided market, the question to ask is under what conditions it is important to account for cross-platform interactions to ensure an accurate understanding of industry equilibrium.

<sup>14</sup> See Auer and Petit, supra note 4, drawing up a list of possible two-sided markets in light of the different definitions provided by the literature.

<sup>15</sup> Auer and Petit, supra note 4.

<sup>16</sup> *American Express*, supra note 1, dissenting opinion, pp. 19-20. See also D.W. Carlton and R.A. Winter, ‘Vertical Most-Favored-Nation Restraints and Credit Card No-Surcharge Rules’, 61 *Journal of Law and Economics* 215, 241 (2018): “the Supreme Court uses a very broad definition of two-sided markets in its decision—so broad that the definition could capture almost any market. Not only does the decision establish an ill-founded difference between antitrust laws for two-sided markets and antitrust laws for conventional markets, but it adds uncertainty to the law because the boundary in the law between the two-sided and conventional markets is left so vague.” Conversely, see Rysman, supra note 10, p. 127 asserting that the interesting question is often “not whether a market can be defined as two-sided—virtually all markets might be two-sided to some extent—but how important two-sided issues are in determining outcomes of interest.”

In *AmEx* the question before the Supreme Court is whether demonstrating that the non-discrimination provisions enforced by American Express suppressed price competition on the merchant side of the credit card platform suffices to prove anti-competitive effects or whether the overall harm must be proven, ie anti-competitive effects on the merchant side are not offset by benefits on the cardholder side. Thus, the Court is expected to clarify whether, by looking at both sides of a platform, two-sided markets must be considered as a part of the antitrust analysis. For these reasons *AmEx* has been much anticipated.

The paper is structured as follows. The second section briefly describes the functioning of the payment card systems. Section 3 discusses the *American Express* case, focussing on the main principles affirmed by the US Supreme Court and their implications for competition policy. The fourth section provides an analysis of the European scenario, taking into account both the Court of Justice's case law and the sector regulation. Section 5 concludes by calling for antitrust analysis of two-sided markets to be fine-tuned.

## **2. The two-sided features of the payment card systems**

The payment system industry is commonly known as one of the most notorious examples of transaction platforms operating with a multi-sided structure, and one of the first to be studied. The added value brought by payment cards is twofold. Firstly, they offer a valuable service to cardholders by avoiding the need for cash and easing payments activities. Secondly, merchants, by accepting payments via card as well as cash and traditional payment instruments such as cheques, widen the range of potential

buyers and ameliorate the shopping experience of their consumers, ultimately increasing the volume of sales.

A noteworthy aspect of the payment system is its strong interdependent demand structure on both sides. The gains enjoyed by cardholders depend on the number of merchants who accept that kind of product or that card's network. Conversely, merchants are incentivised to make use of such a payment method in so far as a significant number of buyers prefer it over cash when shopping. Thus, the more widespread a given card payment network is among merchants, the more valuable it is to shoppers. Similarly, payment methods preferred by a large number of consumers in general, or by big spenders in particular, are appealing to sellers as they promise to draw new buyers and increase the business. Such feedback effects prove to be key to understanding the so-called "see-saw" pricing strategy of payment platforms.<sup>17</sup> Basically, they optimally calibrate prices by leveraging demand elasticity of each group so as to keep as many players as possible on both sides and exploit all the strengths of their business structure.

Card-based payment methods are generally based on two different business methods, namely: the proprietary (closed) circuits and the co-operative (open) circuits. The first, exemplified by Mastercard and Visa, consist of a four-party scheme involving, in addition to the provider, the issuer and the acquirer (generally banks) that trade the debit of the seller, the cardholder, and the merchant. Whereas the issuer intermediates between the cardholder and the provider, the acquirer plays an almost identical role between the merchant and the provider. A payment made by a cardholder triggers a mechanism by which the issuer transfers an amount of money to the acquirer minus a

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<sup>17</sup> Weyl, *supra* note 11, p. 1664; Rochet and Tirole, *supra* note 7, p. 659.

multilateral interchange fee (MIF) retained as a consideration for having managed the transaction with the cardholder. Similarly, the acquirer transfers the sum to the merchant, minus a merchant discount fee (also known as usage-based discount or merchant service charge), the amount of which is largely determined by the interchange fee.

In an open scheme, the provider, acting as the platform operator, is at the centre of the co-operative network and, instead of interacting directly with the seller and the buyer, sets *ex ante* the MIF level and releases licences allowing banks and financial entities to operate as issuers and acquirers. Conversely, closed schemes such as Diners Club and American Express are tripartite loop systems in which the provider carries out the issuing and acquiring roles by operating the payment directly from the buyer to the seller. In this kind of circuit, the cardholder pays a membership fee to the provider and the merchant is charged for the payments received thanks to the system. In essence, whereas open circuits come with a two-level transaction structure hinged on the MIF, such fee is implicitly charged by closed circuits since the revenues and the costs are managed by the same entity.

As far as competition among platforms is concerned, it is worth pointing out that multi-homing is a common practice on both sides of card-based payment systems. This means that merchants and cardholders often accept and use different types of payment cards. Since such phenomenon takes place on both sides of payment platforms, it pushes rival providers to compete more intensely and, therefore, offer lower overall price levels. On the flipside, however, price competition applied in a platform environment is likely to culminate in strongly skewed price distribution and potential hold-up problems. Indeed, once the provider manages to draw a critical mass of players on one side by offering

negative prices, he is more likely to recover such investments by heavily charging the other side. When it comes to payment systems, since cardholders ultimately choose which circuit to pay with once at the check-out, it is the merchants that need to decide whether or not to accept a certain payment system or a specific product within it. This ultimately means evaluating whether the potential benefits brought by a given payment circuit outweigh its overall costs. Admittedly, such practice does not by itself raise competitive concerns: the overall price level may still be competitive even when one group is charged above (or below) cost. In fact, players paying more usually enjoy a countervailing reward due to the positive indirect network externalities arising from higher participation on the other side. In this respect, given merchants' specific position, they may have an incentive to steer buyers at the point of sale to choose a cheaper circuit.<sup>18</sup> By having both pro-competitive and highly disruptive consequences, this type of commercial practice has surfaced as a burning issue in the current antitrust debate over payment platforms, as exemplified by the *American Express* case recently discussed by the US Supreme Court.

### **3. The *American Express* case**

In 2010 the US Department of Justice and seventeen States commenced a legal action against Visa, MasterCard and American Express with regards to non-discrimination rules (NDRs, also known as no-surcharge rules or anti-steering rules) included in their

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<sup>18</sup> H. Bourguignon, R. Gomes, J. Tirole, 'Shrouded transaction costs: must-take cards, discounts and surcharges', 63 *International Journal of Industrial Organization* 99 (2019), highlighting the relevance of the non-discrimination rules in the evolving scenario of the payment industry: since the proliferation of new payment methods on the Internet (eg PayPal and Bitcoin) and payment processing services that piggyback on card networks (eg Android Pay, Apple Pay, and Amazon Pay) challenges the business models of traditional card payment systems, an important dimension of analysis concerns the extent to which merchants should be allowed to price discriminately according to payment method.

affiliation agreements with merchants. According to the prosecution, the NDRs represented a vertical non-price restriction that impeded the merchants from suggesting to clients which card to/they should use. Namely, looking at American Express, anti-steering provisions prohibit merchants from: implying a preference for non-AmEx cards; dissuading customers from using AmEx cards; persuading customers to use other cards; imposing any special restrictions, conditions, disadvantages, or fees on AmEx cards; or promoting other cards more than AmEx. However, the NDRs do not prevent merchants from steering customers toward debit cards, cheques, or cash.

The prosecution alleged that these provisions would have eliminated the competition between network providers that would have taken place when using a card and, as a consequence, would have reduced networks' interest in offering lower and lower merchant fees to merchants as a reward for being suggested when the transaction took place.

In 2011 Visa and MasterCard signed a settlement agreement, accepting that they would eliminate such anti-steering rules, while American Express proceeded with the legal action.

In 2015 the same judge (Garafis) who approved the settlement with Visa and MasterCard condemned American Express for violating Section 1 of the Sherman Act.<sup>19</sup> Although defining the system of payment cards as a two-sided platform, the District Court circumscribed the relevant market to that of services provided to merchants under the acceptance of payment cards. Then, it ascribed to American Express a certain market power due to the loyal cardholder base, ie the determination with which cardholders change merchant or spend less if payment with American Express is not

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<sup>19</sup> *United States v. American Express Co.*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015).

allowed. Lastly, the Court stated that NDRs, by impeding merchants from nudging clients towards other cards, limit inter-brand competition between cards, eliminating an obstacle to the uncontrolled rise in merchant fees.

In 2016 the Court of Appeals considered the District Court's relevant market definition erroneous and rejected its evaluation of the competitive effects of NDRs.<sup>20</sup> With regards to the relevant market, the Court of Appeals chose to consider the network in its entirety because of the indirect network effects between cardholders and merchants, which make high merchant fees justifiable, in the light of a necessary balance between the two sides, by the several benefits reaped by consumers. From this perspective, NDRs are thought of as a means to ensure equilibrium between the two sides of the AmEx platform.

Moreover, the Court highlighted how the effects of NDRs should be evaluated in light of the functioning mechanisms of the platforms. To this extent, the business model adopted by American Express differs from that adopted by Visa and MasterCard. The latter implement a lend-centric model, ie a model in which a significant part of the accrued revenues derives from the interest that providers get from charging cardholders for the unpaid balance of their card. Conversely, AmEx's business model is spend-centric because its revenues come from the merchant discount fees, meaning that they depend on the ability of the network to affiliate marquee cardholders, ie clients inclined to spend a great amount of money on a monthly or yearly basis using their credit card. This explains why American Express gives its clients many rewards and benefits, while it finances such benefits through high merchant fees that, nevertheless, merchants are willing to pay to intercept clients with a greater inclination to spend.

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<sup>20</sup> *United States v. American Express Co.*, 838 F.3d 179 (2<sup>nd</sup> Cir. 2016).

Therefore, from a competition standpoint, NDRs are justified because they block the merchants' free-riding attitude of wanting marquee clients without facing the associated costs. Given that both cardholders and merchants practice multi-homing, should American Express not be able to impede affiliated merchants from nudging their clients towards less costly payment methods, American Express would not be able to offer its clients the level of benefits they expect from it. Its business model would collapse because a reduction in benefits would result in cardholders' migration to other circuits.

In summary, according to the Court of Appeals, the elimination of NDRs could jeopardise the functioning of this network, reducing inter-brand competition through the weakening or the elimination of one competitor from the market for credit cards.

### **3.1 The Supreme Court ruling**

On 25 June, 2018 the US Supreme Court upheld the Court of Appeals' decision in a 5-4 Opinion. By highlighting the relevance of platforms' two-sidedness for market definition and the assessment of competition, the majority Opinion delivered by Justice Thomas confirmed the plaintiffs' failure to prove that AmEx's NDRs generated substantial harmful effects to consumers.

First of all, the Court highlighted that "credit-card networks are a special type of two-sided platform known as a 'transaction' platform."<sup>21</sup> Essentially, payment card systems, by bringing on board cardholders and merchants, facilitate a single, simultaneous transaction between them. What distinguishes this mechanism from all other platform-based businesses is that a sale to a user on one side cannot be made "without

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<sup>21</sup> *American Express*, supra note 1, p. 2.

simultaneously making a sale to the other.”<sup>22</sup> Thus, transaction platforms “are best understood as supplying only one product - transactions - which is jointly consumed by a cardholder and a merchant.”<sup>23</sup>

Secondly, the judges stressed that indirect network effects must be duly considered when carrying out antitrust analysis of transaction platforms. As is known, in order to ensure sufficient participation, providers have to be sensitive to demand elasticity on both sides when setting overall price levels and, even more importantly, their distribution among user groups. Therefore, it should come as no surprise that credit cards schemes “often charge cardholders a lower fee than merchants because cardholders are more price sensitive”.<sup>24</sup> Hence, no inference of anti-competitive effects can be derived from price increases on one side of the platform, this being merely a natural consequence of differences in the two groups’ demand elasticity. In order to suggest that certain practices have actual anti-competitive effects, a plaintiff should bring “some evidence that they have increased the overall cost of the platform’s services.”<sup>25</sup> The message delivered by the Court is clear: antitrust law is concerned with net consumer harm, not gross harm.<sup>26</sup>

However, “it is not always necessary to consider both sides of a two-sided platform.”<sup>27</sup> When indirect network effects are weak, as in the newspaper industry where these effects operate in only one direction since readers are largely indifferent to the amount of advertising, then the market can be treated as one-sided. Conversely, because

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<sup>22</sup> *American Express*, supra note 1, p. 2.

<sup>23</sup> *American Express*, supra note 1, p. 14.

<sup>24</sup> *American Express*, supra note 1, p. 4.

<sup>25</sup> *American Express*, supra note 1, p. 12.

<sup>26</sup> By the same token, the Second Circuit, supra note 19, at 206-207 argued that “[p]laintiffs bore the burden in this case to prove net harm to consumers as a whole—that is, both cardholders and merchants—by showing that Amex’s nondiscriminatory provisions have reduced the quality or quantity of credit-card purchases.”

<sup>27</sup> *American Express*, supra note 1, p. 12.

participants cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Thus, if both groups of players are needed to simultaneously participate for a transaction to occur, as in the credit card industry, then both sides of the platform must be included when defining the relevant market.

Furthermore, the Court stressed the influence that AmEx's business model had in fostering competitive innovation, improving the quality of the services offered to consumers and increasing the volume of output (ie transactions).<sup>28</sup> In such respect, Justice Thomas noted that MasterCard and Visa "began as bank cooperatives and thus almost every bank that offers credit cards is in the Visa or MasterCard network."<sup>29</sup> As a result, while the great majority of AmEx users multi-home, a substantially smaller percentage of Visa and MasterCard cardholders have an AmEx card. Despite all these substantial structural advantages, the spend-centric model adopted by American Express proved so successful that it pushed its main competitors to follow suit by introducing premium cards aimed at offering appealing rewards to cardholders set against higher fees to merchants. Moreover, another positive effect generated by American Express on the credit card market is that of making banking and card payment services available to low-income individuals, who could not otherwise qualify for a credit card and could not afford the fees that traditional banks charge.<sup>30</sup>

Against such a background, anti-steering provisions, by preventing merchants from free-riding on the platform, "actually stem negative externalities in the credit-card

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<sup>28</sup> *American Express*, supra note 1, p. 6.

<sup>29</sup> *American Express*, supra note 1, p. 5.

<sup>30</sup> *American Express*, supra note 1, p. 6.

market and promote inter-brand competition.”<sup>31</sup> Indeed, “while these agreements have been in place, the credit-card market experienced expanding output and improved quality.”<sup>32</sup> Moreover, merchants’ attempts to dissuade cardholders from using AmEx cards at the point of sale “endangers the viability of the entire AmEx network.”<sup>33</sup> Basically, the majority was persuaded by the argument that a prohibition of NDRs would tear the AmEx business apart since a reduction in benefits would result in cardholders’ migration to other rival networks (eg the less expensive and open ones managed by MasterCard and Visa). Thus, NDRs are justified because they preclude the merchants’ rent-seeking attitude of drawing in marquee clients without bearing the associated costs. The Court’s confidence seemed to have been strengthened by the fact that NDRs do not impede price competition among alternative platforms *tout court*. Indeed, merchants remain ultimately free to decide whether to withdraw from the American Express circuit in the event that they deem it not worthy enough compared to either the quality of the service or competitors’ offers.

To sum up, the Court rejected the plaintiffs’ argument – that American Express’s NDRs were anti-competitive as they increased merchants’ fees – on the basis that they erroneously considered just one side of a transaction’s two-sided platform. To establish relevant anti-competitive effects the plaintiffs should have proved that the 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.”<sup>34</sup> Moreover, NDRs were considered as complementary provisions essential to ensuring the existence of the spend-centric business model adopted by American

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<sup>31</sup> *American Express*, supra note 1, p. 19.

<sup>32</sup> *American Express*, supra note 1, p. 3.

<sup>33</sup> *American Express*, supra note 1, p. 19.

<sup>34</sup> *American Express*, supra note 1, p. 3.

Express and, consequently, to maintaining sound competition within the credit card market.

The Supreme Court ruling represents an historic breakthrough in antitrust enforcement involving platform economics, with its key principles set to draw attention worldwide. The following paragraphs will focus on its most compelling findings, namely how platforms' multi-sidedness affects the definition of the relevant market, the balancing of competitive effects and the importance of an undertaking's business method.

### **3.2 Multi-sidedness: relevant market definition and balancing of competitive effects**

The first pivotal question addressed by the Supreme Court sheds light on the plaintiff's initial burden of proof when pursuing alleged anti-competitive conducts under the rule of reason framework. This, in turn, results in a direct targeting of a far-reaching antitrust issue, namely the definition of the relevant market in cases involving multi-sided platforms.<sup>35</sup>

Indeed, according to US antitrust law, rule of reason cases are judged according to a three-step burden-shifting framework aimed at identifying in advance the parties which are best suited to cast light on each allegation. Under this framework, the plaintiff must

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<sup>35</sup> See L. Kaplow, 'Why (Ever) Define Markets?', 124 *Harvard Law Review* 437 (2010) pointing out that defining markets is primarily a legal exercise and that a demonstration of anti-competitive harm is sufficient without explicitly defining a market; conversely, G. Werden, 'Why (Ever) Define Markets? An Answer to Professor Kaplow', 78 *Antitrust Law Journal* 729 (2013) claiming that market definition is a key step in the antitrust analysis and can serve as a critical framing tool for clarifying the issues for both economists and lawyers. With specific regard to *AmEx*, see A.L. Shampine, 'What Is at Stake with Supreme Court Review of *United States v. American Express Co.*?', *Antitrust Source* 1 (2017) arguing that market definition is a question that goes to the foundation of legal antitrust analysis, so that changing how markets are defined would fundamentally change how an antitrust analysis proceeds. On the ongoing debate, more recently, V.H.S.E. Robertson, 'The Relevant Market in Competition Law: A Legal Concept', forthcoming in *Journal of Antitrust Enforcement*.

clear an initial bar of proof establishing a *prima facie* breach of antitrust law by showing that the challenged restraint has a substantial anti-competitive effect that harms consumers in the relevant market. In the second stage, the defendant can rebut the evidence presented or show that the restraint generates countervailing efficiencies able to offset their anti-competitive effects. The plaintiff then has to demonstrate that the pro-competitive efficiencies could be reasonably achieved through less restrictive alternatives. Only at this final stage might the challenged activity be finally considered as either anti-competitive, competition neutral or even pro-competitive. In *AmEx*, the Supreme Court ruled that developing multi-sided market facts is part of the plaintiff's initial burden as it is an essential step for pleading the relevant market. Thus, the defendant (ie the transaction platform provider) is set to benefit from uncertainty.

Given the scale of the problem, several scholars took part in the heated debate on the most compelling antitrust issues covered by the case, arguing for inherently different approaches and solutions. The dispute is about the very essence of two-sided platforms' economics, ie whether it requires a new set of economic principles and its implications for antitrust analysis.<sup>36</sup> Basically, two alternative schools of thought are involved.

According to the first approach, each side of the platform should be analysed as part of a separate market. In *AmEx* the services offered by the platform on both sides are not interchangeable and are not offered by the same participants.<sup>37</sup> Thus, "far from being

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<sup>36</sup> See eg Carlton and Winter, *supra* note 16, pp. 232 and 235: "Contrary to claims in the economic literature that two-sided platforms require a new set of economic principles ... established economic principles are the right guide for antitrust policy. ... the principles discussed in the economics literature on credit cards are equivalent to well-established principles valid for any market. The two-sidedness of the market offers no conceptual barriers to the application of traditional economic principles to an antitrust analysis."

<sup>37</sup> 28 Professors of antitrust law, 'Brief as Amici Curiae supporting Petitioners', (2018) [https://www.supremecourt.gov/DocketPDF/16/16-1454/23982/20171215114926870\\_16-1454%20TS%20AC%2028%20Profs.pdf](https://www.supremecourt.gov/DocketPDF/16/16-1454/23982/20171215114926870_16-1454%20TS%20AC%2028%20Profs.pdf), p. 17: "Merchants do not buy and have no use for the services

substitutes, the two services act more as complementary products and so do not belong in the same relevant market.”<sup>38</sup> Under antitrust principles, ‘relevant market’ is defined as including only services and products that are reasonable substitute and are linked by a cross-elasticity relationship. “Separate markets do not become a single relevant market for antitrust purposes simply because one defendant sells two services as part of the same platform.”<sup>39</sup> In the same vein, Justice Breyer’s dissenting Opinion (endorsed by Justices Ginsburg, Sotomayor and Kagan) finds no support in antitrust law for the view that the market for the card companies’ merchant-related services and the market for the card companies’ shopper-related services should be combined as a single market.<sup>40</sup> Indeed, “[l]ike gasoline and tires, both must be purchased for either to have value” and “it is difficult to see any way in which the price of shopper-related services could act as a check on the card firm’s sale price of merchant-related services.”<sup>41</sup>

This line of reasoning implies that any conduct that harms competition in one side’s relevant market is sufficient to show a *prima facie* violation of antitrust law regardless of parallel effects in the other side. Accordingly, the burden of showing harm to competition under the rule of reason first step should be satisfied solely by presenting evidence of harm to a group of users on one side of the platform, while it should be part of the defendant’s rebuttal to show countervailing efficiencies stemming from market multi-sidedness which warrant balancing.

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sold to cardholders and cardholders do not buy and have no use for the services sold to merchants. There is *zero* cross-elasticity of demand: A merchant cannot switch to purchasing cardholder services in response to an increase in the price of merchant services, and vice versa.”

<sup>38</sup> 28 Professors of antitrust law, *supra* note 37, p. 17.

<sup>39</sup> 28 Professors of antitrust law, *supra* note 37, p. 18.

<sup>40</sup> *American Express*, *supra* note 1, dissenting opinion, p. 9.

<sup>41</sup> *American Express*, *supra* note 1, dissenting opinion, pp. 11-12: “If anything, a lower price of shopper-related card services is likely to cause more shoppers to use the card, and increased shopper popularity should make it *easier* for a card firm to raise prices to merchants, not *harder*, as would be the case if the services were substitutes.”

Since this approach stands for a definition of the relevant market which does not account for all the different sides interconnected by the platform, it has been labelled as the “separate markets” approach.<sup>42</sup>

The second approach, endorsed by the majority of the Supreme Court, holds that transaction platforms are inherently characterised by the interrelationships between their various sides which, consequently, need to be included in the relevant product market definition.<sup>43</sup> Notably, the majority Opinion closely followed the distinction drawn by Filistrucchi et al. between transaction and non-transaction markets, depending respectively on the direct relationship between the two sides of the interface.<sup>44</sup> Accordingly, it is just not possible to evaluate a conduct’s overall competitive impact without balancing its effects across all sides of the platform.<sup>45</sup> This line of reasoning is referred to as the “integrated markets” approach<sup>46</sup> since it provides that competitive

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<sup>42</sup> Wright and Yun, supra note 5.

<sup>43</sup> Evans and Schmalensee, supra note 2, p. 22: “It is essential that market definition faithfully reflect business realities to identify and assess competitive constraints from suppliers that compete with the firm or firms of primary interest. A firm that operates a two-sided platform faces competitive pressures that restrain its ability to raise prices or restrict output that generally depend on both sides of the platform.” See also Wright and Yun, supra note 5, holding that the three-step paradigm of the rule of reason should be adapted to the realities of multi-sided platforms and associated cross-group effects. Conversely, T. Wu, ‘The *American Express* Opinion, Tech Platforms & the Rule of Reason’, forthcoming in *Journal of Antitrust Enforcement*, reports the arbitrariness of the Court’s deviation from the rule of reason and considers the Court’s approach as unprecedented, procedurally indefensible, unnecessarily complex, and ultimately incoherent.

<sup>44</sup> Filistrucchi et al., supra note 5.

<sup>45</sup> See J.D. Ratliff and D.L. Rubinfeld, ‘Is there a market for organic search engine results and can their manipulation give rise to antitrust liability?’, 10 *Journal of Competition Law & Economics* 517, 534 (2014): “When the defendant provides interrelated products, analysis of the relevant market in which it competes must incorporate those interrelated products. ... When some activities (such as pricing of some products) affect the demand for other products, an analysis must incorporate all of these activities and products in order to determine whether an exercise of market power would be profitable.” See also D.S. Evans, ‘The Antitrust Economics of Multi-Sided Platform Markets’, 20 *Yale Journal on Regulation* 325, 357 and 360 (2003), arguing that it is not possible to address the question of market power in multi-sided platforms without considering the combined and interrelated effects on all customer groups served by the platform. Hence, in market definition, the pricing analysis must consider all sides of the market and their interactions. Conversely, Katz, supra note 13, p. 148 asserts that “some parties claiming to apply modern platform economics are, in fact, committing the fundamental error of failing to recognize that users on different sides of a platform generally have divergent interests and that the microstructure of how platform choices are made can have powerful effects on the equilibrium outcome.”

<sup>46</sup> Wright and Yun, supra note 5.

effects on all sides must be included at the very early stage of any antitrust assessment of a platform's conduct.<sup>47</sup>

Depending on which school of thought one decides to follow, the examination of whether a platform's conduct is anti-competitive can change drastically.

From an integrated markets perspective, AmEx's platform offers only one type of service, ie transactions. Hence, it would not make economic sense to analyse the conduct of a platform which provides a service that is consumed jointly by looking only at what customers on one side pay for the service and receive from it.<sup>48</sup> In fact, "[b]usinesses of this sort never provide a transaction to only one side of the service, and every interaction has a party and a counterparty that both benefit from the service."<sup>49</sup>

Therefore, if the integrated markets approach is followed, consumer-welfare standards would be determined by considering equally the effects on all platform users, thereby giving utmost importance to the net overall outcome (net-effect analysis).<sup>50</sup> Consistently with the economic literature on platform pricing, in two-sided markets overall competitive effects cannot be inferred from conduct or effects on one side of the market alone.<sup>51</sup> Moreover, the focus of the analysis shall be on market output instead of prices,

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<sup>47</sup> Evans and Schmalensee, supra note 2, p. 6. See also G.J. Sidak and R.D. Willig 'Brief for Amici Curiae in Support of Respondents', 2018 [https://www.supremecourt.gov/DocketPDF/16/16-1454/28878/20180123115156098\\_BRIEF%20FOR%20AMICI%20CURIAE%20J.%20GREGORY%20SIDAK%20AND%20ROBERT%20D.%20WILLIG.pdf](https://www.supremecourt.gov/DocketPDF/16/16-1454/28878/20180123115156098_BRIEF%20FOR%20AMICI%20CURIAE%20J.%20GREGORY%20SIDAK%20AND%20ROBERT%20D.%20WILLIG.pdf), p. 29 stating that "it would be legal error to shift the burden to American Express to justify its business conduct."

<sup>48</sup> Evans and Schmalensee, supra note 2, p. 18.

<sup>49</sup> Evans and Schmalensee, supra note 2, p. 18.

<sup>50</sup> See Wright and Yun, supra note 5, illustrating the superiority of the integrated effects approach and explaining why that approach is more consistent with fundamental principles of antitrust law and economics. Namely, the Authors argue that the separate-markets approach, while having some appeal in terms of the mechanics of market definition, can lead to a discounting of cross-group effects when assessing competitive effects.

<sup>51</sup> Antitrust Law & Economics Scholars, 'Brief for Amici Curiae in support of Respondents', (2018) [https://www.supremecourt.gov/DocketPDF/16/16-1454/28972/20180123160215215\\_16-1454%20State%20of%20Ohio%20v%20American%20Express%20Brief%20for%20Amici%20Curiae%20Antitrust%20Law%20in%20Support%20of%20Respondents.pdf](https://www.supremecourt.gov/DocketPDF/16/16-1454/28972/20180123160215215_16-1454%20State%20of%20Ohio%20v%20American%20Express%20Brief%20for%20Amici%20Curiae%20Antitrust%20Law%20in%20Support%20of%20Respondents.pdf), p. 9. See also Sidak and Willig, supra

since price changes are not a reliable proxy for welfare differences on platforms.<sup>52</sup> In the case of AmEx, the output to consider would be the number of transactions enabled by the circuit. Indeed, in a transaction platform, the value in getting both sides on board takes the form of an increased volume of transactions, which reflects greater use of the platform by both sides.

Conversely, according to the separate markets approach, the harm suffered by one group of users cannot be balanced out by efficiencies and gains enjoyed by another group of users (separate-effects analysis). In its essence, this line of reasoning deems it vital that no form of discrimination among different consumers could take place and, ultimately, equates harm to one group of consumers in the platform context to harm to competition.<sup>53</sup> The net-effect analysis is considered pernicious and deeply unsound since “it ignores that the balance of prices across the platform’s “sides” should be set *by competition*, not skewed by competitive restraints and then excused by *ad hoc* judicial balancing.”<sup>54</sup> In the case at issue, AmEx restraints directly interfere with the

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note 47, pp. 6 and 25: “To prosper in a two-sided market, a firm needs to compete against alternative platforms by appealing to both groups of consumers with optimally balanced prices and benefits for each side of the market, such that the firm achieves an optimal *aggregate* price posture. ... The aggregate price charged to both sides of the market, together with its optimal allocation between the two sides, is what drives total output in the credit-card industry. Thus, one must recognize the welfare gains on the cardholder side of the market alongside possible welfare losses (if any) on the merchant side of the market, so as to determine the effect of the NDPs in the relevant market as a whole.”

<sup>52</sup> Antitrust Law & Economics Scholars, *supra* note 51, p. 14: “Unlike prices—which might appear simultaneously as predatory on one side of the market and supra-competitive on the other—output tells us what is happening in the market as a whole.” See also Wright and Yun, *supra* note 5, pointing out that the Court’s majority Opinion properly focuses upon output as the key metric in the competitive effects analysis. However, according to Katz, *supra* note 13, p. 146 “the claim that rising industry output indicates that a market is competitive clearly has no basis in sound economics, two-sided or otherwise.”

<sup>53</sup> See M.L. Katz and J. Sallet, ‘Multisided Platforms and Antitrust Enforcement’, 127 *Yale Law Journal* 2142 (2018) arguing that, by ensuring that each group of users enjoys the benefits of competition, separate-effects analysis better comports with the fundamental purposes of antitrust law.

<sup>54</sup> 28 Professors of antitrust law, *supra* note 37, p. 20. See Carlton and Winter, *supra* note 16, p. 241 criticising the Supreme Court for adopting a criterion (the net price) that “completely ignores the key insight of Rochet and Tirole, which is that the prices on each side of the market, not just their sum, matter.” See also Katz, *supra* note 13, p. 144 arguing that “far from being an application of the economics of multisided platforms, reliance on the change in the two-sided price level as a measure of the consumer-welfare effects without considering any changes in the platform’s price structure is an

competition among the credit card platforms<sup>55</sup> and antitrust law should not indulge AmEx's excuse that "it is robbing Peter to pay Paul."<sup>56</sup> Indeed, Amex's justification for its restraint is simply that "it will extract monopoly rents from merchants in order to use (some of) them to entice new cardholders to its platform."<sup>57</sup> Moreover, requiring a plaintiff to weigh alleged harm on one side of a platform against the benefits on the other side is "a difficult and unwarranted burden."<sup>58</sup> In considering pro-competitive justifications, the burden is traditionally placed on the defendant precisely because it is in a much better position to cast light on them.<sup>59</sup>

However, as pointed out by Wright and Yun, defining separate markets does not necessarily prohibit the use of integrated-effects, ie the separate markets approach is consistent with an integrated effects analysis.<sup>60</sup> Hence, regardless of the approach to defining both product markets and transaction platforms, a court might still have to take into account the competitive effects of a conduct on all those sides of a platform affected.<sup>61</sup> From a comparative perspective, this argument is particularly relevant because it would soften the alleged differences with the European approach towards

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example of a fallacy that follows from applying one-sided logic to two-sided markets. ... the source of the error is to act as if the services consumed on the two sides of the platform are complementary products bought by a single consumer rather than to recognize that the parties on two sides of a transaction possibly have divergent interests. Moreover, the claim that the two-sided price is a sufficient statistic for the user or total surplus ignores the existence of cross-platform network effects."

<sup>55</sup> J.M. Connor, M. Gaynor, D. McFadden, R. Noll, J.M. Perloff, J.A. Stiglitz, L.J. White, R.A. Winter, 'Brief for Amici Curiae in support of Petitioners', (2018) [https://www.supremecourt.gov/DocketPDF/16/16-1454/23952/20171214160450195\\_16-1454tsacJohnM.ConnorEtAl.pdf](https://www.supremecourt.gov/DocketPDF/16/16-1454/23952/20171214160450195_16-1454tsacJohnM.ConnorEtAl.pdf), p. 7.

<sup>56</sup> 28 Professors of antitrust law, supra note 37, p. 23.

<sup>57</sup> 28 Professors of antitrust law, supra note 37, pp. 23-24. See also Carlton and Winter, supra note 16, pp. 217-218 claiming that the economics of balancing prices on the two sides of the credit card market is equivalent to the standard economics of balancing price and promotion, hence, despite its two-sided property, one can analyse a credit card market using the vertical structure of a one-sided market.

<sup>58</sup> Connor et al., supra note 55, p. 3.

<sup>59</sup> Carlton and Winter, supra note 16, p. 239; Hovenkamp, supra note 13.

<sup>60</sup> Wright and Yun, supra note 5.

<sup>61</sup> See Wright and Yun, supra note 5, arguing that an integrated effects analysis is the best approach in all platform settings, including the non-transactional platform analysis.

multi-sided markets that we will analyse in paragraph 4.<sup>62</sup>

### **3.3 Business models and inter-platform competition**

The second ground-breaking issue addressed by the Supreme Court concerns the relevance of the defendant's business model when carrying out the antitrust evaluation of a commercial practice. More specifically, the inherent features of platform economics raise questions about the extent to which inter-brand competition considerations can justify restraints which limit price competition among rivals.

Indeed, after noting that AmEx competes with other circuits by using a different business model, the Court highlights that AmEx's business model has significantly influenced the credit-card market and has stimulated competitive innovations in the industry, increasing the volume of transactions and improving the quality of the services offered to consumers and.<sup>63</sup> In this scenario, the Court recognises the pro-competitive effect of anti-steering provisions as "necessary to maintain cardholder loyalty and encourage the level of spending that makes AmEx valuable to merchants."<sup>64</sup> Since AmEx's business model focusses on cardholder spending (rather than lending), to encourage it, AmEx provides better rewards than other networks.<sup>65</sup> Indeed, due its superior rewards, AmEx attracts marquee cardholders, ie wealthier customers who are willing to spend more money. Through its rewards program AmEx creates an attractive pool of customers to deliver to merchants, who in turn place a higher value on these

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<sup>62</sup> For a different point of view, see C. Ritter, 'Antitrust in Two-Sided Markets: Looking at the US Supreme Court's *Amex* Case from an EU Perspective', forthcoming in *Journal of European Competition Law & Practice*.

<sup>63</sup> *American Express*, supra note 1, p. 6.

<sup>64</sup> *American Express*, supra note 1, p. 16.

<sup>65</sup> *American Express*, supra note 1, p. 6.

cardholders, hence AmEx uses this advantage to recruit merchants.<sup>66</sup> In a nutshell, AmEx has historically charged higher merchant fees than its competitors, however this practice reflects “increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price.”<sup>67</sup>

Not surprisingly, AmEx’s business model may cause friction with merchants:<sup>68</sup> even though AmEx’s rewards programme benefits merchants by attracting marquee cardholders, merchants would prefer not to pay the higher fees. Against this background, NDRs prevent free-riding<sup>69</sup>: merchants have strong incentives to use AmEx’s brand name to entice high-spend customers to their locations and then to convince them to use another network for the actual purchase.<sup>70</sup>

Moreover, the use of these restraints could increase competition among credit card networks. Indeed, a lack of “welcome acceptance” at one merchant makes a cardholder less likely to use AmEx at all other merchants, hence it endangers the viability of the entire AmEx network.<sup>71</sup> Therefore, from an economic perspective, anti-steering provisions might provide an important tool to foster inter-brand competition.<sup>72</sup> Indeed, the history suggests that these provisions were implemented when AmEx was

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<sup>66</sup> *American Express*, supra note 1, p. 6.

<sup>67</sup> *American Express*, supra note 1, p. 16: “Amex’s higher merchant fees are based on a careful study of how much additional value its cardholders offer merchants.” See J.C. Rochet and J. Tirole, ‘Must-take Cards: Merchant Discounts and Avoided Costs’, 9 *Journal of European Economic Association* 462, 467 (2011) distinguishing between a merchant’s *ex ante* and *ex post* incentives to accept a payment card: “Retailers often complain that they are “forced” to accept card transactions that increase their net costs. To understand this “must-take card” argument, one must distinguish between *ex post* and *ex ante* considerations. Once the customer has decided to buy from the retailer, it is in the latter’s interest to “steer” the former.” See also R. Gomes and J. Tirole, ‘Missed Sales and the Pricing of Ancillary Goods’, 133 *Quarterly Journal of Economics* 2097 (2018), and Bourguignon, Gomes, and Tirole, supra note 18, finding that platform-imposed restrictions of surcharging may be efficient and identifying a novel and independent channel for must-take cards, that is the merchant’s concern about missed sales. In this perspective, according to the Authors, ancillary goods may be giveaways, rather than a source of hold-up.

<sup>68</sup> *American Express*, supra note 1, pp. 6-7.

<sup>69</sup> *American Express*, supra note 1, p. 19.

<sup>70</sup> Antitrust Law & Economics Scholars, supra note 51, p. 27.

<sup>71</sup> *American Express*, supra note 1, p. 19.

<sup>72</sup> Sidak and Willig, supra note 47, p. 23.

struggling and were intended to help AmEx to compete more forcefully with other networks,<sup>73</sup> which have “significant structural advantages.”<sup>74</sup> In any case, the restraints at issue do not prevent rival networks from competing for merchants by offering them lower fees, since they do not preclude merchants from accepting other cards.<sup>75</sup>

In summary, hindrance to competition caused by NDRs is ultimately outweighed by their stimulating effects on inter-brand competitive pressure. Since card payment market participants compete relying on different business methods and on several dimensions (rather than just on the basis of prices on the merchant side), antitrust law shall ensure that each of these models could thrive and should not compel a firm to compete equally across every dimension of market rivalry.<sup>76</sup> A different approach would suppress product differentiation and, by making rival networks more homogeneous in their service offerings, would make the market more vulnerable to collusion.<sup>77</sup>

The four dissenting Justices strongly object to such line of reasoning, taking the view that undertakings are free to design their business as they like, but cannot “demand contractual protection from price competition.”<sup>78</sup> If American Express’s merchant fees are so high that merchants successfully induce their customers to use other cards, AmEx

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<sup>73</sup> Sidak and Willig, supra note 47, p. 23; Antitrust Law & Economics Scholars, supra note 51, p. 26.

<sup>74</sup> *American Express*, supra note 1, p. 5.

<sup>75</sup> *American Express*, supra note 1, p. 18: “fierce competition between networks has constrained Amex’s ability to raise these fees and has, at times, forced Amex to lower them. ... In addition, Amex’s competitors have exploited its higher merchant fees to their advantage. By charging lower merchant fees, Visa, MasterCard, and Discover have achieved broader merchant acceptance—approximately 3 million more locations than Amex.” See also Sidak and Willig, supra note 47, p. 24.

<sup>76</sup> Sidak and Willig, supra note 47, pp. 8,9 and 24.

<sup>77</sup> Sidak and Willig, supra note 47, p. 5. Differently, Connor et al., supra note 55, pp. 18-19: “with the Amex Restraints in place, competing platforms will be motivated to raise their merchant price – that is, they will be driven towards the Amex business model. In so doing, the platforms will have to abandon other competitive business models that they, the retail consumers, the cardholders, and the merchants might prefer.”

<sup>78</sup> *American Express*, supra note 1, dissenting opinion, p. 26.

can remedy that problem just by lowering those fees or by spending more on cardholder rewards so that cardholders decline such requests.<sup>79</sup>

The core argument raised against the Opinion hinges on a different interpretation of the economic rationale underpinning NDRs. Since steering strategies typically foster price competition among rival networks, they shall be regarded as pro-competitive. Thus, any restraint on these practices could find a justification only if aimed at preventing efforts to steer users towards a non-platform alternative (eg towards cash).<sup>80</sup> Indeed, this could be the only way to maintain sufficient levels of participation on both sides of platforms, which is a prerequisite for the market viability of this typology of business. Conversely, a steering restraint that merely constrains switching among rival networks shall be prohibited whenever evidence indicates that it causes a reduction of the market-wide volume of platform-enabled transactions. Antitrust shall only be concerned by the overall market output rather than the mere amount of transactions generated by one particular undertaking. If steering is allowed “shoppers may benefit from it, whether because merchants will offer them incentives to use less expensive cards or in the form of lower retail prices overall.”<sup>81</sup>

Crucially, this consideration implies that the negative outcome arising from constraints on steering is twofold. Firstly, by allowing NDRs with the ultimate goal of preserving the viability of one individual competitor’s network, the majority Opinion ends up paralysing competitive dynamics on one side of the market and, ultimately, hampers the rise of alternative and more efficient business methods: “Because the provisions eliminated any advantage that lower prices might produce, Discover “abandoned its

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<sup>79</sup> *American Express*, supra note 1, dissenting opinion, p. 26.

<sup>80</sup> Hovenkamp, supra note 13.

<sup>81</sup> *American Express*, supra note 1, dissenting opinion, p. 5.

low-price business model” and raised its merchant fees to match those of its competitors.”<sup>82</sup> Secondly, effects of NDRs have broader implications that undermine consumer welfare overall. Since merchants are precluded from tailoring prices depending on the payment card system chosen by the shopper, they can only calibrate them at a level which is in the middle between the higher price that would otherwise apply to AmEx cardholders and the lower one that would apply to non-AmEx cardholders. Therefore, all shoppers, without exception, are ‘taxed’ in order to support the higher fees charged by a credit card they do not even use.<sup>83</sup> Moreover, consumers are once again harmed by NDRs as they, together with retailers, are precluded from gaining the joint-surplus stemming from the use of a different and more convenient circuit. Indeed, the only cases under which non-steering restraints can effectively affect the choice of both shoppers and retailers is when the two parties involved in a transaction would respectively get a larger trade-surplus from switching to a different circuit.

These considerations lead Justice Breyer to thoroughly refute any allegation that the defendant’s investments are susceptible to free-riding: “American Express pays rewards to cardholders only for transactions in which cardholders use their American Express cards, so if a steering effort succeeds, no rewards are paid.”<sup>84</sup> However, it might nevertheless be possible that networks incurred costs to bring parties together which, ultimately, may require NDRs to avoid free-riding: for example, when shoppers are drawn by a merchant that claims to accept a particular payment card in the expectation

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<sup>82</sup> *American Express*, supra note 1, dissenting opinion, p. 7.

<sup>83</sup> Hovenkamp, supra note 13.

<sup>84</sup> *American Express*, supra note 1, dissenting opinion, p. 27.

of rewards and services.<sup>85</sup> Therefore, in assessing whether a vertical restraint can solve a free-riding problem, competition authorities might consider whether the platform is responsible for bringing users together, whether the platform made investments that are responsible for bringing users together, and finally whether a less restrictive alternative is available, ie free-riding could be resolved in other (less restrictive) ways.<sup>86</sup>

#### **4. The European perspective: separate markets but integrated effects**

The Supreme Court's ruling provides the chance to draw a comparison with the European approach regarding the antitrust relevance of multi-sidedness as well as the treatment of steering strategies in the platform context. Indeed, in *Groupement des cartes bancaires*<sup>87</sup> and *MasterCard*<sup>88</sup> the Court of Justice (CJEU) has offered an interpretation of credit card markets that takes into account the economics of two-sided platforms when it comes to evaluating antitrust conduct.

Notably, in *Groupement des cartes bancaires* the CJEU states that the credit card market consists of two separate but related relevant markets for merchants and cardholder banks (referred to as issuing and acquiring markets). Hence, even if the relevant market does not include the two sides of the platform, the interdependence of

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<sup>85</sup> P.A. Johnson, 'Suggestions for competition authorities when assessing vertical restraints in multi-sided platforms', in OECD, *Rethinking Antitrust Tools for Multi-Sided Platforms*, (2018) p. 201, [www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm](http://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm). See also C. Caffarra and K.-U. Kühn, 'The competition analysis of vertical restraints in multi-sided markets', in OECD, *Rethinking Antitrust Tools for Multi-Sided Platforms*, (2018) p. 213, [www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm](http://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm), making a plea for a shift in attitude to understand the potential efficiency rationales for vertical restraints, suggesting that in many cases firms are just dealing with contractual incompleteness, rather than being motivated by anti-competitive purposes.

<sup>86</sup> Johnson, *supra* note 85, pp. 207-208.

<sup>87</sup> Case C-67/13 P *Groupement des cartes bancaires v. European Commission* EU:C:2014:2204.

<sup>88</sup> Case C-382/12P *MasterCard v. European Commission* EU:C:2014:2201.

these two sides must be taken into account.<sup>89</sup> Therefore, the Court has rejected the argument according to which Article 101(1) TFEU does not apply to the need for a balance of issuing and acquiring activities. When evaluating whether an agreement might be considered so harmful for competition that it may be considered a restriction of competition by object, due consideration must be given to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.<sup>90</sup> According to the Court, that must be the case, in particular, when “there are interactions between the two facets of a two-sided system.”<sup>91</sup>

In the same vein, in *MasterCard* the CJEU states that, in order to exempt an agreement from the prohibition in Article 101(1) TFEU under the efficiency defence, it is essential to contextualise the conduct at issue within the system it refers to by taking into account the whole spectrum of objective advantages stemming from the measure. Moreover, the Court explicitly recognises that such potential positive effects can be found not only in the relevant market where the conduct took place, but also in other markets involving consumers interconnected through the platform, especially when it is patently clear that the two sides of the network are strictly related.<sup>92</sup> Therefore, the CJEU acknowledges that an integrated effects analysis is desirable in two-sided contexts without indulging in the heated debate about the adoption of the integrated market approach instead of the separate markets approach. In this respect, differences in market definition do not

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<sup>89</sup> *Groupement des cartes bancaires*, supra note 86, para. 77.

<sup>90</sup> *Groupement des cartes bancaires*, supra note 86, paras. 53 and 78.

<sup>91</sup> *Groupement des cartes bancaires*, supra note 86, para. 79.

<sup>92</sup> *MasterCard*, supra note 87, para. 237.

matter in so far as competition law analysis accounts for the efficiencies and the anti-competitive effects arising from a specific conduct on both sides of a platform. Nevertheless, the Court points out that a mere reliance on efficiencies in separate yet related markets is not sufficient to fulfill the efficiency defence under article 101(3) TFEU as the group of consumers harmed and the one benefiting from the restraint need to be substantially the same.<sup>93</sup>

However, with respect to the relevant market definition it is also worth mentioning the position expressed by the Bundeskartellamt.<sup>94</sup> By drawing a distinction between matching platforms and audience-providing platforms (also referred to as advertising platforms)<sup>95</sup> and suggesting defining one single market in the case of the former, the German Competition Authority seems to share a similar view of the Supreme Court in *AmEx*. Indeed, according to this line of reasoning, since each side of a matching platform depends on a successful matching result to satisfy its demand, taking into account individual markets would fail to cover the competitive features which might be relevant for an antitrust analysis.<sup>96</sup>

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<sup>93</sup> *MasterCard*, supra note 87, para. 242.

<sup>94</sup> Bundeskartellamt, Market Power of Platforms and Networks. Working Paper B6-113/15 (2016), [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2).

<sup>95</sup> Matching platforms are those that enable a match between different kinds of users who, therefore, interact with the network with the ultimate object of benefitting from a match. Matching platforms can be further divided into platforms that provide a transaction function and platforms without a transaction function. These typologies of undertakings are all characterised by positive bilateral indirect network effects. Conversely, audience-providing platforms attract one group of players (eg social network users), generally by providing them with some freebies, in order to sell this audience's attention to another group (eg advertisers). Contrary to matching platforms, the interests of the different groups of users are not interrelated as generally one of the two does not need the other in order to enjoy the service provided by the network.

<sup>96</sup> See also S. Wismer and A. Rasek, 'Market definition in multi-sided markets', in OECD, *Rethinking Antitrust Tools for Multi-Sided Platforms*, (2018) pp. 55 and 57, [www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm](http://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm), arguing that, defining separate markets for each customer group may be inappropriate if the different groups are inseparably linked by a platform interaction, in particular if a platform's service necessarily involves all customer groups.

A further crucial element stressed in *MasterCard* is the key function played by counterfactuals for proving that a certain practice may fall outside the scope of article 101(1) TFEU in so far as it is considered an ancillary restraint.<sup>97</sup> This means that, in order to evaluate whether a restriction of competition is directly related and necessary to the implementation of a main operation, it is necessary to assess what scenario would realistically materialise in the absence of the measure. If, following such theoretical exercise, it appears that the practice at stake is simply more difficult to implement or even less profitable without the restriction concerned, then the practice would be objectively unnecessary from a competition perspective and, therefore, it would still be caught by the general prohibition as an unjustified restriction of competition.<sup>98</sup>

Applying this framework to the *AmEx* case requires that, in order to escape the prohibition laid down in Article 101(1), it is necessary to demonstrate that American Express business would be impossible to carry out in the absence of the anti-steering provisions. Indeed, MasterCard attempted to prove the necessitated -thus not anti-competitive- nature of the restriction, showing how its business model would have gone down in flames if the alternative states of the world existed (so-called ‘death spiral’ argument).<sup>99</sup>

However, the discussion about the European antitrust analysis of AmEx anti-steering provisions is just theoretical. Indeed, in the EU anti-steering rules are prohibited by law. Namely, Article 11 of the Interchange Fee Regulation provides for a general prohibition of NDRs, stating that any rules imposed by a payment card scheme

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<sup>97</sup> *MasterCard*, supra note 87, paras. 161-166.

<sup>98</sup> *MasterCard*, supra note 87, para. 91.

<sup>99</sup> See UK High Court of Justice, *Arcadia and others v. MasterCard* [2017] EWHC 93 (Comm); and UK Court of Appeal, *Sainsbury’s Supermarkets Ltd v. MasterCard* [2018] EWCA Civ 1536.

preventing merchants from steering shoppers to use different payment instruments or informing them about interbank fees charged is forbidden.<sup>100</sup>

Nonetheless, the EU regulatory treatment of NDRs provides a valuable opportunity to critically assess the soundness of the majority Opinion expressed in *AmEx*. Indeed, the decision delivered by the Supreme Court appears at odds with the European reality. If the anti-steering provisions implemented by American Express are so essential that a different conclusion would endanger the viability of the entire AmEx network, how is it possible that the same platform managed to thrive in the EU market where such restraints are prohibited by Regulation? In a nutshell, it is unlikely that American Express could successfully rely on the death spiral argument to exempt anti-steering constraints from the scope of the general prohibition laid down in Article 101(1) TFEU. This consideration makes us wonder whether the decision of the Supreme Court could have been different, all else being equal, if Justices as well as *amici curiae* had shown more sensitivity, in a comparative perspective, to the regulatory situation on the other side of the Atlantic. Under this scenario, it would have been challenging to dismiss the argument raised by Justice Breyer against the indispensability of NDRs which, ultimately, minimised the concerns regarding inter-brand competition in a counterfactual world.<sup>101</sup>

## 5. Concluding remarks

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<sup>100</sup> Regulation (EU) 2015/751 of the European Parliament and of the Council on interchange fees for card-based payment transactions, (2015) OJ L123/1.

<sup>101</sup> *American Express*, supra note 1, dissenting opinion, pp. 26-27: “American Express possesses the flexibility and expertise necessary to adapt its business model to suit a market in which it is required to compete on both the cardholder and merchant.”

The decision of the Supreme Court in *AmEx* marks a turning point in the antitrust debate around platform economics, since Justice Thomas' Opinion, backed by a narrow majority, acknowledges the relevance of two-sidedness as regards the market definition and the assessment of anti-competitive conducts.

First, the ruling establishes a benchmark to determine whether a multi-sided network requires a new analytical standard hinged on the concept of transaction platforms. Markets in which these players operate differ from traditional ones as they are influenced by significant multilateral indirect network effects. Therefore, transaction platforms need to strike a balance between their different sides by means of interconnected pricing mechanisms in order to remain competitive and increase overall output. Then, by following an integrated market approach, the Opinion takes a strong stance in favour of a net-effect analysis of restraints imposed on one side of the platform. No inference of anti-competitive effects can be derived from price increases on one side of the platform, this being just a natural consequence of differences in the two groups' demand elasticity. The bottom line of the ruling is straightforward: antitrust law focuses on overall net consumer harm, not gross harm. Finally, the Opinion stresses the need to take into account the presence of different business models in order to preserve and promote inter-brand competition. After all, the promotion of inter-brand competition is “the primary purpose of the antitrust laws.”<sup>102</sup>

As is usual for landmark cases, the decision has sparked many endorsements as well as critiques among antitrust scholars.

Opponents argue that both the relevant market definition as an integrated platform and the “netting” of competitive effects across all sides of the platform are ideas in direct

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<sup>102</sup> *American Express*, supra note 1, p. 20.

tension with core principles animating antitrust law. First of all, the notion of transaction platforms is “not one of antitrust art”, hence nothing suggests that a court should abandon traditional market-definition approaches.<sup>103</sup> Further, ordinary tools of antitrust analysis are already suited to the task of addressing multi-sidedness.<sup>104</sup> An additional concern has been raised with regard to the definition of two-sided transaction markets and its implications. Notably, the definition endorsed by the Supreme Court has been judged as excessively broad and vague. As a result, by creating a rule that allows cross-market balancing of benefits and harms for these markets the Court may have immunised tech platforms from effective antitrust scrutiny.<sup>105</sup> After all, two-sidedness is just a description of a business model, rather than market.<sup>106</sup> Ultimately, all these considerations lead Justice Breyer to consider *AmEx* “contrary to basic principles of antitrust law.”<sup>107</sup>

Against this background, the European scenario may provide useful insights for both supporters and opponents of *AmEx*.

On the one hand, according to *Groupement des cartes bancaires* and *MasterCard*, a definition of separate markets does not preclude an examination of the effects of a conduct on related sides of a platform. Hence, whenever a platform shows a strong interdependent demand structure on both sides, antitrust authorities should undertake an integrated effects analysis, instead of focusing on just one side. Moreover, counterfactuals should play a significant role in order to evaluate whether a restraint is

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<sup>103</sup> *American Express*, supra note 1, dissenting opinion, p. 15.

<sup>104</sup> Carlton and Winter, supra note 16, p. 232; 28 Professors of antitrust law, supra note 37, p. 31.

<sup>105</sup> Khan, supra note 3.

<sup>106</sup> 28 Professors of antitrust law, supra note 37, p. 28. Conversely, see D.F. Spulber, ‘The economics of markets and platforms’, 28 *Journal of Economics & Management Strategy* 159 (2019), urging for the need to unify the literature on markets and platforms: provided that digital technologies permeate the economy, it is not necessary to draw a distinction between markets and platforms.

<sup>107</sup> *American Express*, supra note 1, dissenting opinion, p. 28.

necessary to the implementation of a main operation. In this respect, a platform needs to prove that its business model would be impossible to carry out in the absence of that specific provision. From this perspective, even if they embark on different routes, the EU and the US approaches seem to reach the same destination.

On the other hand, by explicitly forbidding anti-steering rules under the Interchange Fee Regulation, the European framework questions the indispensability of these restraints with reference to American Express and their relevance for inter-platform competition. In fact, notwithstanding the ban on NDRs concerning three-party schemes, American Express' business has not collapsed in the EU.

In conclusion, the day after *AmEx*, contrary to what has been reported, is not devastating for competition policy. Concerns regarding the risks of undermining effective antitrust scrutiny should not be overestimated. Indeed, the ruling applies only to transaction platforms with significant indirect network effects. Hence, its principles may affect a broad range of cutting-edge firms like Uber, eBay, Amazon and Airbnb, but it does not involve advertising platforms, such as Google and Facebook. Furthermore, regardless of the approach to defining relevant markets, a court might still have to take into account the competitive effects of a conduct on all sides of a platform affected.

However, a far-reaching message has been delivered to the antitrust community and it should not be overlooked. That is, multi-sided platforms should cautiously depart from a mechanical reproduction of traditional methods and principles.<sup>108</sup> If competition policy wants to stay true to its core goals, it ought to be ready to adapt in a consistent manner its approach to the new features of platform economics. As pointed out by

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<sup>108</sup> See Carlton and Winter, *supra* note 16, p. 218 concerned that, given the Supreme Court's ruling, there is now a different antitrust standard for examining vertical restraints in one-sided versus two-sided markets.

Tirole, even if fine-tuning antitrust to this brave new world is challenging, nonetheless “that is better than misapplying traditional principles.”<sup>109</sup>

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<sup>109</sup> J. Tirole, Regulating the disrupters, (2019) <https://www.livemint.com/Technology/XsgWUgy9tR4uaoME7xtITI/Regulating-the-disrupters-Jean-Tirole.html>.