Report from North America

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THE SUPREME COURT DECISION AND ANTI-STEERING RULES

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In the previous "Report from North America" the *Ohio v American Express*[1] case was discussed. This involved so-called anti-steering rules (also known as non-discrimination rules or NDRs) that prevented merchants from suggesting to consumers that they use a credit card with lower merchant fees for purchases.[2] In that case the District Court found that the American Express (which was the only defendant by the time of trial[3]) NDRs violated s 1 of the *Sherman Act 1890* (26 Stat 209, 15 USC §§ 1–7) (USA) by suppressing price competition. As predicate findings, the District Court also found that American Express had market power in the credit card network services market.[4]

The decision was appealed, and the Appeals Court reversed the District Court's decision.[5] The Appeals Court, in summary, found that the market definition utilised by the District Court was incorrect, and this error was key to reaching the wrong conclusion because, in a properly defined relevant market, American Express did not have market power. As a consequence, American Express's NDRs could not harm competition. In addition, the Appeals Court noted that NDRs are a vertical restriction and found that the District Court did not pay sufficient attention to the fact that vertical restrictions are often pro-competitive.

The United States Supreme Court agreed to review the case during its 2017–2018 term and issued its decision dismissing the appeal in June 2018. This was the only major antitrust case decided during the 2017–2018 term. The case was decided by a narrow 5-4 vote, with all of the so-called more conservative judges aligned with the majority and all of the so-called more liberal judges in the minority. The decision has been quite controversial, with many observers raising alarms about its implications, which, in their view, make it more difficult to challenge allegedly anti-competitive conduct.[6]

The objective of this article is to analyse the economic arguments set forth by the majority and the minority, to determine their validity and applicability and to opine on the economic merits of the case. As will be clear, the decision is, from an economic perspective, somewhat of a muddle and somewhat problematic. Consequently, it seems desirable that, in the near term, the Court will have to clear up the economic problems the *Ohio v American Express* decision will inevitably generate.

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* Vice President, Charles River Associates, California. The conclusions set forth herein are based on independent research and publicly available material. The views expressed herein are the views and opinions of the author and do not reflect or represent the views of Charles River Associates or any of the organizations with which the author is affiliated.

[1] *Ohio v American Express Co* (2nd Cir No 16–1454, 25 June 2018) (sometimes referred to as *United States v American Express*). See: C Pleatsikas, "Report from North America – There Are Two Sides to Every Story: Credit Cards and Antisteering Restrictions" (2017) 25 AJCCL 319.

[2] Merchants are allowed to "steer" consumers to debit cards, cheques or cash instead of credit cards and to offer discounts or other incentives to make one of these switches.

[3] Visa and MasterCard, which had also such rules in place, agreed to eliminate their NDRs prior to trial as part of their settlement with the plaintiffs.

[4] *United States v American Express* (Complaint for Equitable Relief for Violation of s 1 of the Sherman Act, 15 USC § 1, Case No 1: 10-cv-04496-NGG-CLP, filed 4 October 2010, US District Court for the Eastern District of New York) see: <https://www.justice.gov/atr/case-document/complaint-equitable-relief-violation-section-1-sherman-act-15-usc-1>.

[5] *United States v American Express* (2nd Cir, No 15-1672, 26 September 2016).

[6] For example, see R Woodcock, "Ohio v Amex: Supply Chain Fairness, and the Inadequacy of Antitrust's Consumer Welfare Standard", *Pro-Market: The Blog of the Stigler Center at the University of Chicago* (2 July 2018) <https://promarket.org/ ohio-v-amex-supply-chain-fairness-and-the-inadequacy-of-antitrusts-consumer-welfare-standard>; T Wu, "The Supreme Court Devastates Antitrust Law", *New York Times*, 26 June 2018 <https://www.nytimes.com/2018/06/26/opinion/supreme-court-american-express.html>.

The discussion of several elements of the decision will be presented by reference to statements in the opinion of the majority, written by Justice Thomas, and the dissent, written by Justice Breyer. Finally, a review of the case from an economic perspective is presented.

Regulatory Rationale for the Lawsuit

Many countries – for example, the European Union, Canada, Australia and China[7] – regulate the interchange fees that credit card schemes can charge. Because interchange fees are a major portion of merchant fees, these regulatory rules in turn tend to limit the magnitude of fees charged to merchants for credit card transactions. The United States, while it regulates interchange fees for debit cards,[8] has not regulated credit card interchange fees, and there appears to be no strong push to do so in the future.

There are likely at least two reasons for the antipathy to regulation of credit card fees in the United States. First, in general, the United States has been less fertile ground for explicit price or price-related regulation (with the exception of classic monopolies – that is, industries with no competitors, such as electricity distribution) than other advanced industrial countries.

Second, proponents of regulation of credit card interchange fees have often cited two purported market failure rationales to underpin regulation – (1) the fact that the costs associated with credit card transactions tend to increase prices for all consumers (as the costs of credit card transactions are incorporated across-the-board, so that buyers who do not use credit cards implicitly pay a portion of those credit card costs)[9] and (2) that the incentives facing credit card schemes are to increase interchange fees rather than decrease them (and use at least part of the increases to fund incentives to buyers to increase their use of credit cards).

The first source of purported market failure is generally recognised in the United States (although many economists and others would not accept the characterisation that spreading the costs of credit card transactions across all transactions, regardless of the payment instrument used, as an example of market failure). As Justice Breyer noted:

> In particular, merchants generally spread the costs of credit-card acceptance across all their customers (whatever payment method they may use), while the benefits of card use go only to the cardholders. … Thus, higher credit-card merchant fees may have only a limited effect on credit card transaction volume, even as they disrupt the marketplace by extracting anticompetitive profits.[10]

The second potential source of market failure – the so-called perverse incentives to raise, not lower, interchange fees – is not generally acknowledged as a problem in the United States. Indeed, US antitrust policy has relied on competition among the card schemes to ensure that interchange fees and merchant fees are efficient. This case, besides attempting to eliminate contractual provisions that allegedly caused competitive harm, was also implicitly a recognition that certain credit card scheme policies in the United States have resulted in merchant service fees that may be supracompetitive. Again, Justice Breyer opined on this subject:

> This lawsuit is emblematic of the American approach. Many governments around the world have responded to concerns about the high fees that credit-card companies often charge merchants by regulating such fees directly. … The United States has not followed that approach. The Government instead filed this lawsuit, which seeks to restore market competition over credit-card merchant fees by eliminating a contractual barrier with anticompetitive effects.[11]

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[7] For example, see <https://cmspi.com/nam/blogs/interchange-fees-why-some-jurisdictions-have-regulated-successfully-but-most-havent/>.

[8] Debit card interchange fees are regulated in the United States under banking regulations (see, eg, <https://www.federalreserve.gov/paymentsystems/regii-about.htm>).

[9] A central feature of this market failure theory posits that credit card transactions are more expensive for merchants to process than transactions using other payment instruments.

[10] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 23 (Justice Breyer's Dissent).

[11] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 1-2 (Justice Breyer's Dissent).

Basic Framework for Analysis

Despite the sharp differences of opinion between the majority and the minority on the Supreme Court concerning the appropriate interpretation of the facts in this case, there was general agreement on the framework for analysis. First, both sides agreed that the alleged anti-competitive conduct should be analysed under the rule of reason.[12] Second, both sides agreed that the rule of reason framework involves a three-step burden shifting process, first requiring that the plaintiff demonstrates that the challenged conduct results in harm to competition. Then, if the plaintiff has satisfied that first step, the defendant must try to demonstrate that the conduct has, on balance, a pro-competitive effect. Finally, if the defendant has satisfied the second step, the plaintiff must show that the benefit could have been achieved by less anti-competitive means.

Third, both sides agreed that the challenged conduct constituted a vertical restriction.[13] The general implications of vertical restrictions, however, were not aligned between the majority and the minority. While the majority opinion noted that vertical restrictions were often pro-competitive,[14] Justice Breyer noted that:

> Moreover, the procompetitive justifications for vertical price-fixing agreements are not apparently applicable to the distinct types of restraints at issue in this case. A vertically imposed price-fixing agreement typically involves a manufacturer controlling the terms of sale for its own product.
>
> This type of reasoning does not appear to apply to American Express' nondiscrimination provisions, which seek to control the terms on which merchants accept *other brands'* cards, not merely American Express' own.[15]

The apparent failure of the majority opinion to grapple with this distinction is a potentially serious flaw in its analysis.

Market Definition

Differences in views concerning the need for market definition and the boundaries of the relevant market are very significant between the majority and minority views of this case and have some major implications for antitrust jurisprudence in the United States. The first source of difference between the majority and minority views concerns the issue of whether there is always a need for a market definition analysis in antitrust cases. The alternative view is that, at least in some cases, market definition analysis may be a distraction (because the complexities and/or differences in views concerning specifying the precise boundaries of the relevant market may focus attention away from more significant competition issues) and direct evidence of competitive harm may be sufficient to demonstrate an antitrust violation.[16] This alternative view has been gaining adherents in the antitrust community over time and is now considered a mainstream approach among most antitrust economists. This alternative approach was endorsed in the dissent:

> The majority disagrees that market definition is irrelevant. … The majority explains that market definition is necessary because the nondiscrimination provisions are "vertical restraints" and "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first determines the relevant market."
>
> "[T]he purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition". The District Court's findings

[12] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 9-10 (Justice Thomas's Majority Opinion); *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 2-3 (Justice Breyer's Dissent).

[13] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 11, fn 7 (Justice Thomas's Majority Opinion); *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 13 (Justice Breyer's Dissent).

[14] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 11, fn 7 (Justice Thomas's Majority Opinion).

[15] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 24–25 (Justice Breyer's Dissent) (emphasis in the original).

[16] For example, see S Salop, "The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium" (2000) 68 *Antitrust Law Journal* 187; L Kaplow, "Why (Ever) Define Markets?" (2010) 124 *Harvard Law Review* 437.

> of actual anticompetitive harm from the nondiscrimination provisions thus showed that, whatever the relevant market might be, American Express had enough power in that market to cause that harm. There is no reason to require a separate showing of market definition and market power under such circumstances. And so the majority's extensive discussion of market definition is legally unnecessary.[17]

The majority opinion took a much different position:

> Here, the plaintiffs rely exclusively on direct evidence to prove that Amex's antisteering provisions have caused anticompetitive effects in the credit-card market. To assess this evidence, we must first define the relevant market. Once defined, it becomes clear that the plaintiffs' evidence is insufficient to carry their burden.[18]

This dispute then leads to a significant dispute about the scope of the relevant market and some problematic economic analysis by both camps. Justice Thomas correctly identifies credit cards as a two-sided platform that, when defining the scope of the relevant market, requires consideration of both merchant services and shopper services simultaneously. However, he makes three serious economic errors in his analysis that are likely to cause considerable problems in trying to apply his analytical framework to future antitrust cases.

First, he fails to give due consideration to direct effects when evaluating whether Step 1 (the plaintiff's burden to show competitive harm) of the rule of reason analysis has been satisfied. When sufficient evidence of direct effects is available, it seems unduly formalistic to require a market definition analysis and a market power analysis. As a corollary to this error, Justice Thomas appears to imply that defining the wrong market boundaries must be fatal to any rule of reason analysis. In doing so, he seems to be ruling out the possibility that, at least in some cases, the precise market boundaries may be relatively unimportant to a showing of competitive harm.

Second, he fails to define what constitutes a two-sided (or multi-sided market). At various points in his majority opinion, Justice Thomas identifies several characteristics of products in a two-sided market:

- the provision of different products or services;
- the provision of these products or services to different groups of customers;
- the connection of these services and customers through a "platform";
- simultaneity in transactions through the platform;
- the existence of indirect network effects; and
- the need to balance "prices" on the two sides of the transaction so as to promote the magnitude of indirect network effects.[19]

This group of characteristics is both too broad and too vague to be useful as a guide. Indeed, the shortcomings of the definition were exploited in the dissent by Justice Breyer, who claimed that, because the characteristics were so broad, they could encompass almost any product or service. Consequently, these characteristics would provide little useful guidance for antitrust jurisprudence.

Third, and just as important as the problematic identification of the characteristics of a two-sided market, Justice Thomas then specified that it would not always be necessary to consider both sides of a two-sided platform (presumably for both market definition and market power evaluation purposes). This rule appears to have been, at least in part, motivated by a desire to acknowledge a seemingly inconsistent precedent – specifically the consideration of market definition in *Times-Picayune Publishing Co v United States*.[20] In that case the advertising and consumer sides of newspaper industry were apparently considered separately (not as different facets of a two-sided market). Justice Thomas opined that, where "indirect network effects and relative pricing in that market are minor"[21] one need not consider both sides

[17] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 13–14 (Justice Breyer's Dissent) (emphasis omitted).

[18] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 10 (Justice Thomas's Majority Opinion) (footnote omitted).

[19] Indirect network effects occur, for example, when an increase in the number of members on one side of a market increases the value to members on the other side of the market.

[20] Of course, that case was decided long before economists began grappling with two-sided market issues in earnest. *Times-Picayune Publishing Co v United States*, 345 US 594, 610 (1953).

[21] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 12 (Justice Thomas's Majority Opinion).

of a two-sided market. This vague rule is likely to be unworkable, as the likelihood that a well-accepted dividing line between markets where such effects are “minor” and those where such effects are “not minor” would be difficult or impossible to define.

However, Justice Breyer’s economic analysis suffered from its own shortcomings. Among other things, he contended that services supplied to merchants by credit card schemes and services supplied to shoppers by those same schemes were complements and therefore could not exist in the same relevant market.[22] He, too, cites the *Times-Picayune Publishing Co v United States* case to demonstrate that there is no precedent for defining relevant markets that include complementary services.[23] To some extent the problem with Justice Breyer’s analysis is encapsulated in the problem of defining the relevant product for which the market must be defined. Products often combine multiple characteristics and multiple complementary inputs. In this case the product supplied to end users is the transaction. Multiple inputs are required to “produce” a transaction. The fact that at least some of these inputs are complements is not determinative of whether they can be used to produce one relevant product for which a relevant market can be defined.

Furthermore, Justice Breyer, while taking Justice Thomas (and the majority) to task for failing to specify a useful definition of a two-sided market, attempts to demonstrate that two-sidedness is so broad that it can encompass almost anything. His example of tyres and ignition switches as a two-sided market is easily dismissed in economic terms because there is no necessary complementarity in their production.[24] His examples of shopping centres and farmer’s markets are somewhat more difficult to dismiss,[25] but founder ultimately on the fact that congestion costs overwhelm network effects at relatively modest scales, whereas in the two-sided markets of interest (such as credit cards), while there are likely diminishing returns to scale at some point, exhaustion of network effects at real world scales does not occur.

The Supreme Court Becomes a Finder of Fact

The basic rationale for the majority decision was the failure of the plaintiffs in the case to demonstrate whether the accused anti-steering provisions harmed competition because the plaintiffs analysed the wrong relevant market. The plaintiffs did not, according to the majority, evaluate harm within a two-sided market that included services both to merchants and shoppers, and, therefore did not meet their burden under step 1 of the rule of reason burden-shifting process. As a predicate finding that had important implications for subsequent Court of Appeal and Supreme Court decisions, under this reasoning it should not have mattered whether, if the plaintiffs had analysed the accused conduct using the “correct” market, they might have been able to meet their burden.

Consequently, it seems both unusual and somewhat mystifying that the majority decision travels a path well beyond its conclusion that the plaintiffs failed to meet their burden. Indeed, the majority opinion appears to make findings of fact concerning the competitive impact of the accused conduct. For example, the majority state:

> In sum, Amex’s business model has stimulated competitive innovations in the credit-card market, increasing the volume of transactions and improving the quality of the services.[26]
>
> Visa and MasterCard’s merchant fees have continued to increase, even at merchant locations where Amex is not accepted and, thus, Amex’s antisteering provisions do not apply. … This suggests that the cause of increased merchant fees is not Amex’s antisteering provisions, but rather increased competition for cardholders and a corresponding marketwide adjustment in the relative price charged to merchants.[27]

[22] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 11 (Justice Breyer’s Dissent).

[23] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 15 (Justice Breyer’s Dissent).

[24] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 16 (Justice Breyer’s Dissent).

[25] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 17 (Justice Breyer’s Dissent).

[26] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 6 (Justice Thomas’s Majority Opinion).

[27] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 16-17 (Justice Thomas’s Majority Opinion).

> The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. To the contrary, while these agreements have been in place, the credit-card market experienced expanding output and improved quality. Amex's business model spurred Visa and MasterCard to offer new premium card categories with higher rewards.[28]
>
> Lastly, there is nothing inherently anticompetitive about Amex's antisteering provisions. These agreements actually stem negative externalities in the credit-card market and promote interbrand competition. When merchants steer cardholders away from Amex at the point of sale, it undermines the cardholder's expectation of "welcome acceptance" the promise of a frictionless transaction.[29]

These findings not only appear to be unnecessary to the decision rendered by the Court, but also do not appear to be supported by any analysis. It is almost as if the Court found it necessary to its decision both to determine that the plaintiffs had not met their burden and, in addition, that the plaintiffs could never have met their burden because, in the majority's view, the accused's conduct was in fact pro-competitive.

Proof Required and Its Implications

Having implied that direct evidence of competitive harm is insufficient to demonstrate competitive harm, the majority established a standard of proof that is likely to be problematic because it may set the bar too high for plaintiffs in antitrust cases. Specifically, the majority stated:

> 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.[30]

Absent the relevance of direct evidence, this statement appears to imply that econometric models comparing real-world outcomes to hypothetical counterfactual outcomes will be required to demonstrate price and output effects, at least in many cases. Such models are likely to be complex, at least some of whose specific details, structure and operation are likely well beyond the understanding of judges and juries. Arguments about their applicability, structure, assumptions, etc, are likely to invoke complex and obscure (to non-economists) technical concepts and principles, a circumstance unlikely to lead to reasoned and consistent analysis by decision-makers in these cases. Consequently, ruling out direct evidence would appear to both narrow the bases for evaluating conduct and make decision making in antitrust more difficult, more complex and, perhaps, more arbitrary (which would increase regulatory uncertainty in the enforcement of antitrust laws, to the detriment of efficiency in enforcement).

Analysis of the Decision

Beyond the problematic aspects relating to the definition and application of economic principles in both the majority opinion and the minority dissent, there are three serious problems inherent in the Supreme Court's decision in *Ohio v American Express*. First, the direct evidence of harm to competition was apparently (according to Justice Breyer's dissent) particularly strong in this case. Specifically, the District Court found:

(1) Discover's attempt in the 1990s to implement a strategy of being a low-price credit card option to merchants apparently failed because of the NDRs then in place by Visa, MasterCard and American Express.
(2) Protected by NDRs, American Express raised price 20 times during 2005–2010 and used a portion of the increased revenue to increase its profits (ie, not all the increased revenue was utilised to increase cardholder rewards).
(3) American Express apparently did not consider the impact of these price increases on its market share, implying that it had market power because it could increase prices to merchants without suffering any significant competitive impact.

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[28] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 18 (Justice Thomas's Majority Opinion).

[29] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 19 (Justice Thomas's Majority Opinion).

[30] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 15 (Justice Thomas's Majority Opinion).

(4) Many merchants testified that they would have tried to steer consumers to less expensive cards absent the NDRs.[31]

Arrayed against these findings, the claim that American Express's purported "different business model", to the extent that it is a correct characterisation of its business (as American Express, for example, is an issuer of many lend-centric cards as well as cards that earn money mainly from merchant fees), can be used as a rationale for its continuing use of NDRs[32] seems both irrelevant and misleading.

Second, the majority does not appear to have considered sufficiently the implications of the vertical restriction represented by a credit card NDR. As Justice Breyer, in his dissent, pointed out,[33] the NDR in this context is unusual in that it directly affects not only the product with which it is associated, but competitive products as well. Such vertical restrictions are much more likely to have anti-competitive implications than vertical restrictions that apply only to the supplier's own products.

Finally, with all of the focus on whether the plaintiffs (and/or the District Court) defined the relevant market correctly, the Court apparently did not consider whether market definition was a significant factor in determining competitive impact. Given the breadth and strength of the direct evidence of competitive harm, it seems likely that, using either definition (the one set forth by the plaintiffs and the District Court or the one favoured by the Court of Appeal and the majority of the United States Supreme Court), the American Express NDR had the potential to be anti-competitive.

In the author's opinion, given the apparent strength (based on information contained in Justice Breyer's dissent) of findings of alleged competitive harm (relevant to the first part of the rule of reason test) and the economic errors by the majority and the minority of the Court in this case, a more appropriate result, from an economic perspective, may have been to send the case back to the trial court. This could have facilitated a more comprehensive analysis of the plaintiffs' allegations of purported competitive harm. It would also have enabled American Express to provide a more comprehensive examination of the second part of the rule of reason analysis – ie, evaluation of potential pro-competitive defences – if the lower courts still found that the plaintiffs had satisfied the first part of the rule of reason test. Such an outcome could provide a more defensible economic basis for the antitrust analysis and assist in determining whether, on balance, the NDRs at issue were pro-competitive or anti-competitive.

[31] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 12-13 (Justice Breyer's Dissent).

[32] For example, *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 5–6 (Justice Thomas's Majority Opinion).

[33] *Ohio v American Express Co* (2nd Cir, No 16–1454, 25 June 2018) slip op 24–25 (Justice Breyer's Dissent).