

HOW TO APPROACH MARKET DEFINITION AFTER *OHIO V. AMERICAN EXPRESS*

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Technological developments have introduced new methods of buying and selling goods and services. These advancements often times take the form of two-sided platforms. While these platforms increase overall social utility, they also present a host of challenges to antitrust enforcement. One such challenge is defining the appropriate market in cases involving actions that are not illegal *per se*. That task has been made more difficult with the Supreme Court’s recent decision in *Ohio v. American Express Co.* (“*Amex*”).² Moving forward, one of the critical questions *Amex* presents is how to define the product market in the context of two-sided platforms.

In *Amex*, the Court addressed anticompetitive concerns related to two-sided platforms in the credit card market. American Express, and all credit card companies, create a network of merchants where cardholders can purchase goods and services. By providing these services, American Express creates a two-sided platform, where consumers and merchants depend on the company to act as an intermediary to facilitate transactions. To prevent merchants from ‘preferencing’ other credit cards that charge lower merchant fees, American Express includes anti-steering provisions in its merchant contracts.³

The U.S. Department of Justice and State Attorneys General challenged these anti-steering provisions, arguing that they were anticompetitive because they prevented effective competition among credit cards. The Court determined that, even in the face of direct effects of anticompetitive practices, the plaintiffs failed to provide a suitable market definition to satisfy the first step of the Rule of Reason test.⁴ Consequently, the Court required the two-sided platforms be defined as a single market. The Court determined that, to establish *prima facie* evidence of uncompetitive practices, there must be anticompetitive effects on the “two-sided market . . . as a whole,” and effects on one side of the platform are insufficient.⁵

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² 138 S. Ct. 2274, 2279-80 (2018).

³ *Id.* at 2283.

⁴ *Id.* at 2287.

⁵ *Id.*

Federal antitrust enforcers have stated that the *Amex* decision should be read extremely narrowly.⁶ It should only apply in the limited instances where there actually is a two-sided platform in which an intermediary facilitates one-on-one simultaneous transactions with participants on both sides of the platform. “The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other.”⁷ To determine whether a platform is a transactional one, the Court suggests inquiries into whether either side can purchase the service individually.⁸ It also suggests inquiring whether a competitor is offering services to both sides, because “[o]nly other two-sided platforms can compete with a two-sided platform for transactions.”⁹

These conclusions present a challenge for lower courts attempting to determine whether a specific factual scenario fits the *Amex* context. Courts must now determine, as a threshold matter, whether the market at issue is a two-sided “transaction” platform with a single, definable market in which the platform offers services to both sides and both sides “jointly consume a single product.”¹⁰ Unsurprisingly, lower courts have struggled to do this consistently. For courts to analyze two-sided platforms using *Amex*’s reasoning, there must be a single relevant market in which a transaction on one side of the platform is simultaneously offset by a transaction on the other side.¹¹

There are a few platforms that likely constitute transaction platforms within the meaning of *Amex*. An example of this type of transaction platform are ride-sharing apps such as Uber and Lyft, where a consumer purchasing a ride triggers a simultaneous payment to the driver.¹² Other examples of this single market include interbank ATMs, travel booking sites—such as Orbitz, Kayak, and Expedia—and ticket-sale websites such as Ticketmaster and StubHub.¹³ It is important to note that courts must carefully review the facts of each case to determine whether they meet the transaction platform requirements.¹⁴

⁶ See Michele Farquhar, Edith Ramirez, Ryan Thompson & Eugene Kim, 2019 *Winnik International TMT Forum: Fireside Chat with Makan Delrahim*, (Apr. 9, 2019) available at <https://www.lexblog.com/2019/04/09/2019-winnik-international-tmt-forum-fireside-chat-with-makan-delrahim/#more-957835>

(AAG Delrahim stating that he “was optimistic that the impact of the case might be limited because the decision was primarily a factual analysis, but he also said he expects many platforms will seek to be defined as ‘two-sided markets.’”); Mark MacCarthy, *Ohio v. American Express is Sensible Antitrust Policy*, (Aug. 7, 2018) <https://www.cio.com/article/3295539/ohio-v-american-express-is-sensible-antitrust-policy.html>

(quoting FTC Chair Joe Simons statement that “[t]he *Amex* case is extremely narrow. I think generally it’s going to apply to very few situations.”).

⁷ *Am. Express, Co.*, 138 S. Ct. at 2280.

⁸ *Id.*

⁹ *Id.* at 2287.

¹⁰ Benjamin Klein, Andres V. Lerner, Kevin M. Murphy & Lacey L. Plache, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 *Antitrust L.J.* 571, 583 (2006) (cited by *Am. Express Co.*, 138 S. Ct. at 2280, 2286 n.8).

¹¹ Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 *Colum. Bus. Rev.* 35, 81 (2019).

¹² *Id.* at 82.

¹³ *Id.*

¹⁴ *Id.*

It is likely that the *Amex* decision will be of limited utility because the vast majority of two-sided platforms do not constitute transaction platforms that facilitate participants on both sides to engage in simultaneous one-to-one transactions in a market with strong direct network effects. As the Court noted, the classic example of this is a newspaper. Newspapers sell advertisements and subscriptions, but the effects of the market only flow one way, without simultaneous transactions, because newspaper readers are “largely indifferent to the amount of advertising that a newspaper contains.”¹⁵ In a similar fashion, online magazines, search engines, and ad-driven websites arguably fall within this category of platforms that have “weak indirect network effects,” in which readers are largely indifferent to the amount of online advertising.¹⁶ That is to say, “the network effects of increased readers on the value of the product to advertisers are generally much greater than the network effects of increased advertising on the value of the product to readers.”¹⁷

Other platforms do not fit the *Amex* model because they do not act as intermediaries. Video streaming platforms—like Netflix, Hulu, and Amazon—are the licensed owners of ‘streamable’ content, and do not act as an intermediary connecting producers and consumers.¹⁸ Likewise, major retailers, such as Target and Walmart, that conduct online sales do not constitute transaction platforms because these retailers do not act as platform intermediaries.¹⁹

Still, other platforms do not fit the *Amex* model because they are not facilitating a transaction that is jointly consumed by both sides of the platform. Health insurance networks are not simultaneous matches between providers and the insured because of the fee-for-service model.²⁰ Online marketplaces, like Zillow and Match.com, bring both sides of the platform together, but do not conduct transactions.²¹ This list is not exhaustive, but it indicates that the vast majority of two-sided platforms lack the single, simultaneous, transactional aspect of the market to fall within the purview of *Amex*.

Strategic Market Definition Considerations Following *Amex*

The developments in lower courts provide insights for how parties will employ *Amex* in litigation going forward. The approach a plaintiff must take to establish *prima facie* evidence of anticompetitive practices within a two-sided platform changes when it is a transaction platform as defined by *Amex*. In any case in which the facts arguably are similar to those in *Amex*, the parties must undertake a market definition analysis to assess whether the platform is, in fact, a two-sided transaction platform.

¹⁵ *Ohio v. Am. Express Co.*, 138 S. Ct. at 2286.

¹⁶ *Id.*; Hovenkamp, *supra* note 11, at 83; Lapo Filistrucchi, Damien Geradin, Eric Van Damme, & Pauline Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 315 (in media markets, which are two-sided non-transaction markets, two interrelated markets—one for each side—should be defined); David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. B. L. Rev. 667, 675-76 (distinguishing transaction platforms such as credit cards from advertising-supported media platforms such as magazines, newspapers, free television, and web portals such as Google and Yahoo).

¹⁷ Klein, *supra* note 10, at 579 (cited by *Am. Express Co.*, 138 S. Ct. at 2286).

¹⁸ Hovenkamp, *supra* note 11, at 84.

¹⁹ *Id.*

²⁰ *Id.* at 85-87.

²¹ *Id.* at 87-88.

Lower courts have followed the approach in two-sided transaction platform cases since *Amex*. In *US Airways, Inc. v. Sabre Holdings Corp.*, the Second Circuit determined that the plaintiff failed to provide *prima facie* evidence because the relevant market definition did not include both sides of the defendant’s platform, despite evidence of anticompetitive behavior by the defendant.²² The Court noted that “[i]n cases involving two-sided *transaction* platforms, the relevant market must, as a matter of law, include both sides of the platform.”²³

Similarly, in *United States v. Sabre Corp.*, the District Court found that the Department of Justice mistakenly defined the defendant’s two-sided platform as individual sub-markets and ignored the *Amex* requirement that these platforms be analyzed as single markets.²⁴ Although it is not always necessary to consider both sides of a two-sided platform, the Court reasoned, “it is necessary to do so where, as here, both sides of Sabre’s GDS platform ‘facilitate a single, simultaneous transaction between participants.’”²⁵

Finally, in *SC Innovations v. Uber Technologies, Inc.*, the plaintiff survived a motion to dismiss by defining the relevant market as the entire market for ride-sharing services and then alleging that the anticompetitive effects of Uber’s monopoly power harmed both sides of the platform.²⁶ “Sidecar has addressed both sides of the market, as opposed to ‘only one side of the platform in isolation’ and has plausibly suggested a mechanism . . . by which Uber can leverage its dominant market share to raise both passenger fares and commissions withheld from drivers without a rival increasing output to restore competitive equilibrium.”²⁷

Although the Supreme Court in *Amex* was clear that the obligation to identify anticompetitive effects in both sides of a two-sided platform only applied to transaction platforms, one can anticipate that defendants will invite lower courts to apply that standard to other, wildly different contexts. For example, in *F.T.C. v. Surescripts, LLC*, the court addressed “two complementary markets”—one that involves a two-sided platform between prescribers and pharmacies, and another that involves a two-sided platform between payers (pharmacy benefit managers or PBMs) and prescribers.²⁸ Nonetheless, the defendants alleged that the court was required to find “anticompetitive effects in the market as a whole and cannot focus only on the effects on one side.”²⁹ The court concluded that *Amex* was a Section 1 case and did not apply in the same manner to monopoly claims.³⁰ Nonetheless, it also concluded in the alternative, that even if *Amex* did apply,

²² 938 F.3d 48, 63, 69 (2d. Cir. 2019).

²³ *Id.* at 57.

²⁴ 2020 WL 1855433, at *32-33, ___ F.Supp.3d ___ (D. Del., Apr. 7, 2020).

²⁵ *Id.* at *34 (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018)).

²⁶ Case No. 18-cv-07440-JCS, 2020 WL 2097611 *8-10 (N.D. Cal. May 1, 2020).

²⁷ *Id.* at *9.

²⁸ 424 F.Supp.3d 92, 95 (D.D.C. 2020).

²⁹ *Id.* at 102.

³⁰ *Id.* at 103.

the FTC “pleaded sufficient facts addressing the totality of both two-sided markets” in which Surescripts stands to gain above-market returns on both sides of the market.³¹

Likewise, in *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, defendants argued that colleges operate as a multisided platform involving student athletes, non-athlete students, alumni, coaches, faculty, staff, and the community. The court rejected arguments that such a multisided market is anything like a transaction platform in *Amex* because there is “no simultaneous interaction or proportional consumption through a platform by different market participants of what essentially constitutes ‘only one product.’”³²

As these cases illustrate, *Amex* presents parties with a dilemma. As a *prima facie* matter, it only requires courts to examine the anticompetitive effects on both sides of a two-sided transaction platform, but it invites arguments for a broader requirement applicable to other two-sided platforms or to other multisided markets. One can expect defendants to ignore the requirement to show a one-to-one simultaneous consumption of a single product only in a market with strong direct network effects, and argue that with all two-sided platforms, plaintiffs have a *prima facie* obligation to show harm to the whole market. As one scholar noted, “we can expect an outpouring of defendants emphatically claiming to be two-sided It will thus become necessary to filter out the pretext.”³³

Plaintiffs will attempt to distinguish and limit *Amex* to its facts and apply a traditional one-sided analysis to non-*Amex* markets. But they may feel compelled to respond to a defendant’s broad interpretation of *Amex* and, in an abundance of caution, argue harm to both sides of a market.³⁴ By assuming that a court will not find that a two-sided transaction platform exists—as the Department of Justice did in *Sabre*—the plaintiff is taking a gamble that could jeopardize their entire case.

We can anticipate that most courts will properly limit *Amex* to transaction platform markets. But one can also expect that some courts will make erroneous findings as to the scope of *Amex*, or, to preserve their decision on appeal, make alternative findings as to the existence of harm to both sides of the market, even in cases that do not involve transaction platforms.

³¹ *Id.*

³² 2018 WL 4241981 *4 (N.D. Cal. 2018).

³³ Erik Hovenkamp, *Platform Antitrust*, 44 J. Corp. L. 713, 752 (2019).

³⁴ Sarah Oxenham Allen, et. al, *Market Definition in the Digital Economy: Considerations for How to Properly Identify Relevant Markets*.