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REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

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International | Concurrences N° 3-2020

www.concurrences.com

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ABSTRACT

When a U.S. district court recently applied the U.S. Supreme Court's *Ohio v. American Express* (“*Amex*”) opinion to an antitrust merger challenge in the airfare distribution industry, the analysis led to the absurd conclusion that market definition requires courts to ignore existing competition. The opinion fails on its own terms, because *Amex* does not require this result. But the court's error illustrates *Amex*'s fundamental flaws. *Amex* steers antitrust law toward an analytical dead end by converting market definition from a neutral tool for illuminating competitive effects into a tool for hiding them. It is already clear, after only two years, that *Amex* should be narrowly cabined by the federal courts or else legislatively overturned by Congress.

Lorsqu'un tribunal de district américain a récemment appliqué l'avis de la Cour suprême des États-Unis dans l'affaire *Ohio v. American Express* (“*Amex*”) à une contestation d'une concentration dans le secteur de la distribution des tarifs aériens, l'analyse a conduit à la conclusion absurde que la définition du marché exige que les tribunaux ignorent la concurrence existante. L'avis échoue dans ses propres termes, car *Amex* n'exige pas ce résultat. Mais l'erreur du tribunal illustre les défauts fondamentaux d'*Amex*. *Amex* oriente le droit antitrust vers une impasse analytique en transformant la définition du marché d'un outil neutre pour éclairer les effets de la concurrence en un outil pour les dissimuler. Il est déjà clair, après seulement deux ans, qu'*Amex* devrait être étroitement encadrée par les tribunaux fédéraux ou bien être annulée par le Congrès sur le plan législatif.

1. Judge Leonard Stark's April 8 district court opinion rejecting a Department of Justice (DOJ) bid to block the merger of Sabre and Farelogix shows why it is time to set aside the Supreme Court's decision in *Ohio v. American Express* (“*Amex*”).¹ This commentary highlights glaring flaws in Judge Stark's opinion, which the DOJ will be appealing in the Third Circuit. But it argues that, while *Sabre-Farelogix* was wrongly decided, the decision is a symptom. *Amex*'s *sui generis* antitrust rules for an amorphous category of two-sided markets are the root pathology.

2. *Amex* steers antitrust law toward an analytical dead end. Contrary to the rule that antitrust law protects competition, not competitors, *Amex* protects competitors that have platform business models at the expense of competition on either side of the platform. In the course of doing so, *Amex* converts the economic process of defining antitrust markets from a tool for illuminating competitive effects into a tool for hiding them. And worse, nobody knows how or when to apply *Amex*'s unprincipled and incoherent approach. It is already clear, after only two years, that the opinion must be narrowly cabined or else legislatively overturned by Congress.

I. The *Sabre* court made a mockery of the market definition exercise

3. Sabre is a global distribution system (GDS) that, among other things, helps get flight availability and fare information into the hands of the flying public. It sits in the middle of the supply chain, providing both upstream airfare distribution services to airlines and downstream flight information services to travel agents. Farelogix is an IT company that provides only upstream airfare distribution services; it does not participate in the downstream market. This unmistakable fact—that Farelogix sells an upstream input into a vertical distribution chain

¹ *United States v. Sabre Corp.*, No. 1:19-cv-01548-LPS (D.D.C. 2020) [hereinafter “Slip op.”]; *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2282 (2018).

without participating in the downstream market—should have been the district court’s first clue that the *Amex* framework does not fit this case.²

4. In his opinion for the district court, Judge Stark made factual findings that Farelogix helps airlines lower distribution costs by bypassing Sabre and other GDSs—in other words, that Farelogix competes with them. The opinion even unequivocally states that “*Sabre and Farelogix view each other as competitors*” and that “*the record reflects competition between Sabre’s and Farelogix’s direct connect solutions for airlines.*”³ But Judge Stark relied on *Amex* to hold that the government nonetheless failed to prove the most basic element of a Section 7 case. He held that, because “*the Sabre GDS is a two-sided platform, Sabre and Farelogix do not compete in a relevant market.*”⁴

5. Judge Stark’s interpretation of *Amex* is clearly incorrect and seems destined to be overturned on appeal. It begs the question: If not in any relevant market, where exactly do these companies compete?⁵ The court purported to hold that a distinct relevant market for the airline-services side of the two-sided GDS market does not exist, but that Sabre and Farelogix nonetheless compete there. This is not just internally inconsistent; it is incoherent. The idea that actual competition can occur between two firms but not take place in any relevant market does not exist in antitrust law or economics.

6. The court did not consider that airline distribution services may be part of more than one relevant market, which is the norm in antitrust cases. The hypothetical monopolist test—the principal economic tool used to define markets by the courts and under the Horizontal Merger Guidelines—“*does not lead to a single relevant market.*”⁶ Indeed, “[a]lmost invariably, a competitive effects allegation can be analyzed in multiple markets, including overlapping or nested markets, each satisfying the hypothetical-monopolist test.”⁷

7. Accordingly, the Merger Guidelines have had to explain that, “*when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.*”⁸ But the Guidelines also make clear that “[t]he Agencies may evaluate a merger in any relevant market,” because they are “*guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects.*”⁹ In short, nothing in antitrust law or economics prevents courts from recognizing a relevant market on one side of a platform when competition independently occurs on that side.

8. The district court should have recognized that *Sabre* is distinguishable from *Amex*. Unlike the GDS transaction market Judge Stark identified in *Sabre*, *Amex* involved a payment card transaction market in which market participants “*cannot sell transaction services to either cardholders or merchants individually.*”¹⁰ In other words, the Court held that “*cardholders and merchants jointly consume a single product.*”¹¹ And thus, in *Amex*, the Court did not identify any competitors in the payment card transaction market who sell transaction services exclusively on the merchant side (or exclusively on the cardholder side).

9. We do not have to speculate as to whether such competitors can exist in the GDS transaction market. We can observe that Farelogix exists and “*has no travel agency customers.*”¹² The fact that the market can accommodate this business model confirms that Farelogix does not sell a jointly consumed single product like the payment card transactions at issue in *Amex*. To whatever extent there is a two-sided market for GDS transactions, Farelogix’s existence means there must also necessarily be a one-sided relevant market that includes airfare distribution services, where Farelogix competes. For the court to hold otherwise would require a finding that Farelogix occupies a metaphysical state of competitive limbo, where it competes in no market. That would be absurd.

10. Perhaps Judge Stark purported to interpret *Amex* to suggest that, while Farelogix’s one-sided market surely must exist, *Sabre* does not (cannot?) compete in that market because it competes in a two-sided market. But even if that interpretation of *Amex*, which would be divorced from the economic reality that the two companies in fact compete, were accepted, it would still say nothing about whether the merger can have anticompetitive effects in Farelogix’s market. Obviously,

2 D. S. Evans & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Harvard Business Review Press, 2016) 106–108 (“*vertically integrated platform[s]*” among examples of firms that “*often don’t have a stark choice [of] being only a single-sided firm or only a multisided platform*” but rather have to “*blend[] significant single-sided and multisided businesses*”).

3 Slip op. at 31.

4 Slip op. at 69.

5 See J. B. Baker, What’s Wrong with the Way the US v. Sabre Opinion Interprets Amex? A Thread, Thread Reader (April 13, 2020), <https://threadreaderapp.com/thread/1249725862888570880.html> (district judge’s misreading of *Amex* “*required him to ignore competition he knows exists*”); see also J. Wright, University Professor of Law, Antonin Scalia Law School, George Mason University (@ProfWrightGMU), Twitter (April 14, 2020, 4:16 PM) <https://twitter.com/ProfWrightGMU/status/1250155979615997953> (“*This is a thoughtful (and I think largely correct) thread (... AMEX did not require this result)*”).

6 U.S. Dep’t of Just. & Fed. Trade Comm’n, Horizontal Merger Guidelines § 4.1.1, at 9 (2010) [hereinafter “Horizontal Merger Guidelines”].

7 J. B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press, 2019), 184; see also J. B. Baker, Market Definition: An Analytical Overview, 79 *Antitrust L.J.* 129, 148 (2007).

8 Horizontal Merger Guidelines, *supra* note 6, § 4.1.1, at 10.

9 *Ibid.*

10 *Amex*, 138 S. Ct. at 2286.

11 *Ibid.* (citing B. Klein et al., Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees, 73 *Antitrust L.J.* 571 (2006)).

12 Slip op. at 20.

the mere fact that merging parties do not compete in the same market does not prevent a merger from violating Section 7. Were it otherwise, no vertical merger could ever be illegal.

11. For one reason or another, Judge Stark clearly failed to consider whether the merger of Sabre and Farelogix threatens to harm competition in the one-sided market (airfare distribution services) where Farelogix competes. And the government alleged a threat to competition in that relevant market, mindful that Section 7 of the Clayton Act prohibits mergers that may substantially lessen competition “in any line of commerce.”¹³ At a minimum, the threatened harm to competition in the relevant market where Farelogix competes should have precluded *Amex* from deciding this case.

II. *Amex* must be marginalized or reversed because it obscures existing competition

12. Even if the Third Circuit delivers a searing rebuke to the *Amex* portion of Judge Stark’s opinion, as it should, *Sabre* still demonstrates why *Amex* was flawed at inception and remains incoherent and unworkable in application. If the federal courts, starting with this case, do not sharply limit *Amex*, it is now sufficiently clear that Congress should step in and overturn the decision legislatively.

13. *Amex*’s fundamental failing is that it tries to account for the interdependent pricing phenomenon sometimes found in “two-sided” markets at the market-definition stage of an antitrust analysis. This approach has never made sense, because antitrust markets are defined using goods and services “reasonably interchangeable by consumers for the same purposes.”¹⁴ Products and services on opposite sides of a two-sided market are not demand substitutes.

14. As Professor Hovenkamp and 27 leading colleagues explained to the Supreme Court in *Amex*, “[f]ar from being substitutes, these services act more as complements.”¹⁵ To wit, an airline dissatisfied with its current supplier

13 15 U.S.C. § 18.

14 *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); Horizontal Merger Guidelines, *supra* note 6, § 4, at 7 (“Market definition focuses solely on demand substitution factors, i.e., on customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service”); see also Baker, *Antitrust Paradigm*, *supra* note 7, at 183.

15 Brief of 28 Professors of Antitrust Law 17, *Ohio v. American Express Co.*, 138 S. Ct. 2274 (Dec. 14, 2017) [hereinafter “*Amex* Professors Br.”].

of airfare distribution services obviously would never switch to a supplier of travel agent services; it needs both. Travel agent services are used in conjunction with airfare distribution services to deliver airfare information to the public. When two products or services are not demand substitutes, “there is in fact no logical way to include [them] in one antitrust market.”¹⁶

15. Although the *Amex* opinion has enjoyed some support from commentators who generally favor a laissez-faire approach to antitrust enforcement, they do not attempt to refute this point. They tend to argue instead that the long-standing, economically rigorous approach to defining markets based on demand substitution should be altogether scrapped, and a new process should be created that incorporates additional factors.¹⁷ But the rationale for this argument is that it would lead to fewer antitrust cases and faster dismissals (of even meritorious cases), not that it would lead to qualitatively better analysis of whether challenged mergers and conduct ultimately harm competition.¹⁸ On the contrary, it would undoubtedly lead to an inferior analysis of that question.¹⁹

16. Moreover, the *Amex* opinion does not come close to scrapping the traditional approach to market definition. It simply declares that the government “wrongly focus[ed] on only one side of the two-sided credit-card market,” and that the market implicated in that case was a single relevant market for jointly sold, simultaneous credit card transactions.²⁰ The Court retained fundamental market definition principles for the rest of the economy and proceeded to create an analytical exception for some markets, without explaining which ones or how to coherently define them.

17. That leads to the other principal failing of *Amex*, which is that it leaves no clue how the opinion can be rigorously applied beyond the payment card market. Nobody really knows what kinds of two-sided, simultaneous platform transactions can or should qualify for “single relevant market” treatment. As the inventors of the two-sided market concept, economists Jean Tirole and Jean-Charles Rochet, have explained, “the recent literature has been mostly industry specific and has had much of a ‘You know a two-sided market when you see it’ flavor.”²¹

16 *Ibid.* at 18; see also M. Katz & J. Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 *Yale L.J.* 2142, 2154 (2018).

17 See, e.g., G. A. Manne, In defence of the Supreme Court’s ‘single market’ definition in *Ohio v. American Express*, 7 *J. Antitrust Enf.* 104, 106–107 (2019).

18 *Ibid.* at 110.

19 Baker, *Antitrust Paradigm*, *supra* note 7, at 185–189 (explaining that adding factors beyond demand substitution to market definition requires difficult accounting for distinct economic forces simultaneously; misleads courts at the subsequent competitive effects stage of analysis; can lead to incorrect market share measures; and starts a slippery slope toward subsuming competitive effects analysis within market definition and rendering the latter either useless or results-driven).

20 *Amex*, 138 S. Ct. at 2287.

21 J.-C. Rochet & J. Tirole, *Two-Sided Markets: A Progress Report 2* (2005), http://publications.ut-capitole.fr/1207/1/2sided_markets.pdf; see also B. E. Hermalin & M. L. Katz, *What’s So Special About Two-Sided Markets?*, in *Toward a Just Society: Joseph Stiglitz and Twenty-First Century Economics*, M. Guzman ed. (Columbia University Press, 2018) (“An unusual feature of two-sided markets is that there is no consensus regarding what they are. There have been many attempts to offer precise definitions of two-sided markets, but none is fully accepted”).

18. Even if leading economists could agree on whether any given platform transaction market is objectively two-sided in the relevant sense, the Court in *Amex* made clear that most such markets still should not qualify for single-market treatment. Only two-sided, simultaneous, jointly consumed platform transaction markets that have sufficiently “pronounced indirect network effects and interconnected pricing and demand” qualify.²² What are those?

19. As Katz and Sallet explain, the single-market approach is usually problematic “because competitive conditions may differ on the two sides of a platform.”²³ Unless network effects are strong enough to prevent firms other than rival transaction platforms from competing exclusively on one side of the market or exclusively on the other, the platform will often face different unilateral incentives to compete and different incentives to engage in coordinated behavior with the different rivals it faces on each side.²⁴

20. Moreover, a single-market approach “neglects the fact that two very different groups utilize the transaction service, and their interests are not fully aligned.”²⁵ Indeed, user interests on each side may often be in conflict, which was true in *Amex* insofar as merchants prefer to pay a lower credit card fee while consumers prefer to receive higher card rewards.²⁶ When such a conflict exists, the net two-sided price is unhelpful to an antitrust analysis, because it does not provide a market signal that expresses the interests of any one side.²⁷

21. Anti-enforcement commentators also support *Amex* on grounds that, without it, an antitrust analysis in one relevant market would not be able to account for “out-of-market” benefits on the other side of a two-sided platform.²⁸ It is certainly true that the Supreme Court has long held that a restraint that causes anticompetitive harm in one market may not be justified by claimed competitive benefits in a different market, whether under Section 7 of the Clayton Act or Section 1 of the Sherman Act.²⁹ But the long-standing prohibition on “multi-market balancing” has been embraced by everyone from

Robert Bork to Robert Pitofsky, for good reason.³⁰ It is a feature of antitrust law, not a bug.

22. As Bork explained, the prohibition on multi-market balancing is required for “juridical rather than economic” reasons.³¹ A judge tasked with determining “how much each of two groups ‘deserves’ at the expense of the other (...) can relate the decision to nothing more objective than his own sympathies or political views.”³² These decisions are left to Congress because “we think of such value trade-offs as the very essence of politics.”³³ Accordingly, as Professor Hovenkamp and his colleagues put it, courts “should not even indulge arguendo a defendant’s excuse that it is robbing Peter to pay Paul; basic antitrust policy requires that ‘competition should choose the optimal mix of revenue between the two sides.’”³⁴

23. Antitrust law has other methods for dealing with intertwined effects. In the merger context, the agencies can exercise discretion to forego a challenge under the Horizontal Merger Guidelines when merger harms and efficiencies are “so inextricably linked” that the former cannot be cured without sacrificing the latter, and the former are “small” while the latter are “great.”³⁵ In conduct cases, intertwined effects are addressed using the ancillary restraints doctrine. Two or more restraints of trade may be “assessed together” when their procompetitive effects and anticompetitive effects are “so intertwined that they cannot meaningfully be isolated and attributed to any individual agreement,” and the anticompetitive effects of one are “reasonably necessary” to achieve the procompetitive benefits of the other.³⁶

24. But if a trade restraint or merger actually harms competition in a relevant market on one side of a platform and the effects on that side are not inextricably intertwined with beneficial effects on the other side, or if a defendant’s only claimed justification is the “robbing Peter to pay Paul” defense—that the harmful restraint or merger will create an anticompetitive “tax” on one side of the market to “subsidize” competitive benefits for the other side of the market—then it should be condemned.³⁷

25. To the extent modern antitrust law creates a risk of false positives in rule of reason cases involving two-sided markets, the perception of that risk is overblown at

22 *Amex*, 138 S. Ct. at 2286.

23 Katz & Sallet, *supra* note 16, at 2155.

24 *Ibid.* at 2155, 2158.

25 *Ibid.* at 2158 (noting that users may differ in sophistication and market knowledge on different sides and may perceive different degrees of product differentiation among platforms, and that platforms themselves may vertically integrate to different degrees on different sides).

26 *Ibid.*

27 *See ibid.*

28 *See, e.g., Manne, supra* note 17, at 115.

29 *See, e.g., United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963) (“a merger the effect of which ‘may be substantially to lessen competition’ is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress”); *United States v. Topco Assocs.*, 405 U.S. 596, 611 (1972) (“If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion [in a Section 1 case], this (...) is a decision that must be made by Congress and not by private forces or by the courts”).

30 *See* R. H. Bork, *The Antitrust Paradox: A Policy at War With Itself* (Basic Books, 1978), 27, 80; R. Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 *Geo. L.J.* 195, 245–246 (1992).

31 Bork, *supra* note 30, at 27.

32 *Ibid.* at 80.

33 *Ibid.*

34 *Amex* Professors Br., *supra* note 15, at 23.

35 Horizontal Merger Guidelines, *supra* note 6, § 10, at 30 n. 14.

36 Fed. Trade Comm’n & U.S. Dep’t of Just., *Antitrust Guidelines for Collaborations Among Competitors* § 2.3, at 6–7 (2000).

37 *See* R. M. Stutz, *Mr. Magoo at the Drive-Through: The Right Antitrust Lens for Franchise No-Poaching Agreements*, *Concurrences* (forthcoming 2020); J. M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 *Wash. U.L. Rev.* 49, 81 (2016) (“Robin Hood has no place in antitrust doctrine”).

best.³⁸ And even if it were not, it is up to Congress and not the courts to pick winners and losers in this fashion.³⁹ The antitrust laws can only protect competition; they cannot be tasked with maximizing business efficiency across all of the nation's relevant markets, let alone in each individual case.⁴⁰

26. If supporters of platform business models believe society is better served by allowing them to harm competition in a relevant market because doing so serves a greater good, they should make that case to Congress. Congress has the power to elevate other values above competition and sometimes chooses to do so.⁴¹ But courts are not permitted to “*set sail on a sea of doubt*” by striking utilitarian bargains over who is entitled to the benefits of competition and who is not.⁴² And they certainly should not be doing so by distorting an otherwise neutral economic tool like market definition.

III. Conclusion

27. Two-sided platforms can succeed in the marketplace and have procompetitive effects when they increase output, lower prices, or improve quality, choice or service for the benefit of users on both sides of the platform. But when two-sided platforms face competition from non-platform rivals on one side, the antitrust laws prohibit mergers or conduct that harm such competition. The laws do not favor certain business models over others or favor competition in some markets at the expense of competition in other markets. They simply protect competition where competition is found and leave the utilitarian political bargains to Congress.

28. *Amex* contravenes this core principle and undermines the integrity of antitrust law as a neutral law enforcement tool of general applicability to the U.S. economy. Fundamentally, *Amex* ignores that the purpose of the market definition exercise in antitrust law is to identify the “*competitive arena within which significant anticompetitive effects are possible*.”⁴³ It is not “*an end in itself*.”⁴⁴ *Amex* turns the market definition exercise upside down and converts it into a tool for ignoring competition.

29. Although wrongly decided, the *Sabre* case illustrates how *Amex* is divorced from economic realities and too incoherent to apply beyond the payment card market. The case also underscores that, especially in the hands of the wrong court, *Amex* can obscure existing competition and lead to absurd results. The Third Circuit should and likely will reverse the *Amex* portion of Judge Stark's opinion, and it should use the opportunity to cabin *Amex* going forward.

30. However, if the federal courts collectively do not sharply limit *Amex* to its facts, or to cases where network effects are so strong that competition is prevented from occurring on any one side of a two-sided or multi-sided transaction platform, Congress should intervene to prevent *Amex* from metastasizing. A unified approach to market definition must be restored before any more damage is done to antitrust law and competition. ■

38 Stutz, *supra* note 37; see also Baker, *Antitrust Paradigm*, *supra* note 7, at 189 (noting that prohibition on cross-market balancing does not prevent a platform defendant from relying on feedback effects to attack a plaintiff's case by showing it lacks incentive to harm competition on the side where injury is alleged).

39 See Stutz, *supra* note 37.

40 *Ibid.*; see Baker, *Antitrust Paradigm*, *supra* note 7, at 191 (“[O]nce the analysis extends beyond the market in which harm is alleged, there may be no principled stopping point short of undertaking what is unrealistic if not impossible: a general equilibrium analysis of harms and benefits throughout the entire economy”).

41 See, e.g., P. E. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 257a, at 25 (“In passing § 6 of the Clayton Act, Congress was clearly taking sides with labor and against management by permitting laborers to cartelize their side of the labor market but not permitting management to cartelize its side”); *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 34–35 (1979) (“[A] conclusion that excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not constitute a defense to a violation of the Sherman Act”).

42 *United States v. Addyston Pipe & Steel Co.*, 85 F.271 (6th Cir. 1898); see *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 463 (1986) (impermissible for courts to tolerate harm to competition on ground that it serves a “greater good”).

43 Federal Trade Comm'n & U.S. Dep't of Justice, *Commentary on the Horizontal Merger Guidelines* 6–7 (2006).

44 Horizontal Merger Guidelines, *supra* note 6, § 4, at 7.

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