

Two Sides to the Story: An Economic Critique of Ohio *vs.* Amex

Ramji Tamarappoo¹ and Harishankar Jagadeesh²

Abstract

The attractiveness of a platform to one side depends on the number of users on the other side. Platforms use pricing strategies – i.e., they offer lower/zero prices to one side and charge users on the other side – to attract users on one side. Successful platforms tend to grow because of network effects. While traditional antitrust would have viewed conduct by “dominant” entities stringently, recent antitrust enforcement has considered the economics behind such platforms and netted the harm to one side against the benefits to the other side when evaluating conduct. We explore whether this stylised view of the economics of platform markets has come at the expense of effects-based analysis of alleged anti-competitive conduct. Specifically, we analyse the Amex *vs.* Ohio case which dealt with whether anti-steering provisions instituted by credit card companies are anti-competitive. The US Supreme Court evaluated the anti-steering provisions in the context of a two-sided platform and ruled that Amex charged merchants higher fees to provide a more robust rewards program to its cardholders and “evidence of price increases on one side of a two-sided platform cannot be construed as an anticompetitive exercise of market power.” Effects-based analysis of Amex’s conduct would reveal that its outcome is the stifling of competition in terms of fees charged between credit card networks for usage by merchants. We contend that the US Supreme Court’s decision was akin to a template-based application of economic theory.

¹Senior Economist, Econ One Research (USA); rtamarappoo@econone.com

²Economist, Econ One Research (India); hjagadeesh@econone.com

Keywords: Amex Ohio, two-sided platforms, platform markets, credit cards, U. S. Supreme Court, effects-based analysis

1. Introduction

The economic theory relating to platform markets or multi-sided markets has garnered a lot of attention recently due to the proliferation and exponential growth of digital platforms¹ such as Google, Amazon, Facebook, Uber, AirBnB, and Netflix, covering a wide range of industries, including online search, e-commerce, social media, mobility, hospitality, and entertainment. Antitrust analysis of digital platforms started with investigations into Google's conduct in multiple jurisdictions since 2010. The scrutiny of large digital platforms has recently heightened with the US Department of Justice's (along with 11 US states) investigation of Google (US DoJ, 2020) and the US Federal Trade Commission's (along with 46 US states) lawsuit against Facebook (US FTC, 2020).

The rise of antitrust concerns relating to platforms has led to calls for regulatory interventions (Colangelo, n.d.). The economics of platform markets dictate that successful platforms tend to become large because of network effects. While traditional antitrust would have viewed conduct by "dominant" entities stringently, recent antitrust enforcement has been more lenient, considering the economics behind such platforms.

In this paper, we explore whether this stylised view of the economics of platform markets has come at the expense of effects-based analysis of alleged anti-competitive conduct. Specifically, we analyse the most prominent decision relating to multi-sided markets in recent times, the Amex vs. Ohio (US Supreme Court, 2018) case, which dealt with whether anti-steering provisions instituted by credit card companies – which prevented merchants from motivating customers to switch to lower fee cards – are anti-competitive. The US Supreme Court evaluated the anti-steering provisions in the context of a two-sided platform and ruled that American Express (Amex) charged merchants higher fees to provide a more robust rewards program to its cardholders and evidence of price increases on one side of a two-sided platform cannot be construed as an anticompetitive exercise of market power.

Section 2 provides a brief background of the credit card industry and the Amex Ohio case, Section 3 contains a critique of key economic aspects of the US Supreme Court decision, Section 4 outlines our understanding of Amex’s abuse of market power, and Section 5 provides the conclusion.

2. Background

What are Platforms?

According to Evans (2019), “Multi-sided platforms coordinate the demands of distinct groups of customers who need each other in some way.” Platform markets can be divided into transaction markets and non-transaction markets. A transaction platform is one where an intermediary enables transactions between two or more distinct customer groups. For instance, e-commerce platforms such as Amazon connect buyers and sellers of various goods, with buyers on one side of the platform and sellers on the other. The attractiveness of the platform to one side depends on the number of users on the other. Therefore, platforms use pricing strategies to attract users on one side, such as offering lower/zero prices to one side, and then charge users on the other side.

In multi-sided markets, pricing and market outcomes also depend on whether customers choose a single platform (single homing) or use more than one platform simultaneously (multi-homing). For instance, credit cards are an instance of a multi-homing market – customers often have multiple credit cards, and merchants invariably accept multiple cards; contrarily, gaming consoles are a single homing market, where consumers own only one console and game developers may develop a game for multiple consoles.

The US Credit Card Industry

Since the advent of the modern payment card industry in the 1950s, credit cards² have become a principal means by which consumers in the United States purchase goods and services. In 2013, the four dominant networks – Visa, American Express, Mastercard, and Discover – facilitated roughly \$2.399 trillion in spending.

A typical credit card transaction involves five parties:

1. The cardholder: The person who intends to pay for a good or service using a credit card.
2. The card issuer: The bank or institution that has issued the credit card and maintains the cardholder's account. It gives credit to the cardholder to enable the purchase.
3. The merchant: The business or person that is accepting payment using the credit card
4. The acquirer: The acquirer maintains the merchant's account³, provides the point-of-sale technology, and receives the transaction data for processing and verification.
5. The payment network: Acquirers would find it hard to create separate arrangements with the hundreds of institutions that issue credit cards. Instead, they go through a payment network that operates the infrastructure necessary to facilitate interactions between the two sides and processes the transaction.

A merchant pays a transaction fee – usually charged as a percentage of the transaction value, known as “merchant discount rate” – for enabling the credit card transaction, which typically involves three components: an acquirer fee, a network fee, and an interchange fee. The acquirer fee is retained by the acquiring bank for services rendered to the merchant, the network fee is paid to the payment network as the price for facilitating the transaction, and the interchange fee is paid to the card issuer.

It is in this aspect of roles played in a transaction that there is a fundamental difference between the four main credit networks in the US. While Visa and Mastercard are purely payment networks, Amex and Discover are also card issuers⁴ – Amex was the largest credit card issuer in the US and Discover was the sixth largest credit card issuer in the US by transaction volume in 2019 (Julija, 2021). Further, while Visa, Mastercard, and Discover do not deal directly with merchants – they require banks or other institutions to act as the acquirer and set up relationships with merchants – Amex also acts as an acquirer and establishes direct relationships.

Therefore, when a credit card transaction occurs, Amex and Discover can capture value from the entire cycle – Discover collects a large portion of the merchant fees as it is both the issuer and the payment network, while Amex collects the whole of the merchant fee as it is simultaneously the card issuer, the payment network, and the acquirer; they also collect the interest payments on credit card dues. This enhanced value capture can be clearly demonstrated by the fact that, in 2013, Visa, which processed 60 billion transactions worldwide, had a revenue of \$14 billion, while Amex, which processed 6 billion transactions worldwide, had a revenue of \$33 billion (Trefis Research, 2014).

Amex's business model is different from other card issuers – the primary driver of Amex's revenue is the merchant fee, while other card issuers depend on the interest charged on credit card dues to generate the bulk of their revenue (US District Court E.D.N.Y, 2015). American Express incentivises its cardholders to maximise spending by offering premium rewards programs, superior customer service, and other ancillary benefits and charges higher merchant fees for giving access to customers who are ready to spend more (US District Court E.D.N.Y, 2015).

While the BankAmericard (which became Visa in 1976) and American Express Charge Card⁵ were both launched in 1958, the Interbank Card Association (which became Mastercard in 1979) was launched in 1966. Discover was the last to enter the market for payment networks in the US, in 1985 (Discover, n.d.). Discover entered the payments network market through a combination of breakthrough value propositions and circumstances. Discover was initially owned and operated by Sears – one of the largest retailers in the US – and Sears marketed the credit card to its existing customer base (Discover, n.d.). It was also the first credit card to offer a rewards feature without an annual fee (US District Court E.D.N.Y, 2015). Discover also pursued a low-price strategy by setting merchant fees significantly below those of its competitors (US District Court E.D.N.Y, 2015).

Discover was well positioned to disrupt the market for three reasons – (i) The infrastructure for setting up payments networks involve significant costs and increasing the volume of transactions would enable Discover

to lower the overheads per transaction; (ii) While established networks like Amex would hesitate to lower merchant fees as the loss of revenue from existing transactions would be quite large, being the player with the smallest market share, Discover could easily offset lower merchant fees on existing transactions with revenues gained from new transactions; (iii) Unlike Visa and Mastercard, which were only payment networks, Discover was also a card issuer and could afford to offer lower merchant fees in return for increased interest revenues on the part of the increased transaction volume that would become credit card dues.

In the late 1990s, amidst a series of price increases by its competitors, Discover saw an opportunity to leverage its position as the lowest-priced network and launched a major campaign highlighting the pricing disparity between it and its competitors to persuade merchants to shift their business to Discover. Discover suggested that merchants steer customers to Discover cards through methods such as point-of-sale signage and use the savings to lower their prices and generate customer loyalty. The additional volumes generated by these efforts would in turn compensate Discover for the lower discount fees offered to merchants. Discover's efforts, however, failed to produce any significant increase in shares due to the anti-steering rules maintained at the time by Visa, Mastercard, and American Express (US District Court E.D.N.Y, 2015), which denied merchants the ability to express a preference for Discover cards or employ any other tool by which they might steer customers. Recognising that lower discount fees to merchants would not lead to increased transaction volumes on its network, Discover abandoned its low-price business model in 2000 and began raising merchant fees to bring them closer to that of its competitors.

In 2010, the United States Department of Justice (DoJ) filed an antitrust suit (joined by several states) against Visa, Mastercard, and American Express in the United States District Court for the Eastern District of New York (District Court), alleging that the anti-steering provisions in their contracts violated antitrust law. Visa and Mastercard immediately settled with the DoJ without any fines, agreeing to remove the anti-steering

provisions in its contracts with merchants. However, American Express defended its practice and litigated.

In 2015, the District Court ruled in favour of the DoJ and found Amex's anti-steering provisions to be a violation of Section 1 of the Sherman Antitrust Act. American Express appealed the decision in the Second Circuit Appeals Court (Second Circuit), which reversed the lower court ruling in 2016. The Second Circuit held that, due to the special nature of two-sided platforms, the plaintiffs would have to show overall harm.

Eleven states appealed to the Supreme Court of the United States (Supreme Court) in 2017. In 2018, the Supreme Court affirmed the Second Circuit decision that the anti-steering provisions of Amex had not violated antitrust law. The Supreme Court evaluated the anti-steering provisions in the context of a two-sided platform and ruled that Amex charged merchants higher fees to provide a more robust rewards program to its cardholders.

The dissent opinion in the Amex Ohio decision disagreed with the majority opinion on three main grounds. The dissent opinion held that the plaintiffs had satisfied stage one of the rule of reason framework by demonstrating anti-competitive harm resulting from Amex's anti-steering provisions; Discover was unable to compete by offering lower merchant fees and Amex's market share had not declined in spite of repeated price increases. Further, as the increase in cardholder rewards did not equal the increase in merchant fees, the plaintiffs had shown harm even if one were to go by the majority's standard of harm to the market as a whole. Second, the dissent opinion vehemently disagreed with the majority's relevant market definition and held that reliance on the principle of demand substitutability would result in the definition of two complementary but separate markets. Finally, the dissent criticised the majority decision for altering the rule of reason framework to accommodate two-sided platforms by asking the plaintiffs to prove that the pro-competitive justifications on the other side of the platform did not outweigh the anti-competitive effects of anti-steering provisions on one side of the platform – this effectively compresses all three steps of the rule of reason framework into the *prima facie* case to be made by the plaintiff.

The decision has been the subject of considerable economic and legal literature. Evans and Schmalensee's (2019) analysis of the Amex Ohio decision focuses primarily on market definition, its only nod towards effects-based analysis of Amex's conduct is to argue that the restrictions on merchants are balanced out by the benefits to Amex cardholders without undertaking any detailed analysis. Manne's (2019) analysis of the Amex Ohio decision also focuses on the question of market definition and argues that for there to be a finding of harm to competition, the effects of a conduct on all sides of the platform need to be assessed. Kathuria's (2019) analysis of the Amex Ohio decision focuses almost exclusively on critiquing the distinction between transactional platforms and non-transactional platforms that was relied upon by the Supreme Court in defining the relevant market. While Wu's (2019) critique of the Amex decision argues that the Supreme court has disregarded evidence of harm by giving primacy to form-based analysis based on abstract economic theory, it does not go further to examine the theory of harm. Kirkwood's (2019) analysis of the Amex decision contends that it is flawed from an antitrust perspective as it allows conduct (anti-steering provisions) that enables a firm to exploit customers on one side of the platform (merchants) to benefit customers on the other side (cardholders); such conduct should only be permissible in the presence of a market failure, barring which the process of competition is capable of determining the optimal allocation of benefits across the platform. Kirkwood argues that the plaintiffs had clearly established competitive harm by proving that the anti-steering provisions led to merchant fees remaining at levels that were higher than those that would have prevailed in the face of fair market competition and the court was wrong to disregard evidence of harm as proof of Amex's market power and demand that the plaintiff's prove market power based on market definition (Kirkwood 2019).

Most of the literature supporting the decision has focused on market definition, and there has been a lack of literature that engages in a detailed economics analysis of the harm to competition caused by Amex's conduct. In the following sections, we undertake a critique of the Supreme Court's decision and an economic analysis of the harm caused by Amex's conduct.

3. Critique of Supreme Court Decision in Amex Ohio

The Supreme Court held that “due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand” (US Supreme Court, 2018, p.12). The Court therefore included both merchants and cardholders in the relevant market for credit cards.

The court has acknowledged that the merchant and cardholder sides of the platform are, in fact, complementary, i.e., both sides are required for a credit card transaction to take place. It has been argued in an amicus brief submitted to the Supreme Court that while the failure to consider feedback effects could lead to defining the relevant market narrowly, it is not a ground for including two complementary sides of a platform in the same relevant market (American Antitrust Institute, 2017). Services provided by credit card platforms to merchants and services provided to cardholders are not substitutes, as even Amex acknowledges. Combining two complementary sides of credit card platforms violates basic principles of market definition, which focuses solely on demand substitution factors (American Antitrust Institute, 2017).

- Combining two complementary sides of a platform market into the same relevant market violates basic principles of market definition.

This is supported by past jurisprudence, where the US Supreme Court has often found arrangements involving functionally linked products, at least one of which is useless without the other, to constitute two separate product markets. For instance, in *Jefferson Parish Hosp. District No. 2 v. Hyde* (US Supreme Court, 1984), it held that that anaesthesiology and surgical services sold to patients are in separate product markets, notwithstanding that every patient who undergoes surgery would require anaesthesia. Similarly, in *Eastman Kodak Co. v. Image Technical Servs., Inc.* (US Supreme Court, 1992), it found parts and service to be separate markets even if “there is no demand for parts separate from service.” Therefore, when completely different groups of consumers involving different market

circumstances are being assessed, they are necessarily in different product markets (American Antitrust Institute, 2017). Until the Second Circuit's decision in the Amex case, no court had held that two-sided platforms are sufficiently unique to require an exemption from the normal rules for defining relevant markets (American Antitrust Institute, 2017).

The Supreme Court's decision in *Ohio vs. Amex* requiring the plaintiff to show that the action — anti-steering provisions of Amex — caused harm to both sides of the platform is flawed. An amicus curie brief has argued that relevant harm and benefits accrue to the market and consumers as a whole (American Antitrust Institute, 2017); even if higher benefits to Amex cardholders fully offset the higher fees charged to merchants, anti-competitive harm would remain in the form of higher merchant fees on all credit cards, which translates into higher retail prices in establishments that accept Amex credit cards. Further, as stated in an amicus curie brief, price effects on one side not being perfect substitutes for price effects on the other side are a defining characteristic of a two-sided market (American Antitrust Institute, 2017). A firm cannot expect an increase in price on the merchant side to be balanced out by a corresponding drop in price on the cardholder side in the absence of anti-competitive constraints to prevent declining demand due to feedback loops.

- Relevant harm and benefits accrue to the market as a whole; higher merchant fees on all transactions cannot be offset by better rewards to Amex cardholders alone.

The Supreme Court holds that the increase of 30% in credit card transactions from 2008 to 2013 is proof of increasing output in the market, which is inconsistent with competitive harm. Given growth in the economy, most markets are likely to grow over time; the correct assessment to be undertaken is whether the credit card market would have grown more in the absence of anti-steering provisions.

- Absolute growth in credit card transactions is not sufficient to prove lack of harm — market growth should be evaluated in comparison to counterfactual.

The Supreme Court argued that Amex’s anti-steering provisions have not ended competition between credit card networks with respect to merchant fees and gave the example of Amex stopping price raises between 2005 and 2010, when some merchants left the Amex network following price raises. This situation would be better explained by the merchants leaving the Amex network following price increases because the fees charged by Amex were already supra competitive (“cellophane fallacy”).

- Merchants leaving Amex network following price increase is not proof of competition in market; rather, it indicates supra competitive pricing by Amex.

The Supreme Court has held that “antisteering provisions do not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees or promoting their broader merchant acceptance” (US Supreme Court, 2018, p.19). It is evident from the failed attempts of Discover to increase market share by offering lower merchant fees that while companies are indeed free to offer merchants lower fees, merchants who are bound by the anti-steering position are unable to drive additional business to the company offering lower fees, making the whole strategy moot.

- While competitors could offer lower merchant fees or other promotions, merchants had no way to steer customers in response to such incentives.

4. American Express’s Abuse of Market Power

Anti-steering provisions impede inter-brand competition among credit card networks. Amex was able to impose anti-steering provisions on merchants because of its market power as a large player in an oligopolistic market and by leveraging its market power on the cardholder side of the market. The anti-steering provisions prevented the growth of the potentially disruptive player Discover as detailed in the earlier section and kept merchant fees much higher than it would have been under fair

competition. The higher merchant fees were passed on to end consumers as increased prices resulting in reduced total welfare.

One of the sources of Amex's market power is that the payment networks market in the US is highly concentrated, with only four major players and significant barriers to entry. As of 2013, American Express accounted for 26.4% of the credit card market (by purchase volumes) in the US and was second only to Visa with 45%; Mastercard at 23.3% and Discover with 5.3% made up the rest of the market (US District Court E.D.N.Y, 2015). The gap in market share between the top three players and Discover makes it more of a fringe player in a market dominated by the top three players – essentially an oligopoly. If the Herfindahl Hirschman Index is calculated for the market, it would come to 3293 – indicative of a highly concentrated market.

The fact that no firm has entered the market for payment networks for credit card companies since the entry of Discover in 1985 is proof of the existence of significant barriers to entry (US District Court E.D.N.Y, 2015). Any potential entrant would face the chicken and egg problem – it would be difficult to convince merchants to accept a card until there is significant population of cardholders, and it would be equally difficult to convince cardholders to carry a card that is not accepted by a significant number of merchants.

American Express's highly insistent and loyal cardholder base is also critical to gaining market power. The ability of merchants to resist potential anti-competitive behaviour – including price increases – by shifting customers to other credit card networks or payment methods is impeded by the segment of Amex cardholders who would shop elsewhere or spend less if unable to use their card of choice (US District Court E.D.N.Y, 2015). When Walgreen, the ninth-largest retailer in the United States, terminated acceptance of Amex cards in response to a price increase, there was public outcry by customers who said that they would take their business elsewhere if they were unable to use their Amex cards; consequently, Walgreen was forced to go back to accepting Amex after agreeing to the price increases (US District Court E.D.N.Y, 2015). Amex

itself uses cardholder insistence-based calculations to inform pricing strategies and persuade merchants of the importance of accepting Amex cards (US District Court E.D.N.Y, 2015).

American Express used its market power to impose anti-steering provisions on merchants; it essentially leveraged its dominance in the cardholder side of the market to the merchant side of the market. Unlike its competitors, who focused on interest on credit card dues to drive revenues, Amex consciously focused on merchant fees charged on cardholder spending to drive its revenues. Therefore, it was in the interest of Amex's business model to offer better rewards programs to cardholders to induce higher spending. The rewards program became both a value proposition for cardholders and a significant driver of revenue for Amex. This became a self-reinforcing advantage—a better rewards program attracted high spending cardholders and the presence of high spending cardholders enabled Amex to charge higher merchant fees, which enabled the continuation of a superior rewards program. Since a significant portion of Amex's cardholder base is insistent on using their Amex cards, merchants could not afford to decline Amex cards even if it charged higher fees.

It was when competitors such as Visa, Mastercard, and Discover sought to counter Amex's strength on the cardholder side of the platform by competing for business on the merchant side of the platform — by offering lower merchant fees in return for steering consumer towards their cards — that Amex started enforcing the anti-steering provisions vigorously. The anti-steering provisions ensured that Amex did not have to compete on the merchant side of the platform where it was at a disadvantage due to its business model being focused on higher merchant fees, but rather, forced its competitors to compete with Amex on the cardholder side of the platform, where it had a marked competitive advantage due to the strength of its rewards program.

Merchant testimony at the District Court trial proved that if the anti-steering provisions had not been in place, merchants would have steered customers to lower-priced credit cards in response to price increases by

Amex (US District Court E.D.N.Y, 2015). The anti-steering provisions undercut the competitive process by allowing all four payment network operators to raise merchant fees more easily and profitably than it would have been possible if merchants could influence the choice of credit card of consumers. Visa and Mastercard increased their average merchant fees by more than 20% from 1997 to 2009 (US District Court E.D.N.Y, 2015). Discover raised its average merchant fee nearly 24% from 2000 to 2007 (US District Court E.D.N.Y, 2015). The anti-steering provisions allowed Amex to increase its merchant fees on merchants, accounting for 65% of its transaction volume in the late 2000s (US District Court E.D.N.Y, 2015) – Amex only had to consider whether merchants would completely cease acceptance of Amex cards because of the price increase and that was clearly not an option for merchants.

Further, the anti-steering provisions, combined with no-surcharge clauses – which prohibited merchants from charging higher prices to a customer who paid through a high cost method of payment such as credit cards – in contracts with payment networks meant that merchants had to internalise the merchant fees. Economic theory suggests that merchants would pass this increase in costs in its entirety to their consumers (US District Court E.D.N.Y, 2015). Therefore, all customers, regardless of the method of payment, would have to pay a higher price that factored in the high merchant fees of credit cards, while only holders of Amex cards⁶ enjoyed the benefits of the rewards program.

5. Conclusion

Visa, Mastercard, Amex, and Discover handled 44.6 billion transactions worth \$3.966 trillion in the US in 2019. In 2019, there were 340 million Visa, 243 million Mastercard, 60.1 million Discover, and 54.7 Amex credit cards in the US (Julija, 2021). For the same period, the transaction volumes were \$2 trillion for Visa, \$910 billion for Mastercard, \$151 billion for Discover, and \$827.7 billion for Amex (Julija, 2021). Amex, with less than a quarter of the number of cards issued as Mastercard, had transaction volumes only 10% lower than Mastercard. Similarly, while Amex had 10% lesser

credit cards in circulation than Discover, its transaction volumes were nearly six times that of Discover. Both facts point towards the continuing competitive advantages that Amex enjoys over its competitors, a major part of which stems from its anti-competitive conduct of anti-steering agreements.

We contend that the US Supreme Court's decision was akin to a template-based application of economic theory driven almost purely by market definition rather than sound economic reasoning. A credit card company's strategy to offer rewards to customers or offer incentives to merchants depends on the competitive advantage they have in the provision of rewards or incentivising merchants. If a credit card company has a wide network of rewards partners and gets profitable deals from its partners, it would prefer to increase the volume of transactions by offering cardholders higher rewards and recovering the costs by charging merchants higher fees. On the other hand, a company without an extensive network of partners that is unable to negotiate profitable deals with potential partners would prefer to increase transactions by offering fewer rewards to cardholders but charging lower fees to merchants, which would incentivise merchants to push payments via that credit card network among shoppers. Amex is using the "special nature" of two-sided platforms as a smokescreen to camouflage anti-competitive restraints on inter-brand competition that have resulted in the stunting of the potentially "maverick" competitor Discover.

Amex could have responded to steering with pro-competitive measures, such as lowering the discount fees or improving its messaging to communicate the value proposition of Amex to merchants (US District Court E.D.N.Y, 2015). Anti-steering provisions are an artificial barrier that separates merchant demand from the price of network services. If they are removed, merchants would attempt to steer customers towards the card that offered them the lowest merchant fees through a variety of methods, including discounts, free shipping, and a free day for services such as hotel or car rentals. Ultimately, the cardholder could still go with their preferred card if they believe that the rewards offered by the card of their

choice are more attractive, but this process would allow consumers the option of selecting the most attractive offer. The steering process would allow merchants and cardholders to jointly weigh the prices charged on both sides of the platform against each other and there would be pro-competitive benefits arising from indirect network effects in two-sided platforms.

Given that platform markets are becoming increasingly popular in India, Indian antitrust authorities will often have to deal with the conduct of platform operators. The Amex Ohio case holds an important lesson for Indian antitrust authorities – while certain characteristics of platform markets make the application of stylised facts seem appropriate, a purely template-based application of economic theory can lead to misleading conclusions. A thorough effects-based analysis is vital to an assessment of alleged anti-competitive conduct even in platform markets. Further, given that the Indian fintech sector is highly dynamic and innovative – for instance, India leads the world in terms of the number of real-time payments⁷ – the regulator needs to be forward-looking in dealing with this sector and ensure that actions taken do not stifle innovations.

In fact, the conduct of platform operators is not only a competition issue but also has social policy dimensions in a country like India. If the conduct of platform operators has the effect of disadvantaging one group of consumers while benefitting certain others, it would have the effect of income redistribution.⁸ For instance, given that digital payments are increasingly popular with customers using different payment channels, anti-steering provisions could have a chilling effect on competition in the market and cause harm to large sections of the population.

Finally, an appropriate antitrust analysis of two-sided platforms would be centred on the economic impacts of the alleged anti-competitive conduct. Notwithstanding whether a market is two-sided, multi-sided or one-sided, it is important to assess the effect of anti-competitive actions when the Competition Act is enforced. While unique features of the market must be considered, traditional antitrust principles are equally applicable and analytical tools are adequate to analyse anti-competitive behaviour in two-sided/multi-sided markets. Therefore, Indian antitrust authorities

would be well advised to not merely join the bandwagon when it comes to platform markets.

Endnotes

¹While commonly cited examples of platform markets are digital platforms, they can also be offline, such as newspapers, matchmaking services, and payment cards. Changing business practices can also turn traditional businesses into platforms, such as certain hospitals in India, which have specialists who visit during specified times of the week and retain a share of the consulting fees in exchange for providing doctors with a steady stream of patients.

²The Decision refers to General Purpose Credit and Charge Cards (GPCC). Charge cards do not have the facility of carrying forward the due amount to the future in return for paying interest payments on the due amount until it is repaid (revolving credit), and they generally do not have spending limits like credit cards. For the sake of simplicity, we will be referring to them as credit cards in this paper.

³In the US, financial services companies make up the bulk of acquirers, though some banks also act as acquirers.

⁴While they also issue third-party credit cards in association with banks – where their role is limited to that of a payment network – this accounts for a very small part of the total number of cards issued by them.

⁵Charge cards differ from credit cards in that they require the entire outstanding amount to be settled each month

⁶And cards from competitors that offered premium rewards programs.

⁷In 2020, there were 25.5 billion real-time payments in India, whereas China, in second place, had only 15.7 billion transactions. <https://www.linkedin.com/showcase/finshots/posts/?feedView=all>

⁸According to a Brookings Institute study on the Amex vs Ohio decision (available at <https://www.brookings.edu/research/ohio-v-amex/>), the anti-steering provisions of Amex (in combination with provisions in contracts that prohibit merchants from charging customers who pay by Amex a higher fee) essentially raised the prices of goods and services

for all customers. Since merchants are unable to charge a higher price for customers using high-cost methods such as Amex cards, their standard price payable by all customers has to cover these costs. This facilitated a transfer of wealth from all Americans who paid higher prices for goods to the richest Americans, who were the beneficiaries of Amex's rewards program.

References

- Amicus Brief, No. 16-1454, Ohio et al. v. American Express Co. et al. (Supreme Court of the United States). https://www.supremecourt.gov/DocketPDF/16/16-1454/23946/20171214155357158_16-1454%20tsac%20American%20Antitrust%20Institute.pdf
- American Express (n.d.). *Our history*. <https://about.americanexpress.com/our-history/>
- Colangelo, G. (n.d.). *Evaluating the case for regulation of digital platforms in the US and the EU*. Stanford Law. <https://law.stanford.edu/projects/evaluating-the-case-for-regulation-of-digital-platforms-in-the-us-and-the-eu/>
- Discover (n.d.). *Our history*. <https://www.discover.com/company/our-company/>
- Evans, D. S., & Schmalensee, R. (2019). *The role of market definition in assessing anti-competitive harm in Ohio v. American Express*. Social Science Research Network. <https://ssrn.com/abstract=3401325>
- Federal Trade Commission. (2020, December 9). *FTC sues Facebook for illegal monopolization*. <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>
- Julija, A. (2021). *US credit card market share: Facts and statistics*. Fortunly. <https://fortunly.com/blog/credit-card-market-share/>
- Kathuria, V. (2019). Platform competition and market definition in the US Amex case: Lessons for economics and law. *European Competition Journal*, 15(2-3), 254-280. <https://www.tandfonline.com/doi/full/10.1080/17441056.2019.1644578>

- Kirkwood, J. B. (2019). *Antitrust and two-sided platforms: The failure of American Express*. *Cardozo Law Review*. <https://ssrn.com/abstract=3346776>
- Manne, G. A. (2019). In defence of the Supreme Court's 'single market' definition in *Ohio v American Express*. *Journal of Antitrust Enforcement*, 7, 104–127. <https://doi.org/10.1093/jaenfo/jnz003>
- Trefis Research. (2014). *How American Express gains a competitive advantage from its closed-loop network*. *Forbes*. <https://www.forbes.com/sites/greatspeculations/2014/03/13/how-american-express-gains-a-competitive-advantage-from-its-closed-loop-network/>
- United States Department of Justice. (2020). *Justice department sues monopolist Google for violating antitrust laws*. <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>
- United States District Court, Eastern District of New York. (2015). *United States of America vs American Express Company et al*. <https://casetext.com/case/united-states-v-am-express-co-3>
- United States Supreme Court. (1992). *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451. <https://supreme.justia.com/cases/federal/us/504/451/>
- United States Supreme Court. (1984). *Jefferson Parish Hosp. District No. 2 v. Hyde*, 466 U.S. 2. <https://supreme.justia.com/cases/federal/us/466/2/>
- United States Supreme Court. (2018). *Ohio Et Al. V. American Express Co. et al*, 585 U. S. https://www.supremecourt.gov/opinions/17pdf/16-1454_5h26.pdf
- Visa (n.d.). *History of Visa*. https://www.visa.co.in/about-visa/our_business/history-of-visa.html
- Wu, T. (2019). The American Express opinion, the rule of reason, and tech platforms. *Journal of Antitrust Enforcement*, 7, 104–127. <https://doi.org/10.1093/jaenfo/jnz003>