

**IMPLICATIONS OF THE AMERICAN EXPRESS DECISION**

***FEELING THE HEAT:  
ANTITRUST IN THE ERA OF PLATFORMS AND BIG TECH***  
GLOBAL ANTITRUST INSTITUTE & CHARLES KOCH INSTITUTE

**JONATHAN M. JACOBSON**

**WILSON SONSINI GOODRICH & ROSATI**

**NOVEMBER 17, 2018**

Let's start by seeing exactly what the Court held. It said, first, under the rule of reason, the plaintiff must demonstrate an anticompetitive effect from the restraint in issue to make out a prima facie case. That is not controversial. Second, that, in rule of reason case, a relevant market must be defined. That is somewhat controversial as the Court said you can't rely on direct effects on a vertical case; you have to define and prove the market. And third, that the government's case failed because the market in issue was two-sided, and the government had not proven an anticompetitive effect in this two-sided market as a whole. That is quite controversial, as indicated by the four-justice dissent and the mountain of op-eds and other caustic commentary.

I believe the decision was correct, and I'm sure we'll talk about that, but the main topic today is the impact of the decision on technology platforms, such as Google or Facebook. That is not a question susceptible to an easy answer.

The Supreme Court's decision speaks to circumstances where the two sides interact simultaneously. In a credit card transaction, the customer provides the card and the merchant accepts it at the same time. The Court concluded that this simultaneity signaled more pronounced indirect network effects and interconnected pricing, indicating a single two-sided market.

Does this mean that the only two-sided markets are those where the interaction is simultaneous? A number of enforcers and academics hostile to the decision take that point of view and have pledged not to let the decision affect enforcement decisions in markets other than credit cards. Curiously, some others even more hostile to the decision – such as Lina Khan and Tim Wu – appear to take the opposite view, arguing that the decision is bad because it gives platforms such as Facebook and Google a free pass.

I doubt that either of these polar positions is right. For market definition purposes, it seems to me that the key is the degree to which the platform must take both sides into account in its pricing decisions. In *Amex*, for example, it was clear that Amex's cardholder rewards were highly dependent on the level of its merchant discount rate. In the *Times-Picayune* case the Court distinguished – where the claim was tying, with advertisers forced to buy ads in both the morning and evening newspapers – pricing on the advertiser side was largely irrelevant to what readers pay.

For platforms supported by advertising, and where users pay little or nothing, neither credit cards nor newspaper ads provide a complete answer. For internet platforms, a user's click on an ad simultaneously results in payment by the advertiser. But the typical interaction is not simultaneous in the main. Users go on Facebook or Google and may never click on an ad.

But the interaction is still important. If a Facebook page shows predominantly ads, users will be affected. At the margin, more users will defect the higher the proportion of ads. Fewer users, in turn, mean fewer advertisers – the classic indirect network effect that the Court was referring to.

So, for platforms, I do not believe there is a one-size-fits-all solution. Much will depend on the type of claim being asserted and the strength of the indirect network effects relative to that specific claim. For example, if the claim were that Facebook's free price to users – let's ignore the value of data for a minute – is predatory, wouldn't you want to consider the value Facebook receives for the ads? But if the claim were that Facebook was exchanging ad price information with mySpace, looking just at the ad side would make the most sense.

The Lina Khan/Tim Wu perspective is especially mistaken when you look at the implications of two-sidedness. Take Facebook again. If there is a two-sided market, who are the competitors? It might just be mySpace. And if so, Facebook's share would be very high. But if we look at the single side of advertising, the range of competitors would be much broader, possibly including search engines as well as other forms of social media, and maybe television and print as well. In that kind of market, Facebook's share would be quite a bit smaller. Defining the market as two-sided is not a free pass.

The upshot is that market definition in arguable two-sided cases will have to be litigated for years before there is much clarity.

One other point. Some of the criticism of Justice Thomas' opinion is that he moved consideration of justifications out of step two and into step one. Justice Breyer made that point in his dissent. I'm not sure that characterization is right, but the issue is an important one. If the market is not formally two-sided, but the justification for harmful effects on one side is beneficial effects on the other, what result? *Philadelphia National Bank* in 1963, courtesy of Richard Posner, held that effects in one market could not justify harm in another. There, the defense to a bank merger that increased concentration in Philadelphia was that the merger increased competition in the broader northeast banking market. The Court said, no, effects in the broader market can't offset harm in the smaller market.

It's time to rethink that rule, and hopefully *Amex* will be a start in that direction. If the defense in *PNB* was factually correct, then many more consumers would have benefited from deal than would have been harmed. Why the interests of a smaller group should outweigh those of the larger seems not to make a lot of sense.

Part of the rationale for the rule, and for similar statements in *Procter & Gamble* and *Topco*, was that there was no practical way to compare effects in one market with effects in another. But *PNB* was decided 55 years ago, and there have been very significant advances in microeconomics since. I'm not suggesting this is easy, but ignoring beneficial effects or justifications just because it seems too hard is no longer the right way to go.