

# Antitrust Enforcement in Two-Sided Markets: Lessons for American Consumers

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## I. Two-Sided Markets: Theory and Enforcement

In June 2018, the Supreme Court of the United States handed down a landmark judgment in a case involving American Express (“Amex”).<sup>2</sup> The decision followed a suit by the Department of Justice (“DOJ”) against Amex, that was appealed by several states, for imposing high fees and antisteering provisions on merchants using their payment gateways.

Although the court ultimately ruled in favor of Amex, the case has reignited a debate on how anticompetitive harm should be assessed in two-sided markets – industries where two, distinct groups of users (such as merchants and cardholders) attract each other to the same platform.

In this paper, we elaborate on why the Amex case is so significant for antitrust enforcement and what this means for American consumers going forward. It has particularly important implications for future antitrust litigation in the digital economy, where online platforms often involve one group of users interacting with a different set of users across the platform.

### a. Risks to Competition in Two-Sided Markets

There is growing evidence that two-sided markets are characterised by high barriers to entry. Some of the reasons for this are:

- *High switching costs* – in general, it is inconvenient or costly for consumers to leave an incumbent in favour of a competitor in network industries. This

issue is particularly pronounced in industries where consumers communicate with each other, such as social media or telecommunications;

- *High fixed costs* – creating a platform on which consumers can network with each other, such as a telephone network or e-commerce platform, requires extremely high initial investment in software and/or physical infrastructure;
- *Low variable costs* – conversely, the cost for the incumbent of increasing its user base is often low or negligible. In fact, as Economides points out, network industries generally exhibit *increasing returns to scale*, implying that unit costs decrease as the number of users increases.<sup>3</sup>

These features have led some theorists to argue that such industries are particularly prone to abuse of dominance, or other forms of market abuse.<sup>4</sup>

### b. Antitrust Enforcement in Two-Sided Markets

Despite the clear risks to competition in two-sided markets, the DOJ does not appear to have taken as active an interest in this issue as its counterparts in Europe. This is particularly striking, given the undisputed market dominance of large American technology companies such as Uber and Amazon, which are widely viewed as two-sided platforms. Of the monopolization investigations the DOJ has conducted since 2000, only four relate to network industries, of which only three might be classified as two-sided markets:

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<sup>3</sup> Nicholas Economides, *Public Policy in Network Industries*, HANDBOOK OF ANTITRUST ECONOMICS, Bucirossi ed., Cambridge 2003, p. 471; David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20(2) YALE J. ON REG., 325, 367 (2003); Massimo Motta, COMPETITION POLICY: THEORY AND PRACTICE 82 (2004).

<sup>4</sup> Motta, Massimo, COMPETITION POLICY: THEORY AND PRACTICE 82 (2004).

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<sup>2</sup> Ohio v. American Express, 138 S.Ct. 2274 (2018).

Table 1 – Selected DOJ Investigations for Monopolisation

Year	Case Title	Affected Sectors	Two-Sided Market (Y/N)
2007	U.S. v. Daily Gazette Co., and MediaNews Group, Inc.	Newspaper Publishers	Y
2009	The Authors Guild, Inc., et al. v. Google, Inc.	Book Stores, Libraries and Archives, Other Information Services, Other Services Related to Advertising	N
2013	U.S. v. Oklahoma State Chiropractic Independent Physicians Association and Larry M. Bridges	Professional Organizations	Y
2016	U.S. v. Clear Channel Outdoor Holdings Inc. and Fairway Media Group LLC.	Display Advertising	Y

Source: US Department of Justice

It is encouraging that, as reported by Forbes, the DOJ is now initiating separate investigations against Apple, Facebook and Google, all for “unfairly blocking out smaller companies in favour of their own services.”<sup>5</sup> Yet, as we show below, two-sided markets do not simply pose challenges for antitrust enforcement. Quantification of harm in such markets has also proven to be highly contentious. We now turn to *Amex*, a US case where this issue took center stage.

## II. Ohio v. Amex: “Two-sided markets” in Litigation

Amex controls approximately 20% of the market for credit card transactions in the United States and is projected to become the second largest player in the market in 2019.<sup>6</sup>

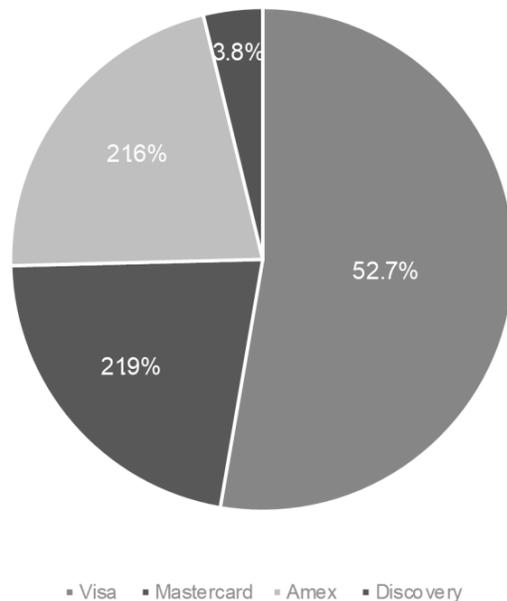
Together, Visa, Mastercard and Amex control more than 95% of the market for credit card transactions in the country:

<sup>5</sup> Rachel Sandler, *Big Tech’s Reckoning: Behind the Probes of Amazon, Facebook and Google*, FORBES, (June 4, 2019, 06:31 PM), available at <https://www.forbes.com/sites/rachelsandler/2019/06/04/big-techs-reckoning-behind-the-probes-of-apple-amazon-facebook-and-google/#12a2e71c1416>.

<sup>6</sup> Trefis Team, *AmEx is Likely to Become the Second Largest US Card Processing Company This Year*, FORBES, (May 29, 2018, 02:28 PM), available at <https://www.forbes.com/sites/greatspeculations/2018/05/29/amex-is-likely-to-become-the-second-largest-u-s-card-processing-company-this-year/#2f9262144fa0>, last assessed 19 July 2019.

Figure 1 – Credit Card Market Shares in the United States (2018)

Market Shares of US Credit Card Issuers  
(By Total Value of Purchases, 2018)



Source: Forbes

In October 2010, the DOJ sued Amex, Visa and Mastercard for imposing a series of contractual provisions on merchants known, collectively known as “anti-steering provisions.” The contracts at issue dissuaded merchants who take Amex payments from promoting or offering different terms on other credit cards at checkout. They also imposed heavy fee penalties for contravention of these conditions.<sup>7</sup> Visa and Mastercard promptly settled – but Amex decided to take the issue to court.

Credit card payment gateways represent a classic case of the two-sided market, a fact recognised by the Supreme Court in its judgment.<sup>8</sup> Purchasers don’t derive utility *directly* from other purchasers using

Amex platforms, but do benefit *indirectly* as a greater user base encourages merchants to accept Amex in more shops. Conversely, merchants benefit *indirectly* from other merchants offering Amex payment gateways, as it encourages more consumers to have Amex credit cards.

Market definition proved the key consideration in the District Court’s decision. Crucially, the court ruled that credit card platforms constitute “two separate markets – one for merchants and one for card-holders.”<sup>9</sup> Given the government’s concern over the high fees charged to merchants, the court reasoned

<sup>7</sup> Rinehart, William and Pranjal Drall, *Platform Competition and the Implications of Amex*, FEDERAL TRADE COMMISSION, available at [https://www.ftc.gov/system/files/documents/public\\_comments/2018/08/ftc-2018-0050-d-0038-155063.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0050-d-0038-155063.pdf), last assessed 19 July 2019.

<sup>8</sup> Ohio v. American Express, 138 S.Ct. 2274 (2018).

<sup>9</sup> *Id.*

that the relevant market to consider was the merchant market. It concluded that the effect of the anti-steering provisions on the merchant market were anticompetitive, as they raised merchant fees above a competitive level.

The Court of Appeals for the Second Circuit – as later affirmed by the Supreme Court – reversed this decision. Writing for the Supreme Court, Judge Clarence Thomas argued that merchants and cardholders constitute one relevant market, as both groups benefit from each other's presence when using the platform:

“For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction’s worth of card-acceptance services to a merchant it also must sell one transaction’s worth of card payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually.”<sup>10</sup>

After holding that merchants and consumers were part of the same two-sided market, the court was not persuaded that Amex’s actions constituted an abusive practice. They noted that “Visa and Mastercard have significant structural advantages over Amex” and accepted that Amex’s contractual provisions offer it a valid defence against their market dominance. The court also accepted that the anti-steering provisions “promote interbrand competition” in the market for credit card transactions and hence improve consumer welfare.<sup>11</sup>

### III. Lessons from Amex

#### a. *The Importance of Market Definition*

The contrasting *Amex* decisions in the district and appellate courts arose from conflicting understandings of the relevant market. The District Court explicitly ruled that consumers using a two-sided platform operate in a separate market from merchants, implying

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

that broader consumer welfare is irrelevant in a claim on behalf of merchants. In contrast, the Supreme Court’s inclusion of consumers as part of the relevant market necessitated a broader assessment of consumer welfare, which ultimately proved decisive.

#### b. *Valuing Consumer Choice and Product Differentiation*

The Supreme Court’s decision did not dispute the allegation that the fees charged to merchants that accept Amex payments were high, nor did it challenge plaintiffs’ claim that the anti-steering provisions were restrictive. However, Amex managed to persuade the court that the anti-steering provisions were necessary to protect its position as a competitor of Visa and Mastercard. Significantly, the court explicitly recognised that increased consumer choice has positive welfare effects, which needs to be considered in antitrust claims. Justice Thomas opined:

“Amex competes with Visa and Mastercard by using a different business model . . . Amex’s business model focuses on cardholder spending rather than cardholder lending. Due to its superior rewards, Amex tends to attract wealthier customers who spend more money . . . In sum, Amex’s business model has stimulated competitive innovations in the credit card market, by increasing the volume of transactions and improving the quality of the services.”<sup>12</sup>

This presents a challenge to plaintiffs bringing litigation in two-sided markets, who may need to present a method of quantifying gains from increased consumer choice. This remains an under-researched area in microeconomics.

#### c. *Quantifying Antitrust Harm*

In a typical claim involving cartel damages or abuse of dominance, an expert economist must first estimate a “counterfactual price” for the affected product. Methodologies for this estimation include:

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<sup>12</sup> *Id.*

- The Yardstick approach: The comparison of price, rates, and/or other metrics in the market in which the cartel is operating vs. the same metrics in a highly comparable market. The
- Benchmark approach: The comparison of prices before, during, and after the alleged formation of a cartel within the

same market.

- Mixed methods: such as difference-in-difference models, cost structure models, and Cournot/Bertrand price simulations.

Direct purchaser damages are then estimated as follows:

$$\text{Damages} = (\text{Actual} - \text{But-for Price}) * \text{Units Sold} - \text{Pass-through}$$

where “pass-through” refers to the proportion of the cost increase passed down the supply chain.<sup>13</sup>

The findings in *Amex* highlight the importance of applying this approach to *both sides* of a two-sided market in order to assess the overall effect on consumer welfare. Evans made this point in his 2003 paper, presciently using American Express as an illustrative example:

“Consider the American Express corporate card charge. The cardholder pays nothing for a transaction and often receives various inducements that make the price of the transaction negative. The merchant pays about 2.7 percent of the transaction to American Express. The fact that cardholders pay a negative price is not relevant; it is consequence, and quite possible a socially efficient one, of pricing in a multi-sided market.”<sup>14</sup>

While we agree broadly with Evans’s assessment, it is also worth pointing out that two-sided markets pose some challenge to the standard methodologies above, particularly regarding counterfactual price estimation. In the case of a dominant company in a two-sided market, applying standard yardstick approaches may be challenging, if that company dominates the global market as well as the local one. This is likely to be the case,

particularly if large, American tech companies are involved in future competition enforcement actions.

When there is more than one major player in a two-sided market, standard models are also limited in addressing some of the secondary consequences of indirect network effects, such as high switching costs. However, all three approaches above can be extended with other quantitative evidence to mitigate this issue. For example, in a two-sided market where one, smaller platform charges merchants less than the dominant platform, a regulator might survey merchants to determine what cost reduction would entice them to forego the advantage of network effects and switch providers. This information could be incorporated into standard damages models, to get a more accurate estimate of the overall welfare effects of the dominant firm’s pricing strategy.

#### d. *A New Defense for Tech Defendants*

Antitrust scrutiny on the tech sector is clearly on the rise. Facebook, Amazon, Google and Apple are all facing antitrust scrutiny, either from the DOJ or FTC.<sup>15</sup> It is likely that private monopolisation claims against these putative defendants will emerge in the near future. Significantly, all four of these putative defendants operate in two-sided markets:

<sup>13</sup> See Raphael Chaskalson, *Passing the Buck: Estimating Pass-on Damages*, FIDERES, available at <https://fideres.com/publications/passing-the-buck>, last accessed 19 July 2019.

<sup>14</sup> David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20(2) YALE J. ON REG., 325, 371 (2003).

<sup>15</sup> <https://www.scotusblog.com/2018/06/opinion-analysis-divided-court-defines-credit-card-networks-as-single-two-sided-market-rejecting-antitrust-challenge-to-anti-steering-provision/>.

Table 2: Two-Sided Markets in the Digital Economy

Company	Sector(s)	Market Capitalisation (USD Billions)	Two-Sided Market?	Explanation
Amazon	E-Commerce, Cloud Computing	995	Yes	An increase in consumers on Amazon attracts more sellers to platform, which in turn increases product variety available to consumers and stimulates price competition
Apple	Telecommunications, IT, Music	939	Yes	An increase in consumers to App Store attracts more App developers, which in turn increases product variety available to consumers
Google	Search Engines, Online Advertising	793	Yes	An increase in users attracts more advertisers, which in turn increases product variety available to consumers
Facebook	Social Media	580	Yes	An increase in users attracts more advertisers and news outlets to use the platform, which in turn increases product variety and information available to consumers

Prospective plaintiffs, particularly merchants or app developers on one side of the platforms listed above, should be mindful of encountering the defense of increased consumer welfare (through increased choice, lower prices or both) in future litigation.

*e. Promoting data availability*

More generally, our past experience in international litigation (most notably in financial markets) strongly suggests that there is a need for decisive action from regulators and legislators to promote data availability. This is particularly true of cases involving digital markets, in which economic analysis is typically very data intensive.

In 2018, the high cost of accessing financial and economic data has become an increasingly contested public issue abroad, precisely for this reason.<sup>16</sup> Regulatory action promoting the availability of proprietary data (and reducing its cost) would aid efforts to hold large companies accountable for their actions, and make prospective private damages claims more viable.

<sup>16</sup> See John McCrank, *Exchange fee fight moves from NYSE floor to data center rooftop*, REUTERS, (Aug. 6, 2019, 3:24 PM) <https://uk.reuters.com/article/us-usa-exchanges-virtu/exchange-fee-fight-moves-from-nyse-floor-to-data-center-rooftop-idUKKCN1UW24U>, last assessed 7 August 2019.

# Procedural Fairness in Competition Investigations and Enforcement: The International Competition Network Introduces New Framework for Competition Agency Procedures and Recommended Practices on Investigative Process

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## I. Introduction

On May 15, 2019, the International Competition Network (“ICN”) kicked off its 18<sup>th</sup> annual conference in Cartagena, Colombia.<sup>19</sup> The two-day conference, hosted by Colombia’s Superintendencia de Industria y Comercio, covered a broad spectrum of antitrust topics including unilateral conduct, competition agency design, and enforcement cooperation.<sup>20</sup> In addition to the presentation of new reports on cartel enforcement and vertical merger analysis, the ICN introduced two new initiatives to promote procedural fairness in competition law investigations and enforcement: the Framework for Competition Agency Procedures

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<sup>19</sup> See Press Release, US Dep’t of Justice, Antitrust Div., *International Competition Network Adopts Framework for Competition Agency Procedures and Recommended Practices on Investigative Process, Announces U.S. Agencies Will Host 2020 ICN Annual Conference* (May 17, 2019) [hereinafter DOJ Press Release].

<sup>20</sup> See News Release, International Competition Network, *2019 ICN Annual Conference Press Release* (May 17, 2019), available at <https://www.internationalcompetitionnetwork.org/featured/2019-annual-conference-press-release/> [hereinafter ICN News Release].

(“Framework”) and Recommended Practices for Investigative Process (“Recommended Practices”).

## II. Background: What is the ICN?

The ICN, which consists of over 100 national and multinational competition agencies across jurisdictions, is dedicated exclusively to competition law enforcement and policy.<sup>21</sup> The organization brings together competition agencies from around the world to formulate effective and practical investigative techniques, frameworks, and best practices that simultaneously respond to and shape the increasingly transnational nature of competition investigations. Throughout the year, ICN members participate in working groups that seek to develop procompetitive and efficiency-enhancing policies across the global antitrust community. In addition to the involvement of its member agencies, the ICN also draws upon the expertise and input of its non-governmental advisors, including consumer groups, academics, and specialists from the legal and economic professions.<sup>22</sup>

## III. The Framework and Recommended Practices: Two New Tools to Promote Universal Procedural Fairness

The topic of procedural fairness in competition investigations and enforcement has been a key focus of the ICN since its inception in October 2001.<sup>23</sup> The

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<sup>21</sup> See Fact Sheet, International Competition Network, *ICN Fact Sheet and Key Messages* (April 2009), available at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/Factsheet2009.pdf>.

<sup>22</sup> *Id.*

<sup>23</sup> International Competition Network, *What is the ICN?* (2018), available at <https://www.internationalcompetitionnetwork.org/about/>.

organization's Agency Effectiveness Working Group ("AEWG") focuses specifically on increasing the efficacy of competition agencies around the world by identifying best practices for agency operations, enforcement, and procedures.<sup>24</sup> In connection with these efforts, the AEWG is responsible for articulating and maintaining the ICN's "Guiding Principles for Procedural Fairness in Competition Agency Enforcement," which consists of nine key principles designed to inform and guide universal enforcement processes.<sup>25</sup> The new Framework allows participants to come together to achieve global implementation of established procedural fairness principles in accordance with the ICN's preexisting standards.<sup>26</sup> Similarly, the Recommended Practices, which were developed by the AEWG in conjunction with the U.S. Federal Trade Commission, seek to formalize preexisting investigative processes and norms and to facilitate worldwide adoption of those processes.<sup>27</sup>

*a. The Framework for Competition Agency Procedures*

The Framework is an opt-in initiative open to any national or multinational competition agency that is willing to adhere to the ICN's fundamental procedural

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<sup>24</sup> *Id.*

<sup>25</sup> International Competition Network, *ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement* (2018), available at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG\\_GuidingPrinciples\\_ProFairness.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_GuidingPrinciples_ProFairness.pdf).

<sup>26</sup> See International Competition Network, *ICN Framework on Competition Agency Procedures* (May 2019), available at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN\\_CAP.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf) [hereinafter *Framework on Competition Agency Procedures*].

<sup>27</sup> See [DOJ Press Release](#).

fairness principles.<sup>28</sup> As of August 2019, there are 72 Framework participants.<sup>29</sup> By signing on to the Framework, participants agree to cooperate with implementation efforts, participate in the discussion and formation of procedural fairness principles, and abide by the Framework to the fullest extent possible.<sup>30</sup> Additionally, each participant agrees to provide documentation of its competition law investigative and enforcement processes and protocols to the Framework's Co-Chairs within six months of joining the Framework.<sup>31</sup> The global antitrust community has recognized the Framework as a historic multilateral initiative.<sup>32</sup>

*b. Recommended Practices for Investigative Process*

The Recommended Practices is a compilation of the ICN's consensus statements on procedural fairness in the context of investigations.<sup>33</sup> The ten-page guidance, which is divided into six sections, provides competition agencies with a detailed and comprehensive overview of universal investigative practices.<sup>34</sup> Section I provides guidance on key investigative tools that competition agencies should use when

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<sup>28</sup> See Press Release, International Competition Network, *ICN Framework for Competition Agency Procedures Update* (June 7, 2019).

<sup>29</sup> See International Competition Network, *ICN Cap Participants* (Aug. 2019), available at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/08/CAPparticipants.pdf>.

<sup>30</sup> See [Framework on Competition Agency Procedures](#).

<sup>31</sup> *Id.*

<sup>32</sup> See [DOJ Press Release](#).

<sup>33</sup> See [ICN News Release](#).

<sup>34</sup> International Competition Network, *ICN Recommended Practices for Investigative Process* (May 2019), available at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/RPs-Investigative-Process.pdf>.

conducting competition investigations, such as written requests for information, on-site inspections, witness interviews, and information submissions from third parties.<sup>35</sup> Sections II and III focus on transparency of agency enforcement policies, both as a general matter and in the context of investigations.<sup>36</sup> Section IV addresses the issue of agency engagement during an investigation, including interactions with parties that are the subject of an investigation as well as agency engagement with third parties.<sup>37</sup> Sections V and VI provide recommendations for the establishment of internal agency safeguards and protections for confidential and privileged information respectively.

issue of global procedural fairness will remain a salient and crucial aspect of competition investigations and enforcement.

#### **IV. Conclusion and Outlook**

The emergence of an increasingly global market economy has given rise to a growing number of cross-border competition investigations, multi-jurisdictional merger reviews, and international trade compliance issues. Now more than ever, the work of competition agencies across jurisdictions is inextricably intertwined; thus, the need for worldwide cooperation and consensus among competition agencies is paramount. As the most collaborative and inclusive agency-led organization, the ICN is at the forefront of creating universal competition policies and frameworks that will shape and affect the trajectory of competition law.<sup>38</sup> The Framework for Competition Agency Procedures and Recommended Practices for Investigative Process are significant steps towards achieving worldwide norms for procedural fairness in competition investigations and enforcement. As the globalization of our economy continues, the

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See [ICN News Release](#).