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Antitrust Publications & Events

Morgan Lewis

FORDHAM UNIVERSITY
THE SCHOOL OF LAW

Antitrust in the Financial Sector: Hot Issues & Global Perspectives

Wednesday, May 2, 2018 - New York

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Program

5:00 pm COFFEE & REGISTRATION

5:15 pm WELCOME REMARKS

Richard TAFFET | Partner, Morgan, Lewis & Bockius, New York
James KEYTE | Director, Fordham Competition Law Institute, New York

5:30 pm OPENING REMARKS

Andrew FINCH | Principal Deputy Assistant Attorney General Antitrust Division, US DOJ, Washington, DC

THE AMEX DECISION: TURNING THE TABLES?

Beau BUFFIER | Chief, Antitrust Bureau, NYS Office of the Attorney General
Jonathan JACOBSON | Partner, Wilson Sonsini Goodrich & Rosati, New York
Jonathan ORSZAG | Senior Managing Director, Compass Lexecon, New York
MODERATOR: James KEYTE | Director, Fordham Competition Law Institute, New York

6:50 pm FINTECHS: HOW TO ENSURE A LEVEL PLAYING FIELD FOR ALL?

Robert HEDGES | Partner, A.T. Kearney, Boston
Omar SHAH | Partner, Morgan, Lewis & Bockius, London
Jon R. ROELLKE | Partner, Morgan, Lewis & Bockius, New York
MODERATOR: Michael SALINGER | Senior Academic Adviser, Charles River Associates, Boston

7:50 pm CLOSING REMARKS

Bruce HOFFMAN | Director of Bureau of Competition, Federal Trade Commission, Washington, DC

8:00 pm DRINKS

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Foreword

Financial markets are the lifeblood of the real economy, giving businesses and consumers access to financial products. The better and more competitively they function, the better the economy will perform. In recent years, two interesting developments can be observed in the antitrust arena: on one hand, the pending Ohio v. American Express Co. case challenges the definition of two-sided markets; on the other hand, the fintech boom brings opportunities and challenges to antitrust regulation. This two-panel workshop aimed at analyzing and discussing these critical issues with some key antitrust enforcers, lawyers, in-house counsels, and economists.

Concurrences and Morgan Lewis were the co-organizers of this three-hour event, supported by Charles River Associates and Compass Lexecon. ■

Richard Taffet
Partner,
Morgan, Lewis & Bockius, New York

Nicolas Charbit
The Editor
Concurrences Review

Opening Keynote Speech

ANDREW FINCH

Endorsing the application of antitrust law to the financial sector, **Mr. Andrew FINCH** (Principal Deputy Assistant Attorney General Antitrust Division, US DOJ) offered his two-fold perspective as a former attorney in private practice who, for the past year, has been overseeing the criminal program of the DOJ. The Division has a significant recent enforcement record in the financial services industry. Awareness that financial services may be susceptible to antitrust crimes has developed in the past decade. As in other sectors, antitrust investigations in the financial sector may begin with one institution or individual seeking leniency. Mr. Finch detailed the main similarities and differences between investigations in the financial sector and investigations in other sectors. Similarities include the infringing conduct, such as price fixing or bid rigging, although there has been some recent discussion on the specific use of computer algorithms in the financial services sector. Mr. Finch noted that once an anticompetitive agreement has been detected, the means of implementation are irrelevant. Penalties for violations of the Sherman Act, i.e. fines and criminal sentences, are also similar across industries, as well as the types of defenses which are often put forward. The Division aims to examine each defendant's arguments during the investigation to ensure just, appropriate and sound decisions. Some important differences are linked to the specificities of the financial services sector. The functioning and regulation of financial firms affect the way in which employees and representatives conduct their work. As banks tend to have more interaction and employees' work conduct may be subject to more freedom and privacy, it may be more difficult to prevent as well as detect anticompetitive behavior. Antitrust penalties may also have specific collateral consequences in the financial sector, which the Division aims to anticipate. Finally, the rise of global commerce has expanded the scope of financial markets, which may now be global. Consequently, multi-jurisdictional investigations are developing. Mr. Finch pointed to the very effective coordination in several financial services investigations between the DOJ and a variety of U.S. and foreign authorities. All market actors should aim to understand the overlapping civil and criminal enforcement regimes, with cooperation being the key to smoother proceedings. To conclude, Mr. Finch commended antitrust compliance programs, as these are critical in the financial sector to prevent violations from occurring and to make sure that violations which occur are identified, reported and mediated. The DOJ has sought to introduce rewards for extraordinary compliance efforts of companies which cooperate in financial investigations, such as Barclay's and BNP Paribas in the Foreign Exchange case, and is considering how to recognize pre-existing compliance programs when their effectiveness can be established. ■

Panel 1

THE AMEX DECISION: TURNING THE TABLES?

Mr. **James KEYTE** (Director, Fordham Competition Law Institute) chaired the first panel of speakers dedicated to the American Express (Amex) case, which will be heard by the Supreme Court this year following a ruling by the Second Circuit Court of Appeals in September 2016. Identifying the main issues raised by this case, Mr. Keyte stressed the complex and diverse implications linked to the application of Section 1 of the Sherman Act and the rule of reason to non-price vertical restraints on a two-sided market. He enhanced the panel discussions by raising questions relating notably to the identification of output and burden shifting in the Amex case.

During his intervention, Mr. **Beau BUFFIER** (Chief, Antitrust Bureau, NYS Office of the Attorney General) addressed the specific issues of digital platforms and two-sided/multi-sided markets, which were central to the Amex case. Platforms are intermediaries between economic groups with complementary activities and needs. The State of New York has a long history of intervening in the credit card industry. Along with other U.S. States, New York took an adverse position to the judgment by the Second Circuit Court in its brief. The brief focused on the economic defects of the appealed decision. The Supreme Court should issue broad and clear guidance on the application of the rule of reason to two-sided markets. Under the rule of reason, the peculiarities of two-sided platforms must be taken into account on a case by case basis: there are often significant differences between the two sides of the platform, which depend on multi- vs. single-homing, the economics on the two sides, the degree of interconnectedness of the two sides, the size and nature of externalities on each side, etc. The Supreme Court should not adopt entirely innovative rules or categorical approaches in this case, as it does not seem to require drastic changes to the rule of reason. The main areas of focus in the brief were market definition and, perhaps more importantly, burden shifting. With respect to market definition, the Second Circuit Court made a fundamental error in collapsing both sides of the platform and identifying one single market including merchants and card-holders. This approach clashes with over five decades of case law. The Court also engaged in improper burden shifting as it insisted on the plaintiffs showing proof of net harm on both sides of the platforms, both to merchants and consumers. It is normally for the defendants to show pro-competitive benefits or justification. During the debates, Mr. Buffier specified that the relevant product market was constituted of the transactions, which affected American Express, the merchant and the card-holder. Before the Court, none of the parties proposed satisfactory ‘surrogates’ to measure output or estimates for the relevant counterfactual, i.e. what would have happened to the output in the absence of the restraint. He also pointed out that the anticompetitive effects in this case resulted from merchants claiming that Amex’s non-discrimination rules had caused price increases which they would have to pass onto all their customers.

Mr. **Jonathan JACOBSON** (Partner, Wilson Sonsini Goodrich & Rosati) first explained that the purpose of American Express' non-discrimination restraints was to maintain the ability to continue as a charge card without receiving funds from revolving credit, necessitating, a higher discount rate to merchants, and to avoid Visa and MasterCard free-riding on Amex investments in merchants attracting cardholders. When these practices were first scrutinized in 2010, both Visa and MasterCard rapidly settled with the DOJ as they probably took this opportunity to enhance their position against American Express. In the prior US v. Visa case, the competition issues focused only on one side of the market – the provision of card network services to banks. In the present case, however,, every transaction affects both sides. In the Amex case, it thus seemed necessary to study both sides – merchants and card-holders. Mr. Jacobson agreed that this requirement to show harm on both sides increases the burden of proof and may even, in some cases, be impractical; however, he considered that the plaintiffs had made no efforts to demonstrate harm by reduced output. As regards procompetitive effects, American Express put forward the convincing argument that merchants would ultimately increase their profit by accepting Amex cards due to increased output. Finally, Mr. Jacobson emphasized the unusual nature of the Amex case, which would make it ill-suited for broad rules or blanket approaches in the Supreme Court.

Broadening the competitive assessment in the Amex case, Mr. **Jonathan ORSZAG** (Senior Managing Director, Compass Lexecon) stressed the potential value placed by consumers on the additional security and services provided by American Express in comparison with other credit cards, which contribute to product differentiation. His view was that the price may only be one element of competition on the credit cards market. Although Amex's non-discrimination rules obviously reduce one element of competition, they could enhance other elements of competition, e.g. quality competition. From an economic perspective, the end question is whether competition as a whole is enhanced or diminished, i.e. whether the specific benefits to competition outweigh the loss of competition. Mr. Orszag also considered as an important factor the choice that merchants have to accept Amex cards or not (approx. 30% do not). For conducting the hypothetical monopolist test, one cannot just focus on one side of the market; one must consider both sides of the market, especially where the feedback effects are strong between both sides of the market. ■

The first panel was concluded with a brief session of Q&As involving the public.

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1 **James KEYTE**
2 **Beau BUFFIER**
3 **Jonathan JACOBSON**
4 **Jonathan ORSZAG**
5 **Panel**
6 **Audience**

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Panel 2

FINTECHS: HOW TO ENSURE A LEVEL PLAYING FIELD FOR ALL?

The second panel of speakers was moderated by Mr. **Michael SALINGER** (Senior Academic Adviser, CRA) and focused on the protection of the level-playing field and consumer data in the fintechs environment. As a general comment, Mr. Salinger indicated that the expression 'level-playing field' fails to make the necessary distinction between protection of competitors and protection of competition. In financial services markets, players may be unfairly excluded or foreclosed. This issue can be explained by several economic reasons. The first reason is that cooperation between financial entities, i.e. competitors, is necessary in order to promote a competitive financial system. This may seem paradoxical. The related competitive concerns include potential collusion, which could be facilitated, and potential disadvantages for other competitors who evolve outside the circle of cooperation. The second reason relates to externalities, due notably to innovation and the acceleration of electronic payments. As externalities are considerable in the financial sector, they could prompt actors to limit access for new entrants. The third reason is that exchange of confidential information between financial entities may be necessary to allow or facilitate financial transactions. The fourth reason is the acceleration of transactions, as consumer demand pushes for a faster pace which may make scrutiny more difficult. Finally, the last reason may come from the fact that some organizations have a natural disadvantage on the market and require regulatory intervention.

Mr. **Robert HEDGES** (Partner, A. T. Kearney) offered his view of competition issues in the context of payment services. He noted that innovation in financial technology services has been progressing in the past few years and regulation is intensifying as a response. He agreed that consumer demand pushes for ever faster services, including direct access, direct banking or account-to-account settlement transfers. Addressing competition issues, several jurisdictions worldwide have intensified their regulation, such as the EU, Australia and Japan. Between 2013 and 2017, the UK Competition and Markets Authority (CMA) conducted a market investigation in the retail banking sector and concluded that competition was insufficient: it appears to be particularly difficult for consumers to switch from one bank to another. The development of fintechs can be seen as a response to the lack of competition in the financial sector. On data protection in the financial sector, Mr. Hedges underlined the implications of consumer data sharing. Until recent scandals on this issue, most American consumers ignored how their data could be used and monetized. However, in some ways, data analysis could potentially produce important consumer benefits.

Focusing on fintech issues arising in the context of asset management and investment services, Mr. **Jon ROELLKE** (Partner, Morgan, Lewis & Bockius) first observed that there are many examples throughout modern history of technological change disrupting existing business models. In financial services, one such example was the development of alternative trading systems that transformed over-the-counter markets, increasing transparency and disrupting existing business and market participation models. Incumbent market makers raced to create joint ventures to leverage their natural advantages, such as access to liquidity and customers, to develop and partner with technology to apply it to existing business models. Regulators noticed these developments and, like regulators today, asked whether collaborative

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1 **Michael SALINGER**

2 **Robert HEDGES**

3 **Jon ROELLKE**

4 **Omar SHAH**

5 **Panel**

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activity among incumbents could potentially constrain the benefits of technology. The DOJ, for example, launched an investigation into multiple joint ventures that sought to develop and deploy electronic trading technology. Recognizing that adapting technological innovation in the financial services market requires collaboration, the DOJ focused its attention on issues of exclusivity of access and supply, and questions about whether new entrants were somehow foreclosed from competing. The same is true today – collaboration is essential but must be tailored to avoid competitive constraints that are not a function of the externalities that provide incumbents with natural advantages and the ability to deploy technological innovation. Addressing the issue of data protection, Mr. Roellke stressed the crucial importance of data in efforts to innovate and deploy new technologies in financial services. The challenge is to promote efficient services through new technologies while maintaining safeguards against unfettered access to private financial information consistent with data protection and privacy mandates. He also pointed to the implications of innovation in relation to AI, which could lead to a revolution in financial advising. In the future, AI could potentially compete with financial advisers if provided with enough data and related information such as its nature, quality, source and use by third parties. But simultaneously controlling these inputs consistent with data privacy and taking advantage of the depth and expertise of incumbent providers while also promoting access and encouraging new entry is a balancing act that regulators will have difficulty with, particularly if calls to develop prospective regulations in a vacuum without the benefit of real world marketplace experiences are heeded.

Mr. **Omar SHAH** (Partner, Morgan Lewis & Bockius) presented European perspectives on these themes. Regulation in the EU is more advanced than in the U.S. Decisions have been made by regulators and lawmakers, most recently with the initiation of the Payment Services Directive 2 (PSD2), which establishes additional sector-specific regulation. Under the European legislation, for example, if bank customers give their consent, their data can be communicated to any third party. This is a key issue for fintechs as, in order to evolve on the market, they require access to the data historically possessed by the incumbents.

While ensuring checks and balances, the EU is trying to create a European ecosystem to compete effectively on a global scale. However, each of the 28 Member States has some flexibility on the implementation of EU law and the new EU regulation does not contain detailed restrictive rules on how to resolve conflicts between incumbent banks and fintechs. In the absence of a comprehensive pan-EU regulatory framework, antitrust enforcers are already taking a leading role in tackling the various challenges relating to data protection and potential market foreclosure and this trend is set to continue. The role and behavior of incumbents in the financial services sector are at the center of the current debate: in March 2018, for example, the European Commission announced that dawn raids had been carried out at the Dutch and Polish Banking Associations to verify the absence of any arrangements in place creating standards or practices which may exclude new entrants. The UK has attempted to tackle these issues head-on by creating a new independent regulator, the Payment Services Regulator (PSR), which has some competition powers and has conducted dawn raids at the premises of a number of payment services organizations. In the future, competition authorities are likely to have to address specific issues relating to fintechs, such as interconnection and information exchange, in several antitrust and merger control cases. As in the case of the telecoms sector, vertically integrated incumbents are likely to come under scrutiny to ensure that they are providing access to infrastructure for fintech challengers. A number of banks have already engaged proactively in this area and are at the forefront of standardization efforts and technological innovation.

The second panel was concluded with a brief session of Q&As involving the public.

Closing Keynote Speech

BRUCE HOFFMAN

To complete and conclude the discussions in the conference, Mr. **Bruce HOFFMAN** (Director of Bureau of Competition, Federal Trade Commission) spoke about several themes, including competitive issues in partial ownership acquisition, filing duties in no-cash transactions and the use of data as a competitive tool. With respect to partial ownership acquisitions, Mr. Hoffman underlined the lasting uncertainties surrounding their effects on incentives and conduct, and focused on the problems which may arise when larger investors with several holdings and many competitors (e.g. large investment funds) purchase minority stakes in various organizations. He pointed out that this is the area where research is least certain and there is room for doubt as to whether any competitive issue may arise. However, citing the Red Ventures/Silver Lake/General Atlantic merger case, he made it clear that overlaps at investor level may be problematic. When this transaction was filed, it is likely that none of the parties had anticipated any issue as this concerned only a small minority stake. Regarding filing duties in no-cash transactions, Mr. Hoffman confirmed that filing duties apply even without positive actions to acquire new assets. Compliance with the legal framework requires investors to anticipate changes in circumstances which may result in an addition to their assets. Finally, the landscape of data and antitrust demonstrates the critical importance of data for fintechs and the evolution of financial markets. However, many factors remain uncertain in this field: it may be difficult to assess the productiveness of data or to achieve meaningful predictive correlations. Similarly, algorithms remain mysterious as it is still uncertain whether they will facilitate collusion or enhance competition. Mr. Hoffman identified one key question: is competition for or with the data? When firms compete with data, this data would most likely be seen as a competitive tool when it is a key differentiator and cannot be replicated by other competitors. Under the U.S. perspective, the fact that a merger allows an entity to provide better products or services due to better data, which competitors do not have access to, would most likely not raise competitive concerns as such. It would be considered a positive effect of the merger in principle. Unlike other jurisdictions, U.S. law does not provide for a general obligation to assist competitors, even for a monopolist. It is therefore very unlikely in the U.S. that a firm would be obligated to provide access to its data (as long as it has been gathered in the course of the competitive process), even when this data is necessary to compete in the market. ■

Videos

During the Conference some of the speakers summarized some of their ideas in short videos. These can be watched at Concurrences.com website (Conferences > Antitrust in the Financial Sector: Hot Issues & Global Perspectives).

Jonathan JACOBSON

Partner, Wilson Sonsini Goodrich & Rosati

Jonathan ORSZAG

Senior Managing Director, Compass Lexecon

Richard TAFFET

Partner, Morgan, Lewis & Bockius, New York

Press reports

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HOT HOT HOT TOPICS: THE TIPLINE FOR 3 MAY 2018

BY PALLAVI GUNIGANTI > Reports by Global Competition Review

The mid-Atlantic region of the US seems to have gone directly from early spring to mid-summer, as temperatures jumped from near-freezing lows last weekend to an expected high in the 90s today. We have a story on Bruce Hoffman's latest remarks on the "hot topics" of common ownership and data, plus one senator's letter-writing campaign on mergers, and a judge's scolding of lawyers in one of the biggest class actions in the US.

THE HEADLINES

The acting director of the Federal Trade Commission's bureau of competition is a former debater, and he dusted off the skill of speed speaking at the Concurrences conference yesterday. With an eye toward letting the audience get out into the temperate New York night, Bruce Hoffman raced through two of the more hotly debated topics in antitrust today: the effect investors' common ownership of companies in the same sector has on how much those companies compete; and data as an asset of competitive concern in mergers and monopolisation. Although he spoke in his personal capacity, Hoffman indicated scepticism within the US antitrust agencies about either of these as a theory of harm.

NEWS & NOTES

Also speaking in New York last night, Andrew Finch discussed a subject he said is "close to my heart": the application of antitrust law to the financial sector. Back in 2005 when he was in private practice, Finch said, he'd made a business development suggestion of offering antitrust compliance training to banks, but had been told that banks didn't really have antitrust problems.

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Of course, Finch touted the benefits of compliance, noting that two banks have had fines reduced in light of changes to their compliance programmes. As for credit for programmes that existed at the time a violation occurred, he said, the DOJ has long taken the view that the involvement of employees in illegal conduct creates a rebuttable presumption that the company lacked an effective antitrust programme. But Finch also noted the Antitrust Division's recent roundtable on compliance, and said the agency is "in the process of assessing" that feedback about how best to recognise corporate compliance efforts, including whether and how existing programmes might merit credit. This process is still in an early stage, he emphasised. ■

To read the full report, visit GCR's website https://globalcompetitionreview.com/article/usa/1168935/hot-hot-hot-topics-the-tipline-for-3-may-2018

FTC SCEPTICAL OF COMMON OWNERSHIP AND DATA THEORIES, SAYS HOFFMAN

BY PALLAVI GUNIGANTI > Report by Global Competition Review

Neither investors with small holdings in multiple competing companies nor most conduct or merger scenarios that involve data present clear antitrust concerns to the Federal Trade Commission, the acting director of its bureau of competition has said.

Speaking in his personal capacity last night at a conference in New York, Bruce Hoffman addressed the "hot topics" of common ownership and data.

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He noted that the FTC and the Department of Justice's antitrust division submitted a paper to the Organisation for Economic Cooperation and Development last December on behalf of the US, which highlighted those uncertainties.

The paper distinguished common ownership from cross-ownership, which it defined as a company holding an interest in a competitor. Common ownership of multiple competing companies in a sector by one investor often occurs at institutional investors, particularly index funds that claim to balance investment among all the companies traded on a given stock exchange.

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DATA

Data is another "area of great uncertainty", Hoffman said. He has previously cast doubt on theories – relied on in both the conduct and merger review contexts – that consumers pay with their data for services in a way that makes data equivalent to money.

"We don't really know how valuable or predictive that data is in any given circumstance," he said, as it is used mainly for correlations, and without causality there is no predictive power.

One key question for antitrust is whether companies compete with each other using the data, he said. If so, is the data "really a key differentiator" that competitors can't replace? "If not, then the data itself is not the driving competitive issue," Hoffman said.

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He described the Supreme Court as being unsure about whether essential facilities doctrine exists. He also said that the high court's Trinko ruling has limited the Aspen Skiing precedent to situations where the defendant had a pre-existing course of conduct where it made its assets accessible to a rival.

This view of dominant companies' duties may not be true elsewhere, as indicated by the European Court of Justice's ruling in Intel, Hoffman said. "But in the United States, there are significant limitations on how we would think about dealing with a single firm getting more data, and from that data becoming more competitive."

Hoffman was the closing speaker at a conference sponsored by Concurrences and held at Fordham law school in New York. ■

To read the full report, visit GCR's website https://globalcompetitionreview.com/article/usa/1168931/ftc-sceptical-of-common-ownership-and-data-theories-says-hoffman

JUSTICE DEPT. MULLS CREDIT TO PRICE FIXERS WITH COMPLIANCE PLANS

ELEANOR TYLER > Report by Bloomberg Law

The Justice Department is considering whether it may be time to trim fines or other punishments for cartel participants if those companies had internal anti-price fixing compliance plans during the time of the violation.

Regulators want to improve voluntary antitrust compliance in U.S. companies to prevent violations, but the DOJ to date has never given credit for existing compliance programs in cartel cases. Antitrust lawyers have long argued that because there is no chance to receive leniency for internal compliance plans, top-notch compliance often eludes companies until after they have a violation.

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But Principal Deputy Assistant Attorney General Andrew C. Finch told antitrust lawyers May 2 that the agency is reconsidering its long-standing position barring credit for compliance programs that were in place when a cartel violation is discovered.

"Whether and under what circumstances" to allow a reduction in fine or otherwise credit an existing program is under review, he told a Concurrences Review conference on antitrust issues in the financial sector at Fordham University Law School.

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The DOJ, on rare occasions, has given companies credit for a systematic overhaul of compliance programs after they were caught in a cartel prosecution. But even that policy is relatively new, and only a few companies have managed to meet the high standard for penalty reductions.

The first company to get credit for a complete turnaround following a cartel violation was Barclays PLC in 2015 in connection with the foreign exchange cartel investigation. The DOJ asked the Connecticut federal court in 2016 to reduce Barclays' fine based on its wholehearted embrace of compliance after its participation in the forex cartel came to light. The court followed the DOJ's recommendation in 2017 and imposed a reduced fine. ■

To read the full report, visit Bloomberg Law's website https://www.bna.com/justice-dept-mulls-n57982092630/

Interview

“ I THINK ONE CAN VIEW COMPETITION FOR MERCHANTS TAKING PLACE AT THE SIGNUP STAGE, AND THAT MERCHANTS APPEAR QUITE FREE TO PURSUE OTHER OPTIONS IF THEY DO NOT LIKE THE NDP POLICIES OF AMEX ”

INTERVIEW WITH **JAMES KEYTE** BY **JONATHAN ORSZAG**

> Concurrences Review, May, 2018

Jonathan Orszag (Senior Managing Director, Compass Lexecon, New York) has interviewed James Keyte (Director, Fordham Competition Law Institute, New York) in view of their panel "The Amex Decision: Turning the Tables?"

From an economic perspective, when you assess relevant markets for so-called two-sided markets, should you analyze each side of the market separately or should they be considered jointly?

Not speaking as an economist, or as a practicing lawyer, I would say the predicate questions are 1) what is the product involved, and 2) what are its competitive constraints (under a variety of tests)?

If, in fact, there are distinct suppliers of platform services of some nature (e.g., restaurant reservations, transportation), one would think that there likely may be a unique demand for that service as well as other providers (demand options for customers) that constrain the pricing and quality of that product.

The complicating factor is that, for such services (or platforms), there are two sets of customers (e.g., restaurant goers and restaurants) for whom a service must be provided. In turn, the question is whether marketplace reality is properly captured if the pricing or quality is assessed by looking only at one side of the marketplace.

A fair argument could be made that the “line of commerce” involved in markets involving platform services -where costs, demand, prices, output and quality must involve looking at two (or multiple) sided offerings – should be at the platform level, especially where the consumption of one side is completely intertwined with the other (e.g., use by both restaurants and patrons of a reservation platform), as the most direct constraint is from other platforms.

If AmEx’s non-discrimination provisions (NDPs) caused both price and quality to increase, is that an antitrust violation?

My initial response to this is “price of what and quality of what”? With these type of markets, one can either look at the price and quality of each side of the market or look at it as a whole. If we look at the platform services overall, and price and quality increase, it may be easy for me to conclude that the result of competition is a perfectly procompetitive “quality-adjusted” price.

If, by contrast, one looks only at each side of the “market,” one may get a distorted picture of both quality and price, potentially leading to false positives (perceived antitrust problems) or even false negatives (masking real antitrust issues); the myopic view may also lead to confusing assessments of

foreclosure conduct and its effects. The preliminary answer then is this: there probably should not be an antitrust issue, but that begs the question of whether a two-step analytical framework (at issues in AMEX) may lead to a different result (e.g., where the price effect is on one side and the "quality" is in a separate "market" that is not even relevant according to some views).

From an economic perspective, if output is unchanged, is there a harm to competition?

It depends on which output we are discussing. If the answer is "of everything" - i.e., nothing changed in either side or at the platform level – it is hard to say the antitrust laws come into play (at least this would be the 7th Circuit's traditional approach). It also is a fair point that, in viewing NDPs as non-price vertical restraints, the effect on market-wide output is an appropriate inquiry, if not a threshold one.

Certainly, some on the Supreme Court thought so, while other Justices were more interested in promoting or preserving in-store competition (for consumers at point-of-sale) or for merchants (one-side of the platform), irrespective of overall output – something that appears strained in the context of vertical non-price restraints.

Is it possible for a firm without significant market power to impose a vertical constraint that harms competition?

While not an economist, I would say it "depends" (the classic economists answer!). On the one hand, if the firm imposing the restraint has no market power, customers (even if just on one side) can easily go elsewhere.

And it is a fair question (which came up at argument in AMEX) whether AMEX's share (an "indirect" measure of "market power") was "low" in that regard (26% or so), reflecting the fact that 75% of merchants had chosen not to carry AMEX (including, perhaps because of its NDP requirements).

But, we have seen some courts define market power more generously (e.g., Toys"R"Us) and some courts may be willing to look at "forcing power" itself as direct evidence of "significant market power." For my part, I think one can view competition for merchants taking place at the signup stage, and that merchants appear quite free to pursue other options if they do not like the NDP policies of AMEX. ■

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