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SUPREME COURT HOLDS AMERICAN EXPRESS'S ANTISTEERING RULES DON'T VIOLATE ANTITRUST LAWS

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On June 25, 2018 the Supreme Court ruled, in a 5-4 decision, that American Express's antisteering rules do not violate federal antitrust laws. In reaching this conclusion the Court determined that, for two-sided markets like credit cards, both sides of the platform must be analyzed when determining whether a practice has an anticompetitive effect. Because Ohio and the other states challenging American Express's antisteering rules had focused only on the price increase on the merchant side of the two-sided market, and ignored the impact on cardholders, they did not carry their burden of showing that the antisteering rules resulted in anticompetitive pricing, *i.e.*, that the antisteering rules had an adverse effect on the market as a whole. Specifically, the plaintiffs had not accounted for the consumer side of the market, which the Court found must be considered in determining the competitive impact of American Express's antisteering rules.

At issue in the case were American Express's antisteering rules: contractual terms that prohibit merchants who accept American Express from attempting to persuade consumers to use a non-American Express credit card. The American Express antisteering rules did not prevent merchants from steering consumers toward debit cards, checks, or cash.

Ultimately, the two rules to be drawn from the case are (1) certain two-sided markets must be examined holistically to determine whether conduct produces an anticompetitive effect and (2) evidence of a price increase on one side of such two-sided markets, without more, is insufficient to show an anticompetitive impact.

The Court's ruling sought to place the focus for analysis on what it categorized as "market realities" rather than "formalistic distinctions" by focusing on the combined credit card transaction market rather than treating the market for merchant services as distinct from the market for cardholder services.

For example, in response to the merchants' arguments about fees, costs, and rules, the Court stated that "plaintiffs' argument about merchant fees wrongly focuses on only one side of the two-sided credit-card market . . . the credit-card market must be defined to include both merchants and cardholders. Focusing on merchant fees alone misses the mark because the product that credit

card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone."

The dissent's primary arguments were aimed at the majority's determination that two-sided transaction platforms should be analyzed as a whole. The dissent found no basis in existing antitrust precedent for such a market definition and argued that each side of the market should be examined independently since the services offered to merchants and cardholder could not be substituted for one another. In other words, the dissent argued that there were two complementary markets not a single two-sided market.

The Court's ruling does not address other credit card networks' rules. Visa and MasterCard agreed to drop their antisteering rules as part of a settlement with the Department of Justice in 2011 at the outset of this litigation. As a result, some credit card networks are permitted to enforce antisteering rules while others are not.

For questions or more information, contact the authors, Joshua James, Stanton Koppel, or Philip Bartz, or any member of our firm's Retail, Antitrust and Competition or Financial Technology teams.

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