

# OVERCOMING *AMEX*: MULTI-SIDED PLATFORMS AND ANTITRUST

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# The *Amex* Problem

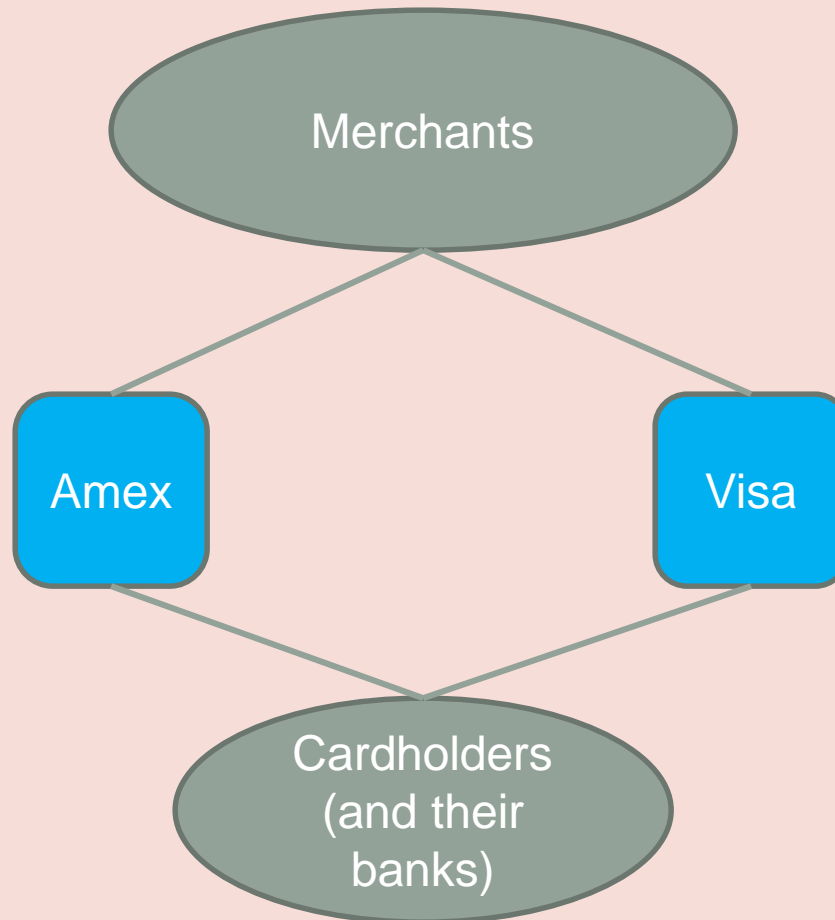
*United States v. American Express Co.*, 838 F.3d 179 (2d Cir. 2016), *cert. granted*, *Ohio v. American Express Co.*, 2017 WL 2444673 (U.S. Oct. 16, 2017) (No. 16-1454)

- Appellate decision makes “false negatives” more likely
  - failure to find an antitrust violation when multi-sided platforms exercise market power
- The Supreme Court has the opportunity to fix the problem

# Platforms: Institutions and Economics

- Platforms enable or facilitate a direct interaction between the users on its sides
  - Often allowing the platform to take advantage of network effects
- Platforms that connect vendors and shoppers
  - supermarkets, shopping malls, Amazon
- Platforms that connect advertisers and consumers
  - newspapers, cable channels, Google, Facebook
- Platforms that connect merchants and cardholders (and their banks)
  - payment systems

# Payment System Platforms Connect Merchants and Cardholders



# Platforms: Institutions and Economics con'td

- Pricing
  - Platforms may set a high price (high margin) to end users on one side and a low price to the other end users
    - Depends on price and participation elasticities
- Competition
  - Competition among platforms (or potential entry) may keep a platform as a whole from earning supracompetitive profits, even if prices (margins) are high on one side
- Harm to platform competition
  - When rival platforms don't compete aggressively, or a platform (or colluding group) prevents price erosion by excluding rivals (or entrants)
  - Prices on one or both sides will be higher than with competition and the platform will earn supracompetitive profits

# Amex (2d Cir. 2016): Competitive Effects

- District Court found that Amex's "nondiscrimination" provisions harmed competition
  - Prevented payment systems platforms from competing by discounting fees to merchants
  - By stopping merchants from steering consumers
  - Fees to both merchants and cardholders were higher industry-wide (not just Amex's fees)
- Appellate panel described a theoretical benign alternative
  - Higher fees to merchants could intensify competition for cardholders
  - Leading to (fully) offsetting reductions in fees to cardholders
- Yet the District court found that *both* merchants and cardholders paid more

# *Amex* (2d Cir. 2016): Method of Analysis

- District Court
  - Analyzed nondiscrimination provisions in separate (yet interrelated) product markets
    - network services (used by merchants)
    - general service cards (used by cardholders)
  - Found competition was harmed in network services, with adverse effects in both markets
  - Rejected Amex's proposed procompetitive justifications
- 2<sup>nd</sup> Circuit
  - District court should have defined a single market encompassing the services provided to both cardholders and merchants
  - Hence the district court should have computed the market price as a net price
    - Merchant fee less reward paid to card user (potential offsetting benefit to cardholders)

# Problems with the Appellate Holding on Market Definition

- Unnecessary to define a single market in order to account for effects on both sides of the platform
- Single market approach fosters analytical confusion in market definition
  - Network services and general service cards are demand complements not substitutes
  - The implications of feedback effects between the platform sides for a platform's incentive to raise price can and should be addressed in competitive effects analysis

# Problems with the Appellate Holding on Market Definition, cont'd

- Single net price requirement fosters analytical confusion and error in competitive effects analysis
  - Defining a single net price led the 2<sup>nd</sup> Circuit to make analytical errors
    - Described plaintiff's initial burden in terms of *Amex's* net price, not the *market* price
    - Rejected the district court's finding that higher prices on one side were not fully passed through to the other side, apparently as a matter of law
  - Confusing or impossible to analyze competitive effects with a single net price in many other antitrust cases involving platforms
    - *Amex's* unusual facts: each transaction involves both sides and neither group of end users has practical non-platform alternatives

# Problems with the Appellate Holding on Market Definition, cont'd

- Appellate approach makes false negatives (failure to identify harmful conduct) more likely
  - Focus on a single net price subverts or prejudices the rule of reason's burden-shifting framework to favor defendants
  - Focus on Amex's net price (as opposed to the market price) improperly excludes adverse effects on merchants and cardholders using rival cards
- Antitrust law's convergence toward a common burden-shifting approach under Sherman Act §1, Sherman Act §2, and Clayton Act §7 exacerbates the potential threat

# Conclusion

- The District Court properly found that Amex's nondiscrimination provisions harmed competition
- The 2<sup>nd</sup> Circuit's analytical approach makes false negatives more likely
  - On the *Amex* facts and in other antitrust cases involving platform competition
- The Supreme Court should reverse the 2<sup>nd</sup> Circuit and affirm the district court