

CORPORATE

Q&A

Two sides to one story

The US Supreme Court's *Ohio v American Express* decision of June 2018 analysed the economics of the two-sided market for credit card transactions

Cravath Swaine & Moore represented American Express in achieving a Supreme Court victory in a lawsuit originally brought by the Department of Justice (DoJ) and several state attorneys general. The case challenged provisions in Amex's merchant agreements that prohibit merchants who accept Amex cards from discriminating against Amex at the point of sale. While MasterCard and Visa settled similar claims, Cravath tried the case for Amex in New York federal court. Although the trial court ruled adversely, finding that the provisions raised prices paid by merchants, in 2016 a panel of the Second Circuit unanimously reversed the decision and directed judgment in favour of Amex, holding that the relevant market for antitrust analysis included both merchants and cardholders.

Although the DoJ and several states initially chose not to seek *certiorari*, other states including Ohio did, which brought the case to the Supreme Court. In a 5-4 decision in June 2018, the Supreme Court affirmed the Second Circuit's decision in favour of Amex. In an opinion that defines how antitrust law applies to two-sided markets, the majority ruled that it was necessary to analyse the two-sided market for credit card transactions as a whole. In that market, the government's case failed: 'Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit card transactions.'

IFLR talked to Cravath partners Peter Barbur and Kevin Orsini, who advised American Express, to get their view on the case.

What does this case mean for the future of two-sided market antitrust cases: will we see other cases like this or is this likely to set a precedent?

We believe the Supreme Court's decision is one of the most significant government antitrust enforcement actions in recent history. We were

able to guide the Court to clarify the law concerning market definition based on standard economic principles for two-sided platforms, which establishes an important precedent because two-sided platforms are increasingly prevalent and important in today's business environment.

Analysis of two-sided markets has been developing for years in academia, but there had been no clear explanation of how the economic analysis translated in any meaningful way to the law. Few prior cases considered the question of market definition for platforms that connect different groups of consumers, and none had confronted the question squarely and with the benefit of recent advances in the economic literature. We developed our approach to two-sided markets through a long, collaborative process – working with Amex to become intimately familiar with their business, delving into the economics of the two-sided platform, and then bringing our analysis to bear in a practical way in the litigation. If the amicus briefs filed in this case are any indication, there are a lot of industries that are interested in the Supreme Court's decision, and we expect to see many cases over the coming years that apply this new precedent.

From a legal perspective, were there any particularly innovative ways in which you went about fighting this case?

As alluded to above, one decision we made early in the case was to rely on a concept – the economics of two-sided markets – that had been well-established in economic literature but was not a concept commonly used in the courtroom. Because the concept had not yet been fully explored in court, there was a lack of clear legal precedent on the issue and we wanted to take the extensive literature and translate it for the court. It was important to both Amex and us that we use economic theory to prove this case; and here we had Nobel prize winning economic literature to

bolster our case. The prominence with which this literature features in the Supreme Court's decision affirms this choice.

For what reason did the court recognise the importance of two-sided markets in the context of vertical restraints?

Justice Thomas in his opinion pointed to the fact that the two sides of Amex's platform, the cardholder side and the merchant side, are inextricably linked and intertwined - there can be no transaction without both sides of the platform agreeing to and entering into a transaction simultaneously. As Mr. Chesler summarised at oral argument: 'You cannot have a credit card transaction unless a consumer and a merchant come together.' Recognising that the product here is a transaction drives the analysis of two-sided competition.

The Court also recognised the importance of evaluating indirect network effects at work in two-sided markets where the value of the platform to one group depends on how many members of the other group participate creating a feedback loop of demand.

What aspects of this case were most problematic, and what parts gave the most satisfaction once they had been overcome?

The most difficult aspect of the case was the length of the journey – from the government's initial investigation that started almost a decade ago, to the filing of the case in 2010, to the trial in 2014 followed by an adverse district court decision that was stayed ultimately overturned by the Second Circuit, to the final result in the Supreme Court this June.

Given the successful outcome, what were the benefits for Amex of not settling shortly after the government filed its suit?

The Court's decision was a major victory for consumers and American Express. The long road to victory vindicated Amex's differentiated product business model and allowed Amex to continue to deliver innovative products and services to both consumers and merchants.

How much of an impact did the market-friendly nature of the current administration have on the outcome of the case?

Looking at the government's track record in this case does not suggest the current administration impacted the Supreme Court's decision. It is important to remember that while the DoJ initially opposed *certiorari* in this case, it did so because there was not a circuit split and thus there was no danger of inconsistent decisions. When *certiorari* was granted, the DoJ joined the petitioner states in opposition to Amex and took that position in both its brief and at the argument. Further, although the Supreme Court was divided five to four, we don't view the outcome as necessarily political. This was a decision that was based on the facts of this case.



Peter Barbur
Partner
Cravath Swaine & Moore
(New York)



Kevin Orsini
Partner
Cravath Swaine & Moore
(New York)