

Two-Sided Platforms

A Practical Guidance® Practice Note by
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This practice note summarizes the latest developments in antitrust law relating to two-sided platforms. Two-sided platforms are products or services that connect two different groups of consumers across one platform and feature “indirect network effects” (explained below) that link the two sides of the platform together. The Supreme Court has recently addressed in *Ohio v. American Express* the issue of how to apply traditional antitrust principles in cases involving two-sided platforms. This practice note describes the Supreme Court’s decision, the state of antitrust law following, and other implications going forward. Throughout, this note lays out tips for counsel to identify two-sided platforms and understand how fundamental principles of antitrust law now apply to these firms.

For a broader background on market definition, see the practice note [Market Definition](#).

Background on Two-Sided Platforms

The term “two-sided platform” is described in cases by most consumers have experience with such platforms on a daily basis. Two-sided platforms have two essential qualities. First, they must connect two different groups of customers to each other across one platform, and the consumers benefit from interacting through the platform. A few common examples are newspapers (connecting readers to advertisers), credit card companies (connecting merchants to cardholders), online retail websites like eBay and Amazon Marketplace (connecting online sellers to buyers), and applications like Uber and Lyft (connecting drivers to riders).

The second essential quality of a two-sided platform is the existence of indirect network effects. Indirect network effects means that customers on one side of the platform obtain value from the customers on the other side. In other words, increased volume from one side of the platform presents benefits to the other side of the platform. Each side of the platform is inherently tied to the other to the degree that effects are felt across the platform—that is, to the network as a whole—so that if the platform owner were to price one side of the platform too high, the platform as a whole is less attractive. Here are examples of how indirect network effects work in an everyday context, using a few of the examples listed above:

- **Credit cards:** the more merchants that opt into using a particular credit card, the more value that card has to the cardholders. Additionally, the more cardholders sign

up for a particular credit card, the greater value that card has for merchants.

- **eBay:** the more sellers that list products on the website, the more value the website has for buyers looking to purchase products. Similarly, the more buyers that visit the website, the more value the website has for sellers listing their products.
- **Uber:** an increase in the number of riders that download the Uber app generates more value for each driver because there are more business opportunities for the drivers. Similarly, an increase in the number of drivers generates value for the riders, as riders have shorter wait times and more available locations at which they can use the app to find a driver.

Various two-sided platforms exhibit degrees of indirect network effects. Even though newspapers are two-sided markets that connect a reader with advertisers, newspaper readers will still likely read the newspaper regardless of how many advertisers there are. In contrast, Uber riders would likely not use the ride-share app if there was an extremely limited number of drivers that utilize the Uber app to provide rides. While all two-sided platforms exhibit indirect network effects, there is variation in the degree of the indirect network effects. While the significance of indirect network effects has been addressed by the Supreme Court in *Amex*, there remain unanswered questions regarding the degree to which indirect network effects will matter for deciding individual cases.

Recent Judicial Treatment of Two-Sided Platforms in Antitrust Law

The Supreme Court's decision in *Ohio v. American Express* and lower court decisions following *Amex* are the most recent significant treatment of two-sided markets.

Supreme Court's Treatment of Two-Sided Platforms: *Ohio v. American Express*

The lawsuit brought by the Department of Justice and state attorneys general alleged that American Express and two other credit card companies for violating Section 1 of the Sherman Act. The government's theory of harm was that "non-discrimination provisions" (NDPs) in contracts between American Express and participants merchants was anticompetitive in that it prohibited merchants from steering customers to use another card, like Visa or MasterCard, when making a purchase.

The district court sided with the government, finding that the NDPs caused anticompetitive effects on interbrand (intercard) competition. *United States v. American Express Co.*, 88 F. Supp. 3d 143, 151-152 (E.D.N.Y. 2015). On appeal, the Second Circuit reversed the district court, finding that the government failed to meet their burden to show harm in a properly defined market. Specifically, the Second Circuit found that the government failed to show that the NDPs made "all American Express consumers on both sides of the platform...worse off overall." *United States v. American Express Co.*, 838 F.3d 179, 205 (2d Cir. 2016). In other words, the Second Circuit noted that the government failed in their complaint by alleging harm to only one side of the market and ignoring the totality of effects to consumers on both sides.

The Supreme Court affirmed the Second Circuit's decision. On the issue of defining a relevant market, the Court agreed with the Second Circuit that the product was the **single, simultaneous transaction** between the cardholder and the merchant. As a result, the Court held that both sides of the platform-both the cardholders and the merchants-must be viewed as a whole when defining a relevant market. *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2287 (2018).

- **Practice Tip.** Defining a market as two-sided is central to the inquiry because if the two-sided market is characterized as having significant indirect network effects, a plaintiff challenging the conduct cannot succeed on its claim alleging anticompetitive conduct without taking into account effects on both sides of the platform.

Furthermore, the Court distinguished the two-sided platform in *Amex* from other two-sided platforms with "minor" indirect network effects. The Court noted that for antitrust purposes, market definition should properly be restricted to one side of the market. The Court's example: newspapers exhibit minor indirect network effects because readers are largely indifferent to the amount of advertising that a newspaper contains.

The Supreme Court's competitive effects analysis followed their market definition-that is, the failure to properly define the market to include both interconnected sides of the platform meant the alleged competitive harm failed under antitrust law. As the Court noted, "due to the indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand." *Ohio v. American Express Co.*, 138 S. Ct. at 2285. Therefore, a price increase on just one side does not suggest an anticompetitive effect without evidence of an

increase of the overall cost of the platform to all customer groups considered together. Specifically, the Court agreed with the Second Circuit in finding that the government failed to prove that the NDPs either (1) increased the price of transactions above a competitive level; or (2) stifled competition in the credit card market.

- No increased price: The government's effects analysis was focused on increased merchant fees, but ignored the effect on cardholders. The key failure was the inability to show that price of transaction was higher than one would expect in a competitive market.
 - Amex, Visa, MasterCard, and Discover run structurally different businesses, and variations on how they allocate fees between merchants and cardholders is not evidence of anticompetitive conduct.
 - Visa and MasterCard's merchant fees increased at locations where Amex was not accepted, suggesting that rising merchant fees were not caused by Amex's NDPs.

- There was a 30% increase in credit card transactions from 2008-2013, which undermined the argument that output was reduced or supracompetitive prices were charged.

- No stifling of competition: Court looked at increased inter-brand competition since NDPs were implemented, including new premium card categories, higher rewards, and availability of credit cards to low-income customers.
- **Practice tip.** Unlike other Sherman 1 antitrust cases, the Court looked at the strength of the pricing constraints rather than the strength of substitute products. This is a central take away from the case - the Court recognized that the one side of a platform may competitively constrain the other side of a platform in the same manner as a substitute product would in a non-platform case, and therefore should be part of the market definition analysis.

Subsequent Judicial Treatment of Amex

	Cases affirming principles of Amex	
Case and Citation	Key Amex principle addressed	Facts, Reasoning, and Holding/Outcome
<i>US Airways, Inc. v. Sabre Holdings Corp.</i> , 938 F.3d 43 (2nd Cir. 2019)	Antitrust plaintiffs must allege harm to both sides of a two-sided platform, where there is a single, simultaneous transaction AND indirect network effects that affect pricing.	<p>Sabre's global distribution system ("GDS") platform connected airlines to travel agencies. The GDS creates an airline's initial ticket offer for the flight, aggregates offers from multiple airlines for travel agents to compare options, delivers the offer from the airlines to travel agents, and then processes the resulting booking.</p> <p>In 2011, US Airways sued Sabre for a violation of the Sherman Act, alleging that Sabre monopolized the distribution of system services to Sabre subscribers. In 2016, a jury found that the relevant market was one-sided and returned a verdict in favor of US Airways for \$15 million.</p> <p>In 2019, after <i>Amex</i>, the Second Circuit overturned the jury verdict and remanded the case to district court. The Second Circuit held that Sabre's GDS is a two-sided platform, and therefore the relevant antitrust market must as a matter of law include both sides of the platform when evaluating competitive effects.</p>

<p><i>SC Innovations, Inc. v. Uber Technologies, Inc.</i>, 434 F. Supp. 3d 782 (N.D. Cal. Jan. 21, 2020)</p>	<p>Antitrust plaintiffs must allege harm to both sides of a two-sided platform, where there is a single, simultaneous transaction AND indirect network effects that affect pricing.</p>	<p>Plaintiffs alleged that Uber was a two-sided platform; their claim defined the relevant market as entire market for ride-sharing services and alleged that anticompetitive effects of Uber's monopoly power harmed both sides of the platform.</p> <p>At motion to dismiss, the district court held that this was a correctly-pleaded antitrust allegation against a two-sided platform.</p>
<p><i>In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.</i>, 2018 U.S. Dist. LEXIS 153318 (N.D. Cal. Sept. 3, 2018)</p>	<p>Courts have limited the application of <i>Amex</i> to two-sided markets featuring both the single, simultaneous transaction AND indirect network effects.</p>	<p>Defendant universities argued that the position that colleges and universities that engage in intercollegiate athletics operate as multisided platform connecting student-athletes to non-student athletes, alumni, coaches and athletic staff, faculty, and the university community.</p> <p>The district court rejected the arguments because “there is no simultaneous interaction or proportional consumption through a platform by different market participants of what essentially constitutes ‘only one product.’”</p> <p>Practice Tip. Here, the district court held that the principles of <i>Amex</i> are limited to two-sided platforms that facilitate the same “simultaneous interaction” as found in <i>Amex</i>.</p>
<p><i>Steward Health Care System LLC et al. v. Blue Cross & Blue Shield of Rhode Island</i>, Case No. 13-cv-405 (D.R.I.)</p>	<p>Antitrust plaintiffs must allege harm to both sides of a two-sided platform, where there is a single, simultaneous transaction AND indirect network effects that affect pricing.</p>	<p>Defendant Blue Cross Blue Shield of Rhode Island filed a motion for reconsideration asking the district court to reverse its denial of summary judgment or certify an immediate appeal to the First Circuit. In their motion, BCBS Rhode Island argued that the district court erred in failing to consider <i>Amex</i> because the complaint alleged two separate subscriber and provider markets, while there is only one market: healthcare-financing (two-sided market).</p> <p>The defendant argued that the product is the transaction facilitated by health plans between subscribers and providers, and there are network effects present given that subscriber demand is a function of providers in network and provider demand is a function of subscriber volume.</p> <p>The motion was denied as moot following BCBS Rhode Island's stipulated dismissal, but it's interesting to note that the transactions facilitated by health insurers are distinguishable from <i>Amex</i> and <i>Uber</i> in two ways:</p> <ul style="list-style-type: none"> • The indirect network effects are not as economically obvious as those in <i>Amex</i> and <i>Uber</i>. • The transaction does not exhibit the single, simultaneous nature that ties the two groups of consumers together like in <i>Amex</i>.

Implications of Amex and Other Cases

Any decision by the Supreme Court has implications on the area of law it addresses, but the *Amex* decision profoundly affects antitrust law, which is grounded in common law principles. For context, there are only two federal antitrust statutes prohibiting conduct in restraint of trade and the current state of antitrust law has been formed primarily by case law.

The holding from *Amex* is that for antitrust actions involving two-sided platforms where there is single, simultaneous transaction linking consumers from both sides AND there are clear indirect network effects linking both sides of the platform, both sides of the platform should be considered one relevant market for purposes of market definition and competitive effects analysis.

- **Practice Tip.** Plaintiffs alleging such actions must allege a relevant market to include both sides of the platform, and the alleged competitive harm must consider relative harm to consumers in the network as whole.

Amex and the subsequent cases have provided additional clarity as to the qualifications of “single, simultaneous transaction” and “pronounced indirect network effects.”

- As for single, simultaneous transaction: the Supreme Court recognized in *Amex* that two-sided platforms like credit-card networks facilitate a “single, simultaneous” transaction that links the consumers on the two sides of the platform. District courts have followed this requirement: in *Uber*, the district court held that plaintiffs’ complaint sufficiently alleged a two-sided platform because, among other reasons, the transaction between Uber drivers and riders was the type of single, simultaneous transaction that linked the consumers on two sides of the platform. In contrast, the district court in *NCAA* rejected the plaintiffs’ complaint because “there is no simultaneous interaction or proportional consumption through a platform by different market participants of what essentially constitutes ‘only one product.’” *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.*, 2018 U.S. Dist. LEXIS 153318, *28 (N.D. Cal. Sept. 3, 2018). The key takeaway: two-sided platforms do not receive the treatment under *Amex* unless they facilitate that single, simultaneous transaction—that one, singular product.
- As to indirect network effects: the Supreme Court’s decision in *Amex* laid down a marker for what constitutes the “pronounced indirect network effects.” There, the Court noted that the value of the platform

dramatically depended on the number of members of the other side. Cardholders placed a higher value on a credit card accepted by more merchants; likewise, merchants placed a higher value on partnering with a credit card used by more cardholders. As a result, any alleged anticompetitive effect must occur to consumers on both sides of the market—price increases to just one side of the market must be balanced with benefits to the other. The Second Circuit followed this holding in *Sabre*, where the Court held that Sabre’s transaction platform demonstrated similar indirect network effects. These cases provide markers for what constitutes indirect network effects that sufficiently link both sides of the platform.

The *Amex* decision has also had an impact on how courts apply antitrust law to prospective mergers. Even though the mergers are governed under the Clayton Act, not the Sherman Act, both statutes share common analytical principles with respect to relevant market and competitive harm.

- In typical merger challenges, the evaluation focuses on the extent to which merging parties are competitors. Similarly, the evaluation of the any potential anticompetitive effects of a merger focuses on the effect of competition to markets in which both parties compete.

In a recent merger challenge, the Department of Justice challenged Sabre Corp.’s acquisition of Farelogix Inc. The district court reviewing the merger challenge held that the two companies are not competitors as a matter of law because Sabre’s product is a two-sided platform while Farelogix’s is one-sided. *United States v. Sabre Corp.*, 2020 U.S. Dist. LEXIS 64637, at *97-8 (D. Del. April 7, 2020). This opinion was the first application of *Amex* to a merger case, and is particularly interesting in its conclusion that two-sided platforms cannot as a matter of law compete with one-sided platforms. For more background on Sabre/Farelogix, see [Federal Merger Enforcement Tracker](#) and search (ctrl+F) for Sabre or Farelogix.

- **Practice Tip.** The district court’s decision was ultimately not appealed because the parties dropped the transaction so this remains a standalone decision, but it is nevertheless useful to note that analysis of two-sided platforms played a dispositive role in a merger challenge.

Remaining Ambiguity Following Amex

While *Amex* explains the reasoning of why certain two-sided platforms require specific treatment under antitrust

law, there remains some ambiguity as to **which** two-sided platforms qualify for the *Amex* treatment.

For example, there is ambiguity relating to the degree of indirect network effects that must be present within the two-sided platform that it would receive the *Amex* treatment. As noted previously, the Supreme Court's *Amex* decision and commentary, and the Second Circuit's *Sabre* decision both put down markers for what types of platforms demonstrate sufficient indirect network effects (credit card companies, airline-to-travel agent transactions) and those that do not (newspapers).

However, it's unclear how the law will treat two-sided platforms whose indirect network effects may fall in between the "pronounced" effects of credit card networks and the "minor" effects of newspapers.

- **Practice Tip.** There will likely be follow-up litigation involving two-sided platforms whose indirect network effects fall somewhere in between "pronounced" and "minor." Keeping updated with these subsequent actions will better inform how antitrust law applies to two-sided platforms with varying degrees of indirect network effects.

There has also been criticism of the *Amex* decision in that it makes it more difficult for antitrust plaintiffs to meet their initial burden of showing anticompetitive effects. In an antitrust lawsuit involving one-sided platforms, plaintiffs must define a relevant market and satisfy the pleading standard if they plausibly allege anticompetitive effects (usually price increases) to that one market. The defendant in that action can then raise a defense that the price increases are not anticompetitive because of certain positive results or efficiencies that are achieved in spite of the price increases.

Following *Amex*, plaintiffs in an antitrust action involving a two-sided platform that allege harm to one side of the network must take on this extra step of evaluating the positive results (which are often seen on the other side of the market given the interconnectedness of the two sides). Critics of *Amex* note that this amounts to a heightened pleading standard for antitrust plaintiffs in certain actions.

- **Practice Tip.** As noted by the district court's decision in *Uber*, plaintiffs bringing an action against a two-sided platform must consider the anticompetitive effects to both sides of the network as a whole in their pleadings to survive a motion to dismiss.

Tips for Counseling Clients

You should keep the following tips in mind as you counsel clients that may be or operate a two-sided platform that may face an antitrust claim as a defendant, clients that may have an antitrust claim involving a two-sided platform as a plaintiff, and clients that may be or operate a two-sided platform engaged in a prospective merger or joint venture proceeding.

- Understand the definition of a two-sided platform.
 - Two-sided platforms connect two separate groups of consumers across one platform and demonstrate indirect network effects in which each group obtains value from the presence of consumers of the other side.
- *Amex* establishes benchmarks for certain two-sided platforms for which antitrust plaintiffs alleging harm must define a relevant market to include both sides of the platform.
 - These two-sided platforms must facilitate a single, simultaneous transaction between consumers from both sides of the platform.
 - Additionally, the two-sided platforms must demonstrate "pronounced" network effects where the two sides are inextricably linked similar to the relationship between credit cardholders and merchants.
- Plaintiffs seeking to bring an antitrust claim against certain two-sided platforms must allege harm to consumers on both sides of the platform, not just one.
 - For antitrust actions involving two-sided platforms featuring (1) single, simultaneous transaction and (2) pronounced indirect network effects, plaintiffs cannot bring an antitrust claim alleging only anticompetitive harm (price increases) to one side of the platform. The allegation of competitive harm must take both sides of the platform into effect.
- There remain areas of ambiguity relating to the degree of indirect network effects.
 - While *Amex* and *NCAA GIA* set down markers for the indirect network effects that must be present for antitrust analysis to require market definition and competitive effects of both markets, there remain many types of two-sided platforms featuring indirect network effects that fall in between those two markers. There is a level of ambiguity present for

those types of platforms, and counsel should advise clients that of that uncertainty (and the likelihood of appeal for such antitrust actions).

- Amex may affect merger analysis if one or both of the merging parties is a two-sided platform.
 - Parties to a merger may cite to the *Sabre/Farelogix* decision to argue that they are not competitors under the law if one party is a two-sided platform as defined under *Amex*. However, that opinion is a standalone decision that was not reviewed by an appellate court, so complete reliance on that decision is not advised.

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Joe is a seasoned antitrust attorney and Co-chair of the firm's Antitrust Practice. He has nearly 30 years of experience that spans roles in private practice, as a general counsel, and with federal antitrust enforcement agencies. He focuses his practice on providing strategic transactional advice and representing clients in government investigations and merger reviews. Joe primarily works with clients in the health care industry.

His work includes representing health care companies before the FTC and DOJ in merger reviews, counseling them on the antitrust aspects of transactions, and advising on risks associated with payer-provider contracting. He also advises pharmaceutical distributors, hospitals, health plans, and physician groups on a broad range of compliance issues, including information sharing, contractual arrangements, and interactions with competitors.

Prior to joining Mintz, Joe was a partner at a Washington, DC-based international law firm, where he was on the steering committee of the firm's Antitrust Group as well as a member of the firm's Health Care Group.

Before returning to private practice, Joe was the general counsel of a national trade association for the health insurance industry. Along with supervising a team of attorneys, he served as the association's policy lead on health care competition issues, regularly testifying before Congress, advocating for positions at FTC policy roundtables, and participating in health care symposia.

Earlier in his career, Joe served as Assistant Chief of the Health Care and Consumer Products Section of the US Department of Justice's Antitrust Division, a lead attorney on DOJ antitrust investigations in multiple industries, and a trial attorney in the Federal Trade Commission's Bureau of Competition.

Joe is a sought-after speaker at trade association events, including the American Health Lawyers Association (AHLA) and America's Health Insurance Plans (AHIP), as well as at the American Conference Institute, American Bar Association Antitrust Law Section, government agencies, and private organizations. He is also frequently quoted in national legal and business publications, including Bloomberg periodicals, Corporate Counsel, Global Competition Review, and Law360.

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Tinny's practice encompasses a variety of antitrust and competition matters including antitrust compliance, merger review, civil litigation, and government investigations. Tinny also assists clients with regulatory reviews by the Committee on Foreign Investment in the United States (CFIUS) assessing the national security implications of foreign investment transactions.

Prior to joining Mintz, Tinny was an associate in the antitrust practice of a nationally recognized class action and litigation law firm in New York, where he represented clients in litigation involving price-fixing, benchmark and commodities manipulation, pay-for-delay, market allocation, and unlawful monopolization.

He is a member of the ABA Antitrust Section's Health Care & Pharmaceutical Committee and serves as an editor for the committee's *Health Care Antitrust Week-in-Review*.

During law school, Tinny was a research assistant at the Global Antitrust Institute in Arlington, Virginia and served as the associate articles editor for the *George Mason Law Review*. Tinny also attended "Competition Law in Brazil: Challenges and Perspectives" in Brasilia, Brazil where he studied Brazilian competition law and policy.

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