NOT SO FAST, YOU STILL HAVE TO DEFINE THE RELEVANT MARKET: THE LESS DEBATED YET VITAL TEACHING OF *OHIO v. AMERICAN EXPRESS*

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I. INTRODUCTION

Most discussions of *Ohio v. America Express*[2] revolve around multi-sided platforms or two-sided markets. This article will not. Here, we will focus on the Court's ruling that plaintiffs cannot avoid defining the relevant market in challenging vertical restraints under Section 1 of the Sherman Act. In this part of the decision — holding that courts must first define the relevant market before assessing evidence of anticompetitive effects in rule-of-reason cases — the majority resisted efforts to relax the market definition requirement, which has been suggested in various contexts in recent years.[3] Instead, the majority reaffirmed the preeminence of defining the relevant market, which has been a fundamental feature of antitrust jurisprudence for nearly a century.[4]

In *American Express*, the U.S. Supreme Court ruled that courts must, from the outset, consider customers on both sides of credit card transactions — merchants and cardholders — when evaluating antitrust claims. In so doing, the Court affirmed the U.S. Court of Appeals for the Second Circuit's rejection of claims that anti-steering provisions in American Express's merchant agreements violated Section 1 of the Sherman Act.[5] The court stated the product market at issue was transaction services for merchants and cardholders, not merchant services, and that assessing whether the anti-steering rules are anticompetitive required appraising their effects on both sides of the platform.[6]

In many antitrust cases, there is not much debate about whether one is required to define the relevant product and geographic market before turning to analyze effects on competition. Litigated merger and monopolization cases almost always involve ample exploration of the relevant market. However, some advocates, scholars, and decisions have suggested that one can dispense with defining the relevant market whenever the plaintiff can demonstrate actual anticompetitive effects, such as higher prices. The dissent and the plaintiffs argued that this was just such a case and that it was not necessary to define the market or debate whether it is one-sided or two-sided. The majority in *American Express* rejected the assertion that, as a general matter, defining the relevant market is required only when there is a lack of evidence of actual competitive harm (often in the form of higher prices or reduced output), ruling that "we must first define the relevant market."[7]

2 *Ohio v. American Express Co.*, 585 U.S. __, 138 S. Ct. 2274 (2018).

3 See, e.g. Louis Kaplow, Why (Ever) Define Markets?, 124 Harv. L. Rev. 437 (2010).

4 See, e.g. Gregory J. Werden, The History of Antitrust Market Delineation, 76 Marquette L. Rev. 123 (1992). See also Jonathan B. Baker, Market Definition: An Analytical Overview, 74 Antitrust L.J. 129, 129 (2007) ("Throughout the history of U.S. antitrust litigation, the outcome of more cases has surely turned on market definition than on any other substantive issue.").

5 138 S. Ct. 2274 (2018).

6 *Id.* at __.

7 138 S. Ct. at 2285.

II. JUSTICE BREYER'S VIEW THAT MARKET DEFINITION WAS UNNECESSARY

The position rejected by the majority is best articulated by the dissent. Justice Breyer argued in his dissent that there was no need to define the relevant market and debate two-sided markets in this case because the plaintiffs showed actual anticompetitive effects in the form of price hikes by American Express and Discover's inability to grow its business with lower prices. Breyer explained that defining a relevant market and estimating market shares is a proxy for evidence of market power, which can be demonstrated directly with proof of anticompetitive effects. He was persuaded that American Express's price increases constituted "proof of actual adverse effects on competition" that would have been sufficient for the district court to find that American Express's nondiscrimination provisions preventing merchants from steering customers to other cards violated the Sherman Act.[8]

Justice Breyer relied principally on the Supreme Court's 1986 opinion in *FTC v. Indiana Federation of Dentists*[9] for the proposition that the ultimate question for courts to address in a rule-of-reason case is whether the challenged restraint "had, or is likely to have, anticompetitive effects"[10] and that issues surrounding relevant market definition, market shares and market power, are merely means to approximate an answer to that ultimate question – whether there are actual or likely anticompetitive effects:

> Since the purpose [in a Sherman Act § 1 case] of the inquiries into ... market power is [simply] to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'[11]

Accordingly, the dissent concluded, "a discussion of market definition was legally unnecessary,"[12] and, as a result, there was no need to decide whether the nondiscrimination provisions should be evaluated in a one-sided market (merchants only) or a two-sided market (including merchants and cardholders).

As the leading precedent for Breyer's argument, *Indiana Federation of Dentists* warrants a short detour: In 1976, a group of dentists in Indiana formed the Indiana Federation of Dentists and collectively refused to comply with requests from dental insurance companies for patient X-rays. Dental insurers said they used X-rays to determine the cheapest adequate treatment for patients. But the federation viewed this practice as a nascent threat to the financial success of dentists and was concerned that providing X-rays might lead the insurers to make inaccurate determinations of the proper level of care.[13] In 1978, the FTC brought a complaint against the federation, alleging that the collective practice of withholding X-rays eliminated competition among dentists. The federation argued that the FTC erred as a matter of law because the it did not make specific findings concerning the definition of the market.[14]

Although it characterized the restraint as lacking in competitive virtue and nearly "naked" – "a refusal to compete with respect to the package of services offered to customers"[15] – the Court in *Indiana Federation* did not condemn the restraint as per se unlawful because, among other things, it was a professional association rule and the economic impact was not immediately obvious.[16] As such, the case falls within the narrow set of restraints that qualify for a "quick look," somewhere between *per se* and the rule-of-reason. The Court ruled the FTC did not need to define a relevant market and prove market power because there was direct evidence of actual anticompetitive effects — dental insurers were unable to obtain X-rays in areas with a large percentage of federation dentists.[17]

8 138 S. Ct. at 2297.

9 476 U.S. 447, 459-61 (1986).

10 138 S. Ct. at 2291.

11 *Id.* (quoting *Indiana Federation of Dentists, supra*, at 460–461, (quoting 7 P. Areeda, Antitrust Law ¶ 1511, p. 429 (3d ed. 1986)).

12 138 S. Ct. at 2297.

13 476 U.S. 447, 451-52 (1986).

14 *Id.* at 460.

15 *Id.* at 459.

16 *Id.* at 458-59.

17 *Id.* at 460-62. Significantly, the Court rejected the federation's argument that the FTC failed to prove that the dentists' collective refusal to provide X-rays to dental insurers resulted in consumers selecting more costly services. This argument was rejected because the practice of preventing customers from obtaining information to determine whether a service's cost is justified is so likely to affect price setting that actual proof of increased pricing is not required. *Id.*

III. THE MAJORITY DECLINES TO JETTISON RELEVANT MARKET REQUIREMENT

In *American Express*, the majority distinguished *Indiana Federation of Dentists* and other cases cited by plaintiffs in support of the argument that courts need not define the relevant market because plaintiffs offered evidence of actual adverse effects in the form of increased merchant fees. The Court stated that plaintiffs' cases evaluated horizontal agreements among competitors not to compete in some way, whereas the restraint challenged in *American Express* was a vertical restraint, "which cannot be evaluated unless the Court first defines the relevant market."[18] A superficial reading may suggest that horizontal restraints can be condemned without defining a relevant market while vertical restraints cannot. But the precedents supporting such condemnation dealt with nearly "naked" restraints, potentially subject to a quick look, rather than more complex horizontal restraints that should be evaluated with a full-blown rule-of-reason review, which would be unwise to conduct without a proper definition of the relevant market.

The majority was careful in the language it used to characterize the absence of a market definition element in the horizontal restraint claims in prior cases, stating, "this Court concluded that it did not need to *precisely* define the relevant market to conclude that these agreements were anticompetitive."[19] The U.S. Court of Appeals for the Seventh Circuit made a similar point in a less subtle manner, observing that *Indiana Federation of Dentists* does not allow

> an antitrust plaintiff to dispense entirely with market definition. Rather these cases stand for the proposition that if a plaintiff can show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power – in lieu of the usual showing of a precisely defined relevant market and a monopoly market share.[20]

The majority and other courts' resistance to jettisoning the relevant market requirement (or at least the "rough contours" of a relevant market) may be attributed to several grounds. First, defining a relevant market serves an important narrative purpose, contextualizing the defendant's conduct and any relief that the courts may impose.[21] Second, the economic principle that underlies the no-market-definition position applies best to classic hypothetical markets for the sale of fungible commodities. In such markets, it is true that, generally speaking, a firm facing competition should not be able to raise prices without losing sales. But that general economic principle finds so many exceptions outside of fungible commodities. Differences in branding, quality, services, and other terms may enable one firm to raise prices without losing a significant number of sales to its competitors. Third, when courts assess evidence of anticompetitive harm, they must have some sense of competition in the relevant context. But how can courts or enforcers know that competition has been harmed – especially where the challenged conduct is not within a presumptively unlawful category – if they do not know the relevant economic market within which to evaluate the alleged harm?[22] The phrase used by Breyer and others is proof of actual or likely *anticompetitive* effects. Not all effects or harms count as competitive effects. When courts turn to deciding whether the effects in the pleadings or presented at trial are anticompetitive as opposed to merely incidental individual injuries, having at least the contours of a relevant market, if not a precise definition, is crucial. The following example may be instructive.

A well-known bakery with a loyal following insists that its landlord agree not to lease space to any other bakery anywhere in the sprawling shopping center. The bakery invests in new recipes using organic ingredients and emphasizes freshness. At the same time, it raises its prices by 10-20 percent but does not lose many customers. Might a plaintiff assert an unlawful exclusive dealing arrangement with actual anticompetitive effects, eschewing the need to define a relevant market? Wouldn't the court need to know if there are other shopping centers nearby? Might an enforcer want to learn if adjacent supermarkets sell baked goods? In the abstract, a price hike coupled with a vertical restraint does not tell us enough about the effect on competition.

18 138 S. Ct. at 2285 n.7.

19 *Id.* (emphasis added).

20 *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004).

21 See, e.g. Keith N. Hylton, *Brown Shoe* Versus the Horizontal Merger Guidelines, Review of Industrial Organization (2011).

22 Similarly, judicial determination of whether a private plaintiff suffered antitrust injury to support recovery under the Clayton Act requires at least some understanding of the relevant market, even in *per se* cases, which generally do not require relevant market definitions. See, e.g. *Atlantic Richfield v. USA Petroleum*, 495 U.S. 328, 346 (1990) ("The antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity.").

IV. HISTORY OF RELEVANT MARKET DELINEATION

Finally, courts resist abjuring the relevant market inquiry because of the long and deeply ingrained tradition of market delineation in antitrust jurisprudence. Economists and courts first began using relevant market analysis and market power tests at least as early as the 1940s.[23] Since Judge Learned Hand's famous dictum about the market shares of the defendants in alternative markets — while ninety percent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough: and certainly thirty-three percent is not" — relying on market shares has become crucial to the structural analysis of antitrust to assess actual or potential market power and harm to competition.[24] Although no Sherman Act violation was found, the earliest usage of the term "relevant market" in a federal antitrust case traces to the Supreme Court's 1948 decision *United States v. Columbia Steel Company*.[25] Legal scholarship was not far behind judicial opinions, and the first two law review articles on antitrust market definition arrived six years later.[26] In the mergers and acquisitions context, judicial decisions interpreting Section 7 of the Clayton Act, which bars mergers and acquisitions the effect of which "may be substantially to lessen competition… in any line of commerce ... in any section of the country," have long relied on market definition.[27]

By the 1960s, relevant market analysis had become so well established that the Court declared: "Without a definition of [the] market there is no way to measure ability to lessen or destroy competition."[28] The *American Express* Court did not accept the invitation to question these longstanding precedents in 2018, proclaiming that "courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market."[29]

V. CONCLUSION

The *American Express* decision will undoubtedly lead to close examination of two-sided markets and debates about which markets require a multi-sided look in antitrust cases, but the opinion may have wider impact in tempering efforts to limit the enduring requirement that plaintiffs define a relevant market at the start of most antitrust cases. Even where that requirement is relaxed (as in horizontal, quick look cases), it isn't completely dispensed with. The Court was careful to say that, in those cases, the precedents indicated that the relevant market need not be defined *precisely*, not that it need not be delineated at all.

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23 Gregory J. Werden, The History of Antitrust Market Delineation, 76 Marquette L. Rev. 123 (1992).

24 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (certified to the Second Circuit due to absence of a quorum of Supreme Court Justices).

25 334 U.S. 495, 508 (1948); see also *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953) (tying cases analyze market power in the "whole and not part of a relevant market").

26 Note, *The Market: A Concept in Anti-Trust,* 54 Colum. L. Rev. 580 (1954); David Macdonald, Comment, *Product Competition in the Relevant Market Under the Sherman Act,* 53 Mich. L. Rev. 69 (1954).

27 See, e.g. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974) (quoting *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957) ("[P]roper definition of the market is a 'necessary predicate' to an examination of competition that may be affected by the horizontal aspects of merger[s]."); *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.28 (1962) ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger, are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.").

28 *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965).

29 138 S. Ct. at 2285.