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Note

Steering for More Trouble? Could the Ruling in *United States v. American Express Co.* Lead to Further Antitrust Enforcement Actions in Europe?

Michael Srodoski[*]

I. INTRODUCTION

American Express contractually prohibits its merchant customers from making efforts to display a preference for any credit card other than American Express. This policy, known as anti-steering, was challenged under § 1 of the Sherman Act[1] by the United States and seventeen states[2] in the United States District Court for the Eastern District of New York.[3] On February 19, 2015, the court found for the United States and co-plaintiffs, holding that the anti-steering policies used by American Express were anti-competitive.[4]

As a multi-national short-term credit entity with an annual transactional capacity of over one trillion dollars, American Express is one of the largest companies in the United States.[5] *United States v. American Express Co.* addressed antitrust issues in a rather complicated two-sided market.[6] This decision may therefore serve as a blueprint for future liability around the

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1. 15 U.S.C. § 1 (2014).

2. The Attorneys General of Connecticut, Iowa, Maryland, Michigan, Missouri, Ohio, Texas, Illinois, Tennessee, Montana, Nebraska, Idaho, Vermont, Utah, Arizona, Rhode Island, and New Hampshire were co-plaintiffs.

3. Before the Honorable Nicholas G. Garaufis, United States District Judge.

4. United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015).

5. American Express is comfortably within the Fortune 100, coming in at number ninety and eighty-eight respectively in 2014 and 2015. *See Fortune 500*, FORTUNE, http://fortune.com/fortune500/ (last visited Oct. 14, 2015) (for the 2014 list; click dropdown menu and select 2014).

6. *See infra* note 17.

globe and escalating damages for American Express and its stockholders.

This Comment seeks to examine the *American Express* decision and determine what, if any, further enforcement action American Express might face in the European Union (EU). Section I will briefly analyze American Express as a company and define the process of anti-steering. It will then turn to the current state of non-price vertical restraint antitrust law in the United States under the § 1 of the Sherman Act. Section II summarizes the Eastern District of New York's decision in American Express. Section III then projects how this case would likely be judged in the EU based on current vertical restraints guidance from the European Commission, and assesses potential antitrust liability for American Express. As a result, this Comment concludes that American Express faces a serious risk of further antitrust enforcement actions in the EU as a result of the decision in *American Express*.

II. BACKGROUND

A. AMERICAN EXPRESS, THE GENERAL PURPOSE CREDIT AND CHARGE CARD INDUSTRY, AND THE PRACTICE OF ANTI-STEERING

American Express is not only one of the three largest credit card companies in the world,[7] handling more than $1 trillion in transactions over its card network annually,[8] it is one of the largest companies of any kind in the United States.[9] Following annual net revenues of over $34 billion, American Express delivered profits of approximately $6 billion.[10] Greater than half

7. While Visa is the undisputed leader in market share of both credit cards and bank cards, American Express and MasterCard have market shares that are very similar. Each has occupied the number two and three spots in the credit card market at various points in the past five years. American Express has no bank card presence. *E.g.*, Odysseas Papadimitriou, *Market Share by Credit Card Network*, CARDHUB, http://www.cardhub.com/edu/market-share-by-credit-card-network/ (last visited Oct. 14, 2015).

8. American Express Co., Annual Report (Form 10-K) (Feb. 25, 2015) at 2, http://www.sec.gov/Archives/edgar/data/4962/000119312515059931/d862737d10k.htm [hereinafter Amex 10-K].

9. *See* FORTUNE, *supra* note 5.

10. American Express Co., Annual Report to Shareholders at 1, http://ir.americanexpress.com/file.aspx?iid=102700&fid=1500069225 [hereinafter Shareholder Report].

of this company's basic and business cards are issued to holders outside the U.S.[11] Of their billed business, about 33% originated from outside the U.S,[12] and billed business is essential to American Express.[13] Unlike its main rivals, American Express derives most of its revenues from customer spending.[14]

The traditional general purpose credit and charge (GPCC) card industry business is built around a credit card.[15] It consists of an "open loop" five participant two-sided market[16]: lenders and customers on one side, acquirers and merchants on the other, and a network like Visa or MasterCard in the middle.[17] Visa partners with lenders to issue cards with a Visa logo to consumers on one side of the market, and Visa partners with acquirers who negotiate with merchants to accept cards with a Visa logo on the other.[18] The lenders take most of the interest income (and all of the customer default risk), the acquirers take most of the discount fees charged to merchants, and as the network access provider, Visa earns its money on a per-transaction basis.[19] American Express' business model differs in both the type of card and the number of players. American Express operates a "closed loop" three participant two-sided market: customers on one side, merchants on the other, and

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11. *Id.* at 25.

12. *Id.*

13. *Id.*

14. FORBES, *infra* note 20.

15. A credit card is one with a spending limit that allows a balance to be carried from month to month with no penalty other than charged interest. A charge card, however, typically has no limit and requires the customer to pay the full balance every month or pay interest plus a penalty. *E.g.*, *Credit Cards vs. Charge Cards–What is the Difference?*, MYFICO, http://www.myfico.com/crediteducation/questions/charge_cards.aspx (last visited Oct. 15, 2015).

16. A two-sided market is one in which a single business brings together two sets of customers by serving each individually. For example, a newspaper sells advertising space to businesses, and sells newspapers to readers, delivering the advertising to the reader. Internet giants Facebook and Google operate in two-sided markets. For a deeper analysis of two-sided markets, see David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses* (Coase-Sandor. Inst. for L. & Econ., Working Paper No. 623, 2012).

17. Trefis Team, *How Has Visa Achieved Double Digit Growth and is it Sustainable?*, TREFIS (Mar. 6, 2014), http://www.trefis.com/stock/v/articles/229673/how-has-visa-achieved-double-digit-growth-and-is-it-sustainable/2014-03-06.

18. *Id.*

19. *Id.* (noting that as of 2008, this fee was $0.08 per transaction and as of 2013, there were 2.2 billion Visa cards in circulation, with an average of 27 transactions annually per card).

American Express in the middle.[20] The vast majority of American Express cards are cards issued by American Express to affluent individuals, and as such, there is far less interest to be collected on balances carried from month to month.[21] Instead American Express' income is derived mostly from the discount rate charged to merchants, which are a percentage of overall spent, instead of a flat rate.[22]

Steering is a practice that is very common in the business world.[23] Since the discount rate American Express charges is higher than Visa, MasterCard, or Discover,[24] merchants have a financial incentive to steer customers away from American Express. Due to their business model, however, American Express has the ability to negotiate directly with merchants[25] and a strong incentive to drive large transaction volumes through their network.[26] Including boilerplate anti-steering clauses in their contracts with merchants is a way for American Express to prevent transaction volume from being steered away from American Express' network and into another form of payment.[27] These Non-Discrimination Provisions (NDPs), as American Express calls them,[28] prevent merchants from displaying any preference for type of payment and from providing customers with information about how much the merchant is paying in fees.[29] Though the U.S. government itself

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20. Trefis Team, *How American Express Gains a Competitive Advantage from Its Closed-Loop Network*, FORBES (Mar. 13, 2014), http://www.forbes.com/sites/greatspeculations/2014/03/13/how-american-express-gains-a-competitive-advantage-from-its-closed-loop-network/.

21. *Id.* (explaining that issuing cards to affluent individuals limits the number of cards in circulation (American Express has 107 million while Visa has 2 billion), limits the rate of delinquency (American Express is at 1.07% and the national commercial banks rate is 2.39%), and positively impacts the amount per transaction (American Express average is $150 while Visa is $50)).

22. *Id.* (noting that 65% of American Express revenues are from discount rate fees charged to merchants).

23. United States v. Am. Express Co., 88 F. Supp. 3d 143, 150 (E.D.N.Y. 2015) (highlighting typical methods of steering, including 'buy one get one free' coupons, discounts on clearance merchandise, and the placement of a particular product at eye level and another on the bottom shelf).

24. Jacob Davidson, *AmEx's Battle with the Feds Could Mean Lower Costs for Credit-Card Users*, TIME (July 7, 2014), http://time.com/money/2962417/amexs-battle-with-the-feds-visa-mastercard-credit-card/.

25. FORBES, *supra* note 20.

26. *See* FORBES, *supra* note 20.

27. FORBES, *supra* note 20.

28. *See* Amex 10-K, *supra* note 8, at 80.

29. *Am. Express Co.*, 83 F. Supp. 3d at 161, 163–64 (noting that American

uses anti-steering mechanisms to protect customers from questionable lending tactics in the home mortgage industry,[30] it views American Express' NDPs as anti-competitive non-price vertical restraints.

B. NON-PRICE VERTICAL RESTRAINTS UNDER THE RULE OF REASON

The Sherman Act of 1890 prohibits the formation of any contract that restrains trade.[31] Read literally, the Act potentially renders all contracts invalid.[32] However, very early in the twentieth century, the Supreme Court identified that the Sherman Act was not intended to infringe upon "normal and lawful contracts or agreements."[33] In adopting an approach that aligned the Sherman Act with the settled common law, the Court in *Standard Oil Co. of N.J. v. United States*[34] created what is now called the rule of reason as a means for analyzing whether a contract unreasonably restrains trade.[35]

Since 1911, analysis under this rule has evolved into a three-pronged approach, depending on the nature of the offense. Some agreements "will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact anti-competitive."[36] These agreements are said to be illegal *per se*.[37] Other agreements must be examined more closely.[38] A reviewing

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Express began vigorously enforcing these provisions in the early 1990s as a direct result of lost business from Visa's successful "We Prefer Visa" campaign).

30. *See, e.g.*, Truth in Lending Act, 12 C.F.R. § 1026.40 (2011).

31. 15 U.S.C. § 1 (2014) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared illegal.").

32. Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.").

33. 221 U.S. 1, 81 (1911).

34. *Id.* at 59–60.

35. *Id.*; *see also* United States v. Am. Tobacco Co., 221 U.S. 106, 180 (1911).

36. Nynex Corp. v. Discon, Inc. 525 U.S. 128, 133 (1998).

37. *See, e.g.*, Klor's v. Broadway-Hales Stores, 359 U.S. 207, 210–11 (1959) (affirming concerted refusals to deal as illegal *per se*); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.").

38. *Bd. of Trade of Chi.*, 246 U.S. at 238 ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby

court will use the rule of reason approach to analyze the specific facts "of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[39] Between these two approaches lies a third category of analysis, where conduct is not immediately determined to be illegal, but it is also not given the in-depth analysis of the rule of reason, instead receiving a 'quick-look' analysis.[40]

Most non-price vertical restrictions pertain to market divisions, which restrain inter-brand competition (competition between sellers of the same brand), but promote intra-brand competition (competition between different brands).[41] For a time, non-price vertical restraints were held to be illegal *per se*.[42] However, a change in economic thinking toward promoting intra-brand competition gained traction in the Supreme Court, [43] and the *per se* invalidity of non-price vertical restraints was overruled.[44] Non-price vertical restraints are now judged under the rule of reason.[45]

To navigate rule of reason cases, courts have devised analytical frameworks. Before any analysis of the merits can begin, the relevant market must be established.[46] There is no set-in-stone way to define a market. The U.S. government has issued guidance on how to expand and contract the market borders to ensure true competitors are captured within the market, but non-competitors are left out.[47] Several factors may be considered. An obvious factor is geography.[48] While parties certainly do dispute the geographic boundaries of a market,[49] it

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promotes competition or whether it is such as may suppress or even destroy competition.").

39. Cont'l T.V. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (citation omitted).

40. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (acknowledging the existence of the quick look analysis, without employing it).

41. 1-19 ANTITRUST LAWS AND TRADE REGULATION § 19.01 (2d ed. 2015).

42. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

43. *Cont'l T.V.*, 433 U.S. at 54–56.

44. *Id.* at 57 (overruling the *per se* rule set forth in *Arnold, Schwinn & Co.*).

45. *Id.*

46. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) (showing that rule of reason analysis requires "an inquiry into market power and market structure designed to assess the combination's actual effect.").

47. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4.2 (2010) [hereinafter MERGER GUIDELINES].

48. *Id.* at § 4.1.

49. *See, e.g.*, Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 332

is generally the most straightforward factor. Another factor is the type of product (or service); but this factor must be expanded to include all reasonable substitutes for the exact product/service at issue.[50] Finally, guidance also focuses on finding the narrowest subset of the larger market where a monopolist, if one hypothetically existed in that subset,[51] could raise its prices by a small, but significant, amount without losing enough sales to make the price change unprofitable.[52]

Once the relevant market is established, the court may proceed to the merits. Initially, the plaintiff has the burden of proving a cognizable antitrust injury.[53] To prove this, the plaintiff first must show the defendant possessed market power.[54] Market power has been defined as the "power to control prices or exclude competition."[55] It may be proven theoretically, through market share[56] or market dynamics analysis,[57] or directly, by providing evidence of actual anti-competitive

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(1961) (discussing the dispute as to whether the market was Florida, Florida and Georgia, or the entire eastern market served by coal mined in the Appalachian region).

50. An economist would call this cross-price elasticity of demand. *See* Mike Moffatt, *Cross-Price Elasticity of Demand*, ABOUT, http://economics.about.com/cs/micfrohelp/a/cross_price_d.htm (last visited Oct. 23, 2015). The Supreme Court relies on the plainer term of "reasonable interchangeability." United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 404 (1956).

51. MERGER GUIDELINES, *supra* note 47, at § 4.1.1.

52. *Id.* at § 4.1.2.

53. K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995).

54. Some circuits make a showing of market power a prerequisite to recovery. *See* General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 596 (7th Cir. 1984). Others, including the Second Circuit (where *American Express* was heard), only require a showing of market power if actual effects cannot be demonstrated. *See K.M.B Warehouse Distrib.*, 61 F.3d at 129.

55. *Du Pont*, 351 U.S. at 391.

56. There is no hard and fast rule as to how much market share is enough to exhibit market power. *Compare* Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949) (deeming 16% of the relevant market a "substantial share") *with Tampa Electric Co.*, 365 U.S. at 332 (deeming 1% of the relevant market not substantial). However, market share need not reach the level of monopoly for a party to have market power. Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 481 (1992) ("Monopoly power under § 2 requires, of course, something greater than market power under § 1.").

57. *See* Int'l Distribution Ctr, Inc. v. Walsh Trucking Co., 812 F.2d 786, 792 (2d Cir. 1987) ("Among these characteristics are the strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct and the elasticity of consumer demand."). Market concentration is also a factor to be considered. *See* MERGER GUIDELINES, *supra* note 47, at § 5.

conduct that demonstrates market power.[58] This direct evidence must show an anti-competitive effect on the market as a whole, not simply on the plaintiff.[59] Further, anti-competitive effects on intra-brand competition must be weighed against pro-competitive effects on inter-brand competition before conduct will be considered anti-competitive as a whole.[60]

If the plaintiff succeeds, the defendant is given the opportunity to provide pro-competitive justification for its conduct.[61] The Supreme Court has foreclosed some justifications, including the argument that competition in this particular market is in and of itself unnecessary or unwise.[62] Other arguments, like prevention of economic free riding, are much more likely to be accepted.[63] If the defendant cannot provide an adequate pro-competitive justification, the conduct is considered anti-competitive and the analysis is complete.[64] If the defendant provides an adequate pro-competitive justification, the plaintiff then must show that there exists an alternative way for the defendant to achieve the pro-competitive goals used to justify the conduct that caused the antitrust injury.[65]

Despite what would seem to be a rigid and formalistic approach, antitrust inquiries remain highly functional in nature. Every market is different, and the facts of each market and situation will necessarily have significant impact on the

58. Fed. Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) ("'[P]roof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" (quoting 7 PHILLIP E. AREEDA, ANTITRUST LAW 429 (1986)).

59. Antitrust laws protect "*competition*, not *competitors*." Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis added).

60. Cont'l T.V. v. GTE Sylvania, 433 U.S. 36, 54–56 (1977).

61. *Eastman Kodak Co.*, 504 U.S. at 483.

62. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978) ("The Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.").

63. *Inter alia*, free riding describes the effect of one firm sharing the benefit of another firm's capital expenditures without sharing the costs. *See* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 889–91 (2007) (discussing the pro-competitive justifications for preventing free riding and providing examples).

64. Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991), *cert. denied*, 502 U.S. 994 (1991).

65. *Id.*

analysis.[66] As courts struggle with antitrust inquiries,[67] it is ironic that for all of the developments in antitrust law over the past ninety-five years, the primary inquiry remains today as it did in 1918: "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[68]

III. *UNITED STATES V. AMERICAN EXPRESS CO.*

As the federal district court readily acknowledged at the outset, this case entailed a very complicated antitrust inquiry.[69] The GPCC Card business is a highly sophisticated industry consisting of several key players operating distinct business models[70] in a two-sided market.[71] The court immediately expressed frustration that it has been put in the position of deciding the issue,[72] given its relative lack of expertise.[73]

At the end of this analysis, the court arrives at five significant conclusions.[74] First, the NDPs at issue were properly classified as non-price vertical restraints, and therefore subject to analysis under the rule of reason. Second, though the GPCC market was indeed two-sided in nature, the appropriate market

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66. Cont'l T.V. v. GTE Sylvania, 433 U.S. 36, 49 (1977) ("Under [the rule of reason], the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.").

67. *See, e.g.*, Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993).

68. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

69. United States v. Am. Express Co., 88 F. Supp. 3d 143, 149 (E.D.N.Y. 2015).

70. *Id.* at 156–60 (discussing the differences between the "spend-centric" model of American Express and the "lend-centric" models of Visa and MasterCard).

71. *Id.* at 154–56 (discussing the two-sided nature of the GPCC industry and the difficulty measuring the effects of conduct in one market when the effects of that conduct are often felt in the other market). The particularities of the two-sided market of the GPCC industry also contribute to high barriers of entry. "The only reason that a merchant wants to use a payment product is that a customer wants to use the product and purchase some good or service from the merchant" and vice-versa. *Id.* at 156. (internal quotation and citation omitted).

72. *Id.* at 151 ("[T]he court has repeatedly urged the parties in this case to negotiate a mutually agreeable settlement.").

73. Indeed, due in large part to extensive explanation of the intricacies of the GPCC industry and how American Express' conduct effects that industry, the decision checks in at a robust 276 pages.

for analysis was the merchant side of the market, and the market did not properly include debit and other bank cards. Third, the court established American Express possessed market power within the GPCC market. Fourth, the plaintiffs demonstrated that the NDPs had resulted in actual and concrete harms to the GPCC industry by removing price sensitivity within the merchant market, leading to higher prices for merchants, which were in turn passed on to consumers. Finally, the court determined that American Express' pro-competitive justifications were neither legally cognizable, nor sufficiently supported by the record. Each will be examined in turn.

A. NDPs as Vertical Non-Price Restraints

The court accepted that NDPs do not "neatly fit into the standard taxonomy of federal antitrust law."[75] Most vertical non-price restraints seek to restrain intra-brand competition in an effort to foster more robust intra-brand competition.[76] The court concluded that while the NDPs have some elements of tying arrangements or exclusive dealing contracts,[77] NDPs did not fit neatly in those categories either.[78] Despite the functional truth that merchants have no real choice in whether to accept the contractual provisions or not,[79] they remain agreements between "firms at different levels of production—namely, between the network and its merchant-customers" and are therefore most properly classified as vertical non-price restraints.[80] As such, NDPs are subject to analysis under the rule of reason.[81]

B. The Merchant Side of the GPCC Industry as the Relevant Market—Debit Cards Excluded

Before engaging in the three-step burden-shifting

75. *Id.* at 168.

76. *See id.* at 61. *See also* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 889–91 (2007).

77. NDPs are contracts of adhesion, where the vast majority of merchants have no room to negotiate. They must agree or they cannot accept American Express cards. *See Am. Express Co.*, 88 F. Supp.3d at 163.

78. *Id.* at 168.

79. *Id.* at 192 (explaining how American Express cardholders' insistence on using their cards puts merchants in an "all-or-nothing" position).

80. *Id.* at 168.

81. *See supra* text accompanying notes 39–41.

framework applicable under the rule of reason,[82] a reviewing court must first determine the relevant market.[83] The geographic market was established as the territorial United States by agreement of the parties.[84] This stipulation left only the relevant product market to be determined. The principle disagreements among the parties concerning the product market were two-fold. First, the parties differed on whether the market was transactional in nature; that is, whether it included both the customer and merchant sides of the market.[85] The second disagreement was whether to include debit and bank cards, which naturally depended on the resolution of the first question.[86]

American Express urged the court to accept the relevant market definition of "transactions, rather than network services."[87] This would effectively "collapse all services provided to merchants and cardholders in the context of the GPCC card platform into a single antitrust market."[88] The court rejected this argument, finding that "this takes the concept of two-sidedness too far. The goal in defining a relevant product market is not to obfuscate or confuse market realities, but rather to 'recognize competition where, in fact, competition exists.'"[89] By refusing to collapse the two-sided market into a single market,[90] the court rejected the argument that, since American Express chooses to structure its business as a closed loop, the relevant analysis should be performed as if all competitors also used a closed loop.[91] The court concluded that the relevant product

82. *Am. Express Co.*, 88 F. Supp. 3d at 168–69.

83. "[T]he court must first determine the contours of the relevant antitrust market and thereby define an appropriate context for the remainder of the analysis." *Id.* at 170.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 173.

88. *Id.*

89. *Id.* at 170 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962)).

90. The Supreme Court has previously refused to collapse a two-sided market into a single market for the purposes of antitrust analysis. *See* Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 610 (1953) ("[E]very newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space. This case concerns solely one of these markets.").

91. *Am. Express Co.*, 88 F. Supp. 3d at 173. ("That American Express has elected to compete at each of these levels by partially integrating into the

market is network services provided to merchants, which is in fact independent of the market for customers.[92]

American Express also argued that, although previous GPCC antitrust cases declined to do so,[93] the court should expand the relevant product market to include debit and bank cards.[94] The main thrust of this proposition was that bank cards have taken on increased significance and now account for a much larger percentage of the total transactions than they did when previous cases were decided.[95] The court declined to accept this argument, leaning on the cross-elasticity of demand testimony[96] and the competitive realities of the GPCC market.[97] The court acknowledged that American Express showed the ability to make several small, but substantial non-transitory increases in price (SSNIP) within the GPCC card market,[98] and therefore saw no reason to include debit cards in the market. Finally, "there is no indication that the merchants—the 'relevant customer' for defining the relevant product market in this case—historically have been or would be inclined to switch to debit network services" or if such substitution did occur "would be sufficient to temper an exercise of market power therein."[99]

issuing and acquiring businesses does not compel the court to collapse these distinct markets into a single 'transactions' market to more closely resemble Amex's chosen business strategy.").

92. *Id.* at 174.

93. *See* United States v. Visa U.S.A., Inc., 344 F.3d 229, 239 (2d Cir. 2003).

94. *Am. Express Co.*, 88 F. Supp. 3d at 175.

95. *Id.*

96. The court leaned heavily on the expert testimony of the Government's economist, Dr. Katz, who testified, *inter alia*, that because merchants were not sensitive to discount price changes, a small but significant non-transitory increase in price (SSNIP) could be profitably maintained by a hypothetical monopolist within the GPCC card industry, exclusive of the debit card industry. *Id*. at 176–79. The court also noted that until this lawsuit was filed, American Express communicated, in its year-end statements to shareholders, that it did not consider itself to be a competitor with debit and bank cards. *Id.* at 176 n.14.

97. The court also placed heavy weight on the testimony of American Express' own executives that indicated American Express did not base its rates on the debit card rates of its competitors in any significant way, and testimony of merchants who do not view debit cards a viable alternative to GPCC cards, when choosing that option means turning away customers who prefer to pay with GPCC cards. *Id.* at 180–84.

98. SSNIP is a criteria used by the Department of Justice in evaluating market size. MERGER GUIDELINES, *supra* note 47, at 10–11. The court discussed these price increases in further detail when evaluating market power. *See Am. Express Co.*, 88 F. Supp. 3d at 182–83.

99. *Id.* at 176.

C. MARKET POWER

The court then discussed whether American Express possessed market power in the GPCC industry. At the outset, the court noted the highly concentrated nature of the GPCC industry,[100] and the strong barriers to entry.[101] The strength of this barrier was described as the "chicken and egg problem": no customer wanted to carry a form of payment unless a large percentage of merchants would accept it, and no merchant wanted to accept a form of payment unless a large percentage of customers carried it.[102] Thus, in order for a new company to enter the GPCC card industry, it would need to build a network of customers and merchants simultaneously,[103] which is very difficult to achieve. Since Discover entered the market in 1985, there have been no entrants,[104] and Discover has not had great success gaining market share from Visa, MasterCard, or American Express.[105] Combined with the highly concentrated nature of the market and high barriers to entry, the court found that the 26.4% share of the GPCC market possessed by American Express was sufficient to "suggest that the firm possesses market power."[106] Yet, "market share alone likely would not suffice to prove market power" without something more.[107]

In searching for this factor, the court took an odd turn. It found that the loyalty of customers holding American Express cards—dubbed cardholder insistence—is demonstrable evidence of market power. The court noted that American Express has taken steps to incentivize cardholders to use their cards by

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100. The court adopted, by reference, a finding that the Herfindahl-Hirschman Index (HHI) for the GPCC industry is over the threshold for a highly concentrated market. *Id.* at 189. The HHI measures the concentration of a market by adding the squares of the market shares of its participants. *See* MERGER GUIDELINES, *supra* note 47, at 18–19.

101. This market has "high barriers to entry, which further reduce the likelihood that an attempt at anti-competitive conduct would be defeated by new suppliers entering the market." *Am. Express Co.*, 88 F. Supp. 3d. at 189–90.

102. *Id.* at 190.

103. *Id.*

104. The court noted that the only reason Discover was able to enter the market was because it was initially owned by Sears, which marketed the cards to holders of Sears cards. *Id.* at 190 n.24.

105. Discover only has 5.3% of the GPCC market. *Id.* at 188.

106. *Id.* at 190.

107. *Id.*

providing "robust rewards programs,"[108] and recounts stories of retailers and gas stations that lost significant business when deciding to no longer accept American Express.[109]

This line of reasoning is suspect since it implicitly penalizes American Express on the merchant side of the market for its success on the customer side of the market. It is well established that market power in a § 1 Sherman Act case is a lower standard than monopoly power in a § 2 analysis.[110] Yet, possession of monopoly power may be defended on the grounds that it is "a consequence of a superior product."[111] If American Express has created a product that is so superior to its competitors that customers will change their shopping habits to only shop where that product is accepted, it does not follow that American Express should be penalized for its success. The court also focused on the way American Express uses the information gained from its customers to market its network to merchants.[112] This reasoning sounds remarkably like market power derived from "business acumen," another affirmative defense to possession of monopoly power.[113] Were these the primary grounds upon which the court rested its finding of market power, the decision as a whole would be subject to a more intense criticism. However, the pricing policies of American Express provide ample direct evidence of market power.

Over a six-year period beginning in 2005 and ending at the filing of this suit, American Express "repeatedly and profitably raised its discount rates to millions of merchants across the United States as a part of its Value Recapture . . . initiative without losing a single large merchant and losing relatively few small merchants."[114] The court counted over twenty different industry-specific price hikes in the relevant time period, with rates in some industries hiking more than once.[115] The airline industry, for example, experienced as much as a 15% increase in discount rate with no merchant attrition.[116] Testimony from

108. *Id.* at 191–92.
109. *Id.* at 194.
110. Eastman Kodak Co. v. Image Tech. Serv., 504 U.S. 451, 481 (1992) ("Monopoly power under § 2 requires, of course, something greater than market power under § 1.").
111. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).
112. *Am. Express Co.*, 88 F. Supp. 3d at 193–94.
113. 384 U.S. at 571.
114. *Am. Express Co.*, 88 F. Supp. 3d at 195.
115. *Id.* at 196.
116. *Id.* at 196.

major merchant executives showed that despite price increases, they had no realistic option to drop American Express.[117] This evidence was sufficient to establish market power directly.[118]

D. ACTUAL HARM TO COMPETITION

In the absence of NDP agreements, merchants would have an incentive to influence customers to use other less costly forms of payment.[119] Other members of the GPCC industry could compete on price, jockeying to be the preferred destination of a merchant's steering efforts.[120] As a result, merchants would save money.[121] Part of those savings would be passed onto customers in the form of lower prices.[122] The NDP agreements remove the ability of merchants to steer, and this removes the incentives for firms in the GPCC industry to compete on price.[123] In practice, the NDPs act to create and reinforce a price floor—a minimum price all GPCC industry firms may charge merchants without fear of a competitor undercutting that price.[124] While this reasoning is formalistic and theoretical at best, it is also the only option available.

Realistically, while there is evidence that firms in the GPCC industry currently do not compete on price,[125] there is also no concrete evidence that steering in the GPCC works—aside from a successful Visa advertising campaign over twenty years ago.[126] The court's own reasoning cuts against the success of steering. If American Express cardholders are insistent upon using their cards, what real effect will steering have? Also, there is no concrete evidence provided to show that if discount rates fall as a result of removing NDPs, merchants will pass those savings onto customers by lowering prices. Yet, as the court addresses in

117. *Id.* at 192–93, nn.26–27.

118. *Id.* at 207–08. *See* Fed. Trade Comm'n v. Indiana Fed. of Dentists, 476 U.S. 447, 460–61 (1986) ("'[P]roof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'") (quoting 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986)).

119. *Am. Express Co.*, 88 F. Supp. 3d at 209.

120. *Id.* at 210.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 210–11.

greater detail when evaluating the pro-competitive justifications raised by American Express, it must assume competition will take place. The hallmark of the Sherman Act is competition,[127] and it is not for the court,[128] nor any single firm,[129] to decide when competition is proper and when it is not.[130]

E. AMERICAN EXPRESS' PRO-COMPETITION REASONING

American Express has two primary pro-competitive justifications. First, the company claims that NDPs protect their differentiated business model, and the success of American Express in the GPCC industry increases overall competition in the card issuing market.[131] Second, the NDPs prevent merchants from free riding on American Express' investments into cardholder value propositions.[132] Judge Garaufis concluded that the first justification is not legally cognizable,[133] while the second justification does not excuse the anti-competitive nature of the NDPs.[134]

While American Express is likely correct that the NDPs are beneficial to the continued success of the closed loop model, and that the continued success of American Express enables greater competition in the card issuing market, the Supreme Court has foreclosed both of these arguments in the past. The intent of the Sherman Act is to protect competition, not competitors.[135] A company cannot shield itself from the competition of the market by entering into anti-competitive agreements.[136] Further, anti-competitive conduct in one industry or market cannot be defended by pro-competitive benefits in another industry or

127. *See, e.g.*, United States v. Topco Associates., 405 U.S. 596, 610 (1972) (referring to the Sherman Act as "the Magna Carta of free enterprise"); Standard Oil Co. v. Fed. Trade Comm'n, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

128. Nat'l Soc. of Prof. Eng'rs v. United States, 435 U.S. 679, 695–96 (1978) ("The judiciary cannot indirectly protect the public against . . . harm by conferring monopoly privileges on . . . manufacturers.").

129. *Id.* at 695 (refusing to allow the Society to "impose[] [its] views of the costs and benefits of competition on the entire marketplace").

130. *Id.* at 696 ("In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.").

131. *Am. Express Co.*, 88 F. Supp. 3d at 226–27.

132. *Id.* at 226.

133. *Id.* at 227.

134. *Id.* at 238.

135. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

136. *Id.*

market.[137] This eviscerates American Express' argument that benefits to customers on one side of the market outweigh harms to merchants on the other.

Preventing economic free riding is generally an acceptable and strong pro-competitive defense for otherwise anti-competitive vertical agreements.[138] The court agreed,[139] but questioned the logical foundation of American Express' arguments.[140] American Express argued that it must prevent free riding because if merchants steer customers away from American Express, those merchants will benefit from the costly market-based analytics American Express is uniquely able to produce due to their closed loop system without having to pay for those services through merchant discount fees.[141]

The court challenged this argument, noting that the record indicates that American Express charges some merchants for these analytics.[142] "American Express's ability to separately price and sell the data-analytics services it claims are susceptible to free-riding . . . leads the court to conclude that the network possesses equally effective and significantly less restrictive means of preventing this form of free-riding."[143] American Express also contended that merchants will reap the rewards of the time and expense put into American Express' robust cardholder benefits programs and direct marketing, without having to pay (again through merchant discount fees) for that access.[144] The court acknowledged that this was a potential issue, however, and questioned the frequency with which American Express' advertising drives customers' purchasing decisions, rather than customers' predetermined desire for the products or services provided by the merchant.[145]

137. United States v. Topco Assocs., 405 U.S. 596, 610 (1972) ("[Competition] cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.").

138. *See, e.g.*, Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 889–91 (2007) (discussing the pro-competitive justifications for preventing free-riding in vertical agreements generally); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984) (discussing the pro-competitive justifications for preventing free-riding in exclusive dealing agreements).

139. *Am. Express Co.*, 88 F. Supp. 3d at 234–35.

140. *Id.* at 235–36.

141. *Id.* at 235.

142. *Id.* at 236.

143. *Id.*

144. *Id.* at 237.

145. *Id.* at 237–38.

Ultimately, District Judge Garaufis found that the pro-competitive merits of American Express' various free riding arguments did not outweigh the anti-competitive effects of NDPs.[146]

IV. PROBABLE EUROPEAN ANTITRUST LIABILITY FOR AMERICAN EXPRESS

In the European Union, antitrust law is laid out in Articles 101–102 of the Treaty on the Functioning of the European Union. Article 101 concerns anti-competitive agreements between two or more parties,[147] while Article 102 concerns anti-competitive conduct by a single party possessing a dominant position in the relevant market.[148] The European Commission is charged with application of treaty principles.[149] Enforcement opinions issued by the Commission based on violations are interpreted by decisions of the General Court, and may in some instances be further appealed to the European Court of Justice.[150] The Commission publishes guidelines summarizing case law and provides interpretive guidance so companies may structure their agreements and conduct to avoid antitrust violations.[151] An examination of the guidelines pertaining to Article 101 and vertical restraints leads to the conclusion that *American Express* would be decided similarly if tried under EU law.

A. THE RELEVANT MARKET

According to the Commission's guidelines, "[t]he objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining the undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure."[152] Although this language is

146. *Id.* at 238.
147. Consolidated Version of the Treaty on the Functioning of the European Union art. 101, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].
148. TFEU art. 102.
149. TFEU art. 105(1).
150. TFEU art. 256.
151. Commission Notice, Guidelines on Vertical Restraints, SEC (2010) 411 [hereinafter Vertical Restraints Guidelines].
152. Commission Notice 97/C 372/03, ¶ 2, 1997 O.J. (C 372/5) [hereinafter

not identical to that used by the court in *American Express*, the foundational underpinnings are analogous: "recognize competition where, in fact, competition exists."[153] Assuming that the geographic market is not in dispute, the product market would likely be found to be the GPCC card market, as it was in *American Express*.[154]

The guidelines define the relevant product market as that which "comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer."[155] This language tracks closely to the reasonable interchangeability language identified by the Supreme Court in *United States v. E. I. Du Pont de Nemours & Co.*[156] The guidelines identify demand substitutability (the ability of customers to easily switch between products) as the "most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions."[157] In this respect, the guidelines advise the use of cross-price elasticity of demand when defining the boundaries of the product market,[158] which the *American Express* court followed.[159] The guidelines also indicate that the ability of a hypothetical monopolist to make small but significant non-transitory increases in price without losing profits would point toward a proper market determination.[160] Though the guidelines do not use the SSNIP acronym, this formulation is the exact same formulation advised by the Department of Justice Horizontal Merger Guidelines,[161] and relied on by Judge Garaufis in *American Express*.[162] Finally, the guidelines instruct that the Commission often contacts "customers and competitors of the companies involved, to gather their views on the

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Market Guidelines]. This notice is incorporated into the Vertical Restraints Guidelines by reference. Vertical Restraints Guidelines ¶ 86.

153. United States v. Am. Express Co., 88 F. Supp. 3d 143, 172 (E.D.N.Y. 2015).

154. *Id.* at 10.

155. Market Guidelines ¶ 7.

156. 351 U.S. 377, 404 (1956).

157. Market Guidelines ¶ 13.

158. *Id.* ¶ 39.

159. 351 U.S. at 380–81.

160. Market Guidelines ¶¶ 15–17.

161. *See* MERGER GUIDELINES, *supra* note 47, § 4.1.2.

162. *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 176–77 (E.D.N.Y. 2015).

boundaries of the product market."[163] Likewise, the *American Express* court placed heavy weight on the testimony of those within the GPCC card market and among merchants that debit cards are not suitable substitute products.[164] The similarities between the Commission's guidance and the reasoning adopted in *American Express* leads to the conclusion that the relevant product market determination inquiry would conclude similarly, with debit cards not included in this market.

B. BLOCK EXEMPTIONS AND VERTICAL RESTRAINTS

Article 101 creates a statutory analytical framework that is similar to the American common law burden-shifting framework used in *American Express*.[165] Article 101(1) prohibits all agreements between undertakings that restrict or distort competition.[166] Article 101(3) carves out a safe harbor for any agreement that "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit."[167] Article 101(3)(a) limits the safe harbor to those agreements that do not "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives."[168] This structure imposes a burden first on the Commission to determine that the conduct is anti-competitive. Next, the parties to the agreement may show that the agreement meets the safe harbor provision, in other words, that the agreement is justified by the pro-competitive benefits it provides. Finally, the Commission may determine the anti-competitive restrictions imposed by the agreement are not "indispensible" to the objectives contemplated by the parties, which is an analogue to imposing a burden of showing that there is a method for accomplishing the goals of the agreement that has lesser anti-competitive effects. This framework tracks closely the methodology used in *American Express*,[169] and any resulting gaps are filled in by the Commission's "block exemption" regulations for the application of the safe harbor

163. Market Guidelines ¶ 40.
164. *See Am. Express Co.*, 88 F. Supp. 3d at 151.
165. *Id.* at 64–67.
166. TFEU art. 101(1).
167. *Id.* at art. 101(3).
168. *Id.*
169. 88 F. Supp. 3d at 168–70.

provision.[170]

Block exemptions allow for large categories of agreements to be considered exempt from Article 101 liability.[171] The Vertical Restraints Guidelines lay out those agreements that do not fall within the purview of Article 101, and therefore do not require exemptions. Article 101 does not cover *de minimis* agreements, which are those considered to be of minor importance.[172] The guidelines also identify agency agreements, which are those between a principal and her agent, despite the fact that they may be different undertakings, as not covered by Article 101.[173] Any other vertical agreement that would otherwise violate Article 101 must therefore comply with the block exemption regulations to be permissible. The block exemption for vertical agreements applies to two or more undertakings, at different levels of the distribution chain, operating in either tacit or implied agreement, based on the purchasing or resale of certain goods or services.[174]

The Commission has acknowledged that vertical agreements may have substantial pro-competitive effects,[175] in the same way as the federal district court in *American Express*.[176] In order to assess the probability of pro-competitive effects outweighing anti-competitive effects, Commission regulations require a determination of the market power of the undertakings involved in the agreement.[177] These regulations set a standard that anything less than 30% market share by each of the undertakings will make an agreement between them

170. Commission Regulation 330/2010 of 20 Apr. 2010 on the Application of Art. 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102/1) art. 2(1) [hereinafter Block Exemption Regulations].

171. *Id.* ¶ 2.

172. Vertical Restraints Guidelines ¶¶ 8–11. *See also* Commission Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community, 2001 O.J. (C 368), ¶¶ 7–9.

173. Vertical Restraints Guidelines ¶¶ 12–21. Similarly, subcontracting agreements are also exempt. *Id.* ¶ 22.

174. *Id.* ¶ 25. This language tracks closely the logic used by the *American Express* court in determining that the NDP agreements were in fact vertical restraints. *See* 88 F. Supp. 3d at 149–52.

175. Block Exemption Regulations ¶ 6 ("Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings.").

176. *Am. Express Co.*, 88 F. Supp. 3d at 234–35.

177. *Id.* ¶ 7.

presumptively pro-competitive.[178] Thus, because American Express only had 26.4% of the GPCC card market,[179] the NDP agreements would be presumptively pro-competitive. However, the regulations also restrict the application of the block exemption for vertical restraints to only those undertakings with annual revenues under €50M (~$56M).[180] With annual revenues of $34 billion, American Express does not qualify for a block exemption.[181] Therefore, the restraints must be considered on the merits.

C. VERTICAL RESTRAINTS OUTSIDE OF BLOCK RESTRICTIONS

As a threshold matter, the guidelines advise that the Commission will evaluate the competitive nature of the agreement in light of how the relevant market would operate if the agreement did not exist.[182] This tracks closely to how the U.S. Supreme Court has mandated that American courts should analyze similar agreements.[183] The Commission will look to actual events as well as hypothetical events,[184] and the effect or likely effect on prices and output will be examined.[185] The court in *American Express* examined actual anti-competitive effects,[186] specifically focusing on the effects on price.[187] The Commission also will look for evidence of market power, which it defines almost exactly as American courts do: "Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not

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178. *Id.* at art. 3(1).
179. 88 F. Supp. 3d at 188.
180. Block Exemption Regulations art. 2(2).
181. *See* Shareholder Report, *supra* note 10, at 24.
182. Vertical Restraints Guidelines ¶ 97.
183. *Cf.* Nat'l Soc. of Prof. Engineers v. United States, 435 U.S. 679, 695–96 (1978) ("The judiciary cannot indirectly protect the public against . . . harm by conferring monopoly privileges on the manufacturers.").
184. Vertical Restraints Guidelines ¶ 97 ("In the assessment of individual cases, the Commission will take, as appropriate, both actual and likely effects into account.").
185. *Id.* ("For vertical agreements to be restrictive of competition by effect they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation, or the variety or quality of goods and services can be expected . . . .").
186. *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 168–69 (E.D.N.Y. 2015).
187. *Id.*

insignificant period of time."[188] As under the Sherman Act, the market power requirement for a 101 violation is less than that required for a finding of dominant position under 102.[189] The Commission has also stated it will examine barriers to entry[190]—in the same way as *American Express*.[191] Whether the agreement is imposed or agreed will also have relevance,[192] as it did in *American Express*.[193] With the Commission analyzing largely the same factors, and in light of proposed regulation by the Commission prohibiting NPDs,[194] the Commission is likely to come to the same conclusion—NPD agreements are anti-competitive in nature, and for them to stand, American Express must offer some substantial pro-competitive justification.

D. PRO-COMPETITIVE JUSTIFICATIONS UNDER 101(3)

Article 101 allows otherwise anti-competitive agreements to be permitted if the agreements have overriding pro-competitive justifications.[195] The Commission has laid out a four-factor test for judging possible pro-competitive benefits.[196] First, the agreement must lead to efficiencies in production or development of the goods or services in question.[197] As in American antitrust analysis, efficiencies gained in one market cannot offset anti-competitive injury to another market.[198]

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188. Vertical Restraints Guidelines, *supra* note 151, ¶ 97; *see also* United States v. Du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (defining monopoly power as the power to control prices or exclude competition).

189. Vertical Restraints Guidelines, *supra* note 151, ¶ 97; *see also Am. Express Co.*, 88 F. Supp. 3d at 189–90.

190. Vertical Restraints Guidelines, *supra* note 151, ¶¶ 111, 117.

191. *See Am. Express Co.*, 88 F. Supp. 3d at 189–90.

192. Vertical Restraints Guidelines, *supra* note 151, ¶ 121.

193. *See Am. Express Co.,* 88 F. Supp. 3d at 163–64.

194. *See Commission Proposal for a Regulation of the European Parliament and of the Council on Interchange Fees for Card-Based Payment Transactions*, at art. 11, COM (2013) 550 final (July 7, 2013) ("Any rule in licensing agreements, scheme rules applied by payment card schemes and in agreements entered into between card acquiring payment services providers and payees preventing payees from steering consumers to the use of any payment instrument preferred by the payee shall be prohibited.").

195. Commission Notice on Guidelines on the Application of Article 81(3) of the Treaty 2004/C 101/08 (EU) No. 101/97 of 27 Apr. 2004, 2004 O.J. (C 101), ¶ 33 [hereinafter 101(3) Guidelines].

196. *Id.* ¶ 34.

197. *Id.* ¶ 34(a).

198. *Id.* ¶ 43.

Second, consumers must receive a fair share of the benefits.[199] Third, the restrictions must be indispensable to the attainment of the objectives.[200] Finally, the agreement cannot eliminate competition in respect to a substantial part of competition of the products in question.[201] All four prongs must be met for an agreement to be adjudged pro-competitive.[202]

Whether an otherwise restrictive agreement produces efficiencies within the market is analyzed from an objective standpoint.[203] The Commission has identified several types of efficiencies, but notes that they must be directly caused by the agreement.[204] Cost efficiencies are recognizable, provided they lead to innovation,[205] synergies from the combination of assets,[206] economies of scale,[207] economies of scope,[208] or better production planning.[209] NDPs provide none of these to the GPCC card market.

Customers, in terms of 101(3) analysis, are the direct or indirect users of the product.[210] As the product in question is network services in the GPCC card market, the relevant consumer is the merchant charged the discount rate. Merchants can be said to receive a fair share of the benefits if they receive benefits that "at least compensate [them] for any actual or likely negative impact caused to them by the restriction of competition."[211] The net effect must be at least neutral.[212] Thus, the greater the harm to competition, the greater the benefit to merchants must be to offset it.[213] Since it can be argued that the merchants receive no benefit from the NDPs, this prong is not met.

Restrictions from the agreement are indispensable if both the agreement in whole and the individual restrictions are

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199. *Id.* ¶ 34(b).
200. *Id.* ¶ 34(c).
201. *Id.* ¶ 34(d).
202. *Id.* ¶ 42.
203. *Id.* ¶ 49.
204. *Id.* ¶ 54.
205. *Id.* ¶ 64.
206. *Id.* ¶ 65.
207. *Id.* ¶ 66.
208. *Id.* ¶ 67.
209. *Id.* ¶ 68.
210. *Id.* ¶ 84.
211. *Id.* ¶ 85.
212. *Id.*
213. *Id.* ¶¶ 90–91.

"reasonably necessary in order to achieve the efficiencies."[214] As noted above, there appear to be no efficiencies gained by the GPCC card market as a whole from American Express' NDP agreements. Additionally, the Commission points out that the pro-competitive effects must be felt by the market as a whole, not by one specific competitor who is party to the agreement.[215] This is analogous to the maxim in American antitrust law that antitrust laws protect "*competition*, not *competitors*."[216]

As the court in *American Express* pointed out, the strongest of the pro-competitive justifications offered by American Express could be achieved without anti-competitive effect by instituting a program where American Express sells the analytics created by its closed loop system to all customers.[217] It seems plausible that there would exist a similar ability to sell those services to merchants in the EU. The existence of a less restrictive alternative to the NDPs ensures the agreement would not meet the third prong of the test.

Whether an agreement eliminates a substantial amount of competition in a market is a context-specific inquiry where both actual and potential competition must be considered.[218] The level of competition existing both before and after the agreement is to be taken into account.[219] Of specific importance are barriers to entry, including the burden of sunk costs, the response of market incumbents to new entry, and past entry on a significant scale or the absence thereof.[220] The court in *American Express* addressed all of these factors at some point in its opinion. It found that competition on price existed on some level before the NDPs, and on almost no level after.[221] The court found that sunk costs for a new entrant to the GPCC card market were significant,[222] that incumbents were likely to be hostile,[223] and that there had been no significant entry into the market since

214. *Id.* ¶¶ 73–74.
215. *Id.* ¶ 49.
216. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis added).
217. United States v. Am. Express Co., 88 F. Supp. 3d 143, 236 (E.D.N.Y. 2015).
218. 101(3) Guidelines, *supra* note 195, ¶ 108.
219. *Id.* ¶ 107.
220. *Id.* ¶ 115.
221. *Am. Express Co.*, 88 F. Supp. 3d at 151.
222. *See id.* at 189.
223. *See id.*

1985.[224] These findings support a conclusion that a substantial amount of competition in the GPCC card market is foreclosed by NDP agreements.

Consequently, NDP agreements objectively produce no substantial efficiencies in the GPCC card market. Merchants receive none of the benefits and agreement restrictions likely have alternatives with fewer anti-competitive effects. NDPs also further restrict competition in a market in which there was little competition to start. With every indicator pointing against pro-competitive justification, it is therefore likely that the Commission will not allow NDP agreements to be protected by the 101(3) safe harbor.

IV. CONCLUSION

The European Commission has issued extensive guidelines so that companies may structure their agreements to avoid antitrust liability. Those guidelines mirror, in many respects, the bedrock principles of American antitrust law applied by the federal district court in *American Express*. The method of analyzing vertical restraints implemented by the court in this case is likely to be very similar to the analysis implemented by the Commission. Considering the overall strength of the reasoning displayed in the *American Express* opinion and the lack of any specific provision unique to EU antitrust law permitting NDP agreements to stand, American Express faces the very real possibility of future antitrust liability in the EU.

224. *Id.* at 190.