Applying the Rule of Reason to Two–Sided Platform Businesses

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Applying the Rule of Reason to Two–Sided Platform Businesses

David S. Evans and Richard Schmalensee*

In recent years, the federal courts’ analysis of the competitive effects of conduct challenged under the Sherman Act’s rule of reason, which generally includes market definition as a critical step, has been properly guided by sensitivity to business reality and sound economic analysis of the conduct at issue. When it comes to two–sided platforms, the courts should adhere to that same flexible but principled approach and avoid rigid alternatives that would apply regardless of the platform, conduct, or fact–pattern.

In Ohio v. American Express Co., (Case No. 16–1454), now before the U.S. Supreme Court, the U.S. Department of Justice as well as some law professors1 and economists2 wrote as amici in support of the Petitioners. They proposed analytical frameworks that would, first, require courts to restrict the relevant antitrust market to the side of the platform that is the subject of the

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challenged conduct\(^3\) and, second, to then exclude the impact of the conduct on the other side of the platform for the purposes of establishing anticompetitive effects under the first stage of the rule of reason inquiry.\(^4\)

Such a rigid approach could lead courts, and possibly require them, to ignore business reality, sound economics, and fact patterns in analyzing alleged anticompetitive conduct by platform enterprises and defining relevant antitrust markets. Following this approach could result in tribunals wrongly exonerating behavior that is anticompetitive or wrongly condemning behavior that is not. This approach should be rejected in favor of accounting for the business realities of two–sided platforms just as the courts have generally done for enterprises.

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\(^4\) See Brief for the United States, supra note 3, at 43–47; Brief of Law Professors Supporting Petitioners, supra note 1, at 20–27; Brief for Economists Supporting Petitioners, supra note 2, at 30–31. The amici law professors and economists that support Petitioners would further exclude consideration of procompetitive benefits on the other side of the platform in the second stage of the rule of reason inquiry. See Brief of Law Professors Supporting Petitioners, supra note 1, at 32–34; Brief for Economists Supporting Petitioners, supra note 2, at 23. We note that the Justice Department does not go to this extreme. It argues that the courts should consider procompetitive benefits on the other side of the platform in the second stage of the rule of reason analysis. Brief for the United States, supra note 3, at 52.
I. INTRODUCTION

The case of Ohio v. American Express Co., (No. 16–1454) (hereinafter AmEx), now before the U.S. Supreme Court, raises fundamental issues regarding the proper application of the Sherman Act’s rule of reason to platform enterprises that, like American Express, connect different types of customers with interdependent demands – merchants and consumers in the case of AmEx. In submissions to the Supreme Court in AmEx, the U.S. Department of Justice and some law professors and economists, as amici curiae in support of Petitioners, propose to require courts in such cases to restrict the relevant antitrust market to the side of the platform that is the subject of the challenged conduct, and then to exclude the impact of the conduct on the other side of the platform for the purposes of establishing anticompetitive effects under the first stage of the rule of reason inquiry.

This approach would apparently apply to all platform enterprises, for all possible challenged conduct, and for all possible fact patterns. It would be a substantial departure from the courts’ long–standing emphasis on understanding business reality and employing sound economic analysis. Since platform enterprises are a large and growing portion of the economy, adopting this rigid framework would fundamentally transform the rule of reason. And, as we show below, it would lead to condemnation of procompetitive conduct in some cases and exonerating anticompetitive conduct in other cases.

The risk of error from ignoring customers on one side of a platform during the first stage of the rule of reason analysis is heightened for platforms that provide services that, by their very nature, are jointly and une severably consumed by two different types of customers. Examples include online marketplaces, stock exchanges, dating businesses, messaging platforms, and payment networks.

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6 See Brief for the United States, supra note 3, at 43–47; Brief of Law Professors Supporting Petitioners, supra note 1, at 20–27; Brief for Economists Supporting Petitioners, supra note 2, at 30–31. The amici law professors and economists would further exclude consideration of procompetitive benefits on the other side of the platform in the first stage of the rule of reason inquiry. See Brief of Law Professors Supporting Petitioners, supra note 1, at 32–34; Brief for Economists Supporting Petitioners, supra note 2, at 23. We note that the Justice Department does not go to this extreme. It argues that the courts should consider procompetitive benefits on the other side of the platform in the second stage of the rule of reason analysis. Brief for the United States, supra note 3, at 52.

7 Examples include online marketplaces, stock exchanges, dating businesses, messaging platforms, and payment networks.
service that both consume jointly in order to recover the platform’s costs and make a profit. A restaurant reservation service, for example, provides a valuable service only when it enables a person wishing to dine at a restaurant to make a reservation and a restaurant to take that reservation from that prospective diner. The reservation service can charge the diner, the restaurant, or both for this service.

To determine whether a restraint is anticompetitive, where, as in the restaurant reservation example, the platform’s matching services are joint and unseverable, the presumption at the first stage of the rule of reason should be to consider the impact on both sets of customers, on how much they jointly pay, and, ultimately, on the overall output of the jointly consumed service. Conduct that increases the overall output of a service should be commended, not condemned, as that is a central virtue of competition.

This is not a matter of burden shifting. There is simply no way to know, especially in the case of a platform that provides a service that customers on each side consume jointly, whether a practice is anticompetitive without at least considering both types of customers and the overall competition among platforms. That analysis must, therefore, happen at the first stage of the rule of reason to assess whether the conduct is anticompetitive or not.

The assertion by the AmEx Petitioners and some of the amici in support that the relevant antitrust market for a two-sided platform always includes the side of the platform on which the conduct has occurred and always excludes the other side of the platform conflicts with sound economics. This assertion is clearly wrong for platforms that provide services that are jointly consumed, and unseverable, by the customers on each side. In such cases, there is a single service that is subject to competition, and it is that service that is interchangeable among the customers that use it. For example, while the benefits that diners and restaurants each obtain from an online reservation service are not reasonably interchangeable, the service they jointly consume is reasonably

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8 As is always the case with the rule of reason, the inquiry ultimately concerns the impact of the conduct on the market price and output. See, e.g., NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 113 (1984) (calling higher prices and lower output “hallmarks of anticompetitive behavior”).

9 Some amici economists even want to discourage the courts from looking at the standard signals of competitive harm—price and output—because, despite received antitrust doctrine, they contend that lower prices and higher output may be undesirable. That would eliminate the main navigational tool that the courts have used with great success in rule of reason inquiries. Those amici economists would have the courts wade into the sea of two-sided platforms without a compass for the rule of reason. See Brief for Economists Supporting Petitioners, supra note 2, at 20, 34–35.
interchangeable with services provided by other online restaurant reservation services.

In submissions to the Supreme Court in *AmEx*, some law professors, economists, and the U.S. Department of Justice, all as *amici*, write as if they are asking the Court to conduct rule of reason business as usual. In fact, they are insisting that the courts *always* view *all* platform enterprises through a uniquely narrow and distorted lens. The Court should reject this request and, instead, take business reality and the facts on the ground into account in applying the rule of reason to two-sided platforms, as courts do in cases involving all other enterprises. There will be matters—especially involving platforms that provide joint and unseverable matching services—in which, to minimize errors, the courts will need to consider both sides of a platform. There will also be some cases in which it may be possible to address certain issues by considering only one side of a platform.

II. TWO–SIDED PLATFORMS SERVE CUSTOMERS WITH INTERDEPENDENT DEMANDS

Two-sided platforms enable two distinct types of participants to interact more readily and realize gains from trade or other interaction. They provide each customer group with access to the other customer group. The key technical feature is that the demand for the platform service by each type of participant depends on the demand for the platform service by the other type of participant as a result of externalities between the two types of participants. It now is generally recognized in industrial organization economics and business strategy that the interdependency of demand for the two customer groups can have significant economic ramifications.

The relevant literature, which started in 2000 with the circulation of a working paper version of Rochet and Tirole’s seminal contribution, encompasses hundreds of published papers, several major books, and is a

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10 Two-sided platforms are a special case of multisided platforms, which can serve two or more distinct groups of customers. We consider two-sided platforms here to simplify the discussion but the analysis applies to platforms with more than two sides.

11 The *amici* economists supporting Petitioners note that the fact that raising the price on one side of a platform decreases demand on the other side is similar at the level of abstract theory to the relation between prices and demands for complements, like tennis racquets and tennis balls. *See* Brief for Economists Supporting Petitioners, *supra* note 2, at 4–5. This neglects a fundamental difference in business reality between the two situations: a platform *must* serve both its sides because it is in the business of connecting them, while many businesses sell one complement (tennis balls) but not the other complement (tennis racquets).
standard and noncontroversial part of the modern industrial organization literature. The basic insights of the economic literature are now widely discussed in nontechnical books and media, have diffused widely through the business world, and are applied in business decisions.

Potential platform participants often make two distinct decisions. They decide whether or not to join a platform so that they have the option to use it. In the case of a ride–sharing service, drivers have to sign on to drive for the service, and passengers need to install an app and set up an account. Having joined a platform, participants make decisions on how much to use it, drivers have to decide how much to drive for a particular service, and passengers have to decide how many rides to take on that service.

For each set of participants, a platform may independently establish access prices (for joining the platform) and transaction prices (for using it). The economic theory of two–sided platforms shows that profit–maximizing access and transaction prices can be less than the marginal cost of provision – even zero or negative – subject to at least some of these prices being sufficiently above marginal cost so that the platform earns a profit. These access and transaction prices affect the overall use of the platform. How they do so depends on the structure of demand for the participants to join the platform and to use the platform after having joined. It is common, though certainly not universal, for two–sided platforms to lose money on one side of the platform.

Beyond this basic description, two–sided platforms, like traditional enterprises, are diverse. The courts will see many platforms that bear little apparent similarity to the credit–card network at issue in this matter. That is apparent from comparing credit–card networks to newspapers and both to ride–sharing services.

See United States Telecom Ass’n v. FCC, 825 F.3d 674, 754 (D.C. Cir. 2016) (Williams, J., concurring in part, dissenting in part) (referring to “the vast scholarly treatment” of two–sided markets).

The diversity of platform enterprises, however, is not fundamentally different from the diversity of single-sided enterprises and does not pose any challenge the courts have not successfully met before. This diversity is certainly not a basis for requiring courts to ignore information that may be relevant to a sound assessment of whether challenged conduct is anticompetitive or not.

III. FOCUSING ON ONLY ONE SIDE OF A PLATFORM CAN RESULT IN FALSE NEGATIVES AND FALSE POSITIVES

The Court’s decision in *Times–Picayune*, relied on by *AmEx* Petitioners, illustrates how different modes of analysis can make economic sense in practice, depending on the violation alleged, the specific issue considered, and the facts on the ground.14

The issue presented to the Court was whether a newspaper publisher, with a two-sided platform for readers and advertisers, engaged in a Sherman Act Section 1 tying violation by requiring advertisers to place ads in one publication as a condition of placing ads in another publication.15 The Court disposed of the issue based on its finding that advertisers had sufficient choices of where to place ads so that the business leverage necessary for an anticompetitive tie was absent.16 There was no apparent reason to examine the impact of the tie on readers to assess whether there was an antitrust violation involving tying, given the Court’s treatment of tying at that time.17 Moreover, for the purposes of assessing whether the newspaper publisher had the bargaining leverage to impose an anticompetitive tie, it was sufficient to consider only competition for advertising.18

In contrast, in analyzing whether the newspaper publisher engaged in predation in violation of Sherman Act Section 2, the district court examined whether the platform as a whole—taking both readers and advertisers into account—was operating at a loss.19 The district court

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15 Id. at 596.
16 Id. at 611–13.
17 One could imagine other sets of facts that would make it necessary to consider both sides for a full understanding of anticompetitive and procompetitive effects in tying cases.
18 *Times–Picayune Publishing Co.*, 345 U.S. at 611.
19 See Brief for the United States, supra note 3, at 38–39; see also *United States v. Times–Picayune Publishing Co.*, 105 F. Supp. 670, 677 (E.D. La. 1952) (evaluating arguments about allocating “revenues and expenses” from both “advertising and circulation” in determining whether one of the defendant’s two papers “was operated at a loss”).
compared revenue from both sides and the costs on both sides. This two-sided arithmetic helped support the district court’s conclusion that there was no Section 2 violation, which the Supreme Court accepted without criticism. Since newspapers typically lose money on the reader side while making money on the advertising side, it would ignore business reality and make no economic sense to look at either side in isolation for predation analysis purposes.

Predatory pricing makes particularly clear how the failure to account for the interdependent demand between the two sides can result in a tribunal concluding that conduct is anticompetitive when it plainly is not (a false positive), and finding that conduct is not anticompetitive when it plainly is (a false negative).

A tribunal could reach a false positive conclusion if it found predatory pricing based on the platform charging a below–cost price on one side. That is common profit–maximizing behavior for two–sided platforms even when they operate in competitive industries. A French commercial court made that mistake in finding that Google Maps engaged in predatory pricing by providing websites with free mapping software. A Paris Appeals Tribunal reversed, relying on an opinion by the French Competition Authority. This opinion, along the same lines as the district court’s in Times–Picayune, states that revenue and cost on both sides of the platform should be considered.

A court could also make a false negative finding. Suppose, contrary to the actual facts, that Times–Picayune Publishing had reduced advertising

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20 Id. As a matter of economics this approach is equivalent to comparing the overall price charged by the platform, based on a weighted average across readers and advertisers, and the overall operating costs incurred by the platform, based on a weighted average across readers and advertisers. This approach is consistent with the two–sided price–cost comparison we recommend in our Oxford Handbook paper. See Evans & Schmalensee, supra note 13, at 423–25.


prices for its evening paper without raising prices to readers and that, although the advertising prices were greater than the cost of providing advertising, doing so resulted in operating the evening paper at an overall loss because of losses on the reader side. Assume further that this pricing structure had forced its rival out of business, since the rival could not match the lower advertising prices without sustaining large losses, and that Times–Picayune Publishing then recouped through higher reader and advertiser prices.

If, in this hypothetical, the district court had defined an advertising–only market and evaluated the predatory pricing claim based only on whether price was greater than cost in that market, then the court would have concluded that Times–Picayune Publishing had not engaged in predatory pricing when in fact it did. The two–sided approach actually adopted by the district court in 1952 would have saved it from making that false negative determination.

False negatives and false positives can arise from any rule of reason analysis in which the finder of fact ignores one side of a platform. There may be situations in which the interdependence between the two sides of a platform is unimportant or can be neglected because of the particular issue at hand. As in any rule of reason inquiry, however, the courts should analyze the challenged conduct in light of business realities and the overall fact pattern before deciding what evidence to consider.

IV. THE RISK OF ERROR IS HEIGHTENED WHEN A PLATFORM PROVIDES A SERVICE THAT IS JOINTLY AND UNSEVERABLY CONSUMED BY TWO TYPES OF CUSTOMERS

For platforms that provide two groups of customers with a service that they must consume jointly, and where the challenged conduct necessarily affects both types of customers, there is a strong presumption that, as a matter of economics, the rule of reason analysis, at the first stage, should consider the impact of the challenged conduct on both groups of customers.

Joint consumption is not an essential aspect of the services provided by many platforms. For instance, people can watch ad–supported television, enjoy the content, and ignore the ads. Although advertisers hope that enough consumers will pay attention to their ads to justify the cost, content and ads are not necessarily consumed jointly. Providing content and providing ads are severable. It is possible to provide content without ads, and some consumers are willing to pay for programming without ads. As a result, two–sided ad–supported television faces
competition from single–sided premium cable channels and streaming video providers.

Some platforms, however, provide a service that, by its very nature, must be jointly consumed by two customers and cannot be separately provided to one or the other. Consider an equity exchange such as Nasdaq. The service involves helping buyers and sellers find each other and engage in trades. The service is jointly consumed: the buyer and seller agree to terms and then consummate a transaction. The exchange service is also unseverable since it is not possible to provide it just to buyers or just to sellers. Any enterprise that wants to be in this business must provide the service to both groups.

When a service is jointly provided, a party and a counterparty stand at opposite ends of the service. In some cases, the same platform participants could be on either end of the service depending on their circumstances. People can, at different times, be both senders and receivers of messages on a messaging platform (e.g. WhatsApp) and both senders and receivers of funds on a person–to–person money–transfer platform (e.g. Venmo). In other cases, the parties and counterparties are necessarily distinct. Heterosexual dating platforms (e.g., Match.com) connect members of opposite sexes, and payment card networks (e.g., American Express) connect cardholders and merchants.

In all these cases, the platform must decide how to split the cost of the service between the parties that consume it jointly and unseverably. OpenTable, for example, charges restaurants $1.00 and diners $0.00 for reservations made through the platform. The price it charges for a reservation would still be $1.00 if it charged restaurants $0.75 and diners $0.25 for each reservation or any other set of numbers that added up to $1.00.

It would not make economic sense to analyze the conduct of a platform that provides a service that is jointly consumed by looking only at what customers on one side pay for the service and receive from it. Businesses of this sort never provide a transaction to only one side of the service, and every interaction has a party and a counterparty that both benefit from the service.

The economic surplus generated by each interaction equals the total difference between the values both parties place on the interaction minus the total costs they incur. The platform determines the division of this surplus between the two sides through the prices it charges each.

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26 We have simplified this pricing structure to aid exposition. In fact, OpenTable also charges restaurants a monthly access fee and provides reward points to diners based on how many reservations they make so diners pay a negative transaction fee. See David S. Evans & Richard Schmalensee, Matchmakers: The New Economics of Multisided Platforms 9–12 (2016).
Competition between platforms that provide joint and unseverable services, like competition between ordinary single-sided businesses, leads to greater economic surplus by encouraging lower prices, better quality, and higher output.

A platform with market power that provides a service that is jointly and unseverably consumed could, like any other firm with market power, engage in conduct that would harm competition. Evidence on whether the challenged conduct has made buyers worse off, or would be likely to do so – through some mix of higher prices, lower output, and lower quality – would typically be important, or certainly useful, for that assessment. Conduct that, at the market level and taking both sides into account, does not reduce the quality of the service or raise the total cost of the service would ordinarily not reduce total market output or buyers’ surplus.

There is a strong presumption that conduct that affects one party to a jointly consumed service has an impact on the other party consuming that service and sharing its cost. In determining prices to maximize its profits, the platform must take the interdependent demands of both parties into account. Conduct that affects one side of the jointly consumed service necessarily affects the other side. Therefore, it would be necessary to consider both sides of the platform that provides the jointly consumed service at the first stage of the rule of reason inquiry to determine whether challenged conduct has harmed consumers and the competitive process.

Considering the impact of challenged conduct on both sides of the interaction is very different than the usual evaluation of procompetitive benefits in the second stage of a rule of reason inquiry in at least two different ways.

First, it is possible that the conduct harms parties on which a restraint has not been imposed, and failure to consider both sides of the platform involved at the first stage of the rule of reason inquiry could lead to a false negative. A job matching platform with market power, for example, might require employers to list jobs exclusively with it in exchange for lower prices. If this prevented the entry of other job sites, however, the firm imposing the constraint could charge higher prices to jobseekers. To properly assess whether challenged conduct harms competition, then, the first stage of the rule of reason inquiry should consider the impact of the

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27 The AmEx Petitioners, and some of the amici in support, claim that the total cost of the service to both types of customers is not relevant because competition should determine the relative prices to the two sides. See Brief of Law Professors Supporting Petitioners, supra note 1, at 20, 23–24; Brief for Economists Supporting Petitioners, supra note 2, at 15. It is not possible, however, to reliably determine if conduct has harmed competition and consumers through a distortion in relative market prices without considering both sides of a two-sided platform at the start of the analysis, since competition takes place on both sides.
conduct on both parties, most naturally by considering the impact on total market prices and market output.

Second, it is possible that the conduct benefits parties on one side of the platform. That benefit is part of the economic surplus generated by the interaction between the parties and should be accounted for in determining whether the practice reduces consumer welfare. Consider a money transfer platform that lowered prices to senders so they received a subsidy, and increased prices to receivers by a smaller amount, thereby resulting in a lower total price, higher demand, and greater output. Its pricing could look predatory on the sending side even though this change in pricing structure reduced the total price for money transfers and increased the output of money transfers. In this example, it is not that there are procompetitive benefits that offset anticompetitive effects; rather, there are no possible anticompetitive effects to begin with.

And therein lies the fundamental error in the arguments about impermissible balancing put forward by the AmEx Petitioners and amici in support. The first stage of the rule of reason analysis involves determining whether the conduct is anticompetitive. The economic literature on two–sided platforms shows that there is no basis for presuming one could, as a general matter, know the answer to that question without considering both sides of the platform.

V. AS USUAL, MARKET DEFINITION SHOULD INCLUDE SUPPLIERS THAT PROVIDE SIGNIFICANT COMPETITIVE CONSTRAINTS

Market definition is normally an important step in the analysis of competitive effects. The basic principles for determining the relevant antitrust market are no different for platform enterprises than they are for other enterprises. The relevant antitrust market should consist of the suppliers that compete with the firm or firms of primary interest and impose significant competitive constraints on that firm or those firms. That principle has been at the core of the economic analysis of market definition since the early 1980s.28 It is essential that market definition faithfully

28 The modern approach to market definition, with its emphasis on competitive constraints rather than mere interchangeability, is generally understood to have begun with the U.S. Department of Justice’s 1982 Merger Guidelines. The basic approach in the guidelines is generally used by economists. See generally Gregory J. Werden, The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm, 71 ANTITRUST L.J. 253 (2003); Dennis W. Carlton, Market Definition: Use and Abuse, 3 COMPETITION POL’Y INT’L 3 (2007); Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 ANTITRUST L.J. 49 (2010); see also
reflect business realities to identify and assess competitive constraints from suppliers that compete with the firm or firms of primary interest.

A firm that operates a two–sided platform faces competitive pressures on both sides of the platform that restrain its ability to raise prices or restrict output on either side or both sides of the platform. Consider, for example, competing shopping malls. If one mall decided to reduce its subsidy to shoppers—by charging for parking or reducing amenities, for example—some of those shoppers would shift their demand to other malls. Because of that fall in traffic, the demand by retailers for locating at that mall would decline, therefore reducing the rents the mall could charge. Competitive pressures on the retailer side therefore constrain the mall’s ability to profitably lower the subsidy to shoppers.

The magnitude of these competitive constraints, however, and the relationship to challenged conduct, will vary across matters before the courts. Sometimes these cross–side competitive constraints could be economically significant, making it a mistake to exclude competition for customers on one side from the set of competitive constraints on competition for the other side. In other cases, these cross–side competitive constraints could be small enough to ignore. In some cases, even though these cross–side competitive constraints are significant, it may be convenient to proceed at the first stage by assembling the competitive constraints separately for each side into two markets and then consider the linkages between them. In all cases, it is important at the first stage of the rule of reason analysis to respect the reality that two–sided platforms are in the business of linking their two sides.

In their filings in AmEx, some amici curiae supporting the Petitioners are asking the Court to require, as a matter of law, that the relevant market for assessing challenged conduct by all platform enterprises never include competition for the customers on the other side of the platform. This rigid approach would exclude relevant competitive constraints on the conduct at issue, and is therefore inconsistent with modern approaches to market definition and basic principles of evidence. It would also prevent the courts

Comcast Corp. v. Behrend, 569 U.S. 27, 44 (2013) (citing the most recent iteration of the Merger Guidelines).


For a discussion of considering linked markets versus a single market see Wismer & Rasek, supra note 29, at 4–7.
The fundamental error in imposing this novel limitation on the court is most clearly seen for platforms that provide services that are jointly and unseverably consumed. In these cases, participants are consuming the same service, just standing at different ends. Any enterprise that provides the service would have to compete for both types of customers. The value of the service to one type of customer depends on their ability to interact with the other type of customer. A platform that is more successful at attracting one type of customer necessarily makes it harder for its rivals to attract the other type of customer. Defining a market that included just one type of customer would be inconsistent with business reality, as there is no rational competition for one side without the other, and it would ignore the competitive constraints coming from competition for both groups.

The AmEx Petitioners, and the amici in support, base their proposal for confining market definition for platform enterprises on two false premises.

The first false premise is that the purpose of market definition is to mechanically identify products that are interchangeable. Examining the extent to which consumers can substitute the products of different suppliers is often an important element in identifying those suppliers that should be included in the market because they impose significant competitive constraints. However, the analysis of the interchangeability of products is not an end in itself. It is just a means for helping the court identify relevant competitive constraints.

The second false premise is that the interchangeability between the services received by opposing sides of a platform is somehow relevant for assessing competitive constraints. To see the error in their analysis, consider competition among person–to–person money transfer services. It is true that the service provided to a person who sends money is literally

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31 See Werden, supra note 28, at 253; Frank H. Easterbrook, Limits of Antitrust, 63 Tex. L. Rev. 1, 22 (1984) (“Market definition is just a tool in the investigation of market power . . . .”).

32 It is not uncommon for courts and antitrust authorities to define relevant product markets that include products or services that most customers would not consider to be reasonable substitutes. For example, the market for hospital services may include heart transplants, brain tumor surgery, and appendectomies, which patients and doctors would not consider to be interchangeable. See, e.g., FTC v. Penn State Hershey Medical Center, 838 F.3d 327, 338–45 (3d Cir. 2016) (including local hospitals that constrain the defendants’ pricing of general acute care services and incorporating new economic learning for determining relevant geographic markets); FTC v. Advocate Health Care Network, 841 F.3d 460, 468, 471–73 (7th Cir. 2016) (including “abdominal surgeries, childbirth, treatment of serious infections, and some emergency care” in the relevant product market and adopting new economic learning for relevant market definition).
different from, and not interchangeable with, the service provided to a person who receives money. Defining separate markets for sending money and receiving money, however, would ignore the core business reality that suppliers compete for transactions between senders and receivers. The transactions between senders and receivers are substitutable across platforms. An increase in the price of the transaction by one platform—almost no matter how that price is divided between the sender and receiver sides—would tend to result in an increase in demand for other platforms.

In the cases of platforms that provide a service that is jointly and unseverably consumed, the observation that the customers are at different ends of the service is irrelevant and should not be used to remove important competitive constraints from the relevant market. Platforms that provide similar jointly consumed services are substitutes for each other, and their products are interchangeable as a matter of business reality. Market definition for platforms that provide services that are jointly consumed and unseverable should therefore focus on identifying suppliers that provide services that are interchangeable in this sense, which typically accords with business reality.

VI. CONCLUSION

The history of the application of the rule of reason shows the importance of allowing the courts to consider all economic evidence that is potentially relevant for determining whether conduct is anticompetitive or not, including new economic learning.33 There is certainly no basis in economics for putting special blinders on the courts when it comes to considering platform enterprises, as requested by the Petitioners and some of their amici in AmEx. Doing so would be a radical departure from the flexible but principled approach that the Court has taken, with great success, in applying the rule of reason to a wide variety of businesses, conduct, and fact patterns.

33 See, e.g., Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 889–91, 897–99 (2007) (citing new economic learning as a justification for ending the per se illegality of vertical resale price maintenance agreements, which had been the law for a century, and instructing courts to take economic considerations into account when applying the rule of reason).