DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

June 26, 2018

U.S. SUPREME COURT HOLDS ANTISTEERING PROVISIONS IN MERCHANT CONTRACTS DO NOT VIOLATE ANTITRUST LAW

The United States Supreme Court concluded that the antisteering provisions American Express Company ("Amex") places in its contracts with merchants do not violate federal antitrust law. Ohio v. American Express Co., __ S.Ct __ (June 25, 2018). The plaintiffs argued that the antisteering provisions are anticompetitive because they result in higher merchant fees. The Court was not persuaded by this argument and found the plaintiffs did not carry their burden to prove anticompetitive effects in the relevant market because the merchants' argument focused only on one side of the two-sided credit card market.

According to the Court, credit card networks are a special type of two-sided platform known as a transaction platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. Thus, in order to demonstrate anticompetitve effects on the two-sided credit card market as a whole, the plaintiffs must prove that the antisteering provisions (i) increased the cost of credit card transactions above a competitive level, (ii) reduced the number of credit card transactions or (iii) otherwise stifled competition in the credit card market.

The Court noted that the antisteering agreements stem the negative effects caused by a lack of welcome acceptance from merchants in the credit card market and promote interbrand competition. The Court concluded Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit card transactions.

Visa and MasterCard were also parties to the original lawsuit, but each entered a settlement with the plaintiffs and voluntarily revoked their antisteering provisions in 2011.

Please contact us with questions or to discuss your merchant agreements. ❑

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