Insistence – Redefining How We Think of Antitrust

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Summary

"Consumer insistence" was a term first coined by Melvin Copeland in his article, "Relation of Consumers' Buying Habits to Marketing Methods" in the *Harvard Business Review* in 1923.[1] In the article, Copeland describes consumer insistence as an extreme form of brand loyalty and demand manifestation such that when a "consumer approaches the purchase of an article in this attitude of mind, he accepts no substitute unless it is an emergency."[2]

The importance here is that insistence limits consumer switching because consumers vehemently *insist* on certain brands. Such brand owners have significant market power[3] because of the unlikelihood that these brand owners will lose customers to competing brands. In such cases, this market power can lead the brand owners (or their distributors) to restrain trade and raise prices well above competitive levels.[4] Therefore, the implications of insistence are far-reaching in terms of the economics and how we think about antitrust matters.[5]

Case Law

The term "insistence" has been cited in case law involving antitrust allegations. We observe the term in *Borger v. Yamaha International*, a refusal to deal case from 1980 whereby Yamaha was noted as "a specialty brand that had achieved a significant level of brand insistence among consumers."[6] Among other allegations, Borger's – a retailer selling audio equipment who was not afforded a franchise contract to distribute Yamaha's merchandise – alleged violations of the Sherman Act, including group boycott and conspiracy to fix prices on Yamaha audio equipment.[7] Borger's argued that its loss of the Yamaha line could not be offset by the sale of other brands due to consumers' insistence on access to Yamaha products.[8] Ultimately, Yamaha prevailed on appeal to the U.S. Court of Appeals for the Second Circuit because a lower court issued improper instructions to jurors with regard to market definition.[9] Still, it is noteworthy that Yamaha's brand insistence was a pivotal factor linked to the antitrust allegations in this case.[10]

More recently (and prominently), the term "insistence" has been emphasized in the US Department of Justice's case against American Express (with the term appearing in American Express's documents describing its customer base and throughout the case filings).[11] The DOJ's case pertained to non-discrimination provisions ("NDPs") required in American Express's contracts with merchants that prevented merchants from promoting competing credit cards over American Express (even if those cards presented better value to the merchant). Merchants could not steer consumers to lower cost payment methods, resulting in higher prices to both merchants and consumers.[12] Because of the insistence expressed by American Express cardholders, American Express was found to have market power whereby merchants could not afford to drop American Express as a method of payment.[13] The court ultimately ruled in favor of the DOJ, determining that American Express's NDPs impeded competition in the market for general purpose credit cards.[14] Brand insistence, which wed consumers to their American Express cards, was a critical issue in deciding the case.

In a recent dispute between two pharmaceutical companies (Eisai and Sanofi/Aventis),[15] Eisai cited the aforementioned *Amex* Decision alleging that the provisions in "[S]anofi's Formulary Access Clauses . . . prevented hospitals from placing rival products ahead of Lovenox [Sanofi's injectable anticoagulant product] on their formularies regardless of price,"[16] noting that American Express' contracts with merchants similarly prohibited merchants from promoting other payment cards over American Express.[17] Eisai argues that the "incontestable demand"[18] for Lovenox due to formulary clauses is akin to the "insistence that prevents most merchants from dropping acceptance of American Express when faced with price increases or similar conduct."[19] How one measures "incontestable demand" is debatable (and the Court has found thus far that Eisai could not establish that its allegedly depressed market share was attributable to anticompetitive conduct by Sanofi), but regardless the market power of Lovenox (perhaps, as Eisai alleges, akin to insistence) is a pivotal point in this case.[20]

Economics

Insistence can be thought of as extreme brand loyalty. This loyalty manifests as "a deeply held commitment to rebuy or repatronize a preferred product/service consistently in the future, thereby causing repetitive same-brand or same brand-set purchasing, *despite* situational influences and marketing efforts having the potential to cause switching behavior."[21] It is the repeat business (or guaranteed demand) coupled with lack of customer switching (or lack of competition) that exacerbates the brand's market power. Brands such as these are not threatened by interbrand competition (or would-be competing brands), and sometimes intrabrand competition (or competition at other levels of distribution chain) is diminished in the terms of the product's distribution.

In terms of distributors or sellers, one important factor related to insistence is the fraction of customers (or more accurately, of profits) that a distributor/seller would lose if it does not accept the insisted-brand. A point successfully argued by the government in the aforementioned *Amex* Decision was that merchants could not afford to drop American Express cards as a payment mechanism for their customers (despite American Express's above-market fees) because patrons would choose to shop elsewhere.[22] Thus consumer insistence created an all-or-nothing situation for merchants (where they had no choice but to accept American Express cards and American Express's anticompetitive contract terms or NDPs).[23]

Insistence is often generated through factors such as brand recognition, trust, satisfaction, and convenience,[24] but there are economic factors that can influence this extreme form of loyalty. Examples include loyalty rewards programs and contract provisions that contain most-favored nation ("MFNs") clauses.

Reward Programs and Insistence

Loyalty reward programs are geared to incent customers to purchase more of a branded product by rewarding those who buy higher volumes (especially those who commit to insist on the branded product). These programs are pervasive in the economy (frequent flyer miles, buy 10 get one free, etc.) and often promote competition amongst sellers vying for business.[25] They can be beneficial to both firms and consumers, including reducing marketing and shopping costs.[26] However, antitrust concerns arise when loyalty programs are market share or volume based as these can involve exclusive dealing, stifle entry, or raise rivals' costs.[27] Specifically, when loyalty programs target distributors of products, the supplier driving insistence for its products may be "able to foreclose rival suppliers from a large enough fraction of the market to deprive rivals of the opportunity to achieve minimum efficient scale" and in effect these MFNs then act as vertical controls.[28] Under certain circumstances, these reward programs have been successfully challenged under antitrust laws using a rule of reason analysis.[29]

"Enrollees in American Express's Membership Rewards program, for example, receive points for purchases made with their Amex cards, and may then redeem those points with Amex or one of its redemption partners for merchandise, gift cards, frequent flyer miles, statement credits, or other goods and services."[30] In the *Amex* Decision, the court found that rewards programs offered by American Express exacerbated its card-holder insistence; these programs, combined with the anti-steering provisions contained in its contracts with merchants, resulted in overall higher retail prices and created barriers to entry into the general purpose credit card market.[31]

Most-Favored Nation Clauses and Insistence

MFNs are typically commitments by a seller to guarantee a buyer certain contract terms (price or non-price) that are at least as favorable as those granted to other buyers.[32] MFNs are frequently found in markets for intermediate goods and are designed to promote brand loyalty or even insistence. Because of the restrictions on pricing or other terms between buyers and sellers, MFNs can be considered vertical restraints and therefore are evaluated under the rule-of-reason analysis.[33]

Like loyalty reward programs, MFNs are ubiquitous and can promote competition, frequently lowering prices and reducing bargaining costs.[34] Antitrust authorities are most concerned when MFNs are used by a dominant firm (or a firm with an insisted-brand) to exclude competition.[35] For example, "if a large buyer obtains MFNs from sellers that comprise a very large fraction of the market, the theory is that the MFNs may prevent the buyer's smaller rivals from entering or expanding their share by obtaining more favorable pricing."[36] Again it is the exclusion of competition in favor of the insisted brand that can decrease consumer welfare and is about which authorities are most concerned.

Market Share and Insistence

A note of clarification is the market power bestowed by insistence does not necessarily correspond to a large brand market share. Returning to the DOJ's case against American Express, insistence compelled many merchants to participate in the Discover Card network even though Discover's overall share of credit card purchases is relatively small.[37] Therefore traditional reliance on market shares for proof of market power can require rethinking if the power insistence plays a central role in the economic analysis.

Two-Sided Markets

Another lens under which to discuss insistence is in the context of two-sided markets. Note that many of the industries previously described, including general purpose credit cards and wholesale/retail links in vertical chains more broadly, can be thought of as two-sided markets. Two-sided markets pertain to situations in which there are two sets of participants (two "sides") who both have a demand to use a "platform" or intermediary to interact.[38]

Insistence is pronounced in two-sided markets when there is single-homing on one side of the platform and multi-homing on the other. Single-homing can be thought of as extreme brand loyalty or insistence because the agent who is single-homing is choosing only one brand of a particular product. As Mark Armstrong explained in *Competition in Two-Sided Markets*, "[w]hen an agent chooses to use only one platform, it has become common to say the agent is 'singlehoming.' When an agent uses several platforms, she is said to 'multi-home.' It makes a significant difference to outcomes whether groups single-home or multi-home."[39] When one side single-homes and one side multi-homes, the platform is referred to as a "competitive bottleneck."[40] As a result, "if it wishes to interact with an agent on the single-homing side, the multi-homing side has no choice but to deal with that agent's chosen platform. Thus, platforms have monopoly power over providing access to their single-homing customers for the multi-homing side. This monopoly power naturally leads to high prices being charged to the multi-homing side, and there will be too few agents on this side being served from a social point of view."[41]

We observe this scenario in the credit card industry where credit cards (the platform) sit between merchants and consumers. In particular, those consumers who benefit from generous rewards programs offered by credit card companies, such as American Express,[42] "centralize their spending on their Amex cards to maximize these benefits" or in a sense single-home.[43] "Indeed, according to one study by American Express, approximately 70% of Corporate Card consumers are subject to some form of 'mandation' policy, by which employers require the employee-cardholders to use Amex cards for business expenses."[44] Because many consumers insist on using a preferred card, which is akin to single-homing, merchants are thereby forced to accept all credit cards."[45] Again, here insistence translates to market power. Notably, the court found that insistence (combined with anti-steering provisions) allowed American Express to charge higher than competitive level interchange fees to merchants, resulting in higher prices to consumers.[46]

Special Case

It is worth noting that in certain special situations seemingly anticompetitive practices are justifiable in two-sided markets. In very special scenarios, the profit-maximizing price charged to the other side of the market can be zero or even negative. Economic theory teaches us that this special case only arises when the respective demands are interdependent and complementary in nature. Only in this special case, may the charge for the platform service to one side of the market exceed the cost of the service. This is because in this special case it is worth it for the owner of the platform and the participants in the market to extract payments from one side of the market to get more of the other side of the market to participate than would otherwise be the case, thereby making everyone better off.[47]

In mature markets (or markets where all agents are already using the platform), this special case does not arise because there is no demand externality (*i.e.*, an unintended benefit conferred by one party to a transaction on a third-party). A platform in a mature market "does not require subsidization to thrive"[48] and there is not an externality or benefit to growing the platform.[49] Because of the lack of externality, prices above competitive levels are not justified as they may be in the special case in nascent markets. We observe the two sided defense is often incorrectly utilized in mature markets.

In sum, competition is limited in two-sided markets where consumers single home (or insist on a certain brand) on one side of a platform and suppliers multi-home on the other side. The role then of a two-sided market analysis is not the potential for externalities as a defense (as prices should be competitive on both sides of a platform except in the special case). Instead what we observe is that insistence creates market power which can be then exacerbated. By using the market power arising from insistence, the platform can impose conditions that further the insistence by raising the likelihood of single homing and reducing inter-platform competition.

Conclusion

Insistence is an extreme form of brand loyalty. Because of the lack of switching amongst the brand-insistent consumers, the brand has tremendous market power. This market power is not necessarily denoted by the brand's market share in its product category. This market power can lead to

	anticompetitive behaviors by brand owners or distributors, such as by raising rivals' costs, impeding entry, or exclusive dealing. These abuses can be exhibited in the form of anti-steering contract provisions, rewards programs, and MFNs, and this situation can be exacerbated when dealing with two-sided markets. * * * * * * * * * *

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[1] Melvin T. Copeland, *Relation of Consumers' Buying Habits to Marketing Methods*, 1 Harvard Business Review, 282, 288 (1923), (hereinafter, *Buying Habits*). *See also* J. Barry Dickinson, *Customer Loyalty: A multi-attribute approach*, Research in

Economics and Business Journal, 9, 2 (2013), (crediting Copeland for first introducing the concepts of "brand preference" and "brand insistence").

2 Copeland, *Buying Habits*, at 288.

3 Daniel A. Crane, *Bargaining Over Loyalty*, 92 Texas L. Rev. 253, 277 (2013). Economically, market power in the most general sense means the ability to price above the purely competitive price, which is equal to marginal cost. William M. Landes, and Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 939 (1981).

4 Interchange fees charged to merchants by credit card companies are often alleged as examples. *See U.S. & Plaintiff States v. American Express Co.*, No. 10-CV-4496 (NGG), U.S. Dist. LEXIS 56945 at *57-*58 (E.D.N.Y. Feb. 19, 2015) (hereinafter, *Amex*).

5 Adam J. Levitin makes this point in his review of the credit card industry. Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, UCLA Law Rev. 1321, 1356 (2008).

6 *Milton Borger & Richard Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 399 (2d Cir. 1980) (hereinafter, *Borger*).

7 *Id.* at 394.

8 *Id.* at 399.

9 The jury's instructions were limited to intrabrand competition instead of including the possibility of interbrand competition. *Id.* at 397.

10 *Id.* at 399.

11 *Amex*, 2015 WL 728563 at *27.

12 *Id.* at *1, *57-*58.

13 *Id.* at *27, *35, *37.

14 *Id.* at *1-*2, *58.

15 *Eisai, Inc. v. Sanofi-Aventis U.S. LLC & Sanofi U.S. Servs. Inc.,* No. 14-2017 (3d Cir. argued Jan. 13, 2015).

16 Letter for Plaintiff at 1, *Eisai v. Sanofi-Aventis*, No. 14-2017 (3d Cir. Mar. 3, 2015) (hereinafter, Letter for Plaintiff).

17 *Id.*

18 Incontestable demand is typically defined as the purchases that cannot be switched to a rival. Nicholas Economides, *Loyalty/requirement rebates and the Antitrust Modernization Commission: What is the appropriate liability standard?* 54 The Antitrust Bulletin 259, 273 (2009).

19 Letter for Plaintiff at 1.

20 Note, while Sanofi/Aventis was granted summary judgment on liability, this case is currently on appeal. *See* Plaintiff's Notice of Appeal, *Eisai Inc. v. Sanofi-Aventis U.S. LLC and Sanofi-Aventis U.S., Inc.*, Case No. 3:08-cv-4168 (D. N.J. Apr. 28, 2014). The case has been argued before the U.S. Court of Appeals for the Third Circuit but a decision is still pending.

21 Richard L. Oliver, *Whence Customer Loyalty?* 63 Journal of Marketing 33, 34 (1999).

22 *Amex*, 2015 WL 728563 at *24, *26, *40.

23 Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, UCLA Law Rev. 1357 (2008); *Amex*, 2015 WL 728563 at *37.

24 *See* Derrick Daye, *5 Drivers of Brand Insistence,* Branding Strategy Insider, http://www.brandingstrategyinsider.com/2010/10/5-drivers-of-brand-insistence.html#.VkzDN50o7yM (Oct. 15, 2010) (describing these elements); Theo Muller, *The Loyalty Factor*, MMResearch, http://www.mm-research.com/Loyalty+Factor (Apr. 2012) (discussing satisfaction as only one of the elements of customer loyalty). *See also* Annette Franz Gleneicki, *7 Steps to Brand Insistence*, CustomerThink http://customerthink.com/7_steps_to_brand_insistence/ (Apr. 3, 2012) (illustrating insistence at the top of a brand preference ladder and discussing factors such as trust).

25 Jarod M. Bona, *Loyalty Discounts and the FTC's Lawsuit Against Intel*, 19 J. Antitrust & Unfair Competition Section, State Bar of California 6, 6-7 (2010). Joshua D. Wright, Remarks, *Simple but Wrong, or Complex and More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts*, Bates-White 10th Annual Antitrust Conference, 5-6 (June 3, 2013).

[26] Bruce H. Kobayashi, *The Economics of Loyalty Discounts and Antitrust Law in the US*, 1 Competition Policy International 117 (2005) (hereinafter, Kobayashi, *Loyalty Discounts*).

[27] Joshua D. Wright, Remarks, *Simple but Wrong, or Complex and More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts*, Bates-White 10th Annual Antitrust Conference, 6-8, 26, 32-33 (June 3, 2013); Nicholas Economides, *Loyalty/requirement rebates and the Antitrust Modernization Commission: What is the appropriate liability standard?* 54 The Antitrust Bulletin 259, 265-66 (2009).

[28] Joshua D. Wright, Remarks, *Simple but Wrong, or Complex and More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts*, Bates-White 10th Annual Antitrust Conference, 7 (June 3, 2013); Kobayashi, *Loyalty Discounts* at 115, 116-17.

[29] Kobayashi, *Loyalty Discounts* at 118-19.

[30] *Amex*, 2015 WL 728563 at *37.

[31] *Id.* at *36-*37, *58.

[32] W. Stephen Smith, *When Most-Favored Is Disfavored: A Counselor's Guide to MFNs*, 27 Antitrust 10, 10 (2013) (hereinafter Smith, *Most-Favored*).

[33] *Id.* at 10.

[34] *Id.* at 11.

[35] *Id.* at 11.

[36] *Id.* at 11.

[37] HSN Consultants Inc., *The Nilson Report*, Issue No. 1001. at 1, 10 (Feb. 2013); *Amex,* 2015 WL 728563, at *35.

[38] David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 Yale J. Regulation 325, 339, 343 (2003).

[39] Mark Armstrong, *Competition in Two-Sided Markets* 37 RAND Journal of Economics 668, 669-70 (2006).

[40] *Id.* at 669-70.

[41] *Id.*

[42] *Amex*, 2015 WL 728563 at *37.

[43] *Id.* Further, "Amex's industry-leading corporate card program, for instance, drives a significant degree of insistent spending, particularly at those T & E merchants that cater to the needs of business travelers." *Id.*

[44] *Id.*

[45] *Id.* at *3, *63-64 n.48.

[46] *Id.* at *3, *57-*58.

[47] David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 Yale J. Regulation 325, 339, 343 (2003).

[48] Adam J. Levitin makes this point in his review of the credit card industry. Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, UCLA Law Rev. 1386-88 (2008).

[49] *Id.*

Winners and Losers in a Rule 23(b)(2) Class: Takeaways from the Class Certification Decision in *Laumann vs. NHL*

[1] *Laumann v. NHL/Garber v. MLB*, Nos. 12-cv-1817 (SAS), 12-cv-3704 (SAS), 2015 U.S. Dist. LEXIS 63745 (S.D.N.Y. May 14, 2015).

[2] Plaintiffs also sought to have a monetary damages class certified under Rule 23(b)(3). In an Opinion and Order dated the same day, and corrected on May 29, 2015, Judge Scheindlin excluded the damages model presented by the Plaintiffs' expert for being unreliable under *Daubert*. *See Laumann v. NHL/Garber v. MLB*, Nos. 12-cv-1817 (SAS); 12-cv-3704 (SAS), 2015 U.S. Dist. LEXIS 70155 (S.D.N.Y. May 29, 2015). As a result, the court denied certification of a damages class under Rule 23(b)(3) because, without a damages model, plaintiffs could not prove that all class members were injured through common evidence. This article focuses on the portion of the Court's opinion that grants certification of a declaratory and injunctive relief class under Rule 23(b)(2).