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Steering in Payment Cards: Between Competition Enforcement and Competition Advocacy

By Andres Calderon[1]

For academics and practitioners of Competition Law, whenever one reads "Steering in payment cards," *Ohio v. American Express* immediately comes to mind. 'The famous case heard by the U.S. Supreme Court in 2018, which fired up the debate on how to analyze market power (and any eventual anticompetitive effects) in multisided markets – above and beyond the interesting discussion regarding the Rule of Reason standard – had to do precisely with analyzing the legality of an anti-steering agreement. Said agreement prevented businesses affiliated to the American Express credit cards from adopting business practices that would steer or incentivize their customers towards using other brands of credit cards – much to their chagrin, due to the higher fees applicable when card-holders used the aforementioned company's credit cards, in turn reducing business revenues when compared to transactions using other credit card brands.

A similar discussion has now reached Latin America, and Peru specifically, as the local competition authority recently published the preliminary report on their market study on payment card systems, which includes a specific recommendation regarding a steering rule. This rule is applied by licensing brands, as well as acquirers, prohibiting businesses from applying overcharges to their customers for using a particular payment card. The Peruvian authority's recommendation consists in eliminating this prohibition. In other words, it would allow overcharges to be applied if commercial businesses wish to do so.

Peruvian Market: Integration Everywhere

Before we discuss the anti-steering rules it is important that we briefly go over the configuration of the Peruvian payment systems market, in order to provide a clear context.

Four international payment card companies operate in Peru (Visa, Mastercard, American Express, and Diners), along with a few private brands. As detailed in Indecopi's report, Visa accounted for 69 percent of issued credit cards and 80 percent of debit cards by 2019. The second place was taken by Mastercard, with 18 and 20 percent respectively.

Those who negotiate the acceptance of these cards in commercial establishments are the acquirers, who obtain a license for these brands. There are two major acquirers in Peru – Niubiz and PMP, who until 2019 were the exclusive license-holders for the Visa and Mastercard brands, respectively. However, since 2020 a multi-brand acquisition model has been employed, meaning Niubiz now also holds a Mastercard license to sign businesses up with the brand, while PMP can do the same with Visa cards.

On the other hand, there are over 30 banking and financial enterprises and municipal and rural credit and savings associations (*Cajas*) who issue payment cards under several brands. None of these enterprises is dominant in debit or credit card issuing, and by 2019 none of them accounted for more than 30 percent of the total payment cards issued.

The competition authority has predicted that moving from an exclusive brand acquirer model to a multi-brand acquirer model could help make the market more dynamic. While we have seen the average discount rates paid by businesses to acquirers fall over the last few years, their prices are still above the rates charged in comparable countries, such as Colombia and Mexico.

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A structural characteristic of the Peruvian market could, however, result in certain limitations to competition in the acquirer market, as well as in other segments of the value chain (issuers, facilitators, and payment processors): Vertical integration.

Peru's largest issuer banks also own the two main acquirers. Niubiz counts among its shareholders the four largest banks in the country (BCP, Interbank, BBVA, and Scotiabank) and one credit card brand (Visa, with 10 percent ownership), while PMP is co-owned (50-50 percent) by two banks (Interbank and Scotiabank). Likewise, each acquirer also owns a payment facilitator: Niubiz controls Vende Más, and PMP owns Izipay.

As should be expected, Peru's competition authority has warned that these property relationships could pose a risk to free competition, as they form incentives for companies to adopt strategically discriminatory conducts to favor their own businesses linked to the segments they interact with, both upstream and downstream. Likewise, the stocks owned by two banks in two competing agents in the acquiring and payment facilitation segments (common-ownership) carry the natural risk of collusion or, at the very least, the potential for a market competitor's commercial information to be taken advantage of. However, the preliminary report shows no evidence of any discriminatory or collusive conduct, and so the competition authority's recommendations on this matter are mostly general, highlighting that contract processes should be neutral, non-discriminatory, timely, and fully informed.

Surcharges and Competition Advocacy

One practice that Peru's competition authority has actually declared to be taking place in the market is the application of surcharges.

Acquirers who took part in the market study told Indecopi that businesses used to charge their customers an extra amount, added to the sale price of their products and services, when said users made payments with credit or debit cards. It's understood that these surcharges were meant to compensate the higher costs for businesses that using some of these methods implied, due to the discount rates they must bay to acquirers or facilitators, or the amount to be paid to processors.

These surcharges, however, were prohibited by contract: agreements between acquirers and businesses prevented the latter from passing these costs on to consumers. In other words, the prohibition on surcharges becomes a different modality of the anti-steering rule, preventing disincentives for end consumers to select certain payment methods.

Peru's competition agency has objected to these rules, as they prevent consumers from freely choosing between payment methods with full awareness of the different costs each method may imply. Being prevented from making these surcharges, businesses must choose between internalizing the costs entirely, or passing them on to all customers, with no distinction regarding the payment method selected. This way – as Indecopi has warned – some users end up subsidizing others for the cost of using payment cards, while competition is reduced between payment systems, between payment card brands, and even between the same brand's various cards (e.g. credit v. debit cards).

This isn't the first agency to turn their attention towards these rules against surcharges. As the preliminary report itself mentions, competition authorities such as Australia's have prohibited the imposition of these rules (although the effects of this prohibition may have been limited in practice), while others such as Chile's TDLC (Court for the Defense of Free Competition) have proposed similar measures, though they haven't been accepted.

Peru's case stands out, as the competition agency has considered that this recommendation could be implemented voluntarily by acquirers and brands, that is, by the economic agents themselves. Should the companies not accept this proposal, the Commission could "evaluate whether to solicit the competent authorities to adopt regulatory or legislative measures that allow for their

implementation”.

The alternative mentioned here brings two thoughts to mind. The first is concerned with the evidence of the alleged restrictive effects on market competition. While a “no surcharge” rule is present in the Peruvian market, its reach has not been established. This calls to mind the *Ohio v. American Express* case due to the importance of the market effect analysis under the rule of reason. One could ask, then, whether the competition authority’s intervention would be justified if there is no conclusive evidence of a substantial restrictive impact in the payment cards market. The analysis of market effects would also force the Peruvian competition authority to take a stand with regard to whether market power should be evaluated in only one side of the market or on all sides when dealing with multi-sided platforms, as happened in the U.S. with the *American Express* case.

Seen another way, having or prohibiting surcharges could also be an “arena for competition,” at both the acquirer and brand levels. Furthermore, under a multi-brand acquirer scenario both the brands and the acquirers would have incentives for offering better clauses or greater flexibility for affiliated businesses, allowing them to choose whether or not to pass costs on to customers.

The second thought relates to the substitutability of interventions available to the competition authority. While it is valid for advocacy efforts to include recommendations for private actors, it does create additional debate surrounding the question of what the appropriate action would be in case said economic agents reject the recommendation. Would it lead to enforcement activities by the competition authority or would the competition agency look to create regulatory obligations through advocacy?

Over the next few months we will surely find answers to these questions. But it is also possible that we won’t find an immediate solution to other structural barriers preventing the development of greater competition in these markets (and described above): vertical integration and common ownership.