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Antitrust Enforcement Against Platform MFNs

ABSTRACT. Antitrust enforcement against anticompetitive platform most favored nations (MFN) provisions (also termed pricing parity provisions) can help protect competition in online markets. An online platform imposes a platform MFN when it requires that providers using its platform not offer their products or services at a lower price on other platforms. These contractual provisions may be employed by a variety of online platforms offering, for example, hotel and transportation bookings, consumer goods, digital goods, or handmade craft products. They have been the subject of antitrust enforcement in Europe but have drawn only limited antitrust scrutiny in the United States. Our Feature explains why MFNs employed by online platforms can harm competition by keeping prices high and discouraging the entry of new platform rivals, through both exclusionary and collusive mechanisms, notwithstanding the possibility that some MFNs may facilitate investment by limiting customer freeriding. We discuss ways by which government enforcers in the United States and private plaintiffs could potentially reach anticompetitive platform MFNs under the Sherman Act, and the litigation challenges such cases present.

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INTRODUCTION

During the past two decades, antitrust enforcement against most favored nations (MFN) provisions has grown in the United States and Europe. U.S. government enforcers have brought cases in healthcare, digital goods, and payment systems, while European agencies have launched a series of challenges to MFNs imposed by online platforms.¹

Given that consumers increasingly use online platforms to purchase goods and services,² it is important to analyze their competitive issues. In contrast to European challenges to platform MFNs, there have been almost no such government enforcement actions against platform MFNs in the United States. This Feature will explain the necessity of U.S. antitrust enforcement against platform MFNs for protecting competition in these important online markets.

Many of the online platform MFN provisions — also termed price parity provisions — investigated in Europe have been imposed on hotels by leading online travel agents (OTAs), such as Booking.com and Expedia. The challenged provisions typically prevent hotels from offering rooms on other websites at prices below those charged on the OTA. While these provisions likely violate U.S. antitrust laws, they have drawn only limited scrutiny.³

This Feature relies on this setting to illustrate the need for more vigorous antitrust enforcement in this platform context, in which the producer or service provider sets the final retail price. In exchange, the platform charges the producer or service provider a fee for distribution. This fee is often a commission set as a percentage of the final retail price. The arrangement whereby the platform does not take ownership of the good (e.g., the hotel room) but sells it on behalf of the vendor at a price chosen by the vendor is termed an agency distribution model.⁴ Providers commonly offer their products or services on multiple online platforms. For example, a hotel may make rooms available on Booking.com, Expedia, and the hotel's own site. A computer manufacturer may offer its product line through its own site, eBay, and Amazon Marketplace. Online platforms for hotel and transportation bookings, consumer goods, digital goods, and handmade craft products are often similarly organized.

1. See *infra* Part II.

2. The share of U.S. retail sales accounted for by e-commerce has grown by roughly 250% since 2010. See U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales: 2nd Quarter 2017*, U.S. DEP'T COM. (Aug. 17, 2017), <http://www2.census.gov/retail/releases/historical/ecom/17q2.pdf> [<http://perma.cc/W4LX-JJT8>].

3. See *infra* Section II.B.

4. In some cases, a platform will purchase the product or service from the vendor and resell it to retail buyers at a markup. This arrangement is termed a wholesale distribution model.

A platform MFN requires that providers refrain from offering their products or services at lower prices on other platforms. The platform is thus guaranteed that no other internet distributor will charge a lower final price, not because the focal platform has worked to ensure that it has the lowest cost, but rather because it has contracted for competitors' prices to be no lower. Platform MFNs are labeled "wide" if they constrain the price on all other platforms, including the provider's own website (if any). In contrast, platform MFNs are considered "narrow" if they prevent the provider from setting a lower price on its own website, while leaving prices on other platforms unrestricted. If a platform with an MFN spots a lower price on another platform, it lowers its price to match. In a market in which most platforms employ wide MFNs with most providers, providers will generally need to set an identical price on all platforms.⁵ The provider may agree to the MFN because it has few practical alternatives given the online platform's market power, or because the weakened price competition also benefits the provider. The higher profits that result from higher product prices need not all accrue to the platform. They can be divided between the platform and the vendors.

Part I of our Feature shows how platform MFN contracts can harm competition and consumers, despite their potential competitive benefits. Our economic analysis draws on the economics literature on the effects of MFNs generally, and platform MFNs in particular. We conclude that platform MFNs generally harm competition, except in narrow circumstances in which freeriding concerns are especially strong. Part II reviews how and why platform MFNs have been treated differently in U.S. and European competition law. Finally, Part III argues that U.S. antitrust enforcers should follow the lead of their European colleagues in investigating platform MFNs before explaining how a case against platform MFNs could be structured to fit within existing U.S. precedents.

I. ECONOMICS OF PLATFORM MFNS

This Part describes the competitive effects of simple MFN provisions, before turning to platform MFNs, the central focus of this Feature. Like platform MFNs, simple MFNs commit sellers not to discount selectively. We begin with simple MFNs because they are familiar from the economics literature and case law and raise analogous competitive issues.

5. Hence, wide platform MFNs with agency distribution will lead to the same outcome as resale price maintenance (RPM) with wholesale distribution: products will be sold on all platforms at identical retail prices, chosen by the vendor.

A. Competitive Problems of MFN Provisions

1. Simple MFNs

A simple MFN promises the covered buyer that it will be charged the lowest price offered by the seller. At first blush, one might expect this provision to lead to a lower price for the covered buyer. However, as explained throughout the economics literature, there are compelling theoretical reasons to expect equilibrium prices to rise due to the MFN.⁶ The empirical evidence supports this prediction.⁷ Below, we provide intuitions from this literature.

Some anticompetitive problems created by MFNs are “collusive” – they weaken price competition.⁸ The term “collusive” includes both coordinated conduct and unilateral accommodating conduct that softens competition. To understand how simple MFNs raise prices, consider the seller’s incentives. An MFN creates a strong financial incentive for the seller not to offer low prices because any discount must be offered to all covered buyers. That penalty makes discounts offered to buyers expensive. By making it costly for firms to offer their customers selective (and, in some cases, confidential) discounts, an MFN may reduce those discounts, soften price competition, and lead to higher prices.⁹

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6. See, e.g., Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nations Provisions*, 27 ANTITRUST 20, 22-25 (2013) (surveying the economics literature on the adverse competitive effects of MFNs); Steven C. Salop & Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27 ANTITRUST 15, 18-19 (2013) (summarizing the economic literature on the competitive effects of MFNs and proposing ways of making enforcement against harmful MFNs more effective).
 7. See, e.g., Fiona Scott Morton, *The Strategic Response by Pharmaceutical Firms to the Medicaid Most-Favored-Customer Rules*, 28 RAND J. ECON. 269, 282-89 (1997); Sarah Moshary, *Advertising Market Distortions from a Most Favored Nation Clause for Political Campaigns* 23-26 (July 13, 2015) (unpublished manuscript), http://www.dropbox.com/s/vlptl4npwai9zod/Quantity_Withholding.pdf [http://perma.cc/PE43-NJD9].
 8. See Baker & Chevalier, *supra* note 6, at 22-23; Salop & Scott Morton, *supra* note 6, at 15.
 9. See, e.g., Steven C. Salop, *Practices that (Credibly) Facilitate Oligopoly Co-ordination*, in NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE 265, 273-79 (Joseph E. Stiglitz & G. Frank Mathewson eds., 1986); Thomas E. Cooper, *Most-Favored-Customer Pricing and Tacit Collusion*, 17 RAND J. ECON. 377, 380-86 (1986); Luca Aguzzoni et al., *Can ‘Fair’ Prices Be Unfair? A Review of Price Relationship Agreements*, OFF. FAIR TRADING 60-83 (Sept. 2012), http://www.learlab.com/wp-content/uploads/2016/04/Can-%E2%80%98Fair%E2%80%99-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf [http://perma.cc/G7D6-BLJT]; Morten Hviid, *Summary of the Literature on Price Guarantees*, U.E. ANGLIA: CTR. COMPETITION POL’Y 3-8 (July 2010), <http://www.uea.ac.uk/documents/107435/107582/Summary+of+LPG+literature+Final.pdf> [http://perma.cc/49L4-CHCT].

An MFN can alternatively or additionally facilitate coordination, including tacit collusion, and thus lead to higher prices.¹⁰ Simple MFNs likely facilitated coordination between General Electric and Westinghouse in the sale of electrical equipment,¹¹ and among DuPont and three other sellers of gasoline additives.¹² Coordination leads to higher prices when firms reach consensus on terms of coordination and prevent cheating, or when firms acting independently but in parallel respond to rivals' less competitive conduct by accommodating it (i.e., by competing less aggressively themselves). Consistent with the theory, the aforementioned MFNs discouraged discounting and stabilized prices in both the electrical equipment and gasoline additive markets.¹³

Second, an MFN may create an exclusionary anticompetitive problem.¹⁴ An MFN can raise the costs of current or potential competitors by negotiating lower prices from suppliers of critical inputs. For example, suppose an entrant wishes to gain customers by charging a lower price (perhaps because it has no established brand name or installed base). It can profitably sell at a low price by undertaking selective contracting with suppliers willing to offer a discount in exchange for more volume or other favorable terms. If those suppliers also supply the incumbent, however, an MFN imposed by the incumbent would require the supplier to charge the same price to the entrant. This parity undermines the entrant's business model by preventing it from making an attractive offer to customers. The symmetry that MFNs impose on the marketplace thus can prevent new competition that would lower prices.

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10. "Tacit collusion," a legal term, encompasses some but not all forms of "coordinated" conduct. See Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL. 143, 145 & 145 n.7, 152 n.16, 156 n.22 (1993) (defining tacit collusion and coordination, and distinguishing legal and economic terms).
 11. See *United States v. Gen. Elec. Co.*, No. 28228, 1977 WL 1474, at *1 (E.D. Pa. Sept. 16, 1977) (prohibiting the use of MFNs and advance price announcements).
 12. See *In re Ethyl Corp.*, 101 F.T.C. 425, 628-32 (1983), *rev'd sub nom.* *E.I. Du Pont de Nemours & Co. v. Fed. Trade Comm'n*, 729 F.2d 128 (2d Cir. 1984). The appellate court acknowledged the anticompetitive potential of MFNs, but reversed primarily on the grounds that the Federal Trade Commission (FTC) did not satisfy the legal standard for demonstrating that the defendant firms had each violated section 5 of the FTC Act by adopting MFNs unilaterally. *Id.*
 13. *Id.* at 555-562, 630-31; Plaintiff's Memorandum in Support of a Proposed Modification to the Final Judgment Entered on October 1, 1962 Against Each Defendant, 42 Fed. Reg. 17,005, 17,005-06 (Mar. 30, 1977).
 14. Throughout this Feature, we use the term "exclusion" to encompass both the complete foreclosure of existing or potential rivals and conduct that disadvantages rivals without necessarily inducing them to exit. Exclusion does not necessarily harm competition; it is only anticompetitive if the excluding firms obtain or maintain market power, such as by raising prices or keeping a supracompetitive price from declining.

The Department of Justice's cases against Delta Dental and BCBS Michigan focused on this anticompetitive possibility.¹⁵ The MFNs in those cases were imposed on health care providers by dominant health insurers. Those contractual provisions made it impossible for entering health insurers to employ selective contracting with health care providers to cut the price of the insurance they sold in competition with incumbent insurers. This made entry more difficult for a new rival whose competitive advantage was low prices and thereby permitted the dominant insurance providers to maintain high prices.

2. Platform MFNs

Platform MFNs differ from simple MFNs because they are agreements between sellers and platforms about the prices that sellers will charge buyers who purchase through rival platforms, not agreements between sellers and buyers about the prices that sellers will charge other buyers. The two types of MFNs nonetheless raise similar competitive concerns.

For example, suppose that OTAs typically charge hotels a commission rate of 30%. If that rate is the product of coordination among OTAs, one of the OTAs might decide to compete more aggressively ("cheat") by charging a commission rate of 15% to hotels that agree to offer lower priced rooms. With or without coordination, moreover, an entering OTA may charge discounted commissions to hotels that offer rooms at a discounted rate, in order to break into the market. Regardless of whether the OTA is cheating or entering, the OTA can profit if it attracts a significant number of travelers seeking discount hotel bookings. Hotels listing through the OTA may also profit. A hotel may earn more per booking after the commission is subtracted, or profit from the increased bookings.¹⁶

A platform MFN imposed by an incumbent OTA could prevent these outbreaks of competition. The MFN would require each hotel making rooms available on the incumbent's platform to set the same price on a rival's or entrant's platform. This parity may undermine the discount OTA's business model by pre-

15. See *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665, 671-76, 679 (E.D. Mich. 2011) (denying the defendant's motion to dismiss); *United States v. Delta Dental of R.I.*, 943 F. Supp. 172, 172-182 (D.R.I. 1996) (denying the insurer's motion to dismiss). As these cases indicate, MFN exclusion problems may arise in industries that require the formation of a network of final providers: dental insurers need a network of dentists (*Delta Dental*), and health insurers need a network of hospitals (*BCBS Michigan*).

16. Numerically, imagine a \$100 hotel room yielding \$70 to the hotel after the incumbent's 30% commission is paid. If the entering OTA lists the room at \$90 and charges a 15% commission of \$13.50, the hotel would earn a net \$76.50, making it better off. Even if the hotel earns less per room with the entering OTA—as would be the case with a 20% commission—the hotel may earn more overall if it fills sufficiently more rooms by listing them at a discounted price.

venting it from making attractive offers to hotels (suppliers) and travelers (customers). The MFN may prevent cheating that would undermine OTA coordination and exclude entrants that would reduce supracompetitive commission rates adopted by a dominant OTA or achieved by an OTA oligopoly with market power.

In anticipation of our later discussion of antitrust enforcement,¹⁷ it is useful to classify the competitive problems created by platform MFNs on two dimensions. First, the mechanism can be collusive or exclusionary (or both).¹⁸ Second, the MFNs can harm competition among platforms or vendors (or both). While our Feature is primarily concerned with collusive and exclusionary harms to platform competition (given the growing proliferation and economic significance of internet platforms), we recognize that MFNs can also harm competition among sellers.¹⁹

Platform MFNs with greater scope and duration would be expected to have stronger anticompetitive effects and impose larger penalties on hotels that sell through a discount OTA.²⁰ As the share of hotels using MFNs increases, the pool of potential providers that can sell at a discount through an entering or cheating OTA decreases. Thus, a discount OTA will be less likely to succeed. Likewise, as the share of total bookings accounted for by incumbent OTAs with MFNs increases, the costlier it becomes for hotels to list rooms at a discounted rate on an entering or cheating OTA (or the costlier it becomes for the entering or cheating OTA to compensate the hotel). Thus, incumbent or entering OTAs will be less likely to adopt a discount business model.

17. See *infra* Part II.

18. Some cases may involve both collusion and exclusion. Colluding firms may need to exclude non-colluding rivals and entrants in order for their collusive arrangement to succeed.

19. In the OTA example, a platform MFN could support coordination among vendors (hotels) by discouraging cheating.

20. An “MFN plus” requires the price on the covered platform (or the price to the covered buyer) to be strictly lower by a certain percentage than prices on competing platforms (or to competing buyers). These contracts ensure that the covered platform can post a price (or has costs) that are below those of its rivals. This feature makes it even more difficult for rival platforms to cheat or enter at a discount, thereby increasing the anticompetitive potential of the platform MFN.

B. Potential Efficiencies

Although the economics literature indicates that platform MFNs often harm competition, platform MFNs can generate efficiencies under the right circumstances.²¹ Online platform MFNs in particular have been justified as protecting investment incentives by preventing freeriding (or “showrooming”²²). While the balance between harms and efficiencies may vary across markets, we are skeptical that this justification will routinely prevail.

Suppose, for example, that a small hotel makes rooms available on an OTA like Booking.com or Expedia. That relationship benefits the hotel by bringing it to the attention of customers that search for rooms using the OTA, who are likely far more numerous than the customers that the hotel could reach on its own. By making rooms available on the OTA, the hotel can market itself to consumers who prefer to compare features and prices before purchasing or those who prefer to conduct their search through an OTA. The hotel likely makes rooms available on other OTAs too, as well as on the hotel’s own site.

An OTA’s business requires many hotels to list on its site: by providing consumers with the ability to search conveniently across a broad range of hotels and make comparisons, the OTA attracts more customers. Critically for our analysis, an OTA makes its money by keeping a share of the revenue of hotel rooms booked through its site. Because hotels pay the OTA only if there is a booking, the OTA has an incentive to design its site and functionality to promote good matches between travelers and hotels.

Absent an MFN, a hotel could have good reasons to set a lower price on other OTAs or on the hotel’s site. The set of consumers that visit the hotel’s own site or an alternative OTA, such as an OTA that caters to student travelers, might be more responsive to price or might care less about particular features of the rooms. Furthermore, the alternative distribution channels might have lower costs than the OTA imposing the MFN. For example, another OTA might charge a lower commission. Or the hotel might not have invested in a highly functional

21. Under some circumstances, for example, MFNs can make investments profitable by protecting relationship-specific investments, discouraging holdouts, or reducing transaction and negotiation costs. *See generally* Baker & Chevalier, *supra* note 6, at 20-22 (surveying the economics literature on the competitive effects of MFNs); Joshua S. Gans, *Mobile Application Pricing*, 24 INFO. ECON. & POL’Y 52, 52-54 (2012) (arguing that most favored customer clauses can allow platform providers to earn more profits and increase the likelihood that the platform is provided); Salop & Scott Morton, *supra* note 6, at 17-19 (summarizing the economic literature on the competitive effects of MFNs).

22. Buyers “showroom” when they visit a store to examine a product before buying online at a discount. This practice is a type of freeriding.

website and thus might be able to process a booking at a cost below the OTA's commission.

When these different prices exist, some consumers may respond by freeriding: they will search for rooms on an OTA that facilitates searching and comparison among many hotels, but book through the hotel site or a rival OTA that offers a lower price. When the lower price arises because the rival has lower costs (e.g., it charges no commission), the consumer has taken advantage of the costly functionality supplied by one OTA without paying for it.

If many hotels and consumers engage in such practices, the efficiency theory goes, the OTA would foresee this problem and not invest in producing the desired functionality. The OTA may not find it profitable to invest in expensive site features, even though consumers are willing to pay for them. Such features might include an attractive design or convenient search and comparison tools. If the OTA cuts back on upgrading its interface and features and on marketing its services, it will lose customers. If freeriding is important, therefore, quality competition in online travel may be harmed. Full service OTAs would come to have less competitive significance over time and would eventually exit. Only no-frills discounters and hotel-only sites would thrive, so consumers' transaction costs of searching would rise.

In theory, an MFN could prevent this outcome.²³ It would allow a full-service OTA to prevent hotel freeriding on the OTA's advertising efforts, thereby allowing the OTA to be compensated for the promotional services it provides. If consumers value full-service OTAs highly, they will be better off as a result.

However, there are two reasons to question whether freeriding would be so substantial as to make full-service OTAs unprofitable and induce their exit. The first is consumer transaction costs: some consumers will not be willing to identify hotels on one site (the full-service OTA), then find and book them on other sites (a no-frills OTA or hotel site). The cost savings from sticking with a full-

23. Theoretical analyses involving platform MFNs that incorporate consumer freeriding find that wide MFNs are harmful to consumers while narrow MFNs can be beneficial but are not necessarily so. See Chengsi Wang & Julian Wright, *Platform Investment and Price Parity Clauses* 28-29 (NET Inst., Working Paper No. 16-17, 2016), http://www.netinst.org/Wang_16-17.pdf [<http://perma.cc/Y5ER-2CLB>] (finding that there is insufficient platform investment without price parity clauses but that wide price parity clauses unambiguously lower consumer welfare); Chengsi Wang & Julian Wright, *Search Platforms: Showrooming and Price Parity Clauses* 35-37 (May 18, 2016) (unpublished manuscript), http://cepr.org/sites/default/files/Wright,%20Julian%20paper_o.pdf [<http://perma.cc/3CYS-SD2L>] (suggesting that narrow price parity clauses are often more beneficial than wide price parity clauses); cf. Bjørn Olav Johansen & Thibaud Vergé, *Platform Parity Clauses with Direct Sales* (Univ. of Bergen Dep't of Econ., Working Paper No. 1/17, 2017), http://www.uib.no/sites/w3.uib.no/files/attachments/working_paper_01-17_revidert.pdf [<http://perma.cc/XZA7-U78V>] (arguing that platform MFNs may make platforms profitable even absent consumer freeriding if competition between hotels is so fierce as to make it unprofitable for hotels to pay platform commissions).

service OTA for booking are likely to be greater for frequent OTA users, as they are likely to have billing information stored on the site. Additionally, the cost savings are likely to be higher for consumers planning trips that require booking multiple hotels (and flights, if the OTA offers those), as well as for consumers that place a high value on their time. Second, the hotels may need the services that the OTA provides, but find it costly to provide those services themselves. If the hotels pay the OTA for its services, consumers that search the OTA but purchase on the hotel site would not be freeriding.

These possible limitations on the cost imposed by freeriding—combined with the incentives to increase prices and the incentives against entry caused by MFNs—make the economic analysis of a platform market critical. The leading theoretical analysis by economists Andre Boik and Kenneth Corts finds that platform MFNs lead to higher platform fees, drive up retail prices, and discourage entry by firms with lower-cost business models.²⁴

More broadly, when an MFN may create both anticompetitive effects and efficiencies, it is an empirical question whether it would be justified as procompetitive in any particular industry.²⁵ A recent study evaluating the banning of narrow MFNs in German hotel markets found that the ban lowered prices but did not alter the supply of hotel rooms.²⁶ Although hotel sites typically priced at a discount to full-service OTAs—a precondition for customer freeriding—the full-service OTAs did not appear pressured to cut back on investments: the hotels posted *more* rooms on OTAs than before, and the full-service OTAs did not change their commission rates.²⁷ A second study in Italy, France, and Spain also found that prices fell when MFNs were banned in the hotel industry.²⁸ To similar

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24. Andre Boik & Kenneth S. Corts, *The Effects of Platform Most-Favored-Nation Clauses on Competition and Entry*, 59 J.L. & ECON. 105, 113-29 (2016). In their model, an entrant pursuing a lower-cost model cannot enter successfully because the platform MFN prevents the entrant from lowering prices to attract customers.
25. Thibaud Vergé, *Are Price Parity Clauses Necessarily Anticompetitive?*, CPI ANTITRUST CHRON. (Jan. 2018), <http://www.competitionpolicyinternational.com/wp-content/uploads/2018/01/CPI-Verge.pdf> [<http://perma.cc/94CK-5JJZ>].
26. Matthias Hunold et al., *Evaluation of Best Price Clauses in Hotel Booking* 19-36 (ZEW Ctr. for European Econ. Research, Discussion Paper No. 16-066, 2016), <http://ftp.zew.de/pub/zew-docs/dp/dp16066.pdf> [<http://perma.cc/R78M-PRW2>].
27. *Id.* at 36.
28. Andrea Mantovani et al., *The Dynamics of Online Hotel Prices and the EU Booking.com Case* 12-27 (NET Inst., Working Paper No. 17-04, 2017), http://ssrn.com/abstract_id=3049339 [<http://perma.cc/W9K9-Y546>]. The leading booking site responded to the MFN ban by introducing quality improvements to the service it provided. *See id.* at 6 tbl.1, suggesting online platform competition increased when platform MFNs were banned.

effect, the platform MFNs adopted by Apple in their e-book distribution contracts with publishers led to substantial increases in e-book prices.²⁹ These studies confirm our view that platform MFNs often harm competition and thus are appropriate targets for enforcement by U.S. antitrust agencies.

II. ANTITRUST ENFORCEMENT AGAINST PLATFORM MFNS

While platform MFNs have been the subject of antitrust enforcement on both sides of the Atlantic, they have garnered greater attention in Europe.³⁰ What explains this difference? This Part surveys enforcement actions in Europe (Section II.A) and the United States (Section II.B). Section II.C attributes the difference primarily to divergent norms governing exclusionary conduct.

A. Europe

In Europe, National Competition Authorities (NCAs) and the European Union's (EU) enforcement institution have brought cases against Amazon and travel booking sites. For the most part, European authorities have looked at platform MFNs as potential infringements of Article 101 of the Treaty on the Functioning of the European Union (TFEU) or equivalent sections of the national competition laws of member states. Article 101 prohibits agreements that prevent, restrict, or distort competition.³¹ Platform MFNs imposed by a dominant

29. Jonathan B. Baker, *Cartel Ringmaster or Competition Creator? The Ebooks Case Against Apple (2013)*, in *THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY* (John E. Kwoka, Jr. & Lawrence J. White eds., 7th ed.) (forthcoming 2019) (manuscript at 1), <http://ssrn.com/abstract=3009492> [<http://perma.cc/EG3Z-5GCR>]; Babur De los Santos & Matthijs R. Wildenbeest, *E-book Pricing and Vertical Restraints*, 15 *QUANTITATIVE MARKETING & ECON.* 85, 91 (2017).

30. See generally Directorate Fin. and Enter. Affairs Competition Comm., *Hearing on Across Platform Parity Agreements*, OECD (Oct. 27-28, 2015), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2015\)66&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)66&doclanguage=en) [<http://perma.cc/4FBR-DPAL>] (explaining the regulatory approach to platform MFNs taken by the United Kingdom's Competition and Markets Authority and describing its competitive concerns with MFNs); Pinar Akman & D. Daniel Sokol, *Online RPM and MFN Under Antitrust Law and Economics*, *REV. INDUS. ECON.* (forthcoming), <http://ssrn.com/abstract=2852782> [<http://perma.cc/SU7L-XXP8>] (analyzing antitrust cases against MFNs in the United States, Europe, and Australia).

31. Consolidated Version of the Treaty on the Functioning of the European Union art. 101, May 9, 2008, 2008 O.J. (C 115) 88-89.

firm could also be found to infringe Article 102, which prohibits abuse of a dominant position.³²

In October 2012, the Office of Fair Trading (OFT) in the United Kingdom – now the Competition and Markets Authority (CMA) – opened an investigation into the MFNs adopted by Amazon Marketplace.³³ At that time, a business that sold through Amazon was prohibited from selling products at a lower price on any competing website, including the seller’s own site. The Bundeskartellamt (Germany’s Federal Cartel Office) opened an investigation contemporaneously. Amazon.de then accounted for 30-40% of online commerce in Germany.³⁴ The Bundeskartellamt found anticompetitive effects in both pricing and entry.³⁵ Ten months later, Amazon voluntarily removed the pricing parity requirement in Europe (though it retained the policy in the United States).³⁶ Thereafter, both the OFT and the Bundeskartellamt closed their investigations.³⁷

Since 2010, MFN clauses used in the online hotel booking sector have been investigated by the NCAs of a number of European nations.³⁸ The largest OTA

32. *Id.* art. 102. See generally Pinar Akman, *A Competition Law Assessment of Platform Most-Favored-Customer Clauses*, 12 J. COMPETITION L. & ECON. 781 (2016) (reviewing the legal authority employed in European platform MFN cases and arguing that European authorities have wrongly opted to rely on Article 101 rather than Article 102 when challenging MFNs imposed by dominant platforms).
33. See Caroline Binham & Henry Mance, *OFT Minded To Drop Investigation into Amazon Pricing Policies*, FIN. TIMES (Aug. 29, 2013), <http://www.ft.com/content/b7fe3790-10a5-11e3-b5e4-00144feabdco> [<http://perma.cc/G8DB-NVUT>].
34. *Case Report: Amazon Removes Price Parity Obligation for Retailers on Its Marketplace Platform*, Ref.: B6-46/12, BUNDESKARTELLAMT 1 (Dec. 9, 2013) [hereinafter *Case Report*], http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf?__blob=publicationFile&cv=2 [<http://perma.cc/5VGV-Q9QF>]. The Bundeskartellamt noted that Amazon enforced the price parity clause by threatening to remove sellers from the platform for noncompliance.
35. *Id.* at 2 (“The Bundeskartellamt initiated proceedings . . . on account of the rules within the Marketplace, particularly the price parity clause. It found that the Marketplace constitutes a horizontal trade cooperation between Amazon and third-party sellers that has as its object and effect various restrictions of competition. The price parity clause is a hardcore restriction which is not indispensable for Marketplace efficiencies and does not allow consumers a fair share of the resulting benefit.”).
36. Binham & Mance, *supra* note 33.
37. *Id.*; see also *Case Report*, *supra* note 34, at 3.
38. In addition to the nations discussed in the text, MFNs have reportedly been investigated on competition grounds in Ireland, Hungary, Poland, the Czech Republic, Denmark, Belgium, Austria, Switzerland, and Greece. See Akman & Sokol, *supra* note 30, at 18 n.11. Furthermore, the competition authorities in eleven European Union jurisdictions and two other nations carried out a coordinated monitoring exercise of the online hotel booking sector in 2016. See EUR. COMPETITION NETWORK, REPORT ON THE MONITORING EXERCISE CARRIED OUT IN THE ONLINE HOTEL BOOKING SECTOR BY EU COMPETITION AUTHORITIES IN 2016 (2017),

in Europe is Booking.com, which has more than a 60% share of the marketplace.³⁹ In the United Kingdom, OFT found that the combination of MFNs and resale price maintenance (RPM) limited competition on hotel room rates and impeded entry by new online travel agents. Although its decision was later reversed, this reversal was due primarily to OFT's failure to fully consider the competitive problems that could arise from the remedy it chose.⁴⁰ In Germany, around the same time, the Bundeskartellamt opened an investigation into OTAs that resulted in the prohibition of a wide MFN used by a major hotel platform.⁴¹ Independently, the competition authorities in three other European nations (France, Italy, and Sweden) conducted a joint investigation of Booking.com, designed to aid and inform other concerned member states.⁴² Their effort was resolved when they accepted the commitment of Booking.com to change its wide

http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf [<http://perma.cc/K7YA-TD2E>]. Notwithstanding the range of nations interested in the competitive implications of these provisions, the European Commission apparently declined to conduct a Europe-wide investigation. See Akman & Sokol, *supra* note 30, at 18.

39. Sean O'Neill, *French Parliament Kills Rate Parity, and Booking Predicts Hotel Price War*, TNOOZ (June 19, 2015), <http://www.tnooz.com/article/french-parliament-kills-rate-parity-and-booking-predicts-hotel-price-war> [<http://perma.cc/836H-B262>].
40. Hotel Online Booking: Decision To Accept Commitments To Remove Certain Discounting Restrictions for Online Travel Agents [2014] OFT 1, OFT1514dec, *rev'd*, Skyscanner Ltd. v. Competition and Mkts. Auth. [2014] CAT 16. OFT's successor closed the investigation the following year "on administrative priority grounds" and indicated that it would continue to monitor how the market developed, particularly in response to then-recent changes in the business practices of major OTAs across Europe. Press Release, CMA, CMA Closes Hotel Online Booking Investigation (Sept. 16, 2015), <http://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation> [<http://perma.cc/T4WS-CVJ6>].
41. See *Online Hotel Portal HRS's 'Best Price' Clause Violates Competition Law—Proceedings Also Initiated Against Other Hotel Portals*, BUNDESKARTELLAMT (Dec. 20, 2013), http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html [<http://perma.cc/56AS-DD9C>]. Its decision was affirmed by the Düsseldorf Higher Regional Court. See *'Best Price' Clause of Online Hotel Portal Booking Also Violates Competition Law*, BUNDESKARTELLAMT 2 (Mar. 9, 2016), http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B9-121-13.pdf?__blob=publicationFile&v=2 [<http://perma.cc/FJD6-JE9M>].
42. See Philippe Chappate & Helen Townley, *Online Hotel Bookings—A Joint European Approach or a Most Favoured Nation?*, SLAUGHTER & MAY (May 2015), <http://www.slaughterandmay.com/media/2497093/online-hotel-bookings-a-joint-european-approach-or-a-most-favoured-nation.pdf> [<http://perma.cc/X99Q-JSFC>].

MFN to a narrow MFN.⁴³ Subsequently, Booking.com expanded its commitment to cover the EU, and Expedia followed suit.⁴⁴ This did not end the competition concerns throughout Europe, however. The Bundeskartellamt next banned Booking.com's use of a narrow MFN.⁴⁵ Not long after, the legislatures of Austria, France, and Italy banned all MFNs, narrow as well as wide,⁴⁶ apparently in response to lobbying by local hotel interests.⁴⁷ Retrospective studies in some of these jurisdictions provide evidence that consumers benefited when narrow as well as wide hotel MFNs were prohibited.⁴⁸ In addition to these cases, the UK's CMA has investigated MFNs in a number of other industries: private motor insurance, mobility scooters, and live auction services.⁴⁹ A recent report details the CMA's current policies concerning MFNs.⁵⁰

B. The United States

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43. See EUR. COMPETITION NETWORK, *supra* note 38, at 4. In addition, the competition authority of Brazil, the Administrative Council for Economic Defence (CADE), recently settled a case against Booking.com on similar terms. See Janith Aranze, *CADE Settles with Booking.com on Price Parity Clauses*, GLOBAL COMPETITION REV. (Mar. 28, 2018), <http://globalcompetitionreview.com/article/1167349/cade-settles-with-bookingcom-on-price-parity-clauses> [<http://perma.cc/8Q9W-ZPKT>].
44. *Id.*
45. See *Narrow 'Best Price' Clauses of Booking Also Anticompetitive*, BUNDESKARTELLAMT (Dec. 23, 2015), http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html [<http://perma.cc/LU2H-7TXF>].
46. See EUR. COMPETITION NETWORK, *supra* note 38, at 4-5; Press Release, Hotrec Hospitality Europe, *Also Italy Prohibits Rate Parity Clauses of Online Booking Platforms by Law* (Aug. 3, 2017), <http://www.hotrec.eu/newsroom/press-releases-1714/also-italy-prohibits-rate-parity-clauses-of-online-booking-platforms-by-law.aspx> [<http://perma.cc/4LFD-Q9VM>].
47. Cf. Press Release, *supra* note 46 (describing support for the bans by an industry trade association).
48. Hunold et al., *supra* note 26, at 2-4, 24-34, 39-40; Mantovani et al., *supra* note 28, at 1-4, 12-13, 18-21, 35-37.
49. See Alasdair Smith, *Private Motor Insurance Market Investigation: Notice of Possible Remedies Under Rule 11 of the Competition Commission Rules of Procedure*, UK COMPETITION COMM'N (Dec. 17, 2013), http://assets.publishing.service.gov.uk/media/5329dec3ed915doe5d00029b/131217_remedies_notice.pdf [<http://perma.cc/M9KN-GKE4>]; *Auction Services – Competition and Markets Authority Investigation Under the Competition Act 1998, Case No. 50408*, CMA (June 29, 2017), <http://assets.publishing.service.gov.uk/media/5954be5c40fob60a44000092/auction-services-commitments-decision.pdf> [<http://perma.cc/9ZHH-WL8E>]; *Mobility Scooters: Anti-Competitive Practices*, CMA (Oct. 19, 2017), <http://www.gov.uk/cma-cases/medical-equipment-anti-competitive-practices> [<http://perma.cc/R82S-XLQL>].
50. *Digital Comparison Tools Market Study*, CMA (Dec. 21, 2017), <http://www.gov.uk/cma-cases/digital-comparison-tools-market-study> [<http://perma.cc/SRP3-JQEJ>].

While cases challenging anticompetitive platform MFNs are less common in the United States, they would likely be framed as agreements in restraint of trade in violation of Section 1 of the Sherman Act, or as monopolization or attempts to monopolize in violation of Section 2 of the Sherman Act.⁵¹ A Sherman Act Section 1 case requires proof that the MFN is introduced by agreement, either among rivals or between upstream and downstream firms. An agreement is not required under Section 2. On the other hand, a Sherman Act Section 2 case requires proof that the defendant exercises monopoly power (for monopolization) or has a dangerous probability of achieving a monopoly (for attempt to monopolize). In practice, this requirement generally means that cases are not brought under Section 2 unless the defendant has a high market share.⁵²

The courts are converging on a common burden-shifting approach to analyzing whether agreements are unreasonable under Section 1 of the Sherman Act and whether a firm with monopoly power has engaged in predatory conduct under Section 2 of the Sherman Act.⁵³ In both settings, a plaintiff that proffers a prima facie case shifts the burden of production to the defendant. If the defendant satisfies that burden, the plaintiff must satisfy a burden of persuasion accounting for the harms and benefits to competition. In both settings, the analysis may be truncated, allowing condemnation of conduct without full analysis.

U.S. courts have contended with the potential anticompetitive effects of MFNs for decades, although largely not in the context of online platforms. Before the 1980s, the major U.S. decisions grappled primarily with the problem of whether to infer an agreement to fix prices when rivals used MFNs unilaterally but in parallel to facilitate coordination. More recent cases have focused on MFNs that facilitate higher prices by both preventing rival discounting and discouraging entry.⁵⁴

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51. See 15 U.S.C. §§ 1-2 (2012). FTC enforcement actions would be brought under section 5 of the FTC Act, applying Sherman Act principles. See 15 U.S.C. § 45 (2012).
52. In monopolization cases, courts that look to market shares for proof of monopoly power are reluctant to do so when the defendant has a market share below seventy percent. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 6.2a (5th ed. 2016). Similarly, the Fourth Circuit has noted that courts should decline to find a dangerous probability of an attempt to monopolize when the defendant has a market share below thirty percent and should be reluctant to do so when the share is between thirty and fifty percent. *Id.* § 6.5b2 (citing *M & M Med. Supplies & Serv. v. Pleasant Valley Hosp.*, 981 F.2d 160, 168 (4th Cir. 1992) (en banc)). Monopoly power can also be demonstrated with direct evidence. *E.g.*, *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999).
53. See Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 *ANTITRUST L.J.* 527, 544-50 (2013).
54. See *United States v. Am. Express Co.*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *cert. granted sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 355 (2017); *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665 (E.D. Mich. 2011); *United*

The recent e-books litigation presents the primary U.S. example of antitrust enforcement against a platform MFN.⁵⁵ The case arose with Apple's introduction of the iBookstore, an e-book retailer. At the time of Apple's entry, Amazon was the leading e-book retailer.⁵⁶ Amazon employed a wholesale distribution model (by which Amazon paid the publishers a wholesale price and set the retail price), charging low prices to customers.⁵⁷ Apple did not expect the iBookstore to be profitable with retail prices at the level Amazon charged.⁵⁸

A federal district court in New York found that when entering the market, Apple set out to reduce price competition from Amazon by using an MFN.⁵⁹ Apple adopted an agency distribution model (by which the publishers set the retail price and paid Apple a 30% commission).⁶⁰ Its iBookstore distribution contracts with five leading e-book publishers included MFN provisions and price caps for different categories of e-books,⁶¹ all of which were above the then-current Amazon sales prices.⁶² Under the MFN provisions, if a specific book were offered by Amazon or another e-book retailer at a price that was below the price that the publisher selected for the iBookstore, the publisher was required to reduce the iBookstore's price to match.⁶³ These discounts would have been costly for publishers if Amazon had continued its discount e-book pricing, so all five publishers converted their contracts with Amazon to agency models and raised the retail prices to the price caps.⁶⁴ The MFN also helped discourage price-cutting once the publishers had obtained pricing authority and increased e-book prices. The district court's opinion clearly and correctly explained the impact of

States v. Delta Dental of R.I., 943 F. Supp. 172 (D.R.I. 1996); see also Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 ANTITRUST L.J. 517, 520-33 (1996) (describing U.S. cases). The appellate decision in *American Express* was concerned primarily with market definition in cases involving two-sided platforms, not the competitive effects of an MFN.

55. United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015). See generally Baker, *supra* note 29 (discussing the case from an economic perspective).

56. *Apple*, 952 F. Supp. 2d at 670.

57. *Id.* at 649. Amazon sold many e-books at retail prices below the wholesale prices that Amazon paid the publishers and was known for its discount retail pricing. *Id.* at 650.

58. See *id.* at 656-58.

59. *Id.* at 662-63.

60. *Id.* at 648, 664.

61. *Id.* at 664.

62. *Id.* at 667.

63. *Id.* at 664.

64. *Id.* at 681-82. The MFN meant that if Amazon did not raise its retail prices the publisher would earn less per book from the iBookstore than from Amazon, because the publisher's compensation after Apple's commission would be less than the wholesale price paid by Amazon. *Id.* at 665.

the MFN on price competition, finding in favor of the plaintiffs. The court found that the MFN provisions “not only protected Apple by guaranteeing it could match the lowest retail price listed on any competitor’s e-bookstore, but also imposed a severe financial penalty upon the Publisher Defendants if they did not force Amazon and other retailers similarly to change their business models and cede control over e-book pricing to the Publishers.”⁶⁵

Platform MFNs were also the subject of two other recent U.S. cases.⁶⁶ In *American Express*, the government challenged MFNs imposed by American Express in its contracts with retailers that accepted the Amex card. The contracts prevented rival cards from charging lower prices (card fees) to retailers, as a rival might seek to do to increase its share of retail payment transactions. The contracts included nondiscrimination provisions tantamount to MFNs. These provisions prevented the retailers from passing on lower card fees to shoppers by offering them discounts for using a less expensive rival card.⁶⁷ The government argued that competition was harmed, because the retailers were discouraged from steering shoppers to American Express’s competitors (rival platforms), and thus, those competitors were discouraged from cutting fees.⁶⁸

The district court agreed, but the Second Circuit held that the district court had not properly defined the relevant market to account for the potential benefit to American Express cardholders.⁶⁹ The Second Circuit did not successfully reconcile its holding with the district court’s finding that cardholders were injured by the challenged conduct. The court also made analytical errors⁷⁰ and distorted

65. *Id.* at 648.

66. *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 165 (E.D.N.Y. 2015), *rev’d*, 838 F.3d 179 (2d Cir. 2016), *cert. granted sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 355 (2017); *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526 (N.D. Tex. 2014).

67. *American Express*, 88 F. Supp. 3d at 165.

68. *Id.* at 150.

69. *American Express*, 838 F.3d at 206.

70. The Second Circuit panel described plaintiffs’ initial burden of proving harm to competition in terms of *defendant’s* net price, not the *market* price. *Id.* at 205-06 (“Plaintiffs’ initial burden was to show that the NDPs made *all* Amex consumers on both sides of the platform . . . worse off overall Because Plaintiffs provided neither ‘a reliable measure of American Express’s per transaction margins,’ nor ‘a reliable measure of American Express’s two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders,’ they failed to meet their burden to show anticompetitive effects directly.” (citations omitted)). The panel also rejected the district court’s factual finding that higher prices on one side of the defendant’s platform were not fully passed through to the other side. Although economists would consider this an empirical question, the Second Circuit treated it as a question of law. *Compare id.* at 204 n.52 (stating that the district court’s conclusion that the challenged conduct raised retail prices was erroneous because “it fails to take into account offsetting benefits to cardholders in the form of rewards and other services”), *with id.* at 205 (acknowledging that “[t]he District

the law's burden-shifting framework to favor defendants.⁷¹ Although the appellate opinion suggested that the panel's holding would not apply to platform MFNs,⁷² the thrust of the Second Circuit decision was to make challenges to such practices more difficult. The Supreme Court recently decided to review this decision.⁷³

Second, private plaintiffs in 2014 challenged price-fixing of hotel room rates by OTAs.⁷⁴ The district court dismissed the complaint primarily on the ground that the putative class of consumer plaintiffs did not allege sufficient facts from which to infer that the eight OTA defendants introduced their parallel MFNs by agreement.⁷⁵ This disposition meant that the court did not reach the question of whether the MFNs harmed competition.⁷⁶ The U.S.

Court fairly observed that Amex's "price increases were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders" and that the record suggests that "not all of Amex's gains from increased merchant fees [were] passed along to cardholders in the form of rewards"). In addition, the Second Circuit defined a product market to encompass services that are not demand substitutes, combining services provided to cardholders and services provided to merchants. See *id.* at 204-05 ("Here, the market as a whole includes both cardholders and merchants . . ."). Doing so is inconsistent with the way that markets are generally defined under Supreme Court precedent. See Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 132-33 (2007) (describing the demand substitution focus of market definition); *id.* at 134 n.30 (explaining that feedback between the sides of a two-sided platform should be accounted for in the analysis of competitive effects, not market definition); *cf. id.* at 157-59 (explaining that "cluster markets" inappropriately collect demand complements, although they may occasionally be defended as a matter of analytical convenience or as specifying the initial product with which market definition analysis begins).

71. The district court properly defined separate markets for network services (used by merchants) and general service cards (used by cardholders). That approach means that when the plaintiff shows that competition was harmed in the network services market, the defendant has the burden of production to show offsetting benefits to cardholders. If competitive effects are evaluated with reference to a single net price accounting for effects on both merchants and cardholders, as required by the appellate panel's market definition, the burden of showing the absence of offsetting benefits to cardholders is placed on the plaintiff.
72. The appellate panel disclaimed concern with platform competition when distinguishing the market definition in another case. *American Express*, 838 F.3d at 198 ("Unlike the contested conduct in this case, the contested conduct in [the distinguished case] occurred not among different sides of the same network platform, but rather between the platforms themselves.").
73. *Ohio v. Am. Express Co.*, 138 S. Ct. 355 (2017). For a discussion of market definition issues raised by two-sided platforms, see Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142 (2018).
74. *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526 (N.D. Tex. 2014).
75. *Id.* at 537-43.
76. *Id.* at 549.

engagement with platform MFNs, limited to these three cases, compares unfavorably with European enforcement.

C. Cross-Atlantic Differences

The platform MFN cases brought by NCAs in Europe and Brazil⁷⁷ appear to be appropriate enforcement actions, with sound theoretical and empirical bases. It is hard to explain on economic grounds why such cases have not been brought in the United States. The regions are likely similar across most meaningful dimensions, including the use of MFNs by online platforms, the potential for competitive harm, and the likelihood and costs of freeriding. For example, high-income travelers seeking a hotel room in another city are as likely to care about price and quality (e.g., a good view or a quiet room) in both regions and as likely to rely on online hotel booking platforms.⁷⁸ Hotels in both jurisdictions likely value the ability to set different prices in different distribution channels similarly. Finally, new travel platforms do not appear to face drastically different entry conditions between the two continents.

Nor do differences in legal rules explain the greater European attention to platform MFN cases. In both regions, the competition policy regime prohibits a wide range of anticompetitive practices, whether adopted unilaterally by dominant firms or through agreement. There is no serious argument that platform MFNs are exempt on either side of the Atlantic. Rather, the enforcement discrepancy is likely due to the relatively greater interest that European enforcers have shown in pursuing anticompetitive, exclusionary conduct. The antitrust norms governing exclusion are more contested in the United States than in Europe,⁷⁹ and European enforcement against platform MFNs often involves exclusionary conduct. This background difference—which may discourage both private and public cases in the United States—may be exacerbated by the way resources are allocated at U.S. antitrust agencies. The agencies necessarily give priority to merger investigations, which have statutory deadlines, over conduct

77. See Aranze, *supra* note 43.

78. Sun, *Sea and Surfing*, ECONOMIST (June 21, 2014), <http://www.economist.com/news/business/21604598-market-booking-travel-online-rapidly-consolidating-sun-sea-and-surfing> [<http://perma.cc/2APC-WL7A>] (noting that 43% of total travel sales in the United States and 45% of total travel sales in Europe occur through OTAs).

79. See Baker, *supra* note 53, at 527-29 (documenting that U.S. courts and commentators downplay exclusion rhetorically); *id.* at 534 (explaining that U.S. legal norms concerning exclusion are contested); *id.* at 577 n.238 (noting greater concern with exclusionary conduct in Europe).

cases.⁸⁰ Doing so can slow nonmerger investigations when merger filings spike or when agencies are subject to hiring freezes or budgetary limitations.

III. U.S. ENFORCEMENT CHALLENGES

The potential competitive dangers from platform MFNs call for antitrust scrutiny. This Part discusses how U.S. government enforcers and private plaintiffs could potentially reach anticompetitive platform MFNs under the Sherman Act—and the litigation challenges presented by such cases. We emphasize the (unilateral) incentives created by MFNs for incumbent platforms to charge higher prices and potential entrants not to enter, because we suspect such conduct and its competitive harms will initially prove the most fertile ground for enforcement. Additionally, we focus on harms to platform—rather than seller—competition, even though the latter could also be a source of competitive harm and consequently an appropriate subject for antitrust scrutiny.⁸¹ We adopt this focus because platforms are growing in economic significance.

Moreover, our discussion gives the greatest attention to harms resulting from anticompetitive exclusion. The adoption of platform MFNs is likely to harm competition through exclusion-absent efficiencies, because scale economies in platform operation typically create oligopoly markets that do not perform competitively. Platforms often benefit from strong scale economies in demand (network effects). They may also benefit from scale economies in supply. Exclusionary conduct that prevents a new entrant from gaining a toehold is particularly problematic when the market is likely to be concentrated, such that firms are competing more for the market itself than for a share of the market.

The setting we analyze has vendors selling goods or services through online platforms. The vendors set the sales price for their customers and pay the platform a transaction fee built into the price.⁸² The platform in turn requires vendors not to sell for less on other sites or platforms. This platform MFN prevents the vendor from allowing its product to be offered at a lower price on its own

80. See Albert A. Foer, *The Federal Antitrust Commitment: Providing Resources to Meet the Challenge*, AM. ANTITRUST INST. 5, http://www.antitrustinstitute.org/files/whitepaper_021120071704.pdf [<http://perma.cc/47SR-EJTK>] (noting that because of statutory deadlines, merger investigations increased from 36% of the Antitrust Division's caseload in 1970 to 76% in 1998).

81. For example, hotels could enlist OTAs to impose MFNs to soften price competition among themselves (a collusive mechanism), thereby increasing room rates. Or a dominant hotel chain could enlist OTAs to impose wide MFNs to prevent a rival hotel chain from competing by discounting heavily on its own site (an exclusionary mechanism), thereby preserving high prices.

82. When transaction fees are built into the final price (e.g., as a percentage), a platform charging a lower fee cannot pass the savings through to consumers without violating the MFN.

website (if any) or on a rival platform.⁸³ As a result, entrants are excluded, allowing the platform (or platforms) imposing the MFN to charge supracompetitive prices. This anticompetitive outcome derives from unilateral platform conduct.

A. Exclusion of Rival Platforms or Entrants

In the most straightforward platform exclusion case, the platform imposing the MFN on vendors is the dominant online retailer of the product or service. The MFN is thought to protect the platform's market power from erosion by discouraging entrants who would compete on price. The entrant might charge a lower commission to vendors that agree to pass through their savings by lowering the price consumers would pay.

With a dominant platform, the Justice Department, state attorneys general, or private plaintiffs could bring a monopolization case, claiming a violation of Section 2 of the Sherman Act.⁸⁴ As previously explained, plaintiffs generally prove the monopoly power element of the monopolization offense by showing that the defendant platform has a high market share. Markets in which firms have high fixed costs and network effects—including online platform markets such as OTAs—are often concentrated.⁸⁵ Thus, this element is likely to be satisfied in many platform MFN cases. However, this predicate for liability means that Section 2 of the Sherman Act may not capture all exclusionary problems from platform MFNs: even a platform with a substantially lower share than the threshold for proof of monopoly power (e.g., 30%) may represent enough business to induce sellers to accept and comply with its MFN.⁸⁶ Collectively, covered platforms may represent a sufficient share of the market to create anticompetitive effects, even if all individual platforms are relatively small. Accordingly, we also discuss enforcement against platform MFNs that exclude platform rivals under Section 1 of the Sherman Act, which does not require proof of monopoly power.

83. If a price reduction is spotted elsewhere, the platform with the MFN lowers the price charged to the minimum in the market and the provider bears the cost of the reduction.

84. The Federal Trade Commission could employ section 5 of the FTC Act (presumably applying the principles of section 2 of the Sherman Act). The conduct could also or instead be challenged as an attempt to monopolize under section 2 of the Sherman Act or as a violation of state unfair competition laws. We do not discuss these alternative approaches.

85. See generally JOHN SUTTON, SUNK COSTS AND MARKET STRUCTURE: PRICE COMPETITION, ADVERTISING, AND THE EVOLUTION OF CONCENTRATION (1991) (providing a theoretical analysis and case studies demonstrating that firms often make sunk investments to attract a larger share of growing market demand, leading to more concentrated markets).

86. If MFNs are introduced by platforms with small shares (e.g., less than 10%) only, then they are unlikely to create competitive problems.

The market shares used to prove monopoly power depend upon the market definition. Shares will be higher – and a Section 2 case will often be stronger – if market participants include online sellers but not brick-and-mortar retailers. In the context of hotel bookings, for example, this would mean defining the market as the online sale of hotel reservations through OTAs and websites.⁸⁷ The market would exclude bookings made through brick-and-mortar travel agents or by telephone. Limiting the product market to online sales is generally supported by consumer behavior in the kinds of platforms that we discuss in this Feature.⁸⁸

To prove monopolization, the plaintiff must also show that the dominant online platform engaged in exclusionary conduct to achieve or maintain its monopoly power. In the MFN context, this is straightforward. A plaintiff would prove its case by showing that the dominant platform prevented a rival or entrant from cutting fees to sellers willing to lower prices for customers.⁸⁹ A court could reasonably infer that the platform engaged in exclusionary conduct from the terms of a contract between the platform and the seller if the contract explicitly requires the vendor to provide price parity. The plaintiff may also be able to support its case by identifying platforms that attempted to enter but were stymied by the MFN.⁹⁰

If multiple platforms use MFNs but none is dominant, the practice could nonetheless exclude the entry of rival platforms that would compete over price. The sum of the market shares of the covered platforms would need to be sufficiently large to ensure that the MFNs would discourage sellers from marketing their products on those platforms.⁹¹ As previously discussed, it is possible that competition could be harmed even if only a single non-dominant platform – acting unilaterally – employed MFNs. However, these competitive harms are not easily addressed under Section 2 of the Sherman Act.

87. That was the product market alleged in *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526, 529-30 (N.D. Tex. 2014).

88. Market definition may also be affected by the Supreme Court's resolution of *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016), *cert. granted sub nom.* *Ohio v. Am. Express Co.*, 138 S. Ct. 355 (2017). See *supra* notes 67-73 and accompanying text.

89. *E.g.*, Complaint at 24-26, *United States v. Blue Cross Blue Shield of Mich.*, No. 10-cv-14155 (D. Mich. Oct. 18, 2010).

90. The Justice Department, the plaintiff in both *American Express* and *Blue Cross*, identified prospective entrants or rivals excluded by the MFN in both cases. See *id.* at 24-25; Second Consolidated Amended Class Action Complaint at 56, 78, *American Express*, 838 F.3d 179 (No. CV-10-4496).

91. If the covered platforms collectively had a small share, sellers attracted to offering their products on the entrant's platform could find it profitable to withdraw their products or services from the platforms with MFNs, or negotiate with those platforms to remove the MFNs.

Absent a dominant platform, an exclusion case would most likely be brought under Section 1.⁹² Section 1's agreement requirement should be satisfied so long as the MFNs were included in the (vertical) contracts between platforms and sellers.⁹³ Additionally, if the rival platforms colluded or coordinated to exclude entrants, the plaintiff could satisfy the statute's agreement requirement by showing that the MFNs were introduced as the product of a (horizontal) agreement among the platforms.⁹⁴

When no platform is dominant, a plaintiff is more likely to succeed in proving competitive harm when the collective share of commerce in the relevant market subject to MFNs is greater. If some platforms adopt MFNs before others, the MFNs might not harm competition until other platforms follow suit, and a critical mass of platforms and hotels are covered. Then a case against the initial platforms would need to challenge their decisions to continue using MFNs after market conditions had changed, not their earlier decisions to introduce those contractual provisions.⁹⁵

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92. The competitive harm from MFNs could also be challenged under Section 5 of the FTC Act. However, that statute is unlikely to reach conduct that would not also violate Section 1 of the Sherman Act. *See, e.g., E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 142 (2d Cir. 1984) (noting that, even if the FTC had “authority under § 5 to forbid legitimate, non-collusive business practices which substantially lessen competition,” the record did not show sufficient competitive harm). The FTC could also consider prohibiting anticompetitive MFNs in an industry through rulemaking. *See* DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 141-43 (2011); Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 *ANTITRUST BULL.* 143, 207-19 (1993); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking To Preserve Drug Competition*, 109 *COLUM. L. REV.* 629, 677-82 (2009); Adam Speegle, Note, *Antitrust Rulemaking as a Solution to Abuse on the Standard-Setting Process*, 110 *MICH. L. REV.* 847, 865-73 (2012).
93. Joseph J. Simons, *Fixing Price with Your Victim: Efficiency and Collusion with Competitor-Based Formula Pricing Clauses*, 17 *HOFSTRA L. REV.* 599, 626 (1989).
94. *Id.* One recent case challenging MFNs in online hotel booking alleged a horizontal agreement, but was dismissed for failure to allege sufficient facts from which such an agreement could be found. *See In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526, 537-43 (N.D. Tex. 2014).
95. When MFNs are adopted sequentially, a defendant is unlikely to prevail by arguing that it was the only platform using MFNs at the time it began to do so, or by arguing that once other platforms instituted MFNs, it had no choice but to follow. Putting aside criminal enforcement and the attempt to monopolize offense, evidence of intent matters only to the extent that it makes an inference of anticompetitive effects more or less probable. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (“Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist’s conduct.”).

In a Section 2 monopolization case, the exclusionary conduct element would most likely be evaluated through the application of a burden-shifting framework, allowing defendants to proffer a procompetitive justification.⁹⁶ A Section 1 case challenging vertical MFN agreements would be evaluated under the rule of reason, again allowing defendants to provide a justification.⁹⁷ However, a horizontal agreement among platforms to institute MFNs could be held illegal *per se* under Section 1.⁹⁸

Defendants will most likely attempt to cast their MFNs as protecting platform investment incentives by eliminating freeriding. A defendant might seek to prove this justification with evidence that, before introducing the MFN, it had been considering limiting its investments in platform improvements due to the freeriding threat. A plaintiff can rebut this argument with empirical evidence, such as studies suggesting that even narrow MFNs are unnecessary to protect investment incentives by OTAs.⁹⁹ A plaintiff might further support a rebuttal with evidence that the consumer transaction costs of freeriding are high, or that the dominant platform charges a fee sufficient to compensate it for the services it provides to freeriders.

If the freeriding concern is serious and if vendors typically sell through their own websites, the evidence may show that a narrow MFN would likely solve the

96. *Id.* at 58–59. In the absence of a plausible efficiency justification, a court may be able to condemn the dominant firm’s imposition of an MFN as monopolization “without a comprehensive analysis of [its] nature, history, purpose, and actual or probable effect.” See Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 548 (2013).

97. In the absence of a horizontal agreement to adopt the MFNs, the rule of reason would apply. This is so regardless of whether the MFNs are viewed as non-price vertical restraints, *see, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18, 59 (1977), or vertical restraints concerning price, *see, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881 (2007). Wide MFNs broadly employed have an economic effect similar to that of resale price maintenance (RPM): both practices result in all sellers charging the same price to all customers. In the language sometimes used to describe vertical restraints, platform MFNs – like the RPM agreements analyzed in *Leegin* – are intrabrand restraints that can harm interbrand competition.

98. Under the modern burden-shifting framework, the horizontal agreement could be termed illegal *per se* if the court concluded that (1) the agreement was, on its face, tantamount to price-fixing; or (2) the competitive harm was otherwise obvious and the MFNs had no plausible business justification. Under such circumstances, the plaintiff would satisfy its initial burden of production without proof of market power, the defendant would have no cognizable defense, and the court would condemn the practice without extensive analysis of its competitive effects. See ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 246–58 (3d ed. 2017) (describing the contemporary application of the rule of reason to horizontal restraints); *see id.* at 181–84 (characterizing the *per se* rule from economic and legal perspectives).

99. *See supra* notes 26–29 and accompanying text.

problem.¹⁰⁰ Under such circumstances, a narrow MFN would be a less restrictive alternative to a wide MFN and could be the basis for a settlement or remedy after a defendant is found liable. The evidence might also show that platforms can discourage freeriding in a less anticompetitive way by charging a per-transaction fee not based on value (i.e., a fixed dollar fee rather than a fixed percentage). So long as there is some competitive harm, an MFN could be found exclusionary when a less restrictive alternative exists without the need to compare harms and benefits.¹⁰¹

Freeriding is not necessarily a better defense in an agreement case involving a market in which no firm is dominant than in a monopolization case against a dominant firm. However, the analysis of the defense may be more complex in the former. On the one hand, consumers would have more choices among platforms, so freeriding may be more prevalent. On the other hand, when sellers have more platform choices, the increased competition may lower fees paid to sellers, so consumers may not have as much incentive to free ride. Substitution patterns across platforms and empirical evidence of freeriding would be critical for evaluating a freeriding justification in a case challenging the use of platform MFNs when no platform is dominant.

B. Coordination Among Rival Platforms

Our legal analysis has emphasized the possibility that a dominant platform — or one or more competing platforms — could harm competition by imposing MFNs that exclude current or potential competitors. But that is not the only possible anticompetitive mechanism. As the economic analysis above indicates, platform MFNs can also harm competition through two coordinated mecha-

100. *Digital Comparison Tools Market Study*, *supra* note 50, § 4.92, at 57–58. On the other hand, a narrow MFN along with a best-price guarantee may have similar harmful consequences to a wide MFN. See Francesca Wals & Maarten Pieter Schinkel, *Platform Monopolization by Narrow-PPC-BPG Combination: Booking et al.* (Amsterdam Law Sch., Research Paper No. 2017-32, 2017).

101. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32, 610–11 (1985) (holding that the petitioner violated section 2 of the Sherman Act); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1070–79 (9th Cir. 2015) (holding that the National Collegiate Athletic Association's compensation rules violated section 1 of the Sherman Act); *Multi-state Legal Studies v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1556–57 (10th Cir. 1995) (denying summary judgment on a claim under section 2 of the Sherman Act); *United States v. Brown Univ.*, 5 F.3d 658, 679 (3d Cir. 1993) (remanding and holding that the plaintiff must identify a less restrictive alternative to prove a claim under section 1 of the Sherman Act).

nisms: (1) discouraging cheating on consensus terms among competing platforms; and (2) inducing parallel accommodating conduct that leads rival platforms to charge higher prices.

If the conduct involves an agreement among multiple platforms to introduce MFNs, this conduct could be challenged as a horizontal agreement under Section 1 of the Sherman Act. As discussed above, such an agreement may be illegal per se.¹⁰² However, although agreements among rivals can be inferred from circumstantial evidence, it can be challenging to prove them without direct evidence.¹⁰³ Alternatively, evidence of an MFN introduced by vertical agreement would also satisfy the agreement requirement of Section 1. The case would then most likely be evaluated under the rule of reason.

CONCLUSION

This Feature has explained why MFNs employed by online platforms can harm competition by keeping prices high and discouraging entry, notwithstanding the possibility that some MFNs may reduce inefficient freeriding. The prevalence of MFN contract terms on online platforms¹⁰⁴ and the steadily growing share of GDP spent on such platforms¹⁰⁵ suggest that greater antitrust enforcement against anticompetitive platform MFNs could have noticeable benefits for productivity and consumer welfare. That conclusion is also consistent with the results of retrospective studies of the consequences of the elimination of MFNs by European OTAs, described above.¹⁰⁶

We find that there are no practical impediments and limited legal constraints preventing U.S. enforcement against anticompetitive platform MFNs. This is an important area for enforcement attention because platforms play a significant role in the economy, the economic analysis of their anticompetitive potential is

^{102.} See *supra* note 97 and accompanying text.

^{103.} See, e.g., *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526, 534-43 (N.D. Tex. 2014) (finding that the plaintiffs' "circumstantial facts" were insufficient to allege a violation of section 1 of the Sherman Act).

^{104.} The prevalence of platform MFN contracts is suggested by the range of industries in which their use has been investigated, including dental insurance, health insurance, motor insurance, mobility scooters, credit cards, OTAs, and ecommerce platforms. The United Kingdom's CMA reported that it found examples of MFNs in all of the sectors in which it focused when studying digital comparison tools. *Digital Comparison Tools Market Study*, *supra* note 50, §§ 1.7, 4.90, at 7, 57 (identifying focus sectors).

^{105.} Mark Knickrehm et al., *Digital Disruption: The Growth Multiplier*, ACCENTURE STRATEGY (2016), http://www.accenture.com/t20160905T010041Z_w_/us-en/_acnmedia/PDF-4/Accenture-Strategy-Digital-Disruption-Growth-Multiplier.pdf [<http://perma.cc/QRA3-WXHN>].

^{106.} See *supra* notes 24-28 and accompanying text.

clear and compelling, and the European experience has shown that challenges to such practices can improve consumer welfare.

The academic and popular literature today is concerned with high levels of concentration in internet businesses.¹⁰⁷ Because MFNs can serve as a barrier to entry by lower-cost platforms, these provisions may make online commerce more concentrated than necessary, limiting competition. Antitrust enforcement targeting anticompetitive platform MFNs has the potential to increase entry and price competition, and thereby enhance productivity and consumer welfare.

107. See generally Carl Shapiro, *Antitrust in a Time of Populism*, INT'L J. INDUS. ORG. (forthcoming) (discussing decreased economic competition and increased interest in antitrust enforcement in the United States); Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASHINGTON CTR. EQUITABLE GROWTH (Mar. 20, 2017), <http://equitablegrowth.org/research-analysis/market-power-in-the-u-s-economy-today> [<http://perma.cc/3D2P-JCC4>] (explaining why market power is a major issue despite well-established antitrust enforcement institutions and legal precedents).



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