TRADITIONAL AND PLATFORM MFN CLAUSES UNDER ANTITRUST LAW: INSIGHTS FROM RECENT PRACTICE

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I. INTRODUCTION

Most Favored Nation ("MFN") clauses have long been a controversial issue in antitrust. Within economics and legal literature attention has in the past been devoted to traditional or wholesale MFN clauses (also known as most favored customer "MFC" clauses), according to which one party (the supplier) undertakes to treat the other party (the buyer) as well as it treats its best customer, i.e. guaranteeing the best terms and price conditions to that buyer as compared with any other dealer. MFNs can be considered as belonging to the more general categories of "price relationship agreements" ("PRAs"), i.e. agreements where the price that the seller charges the buyer is related to another price,[2] and of "contracts that reference rivals" ("CRRs"), meaning contracts between a buyer and a seller where the terms depend on information outside the buyer-seller relationship and derive from other transactions to which those same firms are party.[3]

Recently the use of some particular forms of MFN clauses by platforms has come under antitrust scrutiny. The main difference between traditional and platform MFNs is that the former are a means for the parties to regulate the price and conditions of their own transaction, whereas the latter place restrictions on the parameters of a transaction that one of the parties concerned (the intermediary) will conclude with a party outside the agreement (the final consumer). Different terminologies can be traced in the literature, such as Across-Platforms Parity Agreements ("APPAs"),[4] Retail Price MFNs,[5] platform MFN agreements,[6] and price parity clauses.[7] In digital settings, the typical situation consists of an upstream supplier that sells its products through an online intermediary platform and guarantees that the price and terms it sets for a particular product or service on that platform is no higher than the price and terms it sets for the same product on other platforms and/or distribution channels. In this case, the platform imposes restrictions on the behavior of the producer.

In a different way, there are cases in which the behavior of the retailer may be restricted. In the credit card industry, the so-called no surcharge rule (according to which retailers cannot charge more for purchases made with one credit card than for purchases made with other cards and

2 LEAR, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements*, OFT1438 (September 2012) (report prepared for the Office of Fair Trading).

3 Scott Morton, U.S. Dept. of Justice, *Contracts that Reference Rivals, paper presented at Georgetown University Law Center Antitrust Seminar (April 5, 2012),* https://www.justice.gov/atr/file/518971/download.

4 See LEAR, *supra note 2; OECD, Hearing on Across-Platforms Parity Agreements* (2015).

5 Fletcher & Hviid, *Broad Retail Price MFN Clauses: Are they RPM 'at its worst'?*, 81 Antitrust L.J. 65 (2017).

6 Boik & Corts, *The Effects of Platform MFNs on Competition and Entry*, 59 J.L. & Econ. 105 (2016).

7 E.g. Ezrachi, *The Competitive Effects of Parity Clauses on Online Commerce*, 11 European Competition J. 488 (2015); Vergé, *Are Price Parity Clauses Necessarily Anticompetitive?*, CPI Antitrust Chron. (January 2018), https://www.competitionpolicyinternational.com/wp-content/uploads/2018/01/CPI-Verge.pdf.

ultimately other payment methods) and no-steering or non-discrimination provisions ("NDPs," prohibiting the merchant from using any means of encouraging consumers to adopt another card or transaction method) have been considered as vertical MFN ("vMFN") restraints, meaning contractual clauses preventing a multiproduct retailer from charging more for one supplier's product than for the products of rival suppliers.[8]

II. OVERVIEW ON TRADITIONAL MFNS

Literature on traditional MFNs has identified both efficiency reasons and potential anticompetitive effects related to their use.

On the one hand, with regard to the main competitive harms deriving from MFNs, these can amount to both collusive and exclusionary effects. First of all, such clauses may negatively affect price competition. An MFN provision typically does not limit the seller's commercial freedom to have more customers. However, the MFN undermines the seller's incentives to offer low prices by raising the cost to the seller of cutting prices to buyers other than the beneficiary of the MFN. As any price discounts must be offered to all buyers covered by the MFN itself, such clause in practice reduces selective discounts and leads to higher prices.[9] In addition, MFNs are considered as facilitating coordination and helping firms operating in the markets concerned to deter cheating (as it would be more easily detected). MFNs may also dampen competition when they lead those firms to compete less aggressively.[10]

With regard to the exclusionary harms, MFNs may help an incumbent in foreclosing rivals' entry or expansion by making it impossible for them to bargain for a low price with input suppliers or distributors bound by that clause with the incumbent: this, in turn, would mean that rivals would be discouraged from lowering their own costs and, again, from competing aggressively with the incumbent. Such anticompetitive effects are more likely to arise when parties hold a certain degree of market power or when there is a widespread use of such clauses in an industry to the extent that cumulative effects arise. When MFNs are in place across all buyers for the adopting seller, this amounts to a commitment to uniform pricing.[11]

On the other hand, with regard to the efficiency justifications for the adoption of MFNs, such clauses can be considered as being designed to solve the hold-up problem typical of vertical settings, minimizing externalities, and facilitating investments. According to this argument, they can be used when a party makes relationship-specific investments in order to mitigate the risks of opportunistic conduct of the other party to the contract and to allow the protection of distributors from free-riders. This is particularly true in the case of long-term contracts, where both the buyer and supplier are legitimately concerned about being locked into a deal with potentially disadvantageous terms.[12] Another typical efficiency argument concerns the prevention of delays in transacting and the reduction of transaction and negotiation costs that MFNs may grant (even if it must be considered that they also involve the costs of monitoring and potentially litigating compliance with the agreement).[13]

8 Carlton & Winter, *Vertical most-favored-nation restraints and credit card no-surcharge rules*, 61(2) J.L. & Econ. 215 (2018).

9 Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of 'Most-Favored-Customer' Clauses*, 64 Antitrust L.J. 517, 519 (1996).

10 Baker & Chevalier, *The Competitive Consequences of Most-Favored-Nation Clauses*, 27 Antitrust 20, 24 (2013).

11 Boik & Corts, *supra* note 6, at 108.

12 Salop & Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27 Antitrust 15, 17 (2012).

13 Baker & Chevalier, *supra* note 10, at 21 et seq.

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III. OVERVIEW OF PLATFORM MFNS

Similar antitrust concerns and efficiency justifications also relate to platform MFNs. However, they are characterized by some distinctive features.

Important insights derive from cases which have arisen in digital markets, including, e.g.: the U.S. and European *E-books* cases concerning Apple;[14] the European Commission's investigation of Amazon *E-books MFN*;[15] and the investigations in the European context at national level, such as price comparison websites ("PCWs") in the field of motor insurance and in the field of electricity and gas prices,[16] online travel agents ("OTAs"),[17] online bidding auction services,[18] and Amazon Marketplace.[19]

In digital markets, the use of MFNs has been observed in conjunction with the adoption of the agency model by online platforms, which, as opposed to the wholesale model, provides for suppliers to set final prices.[20] Platform MFNs ensure that the price and terms quoted through the platform will not be higher than those available to a third party (the buyer) on the supplier's website ("narrow MFN") or on other platforms and/or any other channel ("wide MFN").

Although they relate to vertical relationships, the main anticompetitive effects of platform MFNs are realized on a horizontal level and include the foreclosure of market entry for new resellers, the reduction of competition, and the facilitation of collusion between platforms. Moreover, these clauses may serve to acquire or strengthen monopoly pricing by preventing other retailers from competing in the market by offering lower prices, thereby limiting entry.

In detail, platform MFNs limit the possibility of passing on fees imposed on the seller in the form of higher retail prices. If the supplier is bound by the MFN to set on a platform a price not higher than that set on other intermediaries, the platform concerned will not be afraid (or rather will be incentivized) to increase the fee, and other platforms will also have fewer incentives to reduce their fees as well. Moreover, if platforms coordinate and agree on the fee level, free-riders will have less incentive to reduce fees deviating from the collusion due to parity agreements, as such a reduction will be transferred to users of other platforms. In other words, higher fees, in turn, lead to higher retail prices and potentially to higher profits for platforms.

Even without coordination among platforms, platform MFNs may still have a negative impact on entry. Consider the case of a new entrant platform which may wish to gain customers by charging a lower fee to the supplier, thus a lower final price to consumers: the supplier, bound by an MFN clause with an incumbent platform, will be forced to charge the entrant the same price as the incumbent. As a consequence, if the supplier has concluded this kind of agreement with several platforms, the combined effect will be the application of the same price on the various platforms.

Importantly, successful platforms have often proved to hold a strong contractual power over suppliers, allowing platforms themselves to impose fee levels and parity clauses as an unavoidable condition of service.

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14 *United States v. Apple Inc., et al., 952 F. Supp. 2d 638 (S.D.N.Y. 2013); EU Commission, Case No. COMP/39.847 – E-books.*

15 EU Commission, Case No. AT.40153, *E-book MFNs and related matters (Amazon), final commitments published on July 28, 2017.*

16 CMA, *Private motor insurance market investigation*, Final report (September 24, 2014); *Bundeskartellamt*, Press Release, *Verivox vows to stop using 'best price' clauses* (June 3, 2015), http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/03_06_2015_Verivox.html.

17 For details, see next paragraph.

18 CMA, *Decision to accept binding commitments offered by ATG Media in relation to live online bidding auction platform services*, Case No. 50408 (June 29, 2017).

19 See *Bundeskartellamt, Press Release, Amazon abandons price parity clauses for good (November 11, 2013),* http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html%3Fnn%3D3599398; OFT, Press Release 60/13, *OFT welcomes Amazon's decision to end price parity policy (August 29, 2013),* https://webarchive.nationalarchives.gov.uk/20140402160400/http://oft.gov.uk/news-and-updates/press/2013/60-13. It is worth mentioning that Amazon dropped MFN clauses in the U.S. too. See *Amazon eases price restrictions on third-party vendors,* Financial Times (March 12, 2019), https://www.ft.com/content/3beea4a6-445b-11e9-b168-96a37d002cd3.

20 Johnson, *The Agency Model and MFN Clauses, 84 Rev. of Econ. Stud.* 1151 (2017).

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According to some scholars, since in the case of the agency model the final price is fixed by the upstream supplier and not by the reseller, even though the agreements in question do not fix a certain price, wide platform MFNs combine two elements: a vertical one, whereby an upstream firm sets final downstream retail prices, and a horizontal one, whereby the upstream firm sets identical retail prices across all intermediaries. The latter is of major concern and would make the clauses at issue equivalent to the "worst" of RPM.[21]

Such concerns relate mainly to wide MFNs, whereas narrow parity clauses, which affect only the relationship between a single supplier and a single platform, would result in less intrusive restrictive effects.[22]

However, it is worth noting that there are relevant cases in which a combination of platform MFNs with "best price guarantees" ("BPGs," also known as low-price guarantees) occurs. As a matter of fact, antitrust concerns related to the use of best or low price guarantees have been the subject of inquiry by literature in the past.[23] In the case at issue, platforms may have an MFN clause with the supplier and also advertise a BPG clause to consumers, meaning those unilateral promises made by a retailer to consumers that it will offer them the lowest price, typically combined with a commitment to match (price matching) or beat (price beating) competitors' prices. In both platform MFNs and BPGs the price of the goods sold by the retailer is linked to the prices charged by rivals. The difference lies in the fact that, whereas platform MFNs seem not to have a direct effect on consumers' search behavior (since consumers generally are not aware of the agreement), BPGs typically do, as they link the platform and the consumers. BPGs of the matching type, which are used in practice by some online intermediaries, are likely to reinforce the anticompetitive effects of platform MFNs even in their narrow version. Indeed, consider the case of an incumbent platform A, having a narrow platform MFN with a supplier X. Even if other platforms are not covered by such MFN, if platform A offers a price matching guarantee to its consumers, competing platforms will not be incentivized to quote lower final prices to the same product as any reduction will be matched by platform A to any consumer activating the guarantee to obtain the lower price. Moreover, collusive risks derive from the adoption of such BPGs as, in order to avoid the erosion of their market share, other platforms may decide to imitate the strategy offering themselves a price matching guarantee: in this case, they could set the higher price offered by platform A and in turn guarantee a price matching clause. Thus, there would be no difference in prices set by the firms concerned, and so the price matching guarantee would grant customers a reimbursement equal to zero (or rather they would have no reason to use the guarantee) and ensure platforms' higher profits. This outcome is similar to the horizontal effect claimed to result from wide platform MFNs, so that the combination between narrow MFNs and price matching guarantees requires appropriate consideration.

With regard to the efficiency justifications for platform MFNs, the main one can be identified in the protection of investments maintained by the intermediary in order to build a reliable platform and to reduce the risk of "showrooming," which is a form of free-riding.[24] Economic theory teaches that multi-homing has a crucial relevance in the management of indirect network effects between customer groups by multi-sided platforms, which tend to design strategies in order to ensure themselves users' preference.[25] MFN clauses may constitute protective measures aimed at preventing customers from using the platform in order to get information about the products and then subsequently finalize the transaction on the supplier's website or through other channels at a lower price. An appropriate consideration of the multi-sided nature of platforms, which typically implies the platform charging different prices that reflect the demand elasticity of the users on each side, is essential.

Thus, online platforms usually offer their services for a fee on one side of the platform (typically, suppliers/businesses) and for free on the other side (consumers), on which others can free-ride. The same may occur with payment cards, where the merchant has an incentive to advertise acceptance of a card to generate increased custom only to steer customers away from using that card once they have started the process of a purchase and transact on a cheaper platform. As noted in literature, the fact that a consumer and a merchant may transact off the platform that brought the two users together in the first place is the key element of free-riding on platforms.[26]

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21 Fletcher & Hviid, *supra note 5, at 79 et seq.*

22 Ezrachi, *supra* note 7, at 506 et seq. (affirming that with "narrow MFN" clauses each platform may be incentivized to compete by lowering its commission to obtain a lower price).

23 For an overview, see Hviid, *Summary of the literature on price guarantees* (2010), http://competitionpolicy.ac.uk/documents/107435/107582/Summary+of+LPG+literature+Final.pdf.

24 Wang & Wright, *Search platforms: showrooming and price parity clauses*, Mimeo (2017).

25 Armstrong, *Competition in two-sided markets*, 37 Rand J. Econ. 669 (2006).

26 Johnson, *Suggestions for competition authorities when assessing vertical restraints in multi-sided platforms*, in OECD, *Rethinking Antitrust Tools for Multi-Sided Platforms* 2018, at 201, 207 (April 6, 2018), www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm.

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IV. INSIGHTS FROM THE EUROPEAN EXPERIENCE

In the EU, existing practice reveals different approaches by competition agencies and courts. The most prominent example concerns the online travel agency sector. Notably, the first investigation in this sector was conducted in the UK by the Office of Fair Trading (OFT), but its decision was quashed by the Competition Appeal Tribunal (CAT) and the Competition and Markets Authority (CMA) did not continue the inquiry.[27] Later, Italian, French, and Swedish national competition authorities (NCAs) collaborated under the coordination of the European Commission in their investigations into Booking.com and Expedia addressing parity clauses providing the obligation for hotels to offer the OTAs conditions (i.e. prices and other conditions, such as room availability) that were at least as favorable as those offered on other platforms and on the hotels' own websites (wide MFN). Such clauses were considered as vertical restrictions capable of significantly reducing competition on prices and supply conditions, both between platforms and different sale channels, and discouraging entry by newcomers. Booking, in settling with the NCAs, committed to remove the wide MFN and maintain the narrow one (according to which the OTA has undertaken to only apply MFN clauses to prices and conditions publicly offered by hotels through their own direct online sales channels).[28]

The *Bundeskartellamt*, on the other hand, in similar cases, firstly against the portal HRS and later against Booking, did not accept even the narrow MFN.[29] In particular, the *Bundeskartellamt* rejected the free-riding argument and considered that the parties were failing to demonstrate that: the investments made by OTAs in the quality of the service were contract-specific, thus lost as a result of free-riding; MFNs were indispensable to the attainment of efficiencies; and less restrictive remuneration models other than the commission model in use were possible. One main concern of the German NCA was that the narrow MFN would not prevent the "cannibalization" effect, i.e. the erosion of direct sales by hotels.

It is worth mentioning that narrow MFNs have also been accepted by the CMA in its investigation into the private motor insurance ("PMI") market, finding them essential and vital for a PCW in order to protect its credibility, as no alternative mechanisms which can serve to this end were identified. With regard to free-riding, the CMA analyzed some possible alternatives but not in depth due to the lack of harm by narrow MFNs found by the agency in this case. On the other hand, no justifications were considered for wide MFNs, as they would not grant any more protection from free-riding than that already provided by narrow MFNs: free-riding by PMI providers was possible because the PCW made clear which PMI provider had offered the quote, enabling the consumer to go directly to the provider itself, whereas there was not the same possibility for another PCW to free-ride on the first PCW's investment as other PCWs would still need to invest in advertising to attract customers.[30]

Following the closure of the OTAs' investigations, some Member States have intervened, introducing *ad hoc* provisions for online platforms banning any restrictions on hoteliers' pricing freedom (including those that were allowed under the commitments accepted by the NCAs involved, such as in Italy and France), which appear to safeguard the particular interests of hotels.[31] Then, in June 2019, a plot twist has come from the Düsseldorf Court of Appeal, which quashed the decision of the *Bundeskartellamt* prohibiting Booking from operating the narrow MFN clause, finding such clause as compatible with antitrust law and considering it as a means to creating a fair and balanced contractual exchange of services between the portal and the hotels.[32]

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27 OFT Decision, *Hotel Online Booking: Decision to Accept Commitments to Remove Certain Discounting Restrictions for Online Travel Agents*, OFT 1514dec (January 31, 2014). The commitment decision, regarding agreements between Booking and Expedia and the hotel chain IHG, was quashed by the CAT [*Skyscanner Ltd v. CMA*, [2014] CAT 16]. See also CMA, Press Release*, CMA closes hotel online booking investigation* (September 16, 2015), https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation.

28 See Autorità Garante della Concorrenza e del Mercato, Case I779 B, decision of April 21, 2015; Autorité de la Concurrence, Décision n° 15-D-06 of April 21, 2015; Konkurrensverket, Case Ref. No. 596/2013, decision of April 15, 2015.

29 *Bundeskartellamt*, *Hotel Reservation Service* (*HRS*), Case B 9-66/10. This decision was later confirmed by the Düsseldorf Higher Regional Court [Düsseldorf Higher Regional Court (OLG), VI - Kart. 1/14 (V)]. See also *Bundeskartellamt*, *Booking*, Case B 9-121/13.

30 CMA, *supra* note 16, para. 8.106; see also CMA, *Digital comparison tools market study*, *Paper E: Competitive landscape and effectiveness of competition*, para. 3.16 (Sept. 26, 2017).

31 See the French 'Loi pour la croissance, l'activité et l'égalité des chances économiques' (Loi Macron), adopted on August 5, 2015; the Austrian law amending the Austrian Federal Act against Unfair Competition and the Austrian Price Marking Act, which entered into force on January 1, 2017; and the Italian law (Legge annuale per il mercato e la concorrenza), adopted on August 2, 2017 and entered into force on August 29, 2017. Ban of price parity clauses has been then established in Belgium, and in July 2018 the Swedish Patent and Market Court issued a judgement forbidding Booking.com to impose parity clauses in its contracts with hotels.

32 See Oberlandesgericht Düsseldorf, Press Release, *Hotelbuchungen im Internet: "Enge" Bestpreisklauseln sind zulässig* (April 6, 2019), http://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20190604_PM_booking/index.php. Full judgment is not available at the time of writing. Some commentators have advanced the idea that the court may have considered the narrow MFNs as a type of ancillary restraints to the overall agreement between portal and hotels.

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OTAs' investigations have been the subject of huge debate. Recent empirical studies provide initial insights into the effects of the removal of platform MFNs.[33] Among these, some have analyzed the combination of narrow platform MFNs and price matching guarantees – frequently used by OTAs such as Booking – supporting the idea that such BPGs may have in practice substituted the wide MFN's anticompetitive role.[34]

As a matter of fact, inconsistencies among Member States resulting from the investigations have been condemned by scholars as a missed opportunity for the Commission to provide unitary guidance.[35] Only later, in the 2017 E-Commerce Sector Inquiry, [36] did the Commission explicitly state that, in the absence of a hardcore restriction, price parity clauses are covered by the VBER if the parties' market share does not exceed 30 percent and that an individual assessment is required if that threshold is exceeded.[37] Criticisms have also been raised against the legal approach adopted by NCAs, including the adoption of a theory of harm based on Article 101 TFEU rather than on an assessment of the existence and exercise of market power which would have been a more appropriate basis for an infringement of Article 102 TFEU.[38]

In the Amazon *E-Books* MFN investigation, the Commission analyzed MFNs under Article 102: in this case the Commission considered that such clauses could strengthen Amazon's position by reducing the ability and incentive of e-book suppliers and competing platforms to develop new business models and accepted commitments offered by Amazon, according to which it undertook to no longer enforce or introduce MFNs in agreements with publishers.

V. INSIGHTS FROM RECENT U.S. EXPERIENCE

Leaving aside the *E-Books* case mentioned above, where MFNs were considered in the context of the conspiracy between Apple and publishers to raise certain e-book prices, there has been almost no government enforcement against platform MFNs in the U.S. The approach adopted in the U.S. may be emblematically explained through the analysis of two cases.

The first case once again concerns the OTA sector, where a class action by consumers was brought against hotel chains and OTAs on the basis of an alleged industry-wide conspiracy to impose rate parity across room booking websites in order to eliminate intra-brand competition (i.e. among each hotel's online distribution channels, including its own website and OTA-run websites).[39] The Court dismissed the action due to the plaintiffs' failure to allege facts supporting their claim, but recalled that MFNs, such as RPM, are subject to the rule of reason, mentioning precedent cases where the courts deemed them not illegal.

33 See, e.g. Mantovani, Piga & Reggiani, *Much Ado About Nothing? Online Platform Price Parity Clauses and the EU Booking.com Case* (May 1, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3381299; Calzada, Manna & Mantovani, *Platform Price Parity Clauses and Segmentation*, UB Economics Working Papers, 2019/387; Caccinelli & Toledano, *Assessing Anticompetitive Practices in Two-sided Markets: The Booking.com cases*, 14(2) J. Competition L. & Econ. 193 (2018); Hunold, Kesler & Laitenberger, *Evaluation of best price clauses in online hotel booking*, 61 Int. J. Ind. Organ. 542 (2018).

34 Wals & Schinkel, *Platform Monopolization by Narrow-PPC-BPG Combination: Booking et al.*, 61 Int. J. Ind. Organ. 572 (2018). See also Akman, *A Competition Law Assessment of Platform Most-Favoured-Customer Clauses*, 12 J. Competition L. & Econ 781, 786-87 (2016).

35 Akman & Sokol, *Online RPM and MFN under Antitrust Law and Economics, 50 Review of Industrial Organization 133 (2017);* Colangelo, *Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking*, 8(1) JECLAP 3 (2017).

36 See European Commission, *Commission Staff Working Document, Accompanying the Final report on the E-commerce Sector Inquiry, SWD(2017) 154 final, at 177 et seq.*

37 Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, [2010] OJ L 102/1 (hereinafter "VBER").

38 Akman, *supra* note 34; Colangelo, *supra* note 35. Another issue concerns the legal nature of Internet intermediaries, i.e. whether they should be considered as genuine agents or independent resellers to be covered by Article 101 TFEU. Widely, on this topic, Akman, *Online Platforms, Agency, and Competition Law: Mind the Gap*, Fordham Int'l L.J (2019, forthcoming).

39 *In re Online Travel Company (OTC) Hotel Booking Antitrust Litigation*, 997 F. Supp.2d 526 (N.D. Tex. 2014).

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The second relevant case is *AmEx*, which has given some guidance on the antitrust evaluation on anti-steering provisions in the credit card industry.[40] It is worth noting that in the EU the very same clauses are prohibited by Regulation.[41] The U.S. case stems from the particular business model adopted by American Express ("AmEx") which earns most of its revenue from merchant fees that are higher than those applied by Visa and MasterCard (holding higher market share than AmEx), which earn half of their revenue by collecting interest from their cardholders. Amex's business model thus focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending AmEx provides better rewards than other networks, and thereby attracts wealthier (marquee) cardholders, who are also very valuable to merchants. The anti-steering provision at issue prohibits merchants from discouraging customers from using their AmEx card, thereby avoiding AmEx's fee.

After describing credit-card networks as "transaction" platforms,[42] which require that both sides of the platform should be taken into account for the relevant market definition and for the netting of competitive effects, the Supreme Court has declined to consider AmEx's anti-steering provisions as anticompetitive. Indeed, according to the majority of the Court, these provisions stem from negative externalities in the credit-card market, preventing free-riding on AmEx's investments in rewards for cardholders, and promote inter-brand competition, being essential to AmEx's business model which has fostered innovation, improved the quality of the services offered to consumers, and increased the volume of output (i.e. transactions).

VI. CONCLUDING REMARKS

The absence of substantial intervention on platform MFNs in the U.S. has led some scholars to call for antitrust enforcement targeting these clauses in the wake of the approach taken by the EU in digital markets. According to this view, the ability of platform MFNs to make online commerce more concentrated, would require a change in U.S. policy.[43]

In truth, in the EU the antitrust treatment of platform MFN clauses is still a thorny issue. Indeed, on the one side, at national level, some Member States - despite the decisions taken by NCAs mentioned above - have adopted national legislation banning all types of platform MFNs in the online hotel booking sector. On the other side, at EU level, in the 2017 Sector Inquiry on E-Commerce, the European Commission has in the first instance acknowledged both anticompetitive effects and efficiencies linked to parity clauses used by marketplaces and PCWs, arguing that they should be assessed on a case-by-case basis.[44]

More recently, Crémer, de Montjoye & Schweitzer in the Report released for the European Commission on competition policy in digital markets have taken a stance on the issue, arguing that general rules cannot yet be developed and that a case-by-case approach is necessary. However, they claim that any practice aimed at protecting the investment of a dominant platform should be minimal and well-targeted: this would imply that banning only the wide MFN would be sufficient in cases where competition between platforms is vigorous; on the other hand, when competition between platforms is weak, then pressure on the dominant platforms can only come from other sales channels and it would also be appropriate to prevent narrow MFNs.[45]

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40 *Ohio et al. v. American Express Co. et al.*, 585 U. S. ____ (2018). Previously, the District Court for the Eastern District of New York in 2015 found that AmEx violated the Section 1 of the Sherman Act. Then the Court of Appeals annulled such ruling, holding that the District Court failed to properly define the relevant market by not taking into account the multi-sided nature of the credit card market. This case is particularly relevant - and controversial - for the issue of the market definition in two-sided markets.

41 Regulation (EU) 2015/751 of the European Parliament and of the Council on interchange fees for card-based payment transactions, (2015) OJ L123/1. Article 11 provides for a general prohibition of NDRs, stating that any rules imposed by a payment card scheme preventing merchants from steering shoppers to use different payment instruments or informing them about interbank fees charged is forbidden. As noted by Borgogno & Colangelo, *Antitrust Analysis of Two-sided Platforms after AmEx: A Transatlantic View*, 15 Eur. Competition J. 107 (2019), this could raise some doubts in the consideration of the alleged indispensability of NDPs in the case at issue, as one would expect that, for a clause to be considered as essential for the viability of the business, it would have to be as necessary for the platform in the U.S. as it would be in the EU.

42 Filistrucchi, Geradin, Van Damme & Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, 10(2) J. Competition L. & Econ 293 (2014).

43 Baker & Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 Yale L. J. 2176, 2194 (2018).

44 European Commission, *supra* note 36.

45 Crémer, de Montjoye & Schweitzer, *Competition Policy for the Digital Era,* at 56-57 (2019), http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf. As an example of weak competition between platforms, experts argue that in the case of hotel booking platforms direct sales by hotels on their own websites may exercise pressure on dominant platforms. *Id.* at 5-6.

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Finally, the new Regulation on platform-to-business relationships imposing transparency measures requires online intermediaries to disclose the economic, commercial, or legal grounds for MFNs in their terms and conditions, thus implicitly accepting the use of such clauses.[46]

A clear indication on the approach guiding the enforcement on the clauses at issue should come from the Commission in the revision process of VBER and related Guidelines. This would also constitute an opportunity to address the critics on the current enforcement record on vertical restraints and on the lack of a proper consideration of the efficiency justifications for such contractual restrictions in multi-sided environments.[47]

46 *Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services*, OJ L 186/57, 11.7.2019, Art 10.

47 Caffarra & Kühn, *The competition analysis of vertical restraints in multi-sided markets*, in OECD, *supra* note 26, at 213, 219.

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