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Antitrust enforcement of platform MFNs

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What is a platform MFN?

- Fix ideas: will use hotel and travel platform example throughout talk, but there are other examples of course
- Travel platform's contract with hotel says:
 - Hotel chooses price of room on platform
 - Platform takes a percentage commission at sale (e.g. 30%)
 - Platform MFN requires hotel **not** to set a lower price on
 - Hotel's own website or
 - *Any other* travel platform
 - If it does, the covered platform is entitled to that lower price also
- New setting for enforcers: digital platforms

Competitive concern

- Exclusionary impact: competing platform that is more efficient and wants to charge lower commission (e.g. 15%) cannot reflect lower commission in lower hotel prices. Without lower prices, can't attract travelers => less entry harms consumers
- Collusive impact: existing platforms cannot undercut each other. Price competition softened => higher prices harm consumers

The MFN is both a vertical contract between hotel and platform, and also *limits competition between horizontal competitors*, namely competing travel platforms

Potential Efficiency

- Assume no MFN
- Travel platform invests in functionality of site and advertising to bring travelers to the site. Travelers use the functions of the site to find a desirable hotel.
 - Hotel has button “click here to save by buying direct”. Consumer goes to hotel’s site to buy
 - Or, traveler buys on rival platform with poor functionality that offers room at a lower price
- “Free-riding” on platform investments cause platform business to be unsustainable
- Lack of platforms harms consumers; MFN can fix

Rule of reason and evidence

- Clearly platform MFNs are not simple; theory shows countervailing effects
- Enforcer / court need to weigh harms and benefits before bringing case / determining liability
- The Europeans have been enforcing these contracts for 5 years
- Empirical evidence from Europe thus far:
 - Prices fall with all types of MFN bans
 - Room availability unaffected; platforms launch new tools for hotels and consumers, suggestive of quality competition

US agency cases

- Non-platform, older (network formation)
 - Delta Dental
 - BCBS of Michigan
 - Entry of lower cost insurer blocked/harmed in both cases
- Recent platform cases
 - Apple eBooks
 - Prices of ebooks rose when MFN implemented
 - Complication of 5 publishers coordinating
 - Decision highlights core competitive problem of Apple using the MFN to soften price competition from Amazon
 - American Express
 - NDR similar to an MFN
 - DOJ argues NDR softens price competition between platforms

Narrow v Wide MFN

- A “narrow” MFN is the contract barring the hotel or vendor itself from setting a lower price on its own site
- A “wide” MFN is the contract barring the hotel or vendor from setting a lower price on a competing platform

European enforcement

- Amazon: after a few months of first UK then German investigation voluntarily withdrew MFN provision of contracts with Amazon sellers
- Hotel sites (HRS, booking.com, Expedia)
 - UK initiated, combine with RPM, not successful
 - Germany next. Banned wide MFNs
 - Sweden, France, Italy ban wide MFNs only
 - Germany banned narrow MFNs 2015
 - Legislatures in Italy, France, Austria ban all MFNs!
 - (Empirical work again finds prices fall but no other changes)
- UK motor insurance platform

Proposed US Agency Enforcement

- Having weighed the harms and efficiencies and concluded the contract terms are on net anticompetitive:
- Sherman Act s1: MFN contract between hotel and platform restrains trade
 - Causes higher prices and/or limits entry; also coordinated effects
 - Agreement requirement satisfied by the MFN in the vertical contract
- Sherman Act s2: MFN contract required by platform with significant share restricts entry and/or expansion of rivals
 - Share of online travel bookings (not brick and mortar)
 - Platform must have significant share for liability, but also without significant share its MFN is not costly to the hotel so cannot have an impact
 - Exclusionary conduct inferred from the terms of the vertical contract requiring price parity between entrant and incumbent

Possible remedies

- Ban all MFNs
- Allow narrow MFN only
- Less anticompetitive alternatives include payment structure, e.g.
- Platform fee in absolute terms separated from price of product would allow platforms to compete on price

Conclusion

- Platforms are a growing share of GDP
- Significant welfare is at stake if competition continues to fail to be protected in this sector
 - Higher prices
 - Less competition among platforms
 - Less innovative entry
- We have theoretical and empirical evidence of anticompetitive effects of some platform MFNs
- Conduct is reachable under current US law