

# Competitor Parity Clauses: Increased Scrutiny of MFNs in the United States and Europe

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Recent cases in the United States and Europe suggest that the traditional safe harbors for most favored nation clauses (MFNs) may no longer immunize them from antitrust challenges, at least in certain industries. MFNs and parity provisions typically require sellers to give buyers the lowest price (or best terms) offered to any rival purchaser. In this article, we analyze recent challenges to the use of MFNs by online platforms on both sides of the Atlantic—notably, (1) the cases pursued by national competition authorities and the European Commission against online travel agencies (OTAs) and Amazon, and (2) the U.S. Department of Justice's successful challenge to American Express's use of non-price vertical restrictions (in the form of "non-discrimination" provisions) in the Eastern District of New York. In these jurisdictions, regulators have challenged parity clauses even where their beneficiaries were not dominant in the traditional sense and where harm to end consumers was not a primary concern:

- In the *American Express* case, Amex was found to have market power notwithstanding that its market share was below 30 percent (at 26.4 percent), and second to the market leader. Furthermore, the court was clear that Amex's non-discrimination provisions (NDPs) would have been unlawful even absent evidence of harm to end consumers. As Judge Nicholas Garaufis stated, "Proof of anticompetitive harm to merchants, the primary consumers of American Express's network services, is sufficient to discharge Plaintiffs' burden in this case."<sup>1</sup>
- Similarly, in its decision against Hotel Reservation Service (HRS), the German Federal Cartel Office (FCO) found HRS's use of pricing parity provisions unlawful despite HRS's relatively modest market share (just over 30 percent), which had been shrinking and was well below market leader Booking.com (at 40–50 percent). The FCO's primary concern was potential harm to small and medium-sized hotels, rather than the impact of HRS's pricing parity provision on the prices paid by ultimate consumers.<sup>2</sup>

These cases suggest that MFNs and parity provisions are vulnerable to challenge even where they would pass muster under traditional screens, such as modest market shares and lack of harm to end consumers. As a result, antitrust counselors need to use a more sophisticated assessment to fully capture the regulatory risks associated with these provisions and should consider other "aggravating factors" that could trigger antitrust scrutiny.

## The European Landscape

Many European regulators are actively investigating parity clauses based on concerns that they infringe Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and

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<sup>1</sup> United States v. Am. Express Co., 88 F. Supp. 3d 143, 208 (E.D.N.Y. 2015).

<sup>2</sup> See generally Bundeskartellamt [German Federal Cartel Office], Dec. 20, 2013, B 9-66/10, [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf?\\_blob=publicationFile&v=3](http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf?_blob=publicationFile&v=3).

national competition laws.<sup>3</sup> Regulators are particularly concerned with the use of such clauses in e-commerce, which is the subject of a broad and ongoing sector inquiry by the European Commission.<sup>4</sup> While the transparency of the Internet is often helpful to consumers and can facilitate entry and innovation, it can also facilitate coordination among competitors. Because the European Union seeks to “set objectives that match the growth potential of online commerce and services,”<sup>5</sup> its regulators are keen to limit restrictions on potentially innovative entrants, who must compete with established market participants.

### Online Travel Agencies and Hotel Rooms

Since 2012, many European authorities—including the UK, Germany, Austria, Belgium, Denmark, Switzerland, France, Sweden, Italy, Ireland, the Czech Republic, and Hungary—have launched investigations concerning parity provisions in contracts between OTAs and hotels. OTAs, such as Expedia, enable customers to search for and reserve hotel rooms, flights, and other travel-related services through their online platforms. A common model for their agreements with hotels gives the hotel responsibility for setting and listing room prices on OTA platforms, and the OTAs collect commissions upon booking. The parity provisions at issue require that hotel room prices offered through the OTA are the same (or better) than prices offered through the hotel’s other sales channels, including competing OTAs and the hotel’s own website. Typically, this parity requirement also covers other conditions, such as cancellation terms or inclusion of breakfast in the room price. Expedia, Booking.com, and HRS, three of the largest OTAs for hotels in Europe, have all come under scrutiny for requiring such provisions.

European regulators have been concerned that these parity provisions have an adverse impact on competition among OTAs.<sup>6</sup> Because each of the major OTAs requires parity, in practice, the provisions guarantee that the price of a particular hotel room is the same across all online platforms. Knowing that room rates will remain in line with their competitors, regulators believe that OTAs have little (if any) incentive to compete against one another on commission rates charged to hotels. That is, OTAs could raise commission rates to hotels without losing business to one another because the room rate would remain unchanged (at the expense of the hotel’s margins). Alternatively, if the hotel did increase room rates, this increase would apply to their competitors as well. According to national competition authorities, this arrangement eliminates price competition between OTAs and “risks leading to higher commission rates, which in turn risks leading to higher hotel room prices.”<sup>7</sup>

European regulators also have expressed concern that pricing parity reinforces the position of incumbents at the expense of new entrants because pricing parity impedes their ability to increase share by discounting commissions or room rates. As a result, these provisions arguably preserve

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<sup>3</sup> See Consolidated Version of the Treaty on the Functioning of the European Union arts. 101, 102, Sept. 5, 2008, 2008 O.J. (C 115) 47 (effective Dec. 1, 2009).

<sup>4</sup> See European Commission Press Release IP/15/4921, Antitrust: Commission Launches E-Commerce Sector Inquiry (May 6, 2015), [http://europa.eu/rapid/press-release\\_IP-15-4921\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4921_en.htm).

<sup>5</sup> Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, A Coherent Framework for Building Trust in the Digital Single Market for E-commerce and Online Services 2, COM (2011) 942 final (Nov. 1, 2012).

<sup>6</sup> See, e.g., Konkurrensverket [Swedish Competition Authority], 2015 case no. 596/2013, [http://www.konkurrensverket.se/globalassets/english/news/13\\_596\\_bookingdotcom\\_eng.pdf](http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_eng.pdf).

<sup>7</sup> *Id.* ¶ 21.

the concentrated structure of the OTA market, and impede entry from innovative new players. OTA pricing parity thus is at odds with the European Union's desire to facilitate growth and innovation in e-commerce.

### “Broad” vs. “Narrow” Parity Clauses

Many of the European regulators have distinguished between broad and narrow parity clauses in OTA agreements. Broad parity clauses apply to all Internet listings, including those from competing OTAs. Narrow clauses refer to those between OTAs and hotels' direct online channels. Most European regulators have concluded that narrow parity clauses are not per se anticompetitive. Because OTAs earn commissions only when consumers book rooms through their platforms, regulators recognize that allowing hotels to set lower prices through their own online channels creates a free-rider problem. OTAs receive nothing for their search and comparison services if consumers ultimately book rooms through the hotels' direct channels. Germany's competition regulator and France's legislature, however, have taken issue with all MFN clauses, even those requiring parity with respect to hotels' direct online channels, such as booking via the hotel's website.

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To settle investigations with Swedish, French, and Italian regulators, Booking.com agreed to remove broad parity clauses from its hotel agreements on April 21, 2015.<sup>8</sup> Months later, on July 1, Booking.com made this change throughout Europe. Effective August 1, 2015, Expedia followed Booking.com's lead, and similarly amended its parity provisions across Europe.<sup>9</sup> Hotels contracting with Expedia and Booking.com may now offer lower room prices via competing OTA sites.

With the exception of France and Germany, these amendments appear to have satisfied European regulators.<sup>10</sup> In December 2013, Germany ordered HRS to remove all MFN clauses (even with respect to hotels' direct online channels) from their hotel contracts. Despite the contrary conclusions of other European Union members regarding hotel pricing parity, the German FCO has not modified its position. More recently, in spite of its settlement with Booking.com earlier this year, France passed a law prohibiting price parity clauses in hotel contracts, effective August 6, 2015. Like Germany, the ban applies to both broad and narrow parity. Last September, a group of OTAs, including Expedia, filed complaints with the European Commission, challenging the validity of the French law.<sup>11</sup> As a result, market participants operating on a multinational basis must either adopt a country-by-country approach for their contracts or follow the strictest approach in all jurisdictions. In the absence of intervention by the European Commission, this scenario is unlikely to change in the near future.

Two important themes emerge from the European investigations. First, regulators may scrutinize parity provisions even where benefiting parties lack market power. For example, although the

<sup>8</sup> See Sam Schechner, *Booking.com Settles Antitrust Complaints*, WALL ST. J., Apr. 21, 2015, <http://www.wsj.com/articles/booking-com-settles-antitrust-complaints-1429623279>.

<sup>9</sup> See Press Release, Expedia, *Expedia Amends Rate, Conditions and Availability Parity Clauses* (July 1, 2015), <http://expediaincorporated.mediaroom.com/2015-07-01-Expedia-Amends-Rate-Conditions-and-Availability-Parity-Clauses>.

<sup>10</sup> Following the removal of broad parity clauses from Expedia and Booking.com's hotel agreements, many national authorities closed their investigations. However, investigations in Austria, Belgium, the Czech Republic, Hungary, and Turkey are still pending.

<sup>11</sup> See Press Release, European Tech. & Travel Servs. Ass'n, *European Travel Distributors File Complaints with the European Commission to Review Incompatibility of Loi "Macron" with EU Law* (Sept. 14, 2015), [http://www.etsa.eu/uploads/Modules/Mediaroom/2015\\_09\\_12\\_loi-macron.pdf](http://www.etsa.eu/uploads/Modules/Mediaroom/2015_09_12_loi-macron.pdf). Italy may soon follow in France's footsteps. On October 7, 2015, Italy amended a competition bill to ban broad parity clauses. The Italian Senate has not yet considered this bill, which would call into question the Italian government's previous settlement with Booking.com. See Matthew Newman, *Booking.com Settlement May Be Further Undermined by Italian Bill*, MLEX, Oct. 21, 2015.

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Swedish Competition Authority states that Booking.com is “the largest online travel agency . . . in Sweden,”<sup>12</sup> whose market share “exceeds 30 percent by an appreciable margin,”<sup>13</sup> its decision does not analyze whether Booking.com possesses market power over hotels (or consumers). It does not address why hotels could not push back on higher OTA commission rates. Although the German FCO’s HRS decision touched on this concept, finding that small and medium-sized hotels relied on OTAs, HRS was not even the market leader at the time of the decision. In fact, HRS’s market share had been shrinking significantly and, in 2012, HRS maintained a market share only slightly above 30 percent (nearly qualifying for the European Union’s block exemption concerning vertical agreements), well below the market leader Booking.com’s share in the 40–50 percent range.<sup>14</sup> However, due to the high level of concentration in the OTA market and the need for hotels to market themselves on several OTA portals, the German FCO concluded that HRS had “leverage” over small and medium-sized hotels.<sup>15</sup>

Second, the regulators do not require proof of harm to ultimate consumers. The Swedish decision simply reasoned that OTAs had incentives to increase commission rates and hypothesized that such increases would lead to higher consumer prices: “This risks leading to higher commission rates, which in turn risks leading to higher hotel room prices.”<sup>16</sup> Similarly, the FCO referred not to consumer harm, but harm to small and medium-sized hotel partners, which are dependent on HRS to increase their online visibility.<sup>17</sup> Recognizing harm to wholesale-level customers is not new by any means. But the backseat role of consumer harm in these decisions is curious, especially given the consumer-focused nature of the hospitality industry.

To date, the U.S. agencies have not announced any investigation of vertical agreements between OTAs and hotels. Last year, Judge Jane J. Boyle of the Northern District of Texas dismissed a consolidated class action against OTAs and hotel brands. Citing to the European investigations, the class alleged that OTAs and hotel brands were engaged in an “industry-wide conspiracy” to eliminate price competition in the online hotel bookings market.<sup>18</sup> The court found that the vertical agreements “made perfect economic sense” because hotels have “the right to control online pricing for their rooms” and OTAs needed assurances that their competitors would be similarly prohibited from discounting room prices.<sup>19</sup> Thus, the defendants’ actions were consistent with each party’s independent rational business interests.

### Amazon’s Use of Parity Clauses

The EU Member States’ suspicion of parity clauses in e-commerce agreements is not limited to OTAs, as they have kept close watch over Amazon in recent years. In June 2015, the European Commission opened a formal investigation into MFN clauses in Amazon’s e-book publisher con-

<sup>12</sup> Konkurrensverket [Swedish Competition Authority], 2015 case no. 596/2013, ¶ 12.

<sup>13</sup> *Id.* ¶ 18. The 30% figure is significant because competition authorities in the EU apply a block exemption concerning vertical agreements for a firm with a sub-30% market share in the relevant market.

<sup>14</sup> See Bundeskartellamt [German Federal Cartel Office] Dec. 20, 2013, B 9-66/10, ¶ 192 tbl.2, ¶ 193 tbl.3.

<sup>15</sup> See *id.* ¶¶ 236–237.

<sup>16</sup> Konkurrensverket [Swedish Competition Authority], 2015 case no. 596/2013, ¶ 21.

<sup>17</sup> See Bundeskartellamt [German Federal Cartel Office] Dec. 20, 2013, B 9-66/10, ¶ 237.

<sup>18</sup> See *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526, 529 (N.D. Tex. 2014).

<sup>19</sup> *Id.* at 537–38.

tracts.<sup>20</sup> Under these agreements, Amazon, the largest e-book distributor in Europe, has the right to the best terms (price and non-price) offered to other online retailers. According to the Commission, such conduct may constitute an abuse of a dominant market position, as the clauses “may limit competition between different e-book distributors and may reduce choice for consumers.”<sup>21</sup>

In October 2012, the UK’s Office of Fair Trading (now known as the Competition & Markets Authority) opened an investigation into pricing parity provisions between Amazon and its Marketplace sellers. Germany opened a similar investigation in February 2013, followed by an in-depth market analysis with questionnaires to 3000 retailers. “Marketplace” is Amazon’s online platform where third-party sellers can offer new (and used) goods alongside Amazon’s regular offerings. Under the parity clauses at issue, Marketplace sellers were prohibited from selling products at lower prices via other platforms, including their own. Competition regulators were concerned that these clauses might curb entry of potential entrants and affect sellers’ pricing levels, resulting in higher consumer prices. On August 29, 2013, after an in-depth investigation by the FCO, Amazon eliminated these price parity provisions throughout Europe.

Without any formal decisions, it is difficult to assess the role of market power and consumer harm in the Amazon investigations. However, as in the OTA cases, there is little doubt that Amazon’s ubiquitous internet presence was (and is) valued greatly by smaller third-party sellers who rely on the Marketplace for online selling opportunities.

### Heightened Scrutiny of Parity Provisions in the United States

Historically, U.S. courts have regarded MFNs as competitively benign or even procompetitive. For example, in *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, the Seventh Circuit found that MFNs are “standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers.”<sup>22</sup> In *Ocean State v. Blue Cross & Blue Shield of Rhode Island*, the First Circuit similarly held that “a policy of insisting on a supplier’s lowest price—assuming that the price is not ‘predatory’ or below the supplier’s incremental cost—tends to further competition on the merits and, as a matter of law, is not exclusionary.”<sup>23</sup> MFN clauses also may create efficiencies between parties, such as minimizing the bargaining costs associated with ongoing price negotiations. In recent years, however, recognizing that parity requirements may hinder the entry and expansion of competitors, the U.S. antitrust agencies have investigated and sometimes challenged such clauses where they are perceived to facilitate exclusionary or collusive conduct.

### Exclusionary Conduct

MFNs used by dominant firms (i.e., firms possessing monopoly or market power) to exclude or disadvantage competitors are more likely to be targets of antitrust scrutiny. In 2010, the U.S. Department of Justice filed suit against Blue Cross Blue Shield of Michigan (BCBSM), alleging that the MFNs in its contracts with hospitals reduced competition in the sale of health insurance.<sup>24</sup> At the

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<sup>20</sup> See European Commission Press Release IP/15/5166, Antitrust: Commission Opens Formal Investigation into Amazon’s E-Book Distribution Agreements (June 11, 2015), [http://europa.eu/rapid/press-release\\_IP-15-5166\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5166_en.htm).

<sup>21</sup> *Id.*

<sup>22</sup> *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995).

<sup>23</sup> *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110 (1st Cir. 1989).

<sup>24</sup> See Complaint, *United States v. Blue Cross Blue Shield of Mich.*, Civil Action No. 2:10-cv-14155-DPH-MKM (E.D. Mich. Oct. 18, 2010).

time, BCBSM's commercial health insurance policies covered more than 60 percent of Michigan's commercially insured population. The DOJ claimed that BCBSM possessed market power in the sale of commercial health insurance in each of the alleged relevant geographic markets due to BCBSM's high market shares, increased prices to consumers, restricted output, barriers to entry, and exclusion of competitors.<sup>25</sup>

The DOJ's concerns were heightened by the fact that BCBSM's contracts contained "MFN-plus" clauses, requiring hospitals to offer *higher* prices to BCBSM's competitors. According to the DOJ, "These hospitals [were] among the most important providers of hospital services in their respective areas."<sup>26</sup> For example, BCBSM insisted on an MFN-plus clause in its contract with Marquette General, the only tertiary care hospital in Michigan's Upper Peninsula.<sup>27</sup> Such a hospital is a "must-have" for commercial health insurers, which "must provide its subscribers with reasonable access to tertiary hospital care to be able to market a health insurance product."<sup>28</sup> In turn, BCBSM is a "must-have" for such a hospital, as "Blue Cross patients are a significant portion of these hospitals' business, and Blue Cross patients typically are more profitable than Medicare and Medicaid patients."<sup>29</sup> The DOJ argued that these MFNs caused hospitals to substantially raise prices for their services to BCBSM's competitors, limiting entry and expansion in commercial health insurance markets. In 2013, because Michigan passed a law prohibiting health insurers from including MFNs in contracts with health care providers, the DOJ and BCBSM voluntarily dismissed the case.<sup>30</sup>

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### Collusive Conduct

Competing firms also have used MFNs to facilitate or maintain agreements on price or other competitive terms. In *United States v. Apple*, Apple entered into e-book agency sales agreements with five of the "Big Six" publishers.<sup>31</sup> The agreements contained MFNs requiring "each publisher to guarantee that it would lower the retail price of each e-book in Apple's iBookstore to match the lowest price offered by any other retailer."<sup>32</sup> The court found that the publishers understood that the MFNs obliged them to impose agency agreements with other e-book retailers, created a price floor, and enabled them to increase retail prices. Finding that the e-book prices to consumers had increased as a result, Judge Denise Cote ruled against Apple.

The Second Circuit agreed that Apple violated Section 1 of the Sherman Act, explaining that, although MFNs are "surely proper in many contexts,"<sup>33</sup> here the "MFN's capacity for forcing collective action by the publishers was precisely what enabled [Steve] Jobs to predict with confidence that 'the price will be the same' on the iBookstore and the Kindle . . . ."<sup>34</sup>

<sup>25</sup> See *id.* ¶¶ 33–35.

<sup>26</sup> *Id.* ¶ 39.

<sup>27</sup> See *id.* ¶¶ 49–51.

<sup>28</sup> *Id.* ¶¶ 51–52.

<sup>29</sup> *Id.* ¶ 45.

<sup>30</sup> See Stip. Mot. to Dismiss, *United States v. Blue Cross Blue Shield of Mich.*, Civil Action No. 2:10-cv-14155-DPH-MKM (E.D. Mich. Mar. 25, 2013), ECF No. 246.

<sup>31</sup> *United States v. Apple, Inc.*, 791 F.3d 290, 308 (2d Cir. 2015).

<sup>32</sup> Complaint ¶ 65, *United States v. Apple, Inc.*, Case 1:12-cv-02826 (S.D.N.Y. Apr. 11, 2012).

<sup>33</sup> *Apple*, 791 F.3d at 320.

<sup>34</sup> *Id.* at 317 (citation omitted).

## American Express's Non-Discrimination Restrictions

The DOJ's challenge to Amex's non-discrimination provisions (NDPs) demonstrates that even non-price vertical restraints imposed by non-dominant firms can cause anticompetitive harm actionable under the Sherman Act. This past year, Judge Garaufis of the Eastern District of New York found that American Express's use of NDPs in its merchant agreements adversely affected competition in a network services market in which Amex and other card networks compete to provide acceptance services to merchants.<sup>35</sup> Specifically, he ruled that Amex's NDPs prevented merchants from steering customers to other network's cards, "block[ing] Amex-accepting merchants from encouraging their customers to use any credit or charge card other than an American Express card, even where that card is less expensive for the merchant to accept."<sup>36</sup>

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Unlike the MFN clauses in OTA agreements, Amex's NDPs did not explicitly address pricing. But because the NDPs prevented merchants from promoting cards with more favorable discount rates, they similarly "disrupt[] the price-setting mechanism ordinarily present in competitive markets" by "reduc[ing] American Express's incentive . . . to offer merchants lower discount rates."<sup>37</sup> As a result, the court found that the NDPs thwarted horizontal competition in the network services market, much like the effect of MFNs in the market for OTA services. In each case, the provisions effectively insulated their beneficiaries from price competition.

The court found also that Discover Card's failed attempt to expand market share by offering lower merchant discount rates highlighted how Amex's NDPs impeded competition.<sup>38</sup> This is precisely the scenario European regulators sought to avoid in the OTA market. Because the entrenched OTAs relied on MFNs to guarantee they would receive the best hotel room prices and terms, new entrants hoping to gain traction with consumers and hotels were unlikely to extract more favorable deals with hotels by lowering commission rates.

Because the government plaintiffs presented direct evidence of adverse effects to competition in the relevant market, a finding of market power was not necessary.<sup>39</sup> Judge Garaufis nonetheless concluded that American Express had sufficient market power for its NDPs to have anticompetitive effects, despite having a market share below 30 percent; American Express held a 26.4 percent share, which was well below the market leader. Recognizing that American Express's sub-30 percent "market share alone likely would not suffice to prove market power by a preponderance of the evidence,"<sup>40</sup> the court emphasized the concentrated nature of the relevant market, high entry barriers, and strong American Express "cardholder insistence."<sup>41</sup>

More than any other factor, cardholder insistence explains why merchants were beholden to American Express: "[T]he prospect of losing insistent charge volume by terminating acceptance[] constrains merchants' ability to resist anticompetitive behavior by American Express."<sup>42</sup>

<sup>35</sup> See *American Express*, 88 F. Supp. 3d at 151–52.

<sup>36</sup> *Id.* at 165.

<sup>37</sup> *Id.* at 207.

<sup>38</sup> See *id.* at 213–16; see also *id.* at 213 ("[T]he failure of Discover's low-cost provider strategy in the 1990s provides direct evidence of how anti-steering rules like Defendants' NDPs impede modes of completion . . .").

<sup>39</sup> See *id.* at 169 (stating that "proof of actual adverse effects on competition is compelling evidence that the defendant firm does, in fact, possess sufficient power to profitably restrain competition in the relevant market").

<sup>40</sup> *Id.* at 191.

<sup>41</sup> See *id.* at 188.

<sup>42</sup> *Id.* at 194.

A segment of Amex's cardholder base "insist[s] on paying with their Amex cards and [] would shop elsewhere or spend less if unable to use their cards of choice."<sup>43</sup> It was thus economically rational for merchants to accept American Express's repeated price increases because the incremental cost was far lower than losing the business of numerous Amex cardholders altogether. Indeed, American Express performed insistence-based calculations to develop its pricing strategy and relied on this data in negotiations with merchants. For example, American Express instructed airline merchants that highly insistent cardholders were "responsible for hundreds of millions in charge volume that would be put 'at risk' by not accepting the price increase."<sup>44</sup>

The court's diminished emphasis on Amex's modest market share (versus the court's thorough examination of cardholder insistence) is consistent with a full rule of reason analysis, which requires the fact finder to "weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."<sup>45</sup> This is in line with the European OTA investigations—the FCO was not dissuaded by HRS's modest market share or position.<sup>46</sup> The FCO referred to harm to small and medium-sized hotels that relied on OTAs for market exposure: "Small and medium-sized hotels are particularly dependent on marketing their rooms via hotel portals since they are less well known to hotel customers than the large hotels and they cannot reach a good ranking on the search engines when competing with the hotel portals and the large hotels."<sup>47</sup> HRS possessed leverage over such hotels, which chose to accept increases in commission rates rather than withdrawing their listings from HRS's website. The fact that HRS was "not the largest and not the only enterprise on the relevant market"<sup>48</sup> was not dispositive because hotels need to list on several portals in order to successfully market themselves.<sup>49</sup> Similarly, it is to a merchant's advantage to accept payment via multiple card networks. That these competing products are of a complementary nature serves to enhance the market power each competitor exercises at the wholesale level.

Another common theme underlying the *American Express* case and the European OTA investigations is that harm to ultimate consumers was not a primary concern: "Proof of anticompetitive harm to merchants, the primary consumers of American Express's network services, is sufficient to discharge Plaintiffs' burden in this case."<sup>50</sup> While the Swedish Competition Authority considered consumer pricing, its conclusion that the OTAs' parity clauses "risked" leading to higher hotel room rates was purely theoretical. Similarly, the FCO did not evaluate whether hotel room prices had in fact increased. It limited its analysis to increased commission rates, just as Judge Garaufis relied principally on increases in merchant discount rates.

Lastly, *American Express* illustrates how parity provisions can reinforce existing information asymmetries in a two-sided market. Amex's NDPs prohibited merchants from communicating merchant discount rates to cardholders. Because "Amex's rules ensure that the set of customers

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<sup>43</sup> *Id.* at 191.

<sup>44</sup> *Id.* at 193.

<sup>45</sup> *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

<sup>46</sup> It is unclear how American Express would fare in Europe, where there is a block exemption for parties to vertical agreements holding a market share not exceeding 30 percent. As there is no such safe harbor here, U.S. rule of reason analysis appears more flexible than Europe's framework.

<sup>47</sup> Bundeskartellamt [German Federal Cartel Office] Dec. 20, 2013, B 9-66/10, ¶ 237.

<sup>48</sup> *Id.* ¶ 238.

<sup>49</sup> *See id.*

<sup>50</sup> *American Express*, 88 F. Supp. 3d at 208.



responsible for driving demand for network services (cardholders) cannot be influenced in their payment choice by the set of customers on the other side of the platform . . . (merchants),” consumers cannot internalize the full cost of their purchasing decisions.<sup>51</sup> The result is a disruption of the price-setting mechanism in the market for card network services. The presence of MFNs in OTA agreements, another example of a two-sided platform, similarly drive a wedge between consumer demand for online booking and the hotels who are responsible for paying commission rates to the OTAs.

## Conclusion

After *American Express* and the European Union’s OTA cases, there is a heightened risk that MFNs or other parity provisions may be challenged. When evaluating parity provisions, practitioners should look beyond traditional considerations of market power and overtly collusive behavior. Other considerations include the nature of the industry, especially the presence of two-sided networks. Companies with access to an established network of consumers have the ability both to leverage pricing power at the wholesale level and limit the flow of information between customers on opposite sides of the market. Such power enables commercial health insurers to impose price increases on hospitals, credit and charge card companies to increase merchant discount rates, and online travel agencies to increase hotel commission rates. Full rule of reason analysis gives U.S. courts the flexibility to find market power, even if market shares are modest.

To assess the regulatory risks associated with MFN clauses or other parity provisions in the United States and Europe, antitrust counselors should consider a range of factors in addition to traditional screens of market power. Based on recent cases, the following “aggravating factors” may increase the risk of antitrust scrutiny:

- **Market structure:** How concentrated is the market? In its case against HRS, the FCO repeatedly emphasized that HRS, Expedia, and Booking.com composed roughly 90 percent of the OTA market in Germany. Moreover, in both the OTA and card network services markets, it is in the best interest of hotels and merchants to partner with *multiple* OTAs and card networks, respectively.
- **Nature of the product or service:** Recognizing the increasing importance of the Internet and e-commerce to innovation and economic growth, regulators have targeted the use of MFNs by online platforms, especially where they have significant network effects. The use of MFNs by online platforms in this transparent environment can discourage innovation and new entry that otherwise would occur.
- **Reach of the provision:** How strict is the parity provision? Be wary of MFN-plus, retroactive clauses, or other elements of an MFN that give the beneficiary a significant advantage over (not just parity with) competitors.
- **Asymmetric information:** Do the provisions prevent customers on one side of a two-sided market from internalizing the full cost of their decisions? The asymmetry of information reinforced by the NDPs as well as cardholders’ loyalty in *American Express* left merchants with an “all-or-nothing” decision to accept modest price increases or risk losing significant business because they could no longer accept Amex cards.
- **Consumer pricing:** At what level does the parity apply—end consumer or wholesale business? Although harm to consumers has not been a focus of recent MFN cases, as we observed in the OTA cases and *United States v. Apple*, MFNs that set or determine consumer pricing levels are more likely to be challenged. ●

*When evaluating parity provisions, practitioners should look beyond traditional considerations of market power and overtly collusive behavior.*

<sup>51</sup> *Id.* at 209.