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Online RPM and MFN under Antitrust Law and Economics

Pinar Akman & D. Daniel Sokol

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Running Head: Challenges of Online RPM

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Authors: Pinar Akman & D. Daniel Sokol
Affiliation:

D. Daniel Sokol: University of Florida Levin College of Law
Address for correspondence: P.O Box 117625, Gainesville, FL 32611;
phone: (352) 273-0968; email: sokold@law.ufl.edu

Pinar Akman: University of Leeds. p.akman@leeds.ac.uk

ABSTRACT

The legal framing of a firm's pricing strategy can determine whether it constitutes online resale price maintenance (RPM) or online most favored nation (MFN). Together, cases that involve online RPM and MFN can be viewed as a natural experiment of how antitrust economics and law may adapt to an online world. Thus far, legal theories that have been inconsistent with economic theories have dictated enforcement across jurisdictions, which has led to confusion that thwarts potentially efficient business practices.

This paper distinguishes issues of online RPM from traditional RPM and online RPM from online MFN. We apply the economics learning to RPM and analyze the antitrust cases of online RPM and MFN to date in the United States, Europe, and Australia. Finally, we offer policy recommendations that reduce the confusion in current legal doctrine.

Keywords: antitrust, competition law, economics, most favored nation, MFN, resale price maintenance, RPM

JEL Classifications: K21, L42, L11

I. Introduction

Resale price maintenance (RPM) has been a part of antitrust law and economics for over a century. The vast majority of papers on RPM have examined traditional bricks-and-mortar RPM; but there is a small but increasing literature on online RPM (Johansen and Vergé 2016; Klein, 2014; Blair and Haynes, 2010). As with so many different types of online related antitrust issues, there is a tension between the adaptation of antitrust policy to some phenomena that are new and the adaptation to some practices in an online world that are merely another variation of "new wine in old wineskins".

Depending on the legal framing, behavior that might in some circumstances resemble online RPM agreements in other circumstances may instead resemble online most favored nation (MFN) agreements. Together, the cases that involve online RPM and MFN may be viewed as a natural experiment of how antitrust economics and law can adapt to an online world. Thus far, enforcement across jurisdictions has been based on economic theories that do not always match up with legal doctrine. Doctrinal confusion can thwart business practices that may be efficient.

This paper makes a number of contributions: We distinguish issues of online RPM from traditional RPM and online RPM from online MFN. Then, we apply the economic learning on RPM and analyze the antitrust cases of online RPM and MFN to date across the United States, Europe, and Australia. The last part of this paper offers policy recommendations that reduce the confusion in current legal doctrine based on effective use of economic analysis.

II. Economic Issues in RPM and MFNs

To better understand the antitrust policy for RPM and MFN contractual clauses in online markets, we first provide an overview of the theoretical and empirical literature for traditional RPM and note where online RPM might be different from traditional RPM.

A. Vertical coordination, inter-brand competition, and foreclosure

RPM may be used by manufacturers to induce their retailers into accepting an attractive profit margin in return for refusing to take on the distribution of competing brands (Elzinga and Mills, 2008). If the retailers in such RPM agreements make up a sufficiently large share of the relevant market, competing brands may find distribution too costly, and new entrants may be deterred -- provided that the manufacturer in question controls a large share of the relevant market. Rey and Vergé (2010) find that when there are interlocking relationships between rival manufacturers that distribute their products via the same competing retailers, RPM dampens competition at both manufacturing and retail levels and leads to industry-wide monopoly pricing. Asker and Bar-Isaac (2014) show that RPM can lead to the exclusion of an upstream efficient entrant because the vertical restraint creates a quasi-rent that the retailers have an incentive to protect by not accommodating a new entrant that requires retailer support to enter where such entry would reduce the industry profits of the vertical chain.

Cooper, Froeb, O'Brien, and Vita (2005) provide a literature review of the empirical RPM works available at the time of publication. These empirical papers generally find that RPM is pro-competitive. More recently, however, Bonnet and Dubois (2010) analyze RPM for French bottled water producers and the use of RPM to deter retailers from promoting their own in-house brand rather than a producer's brand. They find that the elimination of RPM would lead to lower prices.

B. Cartelization

RPM can create anti-competitive effects because of the possibility of collusion (Jullien and Rey, 2007). RPM may facilitate coordination at either (or both) manufacturer and retailer

levels (Telser, 1960; Shaffer, 1991). The use of RPM thereby may enable more uniform downstream prices, which in turn may facilitate upstream tacit collusion.

Jullien and Rey (2007) find that RPM can facilitate collusion by enhancing the transparency of retail prices when imperfect observability of rivals' prices is the primary obstacle to detecting deviations. This insight may not be as applicable in the online context as in the offline context because retail price transparency often is not an issue in Internet-based competition. Foros et al. (2010) show that even when firms individually adopt RPM to dampen competition, market forces may suffice to minimize this effect to the point that RPM becomes harmless. They further demonstrate that although banning the dominant firm from using RPM always increases welfare, restricting the extent of industry-wide adoption of RPM below the level that would otherwise be sustained in the industry may have adverse welfare effects by leading to higher retail prices than would be the case with the use of RPM that would prevail in an unregulated market economy.

C. Efficiency Justifications

The efficiency justifications for RPM come from the product knowledge and service that certain goods may require. The production of this knowledge to provide such services raises the nominal price of these products. Those retailers that lack such services (in-store or online) could charge a lower price and thereby free ride off those retailers that provide such services. If the free riding is not eliminated, there would not be an efficient presale service effort. RPM increases consumer welfare by creating incentives for retailers to invest in presale services (Klein, 2014).

A second efficiency justification for RPM is the creation of reputation effects. RPM allows manufacturers to depend on dealers who sell goods that are high quality. This in turn allows consumers to rely upon the retailers as a source of high quality goods. This reliance is due

to reputation effects, which require an investment on the part of retailers because of "certification services" (Marvel and McCafferty, 1984).

RPM also can create efficiencies through better coordination between manufacturers and retailers to eliminate double marginalization (Spengler, 1950; Buccirossi, 2013). RPM in this setting may be used as a form of vertical integration via contract (Klein and Murphy, 1988). Further, RPM can align incentives where there is a mix of cost and quality issues in the case of differentiated consumers (Winter, 1993). These efficiency justifications play a role in the online RPM cases although the antitrust agencies typically have not dropped investigations without settlement based on efficiency claims in online RPM and MFN cases.

D. Traditional Versus Online RPM

Recent shifts in antitrust policy in the United States and Europe regarding RPM occurred just as Internet markets began to flourish. In the United States a change in analysis by the Supreme Court led to a structural shift from per se illegality under Dr. Miles[1] in 1911 to a rule of reason approach under Leegin[2] in 2007.

The concern articulated in Dr. Miles was that RPM could be used to facilitate a horizontal conspiracy among manufacturers or among distributers. In those situations in which price rises and/or quantity falls, both consumer welfare and social welfare would be reduced. From the standpoint of antitrust policy, such cartels would be undesirable. What emerged over time in the economics and law literatures were the insights that RPM might have some efficiency-enhancing aspect to them (Breit, 1991), which the Supreme Court recognized in Leegin. Thus, a rule of reason inquiry seemed necessary to determine better, based on the particular facts of the case, whether or not RPM was lawful.

[1] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
[2] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

In contrast, European antitrust rules hold that RPM (involving minimum or fixed prices) should be treated as per se illegal under the block exemption.[3] That is, any RPM restriction is presumed to restrict competition and, therefore, cannot benefit from the block exemption. The availability of an individual exemption under Article 101(3) remains, although it is not very likely. In practice, this has the same effect as a per se violation under Sherman Act under current jurisprudence.

Thus, per se treatment is the standard even though the 2010 European Commission Guidelines on Vertical Restraints[4] (unlike prior verticals guidelines) recognize for the first time some form of efficiencies specifically for RPM. Hypothetically, firms could use an efficiency defense, although no case to date has done so at the European or Member State level. Of note for developments both in the United States and Europe is that the 2010 European Commission Guidelines on Vertical Restraints have only three paragraphs (paras. 52-54) that were devoted to Internet sales, while Leegin does not mention the Internet at all.

The economics literature that is specific to online RPM is relatively scarce. Perhaps this is not surprising given the rapid development of online markets and platforms that have transformed retail relationships. For example, because of the data that online retail provides, a customer's retailers can better observe a customer's browsing history and leverage these data for competitive advantage (Mallapragada, Chandukala, & Liu, 2016).

[3] Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty of the Functioning of the European Union to categories of vertical agreements and concerted practices (April 20, 2010), OJ L 102/1 ("verticals block exemption regulation"). In the EU, block exemptions apply Article 101(3) TFEU to categories of agreements which satisfy the criteria of that provision as stipulated in the block exemption. Agreements satisfying the conditions in the block exemption can make use of the exemption in Article 101(3) TFEU saving the parties to the agreement from an individual case-by-case assessment of the compatibility of their agreement with Article 101(3) TFEU.

[4] European Commission, Guidelines on Vertical Restraints, OJ C 130/1, (May 19, 2010), para. 225.

Free riding in online sales is more significant than would be the case in traditional off-line markets (Liu, Yu, and Chen, 2016). The ease of finding information on the Internet has implications for competition in price and quality for products that are sold in online channels. This is not merely a free riding problem as between two online websites. Rather, the Internet exacerbates free riding by online sites where they compete with bricks-and-mortar stores (Wu, Wang and Zhu, 2015). Customers can use the pre-sales services of bricks-and-mortar retailers to then make a purchase on the Internet at a lower price which reflects the absence of such services at online retailers, known also as "showrooming." These more recent papers build on earlier work that identifies free riding in online markets (Carlton and Chevalier, 2003; van Baal and Dach, 2005).

E. Distinguishing Between Online RPM and Online MFN

An MFN clause involves a promise by one party -- for example, a seller -- to treat a buyer as favorably as that seller treats its best customer (Baker, 1996). In the online context, one particularly common type of MFN clause is that which involves a seller guaranteeing to a platform that the price that the seller charges for a particular product on that platform is no higher than the price that the seller charges for the same product on another platform.

Online MFN clauses that are adopted by platforms are unusual MFN clauses in that they link prices for the same customer that purchases from different outlets (Akman, 2016). In the online context, MFNs are used by platforms to ensure that they can offer the best price (and other terms) available to customers purchasing a given product on their platform in comparison to all (or some) other platforms and/or in comparison to the seller's website if one exists. Online MFNs can thus be used by platforms to deal with a negative externality: The price that is paid by a buyer that purchases on the platform from a given seller influences the willingness of other

buyers to make purchases through that platform and more generally affects the attractiveness of that platform (Buccirossi, 2013).

The main difference between a traditional MFN and an online MFN is that while the former is a means for the parties to discipline the price of their own transaction, the latter is a means to discipline the price of a transaction that one of them will conclude with a party outside the agreement (Buccirossi, 2013). This follows because, with traditional MFNs, the prices for different customers that purchase from the same outlet are linked to one another.

Although the essence of traditional and online MFN clauses may be similar in that the seller tries to assure a customer that they will not be put at a competitive disadvantage by a price reduction in subsequent transactions with their rivals, there are significant differences between these clauses. The factual context surrounding the online MFN essentially flips the competitive analysis because the online MFN is not about offering assurances to the customer; it is about providing assurances to the seller or more precisely, to the platform that it will not be undercut. This difference between the traditional and online MFNs results from the fact that in the online context these clauses are adopted by platforms which are intermediaries on two-sided markets. This contrasts with a traditional MFN that a supplier adopts in a sales contract with a given customer. In the online setting, the ultimate beneficiary of the MFN agreement between a platform and a supplier is a third party: the consumer who is not a party to the agreement. Further, because online MFNs link the prices that are offered to the same customer for purchases from different outlets (platforms), they are closer to "price matching guarantees" (PMGs) than are traditional MFNs. It is for this reason, as well that in the online context, MFN agreements may look like RPM arrangements and RPM arrangements may be inferred from MFN agreements. All of these peculiarities of the online MFNs are aggravated by the fact that – unlike

the traditional model – in the online world where MFNs are used, prices are fully available to all due to the transparency of the Internet and purchases can be made instantly on the basis of prices that can also be checked instantly by all the parties involved.

In cases where there is a platform acting as an online intermediary between suppliers and customers, an MFN agreement first has an effect on the price that is paid by a given customer for the product of a given supplier on a given platform. If the same set of suppliers deals with the same set of platforms in a given market, then the MFN agreements of suppliers with platforms can have the effect of suppliers adopting RPM in their relations with the platforms which sell their products.

However, clauses such as MFNs and PMGs set pricing relativities rather than determine absolute price levels (LEAR, 2012). In this respect, they differ from RPM, which sets the price level at a fixed -- minimum or maximum -- level.

Another complicating factor in the online context is the difficulty of establishing who is upstream and who is downstream. For example, if Apple provides retail services under an agency model to publishers, the publishers' setting of retail prices may be cast as RPM. Alternatively, if Apple provides a service for the publishers (namely, providing an input for the sales activity), then the behavior is cast as the downstream firm setting the price, which would mean that no RPM is involved (Hviid, 2015). Although it may also be occasionally ambiguous in the offline world who is upstream and who is downstream in certain business contexts, the fact remains that establishing which party imposes the restraint on which other party is essential for establishing the liability of the parties involved for legal purposes and will have a particularly direct impact on the legal assessment of the existence and exercise of market power. This economic ambiguity

has played out in a number of U.S. cases over a 100 year period as has the ambiguity between horizontal and vertical.[5]

Clauses that set pricing relativities can potentially harm competition and generate efficiencies with the implication that whether they are good or bad for consumers will depend on several facts, such as: the characteristics of the relevant market; the specifics of the clause; and the nature of the seller that offers it (LEAR, 2012). Therefore, the context for price guarantees suggests that there are justifications that are both pro-competitive and anti-competitive (Corts, 1995, 1997). Such clauses can facilitate coordination by making it impossible to offer selective discounts, or they can lead to exclusion by raising costs of rivals or entrants that attempt to compete by negotiating lower prices from suppliers of critical inputs (Salop and Scott Morton, 2013).

A review of the still nascent literature on online MFN clauses has found that the most likely effects of online MFNs are likely to occur in markets where platforms compete with one another (LEAR, 2012). The possible effects include: foreclosing entry of new platforms, softening competition between platforms; facilitating collusion between platforms; and signaling information about platforms' costs (LEAR, 2012). More recent formal modeling by Boik and Corts (2016) finds that online platform MFNs typically will raise costs.

Fletcher and Hviid (2014) suggest that retail MFN clauses, because of their horizontal element, are worse than pure RPM clauses that affect only the vertical relation between a supplier and a customer. Online MFNs may be more harmful than traditional RPM because the online retailer controls the minimum price that is being set in the market, and it can manipulate that price by increasing its commission (OECD, 2013). Fletcher and Hviid define retail price

[5] See e.g., United States v. Colgate & Co., 250 U.S. 300 (1919).

MFN clauses as those clauses that primarily arise in the context of online platforms by which the suppliers (as opposed to the retailers) set the final retail prices and by which suppliers are required not to offer lower final prices through any other retailer.

Aggravating the effects of a purely vertical RPM, the horizontal element of retail MFNs is demonstrated when the upstream firm sets identical retail prices across all downstream intermediaries. However, this would still affect intra-brand competition and constitute a vertical agreement because it relates to the sale of the same product through different retailers (Akman, 2016). In other words, it does not concern inter-brand competition, which would relate to competition between suppliers and which would need to be proven as an anticompetitive agreement or concerted practice between suppliers or platforms inter se (as opposed to between suppliers and platforms) in order to be considered a horizontal restraint of inter-brand competition.[6]

The procompetitive effects of platform MFN clauses include the efficiency benefits of enabling the platforms to protect any investments that they may have made to provide pre-purchase services to buyers such as reviews or advice (LEAR, 2012). An MFN clause may help a high-cost/high-quality platform to defend its quality investments by preventing other platforms from free riding on them (LEAR, 2012). This efficiency argument should be treated with caution because a platform benefits from reduced competition in the platform market and may therefore not necessarily adopt the restrictive policy only to protect the ancillary services that are valued by consumers (Buccirossi, 2015).

This ambiguity illustrates an important difference between online MFN clauses and online RPM clauses: In the latter, a manufacturer limits price competition among firms on a

[6] Whether the restraint is treated as a horizontal or vertical one has significant legal implications in the EU due to the Verticals Block Exemption Regulation.

different level of the value chain, while in the former a platform softens competition in the same market that it operates (Buccirossi, 2015). Whereas a manufacturer that restricts competition among its retailers is harmed by the increase in price – which has to be outweighed by the benefits of demand-enhancing ancillary services to be a rational strategy – a platform benefits from reduced price competition on the platform market (Buccirossi, 2015). Thus, this type of free riding may be a more realistic defense in the bricks-and-mortar context than in the online context.

There is another type of free riding that constitutes a strong defense in the online context, which is not as applicable in the bricks-and-mortar context. This relates to the two-sided nature of the online businesses that adopt these clauses. Where the platform is an intermediary whose function is to enable buyers and sellers to find the most appropriate match (such as online travel agents), once a match has been found the parties do not need the intermediary to conclude the transaction. Instead, the parties can free ride on the intermediary's services by trading directly (Buccirossi, 2015). This can threaten the entire business model of the intermediary which charges a transaction-based fee. If the intermediary performs a socially efficient economic activity, then preventing such free riding would constitute a valid efficiency justification (Buccirossi, 2015). Such an efficiency justification was indeed accepted in several recent cases that were addressed by some national competition authorities across Europe, as will be discussed below.

F. Agency versus Resale

The Apple/e-books cases have led to the development of a strand of literature on the role that the agency model plays in any anticompetitive effects that result from MFN clauses. In the relevant cases, the adoption of these clauses coincided with a move from the wholesale model to

the agency model. Johnson (2014) finds that if MFN clauses are used alongside the agency model, this leads to higher prices; but they do not have the same effect if the wholesale model is used. Yet, even with the agency model, the clauses may have procompetitive effects when retailers face market-entry costs and when profit-sharing rather than revenue-sharing is used between the suppliers and retailers. Thus, under certain conditions, online MFNs can raise prices; under other conditions, they may also increase choice for consumers without raising prices.

In other work, Johnson (2013) finds that with consumer lock-in, adopting the agency model initially raises prices but lowers them in the future, which implies that the enforcement action in the Apple/e-books case might be misguided. Foros et al. (2013) show that the agency model leads to higher prices if the competitive pressure is higher at the retail level than at supplier level; and with asymmetric business formats, a retail MFN clause leads to retail prices that resemble the outcome under industry-wide RPM.

Surveying this literature, Hviid (2015) finds that from the perspective of the vertical chain, consumer price setting should be delegated to the level at which competition is less fierce, and consumer prices will be higher when this occurs. Hviid (2015) also argues that while the agency model is not a prerequisite for an across-platform parity agreement such as an MFN agreement, it does make implementation of the effects of the latter much simpler.

II. Cases

Cases around the world show the application of economic theories to legal doctrines. Sometimes, the agencies and courts analyze the economic effects correctly; but sometimes their legal analysis is inconsistent with economic logic.

A. United States

The Apple/e-books case was an alleged price-fixing conspiracy in which Apple purportedly used an agency model to facilitate collusion with five of the largest publishers that both the district and circuit courts found was per se illegal under Section 1 of the Sherman Act. Though Amazon controlled 90 percent of the e-books market at the time the scheme was conceived, the company did not engage in monopsony behavior under the antitrust laws but rather was setting loss leading prices, which is permitted (Kirkwood, 2014).

To combat this behavior, Apple moved the publishers from a wholesale model to an agency model (technically only a quasi-agency model because there was a price cap imposed on the publishers). With the agency model, Apple and the publishers coordinated on e-book retail prices and paid Apple a 30 percent commission for each e-book that a publisher sold. Apple had an MFN clause in the agency agreements with each publisher with a penalty clause that imposed significant financial penalties on the publishers for failure to comply. Apple then facilitated the publishers' imposition onto Amazon of similar agency agreements.

As a matter of law, both the district court and appeals court found such behavior to be per se illegal as a hub and spoke conspiracy. On appeal, Apple focused not so much on the efficiencies but instead argued that hub and spoke conspiracies were no longer entitled to per se illegality treatment under Leegin. As a matter of case law, such an argument is incorrect. As a matter of economics, empirically hub and spoke cartels are quite common (Levenstein and Suslow, 2014).

B. Europe

In Europe, the same conduct that was the subject matter of Apple/e-books in the US was dealt with by commitments that were offered following the European Commission's proceedings

against Apple and the publishers.[7] The Commission's competition concerns related to a by-object concerted practice under Article 101 between and among the publishers and Apple in relation to a common global strategy for the sale of e-books with the aim of raising retail prices or avoiding lower retail prices. In their commitments, Apple and publishers agreed to terminate the relevant agency agreements and abandon the use of MFN clauses.

In another recent line of cases, over a dozen National Competition Authorities (NCAs) in Europe have dealt with cases that involved the pricing arrangements that certain online businesses have entered into with their contracting parties. The majority of these cases have concerned online travel agents (OTAs) and the same two companies: Booking.com and Expedia. In the first such case with respect to these companies, the Office of Fair Trading (OFT) (now the Competition and Markets Authority (CMA)) accepted commitments as to the discount parity clauses that were adopted by Booking.com, Expedia, and a major hotel chain; but these commitments were reversed on appeal, and the investigation was eventually closed.[8]

This case concerned the arrangements that the parties had entered into that restricted the OTAs' ability to discount the rate at which room-only hotel accommodation bookings were offered to consumers. The OFT alleged that the agreements between OTAs and the hotel chain -- under which the OTA agreed to offer accommodation at that chain at a day-to-day room rate that was set and/or communicated by the hotel chain and not to offer rooms at a lower rate -- constituted agreements and/or concerted practices that had the object of preventing, restricting, or distorting competition under the UK Competition Act, Chapter I and Article 101. The OFT's

[7] See Case COMP/AT.39847-E-books 12/12/2012 for the commitments from four publishers and Apple. See Case AT.39387 – E-books 25/7/2013 for commitments from Penguin.

[8] See OFT Decision Hotel Online Booking: Decision to Accept Commitments to Remove Certain Discounting Restrictions for Online Travel Agents, OFT1514dec, 31 January 2014 (Booking.com/Expedia/IHG) reversed on appeal in Skyscanner Ltd v Competition and Markets Authority [2014] CAT 16. For the announcement of the CMA's closure of the investigation, see Press Release 'CMA closes hotel online booking investigation', 16 September 2015 available at https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation.

concerns related to a restriction of intra-brand competition and a possible increase in barriers to entry that result from the restrictions on discounting.

The agreements in question also involved MFN clauses that provided that a hotel would provide an OTA with access to a room reservation (for the OTA to offer to consumers) at a booking rate that was no higher than the lowest booking rate that was displayed by any other online distributor. Such MFN clauses were not directly considered by the OFT, except to the extent that such clauses could prevent either hotels or OTAs from offering such discounts as were allowed for by the commitments.

Commitments also have been reached between European NCAs in France, Sweden, and Italy and an OTA (Booking.com) that limit the use of MFN clauses, while investigations into Expedia with regard to the same practice continue (despite Expedia's voluntary adoption of the same commitments).[9] The MFN clauses in question were pricing parity clauses that obliged hotels to offer Booking.com conditions that were at least as favorable as those offered on competing platforms as well as the hotels' own offerings.

The commitments to the European NCAs require Booking.com to abandon the MFN clauses that seek parity with Booking.com's competitors and that seek parity with the hotels' own offline sales (e.g., sales over the phone or in person). Booking.com will still be free to impose MFN clauses that seek parity between the prices on Booking.com and the online prices that are offered by the hotels themselves (e.g., on the hotel website).

[9] Italian Competition Authority, Press Release, 'Commitments offered by Booking.com Closed the Investigation in Italy, France, and Sweden', 21 April 2015. On 1 July 2015, Expedia has voluntarily announced that it will apply the commitments that Booking.com offered and will abandon the use of parity clauses with its hotel partners for 5 years. See http://www.expediainc.com/news-release/?aid=123242&fid=99&yy=2015. Booking.com has also announced that it will apply the terms of the commitments that it entered into with the French, Italian, and Swedish NCAs to all its hotel partners in Europe; see Booking.com, Press Release, 'Booking.com to Amend Parity Provisions throughout Europe', Amsterdam, 25 June 2015, http://news.booking.com/bookingcom-to-amend-parity-provisions-throughout-europeesp.

Clauses that require this latter type of parity have been called "narrow parity" clauses, whereas clauses that require parity across all channels of sale including the principal's own sales channels have been called "wide parity" clauses.[10] Current trends in the enforcement practice in Europe accept narrow parity clauses while finding wide parity clauses (potentially) anticompetitive. The acceptance of the narrow parity clauses is due to the efficiency argument: The inability of the platform to reassure consumers that the platform offers as good a deal as the principal would pose a threat to the survival of the platform as a business model. Under narrow parity, the principal can free ride on the services of the platform as the platform is remunerated only when the sale takes place over the platform and not when a consumer uses the platform for her search before concluding the contract on the principal's own website.

In contrast to the rest of the NCAs in Europe, which proceeded on the basis of accepting commitments and only finding problematic wide parity clauses, the Bundeskartellamt in Germany adopted an infringement decision against an OTA -- Hotel Reservation Service (HRS) -- and later against Booking.com with regard to the same clauses that are the subject of the commitments agreed to between Booking.com and the French, Swedish, and Italian NCAs, while continuing its investigation against Expedia.[11] In the infringement decisions against HRS and Booking.com, the Bundeskartellamt prohibited all types of MFN clauses including narrow ones that seek parity between the price on the OTA website and the price on the hotel's own online

[10] Whether the relationship between a platform and a supplier is that of an agency relationship is a legal question with implications as to the applicability of Article 101/Sherman Act Section 1 to the agreements between such operators. For the argument that these relationships are indeed agency relationships and that consequently Article 101 is not applicable to the agreements between platforms and their suppliers, see Akman (2016).

[11] See Bundeskartellamt, Press Release, 'Bundeskartellamt Issues Statement of Objections Regarding Booking.com's "Best Price" Clauses', 2 April 2015. The other European countries in which these clauses are being/have been assessed from a competition law perspective are Austria, Switzerland, Ireland, Hungary, Poland, the Czech Republic, Denmark, Belgium, and Greece; see M Newman and L Crofts 'Swiss to Wrap Up Hotel-Pricing Probe by Year-End' MLex, 5 August 2015, and, L Crofts and M Newman 'Booking.com, Expedia to Avoid Full Antitrust Scrutiny in Greece' MLex, 22 September 2015.

channels such as the hotel's website. Consequently, Booking.com has been subject to and is obliged to comply with conflicting interpretations of the same law within Europe, which is arguably a single market with no materially different characteristics to justify the differing approaches!

The legal position has been further complicated by the French Constitutional Council's adoption of legislation that bans all types of parity clauses, including the ones that were allowed under the commitments that were made binding against Booking.com by the French Competition Authority -- thereby undermining the commitments.[12] The Italian parliament adopted similar legislation.[13]

Such divergence could have been avoided if the European Commission took on these cases concerning OTAs. Curiously, the Commission has not done so -- despite the issue's being a concern in over a dozen Member States. Even more curious was the lack of the EU level enforcement against OTAs given the action against Apple.

All of the recent cases with respect to OTAs in Europe demonstrate a problematic approach in terms of the theory of harm and the legal provision used. For instance, after qualifying the relevant agreements as vertical agreements, the Swedish Competition Authority found in its commitments decision that it is the horizontal parity (i.e., parity between prices offered by different OTAs) rather than the vertical parity (i.e., parity between prices offered by a hotel and an OTA) that negatively affects competition.

[12] See Article 133 of LOI n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques (also known as 'Macron Law') banning restrictions on hoteliers' pricing freedom.
[13] See Parity Rate Al Rush Finale, 23 June 2016, available at http://www.federalberghi.it/comunicati/comunicati.aspx?IDEL=287 (accessed 1 September 2016).

In the same vein, the Bundeskartellamt found that the economic effect of MFN clauses is similar to direct collusion between hotel portals: concerted behavior with regard to the sale of a specific room at a specific minimum price. These findings on the theory of harm are in conflict with the legal instruments used, which suggests that the Bundeskartellamt as well as the Swedish Competition Authority perceived the case to be one of vertical restraints (hence, the discussion of "verticals block exemption regulation" (VBER) in the decisions).

Despite the use of legal instruments in connection with vertical restraints by the NCAs, the underlying theory of harm appears to be a horizontal one of collusion. Yet again, the decision is only addressed to HRS or Booking.com individually, namely to only one of the parties to an arguably collusive horizontal arrangement and not to the other allegedly colluding parties.

None of the authorities other than the OFT and the US DOJ in Apple/e-books has pursued investigations of these 'agreements' against all the parties to the agreement in question, and none of them has addressed decisions to all the parties to the agreement. This risks creating an anomaly in the application of competition law: Enforcement of Article 101 and/or its national equivalents revolves around an 'agreement or concerted practice' that must have more than one undertaking party to it since otherwisethere would not be an 'agreement or concerted practice' -- but possibly a unilateral practice (Akman, 2016).

Thus, the recent investigations concerning the practices of individual undertakings followed by decisions addressed to individual undertakings do not fit within the framework of the legal provision that has been used by the NCAs. Therefore, the recent decisional practice in the EU demonstrates the confusion of and mixing between horizontal and vertical restrictions of competition with the consequent implication of muddling the separation between different legal provisions applicable to different restrictions. This confusion of horizontal and vertical in the

United States also took decades to fix. Indeed, the facts of Dr. Miles also had a mix of horizontal and vertical issues.[14]

The NCAs that have been involved in these cases have also overlooked the potential anticompetitive effects of 'best price guarantees,' which all of the OTAs in question have in place in their terms and conditions for consumers booking rooms on their platforms (Akman, 2016). Given that the economics literature suggests that price-matching-guarantees can cause consumer harm through higher prices (Hviid, 2015), as a result of a lack of their understanding of the operation of these different clauses the NCAs may have moved this market to a potentially more anticompetitive equilibrium by banning MFN clauses and focusing the platforms' options on the use of price-matching guarantees that are directly offered to and will be enforced by consumers (Akman, 2016).

In a case that predates the cases that involved OTAs, the then UK Competition Commission (CC; now the CMA) investigated the private motor insurance market for inter alia the potentially anticompetitive use of MFN clauses by insurance price comparison websites (PCWs). In its investigation, the CC found that narrow MFN clauses (i.e., clauses that provide parity between PCW and the insurer's own website) may be necessary for PCWs to survive.[15]

The CMA, which has taken over the market investigation from the CC, has banned price parity agreements between PCWs and insurers (wide MFN clauses) that stop insurers from making their products available to consumers elsewhere at a lower price, while allowing the PCWs to continue the use of narrow MFN clauses.[16] The CC found that while wide MFN

[14] Hovenkamp (1991).
[15] Competition and Markets Authority, Private Motor Insurance Market Investigation Final Report (2014), https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf §§8.85-8.102.
[16] CMA 'Private Motor Insurance Market Investigation Order 2015' (18 March 2015) available at https://assets.digital.cabinet-office.gov.uk/media/5509879f40f0b613e6000029/Order.pdf.

clauses soften price competition between PCWs by reducing the incentives of a PCW that faces a competitor with a wide MFN clause to seek better prices for their retail consumers from insurers (because that better price would also be passed on to the competitor), narrow MFN clauses may be necessary for the survival of PCWs as a business model. Such clauses provide credibility to the proposition that the policies found on the PCW cannot be purchased more cheaply simply by going to the website of the provider. Without that reassurance, consumers would learn that PCWs could not be trusted to be a better alternative to direct search, and demand for their services might disappear.

Further, the CC also found that the insurance providers could free ride on the advertising that PCWs provide. Coupled with the finding that PCWs enhance rivalry on the market, the CC reached the conclusion that a risk to the existence of PCWs from the absence of narrow MFN clauses would be damaging to competition. According to the CC, there were no alternative means for PCWs to provide customer assurance on their truthfulness with regard to the statements on price (i.e. credibility for PCWs), although there were alternative mechanisms other than MFNs to prevent free riding by insurers.

In another line of case law that involves price parity clauses, the OFT and the Bundeskartellamt proceeded against Amazon for enforcing price parity clauses on the Amazon Marketplace platform.[17] These proceedings were terminated after Amazon removed the relevant clauses from its agreements with sellers on Amazon Marketplace. The parity clauses in question prevented sellers on Amazon Marketplace from offering their goods elsewhere online (both on other platforms and on the retailers' own websites) at a lower price. The Bundeskartellamt found

[17] Bundeskartellamt, Case Report, Amazon removes price parity obligation for retailers on its Marketplace platform, B6-46/12, 9 December 2013, available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf?__blob=publicationFile&v=2

Amazon Marketplace to be a horizontal trade cooperation between Amazon and third party sellers that has as its object and effect various restrictions of competition.

Although there is a vertical aspect to the relationship between Amazon and the retailers that sell on Amazon as a platform, because Amazon also sells the same products itself, Amazon and these retailers were construed to be direct competitors on the trading markets concerned. The price parity clauses thus were found to constitute horizontal price-fixing. The clauses were also found to act as barriers to entry and expansion.

In three other cases, UK antitrust enforcers took infringement decisions in connection with online RPM. However, these three cases differ significantly from the cases that involved OTAs and Amazon because they were simply cases of RPM that was practiced in the context of online sales rather than cases in which the online aspect added a relevant dimension for the competition law assessment by, for example, involving a platform.

The one aspect of these cases that differs from bricks-and-mortar RPM is that because the practice concerns online sales, the consequent increase in price transparency allows the manufacturer, competing retailers, and consumers easily to observe and compare prices. It also enables the manufacturer that imposes RPM to detect and potentially punish any deviation from the prices that are imposed by the manufacturer more readily.

In an infringement decision that concerned mobility scooters, the OFT found that prohibiting online advertising by certain retailers of prices that were below the recommended retail price (RRP) was an ancillary restriction of competition through an anticompetitive agreement/concerted practice between the manufacturer and retailers.[18] The OFT's infringement

[18] Decision of the Office of Fair Trading, Mobility scooters supplied by Pride Mobility Products Limited: prohibition *on online advertising of prices below Pride's RRP*, CE/9578-12, 27 March 2014 available at https://assets.publishing.service.gov.uk/media/54522051ed915d1380000007/Pride_Decision_Confidential_Version.pdf.

decision was addressed to both the manufacturer and the retailers in question. The OFT held this conduct to be a hard-core breach under the VBER in the form of a restriction of customers to whom and/or the territories into which sales could be made. Note that RRP as opposed to minimum or fixed prices is not a hard core restriction under the Regulation (provided that it does not amount to de facto fixed or minimum pricing).[19]

More recently, the CMA adopted an infringement decision that imposed a fine on a bathroom fittings manufacturer for preventing its retailers from discounting below a fixed level for products that were sold or advertised online.[20] This was found to be a restriction by object. However, despite the anticompetitive conduct in question being an agreement/concerted practice between the manufacturers and retailers, the CMA only found an infringement against (and imposed a fine on) one of the parties to the agreement/concerted practice: the manufacturer.[21]

Finally, in another case concerning RPM, the CMA fined an individual undertaking (a manufacturer of commercial catering equipment) for prohibiting retailers from advertising certain products below a minimum advertised price both online and offline.[22] Similar to the other RPM cases, the restriction in this case also was found to be a restriction by object. In this case, the rationale of the RPM policy was to protect the margins of the dealers, and the policy was instituted in response to requests and pressure from the dealers. Yet, the only party that was fined for the infringement was, again, the manufacturer.

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[19] See Verticals Block Exemption Regulation Article 4(a).

[20] Decision of the Competition and Markets Authority, Online resale price maintenance in the bathroom fittings sector, CE/9857-14, 10 May 2016 available at https://assets.publishing.service.gov.uk/media/573b150740f0b6155b00000a/bathroom-fittings-sector-non-conf-decision.pdf.

[21] The CMA indeed has the power to address decisions to fewer than all of the relevant parties. See The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014, Statutory Instrument 2014/458, Article 10(2).

[22] Decision of the Competition and Markets Authority, Online resale price maintenance in the commercial refrigeration sector, CE/9856/14, 24 May 2016 available at https://assets.publishing.service.gov.uk/media/575a8f5eed915d3d24000003/commercial-catering-equipment-non-confidential-decision.pdf.

C. Australia

Australia began the shift from per se illegality to a rule of reason approach in 2014, when the Australian Competition and Consumer Commission (ACCC) for the first time authorized an RPM agreement. In doing so, it recognized the competitive effects (the supplier had limited market power) and the efficiencies of the agreement (the RPM agreement was welfare-enhancing for consumers).[23] However, the ACCC brought two vertical price-fixing cases starting in 2013. One involved a bank and mortgage brokers.[24] Of interest for this paper, the other case involved airlines and a flight travel agent service (Flight Centre).[25]

In Flight Centre,[26] the ACCC alleged that the result of the agreement (which in the United States would be described as an invitation to collude) between Flight Centre and the airlines would be that the participating airlines would make available to Flight Centre any airfare that the airlines offered online which would be collusive. Such airfare would not be less than the "nett price," which is the price of the airfare Flight Centre would have been entitled to receive if Flight Centre had itself sold the fare, plus the commission.[27] Because of the agency model, the ACCC alleged that Flight Centre was in competition with the airlines in the market of booking services for customers and in distribution services for international travel.

Flight Centre appealed and the judgment was reversed.[28] The appeals court (Full Federal Court) held that the ACCC's market for distribution and booking services was nothing more than an artificial construct. Without competition in a dual distribution market, there could be no

[23] ACCC (5 December 2014) ACCC authorises minimum retail prices on Festool power tools.
[24] ACCC v ANZ [2013] FCA 1206 (finding in favor of the parties); ACCC v ANZ [2015] FCAFC 103 (dismissing the ACCC's appeal).
[25] On the MFN issue Australia has settled with Bookings.com and Expedia to allow only narrow MFNs along the European model.
[26] ACCC v Flight Centre Limited (No 2) [2013] FCA 1313.
[27] Id. at para 17.
[28] Australian Competition and Consumer Commission v. Flight Centre Limited (No 3) [2014] FCA 292.

collusion. The case did not turn on the potential efficiencies in the agency model, and the economic analysis of the contractual arrangements was not analyzed in detail. This is surprising because narrow clauses may be necessary. Otherwise the specific business model of the platform would be undermined. Neither was the economic case for the airlines to participate in the agreement clear. Nevertheless, the Australian High Court recently found in favor of the ACCC, reinstating the trial judge's decision. Though the High Court focused on the principal and agent relationship, like so many courts elsewhere in the world it muddled the analysis between vertical and horizontal issues.

III. Conclusion

Online RPM has some common features with traditional bricks-and-mortar RPM. The main distinctions of online RPM are caused by: (a) a more robust free-riding justification; and (b) the efficiencies in using the online platform. In some cases that involve online RPM and online MFN, the need for antitrust enforcement seems clear. However, the economic analysis that has been employed in connection with rigid antitrust doctrines, particularly in Europe, has led to inconsistent and potentially economically incorrect outcomes.

As a matter of policy, the decision of the European Commission to let the NCAs take on the online OTA cases was a terrible mistake – and the inconsistency among Member States is borderline inexcusable given that the OTAs in question might have lacked significant market power, even though the decisions were not based on whether or not they had market power as they were based on an analysis of Article 101 rather than Article 102. This is all the more reason for an economics-based approach to Article 101 cases and the need to move away from virtual per se treatment in Europe. The failure of European enforcement in the OTA cases is aggravated

by the Member State NCAs' having the real possibility of coordination under the European Competition Network (ECN). Despite the fact that the case concerning OTAs would have been a prime candidate for utilizing the ECN, the difference in the approaches and perspectives of the competition authorities within the ECN appears to have led to different enforcement outcomes to identical practices adopted by the same businesses. This begs the question what can be achieved by networks such as the ECN when the authorities involved have such diverging views on both the substantive issues and the enforcement options (vis-à-vis DG Competition). The failure of reaching a uniform outcome within the context of the ECN is an example of the limits of "antitrust federalism" and shows that such federalism may not always be a good idea since it takes only one jurisdiction to take a wrong decision to negatively affect the entire global chain of decision-making.

The challenge of distinguishing between horizontal and vertical restrictions of competition posed by various online vertical restraints suggests that form-based approaches to antitrust policy and decision-making fail to engage with the real question: whether the restraint leads to exclusion, collusion or both. This is also demonstrated by the failure of several European NCAs to recognize that a practice that they have not scrutinized (best price guarantees) while remaining exclusively focused on MFNs is potentially just as detrimental to competition as MFNs, if not more. Fixating on the type and form of a given restraint has thus led to the failure to challenge a practice that may have more significant anticompetitive effects. The need to adopt an effects-based approach that would cover the entire business practice rather than aspects thereof is obvious.

Finally, the distinctions of online versus bricks-and-mortar RPM and MFN suggest, as a policy matter, a relaxing of the per se like illegality in Europe and other jurisdictions given the

potential efficiencies that such relationships may exhibit. However, case analysis remains fact-specific even in such circumstances despite the fact that a rule of reason approach would be much more appropriate.

Outside of the United States, online RPM (and bricks-and-mortar RPM) receive per-se-like treatment. Thus, the economic analysis in these cases is far more cursory than it would be in a rule-of-reason world, which is what Leegin requires in the United States. What results is that the antitrust authorities set terms for behavior that are not based on effects. Therefore, it will take time for courts around the world to take a broader and more nuanced look into these arrangements when agencies undertake enforcement in this area.

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