RESTRAINTS ON PLATFORM DIFFERENTIATION

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The most pressing debates in antitrust today center on major platforms like Amazon, Google, and Facebook. Platform markets are subject to strong network effects, which tend to create barriers to entry and reinforce market power. Frequently, the only way for a new platform to enter the market successfully is to differentiate itself from the leading incumbent in some way—often by offering exclusive content or features. However, recently some dominant platforms have attempted to prevent this by entering into a novel type of "most favored nation" (MFN) agreement with trading partners. Unlike traditional MFNs, which restrain pricing, these MFNs prohibit trading partners from offering any exclusive content, features, or other services to smaller platforms.

These new MFNs are the subject of numerous ongoing lawsuits and regulatory probes involving major platforms, including Amazon. But they have not previously been examined in academic research. This article evaluates the novel antitrust issues they raise. The primary concern is that these MFNs may allow a dominant platform to forestall competitive entry by restraining the ability of new platforms to differentiate themselves. This is consistent with research in economics indicating that exclusive dealing can help to facilitate entry in network industries. I discuss some key differences between these restraints and traditional price-based MFNs, and I identify some key errors in recent judicial decisions evaluating them.

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TABLE OF CONTENTS

INTRODUCTION **273**

I. PLATFORMS AND PLATFORM COMPETITION **279**

A. Platform Markets and Network Effects........ *279*

B. Entry Barriers........ *281*

C. Differentiation and Multihoming; Contrast with Natural Monopoly........ *282*

II. PLATFORM EXCLUSIVE DEALING **284**

A. Potential Procompetitive Effects *286*

B. Potential Anticompetitive Harms........ *288*

III. RESTRAINTS ON PLATFORM DIFFERENTIATION **289**

A. Examples........ *290*

1. Amazon........ 290

2. The National Association of Realtors........ 293

3. TV Programming Distributors 295

B. Assessing Competitive Effects........ *297*

1. Evaluating the Plaintiff's Exclusive Dealing........ 298

2. Evaluating the MFN Terms 302

3. Market Power Considerations........ 303

C. Potential Justifications *304*

D. Less Restrictive Alternatives *306*

IV. CONCLUSION **307**

INTRODUCTION

There is widespread concern that antitrust law is not adequately addressing anticompetitive behavior within "Big Tech."[1] Public attention has focused particularly on situations in which dominant platforms discriminate against or exclude rivals in adjacent markets who rely on their platforms to make sales.[2] Such conduct has been the subject of much academic writing,[3] as well as some newly proposed legislation.[4]

This article addresses a distinct antitrust concern involving dominant platforms, which has not previously been explored in the academic literature despite being the recent subject of litigation and regulatory probes centering on major platforms. It surrounds situations in which a dominant platform forestalls competitive entry by restraining the ability of new platforms to differentiate themselves. The dominant firm accomplishes this by entering into vertical agreements[5] with trading partners that restrict what kinds of business arrangements they can form with rival platforms.

It is typically hard for new firms to enter a platform market, particularly if it is already dominated by a large incumbent. This is because platform markets are subject to strong network effects.[6] This means that a platform becomes more attractive when its network of users gets larger. For example, the value a user gets from a social media platform depends in large part on how many of her

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[1] *See, e.g.*, SUBCOMM. ON ANTITRUST, COM., AND ADMIN. L. OF THE COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 4-21 (Comm. Print 2020) (summarizing the Judiciary Committee's view that antitrust is failing to police anticompetitive conduct by dominant platforms).

[2] For example, Apple has been accused of using its control of the iOS App Store to discriminate against apps that compete with its own apps. *See, e.g.*, Jack Nicas & Keith Collins, *How Apple's Apps Topped Rivals in the App Store It Controls*, N.Y. TIMES (Sept. 9, 2019), https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html [https://perma.cc/DQM8-UUK]

[3] *See, e.g.*, Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1024-36 (2019); Eleanor M. Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, 98 NEB. L. REV. 297, 304-13 (2019); William P. Rogerson & Howard Shelanski, *Antitrust Enforcement, Regulation, and Digital Platforms*, 168 U. PA. L. REV. 1911, 1917-36 (2020); Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech,* 131 YALE L.J. 1483, 1483-90 (2022).

[4] American Innovation and Competition Online Act, S. 2992 117th Cong. (2022).

[5] A "vertical" agreement is one between two firms at different levels of a supply chain (e.g. a tire manufacturer and a rubber producer). *See generally* Louis Kaplow, *The Meaning of Vertical Agreement and the Structure of Competition Law*, 80 ANTITRUST L.J. 563 (2016).

[6] *See infra*.Section I(A).

acquaintances are signed up. Similarly, the value a consumer gets from Postmates depends on how many restaurants are available on it.[7] Strong network effects tend to entrench market power.[8] The market leader has the advantage of a larger network, which makes it harder for smaller firms to compete for users even if their platforms are technologically superior.[9]

Due to strong network effects, the most viable way for a new platform to challenge a dominant incumbent is often to differentiate itself in some way. In many cases, this involves offering exclusive content or features. By offering something distinctive that the market leader cannot provide, an entrant can persuade many users to adopt its service even if its network is much sparser than the incumbent's.

For example, suppose a startup plans to launch a new music streaming app to compete with Spotify. When it first enters the market, its content library will inevitably be smaller than Spotify's. If all the music in the startup's library is also available on Spotify, then this disadvantage could easily be fatal, as almost all users would then view Spotify as clearly superior. But if the startup can offer some popular *exclusive* content, then it can give users a reason to pick its platform over Spotify. In other words, by differentiating itself with some unique content, the startup can avoid competing purely on the basis of library size—a battle it cannot win.[10]

The Federal Trade Commission's (FTC's) ongoing antitrust suit against Facebook is a high-profile example of the importance of differentiation in platform competition.[11] The case centers in part on Facebook's acquisition of Instagram, whose focus on photo-sharing on smartphones made it distinct from Facebook at the time of the acquisition in 2012.[12] While deliberating the deal, one Facebook executive questioned whether it made business sense, given that copycat photo-sharing platforms would likely spring up in the future.[13] But, in internal conversations, CEO Mark

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[7] This goes both ways: the platform's value to a restaurant depends on how many consumers use it. This is an example of "indirect" network effects. *See id.*

[8] *See infra* Sections I.B-C.

[9] *See, e.g.*, Toker Doganoglu & Julian Wright, *Exclusive Dealing with Network Effects*, 28 INT'L J. INDUS. ORG. 145, 147 (2010).

[10] In principle, an undifferentiated entrant could attempt to compete on the basis of price. However, larger firms tend to have lower costs due to economies of scale, making it hard for smaller firms to undercut them. Hence, this strategy is often not feasible.

[11] Complaint at 1, FTC v. Facebook, Inc. (D.D.C. 2022) (No. 1:20-cv-03590).

[12] Substitute Amended Complaint at 26-29, FTC v. Facebook, Inc. (No. 1:20-cv-03590) (D.D.C. 2022).

[13] *Id.* at 29-30.

Zuckerberg explained that network effects would likely prevent any similar photo-sharing platforms from gaining traction:

> [T]here are network effects around social products and a finite number of different social mechanics to invent. Once someone wins at a specific mechanic, it's difficult for others to supplant them without doing something different.[14]

This logic also explains why Facebook leadership did not view "Facebook clones" as a significant competitive threat.[15] For example, when Google launched its Google+ social media platform in 2011, its similarity to Facebook ultimately prevented it from gaining a critical mass of users.[16] This makes sense: if two social media platforms have largely the same core functionalities but one has a much larger network of users, then consumers will opt for the larger platform. For that reason, Facebook's worries about upstart competitors tend to focus on "differentiated services."[17]

In many platform markets, the most viable way for an entrant to differentiate itself is to enter into strategic relationships with a few trading partners.[18] In these dealings, the trading partners agree to make certain products, features, or other services exclusive to the entrant's platform, at least temporarily.[19] The arrangement may also involve an innovative collaboration with the trading partner to develop new products or features. For example, a streaming service like Hulu might work with movie studios to develop exclusive films for its platform.

However, recently some major platforms have begun entering into restrictive vertical agreements with trading partners that threaten this channel of competitive entry. These deals prohibit

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[14] *Id.* at 30 (quoting Mark Zuckerberg).

[15] Complaint at 3, FTC v. Facebook, Inc. (D.D.C. 2022) (No. 1:20-cv-03590).

[16] As the FTC noted in its complaint:

> Facebook commented internally in December 2011 about the entry barriers that appeared to be blocking the growth of Google+: "People who are big fans of [Google+] are having a hard time convincing their friends to participate because 1/ there isn't yet a meaningful differentiator from Facebook and 2/ switching costs would be high due to friend density on Facebook."

Substitute Amended Complaint at 26, FTC v. Facebook, Inc. (D.D.C. 2022) (No. 1:20-cv-03590).

[17] Complaint at 3, FTC v. Facebook, Inc. (D.D.C. 2022) (No. 1:20-cv-03590) ("Facebook's leadership has learned and recognized that the sharpest competitive threats to Facebook Blue come not from 'Facebook clones,' but from differentiated services.").

[18] *See infra* Section II.A.

[19] However, in most cases, the trading partner will continue to make most of its products and features available on all platforms.

trading partners from making any products or features exclusive to rival platforms, even for a short time. In other words, they prohibit trading partners from helping smaller platforms to offer something unique to consumers. This can prevent entrants from being able to differentiate themselves, in which case network effects may make market entry impossible.

I discuss numerous examples of these agreements that have come up in recent litigation and regulatory investigations.[20] For instance, Amazon is accused of entering into far-reaching agreements with eBook publishers that deter them from collaborating with rival eBook platforms to develop alternative distribution models (e.g. a subscription model) or eBook functionalities (e.g. animated content).[21] It does this not by expressly prohibiting such efforts, but rather by requiring publishers to ensure that Amazon will be in a position to unveil the same new content or distribution model at the exact same time as any rival platform.[22] But, of course, this largely kills off rivals' incentive to introduce novel features or business models in the first place. Such restrictions could easily undermine both competition and innovation.

These potentially anticompetitive restraints fall into the category of "most favored nation" (MFN) agreements. In an MFN, one party agrees that it will offer terms to the other party that are at least as favorable as those it offers to the other party's competitors. MFNs traditionally center on price. For example, an upstream supplier might promise to give a downstream producer a price that is no higher than the price it charges to competing producers.[23] There is extensive academic writing on price-based MFNs,

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[20] *See infra* Section III.A.

[21] *See infra* Section III.A.1.

[22] Moreover, if a new eBook functionality developed for a rival platform does not work on Amazon's Kindle, then the agreements require the publisher to develop a new specialized version that will run on Amazon's devices.

[23] *See, e.g.*, Jonathan Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 ANTITRUST 20, 20 (2013); Steven C. Salop & Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27 ANTITRUST 15, 17 (2013).

including in platform markets.[24] This is an important subject, as many platforms use price MFNs.[25]

But the nonprice MFNs considered in this paper raise distinct antitrust concerns and have received no significant attention in academic work. Rather than potentially creating problematic pricing incentives—the primary concern with traditional MFNs—they make it hard or impossible for new platforms to differentiate themselves from the dominant incumbent. This may forestall competitive entry without the need for any contractual restrictions on price.

These nonprice MFNs also present distinct legal challenges for antitrust enforcement. A novel feature of these agreements is that they typically work by preventing smaller rivals from engaging in exclusive dealing[26]—a vertical restraint that is itself a frequent target of antitrust litigation.[27] This presents a difficulty for an antitrust plaintiff, because courts are accustomed to thinking of exclusive dealing as a potential antitrust violation. As a result, a court may cavalierly assume that the defendant's MFN cannot be harmful, since it merely prevents smaller rivals from doing something potentially anticompetitive.[28] Indeed, some recent lawsuits in this area have been dismissed for this very reason.[29]

This rationale for rejecting the plaintiff's case is far too simplistic. To be sure, exclusive dealing tends to become harmful when it is sufficiently extensive in scope.[30] But in small doses it is often a competitive stimulant.[31] And the MFNs raising serious antitrust concerns are specifically those that prevent small-scale

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[24] *See, e.g.,* Andre Boik & Kenneth S. Corts, *The Effects of Platform Most-Favored-Nation Clauses on Competition and Entry*, 59 J.L. & ECON. 105 (2016); Justin P. Johnson, *The Agency Model and MFN Clauses*, 84 REV. ECON. STUD. 1151 (2017); Benjamin Edelman & Julian Wright, *Price Coherence and Excessive Intermediation*, 130 Q.J. ECON. 1283 (2015); Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2018).

[25] Indeed, the Supreme Court's recent *American Express* case, which addressed questions about how antitrust law applies to platform markets, involved a price-based MFN that American Express used to prevent merchants from "steering" consumers toward alterative credit cards. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2277 (2018).

[26] Exclusive dealing refers to any contract in which one party agrees to buy or sell something exclusively to the other party. *See infra* Part II (discussing exclusive dealing by platforms).

[27] *See infra* Section III.B.

[28] *See infra* Section III.B.1.

[29] *Id.*

[30] *See infra* Section II.

[31] *Id.*

exclusive dealing by small competitors.[32] The potential for such exclusive dealing to be procompetitive is especially pronounced in markets with strong network effects. Indeed, a wealth of research in economics, management, and adjacent fields indicates that exclusivity contracts often help to facilitate competitive entry in network industries.[33] This is frequently linked to its important role in allowing new platforms to differentiate themselves.

The balance of the paper is organized as follows. Section I provides a brief overview of the economics of platforms. It describes how network effects create barriers to entry, but also how product differentiation and other factors can help to circumvent those barriers. This clarifies why most platform markets are not subject to a "natural monopoly" problem, although they do raise some analogous concerns.

Section II addresses competition policy implications of exclusive dealing in platform markets. It first discusses the abundance of academic research showing that exclusive dealing by small platforms is often procompetitive. It also discusses the potential anticompetitive use of exclusive dealing by *dominant* platforms. However, as this section notes, exclusive dealing is often a highly expensive way to exclude rivals.[34] By contrast, MFNs that restrain differentiation are likely to be much easier for a dominant firm to implement. And if network effects are strong, they may be more than sufficient to foreclose competitive entry.

Section III focuses on the MFNs at the heart of this paper. It starts with several detailed examples involving Amazon, the National Association of Realtors, and various cable and satellite TV service providers. It then discusses how courts should evaluate such MFNs in general. As the analysis explains, one cannot properly assess the antitrust implications of the MFN without carefully considering the competitive function of the exclusive dealing arrangements it proscribes. Thus, this section devotes significant attention to the antitrust analysis of exclusive dealing by entrants or small incumbents. It also considers potential justifications and less restrictive alternatives.

Section IV clarifies that antitrust scrutiny of nonprice MFNs does not entail a more permissive attitude toward potentially

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[32] If the MFN merely prohibited large-scale (and thus potentially harmful) exclusive dealing, then it would be unlikely to raise antitrust concerns. *See infra* Section III.B.2.

[33] *See infra* Section II.A.

[34] To convince a trading partner to stop dealing with rivals, one must pay it enough to cover all of the profits it will give up as a result. *See infra* notes 87-90 and accompanying text.

harmful exclusive dealing. This is because the nonprice MFNs raising antitrust concerns are those that proscribe small-scale exclusive dealing by smaller competitors or entrants. Finally, Section V concludes.

I. PLATFORMS AND PLATFORM COMPETITION

This section gives a brief overview of the economics of platforms and platform competition, focusing on issues that will be relevant in the rest of the paper.

A. Platform Markets and Network Effects

The standard economic view of platforms is that they are traders in "two-sided" (or multi-sided) markets.[35] This means that they engage in separate dealings with two distinct groups of users, which are described as representing different "sides" of the market.[36] For example, Uber deals with drivers and riders; a credit card network like Visa deals with cardholders and merchants; and an app store deals with consumers and app developers. Some platforms have more than two sides. For example, delivery apps like Postmates are three-sided: they deal with consumers, restaurants, and drivers.

The role of the platform is to allow the two sides to connect with each other in some profitable way.[37] This paper will focus on transaction platforms, which act to intermediate transactions or to deliver valuable content (e.g. music or games) from one side to the other.[38] All four examples from the previous paragraph fall into this category. Other familiar examples include travel booking services (e.g. Expedia); home-sharing apps (AirBnb); reservation apps

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[35] *See, e.g.*, Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990 (2003); Geoffrey G. Parker & Marshall W. Van Alstyne, *Two-Sided Network Effects: A Theory of Information Product Design*, 51 MGMT. SCI. 1494 (2005); Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. ECON. 668 (2006); David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 COMPETITION POL'Y INT'L 151 (2007); Andrei Hagiu & Julian Wright, *Multi-Sided Platforms*, 43 INT'L J. INDUS. ORG. 162 (2015).

[36] *See, e.g.,* Rochet & Tirole, *supra* note 35, at 990-91.

[37] *See, e.g.,* David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. REGUL. 325, 332-33 (2003).

[38] By contrast, on a *media platform*, the two sides are generally consumers and advertisers. Typically consumers pay little or nothing to use the platform, while advertisers pay to run ads on the platform or otherwise to exploit its data. Examples of media platforms include social media platforms (e.g. Facebook); search engines (Google Search); and messaging apps (WhatsApp).

(Open Table); streaming apps (Netflix or Spotify); and operating systems (Windows). The two sides of a transaction platform are typically buyers and sellers. The buyers are often end consumers. The sellers are often described as "complementors" and their products as "complements."

Network effects are a key feature of platform markets. In particular, what makes two-sided markets special is *indirect network effects*.[39] This simply means that the two sides of the market care about each other.[40] More specifically, users on one side of the market care about the extent of participation by users on the other side. This can be interpreted in terms of quality. Each side views the quality of the platform as depending in part on the extent of the other side's participation.[41]

For example, in the two-sided market for video game consoles, consumers and video game developers represent the two sides. All else being equal, consumers prefer consoles that have more games available on them. And when deciding what consoles to make their games available on, game developers prefer consoles that are more widely used by consumers. Similarly, when a consumer evaluates different credit card networks, she prefers those that are more widely accepted by merchants. And likewise merchants prefer cards that are more widely carried by consumers.

On most transaction platforms, indirect network effects are sufficiently important to make the platform largely useless to everyone unless there is active participation by users on both sides.[42] For example, Uber confers no value to drivers if no riders are actively using it, and vice versa. Thus, a key step in getting a new platform up and running is to garner a critical mass of users on both sides of the market—a difficulty that we will return to shortly.

A platform may or may not also exhibit *direct network effects*, which arise when users on one side of the market care about the extent of participation by other users on the same side.[43] For example, in the case of video game consoles, consumers like to be able to play games online with other players. Hence, consumers care

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[39] *See, e.g.,* Hagiu & Wright, *supra* note 35, at 163.

[40] On a media platform, these network effects may not be positive in both directions. In particular, consumers may prefer to have less advertising, not more. However, advertisers always prefer platforms with more users.

[41] Quality may also depend on other, intrinsic features of the platform. For example, from a consumer's perspective, the quality of a video game console depends in part on the lineup of games that can be played on it, but also on its technological specifications (e.g. the speed of its processor).

[42] *See, e.g.*, Evans, *supra* note 37, at 327-28.

[43] *See, e.g.*, Michael L. Katz & Carl Shapiro, *Systems Competition and Network* Effects, 8 J. ECON. PERSPECTIVES 93, 96 (1994).

not only about how many games are available on a given console (indirect network effects), but also how many other consumers use it (direct network effects). But many platforms do not have this characteristic. For example, consumers who use Open Table (a restaurant reservation platform) only care about how many restaurants use it, not how many other consumers use it.

B. Entry Barriers

One key reason why platform markets are so relevant to antitrust is that network effects are conducive to market power. This is because competitive entry tends to be difficult in such markets.[44] There are two primary reasons for this. The first applies even to the first platform to enter the relevant market. In order to become successful, a platform must solve a "chicken-and-egg" problem: it cannot operate effectively without active participation by users on both sides, but neither side is interested in signing up until the other is already using it.[45] Overcoming this coordination problem is a major obstacle to entry in platform markets.

A famous example is the "applications barrier to entry" that played a key role in the *Microsoft* antitrust case.[46] The court noted that Microsoft's dominance in the operating system market was protected by strong entry barriers because a new operating system will not appeal to consumers until many software applications are available on it.[47] But software developers do not have a strong incentive to make their applications run on an operating system (a costly process) unless it is already widely used by consumers.[48]

The second difficulty is specific to second movers—platforms who are not the first to enter. This is the fact that a large incumbent platform will often have a major advantage over potential entrants simply because it already has a large network of active users. This makes the incumbent highly attractive to users for reasons that have nothing to do with the technological quality of its

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[44] *See, e.g.,* A. Douglas Melamed, *Network Industries and Antitrust*, 23 HARV. J.L. PUB. POL'Y 147, 151 (1999); Evans, *supra* note 37, at 363.

[45] See Bernard Caillaud & Bruno Jullien, *Chicken & Egg: Competition Among Intermediation Service Providers*, 34 RAND J. ECON. 309, 310 (2003) ("[I]ndirect network externalities give rise to a 'chicken & egg' problem").

[46] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[47] *Id.* at 55.

[48] *Id.*

service. This can allow the incumbent to stave off second movers even if they are technologically superior.[49]

C. Platform Differentiation; Contrast with Natural Monopoly

Network effects can thus lead to self-reinforcing success for whichever firm is largest (often the first one to enter). In the extreme case, this can result in a "winner-take-all" market.[50] For this reason, digital platforms are sometimes likened to natural monopolies.[51] The "natural monopoly" problem arises when certain market conditions—usually large economies of scale[52]—make it infeasible for any would-be competitors to challenge the incumbent.[53] As a result, the incumbent can enjoy a durable monopoly without having to engage in any anticompetitive conduct. The canonical examples of natural monopolies are utilities (e.g. electricity or water service). The standard legal remedy for natural monopoly is not antitrust, but rather regulation.[54]

Network effects are analogous to economies of scale, but they involve rising demand rather than falling costs.[55] Some network industries, such as the market for telephone service, can thus create

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[49] *See, e.g.*, Doganoglu & Wright, *supra* note 9, at 145. Joost Rietveld & Melissa A. Schilling, *Platform Competition: A Systematic and Interdisciplinary Review of the Literature*, 47 J. MGMT. 1528, 1537-38 (2021).

[50] *See, e.g.,* Carmelo Cennamo & Juan Santalo, *Platform Competition: Strategic Trade-Offs in Platform Markets*, 34 STRATEGIC MGMT. J. 1331, 1331-32 (2013).

[51] *See, e.g.,* Dipayan Ghosh, *Don't Break Up Facebook – Treat It Like a Utility*, HARVARD BUS. REV. (May 30, 2019), https://hbr.org/2019/05/dont-break-up-facebook-treat-it-like-a-utility [https://perma.cc/92F4-LE6P] (arguing that "Facebook and firms like it have become natural monopolies that necessitate a novel, stringent set of regulations to obstruct their capitalistic overreaches and protect the public against ingrained economic exploitation").

[52] Often this takes the form of a very large upfront fixed cost of market entry such that a firm's average costs will be prohibitively high unless it can serve the large majority of customers by itself.

[53] *See, e.g.,* WILLIAM W. SHARKEY, THE THEORY OF NATURAL MONOPOLY (1983); Richard A. Posner, *Natural Monopoly and its Regulation,* 21 STAN. L. REV. 548 (1968).

[54] There are two main reasons for this. First, antitrust penalties are reserved for anticompetitive conduct, but a natural monopolist acquires its dominance without having to engage in any such conduct. Second, regulation requires continuous hands-on supervision and control by a technocratic regulatory authority. By contrast, antitrust runs through the court system and is more limited and passive; it condemns certain bad acts but does not otherwise attempt to micromanage firm behavior.

[55] *See, e.g.,* Carl Shapiro, *Exclusivity in Network* Industries, 7 GEO MASON L. REV. 673, 673 (1999).

a natural monopoly problem through strong network effects.[56] One might therefore wonder whether two-sided platform markets are inherently prone to natural monopoly. To be sure, strong network effects are conducive to the rise of dominant platforms, such as Google Search or Microsoft Windows. But literal monopoly is rare. Most platforms, even dominant ones, face at least some meaningful competition from rival platforms.[57]

There are numerous reasons why durable competition arises in platform markets, but one of them will be most important for purposes of this paper.[58] Platforms can often differentiate themselves from one another. That is, users may view two competing platforms as distinct for reasons unrelated to price or sheer network size. For example, if a small platform has some distinctive quality that strongly appeals to a subgroup of users, those users may opt to use that platform even though it has a smaller network.[59] Once those users join, network effects kick in and the platform will attract other users as well. This can prevent the market from tipping into monopoly.

True natural monopolies tend to involve fungible, utilitarian services like electricity or water service.[60] This means that there is little or no room for product differentiation. For example, consumers don't care what brand of electricity they get, so long as it works.[61] But platform markets are generally not like this. It is usually possible for platforms to differentiate themselves in meaningful ways.

There are two main reasons why users on a given side of the market—say, the buyer side—may view two competing platforms as differentiated.[62] First, the platforms could have different intrinsic features or functionalities. Second, if complementors' products (e.g. video games) are differentiated, consumers will view two platforms as differentiated if there is "singlehoming" by some important

[56] *See, e.g.,* Kohn E. Kwoka, *Networks and Natural Monopoly*, *in* NETWORK ACCESS, REGULATION, AND ANTITRUST, 16-18 (Diana L. Moss ed., 2005).

[57] They may also compete with one-sided firms. For example, Uber and Lyft compete with ordinary taxi companies to some extent.

[58] For discussion of other possible reasons, *see, e.g.,* Robin S. Lee, *Competing Platforms*, 23 J. ECON. & MGMT. STRATEGY 507 (2014).

[59] *See, e.g.,* Rietveld & Schilling, *supra* note 49, at 1542-43.

[60] Railroads are another common example.

[61] Of course, they would care if different brands charged different prices, but "product differentiation" refers to intrinsic differences unrelated to price.

[62] Sometimes only one side views two platforms as differentiated. For example, if two credit cards offer different reward types but charge the same fees to merchants, then consumers will view them as distinct but merchants might not.

complementors.[63] That is, there may be some distinctive products that are available only on one platform or the other.

Consider an example. Many consumers prefer the Nintendo Switch over Xbox or PlayStation, even though the latter consoles have larger lineups of games.[64] This is partly because the Switch offers certain functionalities (e.g. portability and motion control) that the other consoles do not. It is also because some popular games (e.g. Mario Brothers) are exclusive to the Switch. If instead the Switch had no exclusive games, and if it had no distinctive functionalities, then essentially all consumers would view it as inferior to the other consoles.

Differentiation helps to avoid monopoly by limiting the influence of network size on users' decision making. This was clear in the Facebook-Instagram example from the intro.[65] If the only significant difference between two platforms is that one has a much larger network, then users will tend to flock to the larger platform. But if the platforms are differentiated, then network size is no longer the only thing that matters.

For these reasons, differentiation is often essential to competitive entry in platform markets, because it is often the only way to circumvent the entry barriers created by strong network effects. As such, an MFN that restrains platform differentiation may forestall entry.

II. PLATFORM EXCLUSIVE DEALING

In general, the main concern raised by exclusive dealing is that it may suppress competition by foreclosing competitors[66] or prospective entrants.[67] Significant foreclosure means that the deals in question are sufficiently far reaching to cut rivals off from a sizeable portion of potential trading opportunities. It is not necessary for rivals to be "totally" foreclosed from the market in order for

[63] A user "singlehomes" if she uses a single platform. She "multihomes" if she uses multiple platforms interchangeably or simultaneously.

[64] They also have faster processors and more hard drive space than the Switch.

[65] *See supra* notes 11-17 and accompanying text.

[66] *See, e.g.,* United States v. Dentsply International, Inc., 399 F.3d 181, 191 (3d Cir. 2005), cert. denied, 546 U.S. 1089 (2006). On the economics of exclusive dealing, *see, e.g.,* B. Douglas Bernheim & Michael D. Whinston, *Exclusive Dealing*, 106 J. POL. ECON. 64 (1998).

[67] *See, e.g.*, Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc., 386 F.3d 485, 508 (2d Cir. 2004); U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 595 (1st Cir. 1993).

exclusive dealing to harm competition.[68] Partial foreclosure may impair rivals' ability to compete by relegating them to less desirable trading partners. As such, in many cases courts require only about 40% foreclosure to find a violation, and often less if the defendant is dominant.[69]

As with other vertical restraints, exclusive dealing is not always anticompetitive and is therefore evaluated under the rule of reason.[70] In many situations it is procompetitive.[71] Among other things, exclusive dealing can reduce uncertainty; improve incentives to market products efficiently; and enhance coordination between trading partners.

What about exclusive dealing in platform markets?[72] Over the last two decades, exclusivity contracts in two-sided markets have been studied extensively in economics, management, and adjacent disciplines.[73] This literature has important implications for antitrust policy, but they have not yet been brought to bear in antitrust practice. Platform exclusive dealing may raise the same pro- or

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[68] *See Dentsply Int'l, Inc.,* 399 F.3d at 191 ("The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit.").

[69] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001) (finding that "exclusive contracts, in certain circumstances, may give rise to a § 2 [Sherman Act] violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 [Sherman Act] violation").

[70] *See, e.g.,* ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 271 (3d Cir. 2012) ("Due to the potentially procompetitive benefits of exclusive dealing agreements, their legality is judged under the rule of reason.")

[71] *Id.*

[72] In principle, a platform could enter into exclusive deals with users on both sides. But in practice it is usually limited to one side. One reason for this is that platforms rarely seek exclusivity commitments from end consumers, perhaps because they would be too costly to enforce.

[73] *See e.g.,* Mark Armstrong & Julian Wright, *Two-Sided Markets, Competitive Bottlenecks and Exclusive Contracts*, 32 ECON. THEORY 353 (2007); Kenneth S. Corts & Mara Lederman, S*oftware Exclusivity and the Scope of Indirect Network Effects in the U.S. Home Video Game Market*, 27 INT'L J. INDUS. ORG. 121 (2009); Doganoglu & Wright, *supra* note 9 at 145; Ravindra Mantena et al., *Platform-Based Information Goods: The Economics of Exclusivity*, 50 DECISION SUPPORT SYS. 79 (2010); James E. Prieger & Wei-Min Hu, *Applications Barrier to Entry and Exclusive Vertical Contracts in Platform Markets*, 50 ECON. INQUIRY 435 (2012); Robin S. Lee, *Vertical Integration and Exclusivity in Platform and Two-Sided Markets*, 103 AM. ECON. REV. 2960 (2013); Upender Subramanian et al., *Exclusive Handset Arrangements in the Wireless Industry: A Competitive Analysis*, 32 MKTG. SCI. 191 (2013); Haeyop Song et al., *Platform Competition in the Video Game Console Industry: Impacts of Software Quality and Exclusivity on Market Share*, 30 J. MEDIA ECON. 99 (2017); Cristian Chica et al., *Exclusive Dealing and Entry by Competing Two-Sided Platforms* (Harv. Bus. Sch., Working Paper No. 21-092, 2021).

anticompetitive effects that arise in ordinary one-sided markets. But there are additional relevant considerations that relate to the novelties of platform markets.

A. Potential Procompetitive Effects

In a platform market, exclusive dealing may play a particularly important procompetitive role, at least for entrants or small incumbents. Specifically, it may be necessary to facilitate competitive entry or to keep a small incumbent operational. The reason is that it can help a small platform to solve its chicken-and-egg problem—its need to gain a critical mass of users on both sides of the market.[74] For example, if Lyft is trying to break into a city currently dominated by Uber, it could pay a cohort of drivers to drive exclusively for Lyft for a month or two.[75] That way, when consumers check the Lyft app, they are more likely to find available drivers. This will lead more riders to start using Lyft, which will in turn persuade drivers to start using Lyft voluntarily. Lyft could then eliminate exclusives and its platform would remain operational.

Exclusive dealing may also be an essential means by which a new platform can differentiate itself from an incumbent.[76] For example, a well-known article by Robin Lee shows that exclusive content helped to stimulate entry in the market for video game consoles.[77] In the "sixth generation" of video game consoles (circa 2000-2005), the market leader was the Sony PlayStation 2 (PS2),[78] which had sold 5 million consoles and offered more than a thousand video games.[79] There were two smaller competitors, the Microsoft Xbox (Microsoft's first game console) and the Nintendo GameCube. All three firms had some exclusive rights over certain games. Lee provides empirical evidence that, if none of the consoles had any exclusive content, this would have substantially boosted the

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[74] *See, e.g.,* Evans, *supra* note 37, at 372; Ravindra Mantena et al., *Platform-Based Information Goods: The Economic of Exclusivity*, 50 DECISION SUPPORT SYS. 79, 89 (2010).

[75] Of course, to persuade the drivers to accept this, Lyft would have to compensate them for the lost revenues they would incur by not giving rides over Uber.

[76] *See, e.g.,* Song et al., *supra* note 73, at 102 ("[E]xclusivity creates a competitive advantage through product differentiation.").

[77] *See* Lee, *supra* note 73, at 2962 ("[P]rohibiting exclusive arrangements would have benefited the incumbent and harmed the smaller entrant platforms")*; see also, e.g.*, David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses* 30 (Coase-Sandor Inst. L. & Econ., Working Paper No. 623, 2012).

[78] Lee, *supra* note 73, at 2966.

[79] *Id.*

PS2's sales and profits, while substantially reducing those of the Xbox and GameCube.[80] In other words, exclusive content helped the smaller consoles to enter the market and compete effectively with the larger incumbent. This is because, absent exclusive content, "neither entrant would have been able to significantly differentiate [itself] from the incumbent."[81]

Of course, exclusive dealing is not the only way that platforms can differentiate themselves. For example, to borrow Mark Zuckerberg's terminology, a new platform may be able to adopt a "different mechanic" than the incumbent.[82] This is the major source of differentiation in the social media context. Facebook, Instagram, Twitter, and TikTok clearly differ from one another in ways that have nothing to do with the makeup or size of their user bases.

However, this type of differentiation is not always a viable option. For many platforms, the value they provide to users is largely limited to indirect network effects—that is, the value of connecting with users on the other side. For example, suppose a firm wants to start a new restaurant delivery platform to compete with incumbents like Postmates and Door Dash. It is not clear how it could differentiate itself by developing a "new mechanic." All platforms in this market perform the same core functions; they take restaurant orders and arrange delivery. But a new platform could differentiate itself by persuading some popular restaurants to be exclusive to its own platform.

One might argue that, while it may indeed be procompetitive for a platform entrant to make certain complements exclusive, this is likely to be true only if the entrant developed those complements itself. For example, on this view, it is reasonable for Nintendo to maintain exclusive rights over games it developed internally (e.g. Mario Brothers),[83] but it is undesirable for Nintendo to acquire exclusive rights over games developed by other firms.

At first blush, this argument makes some sense. When a platform develops its own complement, this is competitive entry in the complement market. Even if the complement is kept exclusive to its creator's platform, consumers are left with more choices than they had before. But when a platform merely acquires exclusive rights over another firm's complement, it does not create anything

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[80] *Id.* at 2992-93.
[81] *Id.* at 2962.
[82] *See supra* notes 11-14 and accompanying text.
[83] Technically, this is not "exclusive dealing," since Nintendo already possesses exclusive rights over its own games by default. It is rather a "refusal to deal," i.e. a refusal to share the rights with other firms.

new. It just restricts access to a product that would otherwise have been available over multiple platforms.

The problem with this argument is that it implicitly assumes that it is feasible for a new platform to create enough new complements to gain a foothold in the platform market. But one can hardly assume this, as it effectively asks the firm to enter two markets at once. This is unrealistic and misguided. Such a requirement would tend to restrain entry and diminish competition. Courts have acknowledged this threat when evaluating practices (such as tying arrangements) that may harm competition by requiring new firms to enter two markets at once. This came up in the *Microsoft* case, for example.[84]

B. Potential Anticompetitive Harms

The previous section indicates that exclusive dealing by small platforms may play a particularly important procompetitive role by helping to mitigate the challenges created by network effects. The flipside of this is that the potential anticompetitive potential of exclusive dealing by dominant firms may be greater in the presence of strong network effects.[85] Network industries are already prone to tipping in favor of the firm with the largest network of users. As noted earlier, this means smaller rivals are at a disadvantage even if their products are technologically superior. Exclusive dealing exacerbates this problem by making it even harder for rivals to grow their own networks. This can prevent a potential entrant from solving its chicken-and-egg problem.[86]

The most obvious reason for this is that exclusive dealing eliminates multihoming, which ordinarily helps to facilitate competition, as noted above. For example, in the late 1980s, Atari (a video game console maker) accused Nintendo of entering into unlawful exclusive deals with game developers.[87] Nintendo had the ability to block unauthorized games from running on its console, and it would provide the necessary authorization only to developers who

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[84] United States v. Microsoft Corp., 253 F.3d 34, 87 (D.C. Cir. 2001) (noting that Microsoft's conduct could restrain competition by forcing rivals to enter two markets at once).

[85] *See, e.g.,* Carl Shapiro, *Exclusivity in Network* Industries, 7 GEO MASON L. REV. 673 (1999).

[86] *See, e.g.,* David S. Evans, *Vertical Restraints in a Digital World* (unpublished manuscript, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551597 [https://perma.cc/9CXU-VNJV].

[87] Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832, 845 (Fed. Cir. 1992).

agreed to make their games exclusive to Nintendo for two years.[88] This was likely hard for game developers to turn down, because Nintendo was the leading console at the time. As a result of this scheme, most new games could be played only on a Nintendo. This could easily have made it much harder for rivals like Atari and Sega to compete effectively.[89]

Importantly, however, exclusive dealing is not always viable strategy for impeding competitive entry. There is evidence that exclusive dealing by an incumbent is subject to diminishing returns in terms of the strategic value it confers to the platform.[90] This is in part because the impact of exclusive dealing depends not only on how many complementors are exclusive, but also on *which ones*. Many studies show that "superstar" complementors play a disproportionately large role in attracting consumers to a platform.[91] For example, the competitive significance of making a video game exclusive to a given platform depends on how popular the game is. Exclusive dealing with a less important complementors may provide a negligible competitive advantage; and there may be too many such firms to attempt exclusive dealing with all of them.

Additionally, persuading sellers to be exclusive is generally expensive, particularly if multihoming is easy and desirable by default.[92] It requires the platform to compensate the seller for all the foregone revenues it would have earned if it could make additional sales over other platforms. These costs could make exclusive dealing an uneconomical means of excluding rivals.

III. RESTRAINTS ON PLATFORM DIFFERENTIATION

Exclusive dealing is not the only way a dominant firm can restrain competitive entry. Another possibility is that the dominant firm may use MFNs that prevent smaller rivals from effectively differentiating themselves. In a market with strong network effects, this may act as a significant barrier to entry.

These MFNs will also tend to be easier for a dominant firm to implement than exclusive dealing. They typically require

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[88] *Id.*

[89] For further discussion of this case, *see, e.g.,* Shapiro, *supra* note 95.

[90] *See, e.g.*, James E. Prieger & Wei-Min Hu, *Applications Barrier to Entry and Exclusive Vertical Contracts in Platform Markets*, 50 ECON. INQUIRY 435, 436 (2010).

[91] *See* Rietveld & Schilling, *supra* note 49.

[92] *See, e.g.,* Ravindra Mantena et al., *Platform-Based Information Goods: The Economics of Exclusivity*, 50 DECISION SUPPORT SYS. 79, 89-90 (2010) ("[Exclusivity] comes at a significant sacrifice of revenues.").

complementors not to make any goods or services exclusive to any competing platforms. From the complementor's perspective, this is a smaller sacrifice than agreeing to stop dealing with other platforms altogether. This means the dominant firm will not have to compensate them as much as it would in an exclusive dealing scheme. For these reasons, in markets with strong network effects, MFNs that restrain differentiation may be the more strategically advantageous means of excluding entrants.

Unfortunately, it is not possible to say how prevalent these MFNs are in practice. This is because, unlike some other common restraints, it is not usually possible to detect that a nonprice MFN is in place without direct evidence. For example, if a popular game is exclusive to one video game console, we can probably infer that there is an exclusive deal in place. But if a popular game is on both consoles, we cannot conclude that this is attributable to an MFN.[93] In addition, firms who utilize such MFNs are likely to keep them confidential. Accordingly, it is likely that most nonprice MFNs will not come to light unless they become the subject of a legal challenge, as with the examples considered below.

This section begins with several detailed examples from recent and ongoing cases and government investigations. It then considers the relevant antitrust issues: competitive effects, potential defenses, and less restrictive alternatives. It concludes by contrasting these MFNs with more traditional price-based MFNs.

A. Examples

1. Amazon

In 2011, the European Union's competition law authority, the European Commission, began to investigate potential anticompetitive conduct surrounding the distribution of eBooks.[94] About 80% of all eBooks are sold by five major book publishers known as the "Big Five."[95] The investigation was initially focused

[93] Such an inference would require evidence that the game likely would have been exclusive to one console absent an MFN. But it is hard to imagine many situations in which one would have such evidence.

[94] European Commission Competition Directorate General, Commission Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement, at 8 (April 5, 2017) [hereinafter DG Comp.].

[95] They are Hachette Book Group; HarperCollines Publishers; Macmillan Publishing; Penguin Random House; and Simon & Schuster. *See id.*

on collusion among the Big Five and Apple, which was the subject of the well-known *Apple eBooks* case in the United States.[96]

The Commission's attention subsequently shifted to Amazon—in particular, its potentially anticompetitive MFN agreements with eBook publishers, including the Big Five.[97] These agreements are also the subject of numerous recent private antitrust complaints in the United States.[98] Some of the agreements are familiar price-based MFNs, such as one that prohibits publishers from letting their eBooks sell for lower prices on competing eBook retailers.[99] But my focus will be on a number of nonprice MFNs that restrain publishers' dealings with Amazon's rivals in a wide range of different ways.

The first is a so-called "business model parity" clause. This provision says that if a publisher works with a rival eBook retailer to implement a new business model for eBook distribution, then the publisher must offer Amazon the right to implement the same distribution model on the same terms.[100] In other words, it prohibits publishers from entering into any exclusive agreements with rivals designed to accommodate a new business model for eBook distribution. The European Commission found that this prevented competitors from attempting to introduce certain new types of distribution models, writing that

> [T]he Business Model Parity Clause prevented the emergence and/or development of alternative models with competitors, including: (i) print and e-book bundles; (ii) pay-as-you read and book club models (where readers do not necessarily have to acquire the ebook for an unlimited period of time, but are rather given a license to access only parts thereof); (iii) subscription models; and (iv) applications for smartphones giving access to ebooks versions of classics.[101]

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[96] United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015) [hereinafter *Apple eBooks*] (upholding per se liability for Apple's role in helping to effectuate a conspiracy among the Big Five). For discussion of this case, see, e.g., John B. Kirkwood, *Collusion to Control a Powerful Customer,* 69 U. MIAMI L. REV. 1 (2014).

[97] DG Comp., *supra* note 94, at 9-12.

[98] These complaints have recently been consolidated. *See* Consolidated Amended Class Action Complaint, In re Amazon.com, Inc., eBook Antitrust Litigation No. 1:21-cv-351-GHW-DCF (S.D.N.Y. filed Jun. 2, 2021) [hereinafter Class Action Complaint].

[99] DG Comp., *supra* note 94, at 10-11.

[100] *Id.* at 9.

[101] *Id.* at 23.

The clause does not affirmatively prohibit anyone from introducing a new business model. It only prevents competitors from being able to do so *exclusively*. Nevertheless, the Commission found that this largely eliminated rivals' primary impetus for attempting to introduce a new business model, which is "to differentiate themselves."[102] This point is echoed in the American complaints against Amazon.[103] This allegedly acted to restrain entry by eBook retail platforms. As one American plaintiff put it:

> [E]ffective entry into or expansion in the eBook market would require [a]lternative [p]latforms to be able to differentiate their products or services, including by offering . . . innovative distribution methods or innovative products. Amazon's MFNs and similar provisions make such competition impossible.[104]

Another key MFN is called a "selection parity clause." It is in fact a bundle of three distinct nonprice MFNs.[105] The first is a "catalogue parity clause," which means that any eBook available on a competing eBook platform must also be available on Amazon.[106] Thus, rivals are unable to garner exclusive titles from any publisher that deals with Amazon. It is worth noting, however, that Amazon has a huge number of exclusive titles on its own eBook store.[107]

The second is an "availability date parity clause," which stipulates that no competing eBook platforms can get earlier access than Amazon to any eBooks.[108] This means that rivals cannot even get "timed exclusives" (i.e. temporary exclusives).

Finally, the selection parity agreement includes a "features parity clause."[109] This requires that the publisher "make available to Amazon any feature, functionality, usage rule, element or content for one or more e-books as a result of the [publisher] making [that feature] available" to competing eBook platforms.[110] This is similar to the business model parity clause in that it restrains competing

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[102] *Id.* at 24.
[103] *See, e.g.*, Class Action Complaint, *supra* note 98, at ¶4, Silverman v. Amazon.com, Inc., No. 1:21-cv-01256 (S.D.N.Y. filed Feb. 11, 2021) (the MFNs "give Amazon the right to copy any [new business model], which once again blocks the possibility of the [a]lternative [p]latforms differentiating themselves.").
[104] *Id.* at ¶46
[105] DG Comp., *supra* note 94, at 27.
[106] *See* Class Action Complaint, *supra* note 98, at ¶110.
[107] At the time of writing, it boasts "over 1 million digital titles you won't find anywhere else." See https://www.amazon.com/Kindle-Exclusives-eBooks/b?ie=UTF8&node=1268190011
[108] *Id.* at ¶111.
[109] *Id.* at ¶112.
[110] DG Comp., *supra* note 94, at ¶27.

platforms' ability to differentiate themselves through innovative new offerings. This provision is particularly onerous in the case of features that are hard to implement on Amazon's Kindle reader, which is designed mainly for text rather than visuals. As the Commission explained:

> For enhanced or highly illustrated ebooks containing features . . . not supported by Amazon's e-book readers, the [publisher] is obliged to produce . . . a version of such titles with equivalent features that are compatible with Amazon's e-book readers.[111]

Amazon thus demands not only the right to copy any innovations its rivals develop with publishers, but also to have a special version created (at the publisher's expense) to run on its own devices. The costs of accommodating this demand could easily discourage publishers from working with competing platforms to develop innovative new eBook functionalities.

In late 2016, the European Commission notified Amazon of its Preliminary Assessment that Amazon's MFNs were likely anticompetitive and unlawful.[112] In 2017, Amazon agreed to stop enforcing its MFNs in Europe for five years.[113] However, the recent American complaints allege that Amazon still actively enforces the MFNs in the United States.[114]

2. The National Association of Realtors

A multiple listing service (MLS) is a database of residential real estate listings within a given geographic area. It is a platform that helps to facilitate trade in the real estate market. Most MLSs are controlled by members of the National Association of Realtors (NAR).[115] The NAR is a powerful trade association whose membership comprises the large majority of residential real estate agents and brokers.[116] Agents who wish to use an NAR-affiliated

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[111] *Id.* at 27-28.

[112] *Id.* at 5. Amazon's MFNs were also briefly discussed in a 2020 Congressional report on competition in digital markets, which concluded that they were likely anticompetitive. SUBCOMM. ON ANTITRUST, COM., AND ADMIN. L. OF THE COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 248-49 (2020).

[113] See DG Comp., *supra* note 94, at 39-46 (describing the commitments made by Amazon to the European Commission).

[114] *See, e.g.,* Class Action Complaint, *supra* note 98, at 25, Cook v. Amazon.com, Inc., No. 1:21-cv-01369 (S.D.N.Y. filed Feb. 17, 2021).

[115] PLS.com, LLC v. National Association of Realtors, 32 F.4th 824, 829 (9th Cir. 2022) (*PLS II*).

[116] *Id.*

MLS must pay for NAR membership, which also requires that they abide by NAR's various policies.[117] Thus, through its policymaking, the NAR can restrict access to MLSs. This gives it substantial power over the real estate market, as "it [is] nearly impossible for any agent to earn a living without access to the MLS."[118]

Home sellers usually wish to circulate their listings as widely as possible to reach more potential buyers. Thus, most homes for sale are listed on NAR-affiliated MLSs.[119] However, for various reasons, sellers sometimes prefer not to circulate their listings over an MLS. Such off-MLS listings are known as "pocket listings."[120] For example, due to concerns about privacy or security, they may prefer not to provide all the detailed information that an MLS requires.[121] Or they wish to test the market discretely so as to avoid any stigma if they end up deciding to delist the property.[122]

As discussed below, some new companies have attempted to challenge the MLS system by offering alternative listing platforms. The NAR responded by promulgating a rule called the "Clear Cooperation Policy," which provides that "[w]ithin one (1) business day of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants."[123] In other words, if a real estate agent posts a home listing on any non-MLS platform, she must also post it on an MLS.[124] This is analogous to the seller of the leading video game console telling game developers that they cannot make any of their games exclusive to other consoles, or else they will be barred from putting any games on the leader's console.

One of the alternative platforms that attempted to enter the market was PLS.com.[125] It differed from the MLS system in a few respects. It allowed agents to withhold information that their clients were uncomfortable sharing.[126] It accepted listings from any agent, whether or not they were NAR members.[127] And it charged lower

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[117] Top Agent Network, Inc. v. Nat'l Ass'n of Realtors, 554 F. Supp. 3d 1023, 1027 (N.D. Cal. 2021).
[118] *Id.* at 1028.
[119] *Id.* at 1027.
[120] *PLS II*, 32 F.4th at 830.
[121] PLS.com v. Nat'l Ass'n of Realtors, 516 F. Supp. 3d 1047, 1059 (C.D. Cal. 2021) (*PLS I*)
[122] *Id.* at n.63.
[123] *PLS II*, 32 F.4th at 830.
[124] Agents who do not comply with the policy will be fined and may lose access to the MLS. *Id.*
[125] *Id.* at 829.
[126] *Id.* at 830.
[127] *Id.*

fees than NAR-affiliated MLSs.[128] According to PLS, it initially grew rapidly, as there was widespread demand for an alternative to the MLS system.[129] But after the NAR implemented its Clear Cooperation Policy, many agents withdrew their listings from PLS and circulated them on the NAR's MLSs instead.[130] PLS alleges that this prevented it from reaching the critical mass of users it needed to become a viable challenger to the MLS system.[131]

The core purpose of PLS was to provide a viable alternative platform for certain listings that would preferably not be listed on an MLS (e.g. in order to protect the client's privacy). But the Clear Cooperation Policy makes this untenable, since an agent who attempts to limit certain listings to a non-MLS platform will be barred from placing *any* listings on an MLS. And that is too big a price to pay for most agents, given that the MLS is the preferred platform for most (but not all) listings. This makes it much harder to launch a new platform that is differentiated from the MLS. And without such differentiation, competitive entry will be extremely difficult, given the sheer size of the NAR's network.

PLS brought an antitrust claim against the NAR soon after it instituted its Clear Cooperation Policy.[132] The district court dismissed the complaint,[133] but that decision was recently reversed by the Ninth Circuit on appeal.[134] A later section discusses a separate case brought against the NAR by a different entrant.[135]

3. TV Programming Distributors

Most TV programming is delivered to consumers by traditional "multichannel video programming distributors" (MVPDs). These include cable companies like Comcast, as well as satellite TV services like AT&T (which owns DirecTV). MVPDs negotiate licensing deals with programmers (content creators) like

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[128] *Id.*
[129] *Id.*
[130] *Id.* at 830-31.
[131] *Id.*
[132] This is not a traditional vertical restraint case because the NAR is not an individual actor, but rather an association of competing realtors. As such, the NAR's decision to implement the Clear Cooperation Policy can be challenged as a collusive agreement—specifically, a concerted refusal to deal (also known as a group boycott). *See id.* at 834-37. This means that the NAR's conduct will be easier to challenge than a purely vertical agreement, but it does not change the fact that the relevant injury involves forestalling entry by impairing rivals' ability to introduce differentiated services.
[133] *PLS I*, 516 F. Supp. 3d at 1059.
[134] *PLS II*, 32 F.4th at 830.
[135] *See infra* notes 148-171 and accompanying text.

CNN, Comedy Central, or ESPN for the rights to carry their programming. These deals specify what license fees the programmer will receive and how the parties will split advertising revenues, among other things.

MFNs are widespread in dealings between MVPDs and programmers.[136] The most concerning such agreements are so-called "unconditional" MFNs.[137] An unconditional MFN allows the MVPD to "cherry pick" terms from a programmer's dealings with third parties: to take any benefits offered to other distributors without having to assume whatever extra obligations or limitations were attached to those benefits.[138] These MFNs apply to both price and nonprice terms.[139]

Unconditional MFNs penalize programmers severely for attempting to enter into differentiated agreements with alternative distributors. For example, suppose distributor A is a new distribution platform—say, an online distributor like Sling TV or YouTube TV. It seeks to offer consumers a "skinny bundle," which is a narrower lineup of channels at a lower monthly price. A programmer agrees to sell a single channel of programming to distributor A for $.25 per subscriber. Separately, it agrees to license several channels of programming to distributor B, which is a traditional MVPD that offers conventional "fat" bundles, for a total fee of $.50 per subscriber.

If distributor B has an unconditional MFN with the programmer, then it can claim the lower price given that distributor A paid for a single channel while continuing to take several channels of programming for itself.[140] This would deter the programmer from agreeing to give a narrower content package to distributor A. Programmers allege that examples like this have resulted in "the

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[136] *See, e.g.,* Erik Hovenkamp & Neel U. Sukhatme, *Vertical Mergers and the MFN Thicket in Television,* 2 ANTITRUST CHRONICLE 21 (2018).

[137] *See* Promoting the Availability of Diverse and Independent Sources of Video Programming, 81 Fed. Reg. 73368-75 (proposed Oct. 25, 2016) (hereinafter *FCC Proposed Rulemaking*) at 7-9.

[138] *See id.* at 11 (defining an unconditional MFN as one that "entitles an MVPD to contractual rights or benefits that [a programmer] has offered or granted to another [distributor] . . . without obliging the MVPD to accept any terms and conditions that are integrally related, logically linked, or directly tied to the grant of such rights or benefits in the other [distributor's] agreement.")

[139] *See id.* at 73371, n. 25.

[140] By contrast, under a traditional ("conditional") MFN, distributor B could only claim the lower price offered to distributor A if it also agreed to limit itself to the same single channel of programming that was licensed to distributor A.

standardization of carriage terms"—in other words, the absence of differentiated offerings.[141]

In 2016, the FCC promulgated a proposed rulemaking that would prohibit unconditional MFNs for MVPDs in their carriage contracts for video programming.[142] This highlighted many comments submitted by programmers (mainly smaller, independent programmers) on the potential anticompetitive effects of these MFNs.[143] However, the administration changed a few months later, and the proposal was evidently abandoned.

Even if the FCC declines to take regulatory action, these MFNs could be challenged under antitrust law. On their face, the allegations suggest that unconditional MFNs are anticompetitive. Many programmers asserted that these deals prevented them from entering into novel or innovative arrangements with other distributors, thus restraining entry and innovation by alternative distribution platforms.[144] One major concern was that the MFNs discouraged programmers from dealing with online distribution platforms, hamstringing the emergence of a potentially disruptive new technology.[145]

B. Assessing Competitive Effects

How should courts evaluate the sort of nonprice MFNs discussed in the previous section? A relatively novel feature of these MFNs is that they are "restraints on restraints"—that is, they restrain the ability of smaller rivals to implement their own vertical restraints. As a result, one cannot properly assess the competitive impact of the defendant's MFN without carefully evaluating the potential procompetitive role of exclusive dealing by entrants and small incumbents. Indeed, the relevant theory of harm hinges on the elimination of those procompetitive effects.

To this end, this section begins by discussing how courts should—and should not—evaluate rivals' exclusive dealing as a part

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[141] *FCC Proposed Rulemaking*, *supra* note 137, at 7.

[142] *Id.* at 3-7.

[143] The most restrictive MFNs tend to be imposed on smaller programmers, because they lack the bargaining power to demand more favorable terms. *See* Hovenkamp & Sukhatme, *supra* note 136, at 5.

[144] *FCC Proposed Rulemaking*, *supra* note 137, at 7 (the MFNs "impede the development of new and diverse platforms, technologies, service offerings, and business models.")

[145] According to the FCC, unconditional MFNs "reduce a programmer's economic incentive to grant certain rights to an online distributor because doing so would obligate it to offer such rights to an MVPD with MFN status for no incremental consideration." *Id.* at 12.

of its broader analysis. It then discusses other relevant factors to consider when evaluating the defendant's MFN agreements. Throughout this section I assume that the plaintiff is one of the entrants or smaller incumbents who has allegedly been excluded by the challenged MFN. Also, I will initially assume that the defendant is dominant and that the plaintiff lacks market power.[146] This section concludes by considering how things change when these market power assumptions are not satisfied.[147]

1. Evaluating the Role of Exclusive Dealing

Courts are accustomed to evaluating exclusive dealing as a potential antitrust violation. As such, there is a risk that courts will view the plaintiff's complaint with great skepticism based on unfounded assumptions. In particular, a court may cavalierly assume that the plaintiff's exclusive dealing was itself anticompetitive, leading it to dismiss the complaint prematurely.

This is what happened in *Top Agent Network v. National Association of Realtors*.[148] This was separate from PLS's case against the NAR (discussed above[149]), although the two cases are factually quite similar. The plaintiff, Top Agent Network (TAN), was a small listing platform attempting to break into the market and compete with the MLS.[150] Its complaint similarly focused on the NAR's Clear Cooperation Policy. TAN positioned itself as an "elite" listing platform limited to agents in the top ten percent of all agents by sales volume.[151] And, similar to PLS, it offered more discretion and privacy than MLSs do.[152] TAN's member agents would place certain listings exclusively on TAN's network in cases where it was preferrable to avoid the more public MLSs.[153]

The district court held that TAN's business model was itself anticompetitive, because it leads member agents to make some listings exclusive to TAN's platform.[154] The court reached this

[146] *See, e.g.,* Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 129 (2d Cir. 1981) (involving a small goods transport service operating in New York and New Jersey challenging UPS's alleged monopolization of package pickups and deliveries in the New York garment district).

[147] *See infra* Section III.B.3.

[148] Top Agent Network, Inc. v. Nat'l Ass'n of Realtors, 554 F. Supp. 3d 1019 (N.D. Cal. 2021).

[149] *See supra* Section III.A.2.

[150] *National Association of Realtors*, 554 F. Supp. 3d at 1027-30.

[151] *Id.* at 1027.

[152] *Id.* at 1027-28.

[153] *Id.* at 1028.

[154] *Id.* at 1032 ("TAN's business model is itsellf anticompetitive in a way that [the NAR's] [p]olicy would tend to remedy.").

conclusion despite not evaluating TAN's business plan (or the relevant market) in any significant detail.[155]

The court's conclusion on this point runs counter to both antitrust case law and antitrust economics. This is clear when one considers how judges evaluate defendants' conduct in cases centering on exclusive dealing (as opposed to MFNs). First, courts require evidence that the exclusive dealer has market power.[156] Without market power, a firm lacks the leverage needed to exclude competitors. Given that TAN is a small entrant whose membership was miniscule in comparison to the NAR's,[157] it seems clear that it did not have market power. This was a dead giveaway that TAN's business plan was surely not anticompetitive. Tiny entrants cannot exclude giant incumbents.

Second, as noted earlier, courts will not consider exclusive dealing to be anticompetitive unless it is sufficiently broad in scope.[158] There was no suggestion that TAN sought to engage in exclusive dealing on such a large scale. Indeed, its small size would tend to make that impossible.

Third, the case law is very clear that exclusive dealing is not categorically anticompetitive.[159] Indeed, if courts believed that, it would be illegal per se, not a rule-of-reason offense. Courts routinely acknowledge the potential procompetitive justifications for exclusive dealing.[160] In the present case, the likely procompetitive justifications are obvious: TAN's business model facilitates competitive entry by allowing it to offer the market something different from the MLS. And as argued above, exclusive dealing is often necessary for a platform to differentiate itself.[161]

It is likely that the court did not consider these points because this is not a traditional exclusive dealing case; it is not the defendant who was engaging in exclusive dealing. The court may

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[155] In an exclusive dealing case, a court will ordinarily undertake a detailed inquiry into the relevant market and the defendant's conduct before reaching a decision.

[156] *See, e.g.,* United States v. Dentsply Int'l., Inc. 399 F.3d 181, 186 (3d Cir. 2005).

[157] At its peak, TAN had 10,000 members, in comparison to the NAR's 1,400,000 members. *Nat'l Ass'n of Realtors*, 554 F. Supp. 3d at 1027.

[158] *See supra* notes 155-57 and accompanying text.

[159] *See, e. g.,* E. Food Servs., Inc. v. Pontifical Cath. Univ. Serv. Ass'n, 357 F.3d 1, 8 (1st Cir. 2004) ("Rather, it is widely recognized that in many circumstances circumstances [exclusive dealing contracts] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all.")

[160] *Id.*

[161] *See supra* Section II.A.

thus have deemed it unnecessary to evaluate the plaintiff's conduct carefully. But this was a serious error. It guaranteed that the court would overlook the relevant theory of harm, which is that the defendant's MFN is anticompetitive precisely because the plaintiff's business plan would have stimulated competition.

A naïve analysis of the plaintiff's exclusive dealing will likely lead the case to resolve in one of two ways, both of which are problematic. First, the court might decide that the plaintiff-rival is not entitled to sue even if the defendant's MFN is anticompetitive, because the plaintiff has not suffered an "antitrust injury."[162] The antitrust injury doctrine says that a private plaintiff can sue only if its asserted injury is the kind antitrust seeks to prevent—one that stems from the anticompetitive effects of the defendant's conduct.[163] This is what the district court did in *Top Agent Network*. In dismissing the complaint with prejudice, the court wrote that:

> It may well be that NAR's policy has anticompetitive effects. But it is not anticompetitive to the extent that it prevents members of an exclusive listing service like TAN from concealing listings from NAR's subscribers... Indeed, it is TAN's business model that would, if it succeeded, have anticompetitive effects on the real estate market. Thus, although the policy presumably causes real estate agents to be less interested in using TAN's service and becoming TAN members, this is not the type of harm that the antitrust laws are designed to prevent.[164]

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[162] I am assuming here that the plaintiff is one of the smaller rivals that was allegedly excluded by the defendant's conduct.

[163] As the Supreme Court put it:

> Actionable "antitrust injury" is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Injury, although causally related to an antitrust violation, will not qualify unless it is attributable to an anticompetitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition.

Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 328 (1990). The doctrine's purpose is to ensure "that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust law in the first place." *Id*. at 342. For example, suppose firm A seeks to acquire firm B and that it plans to fire the latter's CEO ex post. The CEO might try to block the merger by arguing that it would reduce competition. Even if that's true, however, the CEO's injury (his termination) has nothing to do with the competitive effects of the merger. Hence, there it is not an antitrust injury. *See, e.g.,* Anago v. Tecnol Medical Products, 976 F.2d 248 (5th Cir.1992).

[164] Top Agent Network, Inc. v. Nat'l Ass'n of Realtors, 554 F. Supp. 3d 1023, 1026 (N.D. Cal. 2021).

Courts have made similar arguments in other recent cases.[165] One aspect this argument is correct. If indeed a plaintiff were merely upset that the defendant prevented him from engaging in anticompetitive conduct, then his injury would not be the type antitrust seeks to remedy.[166] The problem is that this argument does not apply here, because its core premise—that the TAN sought to engage in anticompetitive conduct—is false.

Alternatively, a court might draw a stronger conclusion: it might decide that the defendant's MFN is necessarily procompetitive.[167] For example, in PLS's suit against the NAR (discussed in the previous section), the district court's dismissal of the complaint was based in part on this erroneous determination.[168] The court suggested that the NAR's Clear Cooperation Policy could not be anticompetitive because, by forcing more listings onto the MLS, it would increase the information available to the MLS's users. And, in the court's view, that rules out anticompetitive harm.[169] As in the *PLS* case, this argument ignores key procompetitive justifications that may make exclusive dealing necessary for competitive entry.

In sum, courts must not blithely assume that the plaintiff's exclusive dealing would be anticompetitive. Rather, they must seriously consider whether it serves an important procompetitive function. To do this, the court should consider what it would likely conclude if there were no MFN and the plaintiff-rival's exclusive dealing were itself the subject of an antitrust challenge. In that case,

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[165] *See, e.g.,* Pulse Network L.L.C. v. Visa, Inc., 30 F4th 480, 490 (5th Cir. 2022) ("Pulse counters that its loss of exclusive-dealing arrangements can constitute antitrust injury because exclusive dealing may be the only way for non-dominant firms, such as Pulse, to compete. We disagree. Pulse cites multiple cases to support its "loss-of-exclusivity" theory of injury. But those cases teach only the well-established proposition that exclusive-dealing arrangements are not per se antitrust violations. Whether exclusive-dealing arrangements are legal is a question separate from whether conduct that limits exclusivity, like Visa's here, causes antitrust injury. In this case, the answer is no.")

[166] *Nat'l Association of Realtors*, 554 F. Supp. 3d at 1035 (there is no antitrust injury if the plaintiff complains "that a competitor's practice is preventing it from reaping the benefits of anticompetitive activity").

[167] This is a stronger conclusion because it would suggest that nobody—not even the government—could successfully challenge the MFN. By contrast, if the plaintiff loses for lack of antitrust injury, this does not rule out the possibility that the MFN is anticompetitive. The government could still challenge it, since the antitrust injury requirement applies only to private plaintiffs.

[168] PLS.com v. National Association of Realtors, 516 F. Supp. 3d 1047, 1063-64 (C.D. Cal. 2021).

[169] *Id.* ("Basic economics dictates that increased information about market conditions stimulates more competition.")

the court would be compelled to consider potential rationales for the exclusive dealing, such as facilitating entry in a network industry.

The plaintiff-rival's size in comparison to the defendant can also be relevant circumstantial evidence. If the plaintiff is small and lacks market power, this suggests that its exclusive dealing likely served a procompetitive function. Firms without market power are incapable of engaging in anticompetitive exclusion. And if a restraint is not designed to serve an anticompetitive purpose, then presumably it is intended to help the firm compete on the merits, suggesting it is procompetitive.

The specific content of the exclusive deals may also provide helpful insights. If they are narrow in scope or duration, then ostensibly they cannot generate significant foreclosure.[170] For example, if a video game console enters into exclusive deals with three games and there are 10K games in the market, then there will not be significant foreclosure. And if the exclusives last for only a short time, they similarly do not pose an appreciable threat to competition.[171] Here too, the restraint's inability to harm competition suggests it likely serves a procompetitive purpose.

2. Evaluating the MFN Terms

Once a court finds that a plaintiff's exclusive dealing likely served a procompetitive function, it should ask whether the defendant's MFN unreasonably interferes with that function. An MFN that prohibits a broader range of exclusive dealing arrangements will tend to be more problematic, all else being equal. A narrow MFN might not raise any concerns at all. For example, suppose that a video game console and a single game developer agree that handful of specific games will not be made exclusive to any rival platforms. This is unlikely to materially harm competition, since rivals still have ample freedom to garner exclusives for their own consoles.

By contrast, suppose the console maker enters into MFNs with most or all of the largest game developers, requiring all of them not to make any games exclusive to competing consoles. This could seriously threaten entry by leaving few opportunities for rivals to differentiate themselves with exclusive titles. Thus, the MFN's anticompetitive potential is linked to how broadly it eliminates opportunities for procompetitive exclusive contracting.

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[170] This is so even if the plaintiff has market power.

[171] *See, e.g.,* Balaklaw v. Lovell, 14 F.3d 793, 799 (2d Cir. 1994) (rejecting antitrust challenge to exclusive dealing agreements lasting only 6 months).

Courts should also be suspicious of MFNs that threaten innovative collaborations between complementors and rival platforms. Amazon's eBook MFNs fall into this category.[172] Among other things, they apply to any conceivable distinct business model or eBook features that rivals might attempt to develop in collaboration with publishers. Rivals will thus have little incentive to engage in such innovative efforts, given that Amazon retains the right to immediately copy whatever they come up with.

Such an MFN is particularly hard to justify when it restrains the introduction of new goods or services that the defendant has no intention of introducing itself. Here too the Amazon case is apropos. Take the example of an eBook rental model, which the European Commission mentioned as an example of a business model that has been restrained by Amazon's MFNs.[173] Amazon apparently does not offer eBook rentals. But it nevertheless restrains rivals from using it as a means of distinguishing themselves. This potentially eliminates a valuable business model from the marketplace, reducing not only competition but also product diversity.

3. Market Power Considerations

The theory of harm considered in this paper is strongest when the defendant is dominant and its MFN threatens entrants or small incumbents that lack market power. It becomes more precarious when the defendant and the affected rivals are closer to equals. First, if the defendant is not dominant, it has less power to convince trading partner to accept anticompetitive MFN terms. Second, if the plaintiff is large enough to have some market power, then presumably it has already attained a critical mass of users. This makes it less likely that exclusive dealing is still necessary for it to be a viable competitor.

Third, if the plaintiff has some market power, then we must take seriously the possibility that its exclusive dealing could be anticompetitive. If the plaintiff sought to engage in a significant amount of exclusive dealing—enough to foreclose a nontrivial portion of the market—then it begins to look less like a necessary condition of the plaintiff's survival and more like a potential threat to competition. All else being equal, this would tend to make the defendant's MFN more reasonable.

There are exceptions, however. For instance, it could be that exclusivity is an important aspect of what makes the plaintiff's

[172] *See infra* Section III.A.1.
[173] DG Comp., *supra* note 94, at 9.

platform attractive to users, or that users are exclusive to the plaintiff's platform because they choose to be, and not because they are contractually restrained. In such a case, there may be no reason to worry that the plaintiff's business model is harmful even if the plaintiff has market power and many customers use its service exclusively.

Recall the example of *Top Agent Network v. National Association of Realtors*.[174] Even if TAN had market power, it is still entirely plausible that the NAR's Clear Cooperation Policy was anticompetitive.[175] Taking TAN's allegations as true, they imply that TAN's member agents would post certain listings exclusively on TAN not because they were contractually required to do so, but because they preferred to keep those listings off the MLS.[176] Indeed, nothing in the district court opinion indicates that they were *obligated* to make any listings exclusive to TAN.[177] Rather, TAN offered them a differentiated service, and they voluntarily made certain listings exclusive to it.

This indicates that there was significant interest among agents in an exclusive platform—or at least an alternative to the MLS. TAN thus satisfied a customer demand that was not previously being met. This makes it hard to avoid the conclusion that TAN's business model was procompetitive, even if it happens to have market power.[178] And to the extent that the defendant's MFN risks the elimination of a significant alternative to the defendant's MLS, it is likely anticompetitive.

C. Potential Justifications

This section considers possible procompetitive justifications that defendants might raise in defense of their MFNs. As noted earlier, it is *not* a good defense to argue that prohibiting exclusive dealing by smaller rivals must be a good because exclusive dealing is harmful.[179] But what other defenses might be relevant?

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[174] Top Agent Network, Inc. v. National Association of Realtors, 554 F. Supp. 3d 1023 (N.D. Cal. 2021).

[175] This argument given here does not hinge on the fact that the NAR is a collaboration of rivals.

[176] *Id.* at 1034 ("TAN's members generally advertise off-MLS for the purpose of avoiding the MLS.")

[177] According, the plaintiff's conduct did not involve literal exclusive dealing, as the exclusivity was mandated by contract.

[178] The district court erred on this point, as noted earlier.

[179] *See supra* Section III.B.1.

The most common procompetitive rationale cited in defense of MFNs is that they may encourage vertically related firms to make relationship specific investments.[180] This could potentially apply to the sort of nonprice MFNs considered in this paper. For example, suppose that a video game console is considering working with a large video game developer to create a virtual reality (VR) gaming technology. For this investment to pay off for the console maker, it will want to make sure it has access to the hottest VR games. To that end, it may be reluctant to invest in the new technology unless the game developer agrees to make most or all of its VR games available on its console.

However, not all variations of this argument would seem to apply to nonprice MFNs. For example, the argument is sometimes framed in terms of preventing a "holdup" problem,[181] or in terms of curbing free riding. Consider the latter example. In the platform context, the free-riding argument focuses mainly on situations where a complementor might rely on the platform to get exposure, but then encourage consumers to go to its own website, where it will charge a lower price.[182] (It can afford to set a lower price on its own website because it does not pay the platform a fee for these sales.) This is often discussed in the context of travel booking platforms.[183]

It is not clear that any analogous free riding argument might apply to nonprice MFNs that prevent complementors from entering into exclusive deals with rival platforms. On the contrary, some of the MFNs at issue seem more likely to *create* a free riding problem than to solve one. For example, Amazon's eBook MFNs would tend to allow Amazon to free ride on any innovative features or business models flowing from collaborations between publishers and rival platforms.[184]

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[180] *See, e.g.,* Baker & Chevalier, *supra* note 23, at 25; Salop & Morton, *supra* note 23, at 15; Baker & Morton, *supra* note 24, at 2183.

[181] The holdup problem arises when a firm is discouraged from investing in a relationship-specific technology due to the fear that its trading partner could opportunistically raise price after it is "locked in" to that technology. *See, e.g.,* Baker & Chevalier, *supra* note 23, at 20-21. Because this scenario hinges on prices, it is not as relevant to the MFNs considered in this paper.

[182] *See, e.g.*, Baker & Morton, *supra* note 24, at 2183.

[183] *Id.* For example, suppose consumers find a hotel on Orbitz.com. They might then try to cut Orbitz out of the deal by going directly to the hotel's own website, where they can pay a lower price. If a platform like Orbitz could not prevent this with an MFN (which would prohibit the hotel from setting a lower price on its own website), then it might have decided not to create its platform in the first place.

[184] *See supra* Section III.A.1.

D. Less Restrictive Alternatives

Even if a defendant's conduct likely achieves a certain efficiency, it may be condemned if the plaintiff can demonstrate a less restrictive alternative (LRA).[185] An LRA is an alternative, practicable means of achieving the same efficiency in a way that poses a lesser threat to competition. The existence of an LRA implies that the defendant is restraining competition in a way that is not reasonably necessary to achieve the relevant efficiency. For example, two large firms might be able to reduce their production costs by merging; but if they could obtain the same efficiency without merging, then this would not be a defense.[186]

In a case involving restraints on differentiation, an LRA might involve a narrower MFN—one that only prevents rival platforms from engaging in large amounts of exclusive dealing. For example, the MFN might preclude exclusive dealing with rivals only if it lasts for longer than some specified duration (e.g. 2 years). Thus, exclusive dealing would still be allowed, but only temporarily.[187] For example, Amazon might stipulate that eBook publishers can make certain titles exclusive to third-party platforms, but only for a year or two.[188] This does not completely abolish the relevant MFN; it merely puts a limit on how restrictive they can be.

Similarly, a less restrictive MFN might prohibit exclusive dealing only when it becomes sufficiently broad in terms of the range of products or features it subsumes. For example, a video game console maker could enter into an MFN with a large video game developer in which the latter agrees not to make more than a third of its library exclusive to rival consoles. This poses a much smaller threat to competition than an MFN that forbids the developer from making *any* games exclusive to rival platforms.

Another possible LRA is an agreement that would permit exclusive dealing with third-party platforms who are sufficiently small.[189] This reflects the fact that the procompetitive effects of exclusive dealing are likely to be biggest when the platform is a

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[185] *See, e.g.*, C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927 (2016) (discussing the use of LRAs).

[186] Courts in merger cases thus require that efficiencies are "merger-specific," meaning they could not be achieved without merging. *See, e.g.,* United States v. Anthem, Inc., 855 F.3d 345, 356 (D.C. Cir. 2017).

[187] Of course, for this to allay the antitrust concerns, the permitted exclusivity must last long enough to enable the entrant to gain a foothold in the market.

[188] Such "timed exclusives" are common in many industries. For example, video games are sometimes exclusive to a single console for a year or so before becoming available on competing consoles.

[189] The volume of trade (e.g. output or revenue) could be used as a proxy for the size of a third-party platform.

small entrant. As with timed exclusives, this provides a natural means by which the exclusivity would end after a platform entrant grows into an established competitor.

IV. MAINTAINING LIMITS ON EXCLUSIVE DEALING

Although this article argues that nonprice MFNs can be anticompetitive, this should not be misconstrued as an endorsement of unlimited exclusive dealing. The standard view on exclusive dealing is that it tends to become harmful when it grows sufficiently extensive in scope,[190] and nothing in this paper conflicts with that position.

As I have emphasized, the potential anticompetitive effects of the defendant's MFN are directly linked to the potential procompetitive benefits of the exclusive deals it proscribes.[191] Thus, an MFN will not arouse antitrust concerns if it merely discourages the kind of large-scale exclusive dealing that threatens competition and consumers. The potentially harmful MFNs are those that proscribe small-scale exclusive dealing by small competitors. These exclusive deals are too narrow to threaten competition, but they could very well enhance the competitive vitality of a small firm.

Additionally, notice that this proposal does not entail any modification of the usual antitrust limits on exclusive dealing. It certainly does not suggest that we should permit a powerful platform to engage in widespread exclusive dealing. On the contrary, as I have emphasized, large-scale exclusive dealing by a powerful firm may be even more concerning in a platform industry than in a more conventional one.[192] Similarly, if an initially small firm relies on exclusive dealing to gain a foothold in the market, this does not shield the firm's future conduct from antitrust scrutiny. If it grows more powerful and begins acquiring exclusive rights on a larger scale, it will be subject to the same antitrust restrictions as anyone else.

CONCLUSION

Due to strong network effects, platform markets are generally hard for new firms to enter. In many platform markets, the most viable way for a new platform to enter is to differentiate itself from the leading incumbent in some way, such as by offering

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[190] *See supra* Part II.
[191] *See supra* Section III.B.
[192] See *supra* Section II.B.

exclusive content or features. However, recently some dominant platforms have attempted to prevent this using restrictive MFNs with trading partners. But unlike traditional MFNs, which restrain what prices a trading partner can charge, these MFNs prohibit trading partners from offering any exclusive content, features, or other services to smaller platforms. This can make it difficult or impossible for a new platform to differentiate itself from the market leader.

These MFNs have not previously been explored in academic research, despite being the subject of numerous ongoing regulatory investigations and lawsuits against major platforms, including Amazon. This article has attempted to fill that gap. The principal antitrust concern is that these MFNs force new platforms to compete on the basis of sheer size, as opposed to the type of content they offer. In a market with strong network effects, this may make entry impossible, thus cementing the leading platform's dominance. The agreements may also diminish innovation by discouraging productive collaborations between new platforms and trading partners.

There are several important legal issues that distinguish these contracts from traditional price-based MFNs, and several recent district court cases have made key errors when evaluating them. One novelty of these MFNs is that they generally work by prohibiting trading partners from entering into any kind of exclusive dealing arrangements (even narrow or temporary ones) with smaller platforms.

The problem is, courts are used to thinking of exclusive dealing as a potential antitrust violation in its own right. Hence, courts may be tempted to reject a plaintiff's complaint on the ground that the MFN merely prevents the defendant's rival from doing something anticompetitive. But this ignores a wealth of research in economics, management, and adjacent fields showing that exclusive dealing by small platforms is often integral to competitive entry in platform markets. When this is taken into account, it becomes clear that the MFNs in question may indeed be anticompetitive. To that end, this article has discussed a range of specific factors that courts can use to evaluate these MFNs in practice.