O'Melveny

Platform Antitrust

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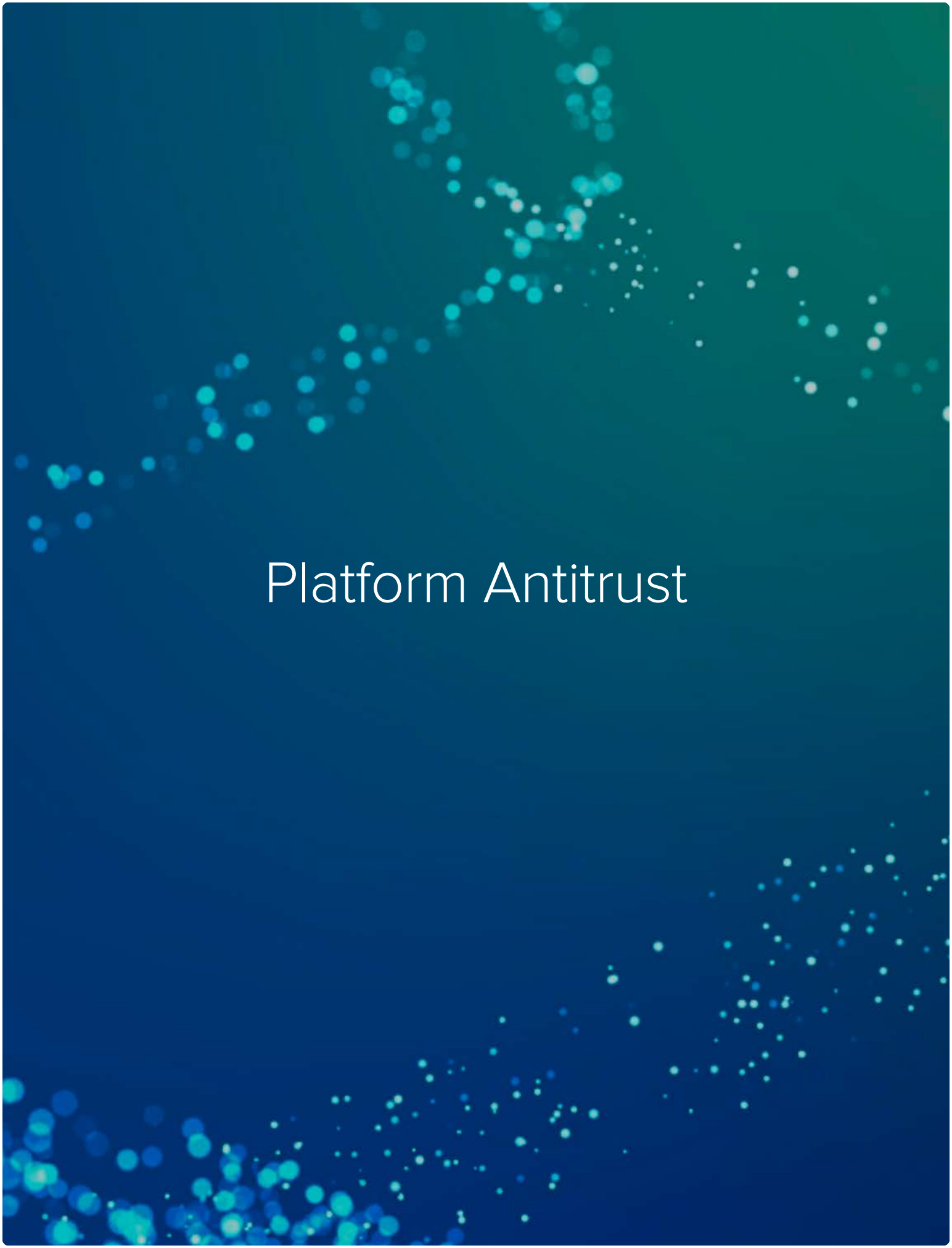
The views of litigants, courts, and commentators summarized in this report are their own and do not necessarily reflect the views of O'Melveny & Myers, its attorneys, or its clients. This report is based on public information; it attempts to summarize parties' respective positions and should not be construed as an endorsement of any position.


Platform Antitrust

Multi-sided platforms—businesses that connect two or more distinct groups of users—are playing an increasingly important role in our economy, and the antitrust law and doctrine that govern these businesses are developing rapidly. O'Melveny brings unique perspective to this burgeoning area of law, having represented both plaintiffs and defendants in multi-sided platform cases.

In this report, we summarize important recent developments in platform antitrust. We synthesize relevant recent cases, academic commentary, and legislative proposals to offer a glimpse into how this important area of antitrust is evolving: which plaintiff theories are gaining popularity? Which defenses have proved effective? How are practitioners grappling with the complexities of defining platform markets?

Platforms and *Amex* (pg. 6): We define platforms, explain the key concepts to understanding platforms, and discuss the 2018 Supreme Court *Amex* opinion, which launched the modern platform antitrust era.

Platform Conduct in the Crosshairs (pg. 12): We identify platform strategies and practices that have been targeted in recent lawsuits, investigations, and legislative proposals, including self-preferencing (pg. 13), tying or product integration (pg. 21), platform MFNs (pg. 23), and suppression of multi-homing (pg. 28). We also discuss false positives in platform antitrust—i.e., mistaking procompetitive platform strategies for anticompetitive conduct (pg. 33).

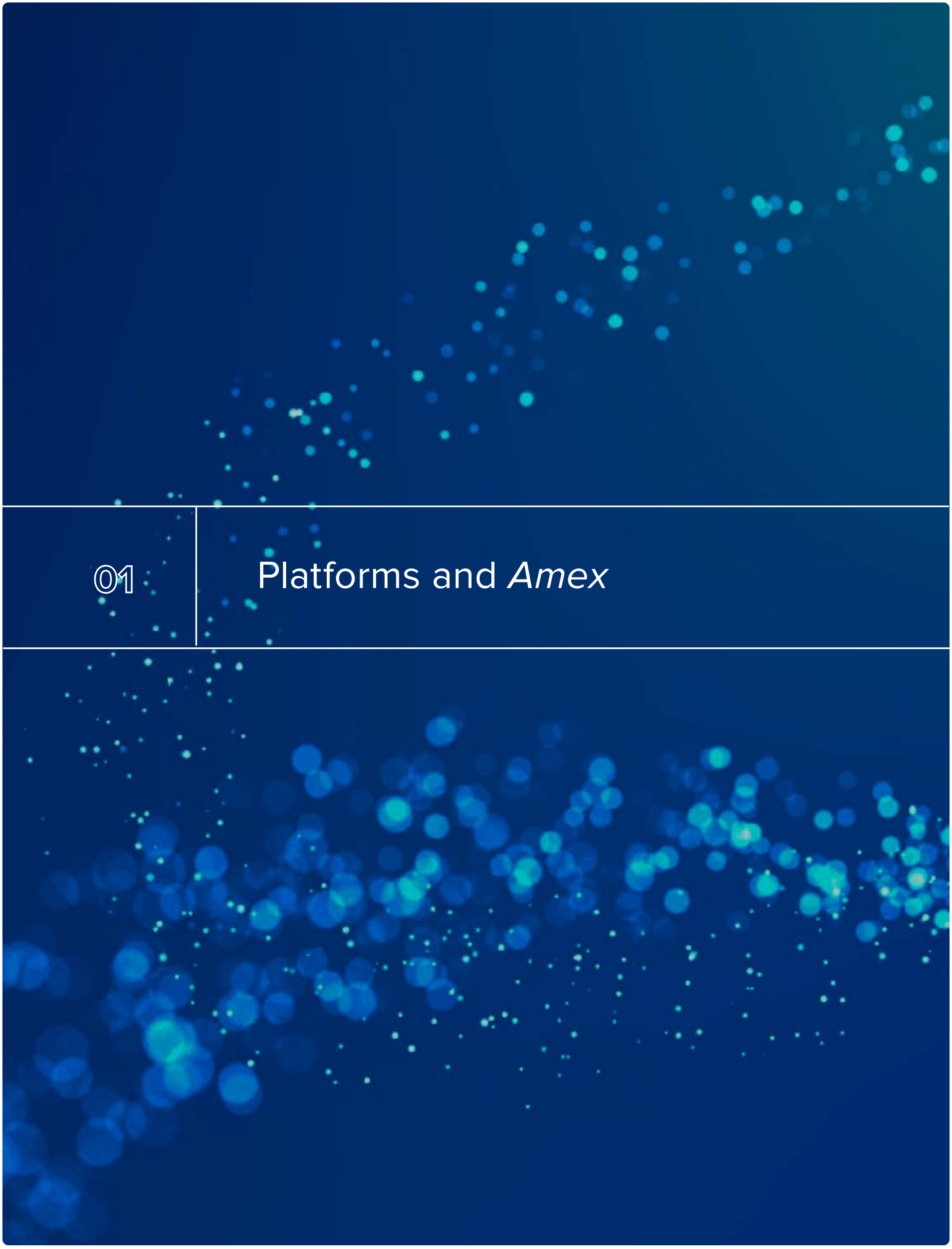
Market Definition Issues in Platform Antitrust (pg. 35): We describe some of the challenges in applying traditional market definition tools in the platform context. We look at how some litigants have overcome these challenges by coming up with platform market definition analyses that courts have accepted.

Other Issues in Platform Antitrust (pg. 40): We discuss the role of price allocation—how fees are divided among different sides of the platform—in platform antitrust analysis (pg. 41) and how courts have applied the *Amex* Supreme Court decision in different contexts, including at the pleading stage (pg. 42), at class certification (pg. 42), in relation to the direct purchaser doctrine (pg. 42), and in situations where indirect network effects run in only one direction (pg. 43).

Proposals for Reform (pg. 45): We examine several legislative proposals in the United States intended to create new rules for platform antitrust, including recommendations to override specific aspects of the *Amex* opinion.

Where relevant, we also analyze platform antitrust policy and enforcement in Europe and Asia and highlight emerging trends in those jurisdictions.

Platform antitrust remains a new, and rapidly developing, area of law. Many important platform cases are currently being litigated, and the resolution of these cases will potentially provide important precedents. Scholars continue to debate the proper legal and economic approaches to platform markets, and legislators and policymakers continue to generate and discuss legislative proposals for rules to promote platform competition. O'Melveny will continue to monitor this area closely, and we hope to bring you regular reports as platform antitrust continues to develop.



01 Platforms and *Amex*

What Are Multi-Sided Platforms?

Platforms connect two or more distinct groups of users who use the platform to interact with one another.

Here are some examples of platforms:[1]

An app store, gaming console, or operating system that connects developers and users—e.g., iOS, Android, PlayStation, Windows.

A travel search-and-booking platform that connects airlines or hotels with travelers or travel agents—e.g., Expedia, Booking.com.

A digital content or social media platform that connects content creators, advertisers, and users—e.g., YouTube, Facebook, TikTok.

A Multiple Listing Service that connects real estate buyers and sellers—e.g., Zillow, Trulia.

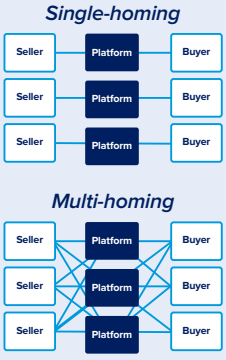
A health insurance plan that connects doctors and patients—e.g., Blue Cross Blue Shield.

The key economic features of platforms:

Indirect network effects: The platform's value to one side depends on the number and quality of participants on the other side.

Feedback loops: Adding more participants to one side of the platform leads to more participants joining on the other side, which attracts more participants on the first side, and so on. This also works in reverse, with sides losing participants, creating a negative feedback loop or "death spiral."

Single-homing vs. multi-homing: Participants on one side who only use one platform to connect to users on the other side are ***single-homing***; participants who use multiple platforms to connect to users on the other side are ***multi-homing.*** For example, if sellers sell exclusively through a particular e-commerce platform, the sellers are single-homing, and the platform is the only way for buyers to connect to those single-homing sellers. If sellers sell through multiple platforms (and other channels), the sellers are multi-homing, and buyers have many ways to connect to those multi-homing sellers. We explore single-homing and multi-homing further on pg. 28.

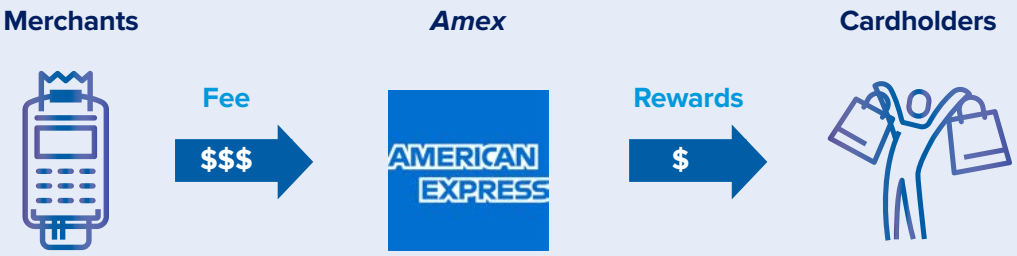


1 This illustrative list is far from exhaustive—platform business models are common, especially in the digital economy, and companies are developing new platform business models regularly.

The Legacy of *Amex*

The backbone of modern platform antitrust doctrine comes from *Ohio v. American Express (Amex)*,[2] a 2018 Supreme Court opinion. Though it is often criticized and leaves many questions unanswered, the *Amex* ruling is nonetheless vital to understanding this area of law.

Amex is a two-sided platform connecting merchants and cardholders. Amex charges merchants a fee and pays rewards to cardholders. The Government challenged Amex's anti-steering rules, which prohibited merchants from offering discounts to shoppers for using a different credit card (even if the other credit card charges merchants a smaller fee). This is an example of a ***platform Most-Favored-Nation (MFN) agreement***—a contractual provision preventing a platform participant from offering better terms on another platform.



Key holdings from *Amex:*

- Two-sided ***transaction platforms*** that "facilitate a single, simultaneous transaction between participants" must be analyzed as two-sided markets because they "exhibit more pronounced indirect network effects and interconnected pricing and demand."[3]
- "[I]n two-sided transaction markets, only one market should be defined," and "[e]vidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power."[4]
- Plaintiff did not carry its burden of showing that the challenged anti-steering provisions caused net competitive harm (taking into account all sides of the platform), despite showing that they caused harm on the merchant side of the platform (in the form of higher merchant fees).
- The plaintiff bears the burden of showing net competitive harm across all sides of a multi-sided platform, and it can do so by showing:
  - a net price (taking into account fees and discounts on all sides of the platform) above the competitive level;
  - a reduction in platform output (number of transactions); or
  - that the challenged conduct "otherwise stifled competition."[5]

2 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).
3 *Id.* at 2286.
4 *Id.* at 2287.
5 *Id.*

***Amex* in a nutshell:** Transaction platforms must be evaluated as multi-sided markets, taking all sides of the platform into account in assessing the competitive effects.

***Amex* has drawn criticism** both for its economic logic and for leaving some key questions unanswered:

1. The Court stated that "[o]nly other two-sided platforms can compete with a two-sided platform for transactions,"[6] but critics contend this is demonstrably wrong—a two-sided platform like Uber may compete against one-sided transportation alternatives like taxis and buses.

2. The opinion abandons substitutability as the bedrock principle of market definition. Antitrust markets are usually defined to include products that are reasonable substitutes. The *Amex* Court held that Amex's services to merchants and services to cardholders are in the same market—even though those services are not substitutes.

3. The opinion leaves unclear whether different sides of a ***non-transaction platform***[7] should be treated as participants in a single two-sided market or as participants in distinct markets. *Amex* notes that the different sides of transaction platforms should be treated as belonging to a single two-sided market because transaction platforms display "pronounced indirect network effects and interconnected pricing and demand,"[8] but many non-transaction platforms display these same characteristics.

6 *Id.*

7 Non-transaction platforms connect two or more distinct sets of users, but do not facilitate simultaneous transactions between users. The *Amex* opinion points to newspapers as an example of a two-sided non-transaction platform: newspapers connect advertisers and readers but do not facilitate simultaneous transactions between these groups. *Id.* at 2286.

8 *Id.*

EU Platform Market Definition. The European Commission and the Court of Justice of the European Union follow a more traditional substitutability-based approach to defining platform markets. While acknowledging that in "the digital economy [...] traditional parameters such as the price of products or services or the market share of the undertaking concerned may be less important than in traditional markets, compared to other variables such as innovation, access to data, multi-sidedness, user behaviour or network effects,"[9] the connections between the sides of a multi-sided market are taken into account not when defining the relevant market(s) but only at the later stage of assessing whether a company holds a dominant position in such a market. This approach to assess **"distinct but interconnected relevant markets"**[10] aims to ensure that "while the relevant markets are presented separately," they are not "artificially separated in so far as they all [may have] complementary aspects."[11]

UK Platform Market Definition. In the United Kingdom, the Competition and Markets Authority (CMA) has also taken the approach of assessing different sides of a platform market separately. In its recent decision blocking the Microsoft-Activision merger, the CMA explained: "In this case, we consider that gaming platforms are two-sided, with users on one side and content providers on the other. In defining the market, we have assessed each side of the market separately, focusing primarily on the user side of the market, where the potential competitive concerns in this Merger arise. We have considered both sides of the market in the competitive assessment, including the impact of direct and indirect network effects".[12]

CMA's approach in *Microsoft* is consistent[13] with the August 2022 judgment of the UK's Competition Appeals Tribunal (CAT) in *BGL v. Competition and Markets Authority.*[14] The CAT specifically references *Amex,* referring to what it calls the "it depends" approach to one- vs. two-sided market definition as controversial. According to the CAT, "as a general precept, the markets in which the different [products] provided by Platforms are sold should always be assessed separately. [...] If one regards the Buyers of different [products] as a single group [...] an immediate analytic uncertainty is introduced. What are, in fact, separate Products provided to different groups of Buyers are wrongly conflated, and the potential significance of substitute products (which may not or may not all be provided through Platforms) is lost."[15] While the CAT recognized that network effects need to be taken into account, it concluded that they are "primarily relevant to the later stage of assessing harmful effects" and are relevant for the market definition stage only in assessing demand-side substitutability, if at all.[16]

9 Judgment by the General Court of September 14, 2022, in Case T-604/18 Google and *Alphabet v. Commission*, at 115 (under appeal), *available at* https://curia.europa.eu/juris/document/document.jsf?text=&docid=265421&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21733111.

10 Case T-604/18 Google and *Alphabet v. Commission*, at 129 (under appeal), *available at* https://curia.europa.eu/juris/document/document.jsf?text=&docid=265421&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21733111. (emphasis added)

11 *Id.* at 126 and 127 ("Apps that were accessible from an Android app store were of interest only because they ran on the licensed Android OS. Conversely, a licensable OS was dependent, in terms of increasing its attractiveness, on the number, variety and quality of apps that could run on that OS"). Cf. decision by the European Commission September 21, 2012, in Case No COMP/M.6458 Universal Music Group/ EMI Music, at 103 ("It is not necessary to take a view as to whether A&R activities should be considered and analysed as a separate product market or even whether the recorded music market should be viewed as a two-sided market, where the strength of a record company on one side of the market (A&R) has a positive influence over its market position on the other side of the market (wholesale of recorded music) and conversely. This reflects the fact that, regardless of the position on this point, the competitive assessment of the proposed concentration will not be affected, as the strength of record companies in A&R will be taken into account in the competitive assessment as one of the key factors contributing to their market position in the market for wholesale of recorded music.").

12 Decision by the CMA of April 26, 2023, in *Microsoft/Activision*, at 5.26, *available at* https://assets.publishing.service.gov.uk/media/644939aa529eda000c3b0525/Microsoft_Activision_Final_Report_.pdf.

13 The CMA's 2021 Merger Assessment Guidelines posited a somewhat more flexible view: "[t]he CMA's approach to market definition in two-sided markets [would be] likely to reflect its approach to conducting the competitive assessment" (CMA129, at 9.12)," *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf.

14 *BGL (Holdings) Limited & Others v. Competition and Markets Authority [2022] CAT 36*, *available at* https://www.catribunal.org.uk/sites/cat/files/2022-08/20220808%201380%20BGL%20v%20CMA%20Approved%20Judgment%20%5B2022%5D%20CAT%2036%20-%20Website%20%281%29.pdf.

15 *Id.* at 147.

16 *Id.*

China Platform Market Definition. The *Antitrust Guidelines for the Platform Economy,* issued on February 7, 2021, state that defining the relevant market is normally needed in cases concerning anticompetitive agreements, abuse of dominance, and mergers involving platforms. The Guidelines propose a traditional substitution analysis for defining the relevant market, while also taking certain industry-specific features into account. These include platform function, business models, application scenarios, user profiles, network effects, lock-in effects, switching costs, and cross-disciplinary competition.

The Guidelines discuss three approaches to defining the relevant market:

- defining a market based on the products on the side of the platform most relevant to the investigation;
- defining a market for each side of the platform and taking into consideration the interrelationship between the two;
- defining a single market for services offered to both sides of the platform.

In practice, the State Administration for Market Regulation (SAMR) has invariably adopted the last of these approaches, defining the following markets in recent cases:

Alibaba: the China market for online retail platform services

Tencent Music/China Music Corporation: the China market for music-streaming platform services

Meituan: the China market for online food delivery platform services

CNKI: the China market for Chinese academic literature online database services

02 Platform Conduct in the Crosshairs

Self-Preferencing

Tying and Product Integration

Platform MFNs

Suppression of Multi-Homing

Risk of False Positives in Platform Antitrust

It is impossible to list every conceivable form of conduct that might raise competitive concerns. As the D.C. Circuit observed in the famous *Microsoft* monopolization case, "the means of illicit exclusion, like the means of legitimate competition, are myriad."[17] Recent investigations, lawsuits, and legislative proposals have zeroed in on a few specific platform strategies:

Self-Preferencing

Platform operators engage in self-preferencing when they themselves participate on one or more sides of the platform and give their own offerings preferential treatment. For example, the owner of an e-commerce platform might display its goods in a more prominent position in search results. There is increasing concern among legislators and antitrust enforcers that as platforms grow, their ability to give preferential treatment to their own offerings may skew competition.

The following are some recent examples of cases alleging platform self-preferencing and other relevant developments in this area:

Amazon–iRobot Merger

The FTC's investigation of the proposed merger between Amazon and Roomba vacuum maker iRobot is focused on whether Amazon would favor Roomba over rival automated vacuum cleaners on its platform, according to trade press. For instance, the FTC is reportedly concerned that Amazon could (to the detriment of Roomba's competitors):

- List Roombas at the top of search results;
- Display banner ads featuring Roombas;
- Give Roombas preferential access to the coveted "Buy Box" that allows for one-click purchases.

FTC's investigation remains ongoing as of the time of writing (October 2023).

Google Search Litigation[18]

A 2020 complaint brought by the DOJ and several states, later consolidated with a separate complaint filed by the Colorado AG and a different group of states, alleges that Google used various exclusionary acts to illegally maintain monopoly power in general search services and general search advertising.[19] The key allegation is that Google paid browsers, phone manufacturers, and wireless carriers to preinstall Google search and make it the default search option, but Colorado also alleges two types of exclusionary conduct that can be characterized as self-preferencing: (1) disadvantaging a rival search engine by "delaying the implementation of various [search engine marketing tool] product features for Microsoft Ads that have long been available for Google Ads," and (2) "limiting the visibility of [Specialized Vertical Providers[20]] on Google's Search Engine Results Page."[21] The court denied Google's motion for summary judgment as to the first theory, finding that "Plaintiffs offer some evidence that… Google's delayed rollout of SA360 [Google's search engine marketing tool] support for Microsoft Ads inhibited or dissuaded

17 *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

18 *United States v. Google LLC (Search)*, 1:20-cv-03010, (D.D.C. 2020).

19 The DOJ also alleged monopolization of the search advertising market, and the Colorado AG also alleged monopolization of the general search advertising market. *United States v. Google LLC*, No. 20-CV-3010, 2023 WL 4999901, at *1 (D.D.C. Aug. 4, 2023).

20 Specialized Vertical Providers are companies the provide search results for specific market segments—e.g., Expedia for travel and OpenTable for restaurant reservations.

21 *United States v. Google LLC*, No. 20-CV-3010, 2023 WL 4999901, at *2 (D.D.C. Aug. 4, 2023).

advertisers from placing ads on its competitor's search engine."[22] The court granted summary judgment for Google on the Specialized Vertical Provider claim, finding that Specialized Vertical Providers operated outside the alleged relevant markets (general search and general search advertising), and any connection between the weakening of Specialized Vertical Providers and diminution of competition in general search was too speculative to sustain the claim.[23] Trial began on September 12, 2023.

Proposed AMERICA Legislation

A bipartisan group of senators introduced the Advertising Middlemen Endangering Rigorous Internet Competition Accountability (AMERICA) Act on March 30, 2023. The bill's sponsors hope it will address alleged conflicts of interest that might result when the same company controls multiple layers in the ad tech stack—the technology used to connect online advertisers and website publishers (see illustration below)—and they have pointed to several examples of self-preferencing, including:

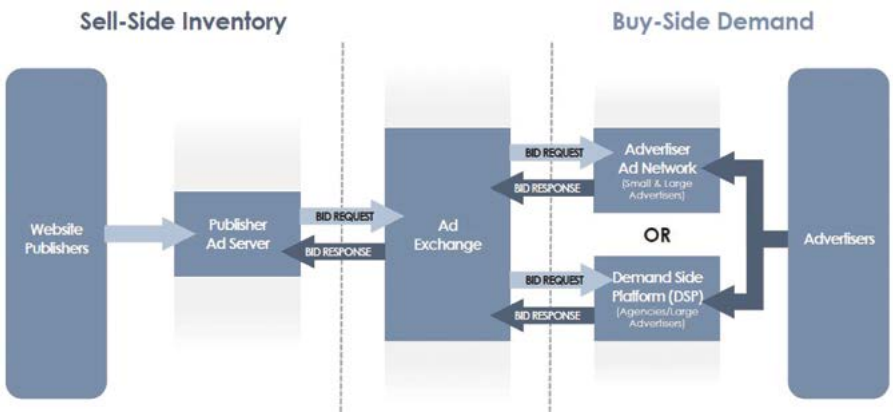
- A company giving its own ad services information and speed advantages over competitors;
- A company steering bids to its own services;
- A company using information about a competitor's trading activity to give an advantage to its own properties.

The bill seeks to address these issues by (1) prohibiting large digital advertising companies from owning more than one part of the digital ad ecosystem, and (2) imposing a series of obligations on medium-size and larger digital advertising companies to minimize conflicts of interest (e.g., requiring firewalls between different levels of the ad tech stack operated by the same company, calling for transparency so customers can verify the company is acting in their best interests). See Proposals for Reform section (pg. 45) for additional legislative proposals intended to address platform self-preferencing.

Google Ad Tech Stack Litigation[24]

The proposed ad tech stack legislation (described above) came on the heels of a January 2023 complaint brought by the DOJ and several states, alleging that Google monopolized several layers of the ad tech stack.

Ad Tech Stack diagram from DOJ complaint



22 *Id.* at *26. The claims pertaining to Google paying other companies to make Google the default search engine also survived summary judgment.

23 *Id.* at *22-23.

24 *United States v. Google LLC*, No. 1:23-cv-00108 (E.D. Va., Jan. 24, 2023). The lawsuit is not the first to challenge Google's conduct in digital advertising; a series of lawsuits alleging that Google monopolized the ad tech stack was consolidated in the Southern District of New York in 2021. *In re Google Digital Publisher Antitrust Litig.*, No. 1:21-cv-07034 (S.D.N.Y. Dec. 15, 2020).

The complaint alleges that Google used its control of multiple layers of the ad tech stack to preference its own tools at the expense of competitors by, among other things:

- Either disallowing its advertiser ad network from bidding on rival ad exchanges or disadvantaging those bids by, for instance, making bid modeling and targeting data available only for bids made on its own ad exchange;
- Requiring publishers to use Google's ad server to obtain real-time bids from its ad exchange;
- Configuring its publisher ad server to give Google's ad exchange a "first look" at all inventory that the ad exchange was eligible to buy;
- Giving its ad exchange more opportunities to win high-value ad inventory on preferential terms.

The DOJ connects these allegations of self-preferencing to its monopolization theory, arguing that Google's conduct prevented rival tools from attaining sufficient scale to impose a competitive constraint. The litigation is pending in the Eastern District of Virginia, a jurisdiction known for its "rocket docket," and is expected to move quickly.

FTC's Monopolization Lawsuit Against Amazon[25]

The FTC and a group of states sued Amazon in September 2023, alleging that Amazon maintains monopoly power in the online superstore and online marketplace services markets. The complaint focuses on two types of alleged conduct: (1) "Amazon coerc[ing] sellers into using its fulfillment service to obtain Prime eligibility and successfully sell on Amazon,"[26] and (2) discouraging or preventing sellers from offering lower prices on non-Amazon online sales channels (this will be covered in the Platform MFN section below). The FTC argues that by compelling sellers to use its own fulfilment services, Amazon stunts the growth of independent fulfillment-service providers, which in turn makes it more difficult "for sellers to offer items across a variety of outlets" and perpetuates sellers' dependance on Amazon.[27]

The FTC also points to a different form of self-preferencing as a **consequence**, rather than a **cause**, of Amazon's alleged monopoly power. The complaint alleges that Amazon "degrades the quality of its search results by burying organic content under recommendation widgets… which display Amazon's private label products over other products sold at Amazon," and claims that the "fact that Amazon's degradation of its search results through biased widgets did not cause Amazon to lose sufficient business or to change its behavior further demonstrates its monopoly power."[28] According to the FTC, self-preferencing, like elevated prices or reduced quality, may be evidence that the firm is exercising monopoly power.

25 *Fed. Trade Comm'n v. Amazon.com, Inc.,* No. 2:23-cv-01495 (W.D. Wash., Sep. 26, 2023).

26 Compl. ¶ 257.

27 Compl. ¶ 29.

28 Compl. ¶ 241, 248.

2023 Draft Merger Guidelines

On July 19, 2023, the FTC and the DOJ released draft updated Merger Guidelines, intended to provide guidance on the agencies' approach to merger enforcement.[29] Unlike previous versions, the new Guidelines explicitly address mergers involving platforms, and explain that agencies may challenge transactions that substantially lessen competition **between** platforms, **on** a platform, or **to displace** a platform.

The new Guidelines make clear that the agencies consider conflicts of interest and potential for **self-preferencing** when assessing mergers between a platform operator and a participant. According to the Guidelines, "a platform operator that is also a platform participant has a **conflict of interest** from the incentive to give its own products and services an advantage against other competitors participating on the platform, harming competition in the product market for that product or service."[30] Transactions that create conflicts of interest that harm competition may be subject to challenge.

Duty to Deal Doctrine as a Potential Defense

In some cases, it may be possible to reconceptualize self-preferencing as a refusal to deal with competitors on the competitors' preferred terms. Under current US law, the duty to deal with competitors arises only under two very narrow circumstances: when the defendant sacrifices short-run profits to terminate an existing course of dealing with a rival to exclude the rival and reap monopoly profits,[31] or when a monopolist controls "a facility that cannot reasonably be duplicated and which is essential to competition in a given market."[32] Some scholars have recommended expanding the scope of platforms' duty to deal with competitors,[33] and the doctrine may evolve, but for now, the narrowness of the duty to deal provides a powerful defense.

Example: In *New York v. Meta Platforms, Inc.*,[34] plaintiffs claimed that Facebook maintained monopoly power in personal social networking in part by "us[ing] its control over Facebook Platform to degrade the functionality and distribution of potential rivals' content when it perceived those firms as threats to Facebook's monopoly power."[35] The D.C. Circuit characterized this allegation as just "another way of saying that Facebook refused to deal with its rivals on the rivals' preferred terms" and upheld dismissal, relying on the Supreme Court's statement that as "a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."[36]

29 US Dept. of Justice & Fed. Trade Comm'n, Draft Merger Guidelines (Jul. 19, 2023), *available at* https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

30 *Id.* 25.

31 *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 US 585, 603-611 (1985); *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 US 398, 409 (2004).

32 *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1128 (9th Cir. 2004). The Supreme Court has neither recognized nor rejected the essential facilities doctrine. See *Trinko*, 540 US at 411 ("We have never recognized [the essential facilities] doctrine… and we find no need either to recognize it or to repudiate it here.").

33 *See, e.g.,* Erik Hovenkamp, *Trinko Meets Microsoft: Leverage and Foreclosure in Platform Refusals to Deal* (Apr. 5, 2023), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4392072.

34 66 F.4th 288, 306 (D.C. Cir. 2023).

35 Compl. ¶ 205, *State of New York v. Facebook, Inc.*, No. 1:20-cv-03589 (D.D.C. Dec 9, 2022), ECF No. 4.

36 *Meta Platforms*, 66 F.4th at 306, quoting *Pac. Bell Tel. Co. v. linkLine Commc'ns., Inc.*, 555 U.S. 438, 444 (2009).

EU Digital Markets Act in Focus. With a view to ensuring "contestable and fair markets in the digital sector," the Digital Markets Acts (DMA)[37] lays down a set of dos and don'ts that companies providing core platform services[38] need to comply with. The European Commission will designate companies as "gatekeepers" based on the following criteria: (1) whether the company has a significant impact on the internal (EU) market; (2) whether the company's platform services are an important gateway for businesses to reach end users; and (3) whether the company enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future.[39] If certain quantitative criteria pertaining to a company's size (i.e., its revenues and user numbers) are met, there is a rebuttable presumption that the company fulfils the criteria for designating it as a gatekeeper. By creating this shortcut, the DMA sidesteps the need for defining relevant markets and for finding market power, which is difficult to do in the digital sector and can slow down enforcement actions. European regulators want to use the DMA to prevent harm before it materializes, in part due to the belief that economic characteristics of platform markets (such as network effects and potential for markets tipping toward a dominant firm) make it difficult to remedy competitive harms retroactively.

The obligations and prohibitions that the DMA imposes on designated gatekeepers include:

- Allowing end users to easily un-install pre-installed apps or change default settings on operating systems, virtual assistants, or browsers that steer them to gatekeeper's products and services, and providing choice screens for key services;
- Allowing end users to install third-party apps or app stores that use or interoperate with the operating system of the gatekeeper;
- Allowing end users to unsubscribe from core platform services of the gatekeeper as easily as they subscribe to them;
- Allowing third parties to interoperate with the gatekeeper's own services;
- Providing those companies advertising on their platform with access to the gatekeeper's performance-measuring tools and the information necessary for advertisers and publishers to carry out their own independent verification of their advertisements' performance;
- Allowing business users to promote their offers and conclude contracts with their customers outside the gatekeeper's platform;
- Providing business users with access to the data generated by their activities on the gatekeeper's platform;
- Banning gatekeepers from using business users' data when gatekeepers compete with business users on the gatekeeper's platform;
- Banning ranking the gatekeeper's own products or services in a more favorable manner compared to those of third parties;
- Banning requiring app developers to use certain of the gatekeeper's services (such as payment systems or identity providers) as a condition for selling apps in the gatekeeper's app store;
- Banning tracking end users outside the gatekeepers' core platform service for the purpose of targeted advertising, unless users consent to this practice.[40]

The DMA came into force in late 2022, and it requires potential gatekeepers to notify the EC of their core platform services by July 3, 2023. Once designated by the Commission, gatekeepers will have six months, or until March 6, 2024 at the latest, to comply with the requirements in the DMA.

On September 6, 2023, the European Commission designated Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft as gatekeepers under the DMA, specifically focusing on 22 "core platform services" provided by these companies.

37 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, 1-66, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925&qid=1686825577153.

38 The DMA covers ten core platform services: online intermediation services; online search engines; online social networking services; video-sharing platform services; number-independent interpersonal communication services; operating systems; cloud computing services; advertising services; web browsers; and virtual assistants.

39 *Id.* Article 3(1).

40 European Commission's Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets, *available at* https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349.

Google. Self-preferencing as a stand-alone antitrust infringement in digital markets came to the fore in 2017, when the European Commission imposed a €2.42 billion fine on Google for abusing its market dominance in general internet search by systematically giving prominent placement to its own comparison-shopping service, Google Shopping, and by demoting rivals.[41] According to the Commission, "[w]hile competing comparison shopping services [could] appear only as generic search results and [were] prone to the ranking of their web pages in generic search results on Google's general search results pages being reduced ('demoted') by certain algorithms, Google's own comparison shopping service [was] prominently positioned, displayed in rich format and [was] never demoted by those algorithms."[42] Rather than showing actual negative effects on competition, the Commission's case rested on the conclusion that the conduct in question had "the potential to foreclose competing comparison shopping services, which may lead to higher fees for merchants, higher prices for consumers, and less innovation"[43] and that it was "likely to reduce the ability of consumers to access the most relevant comparison shopping services."[44] Google argued that its practices were part of quality improvements in its search services and therefore represented competition on the merits. On appeal, the Court of Justice of the European Union upheld the Commission's decision in all key aspects.[45] While the Court held that leveraging practices do not necessarily amount to an illegal abuse of market power, it agreed with the Commission's conclusion that in the case of Google Shopping, there were a number of key factors that made the alleged self-preferencing "liable to lead to a weakening of competition [in] the market" and therefore "a departure from competition on the merits."[46] The Commission focused on the network effects generated by Google's general search engine ("the more a comparison shopping service is visited by internet users, the greater the relevance and usefulness of its services and the more merchants would be inclined to use them"),[47] the fact "that users typically concentrated on the first three to five search results and paid little or no attention to the remaining results,"[48] and the fact that "diverted traffic [...] could not be effectively replaced by other sources, including text ads, mobile applications (apps), direct traffic, referrals from affiliate websites, social networks or other search engines."[49]

In June 2021, the European Commission opened a new investigation into Google's practices following concerns that the company might be "favouring its own online display advertising technology services in the so called 'ad tech' supply chain to the detriment of competing providers of advertising technology services, advertisers and online publishers. The [ongoing] formal investigation will notably examine whether Google is distorting competition by restricting access by third parties to user data for advertising purposes on websites and apps, while reserving such data for its own use."[50]

41 Decision by the European Commission of June 27, 2017, in Case AT.39740 *Google Search (Shopping), available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

42 *Id.* at 344.

43 *Id.* at 593.

44 *Id.* at 597.

45 Judgement by the General Court of November 10, 2021, in Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* (under appeal), *available at* https://curia.europa.eu/juris/document/document.jsf?text=&docid=249001&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4125758.

46 *Id.* at 169, 175.

47 *Id.* at 171.

48 *Id.* at 172.

49 *Id.* at 173.

50 European Commission press release of June 22, 2021 *"Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector"* in Case AT.40670, *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143. The UK CMA opened a similar investigation in May 2022 which remains ongoing, cf. https://www.gov.uk/cma-cases/investigation-into-suspected-anticompetitive-conduct-by-google-in-ad-tech.

Amazon. Concerns about the negative effects of self-preferencing also lay at the center of the European Commission's investigation into how Amazon grants sellers access to its Buy Box and Prime Program. The Commission concluded that Amazon's rules and criteria for the Buy Box and Prime Program unduly favored its own retail business, as well as marketplace sellers that use Amazon's logistics and delivery services.[51]

Opened in November 2020, the investigation was closed with a commitment decision on December 20, 2022.[52] As part of that "settlement," Amazon agreed to treat all sellers equally when ranking the offers for the selection of the Buy Box winner, to prominently display a second competing offer to the Buy Box winner, and to set non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers for the Prime Program.

DMA. DMA[53] imposes an obligation on designated gatekeepers to "not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking."[54] Reflecting the Court's observation in *Google Shopping* that self-preferencing (or any other type of leveraging) is not *per se* illegal, the DMA gives gatekeepers an opportunity to negotiate tailored and proportionate remedies with the Commission.[55]

Digital Markets, Competition and Consumers Legislation. In the United Kingdom, the draft Digital Markets, Competition and Consumers bill calls for setting up an enforcement tool similar to the EU's DMA. But the process of designating a company a "gatekeeper" under the DMA is very different from how a digital platform is designated to have "strategic market status" (SMS) under the UK regime. Under the DMA, there is a rebuttable presumption that platforms meeting certain size criteria are gatekeepers. By contrast, the UK regime foresees assessing each case individually, with the enforcer—the Digital Markets Unit (DMU)—having discretion to appraise whether a platform has "substantial and entrenched market power" (for example, because of lack of alternative products or services that users could turn to and barriers to market entry and expansion that make it unlikely that the market power could be competed away in the short or medium term) and "strategic significance" (for example, because a platform has grown so large, or because it offers an important access point to consumers, or because it can determine the "rules of the game").[56] Another key difference is that under the UK bill, the DMU will issue tailored obligations for each designated SMS platform, while under the DMA, the same set of obligations principally applies to all gatekeepers. But despite these differences, it is expected that the DMU's enforcement practice will be largely informed by and aligned with the European Commission's enforcement of the DMA.

51 Decision by the European Commission of December 20, 2022 in Case AT.40462 *Amazon Marketplace* and AT.40703 *Amazon Buy Box*, at 208 and 209, *available at* https://ec.europa.eu/competition/antitrust/cases1/202310/AT_40462_8990760_8322_4.pdf.

52 Article 9 (1) of the EU Antitrust Regulation (Regulation 1/2003) allows the Commission to conclude antitrust proceedings by accepting commitments offered by a company. Such a decision does not reach a conclusion as to whether there is an infringement of EU antitrust rules but legally binds the company to respect the commitments.

53 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, 1-66, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925&qid=1686825577153.

54 *Id.* Article 6(5).

55 *Id.* Article 8(7).

56 UK Government report on the outcome of its consultation process concerning the adoption of a new pro-competition regime for digital markets, *available at* https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/consultation-document-html-version#part-3-strategic-market-status.

Platform Guidelines. On January 12, 2023, the KFTC issued guidelines which provide screening criteria for abuse of dominance cases. The guidelines provide criteria for defining relevant markets and assessing dominance and list the most common types of anticompetitive conduct encountered. These include multi-homing restraints, MFNs, self-preferencing and tying. The KFTC identifies a number of platforms of interest including intermediation services, search engines, social media, video streaming services, mobile operating systems, and digital-ad services.

Naver I. In October 2020, the Korea Fair Trade Commission (KFTC) fined South Korean internet giant Naver 26.7 billion won (~$23 million) for manipulating search results to favor its own online shopping and video-streaming services.

Naver appealed the KFTC decision to the Seoul High Court, arguing that it was a new entrant in the e-commerce market. The KFTC countered that Naver was a dominant player in the online price-comparison market with a share of more than 70% and that it was seeking to leverage that dominance into e-commerce by favoring its own online shopping service through the manipulation of search algorithms. In December 2022, the Seoul High Court issued a ruling upholding the KFTC's decision. Naver has filed an appeal with the Supreme Court.

The KFTC also found that Naver's 2017 algorithm updates lowered the ranking of rival video services and resulted in lower viewership for these services while Naver's own video content was favored. On appeal, Naver argued that algorithm updates were intended to improve overall video-search results, and that Naver's videos only made up 22% of those results. In February 2023, the Seoul High Court determined that Naver had favored its own video service by altering algorithms to increase its exposure in search results. But the court quashed the KFTC's finding that Naver had discriminated against rivals by hiding the algorithm updates from competing video services.

Kakao Mobility. In February 2023, the KFTC fined Kakao Mobility, South Korea's top ride-hailing app operator, 25.7 billion won (~$20 million) for manipulating algorithms to preference its drivers.

Tying and Product Integration

Tying is the practice of making the availability of one product conditional on the purchase of a separate product that the buyer either does not want at all or wants to purchase from a different seller. Tying can take place outside the platform context, but tying allegations are fairly common in platform antitrust litigation. A plaintiff may bring a tying claim under either Sherman Act Section 1 (proscribing agreements in restraint of trade) or Section 2 (proscribing monopolization and attempted monopolization). Plaintiffs have challenged tying as a form of self-preferencing. For instance, a plaintiff who claims that a platform operator is self-preferencing by requiring platform users to use the platform's tools may also bring a tying claim for tying the tools to the platform. There are frequently disputes between plaintiffs and defendants over whether the defendant is engaging in an anticompetitive tie or procompetitive product integration (that may make products safer, ensure high quality, and provide other benefits).

Some examples of ongoing disputes over platform strategies that plaintiffs characterize as tying include:

Google Ad Tech Stack Litigation

The Google Ad Tech Stack litigation (already described in the Self-Preferencing section) also includes tying allegations. Plaintiffs allege that Google locked up valuable advertising demand on its advertiser ad network (Google Ads), required publishers to use its own ad exchange (AdX) to access that advertising demand, and required publishers to use its own publisher ad server (DFP) to obtain real-time bids from AdX.[57] According to the complaint, this constitutes tying the use of Google's ad exchange to the use of its publisher ad server.

Epic Lawsuits Against Apple and Google

In 2020, Epic Games, the maker of the blockbuster game Fortnite, sued the operators of the two largest mobile ecosystems—Apple[58] (iPhone) and Google[59] (Android). Among other allegations,[60] each suit claimed that the mobile ecosystem operator had tied app distribution to the use of the operator's payment system. Epic alleged that app developers could not distribute their apps through Apple's App Store or Google's Play Store without using Apple's or Google's payment systems for app purchases and in-app transactions.

In the Apple case, US District Court Judge Gonzalez Rogers issued a 249-page opinion in September 2021, finding for Apple on most claims.[61] The court rejected Epic's tying claim because it found that Apple's payment system was not a separate product but rather "integrated into the iOS devices."[62] The fact that the App Store is a two-sided platform contributed to the court's analysis: the court reasoned that the App Store "has two sides: the developer on one side providing gaming apps and the consumer on the other, purchasing the apps. This is a single platform which cannot be broken into pieces to create artificially two products."[63]

57 Compl. ¶¶ 89, 336-39, *United States v. Google LLC,* No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2023).

58 *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR (N.D. Cal. Aug. 13, 2020).

59 *Epic Games, Inc. v. Google LLC*, No. 3:20-cv-05671-JD (N.D. Cal. Aug. 13, 2020).

60 The other allegations were that Apple and Google made it either impossible or unduly difficult to distribute apps on their platforms outside their proprietary app stores.

61 Epic's only victory was on its claim that Apple's anti-steering rules (limiting developers' ability to communicate with consumers about alternative purchase channels that bypassed Apple's payment system) constituted an unfair practice under California Unfair Competition Law.

62 559 F. Supp. 3d 898, 1046 (N.D. Cal. 2021).

63 *Id.*

The Ninth Circuit disagreed with the district court's tying analysis in its April 24, 2023 opinion, but nonetheless found the tie to be lawful. The Ninth Circuit explained that the "functional relation" between the payment system and iOS devices did not matter—Epic successfully showed that these are two separate products by establishing "(1) that it is possible to separate the products, and (2) that it is efficient to do so, as inferred from circumstantial evidence."[64] The Ninth Circuit posited that "*Amex* simply does not stand for the proposition that any two-sided platform will necessarily relate only to one market".[65]

However, the Ninth Circuit held that "ties related to app-transaction platforms that combine multiple functionalities" are ***not*** *per se* illegal.[66] The Ninth Circuit explained that "[s]oftware markets are highly innovative and feature short product lifetimes—with a constant process of bundling, unbundling, and rebundling of various functions. In such a market, any first-mover product risks being labeled a tie pursuant to the separate-products test."[67] The panel found that the tie was not illegal under the rule of reason analysis because Apple's procompetitive justifications (protecting users' privacy and security and ensuring it could collect compensation for its investment in iOS) outweighed any anticompetitive harms.[68]

The Google case, which has been joined by dating app developer Match Group, is scheduled for trial in November.[69]

Lawsuit Against Valve[70]

Video game publisher and distributor Valve won a motion to dismiss in a suit claiming that it unlawfully ties the Steam Platform (a PC gaming platform allowing users to maintain and update their game libraries and track in-game achievements in one location) to the Steam Store (that allowed developers to sell games to users and collected a fee for each sale).[71] The court found that the Steam Platform and the Steam Store were a single product because the plaintiffs' allegations did not support a finding of separate demand for "fully functional gaming platforms" as distinct from "game stores."[72]

64 *Epic Games, Inc. v. Apple, Inc.,* 67 F.4th 946, 995 (N.D. Cal. 2023).

65 *Id.* at 996.

66 *Id.* at 997.

67 *Id.* at 998.

68 *Id.* at 998-99.

69 The case was also joined by a class of other app developers, a class of app consumers, and a group of state attorneys general, but Google has settled with the developer class and has announced an agreement in principle to settle with the consumer class and the states.

70 *Wolfire Games, LLC v. Valve Corp.*, No. C21-0563-JCC (W.D. Wash. Apr. 27, 2021).

71 *Wolfire Games, LLC v. Valve Corp.*, No. C21-0563-JCC, 2022 WL 1443744, (W.D. Wash. May 6, 2022).

72 *Id.* at *3.

Google Android. While tying may result in procompetitive efficiencies, proving that a restriction is justified and necessary to generate such efficiencies is notoriously difficult. The threshold for the Commission to show negative effects from tying is fairly low. In its 2018 *Google Android* decision, the EC defined the legal test as follows: "[T]he Commission is not required to demonstrate in a general manner that 'there would have been greater competition' absent the tying of the Google Search app with the Play Store. Rather, the Commission is required to demonstrate that the tying is capable of restricting competition."[73] In light of network effects ("the greater the number of queries a general search service receives, the quicker it is able to detect a change in the pattern of user behaviour and update and improve the relevance of its search results and related search advertising")[74] and users' "status quo" bias (i.e., "[w]here a product is preloaded by default, consumers tend to stick to this product at the expense of competing products—even if the default product is inferior to competing products"),[75] the Commission found that "Google's conduct [tying the Play Store and the Google Search app] helps to maintain and strengthen its dominant position in each national market for general search services, increases barriers to entry, deters innovation and tends to harm, directly or indirectly, consumers."[76]

DMA. The Digital Markets Act (Article 5(7)) prohibits designated gatekeepers from tying certain services (including payments) to platforms: "The gatekeeper shall not require end users to use, or business users to use, to offer, or to interoperate with, an identification service, a web browser engine or a payment service, or technical services that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper in the context of services provided by the business users using that gatekeeper's core platform services."

Platform MFNs

Platform Most-Favored-Nation clauses are contractual provisions in which a seller promises a platform that it will not offer a lower price or better terms for sales through other platforms—or, in some cases, for direct sales or sales through non-platform channels. Plaintiffs challenging platform MFNs argue that MFNs reduce competition by preventing sellers from steering buyers to platforms that charge lower fees or offer better services. Plaintiffs can challenge platform MFNs under Sherman Act Section 1 (on the theory that they are anticompetitive agreements that unreasonably restrain trade) or Section 2 (on the theory that they create or preserve the platform's monopoly power by impairing rivals' opportunities). The earliest cases challenging platform MFNs date back to the mid-2000s, but legal challenges to these provisions have proliferated in recent years.

73 Decision by the European Commission of July 18, 2018, in Case AT.40099 *Google Android*, at 872, *available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

74 *Id.* at 855.

75 *Id.* at 782.

76 *Id.* at 858 *et seq.*

Platform MFNs

Here are examples of legal disputes involving platform MFNs:

Travel Platforms: US Airways v. Sabre[77]

US Airways sued Sabre, a Global Distribution System (GDS) platform, alleging that Sabre monopolized the market for GDS services connecting airlines to Sabre-subscribing traditional travel agents. US Airways alleged that Sabre engaged in several exclusionary acts, including pressuring airlines to provide "full content"—a platform MFN that prevented airlines from offering lower fares or other benefits through other distribution channels. Sabre punished airlines that tried to resist "full content" by charging them punitive fees, biasing search results to make the airlines' flights less prominent, and threatening to remove their flights from its platform altogether.

At trial, in May 2022, US Airways' economist explained to the jury that "full content" amounted to a "One Price Rule" that hampered airlines' ability to stimulate demand for other distribution channels, including direct sales to travel agents, which entrenched Sabre as an unavoidable and overpriced middleman. US Airways also demonstrated "net harm" across both sides of the GDS platform by showing that the "net price" charged by Sabre (fees charged to airlines minus "incentive" payments to travel agents) was above the competitive level. The jury sided with US Airways and found Sabre liable in the first modern two-sided monopolization jury trial.

US Airways demonstrated that Sabre's net price was above the competitive level (trial demonstrative).

77 *US Airways, Inc. v. Sabre Holdings Corp.*, No. 1:11-cv-02725-LGS-JLC (S.D.N.Y. Apr. 21, 2011). O'Melveny represented US Airways in this litigation.

Platform MFN Suits in Other Industries

Platform MFNs have been a popular theory of harm in two-sided platform markets, and platform MFN claims have survived motion-to-dismiss challenges in multiple industries.

- **Credit cards.** In the landmark *Amex* case (discussed on pg. 8), plaintiffs challenging platform MFNs in the credit-card industry won at the district court level before being overturned by the Second Circuit (and eventually the Supreme Court) for failing to show net harm across both sides of the platform. Other platform MFN challenges in the credit-card industry remain ongoing.
- **PC gaming.** In *Wolfire Games v. Valve*,[78] the plaintiff—a game developer—got past a motion to dismiss with its allegations that Valve's Steam PC gaming platform "imposes a PMFN regime…to prevent price competition from rival storefronts, resulting in higher prices for [video] games and less competition in the broader PC game distribution market."[79] As in *Sabre*, the ***manner*** in which the defendant imposed the platform MFNs, not just the existence of MFNs, was key: the court noted that "Defendant also threatens game publishers with punitive action, including removal of their Steam-enabled games, if they sell non-Steam-enabled versions of those games at lower prices."[80]
- **E-commerce.** In *Frame-Wilson v. Amazon*,[81] a putative class of consumers alleged that Amazon's platform MFNs prohibiting third-party sellers on Amazon from offering their goods at a lower price on other channels raised the price of goods on non-Amazon e-commerce channels. The court allowed plaintiffs to seek damages from Amazon for alleged overcharges on purchases from non-Amazon channels[82] on the theory that "online sellers become co-conspirators to Amazon's alleged price-fixing conspiracy by virtue of their agreement with Amazon to sell their products on third party sites at supracompetitive prices."[83] But the court sided with Amazon in finding that its agreements with sellers were ***vertical*** rather than ***horizontal***, reasoning that "Plaintiffs are not challenging Amazon's conduct as a competitor to its third-party sellers," but rather "the vertical agreement between third-party sellers and their host platform, Amazon.com."[84] The distinction between horizontal and vertical agreements is crucial in antitrust doctrine, because while horizontal price-fixing agreements are *per se* illegal, plaintiffs must prove that vertical agreements are anticompetitive under the *rule of reason*, which entails a thorough market analysis and a weighing of the competitive harms and benefits caused by the challenged agreement.

  One of the core allegations in the FTC's 2023 monopolization lawsuit against Amazon (referenced earlier in the report) is that Amazon "punishes sellers" for offering lower prices elsewhere by: (1) "disqualifying a seller's offer from appearing in the Buy Box when Amazon finds a lower price on another online store for an item being sold by a seller on Amazon," and (2) "imposing contractual obligations on certain important sellers, backed up with the threat of even stronger penalties, including

78 *Wolfire Games, LLC v. Valve Corp.*, No. C21-0563-JCC, (W.D. Wash. April 27, 2021).

79 *Wolfire Games, LLC v. Valve Corp.*, 2022 WL 1443744, at *4 (W.D. Wash. May 6, 2022). (quotations omitted).

80 *Id.*

81 *Frame-Wilson v. Amazon.com, Inc.*, No. 20-cv-00424-RAJ (W.D. Wash. March 19, 2020).

82 A separate putative class is seeking overcharge damages for goods purchased on Amazon, under the same theory that platform MFNs drove up the price of goods. *De Coster v. Amazon.com, Inc.*, No. 21-cv-693-RSM (W.D. Wash.).

83 *Frame-Wilson v. Amazon.com, Inc.*, 591 F. Supp. 3d 975, 984 (W.D. Wash. 2022).

84 *Id.* at 986.

total banishment from Amazon's Marketplace."[85] The FTC alleges that this conduct injures shoppers, sellers, and rival marketplaces alike. As to shoppers, the complaint claims that "[b]ecause Amazon has steeply raised its fees, sellers need to charge higher prices on Amazon than they would on a less-costly marketplace to make the same per-unit profit," and because Amazon effectively prohibits sellers "from discounting on other website, sellers must often use their inflated Amazon prices as an artificial price floor everywhere."[86] As to sellers, the FTC alleges that rival marketplaces "no longer compete to offer sellers lower fees, since Amazon's anti-discounting conduct prevents sellers from passing those savings on to shoppers."[87] Finally, as to rival marketplaces, the complaint argues that "[w]ithout the ability to attract shoppers or sellers through lower prices, rivals are unable to gain a critical mass of either shoppers or sellers despite needing both to compete against Amazon."[88]

- **Food delivery.** In *Davitashvili v. Grubhub*,[89] three putative classes of restaurant customers challenged platform MFNs allegedly imposed by restaurant delivery platforms Grubhub, Uber, and Postmates. The platform MFNs prohibited restaurants from charging less for food sold through other channels—including other platforms, in-restaurant dining, and direct delivery by the restaurant.[90] Plaintiffs attacked the platform MFNs as a form of "vertical price fixing," analogizing them to minimum resale prices imposed by a manufacturer on a retailer. The claims survived a motion to dismiss. The court found plaintiffs' theory of the case to be plausible: "It is exceedingly difficult for restaurants to avoid being bound" by the MFNs because many consumers use only one particular delivery platform—that is, they single-home—and restaurants have to do business with the platform to reach these single-homing consumers. "And once they are so bound, restaurants cannot lower their list prices—either for direct purchases or on platforms that charge lower commissions or fees—in order to offset the costs they incur on Defendants' platforms," which forces restaurants "to raise prices to counteract Defendants' high commission rates."[91]
- **Mobile apps.** In *Epic v. Apple*,[92] a game developer challenged (among other restrictions detailed above) Apple's anti-steering restrictions, which prohibited apps from including "buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase" and "encouraging users to use a purchasing method other than in-app purchase either within the app or through communications sent to points of contact obtained from account registrations within the app."[93] Some argue that these anti-steering rules function as a weaker version of an MFN, allowing developers to offer lower prices on other platforms but preventing them from communicating these offerings to customers on Apple's platform. Although Epic did not prove that the anti-steering provisions violated federal antitrust laws, the court found that they did violate California's Unfair Competition Law by "preventing informed choice among users of the iOS platform" and effectively "preventing substitution among platforms for transactions."[94]

85 Compl. ¶ 269, *Fed. Trade Comm'n v. Amazon.com, Inc.,* No. 2:23-cv-01495 (W.D. Wash., Sep. 26, 2023).

86 Compl. ¶ 271, 309

87 Compl. ¶ 258.

88 Compl. ¶ 265.

89 *Davitashvili v. Grubhub Inc.*, No. 20-cv-3000-LAK (S.D.N.Y. April 13, 2020).

90 The platform MFNs varied in whether they covered all alternative channels or just some.

91 *Davitashvili v. Grubhub Inc.*, No. 20-CV-3000 (LAK), 2022 WL 958051, at *4 (S.D.N.Y. Mar. 30, 2022).

92 *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898 (N.D. Cal. 2021), aff'd in part, 67 F.4th 946 (9th Cir. 2023).

93 *Id.* at 1055 (cleaned up).

94 *Id.* at 1055-56.

Platform MFN Challenges

Industry	Case	Claims	Outcome or Status
Travel distribution	*US Airways v. Sabre*	Sherman Act §§ 1 & 2	Jury found defendant platform liable under Section 2
Credit cards	*Ohio v. American Express*	Sherman Act § 1	Plaintiffs won at the district court level; victory overturned due to failure to show net harm across both sides of the platform; other platform MFN challenges remain ongoing
PC gaming	*Wolfire Games v. Valve*	Sherman Act §§ 1 & 2; state consumer protection statute	Plaintiff survived motion to dismiss; litigation ongoing
E-commerce	*Frame-Wilson v. Amazon, Inc.; De Coster v. Amazon, Inc.* *Fed. Trade Comm'n v. Amazon.com, Inc.*	Sherman Act §§ 1 & 2; state consumer protection and antitrust statutes FTC Act Section 5	Litigations ongoing; in *Frame-Wilson*, court dismissed horizontal price-fixing claims, but other claims survived
Food delivery	*Davitashvili v. Grubhub*	Sherman Act §§ 1 & 2	Plaintiff survived motion to dismiss; defendants' motion to compel arbitration was denied and is being appealed; litigation stayed pending the appeal

EU Approach to Platform MFNs. European antitrust enforcers and courts take a nuanced approach to appraising MFN clauses (also referred to as parity or best-price clauses). In line with academic literature,[95] the European Commission, for example, considers case-by-case analysis of MFNs necessary because they "can have both pro- and anticompetitive consequences."[96] The Commission has expressed the view that "any practice aimed at protecting the investment of a dominant platform should be minimal and well targeted.... If competition between platforms is sufficiently vigorous, it could be sufficient to forbid clauses that prevent sellers on a platform from price differentiating between platforms (i.e., a ban of 'wide' MFNs) while still allowing clauses preventing the seller from offering lower prices on its own website ('narrow' MFNs). If competition between platforms is weak, then pressure on the dominant platforms can only come from other sales channels (e.g., in the case of hotel booking platforms, direct sales by hotels on their own websites) and it would be appropriate to also prevent 'narrow' MFNs."[97]

The differential treatment of wide and narrow MFNs is also reflected in the European Commission's revised 2022 Block Exemption Regulation for Vertical Agreements,[98] which provides a safe harbor for certain vertical agreements (i.e., agreements between companies active at different levels of the production or distribution chain). "Wide retail parity clauses used by online platforms are excluded from the new . . . safe harbour. However, other types of parity clause, including narrow retail parity clauses, continue to benefit from the safe harbour."[99]

95 Steven C. Salop and Fiona Scott-Morton, *"Developing an Administrable MFN Enforcement Policy,"* Antitrust, Vol. 27, No. 2, Spring 2013, 15-19, *available at* https://media.crai.com/sites/default/files/publications/Developing_An_Administrable_MFN_Enforcement_Policy_Salop_ScottMorton_Antitrust_Spring_2013.pdf.

96 European Commission's 2019 report on Competition Policy for the digital era, at 55, *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

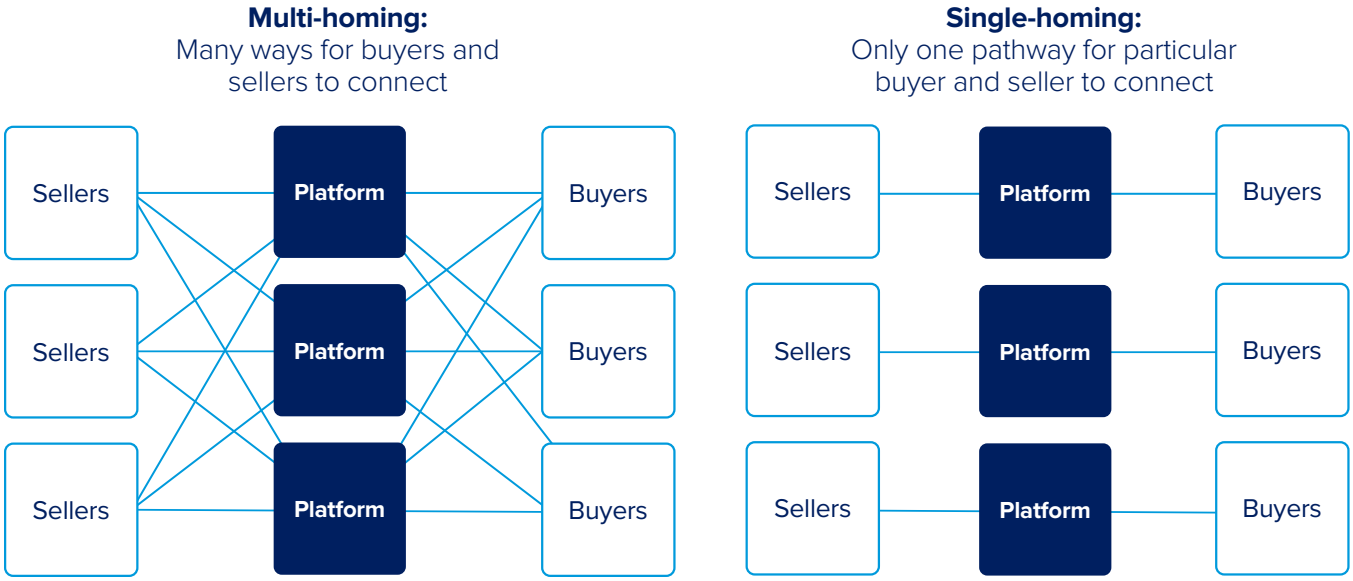
97 *Id.* at 5-6.

98 Commission regulation (EU) 2022/720 of May 10, 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134, 11.5.2022, 4–13, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0720.

99 European Commission press release of August 26, 2022: *"Antitrust: Commission publishes market study on hotels' distribution practices," available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5045.

Suppression of Multi-Homing

Multi-homing may play an important role in determining the competitiveness of a platform market. When both sides of the market (*e.g.*, buyer and sellers) multi-home, there are multiple pathways for sellers and buyers to connect; when buyers single-home, sellers can only reach a particular buyer through the one platform the buyer participates in. According to some, this dynamic may create market power for the platform if the platform becomes the exclusive means for sellers to connect to a critical mass of buyers.[100]



Multi-homing may also decrease barriers to entry. In a multi-homing platform market, a new platform entrant need not convince users to abandon the incumbent platform entirely to try the new platform; users can shift some of their usage to the new platform while continuing to use the incumbent platform. And switching costs may be lower in multi-homing markets: if a user already uses two platforms, shifting usage from one to the other is simpler than shifting 100% of usage to a new platform.

100 Similar dynamics may apply to seller single-homing—the generalizable point is that when one side single-homes, the platform may be the exclusive way to connect to those participants.

In several recent cases, allegations that a defendant suppressed multi-homing to increase its market power have played an important role:

US Airways v. Sabre

Single-homing played a key part in US Airway's case against Sabre. The airline's expert explained that Sabre had monopoly power in large part because it was the exclusive gatekeeper to a critical mass of Sabre-subscribing travel agents whose business the airlines needed to survive.

Because of travel agent single-homing, Sabre was the only "pipe" connecting airlines to Sabre-subscribing travel agents (trial demonstrative)

Sabre recognized that its power depended on travel agent single-homing and took steps to impair multi-homing, including by:

- Paying travel agents volume-based incentives—and penalizing them for volume shortfalls—to encourage them to use Sabre exclusively;
- Hampering the adoption of technology that would have allowed travel agents to multi-home easily, such as aggregators capable of pulling in fares from multiple GDSs and other sources;
- Prohibiting airlines from offering special fares or other perks through other channels, which would have motivated travel agents to multi-home to gain access to options not available in Sabre; and
- Retaliating against airlines that encouraged travel agents to multi-home by offering special fares and perks outside Sabre.

Much of the exclusionary conduct that led to the monopolization verdict against Sabre could be characterized as acts to perpetuate travel-agent single-homing to preserve Sabre's gatekeeper power.

In re Surescripts Antitrust Litig.[101]

Allegations of suppression of multi-homing also play a key role in the *Surescripts* litigation. Pharmacies sued Surescripts, the largest provider of e-prescribing services—"the computer-based electronic transmission of prescription information from a doctor to a pharmacy."[102] The complaint claimed that a loyalty scheme rewarded doctors with higher bonuses and paid pharmacies lower prices if they used Surescripts' network exclusively—and penalized them by clawing back bonuses and discounts if they started using a competing network. The complaint survived a motion to dismiss; the court found the monopolization allegations plausible, because by making it difficult for users on both sides of the platform to multi-home, "the loyalty scheme becomes a self-reinforcing barrier to entry for smaller competitors."[103] An earlier lawsuit by the FTC featuring similar allegations against Surescripts survived both a motion to dismiss and summary judgment, before eventually settling.[104]

FTC's Monopolization Lawsuit Against Amazon

As described above (pg. 15), one of the core allegations in the FTC's lawsuit against Amazon is that Amazon conditions "sellers' ability to be 'Prime eligible' on their use of Amazon's order fulfillment service."[105] The FTC claims that one of the anticompetitive consequences of this conduct is that it suppresses multi-homing: if sellers did not have to use Amazon's fulfillment service, they "could multihome more cheaply and easily by using an independent fulfillment provider—a provider not tied to any one marketplace—to fulfill orders across multiple marketplaces. Permitting independent fulfillment providers to compete for any order—on or off Amazon—would enable them to gain scale and lower costs to sellers… All this would make it easier for sellers to offer items across a variety of outlets, fostering competition and reducing sellers' dependance on Amazon."[106]

Google Ad Tech Stack Litigation

As described above (pg. 14), plaintiffs claim that Google steers both advertisers and website publishers to use its ad technology tools through preferential treatment—for instance, "by giving Google's ad exchange (and only Google's ad exchange) a 'first look'" at inventory available for sale on Google's DFP ad server.[107] The complaint alleges that Google's strategy was to "inhibit the ability of publishers and advertisers to transact effectively through rivals" because "[t]he growth of alternative ad tech tools posed a risk of increased competition via more effective multi-homing, leading to pressure to reduce prices and increase choice and quality for publishers and advertisers."[108] This is another flavor of the "suppression of multi-homing" theory of harm: plaintiffs may allege that scale is vital in platform markets, and suppression of multi-homing makes it that much more difficult for upstart rival platforms to reach viable scale.

101 *In re Surescripts Antitrust Litig.*, No. 19-cv-06627 (N.D. Ill. Oct. 4, 2019).

102 *In re Surescripts Antitrust Litig.*, 608 F. Supp. 3d 629, 635–36 (N.D. Ill. 2022).

103 *Id.* at 645.

104 *Federal Trade Commission v. Surescripts, LLC*, No. 1:19-cv-01080-JDB (D.D.C. Apr. 17, 2019).

105 Compl. ¶ 24, Fed. Trade Comm'n v. Amazon.com, Inc., No. 2:23-cv-01495 (W.D. Wash., Sep. 26, 2023).

106 Compl. ¶ 29.

107 Compl. ¶ 124, *Federal Trade Commission v. Surescripts, LLC,* No. 1:19-cv-01080-JDB (D.D.C. Apr. 17, 2019).

108 Compl. ¶ 268.

2023 Draft Merger Guidelines

The new draft Merger Guidelines make clear that US antitrust agencies will scrutinize mergers that may lead to suppression of multi-homing. According to the Guidelines, "acquisitions of firms that provide services that facilitate participation on multiple platforms can deprive rivals of platform participants."[109] Examples of these multi-homing services include "tools that help shoppers compare prices across platforms, applications that help sellers manage listings on multiple platforms, or software that helps users switch among platforms."[110] Agencies likely will examine whether a platform acquiring a service that facilitates multi-homing will have the ability and incentive to make multi-homing more difficult in order to deprive rival platforms of users.

Recent Scholarship on Platform Annexation

In a 2022 article, economists Susan Athey and Fiona Scott Morton argue that "[a]vailable and vibrant multi-homing is… a strong signal that there is competition between platforms in a market and that consumers have choices," and they suggest that harm to multi-homing may be used as a screen by antitrust enforcers to identify conduct that is worth investigating.[111] The authors label conduct that reduces multi-homing and increases a platform's power as "platform annexation." Platform annexation may involve a platform's acquisition of a tool that aided multi-homing, "[b]ut even without an acquisition, a dominant platform may engage in foreclosure of this type by restricting the interoperability of its tools or platform with rival tools or platforms."[112] The article is particularly noteworthy given the authors' positions in public antitrust enforcement: Athey is the Chief Economist at the DOJ Antitrust Division and Scott Morton served as the Deputy Assistant Attorney General for Economic Analysis at the Antitrust Division in 2011 and 2012.

EU Focus on Multi-Homing. In its 2019 report on Competition Policy for the digital era, the European Commission described the importance of multi-homing: "In order to encourage exploration by consumers and to allow entrant platforms to attract them through the offer of targeted services, it is key to ensure that multi-homing and switching are possible and dominant platforms do not impede it." The Commission noted certain forms of loyalty rebates and bundling as two practices that may impede multi-homing, though it emphasized that there are myriad ways to restrict multi-homing and that a case-by-case analysis is necessary.[113] According to the Commission, "any measure by which a dominant firm restricts multi-homing should be suspect and such firm should bear the burden of providing a solid efficiency defence." The Commission also noted two practices that can foster multi-homing: "(i) **data portability**, i.e., the ability of users to transfer elsewhere the data that a platform has collected about them; and (ii) **interoperability** (in its various specifications, namely protocol interoperability, data interoperability, full protocol interoperability)."[114]

109 US Dep't of Justice & Fed. Trade Comm'n, Draft Merger Guidelines 24 (Jul. 19, 2023), *available at* https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

110 *Id.*

111 Susan Athey and Fiona Scott Morton, Platform Annexation, 84 Antitrust L J 677, at 678, 691 (2022).

112 *Id.* at 680.

113 *Id.* at 57.

114 European Commission's 2019 report on Competition Policy for the digital era, at 6, *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

DMA. The DMA prohibits designated gatekeepers from restricting multi-homing.[115] Further, the lack of multi-homing is considered a sign of a market's "weak contestability" under the DMA,[116] and the availability of multi-homing may be considered in the decision on whether to designate a platform operator as a "gatekeeper."

Foodpanda and Deliveroo. In September 2021, the Hong Kong Competition Commission (HKCC) launched an investigation of food delivery platforms Foodpanda and Deliveroo. The HKCC recently published a proposed settlement for public consultation. Under the settlement, Foodpanda and Deliveroo would amend their terms to allow restaurants to partner with rival platforms without losing commercial incentives, and to charge lower prices on the restaurant's own channels and on other platforms.

Meituan. In October 2021, SAMR found that Meituan had abused its dominant position in the China market for online food delivery platform services by restricting in-platform merchants from dealing with Meituan's competitors. Meituan was found to have:

- set higher commission rates for non-exclusive partners;
- delayed the launch of non-exclusive partners' stores on Meituan's platform;
- implemented and policed the merchants' adherence to the *"choose one of two"* policy (i.e., platform exclusivity) by collecting "exclusive cooperation deposits" and leveraging its access to merchant data.

SAMR ordered Meituan to refund the "exclusive cooperation deposits" and imposed a fine of approximately $475 million.

CNKI. In December 2022, SAMR fined CNKI approximately $12.6 million for abuse of dominance in the China market for online Chinese academic literature database services. CNKI was found to have imposed exclusivity requirements prohibiting academic journal publishers and universities from authorizing CNKI's competitors to publish their academic journals, doctoral and master's degree theses, and other academic literature. CNKI was also found to have charged exploitative prices for its database services.

Alibaba. In April 2021, SAMR fined Alibaba approximately $2.78 billion (4% of its China turnover for FY2020) for abuse of dominance in the China online retail platform services market. The company was found to have implemented exclusivity requirements known as *"choose one of two."* These prohibited in-platform merchants from opening stores or participating in sales promotion activities on competing platforms. Alibaba had penalized merchants that failed to comply with its policy by reducing promotional support, disqualifying them from sales promotion activities, and lowering their ranking in search results.

Tencent Music/China Music Corporation. In July 2021, SAMR penalized the two largest music-streaming platforms in China for gun-jumping. With an 80% market share, SAMR found the merged entity would have the ability and incentive to impose exclusive supply agreements on upstream copyright holders, which would suppress artists' ability to multi-home and increase barriers to entry in the music-streaming market. In addition to levying a fine of $77,000, SAMR imposed conditions on the merged entity, including a requirement that it refrain from entering into exclusive copyright agreements with copyright holders and that it terminate all such existing agreements (except for exclusive cooperation for song debuts or with independent musicians). The case marks the first time that SAMR imposed corrective measures for gun-jumping.

115 *Id*. Article 6(6).

116 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, at recital 13, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925&qid=1686825577153.

Naver II. In September 2020, the KFTC fined Naver 1 billion won ($866,200) for abuse of dominance in the online real-estate search market. The KFTC found that from 2015 to 2017, Naver had clauses in its contracts that prevented real-estate information distributors from dealing with Kakao, causing Kakao to shut down its real-estate services offering. Naver appealed the KFTC's decision to the Seoul High Court, arguing that the contract clauses were necessary to prevent Kakao from free-riding on Naver's property-filtering system. The KFTC countered that Naver was an unavoidable gateway to customers seeking real-estate information providers. The Seoul High Court has yet to issue its ruling as of August 2023.

Google. In April 2023, the KFTC fined Google 42.1 billion won (~$39 million) for preventing mobile game developers from releasing their games on One Store, a competing app store launched by Naver in 2016. According to the KFTC, Google held a near-monopoly share of more than 85% in the Korean Android app market and acted as a "gatekeeper." The KFTC claimed that from June 2016 to April 2018, Google abused its dominant position in the market by offering game developers app store features and support for overseas expansion in exchange for an exclusive launch on Google Play, and that, as a result, One Store's platform value and sales suffered.

Risk of False Positives in Platform Antitrust

One reason platform markets present a unique challenge is that conduct that may at first appear anticompetitive may actually reflect procompetitive business strategies responding to the peculiar economics of two-sided markets.

Seeding the platform may be mistaken for predatory pricing.

As two authors of this report explore in an article,[117] a procompetitive seeding strategy to jump-start a new platform business may superficially resemble predatory pricing. New entrants in platform markets face a "chicken-and-egg" problem: how to attract new users to one side of the platform without there being many users on the other side. One way to solve this problem is to offer heavy discounts—even below cost—to attract initial users to one or both sides of the platform. Once a critical mass of initial users joins, indirect network effects can spark a virtuous cycle that leads to rapid growth: users on one side of the platform attract more participation on the other side, which in turn attracts more users on the first side, and so on. With the platform now populated on both sides, below-cost pricing is no longer necessary to attract users, so it is economically rational for the platform to raise its fees. A successful platform may now enjoy healthy margins, even in a competitive market. While the platform's actions benefited competition (by ensuring successful entry), the below-cost pricing followed by high profits that recouped the earlier losses may be mistaken for the traditional antitrust offense of predatory pricing.

117 Sergei Zaslavsky and Tyler Helms, *A Sheep in Wolf's Clothing: Predatory Pricing, Platform Antitrust, and the Risk of False Positives,* COMPETITION POLICY INTERNATIONAL (Apr. 26, 2023), *available at* https://www.pymnts.com/cpi_posts/a-sheep-in-wolfs-clothing-predatory-pricing-platform-antitrust-and-the-risk-of-false-positives/.

"Coring" may be mistaken for anticompetitive restraints.

Catherine Tucker, a leading scholar on multi-sided platforms, explained the concept of "coring" in a 2022 article. Coring is the "practice of actively managing [platform] interactions to make sure they go well," such as "adopting technology, policies, and procedures that facilitate the interaction taking place, build trust in the interactions, and provide incentive for interactions to stay on the platform."[118] Coring may involve imposing some restraints—for instance, limits on what products are available or "removing users who undermine trust in the quality of interactions on the platform."[119] In that way, "coring may result in policies restrictive for one side in isolation, but that are procompetitive and improve the platform as a whole and the quality and value of the interaction for all user sides."[120] Tucker also warns of conflating "a platform's coring actions with a market"—i.e., mistakenly defining a market around the platform's coring activity rather than around the broader service of facilitating interactions among users on different sides of the platform.[121]

118 Catherine Tucker, *How Platforms Create Value Through Coring and Implications for Market Definition*, ANTITRUST CHRONICLE 16 (July 2022).

119 *Id.*

120 *Id.*

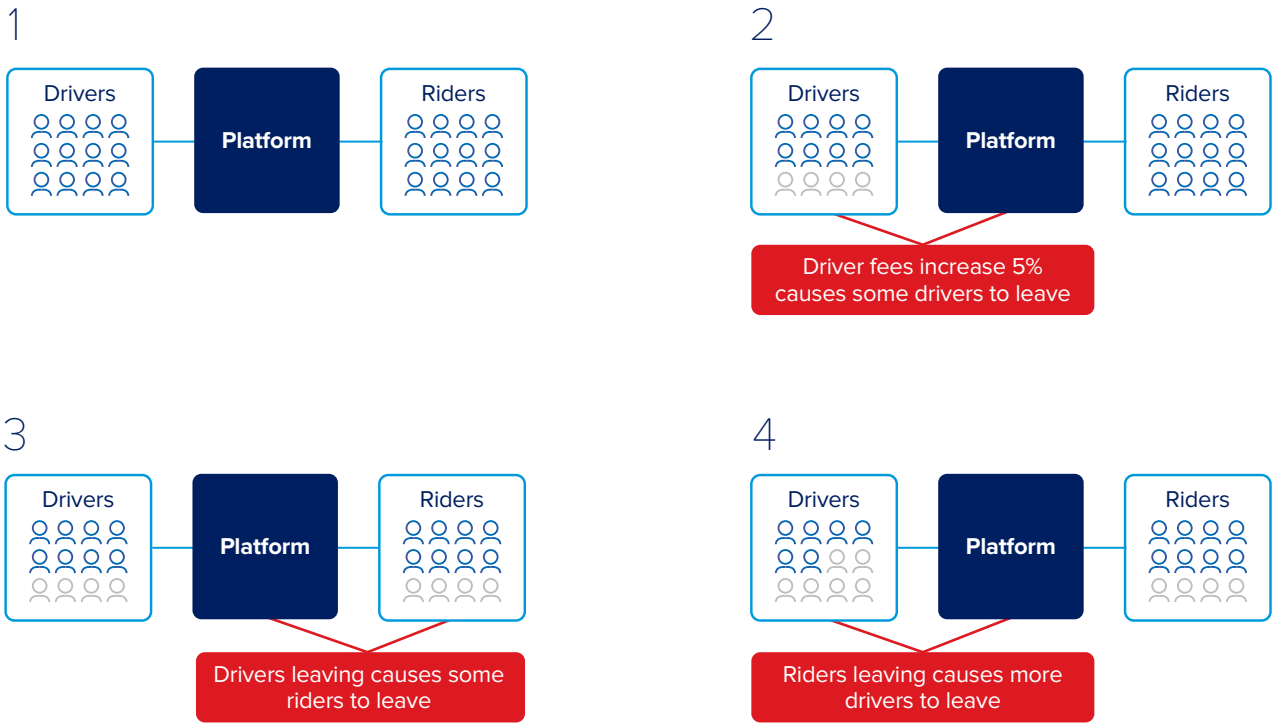
121 *Id.* at 19.

03 Market Definition Issues in Platform Antitrust

Market definition is important in most antitrust cases but it raises unique challenges in the platform context. The goal of product market definition is to identify a set of products that are reasonably interchangeable, meaning that if the seller raises price on one product in the market, buyers can substitute to the other products. The Hypothetical Monopolist Test, a common analytical framework for identifying the relevant product market, asks whether a hypothetical monopolist controlling a group of products would be able to raise prices by 5% without losing so many customers that the price increase becomes unprofitable. If the hypothetical monopolist can profitably impose the 5% increase, then the proposed market includes enough substitute products to pass the test; if the hypothetical monopolist would lose too many customers to substitute products, the proposed market needs to be broadened to include additional reasonably interchangeable substitutes.

Hypothetical Monopolist Test in a Platform Market

Applying the Hypothetical Monopolist Test in a platform market presents challenges because of potential feedback effects between the two sides of the platform. For example, if a hypothetical monopolist in ride-hailing apps raises fees it charges drivers by 5%, which causes some drivers to leave the platform, that is not the end of the analysis. Drivers leaving may make the ride-hailing platform less attractive to passengers on the other side because they will now have to wait longer for a ride, and that might cause some passengers to leave the platform as well, which in turn could prompt more drivers to leave, and so on. Hence, to estimate the profitability of raising price by 5%, it is necessary to consider not only the immediate effects (drivers leaving due to the price increase) but also the feedback effects (passengers leaving because the initial driver departures made the platform less attractive).



Epic v. Apple. Several recent cases have addressed the Hypothetical Monopolist Test in the context of platforms. In *Epic v. Apple*, the court rejected Epic's expert's attempt to use a Hypothetical Monopolist Test to establish that iOS app distribution was the relevant market. The court quoted the expert's own academic writings saying that "even if it is technically possible to extend the hypothetical monopol[ist] test to two-sided platforms, the challenges of implementing the… test empirically in two-sided markets are likely to be overwhelming in practice."[122] The court faulted the expert for conducting the test on the consumer side and the developer side separately, ignoring the feedback effects between the two sides and disregarding the fact that "a price increase would reduce consumer demand for apps, which in turn would make app sales less profitable for developers, and developers may in turn react by reallocating engineering or marketing resources even if they do not leave the platform entirely."[123]

Interchange Fee. In *Interchange Fee*[124] litigation challenging Visa's and Mastercard's platform MFNs, the court excluded the market definition analysis of the plaintiff's expert for focusing exclusively on one side of the platform (merchants) and disregarding the other (cardholders).[125] Even though the expert "consider[ed] the feedback effects of an increase in the merchant price," he did not "consider feedback effects in response to a hypothetical increase on the *cardholder* side of the platform," and "his analyses from functional interchangeability and natural experiments [similarly] consider[ed] *merchant* substitution, not cardholder substitution."[126]

US Airways v. Sabre. *US Airways v. Sabre* provides one example where the plaintiff expert did successfully take both sides of the platform into account in defining a market. US Airways' expert opined that Sabre's GDS platform constituted its own single-brand market (which did not include the two other GDSs and other channels connecting airlines and travel agents, such as direct sales). He supported this opinion with analyses that focused on both sides of the platform. The court credited evidence and expert analysis showing that "from the airlines' perspectives, Sabre's platform is not interchangeable. . . . because a contract with another GDS would not provide access to the market of Sabre travel agent purchasers locked in on the other side of the Sabre GDS platform."[127] On the other side of the platform, the court credited evidence that "travel agent switching rarely occurred" and "many factors impede travel agent switching, including long-term contracts, non-linear incentive structures and user-unfriendly interfaces."[128] The expert bolstered this evidence with a Hypothetical Monopolist Test showing that Sabre could (and in fact did) raise its net fee by 5% above the competitive level without losing a significant number of bookings (since any resulting decline in travel booked through the platform would be negligible, and airlines would not leave the platform in response because Sabre was the exclusive way to reach a critical mass of Sabre-subscribing travel agents). The market definition analysis survived summary judgment, and supported a jury verdict at trial.

122 *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 964 (N.D. Cal. 2021).

123 *Id.*

124 *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 05-MD-1720 (MKB) (E.D.N.Y. Oct. 20, 2005).

125 O'Melveny represents defendant Capital One in this litigation.

126 *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB), 2022 WL 15053250, at *24 (E.D.N.Y. Oct. 26, 2022).

127 *US Airways, Inc. v. Sabre Holdings Corp.*, No. 11 CIV. 2725, 2022 WL 874945, at *8 (S.D.N.Y. Mar. 24, 2022).

128 *Id.*

Defining a Market Based on "Practical Indicia"

While implementing an empirical Hypothetical Monopolist Test in platform markets can be challenging, it is not the only way to define a relevant market. Courts continue to look to "practical indicia" identified in a 1962 Supreme Court case to define the contours of the relevant product market—these indicia include "industry or public recognition of the [market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[129] While courts frequently prefer a quantitative analysis in support of market definition, the difficulties of constructing a rigorous quantitative analysis capable of accounting for feedback effects in platform markets have made these "practical indicia" particularly important in platform cases.

Davitashvili v. Grubhub. At least at the pleading stage, courts have been willing to let plaintiffs define platform markets based on practical indicia rather than through a Hypothetical Monopolist Test. In *Davitashvili v. Grubhub*, the court agreed with the plaintiffs that "practical indicia support separate treatment for the proposed Restaurant Platform Market" as distinct from direct restaurant delivery.[130] The court credited "plausible" allegations that restaurant delivery platforms provide a distinct service "because they aggregate the offerings of many restaurants in one place"; offer "functionalities that restaurants do not, including search, the ability to write and read reviews, and automated recommendations based on the user's 'preferences and other consumer reviews'"; appeal to a distinct group of consumers (young urban professionals); and have been recognized as a distinct market by industry analysts.[131]

Klein v. Meta Platforms, Inc. In *Klein v. Meta Platforms, Inc.*,[132] a case involving allegations by consumers and advertisers that Facebook monopolized the Social Network and Social Media markets, the court found that plaintiffs sufficiently pleaded the proposed relevant markets based on practical indicia. Specifically, the court credited consumers' allegations that social networks are "a distinct type of social media service" based on three "peculiar characteristics":

- the use of "a 'social graph,' which is a system for tracking connections between users";
- offering "substantive features to users which facilitate a wide array of interactions among the wide array of people that make up a user's social graph," such as the ability to form "groups based on common interests, hobbies, and backgrounds"; and
- providing a "one-stop shop" by combining "multiple substantive features and functionalities into one product."[133]

The court also pointed to "significant 'industry or public recognition'" of the Social Network Market as a "separate economic entity," including the US House of Representatives' finding that social networks constitute a distinct economic market, and similar findings by Germany's Federal Cartel Office and the United Kingdom's Competition and Markets Authority.[134]

129 *Brown Shoe Co. v. United States*, 370 US 294, 325 (1962).

130 *Davitashvili v. Grubhub Inc.*, No. 20-CV-3000, 2022 WL 958051, at *9 (S.D.N.Y. Mar. 30, 2022).

131 *Id.*

132 *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570 (N.D. Cal. Dec. 3, 2020).

133 *Klein v. Facebook, Inc.*, 580 F. Supp. 3d 743, 767 (N.D. Cal. 2022). This is the same litigation as *Klein v. Meta Platforms, Inc.*, but the formal name of the litigation was changed in February 2022 after Facebook changed its name to Meta.

134 *Id.* at 770. Despite crediting consumers' market definition allegations, the court dismissed the consumers' claims, but allowed the advertisers' claims to go forward.

Can Two-Sided Platforms Compete with One-Sided Businesses?

One of the most criticized elements of *Amex* is the Court's statement that "[o]nly other two-sided platforms can compete with a two-sided platform for transactions."[135] Many commentators think that this statement is incorrect both as a matter of common sense and economics: as we noted, antitrust scholar Steven Salop and his coauthors pointed out in a 2022 article that businesses which are not two-sided platforms routinely compete with two-sided platforms—for instance, hotel websites compete with booking platforms like Hotels.com.[136] Nevertheless, some courts have interpreted this passage from *Amex* to mean that one-sided businesses cannot, as a matter of law, be in the same product market as two-sided transaction platforms.

United States v. Sabre Corp.[137] A District of Delaware court rejected the DOJ's challenge to the merger between Sabre (a two-sided platform connecting airlines and travel agents) and Farelogix (a technology company that sells airlines IT solutions that allow airlines to connect to travel agents either directly or through platforms like Sabre).[138] The court was "persuaded that at various points Sabre has viewed [Farelogix] as a competitive threat," and agreed that "evidence suggests that Sabre will have the incentive to raise prices, reduce availability of [Farelogix], and stifle innovation" in the wake of the merger.[139] Nevertheless, the court went on to hold that because of *Amex*, "as a matter of antitrust law, Sabre, which is a two-sided platform facilitating transactions between airlines and travel agencies, does not compete with Farelogix, which indisputably only interacts with airlines and is not a two-sided platform."[140] The court therefore refused to enjoin the merger because "Sabre and Farelogix do not compete in a relevant market."[141] Sabre and Farelogix eventually abandoned the proposed merger after it was blocked by the UK Competition & Markets Authority.

Davitashvili v. Grubhub. The court in the restaurant delivery platform litigation described on pg. 26 also relied on *Amex* in holding that orders placed directly with the restaurant (a one-sided business) were not in the same market as orders placed through a restaurant delivery platform (a multi-sided platform).[142]

2023 Draft Merger Guidelines

The new Guidelines suggest that US antitrust agencies believe that non-platforms may compete with platforms, noting that "a non-platform service" can either "replace one or more services the incumbent platform operator provides" or "lessen dependence on the platform by providing an alternative to one or more functions provided by the platform operators."[143] According to the Guidelines, the agencies will scrutinize mergers that may inhibit "the prospects for displacing the platform or for decreasing dependency on the platform."[144]

135 138 S. Ct. 2274 at 2287.

136 Steven Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving on From Ohio v. American Express*, 84 ANTITRUST L J 883, 901-02 (2022).

137 *United States v. Sabre Corp.*, No. 1:19-cv-01548-LPS (D. Del. Aug. 20, 2019).

138 *United States v. Sabre Corp.*, 452 F. Supp. 3d 97 (D. Del. 2020). O'Melveny represented American Airlines as a third party in this merger litigation.

139 *Id.* at 146.

140 *Id.* at 136.

141 *Id.*

142 *Davitashvili v. Grubhub Inc.*, No. 20-CV-3000, 2022 WL 958051, at *8 (S.D.N.Y. Mar. 30, 2022).

143 US Dep't of Justice & Fed. Trade Comm'n, Draft Merger Guidelines 25 (Jul. 19, 2023), *available at* https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

144 *Id.*

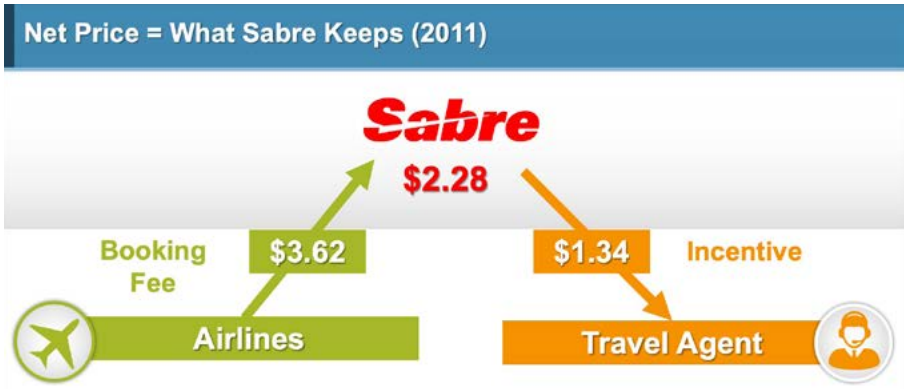
04 Other Issues in Platform Antitrust

Allocation of the Net Fee Across the Two Sides of the Platform

In platform antitrust, "price level" refers to the net fee charged by the platform, and "price allocation" refers to how that fee is allocated between the different sides. For instance, a platform that connects Side A and Side B may charge both sides $1 for facilitating a transaction, may charge Side A $2 and charge Side B nothing, or may even charge Side A $3 and *pay* Side B $1. In each case, the price level is $2, but the allocation of that price between Side A and Side B varies. Both price level and allocation can play an important role in platform antitrust litigation.

US Airways v. Sabre

US Airways alleged not only that Sabre's net fee was inflated, but also that Sabre allocated that fee in a peculiar way, which injured the airline—charging the airline more than 100% of the net fee and then paying part of that fee to travel agents as "incentives" to book through Sabre.



Sabre charged airlines $3.62 and paid travel agents a $1.34 incentive (trial demonstrative)

US Airways' expert explained that in a competitive two-sided market, the allocation of the net fee depends on (1) the relative strength of indirect network effects (i.e., which side values the other side more) and (2) relative price elasticities (i.e., which side is more price-sensitive). Logically, the side that values the other side more and that is less price-sensitive would be expected to pay a larger portion of the net fee. So in a competitive market, travel agents would be expected to pay more than airlines, because (1) travel agents benefit more from having multiple airlines aggregated on one platform than airlines benefit from having multiple travel agents aggregated on one platform, and (2) travel agents would be less price-sensitive because their customers would demand that they use whatever platform offers the best travel option.

The court credited US Airways' argument that Sabre's fee allocation reflected Sabre's monopoly power, citing "a flow of payments from GDSs to travel agents that would not exist in a competitive market" in denying Sabre's motion for summary judgment on the monopoly power element.[145] And the court denied Sabre's motion to exclude US Airways' damages expert, allowing US Airways to present a damages model to the jury based on the theory that the allocation of the fee would be different in the but-for world without Sabre's illegal conduct.[146]

145 *US Airways, Inc. v. Sabre Holdings Corp.*, No. 11 CIV. 2725, 2022 WL 874945, at *9 (S.D.N.Y. Mar. 24, 2022).
146 *Id.* at *3-*4.

Cabining *Amex*

Several recent court decisions have addressed the issue of when *Amex* applies or does not apply.

Amex *at the Pleading Stage*

In *PLS.Com v. National Association of Realtors*, a case challenging policies requiring real estate agents to also post listings on defendant-affiliated platforms when they post on competing platforms, the Ninth Circuit addressed the question of when a plaintiff must plead net harm under *Amex*.[147] The court explained that "plaintiff is not required to define a particular market for a *per se* claim"[148] or "for a rule of reason claim based on evidence of the actual anticompetitive impact of the challenged practice," and therefore "*Amex* does not apply to these claims."[149] *Amex* ***may*** apply, the court found, for "rule of reason claims based on indirect evidence" where "a plaintiff must define the relevant market and show that the defendant has market power in that market to prove that the challenged practice is anticompetitive."[150] Where the complaint discloses market characteristics that trigger the application of *Amex*—either transaction platforms or platforms with strong indirect network effects[151]—the plaintiff must plead net two-sided harm. Where "the complaint [does] not contain the necessary facts [to determine whether *Amex* is triggered],... the court may need to wait to examine the evidence to determine whether *Amex* applies."[152]

Amex *and Class Certification*

In *National ATM Council v. Visa*, a case involving a challenge to Visa's and MasterCard's platform MFNs for ATM access fees, the court held that plaintiffs need not "conduct two-sided market analyses under *Amex*" at the class certification stage.[153] It is not clear, however, whether the court's reasoning was based on the broadly applicable principle that "plaintiffs need not show at [the certification stage] that the common questions raised will be answered, on the merits, in favor of the class," or on narrower grounds that plaintiffs alleged *per se* claims for which *Amex* analysis was less relevant and the "the market [at issue was] not a mirror image to the three-participant market in *Amex*."[154]

Amex *and the Direct Purchaser Doctrine*

Under federal antitrust law, only direct purchasers—not consumers further down the supply chain—have standing under Section 4 of the Clayton Act to bring an overcharge claim. In *Salveson v. JPMorgan Chase*, a case involving allegations of an interbank conspiracy to fix credit and debit card interchange rates, the Second Circuit held that *Amex* does not "bar courts from treating participants in [credit card] markets as

147 *PLS.Com, LLC v. National Association of Realtors*, 32 F.4th 824, 838–39 (9th Cir. 2022).

148 *Id.* at 838. A few agreements, such as those between competitors on price, levels of output, and market allocation, are *per se* illegal; most other agreements are evaluated under the rule of reason that balances anticompetitive harms and procompetitive benefits. In a different case involving real estate listing platforms, the court held that *Amex* does not apply at the summary judgment stage either for *per se* claims. *Burnett v. National Association of Realtors,* No. 4:19-cv-00332-SRB, 2022 WL 17741708, at *10 n.15 (W.D. Mo., Dec. 16, 2022).

149 *PLS.Com*, 32 F.4th at 838.

150 *Id.*

151 The court did not resolve the dispute over whether *Amex* applies only to transaction platforms or also to non-transaction platforms displaying strong indirect network effects.

152 *Id.* at 839.

153 *National ATM Council, Inc. v. Visa Inc.*, Nos. 11-1803 (RJL), 11-1831 (RJL), 11-1882 (RJL), 2021 WL 4099451, at *7 (D.D.C. Aug. 4, 2021).

154 *Id.*

purchasers of distinct goods for the purposes of the [direct purchaser] doctrine."[155] In other words, just because *Amex* "established that credit card markets involve the sale of a single product—transactions—to both cardholders and merchants" for the purpose of market definition, that does not mean that merchants and cardholders are both direct purchasers for the purpose of antitrust standing; the group that does not directly pay the interchange fee (cardholders) is not a "direct purchaser."[156] The court distinguished the *Apple v. Pepper* opinion where "the Supreme Court held that iPhone owners were not barred… from suing Apple for taking a 30% commission from iPhone app sales" because the iPhone owners "purchased the apps directly from Apple, and thus paid the allegedly supracompetitive price directly to Apple."[157]

In *Hogan v. Amazon.com*,[158] the court found a lack of antitrust standing for a consumer class that alleged that Amazon conditioned third-party sellers' access to the "Prime Badge" and "Buy Box" placement on the sellers' purchase of Amazon's logistics services. Plaintiffs claimed that this tie reduced competition in the market for logistics services for retail goods and forced sellers to pay for Amazon logistics, causing sellers to charge consumers higher prices for goods sold through Amazon.[159] But the court held that consumers did not have standing to sue because "[u]nlike in *Pepper*… here Plaintiffs did not pay for the allegedly monopolized product (logistic services…)."[160]

Amex *and Platforms Where Indirect Network Effects Run in Only One Direction*

In *Singh v. American Racing-Tioga Downs*, the court rejected the application of *Amex* to a horse-racing track because "[a]lthough the racetracks connect the market of horse fans to the market of horse owners, the network effects based on the Complaint's allegations run mainly in one direction: 'the more owners who race their horses at these racetracks, the more competitive the races are and the more attractive the races are to the public.'… The Complaint provides no allegations regarding why the horse owners would care how many racing fans there are."[161] This precedent suggests that litigants may find it difficult to convince courts to apply *Amex* to platforms where indirect network effects only run in one direction.

FTC's Amazon Lawsuit: A Challenge to Amex*?*

In its monopolization lawsuit against Amazon described earlier in the report, the FTC alleges a separate consumer-facing "online superstore" market and seller-facing "market for online marketplace services" rather than a platform market connecting sellers and shoppers. Despite defining two interrelated one-sided markets rather than one two-sided market, the complaint focuses heavily on network effects and other defining characteristics of platform markets. For instance, the complaint explains that "[b]y providing sellers access to significant shopper traffic, Amazon is able to attract more sellers onto its platform," and "[t]hose sellers' selection and variety of products, in turn, attract additional shoppers."[162] The FTC alleges that these "feedback loops between the two relevant markets further demonstrate the critical importance of scale

155 *Salveson v. JPMorgan Chase & Co.*, 860 F. App'x 207, 209 (2d Cir. 2021).
156 *Id*. at 209–10.
157 *Id*. at 210.
158 *Hogan v. Amazon.com, Inc*., No. C21-996-RSM, 2023 WL 3018866 (W.D. Wash. Apr. 20, 2023).
159 *Id.* at *2.
160 *Id*. at *5.
161 *Singh v. American Racing-Tioga Downs, Inc.*, No. 3:21-CV-0947 (LEK/ML), 2021 WL 6125432, at *6 n.5 (N.D.N.Y. Dec. 28, 2021).
162 Compl. ¶ 9, Fed. Trade Comm'n v. Amazon.com, Inc., No. 2:23-cv-01495 (W.D. Wash., Sep. 26, 2023).

and network effects," and "can create powerful barriers to entry in both markets."[163] The litigation will likely show whether it is a viable strategy to define two interrelated one-sided markets connected by feedback loops, notwithstanding Amex.

Amex *and the Draft Merger Guidelines*

In the new Guidelines, the agencies explain that they "will seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants—i.e., around ***one side*** of the platform." (emphasis added). The Guidelines try to cabin the *Amex* holding that ***all sides*** of a transaction platform must be considered by noting that many platforms are not transaction platforms, and even transaction platforms frequently "offer simultaneous transactions as well as other products and services."[164]

163 Compl. ¶ 119.

164 US Dep't of Justice & Fed. Trade Comm'n, Draft Merger Guidelines 24 (Jul. 19, 2023), *available at* https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

05 Proposals for Reform

While antitrust doctrine usually develops gradually through case-by-case adjudication, some commentators fear that platform business innovation has outpaced the development of platform antitrust doctrine, and that *ex-ante* rules are needed to address platform conduct that has the potential to impact competition. Europe has taken the lead on *ex-ante* regulation of digital platforms with the DMA—legislation imposing new legal obligations and prohibitions on certain digital platforms designated as "gatekeepers"—which came into effect on November 1, 2022 (see pg. 17 for a detailed description of the DMA).[165] In the United States, legislators have introduced several bills in the past few years seeking to address platform conduct, but at the time of writing (October 2023), none appears close to passing.

Legislative Proposals Come in Several Flavors

Some legislative proposals follow the DMA example and focus on *ex-ante* behavioral rules that would apply to covered platforms throughout the economy.

Under the **American Innovation and Choice Online Act (AICOA)** (117th Congress, S. 2992; reintroduced in the Senate on June 15, 2023), covered platforms would be prohibited from engaging in several forms of conduct discussed in this report, including:

- Preferencing their own products and services in certain circumstances, including an interoperability provision prohibiting restrictions on the ability of business users to access features that are available to the platform operator's own products or services, and a prohibition on using non-public data from business users to benefit the platform operator's own offerings;
- Tying access to or preferred placement on their platforms to the purchase or use of other products or services;
- Impeding multi-homing by restricting or impeding a business user from accessing or transferring data generated by the user's activities on a covered platform;
- Imposing platform MFNs and restricting a business user's communications on a covered platform about other transaction options.[166]

Other legislative proposals focus on specific sectors of the digital economy. The **Open App Markets Act (OAMA)** (117th Congress, S. 2710) targets a lot of the same conduct as AICOA but focuses specifically on large app stores. The **Advertising Middlemen Endangering Rigorous Internet Competition Accountability (AMERICA) Act**, which we discussed earlier, targets perceived self-preferencing only in the online ad tech stack.

Other proposals take yet other approaches, either directing agencies to draft rules applicable to specific platforms or imposing structural rules to reduce the need for extensive oversight and expensive adjudication associated with behavioral rules. The **Augmenting Compatibility and Competition by**

165 As an article authored by O'Melveny attorneys explains, DMA is actually a hybrid scheme based both on *ex ante* rules and *ex post* intervention that will clarify numerous ambiguities in the *ex-ante* rules. Ben Bradshaw, Peter Herrick, and Sheya Jabouin, *Upping the "Ante" on Competition Regulation: Gambling with the Future of Big Tech?*, COMPETITION POLICY INTERNATIONAL.

166 This provision was only present in the House version of the bill.

Enabling Service Switching (ACCESS) Act (117th Congress, H.R. 3849) would authorize the antitrust agencies to designate individual platforms and issue standards of interoperability specific to each platform. The **Ending Platform Monopolies Act** (117th Congress, H.R. 3825) takes a structural approach to combating self-preferencing and tying by prohibiting covered platforms from owning a line of business that "(1) uses the platform to sell products or services, (2) offers a product or service that the platform requires a business user to purchase or use as a condition for access to the platform, or (3) gives rise to a conflict of interest."[167]

Senators Elizabeth Warren and Lindsey Graham unveiled the most comprehensive platform legislative proposal to date on July 27, 2023.[168] The **Digital Consumer Protection Commission Act** would create a new federal agency to regulate digital platforms. The agency would have investigative, rulemaking, and enforcement authority, and would focus on several areas in addition to competition, including privacy, transparency, consumer protection, and national security. On the competition front, the bill would presumptively ban self-preferencing, tying, maintaining conflicts of interest, noncompete agreements, and pre-dispute arbitration agreements for all "dominant" platforms, as well as bar "dominant" platforms from acquiring other firms unless the platform can demonstrate the acquisition serves the public interest.

Undoing *Amex*

Some in the antitrust world are critical of the holdings and reasoning in the Supreme Court's *Amex* opinion, leading to several proposals to override some or all aspects of the ruling through legislation.

The broadest attack on *Amex* comes in the **Competition and Antitrust Law Enforcement Reform Act** (117th Congress, S. 225), which would overturn the main holding of *Amex* by making platform operators liable for exclusionary conduct[169] without requiring a showing that the conduct "presents an appreciable risk of harming competition on more than 1 side of the multi-sided platform."

Other proposals take narrower aim at specific aspects of *Amex*.

- **Defining distinct markets on each side of the platform.** In a 2022 article, antitrust scholar Steven Salop and his coauthors argue that treating multi-sided platforms as operating in a single multi-sided market makes it more difficult to analyze competitive conditions on each side of the platform, and undermines the bedrock doctrinal principle that markets should encompass products that are reasonable substitutes.[170] The authors argue that "a separate-markets approach allows more precise measurement of competitive conditions, which may differ significantly from one side of platform to another."[171] The authors propose defining separate markets for each side of the platform while allowing, in limited circumstances, for cross-market balancing (weighing competitive harms in one market against benefits in a related market).[172]

167 The AMERICA Act would impose both structural and behavioral rules for the online advertising market.

168 Elizabeth Warren, *Warren, Graham Unveil Bipartisan Bill to Rein in Big Tech* (Jul. 27, 2023), *available at* https://www.warren.senate.gov/newsroom/press-releases/warren-graham-unveil-bipartisan-bill-to-rein-in-big-tech.

169 While the term "exclusionary conduct" is traditionally used in monopolization doctrine, the Act would impose a broader prohibition on "exclusionary conduct that presents an appreciable risk of harming competition" and apply the prohibition whether the defendant is "acting alone or in concert with other persons."

170 Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving on From Ohio v. American Express*, 84 ANTITRUST L J 883 (2022).

171 *Id.* at 901.

172 *Id.* at 905–09.

- **Acknowledging that multi-sided platforms can compete against one-sided businesses.** A 2020 congressional report recommended overriding *Amex* and *United States v. Sabre* by "clarifying that platforms that are 'two-sided,' or serve multiple sets of customers, can compete with firms that are 'one-sided.'"[173] Salop and his co-authors agree, writing that the Supreme Court was "misguided in commenting that '[o]nly the two-sided platforms can compete with a two-sided platform for transactions.'"[174]

Self-regulation. An initiative to encourage self-regulation by platform operators was launched in July 2022 by a cross-government consultative body comprising the Ministry of Science and Information and Communication Technology, the KFTC, the Korea Communications Commission, and the Personal Information Protection Commission. In May 2023, ten online platforms, including Google, Meta, Naver, Kakao, and Coupang, published a set of measures for online ranking transparency. The companies agreed to review their services over the next six months and make any changes necessary to comply with the measures to ensure that users can access information related to online search results and recommendations.

173 House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* 399 (2020).

174 Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving on From Ohio v. American Express*, 84 ANTITRUST L J 883, 902 (2022).

Platform antitrust is a rapidly evolving area of law, and O'Melveny will continue to monitor it closely and bring you periodic updates. Please contact the attorneys listed here or your O'Melveny counsel to help you navigate the developing field of platform antitrust.

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