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RESEARCH ON THE COMPETITIVE EFFECTS AND ANTI-MONOPOLY GOVERNANCE PATH OF MOST-FAVORED-NATION CLAUSES IN PLATFORM ECONOMY

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Abstract: In the current thriving digital economy, the Most-Favored-Nation (MFN) clauses in digital platforms have become a hot topic in antitrust law, but there are many controversies regarding their competitive effects. When determining whether MFN clauses constitute anti-competitive behavior, it is difficult to prove collusion or abuse of market dominance, and the unique agency model is affected by the traditional 'agency exception' rule in the determination of monopoly agreements. In recent years, MFN clauses have also begun to be applied in China's digital platforms, posing potential risks to platform market competition in China. However, China's current antitrust laws have an imperfect regulatory framework for such clauses. This paper focuses on the antitrust regulation of MFN clauses in digital platforms, conducting an in-depth study to analyze their competitive harm theory and regulatory challenges, particularly the evidentiary difficulties in proving anti-competitive behavior and issues related to the agency principle. Meanwhile, it reviews relevant antitrust regulatory practices abroad, combines China's actual situation, and suggests that China should adopt a cautious attitude when regulating platform MFN clauses, strengthen economic analysis oriented towards competitive effects, thereby fulfilling market supervision responsibilities, stimulating platform innovation, and fostering a good competitive ecosystem for the digital economy.

Key words: Most-Favored-Nation clause ； Digital platform ； Competitive effects ； Agency model ； Antitrust law

INTRODUCTION

Against the backdrop of the global economic digital transformation, over the past two decades, the Most Favored Nation Clause (MFN Clause) has remained at the forefront of antitrust enforcement by various countries, becoming a highly focused topic of attention. With the in-depth innovation and widespread application of digital platform technologies, the competitive landscape in the digital economy has undergone profound changes. U.S. enforcement agencies have actively intervened in key areas such as healthcare, health insurance, credit card payment systems, and digital goods, initiating a series of influential antitrust lawsuits; EU antitrust enforcement agencies have also carried out comprehensive law enforcement actions targeting the Most Favored Nation treatment implemented by digital platforms (Platform Most Favored Nation Clause, hereinafter referred to as PMFN Clause). The strategic shift of law enforcement focus from traditional MFN Clauses to PMFN Clauses by European and American enforcement agencies clearly reflects the dynamic evolution of antitrust regulatory

priorities in the digital economy era.

Though the PMFN clause has not yet given rise to landmark anti-monopoly law enforcement cases in China, it has been widely applied in practice. In the food delivery industry, platforms such as Meituan and Ele.me impose strict pricing constraints on merchants settled on their platforms by virtue of platform rules. They explicitly require that the actual offline sales prices of merchants shall not be lower than the prices marked on the platforms, thus establishing a specific restrictive framework for price setting；[1]Based on its platform operation strategies and market competition considerations, Tmall e-commerce platform stipulates that the prices of commodities sold by settled merchants on other sales channels shall not be lower than those on Tmall. This measure is intended to maintain the platform's relative advantage in the price system.[2]， In the live-streaming e-commerce sector, disputes between a top-tier live-streamer and brand owners over the floor price agreement have attracted significant attention and intense discussions from all sectors of society. These disputes have fully exposed the potential issues related to the PMFN clause in this field. These specific cases reveal that the PMFN clause has been deeply integrated into the business operations of China's digital platform market, exerting a potential impact that cannot be ignored on the market competition ecosystem.[3]

China's Anti-Monopoly Law demonstrates keen insight and forward-looking consideration regarding the development trend of the digital economy. Although it does not provide direct and detailed provisions on the PMFN clause, Articles 9 and 22 thereof reserve institutional space for addressing emerging anti-monopoly situations in the digital economy field. Paragraph 2 of Article 7 of the Guidelines on Anti-Monopoly in the Platform Economy Field issued by the Anti-Monopoly Commission of the State Council (promulgated in 2021) accurately identifies and elaborates on the potential risks of the PMFN clause in terms of monopoly agreements and abuse of dominant market position.[4]； Article 15 of the Provisions on Prohibiting Monopoly Agreements (revised in 2022) further explicitly prohibits business operators from concluding monopoly agreements by means of data, algorithms, technology, and platform rules. This provision demonstrates the positive response and regulatory determination of China's legislative and law enforcement authorities to anti-monopoly issues in the platform economy field from multiple dimensions.

Although China has steadily advanced anti-monopoly legislation in the platform economy field and its relevant legal system has gradually become more sophisticated, there remains an obvious legal gap in the regulation of PMFN clauses. Academic research on such clauses mostly focuses on the theoretical elaboration of competitive effects, while the analysis of the harms derived from these clauses and their inherent causes is relatively insufficient. When discussing PMFN clauses, existing literature generally fails to fully attach importance to the unique agency model behind them; it only mentions the need to pay attention to the regulatory dilemmas arising from PMFN clauses under this model when addressing how to regulate such clauses. The academic community

[1] Article 3.11 of the 'Ele.me Online Food Ordering Platform Service Agreement' states: 'Merchants guarantee that the actual selling price within their business premises shall not be lower than the online marked price on the platform, and shall not incite or guide users to abandon Ele.me's online food ordering service and instead engage in direct transactions between merchants and users in other forms. Otherwise, Ele.me has the right to immediately terminate the cooperation and require the merchant to bear the liability for breach of contract as stipulated in the agreement.' Similar provisions are also included in Article 4.8 of the 'Meituan Merchant Service Agreement'.

[2] Tmall Product Price Management Regulations: 'To ensure consumers' price experience, promote effective resource investment and conversion by the platform and merchants, and drive merchants to sell products on Tmall, product sales prices should ensure that they are not overpriced or effectively increased in price on the Tmall platform. The sales price on the Tmall platform should not be higher than the sales price of the same product (with completely identical product parameters such as brand, style, model, color, etc.) during the same period in other channels (such as brand official websites, other internet channels, and offline physical stores), except where otherwise specified by Tmall or in special circumstances.'

[3]What is Li Jiaqi and JD.com actually fighting over in their 'bottom price' dispute? https://new.qq.com/rain/a/20231028A08M7A00

[4] Article 7 of the Guidelines of the State Council Anti-Monopoly Commission on Anti-Monopoly in the Platform Economy Domain stipulates that operators in the platform economy domain and their trading counterparts may reach vertical monopoly agreements such as fixing resale prices or limiting minimum resale prices through the following means: (ii) using platform rules to unify prices...

rarely addresses issues such as whether the agency model itself is anti-competitive and why PMFN clauses exhibit anti-competitive nature under this model.[5]

Against the above background, this paper aims to conduct a comprehensive and in-depth analysis of the harmful effects of the PMFN clause, explore the root causes of the dilemmas faced by its agency model by drawing on domestic and foreign law enforcement practices, and seek practical and feasible solutions.

1. Most-Favored-Nation Clauses in Digital Markets: A Double-Edged Sword for Competition

Due to the significant network effects, two-sided market characteristics, and competitive transparency inherent in the platform economy, the existence of PMFN clauses exerts multifaceted impacts on the competitive landscape of the platform market. On the one hand, they exhibit the effect of restricting and eliminating competition in many cases, posing challenges that cannot be ignored to the normal competitive order of the market and the rights and interests of consumers. On the other hand, under specific conditions, they may contain potential competitive efficiency, which is conducive to promoting market competition and innovation. This duality makes it necessary for us to conduct an in-depth and comprehensive economic analysis of PMFN clauses, so as to more accurately grasp their actual role in the market and the impact they bring to anti-monopoly regulation.

1.1 Negative Impact of PMFN Clauses on Market Competition

Under the traditional MFN clause, suppliers commit to providing buyers with the lowest purchase price. From the perspective of social welfare, this clause ensures that buyers' costs remain the lowest in the competitive market, and the resulting retail prices at the market end are also beneficial to consumers. However, some scholars argue that this clause does not ultimately increase social welfare; instead, it leads to a rise in the equilibrium price.[6]Theoretical analysis by economists Boyk and Coates reveals that PMFN clauses lead to higher platform fees, increased retail prices, and barriers to entry for enterprises with low-cost business models.[7]A PMFN clause is an agreement between a supplier and a platform regarding the prices at which the supplier sets for selling goods on competing platforms. It is not an agreement between a supplier and a platform regarding the prices that the supplier charges to other competing platforms. The main competitive harm of PMFN clauses lies in the fact that platform enterprises use such clauses to engage in price coordination, or dominant enterprises utilize these clauses to drive market prices toward uniformity, thereby weakening market competition and market innovation.

1.1.1 Suppressing market price competition

PMFN clauses will strengthen the collusive behavior of platforms. Platform enterprises can collude to sign PMFN clauses with upstream suppliers, which in turn reinforces the commitment of individual enterprises not to lower prices, serves to monitor the price-cutting behavior of individual enterprises, and weakens oligopolistic price competition. The existence of PMFN clauses eliminates enterprises' incentives to reduce prices, making it difficult for the price competition mechanism to function. This easily leads to the formation of price cartels and undermines consumer welfare.

Furthermore, due to the existence of PMFN clauses, if a supplier offers more favorable prices to a competing platform, it must provide the same price concessions to the platform that is the counterparty to the clause. Therefore, when a supplier intends to offer favorable prices to a competing platform, it will reduce its sales profits on the platform of the clause counterparty. Especially when the clause counterparty platform is the supplier's main

[5] See Tang Yaojia and Qian Shenghui, 'Competition Effects and Antitrust Policies of Platform Most-Favored-Nation Clauses', in Research on Competition Policy, No. 5, 2019, p. 63; Tan Chen, 'Antitrust Legal Regulation of Most-Favored-Nation Treatment under Internet Platform Economy', in Journal of Shanghai University of Finance and Economics, No. 2, 2020, p. 149; Sun Jin, 'Reasonable Antitrust Analysis of Most-Favored-Nation Treatment Clauses in the Context of Digital Economy', in Electronic Intellectual Property, No. 12, 2018, p. 14.

[6] See Jonathan B, Baker & Judith A. Chevalier, The Competitive Consequences of Most-Favored-Nations Provisions,27 ANTITRUST 20,22-25(2013); Steven C. Salop & Fiona Scott Morton, Developing an Administrable MFN Enforcement Policy, 27 ANTITRUST15,18-19(2013).

[7] See Andre Boik & Kenneth S. Courts, The Effects of Platform Most-Favored-Nation Clauses on Com-petition and Entry, 59 J.L.& ECON 105, 113-29 (2016).

sales channel, the supplier will have no incentive to lower its sales prices on the competing platform unless the sales profits generated by offering more favorable prices to the competing platform are sufficient to increase its total profits. After all, a company that can only lower prices at the cost of reducing all its prices has zero possibility of cutting prices.

Consequently, the desire of competing platforms to increase their market share by reducing their platform commissions to lower the retail prices of sellers on their platforms will not be realized. The existence of PMFN clauses tends to align the prices of products or services across different platforms, weakening the competitive effect.

1.1.2 Form market barriers to entry

PMFN clauses may serve as a means for large platforms to exclude competitors and impede market entry. When large platform enterprises sign PMFN clauses with suppliers, the suppliers' right to set prices freely is restricted. If a supplier reduces the selling price of its products on a certain platform, it must set the same or a lower price for the products sold on the large platform.

Newly entered platform enterprises, due to their small market scale and limited end users, must offer lower prices on their platforms than large platforms to quickly capture market share. However, the existence of PMFN clauses makes it difficult for them to reduce platform commissions to encourage suppliers to provide lower retail prices, which would attract consumers to purchase on their platforms. When the market has a minimum requirement for the market share of new entrants, or when new entrants need to bear high costs to enter the market, PMFN clauses will block their market entry.

For large platforms, this blocking effect is not unconditional. It requires large platforms to sign clauses with a sufficient number of suppliers of similar products—such a number must reach a level where there are almost no other suppliers offering the same or better product quality. Otherwise, new entrants can still cooperate with other suppliers. Nevertheless, due to the existence of network effects, new platforms find it difficult to gain extra favor from suppliers compared with large platforms, as new platforms have far fewer end users. Once large platforms detect competition from small platforms, they will choose to sign clauses with their suppliers to stifle such market competition.

Therefore, under PMFN clauses, small platforms struggle to survive in such a competitive environment. With the support of this clause, large platforms can continuously consolidate their dominant market position, creating a situation where "the strong become stronger while the weak withdraw from the market." Ultimately, this harms consumers' interests and hinders market innovation.

1.2 Potential Competitive Efficiency of PMFN Clauses

1.2.1 Eliminate 'free-riding' behavior

In the complex ecosystem of the platform economy, free-riding behavior is like an unavoidable "parasitic phenomenon," exerting a profound impact on the fairness and innovation of market competition. Conceptually, free-riding behavior refers to a scenario where a platform enterprise invests substantial efforts and costs in product promotion, website development, and the provision of extensive services in the early stage—efforts that help consumers gain a clear understanding of product quality and prices. However, competitors selling the same or similar products, or even the suppliers themselves, can gain an edge in market competition without investing significant costs in product promotion, simply by offering consumers certain price discounts. Essentially, this behavior is a form of "reaping without sowing"; it undermines the fairness of market competition and discourages platform enterprises from investing in and pursuing innovation.

Take hotel OTA (Online Travel Agency) platforms as an example: the manifestation and impact of such free-riding behavior are more intuitive. In the hotel OTA sector, large platforms like Ctrip and Qunar typically invest substantial funds and human resources in marketing, technological R&D, and service optimization. They establish cooperative relationships with numerous hotels, attract consumers to book hotels on their platforms by providing

comprehensive hotel information, convenient booking processes, high-quality customer service, and precise recommendation algorithms. These platforms also spend heavily on advertising to enhance brand awareness and attract more users.

However, some small OTA platforms or hotels' official websites may not invest comparable resources in marketing or service optimization. Instead, they may leverage the brand awareness and user base already built by large OTA platforms, attracting consumers by offering lower prices. Unlike large OTA platforms, these small platforms or hotel official websites often fail to provide consumers with all-round services—such as storing billing information, more thoughtful customer service, or detailed travel guide services. Even so, they can still gain a share of the market through free-riding.

From the perspective of consumers' transaction costs, the competitive efficiency of such free-riding behavior is highly questionable. Not all consumers are willing to browse and compare information on a large OTA platform with high-quality services, find a preferred hotel, then spend a lot of time comparing prices across other websites, and finally book the hotel on the OTA platform offering the lowest price. For users who frequently use hotel OTA services, large platforms with comprehensive services may provide after-sales support that other hotels or small platforms do not offer—support that enhances user experience and saves users' time and effort costs. For consumers who value time costs, the more powerful search engines and more sophisticated customer preference recommendations of large OTA platforms can maintain the loyalty of this consumer group. These consumers are more willing to book on a platform where they can quickly and accurately find their preferred hotel, rather than spending excessive time comparing across different platforms.

From the perspective of hotels' needs: large OTA platforms hold a larger market share and offer lower search costs. Hotels rely on these platforms' services to boost their visibility and expand their sales channels. To settle on an OTA platform and access its services, hotels usually pay a certain fee. In this context, if a hotel allows consumers to search for its information on an OTA platform and then offers a lower price on its own official platform, this does not constitute free-riding behavior. The reason is that the hotel has already paid for using the OTA platform's services, so it has the right to set prices on different channels based on its own marketing strategies. Hotels also need to consider their cooperative relationships with OTA platforms: frequently offering lower prices on their own platforms may harm this cooperation, leading to the loss of the promotion and sales channels provided by the OTA platform.

An empirical evaluation and analysis conducted by Germany's federal antitrust authority on the prohibition of Booking.com's narrow MFN clauses found that the ban reduced hotel prices but did not change the quantity of hotel supply.[8]In the Apple e-book case, the PMFN clauses between Apple and publishers ultimately also led to an increase in retail prices.[9]。While the defensive effect of invoking free-riding to justify PMFN clauses is questionable, if free-riding is extremely prevalent within an industry—for instance, when suppliers typically sell goods through their own websites—it may indicate that narrow MFN clauses could address this issue. In such cases, narrow MFN clauses would serve as a less restrictive alternative compared to broad MFN clauses.[10]

Table.1 Comparison Table (Subjects, Manifestations, and Hazards of 'Free-Riding Behavior' on OTA Platforms)

Participating Entities	Behavioral Manifestations of Free-Riding	Harm to Market Competition

[8] See Matthias Hunold, Ulrich Laitenberger& Frank Schlütter, Evaluation of Best Price Clauses in Hotel Booking(2016), http://ftp.zew.de/pub/zew-docs/dp/dp16066.pd

[9] See Baker, jonathan, Cartel Rinamaster or Competition Creator? The Ebooks Case Against Apple (2013), https://digitalcommons.wcl.american.edu/facsch_bk_contributions/123; Babur De los Santos & MatthijsR. Wildenbeest, E-book Pricing and Vertical Restraints, 1S QUANTITATIVE MARKETING & ECON 85,91(2017).

[10] See Jonathan B. Baker& Fiona Scott Morton, Antitrust Enforcement Against Platform MFNS, 127 The Yale Law Journal 2176, 2199（2018）.

Small OTA Platform	Without investing in marketing or service costs, directly quoting hotel information from large OTAs (such as Ctrip) to attract consumers with low prices	Weaken the incentive for innovation on large platforms and undermine fair competition
Hotel Official Website	After consumers check hotel information on large OTAs, they can book at a lower price on the official website (without bearing the promotion costs of the OTA).	Reduce OTA platform service returns and curb platform investments
Consumers (partial)	After comparing hotel information on large OTAs, users turn to low-cost channels for booking without paying for the OTA's 'information service'.	Indirectly, OTA will increase service fees, which will eventually push up retail prices

This article takes the OTA platform as an example to illustrate the concept of "free riding". This table can be clearly classified to strengthen the rationality of "why PMFN clauses can alleviate free riding".

1.2.2 Prevent platform enterprises from being trapped by upstream suppliers

Furthermore, PMFN clauses may have a competitive effect of preventing platform enterprises from being held hostage by upstream suppliers. When platform enterprises, especially small and medium-sized ones, make large-scale investments in advance to promote products, signing PMFN clauses helps avoid damages caused by suppliers raising prices, prevents losses from sunk costs, and encourages their investments—thereby benefiting market competition and market innovation.

In summary, PMFN clauses in the digital platform market pose potential monopolistic risks such as suppressing market price competition and constructing market entry barriers. The existence of these risks exerts a negative impact on market competition, market innovation, and consumer welfare. Although efficiency defenses represented by preventing free-riding are hardly satisfactory to regulatory authorities, PMFN clauses still have positive effects on market competition and market innovation in certain scenarios.

Overall, there is little disagreement in both academic and practical circles regarding the need to regulate this clause. However, the high transparency, dynamic competitiveness, and two-sided nature of the platform economy present numerous challenges for the traditional anti-monopoly law framework in regulating PMFN clauses. On the one hand, the clause exhibits complex and diverse forms in practical application, and its interactive effects with various market participants profoundly influence the competitive landscape. On the other hand, the existing regulatory system seems to be caught in a dilemma when dealing with it—whether considering it from the perspective of abusing dominant market position or comparing it with the traditional regulatory principles for vertical monopoly agreements, there are many unclear issues that urgently need to be resolved.

2. Regulatory Challenges of Anti-Competitive Practices under PMFM Clauses

As mentioned above, along with the impact of platform economy on the traditional antitrust regulatory framework, the monopoly risks and potential competitive effects of PMFN clauses in the platform economy have posed many challenges for antitrust enforcement authorities in regulating them. These challenges are concentrated in the identification of anti-competitive behavior of PMFN clauses and their conflicts with traditional agency practices.

2.1 The Burden of Proof Dilemma in Anticompetitive Conduct under PMFN Clauses

In the digital economy, regulatory authorities can use the abuse of market dominance system to regulate platform enterprises that hold an absolute market share.[11]However, even digital giants such as Amazon, Google, Apple, and Microsoft face difficulties in proving their market dominance in niche segments of relevant markets. This

[11] See FTC Sues Amazon for Illegally Maintaining Monopoly Power, FTC(2023),https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power.

situation is particularly pronounced under PMFN clauses. First, platform economies have unique characteristics such as two-sided markets, network effects, and dynamic competition, which make the definition of relevant markets extremely complex. Second, in platform economies, market share is not the standard for measuring market power; instead, the value of platforms is more reflected in factors such as the number of users, data traffic, and network effects, which are difficult to accurately quantify and measure, making it hard to determine market power. Additionally, since PMFN clauses have both positive effects in promoting market competition and negative effects in hindering and excluding market competition, and considering that platform enterprises in reality find it difficult to force all market suppliers to sign PMFN clauses, as well as the necessity to encourage innovation, law enforcement and judicial authorities in Europe and America rarely use the abuse of market dominance system to regulate PMFN clauses.

In the identification of collusive practices among enterprises, on the one hand, competing platform enterprises usually sign PMFN clauses with suppliers to coordinate and fix market prices, thereby weakening market competition. PMFN clauses play a role in coordinating and fixing prices in this process. On the other hand, in market foreclosure, platform enterprises that do not hold a dominant position can often reach agreements with competing platforms in the market and then sign PMFN clauses with suppliers respectively, so as to exclude and restrict other competitors from entering the market. Since the market share of the actors involved is far below the threshold for proving monopolistic power, antitrust law enforcement agencies usually regulate such conduct under the monopoly agreement regime.

It is inherently illegal to use PMFN clauses for collusion to weaken market competition and engage in market foreclosure. However, due to the high transparency of the platform economy, there may be situations where evidence is insufficient when regulating such conduct under the monopoly agreement regime, especially in cases involving parallel conduct. Although it is possible to infer the existence of agreements between competing platforms from indirect evidence, proving collusion between competing platforms without direct evidence can be challenging.

2.2 Regulation of PMFN Clauses and Conflict with the 'Agency Exception' Rule

In the regulatory principles for vertical monopoly agreements, antitrust laws of all countries exclude agency agreements from regulation. This principle was originally established to address Resale Price Maintenance (RPM) clauses. As early as the 1926 "GE Case," U.S. antitrust law laid down the agency exception principle for vertical agreements.

In the "GE Case," General Electric (GE) developed a distribution plan for its light bulbs: it distributed light bulbs to agency entities through a consignment model, allowing these agencies to sell the bulbs on its behalf. The agencies earned commissions from the sales, while the remaining profits belonged to GE. In this case, the agencies did not purchase the light bulbs for resale—GE retained ownership of the bulbs and bore responsibility for the risks associated with the sales. The U.S. Supreme Court held that the relationship between GE and the agencies was indeed an "agency" relationship under common law, rather than a sales relationship disguised as an agency. Consequently, this relationship was not subject to regulation under Section 1 of the Sherman Act.[12]The logic behind this principle lies in the fact that the commercial activities conducted by an agent are based on the principal's will—such acts are deemed the principal's own conduct. The agent lacks an independent status and, furthermore, cannot collude with the principal for the purpose of excluding competition.

The identification of traditional agency models primarily relies on the economic independence standard, a criterion that was further clarified in the 1975 "Suiler unie Case" (a landmark ruling by the Court of Justice of the European Union in EU antitrust law). In this case, the court emphasized that to qualify as a "traditional agent," the entity in question must not bear independent economic risks related to the sales activities (e.g., inventory risks,

[12] See United States.v. Genernal Electric Co.,272 U.S.476(1926).

pricing autonomy) and must act under the principal's decisive control. If an agent retains substantial autonomy in pricing, inventory management, or profit distribution, it may be deemed an independent economic operator rather than a true agent—and thus the "agency exception" would not apply to its agreements with the principal.[13]The 1995 "Volkswagen Case" established the criteria for this standard as "auxiliary entity + no assumption of risks".[14]In the 2006 "CEPSA Case" ruled by the Court of Justice of the European Union (CJEU), in addition to reaffirming the "auxiliary entity" criterion, the court also pointed out that the formal independence of an agent arising from its legal person status is not a decisive factor. Only when an operator is recognized as an entity with economic independence can Article 101 of the Treaty on the Functioning of the European Union (TFEU) apply.[15]From a formal perspective, platform enterprises under the agency exception principle have no right to determine the retail prices of upstream suppliers, and platform enterprises also do not bear the risks of commodity sales. This seems to put the regulatory approach to vertical monopoly agreements under PMFN clauses in conflict with legal application.

The agency model is a significant characteristic of platform economy. Unlike traditional agency relationships, agency relationships in the platform economy are more complex, involving multiple parties such as platforms, suppliers, and consumers. However, platform enterprises do not necessarily adopt the agency model in their business activities, as the wholesale model may yield greater profits than this model. PMFN clauses are terms under the agency model. Therefore, clarifying why platform enterprises adopt the agency model and the role of PMFN clauses within this model is crucial for understanding the anti-competitive effects of PMFN clauses and resolving the regulatory conflicts between PMFN clauses and the agency exception principle.

Existing research shows that when competition between platforms is greater than competition between upstream suppliers, platform enterprises adopting an agency model that hands pricing power over to upstream suppliers will lead to higher retail prices.[16]This is because, under the traditional wholesale model, when platform enterprises control retail prices, they are forced to engage in direct competition to attract consumers. In contrast, in the agency model, when upstream suppliers control retail prices, product substitution between platforms is internalized. By delegating control of retail prices to upstream suppliers, downstream platform enterprises can effectively exchange the externality of substitution between platforms for the externality of substitution between products. In this model, when competition among suppliers is intense, suppliers will lower product prices to attract consumers to purchase their goods. However, once the intensity of competition in the upstream supplier market is less than that in the downstream platform market, upstream suppliers will raise product prices. Therefore, the agency model leads to higher retail prices if and only if the degree of substitution between platforms is higher than the degree of substitution between suppliers' products.

Nevertheless, in reality, platform enterprises may not necessarily adopt the agency model, even if all enterprises (upstream and downstream) can benefit from adopting the agency model. This is because adopting the agency model by platform enterprises may lead to a situation similar to the prisoner's dilemma. Suppose in the existing market, competition among platform enterprises is more intense. When one downstream platform enterprise adopts the agency model, upstream suppliers internalize the substitution between platform enterprises, causing the retail prices of platform products to start rising. Due to price following, the product prices of competing downstream platform enterprises will also rise. In such a scenario, both the platform enterprise and competing

[13] See Joined cases 40 to 48，50，54 to 56，111，113 and 112 — 73，Coöperatieve Vereniging"Suiker Unie"UA and others v．commission of the EuropeanCommunities，Judgment of the Court of 16 December1975.

[14] See Case C-266 /93, Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH.,Judgment of the Court of 24 October 1995.

[15] See Case C-217 /05, Confederación Espa ola de Empresarios de Estaciones de Servicio v. Compa ía Espa ola de Petróleos SA, Judgment of the Court (Third Chamber) of 14 December 2006.

[16] See Øystein Foros，Hans Jarle Kind& Greg Shaffer，Apple's Agency Model and The Role of Most-Favored-Nation Clauses，48 The Rand Journal of Economics 673，678-679（2017）.

platform enterprises could benefit. However, under the agency model, the decision-making power over terminal retail prices lies with upstream suppliers, who set prices based on their own business objectives, which may differ from those of platform enterprises. Platform enterprises typically aim for maximizing their own profits, while upstream enterprises usually consider their own business strategies, such as the distribution of interests throughout the industrial chain and the balance of their own costs and benefits. These differences in business objectives lead upstream enterprises, when setting terminal retail prices under the agency model, not to necessarily choose the optimal price as perceived by platform enterprises. At this point, if competing enterprises adopt the wholesale model and can independently determine prices, competing platforms may lower prices for promotional purposes to expand their operating profits. The platform enterprise then finds it difficult to quickly respond to the price changes of competing platforms, ultimately falling behind in market competition. In contrast, under the wholesale model, platform enterprises can promptly adjust their prices in response to changes in competing platforms' prices to maximize their own interests. Therefore, when it cannot be guaranteed that competing platforms will adopt the agency model, platform enterprises generally will not unilaterally adopt the agency model. Furthermore, from the perspective of the operational results of the platform agency model, agency agreements themselves are subject to market regulation and are unlikely to produce exclusionary or restrictive competitive effects. Thus, the platform agency model itself does not require attention from antitrust laws.

The harm of the PMFN clause lies in its dual nature: while it can effectively resolve the prisoner's dilemma in the platform agency model by restricting upstream suppliers' pricing power, thereby preventing platform enterprises adopting the agency model from falling behind in price competition, it also promotes collusion among platforms, ultimately maintaining higher market prices. As mentioned above, when the substitutability between products is lower than that between platforms, adopting the agency model can increase retail prices. Therefore, downstream competing platform enterprises often collude to agree on adopting the agency model in order to maximize their operating profits. To prevent cheating among the parties to the agreement and avoid losses for compliant parties, the parties to the agreement will strengthen internal supervision, maintain the protocol alliance, and prevent its collapse by signing PMFN clauses with upstream suppliers. Furthermore, the existence of PMFN clauses ensures that the retail prices of platform enterprises remain at the lowest level, making it impossible for competing platforms adopting the wholesale model to sell goods at a price lower than that of upstream enterprises. Any attempt to do so would force upstream enterprises to lower their prices correspondingly, resulting in all prices remaining unchanged. Therefore, under the PMFN clause, platform enterprises face a very high risk of excluding and restricting competition. Antitrust regulation of PMFN clauses should be analyzed from their market harmfulness, breaking through the restrictions of the agency principle.

Table.2 The Competitive Effect of PMFN Clauses

Impact Dimension	Potential Competitive Efficiency (Promoting Competition)	Potential Competitive Efficiency (Promoting Competition)
price Level	Price convergence leads to price cartels, resulting in higher retail prices	Price convergence leads to price cartels, resulting in higher retail prices
Market Entry	The new platform struggles to attract suppliers with low prices → higher entry barriers	No direct promotion, but it can stabilize the platform - supplier cooperation relationship and reduce cooperation risks

Innovation Drive	Consolidation of dominant positions by large platforms → loss of motivation for technological/service innovation	Avoid free-riding behavior → encourage platform investment in marketing and R&D (such as OTA recommendation algorithms)
Consumer Benefits	Selection reduction, price increase	Save information search costs (such as precise recommendations from large OTAs)

This article disperses the positive and negative effects into different sections, and this table can visually compare the contradictory effects under the same dimension, echoing the core argument of the "double-edged sword" and laying the foundation for the subsequent recommendations of "cautious regulation".

3. Anti-Monopoly Practice and Legal Enlightenment of PMFN Clauses under a Global Perspective

Abroad, the antitrust analysis of PMFN clauses mainly revolves around their competitive effects and regulatory pathways. Antitrust authorities in various countries generally hold a negative attitude toward the antitrust risks posed by PMFN clauses, but they each have their own characteristics in terms of regulatory principles and pathways. After a long period of practical accumulation and theoretical exploration, some consensus has been reached among countries on the regulation of this clause amid differences. In practice, the core controversy of PMFN clauses focuses on the balance between 'efficiency improvement' and 'competition restriction'—some enterprises argue that the clause can reduce negotiation costs and stabilize cooperative relationships, while antitrust authorities are more concerned about issues such as 'price coordination' and 'market barriers' that it may lead to. This divergence has also directly influenced the regulatory strategies of various countries.

3.1 USA

From a judicial practice perspective, U.S. courts have generally adopted a laissez-faire attitude toward the regulation of MFN clauses, and antitrust regulation of PMFN clauses is even less common. U.S. courts primarily apply the doctrine of reasonableness to PMFN clauses, a principle that stems from the U.S. stance on MFN clauses.[17]In the case of United States Department of Justice v. Blue Cross Blue Shield Association, U.S. courts held that Most-Favored-Nation (MFN) clauses are not inherently illegal, but they may harm fair competitive market order during their operation.[18]。In this case, Blue Cross Blue Shield locked in over 80% of local medical service providers through MFN clauses, making it difficult for other insurance companies to sign contracts with medical institutions at lower prices, which ultimately drove up medical insurance premiums. This was also the first time the court explicitly pointed out the potential 'market lockout' effect of PMFN clauses. In the 1990s, the U.S. government's lawsuit against Rhode Island Delta Dental Insurance Company changed the U.S. courts' long-standing laissez-faire attitude toward MFN clauses. In that case, the insurance company reached MFN agreements with 90% of practicing dentists, and the plan covered 35% to 40% of people who purchased dental insurance in Rhode Island. The court held that the MFN clause deprived the insurance company of the opportunity to participate in fair competition.[19]In the Apple case, Apple set up the PMFN clause to enter the e-book market dominated by Amazon. The main content of this clause was a consignment agreement between Apple and publishers, which stipulated a 'tiered maximum price clause' for best-selling e-books and granted Apple the most favorable price. The existence of the PMFN clause required publishers to ensure that the price of e-books sold on

[17] See Susan E. Stenger，Most-Favored-Nation Clauses and Monopsonistic Power: An Unhealthy Mix?,15 American journal of law & medicine 111，115-116 (1989).

[18] See Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 663 F. Supp. 1360 (D. Kan. 1987).

[19] See U.S. v. Delta Dental of R.I.,943 F .Supp. 172 (D.R.I. 1996).

Apple's iBook platform was the lowest. As a result, five publishers jointly pressured Amazon, which was selling e-books at a low price of $9.99, to terminate its original wholesale pricing model and adopt the same agency sales model as Apple, thereby increasing the price of e-books on the Amazon Kindle platform.[20]The court found that Apple played a de facto role in connecting major publishers during the process of signing consignment agreements with them, enabling the publishers to be aware of each other's agreements with Apple. Through this agreement, a hub-and-spoke monopoly agreement was formed among the publishers, ultimately facilitating this price cartel. The U.S. court held that this conduct seriously harmed market competition, reduced consumer welfare, and violated Section 1 of the Sherman Act, imposing penalties on both the publishers and Apple.[21]

Overall, however, U.S. courts have been relatively cautious in regulating PMFN clauses. In the "American Express case," the U.S. Department of Justice and plaintiffs such as the state of Ohio filed a lawsuit against American Express in a federal district court, alleging that American Express had imposed Most Favored Nation (MFN) treatment in its contracts with retailers that accepted American Express cards. The U.S. Department of Justice argued that the PMFN clauses in the contract prevented competitors from charging retailers lower interchange fees, as competitors might increase their share of retail payment transactions by lowering these fees. These clauses also prevented retailers from passing on the lower fees to shoppers who used cheaper competitor cards through discounts, thereby violating Section 1 of the Sherman Act. The federal district court at first instance supported the plaintiffs' claims, ruling that American Express's PMFN clauses were illegal because they resulted in higher merchant fees and allowed the company to capture monopoly profits.[22]However, the U.S. Court of Appeals for the Second Circuit held that the district court had failed to properly define the relevant market to account for the potential benefits to American Express cardholders. It found that the lower court had not analyzed the competitive effects of the vertical restraint in conjunction with the two-sided market effects of credit card transactions, and concluded that the PMFN clauses in question did not have anti-competitive effects.[23] In 2018, the U.S. Supreme Court ruled by a narrow 5-4 majority that the vertical restraint in question did not violate the Sherman Act.The majority opinion of the Supreme Court held that the credit card market is a typical transactional two-sided market in the economic sense, and that both sides of participants on the two-sided platform must be included in the relevant market to accurately assess the impact on market competition. Regarding the competitive effects of the challenged PMFN clause prohibition, both the majority and the minority agreed that the Rule of Reason should apply. However, they disagreed on the content and degree of proof required to demonstrate anti-competitive effects: the majority argued that the plaintiff failed to meet the burden of proof required for the first step under the Rule of Reason, while the minority insisted that the majority had disregarded the detailed factual findings made in the trial court (district court) proceedings.[24]

In the hotel booking monopoly case, private plaintiffs brought an antitrust lawsuit against hotel platforms (OTA) for using parallel PMFN clauses. The district court held that the consumer plaintiff group had not presented sufficient facts to infer that the eight online travel agency defendants introduced parallel PMFN clauses through an agreement, and dismissed the claims[25]. This handling means that the court did not address the issue of whether the most-favored-nation treatment harms competition. This case highlights the complexity and challenges in antitrust litigation in the United States related to platform most-favored-nation treatment. In this case, because the plaintiff failed to successfully prove that there was an agreement among the defendants to introduce most-favored-nation treatment, the court was unable to further examine the potential harm of most-favored-nation treatment to competition. This also reflects that proving the existence of an agreement is a key threshold issue in such antitrust

[20] See United States v Apple Inc,,952 F. Supp, 2d 638 (S.D.N.Y 2013).
[21] See United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012).
[22] See United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015).
[23] See United States v.Am.Express Co., 838 F.3d 179 (2d Cir. 2016).
[24] See Ohio v. American Express Co., 138 S. Ct. 2274 (2018).
[25] See In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig., 997 F. Supp. 2d s26 (N.D. Tex74.2014).

lawsuits.

In the process of antitrust enforcement against PMFN clauses in the United States, authorities mainly analyze and regulate them under the framework of monopoly agreements. This is due to three key reasons: first, it is difficult to prove that platform enterprises hold a dominant market position; second, in the early analysis of the anti-competitive effects of MFN clauses, law enforcement agencies primarily identified their "collusive effects"; and third, due to the reliance on this legal application path, antitrust authorities still tend to regulate PMFN clauses using the mindset of monopoly agreement analysis.

There have long been disputes regarding the purpose and effects of vertical restraints, and U.S. courts have always adopted a cautious attitude toward this issue. The Chicago School, represented by Richard Posner, argues that vertical restraints do not hinder competition nor reduce consumer welfare, and thus should be deemed per se lawful.[26]

Regarding the agency issue in the context of monopoly agreements, the agency principle typically does not have a substantive impact on the determination of illegality in U.S. antitrust practice. This is mainly because the U.S. usually analyzes vertical monopoly agreements from the perspective of competitive effects.

In the 1964 "Simpson Case," the court held that the criteria for distinguishing an "agency" relationship primarily depended on two factors: first, whether the parties had formally delineated ownership rights; second, who bore the risks of product loss and unsold inventory when the distributor had control over the goods—whether it was the manufacturer or the distributor. From the perspective of the nature of PMFN clauses, this set of criteria alone cannot incorporate the agency principle into antitrust regulation. However, the court further noted that another factor also carried weight: whether the distributor sold only the seller's products or simultaneously sold products from other sellers. In the latter case, the distributor was unlikely to be considered an agent, even if other provisions of the agreement contained agency-like characteristics.[27]In addition, some American scholars believe that the real focus of the agency problem should be on the competitive analysis of behavior，[28]Some scholars also argue that distinguishing the agency agreement doctrine is meaningless when applying the reasonable principle in vertical restraint cases.[29]After the "Leegin Case" (Leegin Creative Leather Products, Inc. v. PSKS, Inc.), the U.S. Supreme Court generally applies the Rule of Reason to analyze the competitive effects of vertical agreements when enforcing the vertical agreement regime. Therefore, the agency exception principle does not pose an obstacle to the antitrust regulation of PMFN clauses in the United States.

3.2 European Union

Compared to the lenient law enforcement attitude of the United States, the European Union appears more stringent. The EU views platform most-favored-nation treatment as conduct that may violate Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits agreements that hinder, restrict, or distort competition, as well as equivalent provisions of national competition laws of Member States.，[30]The most-favored-nation treatment implemented by dominant companies on platforms may also be deemed a violation of Article 102 prohibiting abuse of market dominance.[31]

In the Amazon e-book case, Amazon used its market advantage to include PMFN clauses in agreements with relevant publishers, including most favorable prices, best business models, best price choices, and non best price

[26] See Richard A. Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 The University of Chicago Law Review 6, 24 (1981).

[27] See Simpson v. Union Oil Co. of California, 377 U.S. 13 (1964)

[28] See Herbert Hovenkamp, Antitrust Law in America: Principles and Cases (2nd ed.), translated by Chen Wenxuan and Yang Li, China Renmin University Press, pp. 431-432.

[29] See Richard A. Posner, Antitrust Law (2nd ed.), translated by Sun Qiuning, China University of Political Science and Law Press 2003 edition, p. 219.

[30] See European Union, Treaty on the Functioning of the European Union [TFEU], 2012, in Official Journal of the European Union, C 326, pp.47-390.

[31] See Id.

clauses. The European Commission believes that Amazon is suspected of abusing its market dominance, and its actions will hinder new platform companies from entering the e-book market, harm innovation in market competition models, weaken market competition, reduce consumer choices, and increase consumer prices.[32]The more common regulatory approach in EU practice is still to use monopoly agreements. In the anti-monopoly enforcement process of hotel OTAs, EU member states mainly identify them through vertical monopoly agreements. In the InterContinental Hotels case, the UK Office for Fair Trade (0FT) found that Booking.com and Expedia, two hotel booking platforms, were suspected of fixing hotel sales prices through PMFN terms with InterContinental Hotels, violating Article 101 of the Treaty on the Functioning of the European Union and constituting a vertical monopoly agreement;[33]In the HRS Hotel case, the German Cartel Office (FCO) held that the German hotel online booking service provider HRS had set most favored nation treatment clauses with partner hotels, setting conditions on booking prices, number of rooms, and cancellation of orders. This PMFN clause violated Article 1 of the German Anti Competition Law and Article 101 of the Treaty on the Functioning of the European Union, constituting a vertical monopoly agreement.[34]In the process of conducting antitrust investigations on PMFN provisions, the EU antitrust authorities' distinction between broad and narrow PMFN has led to varying considerations and attitudes towards the competitive effects of PMFN provisions among countries. The restriction of the broad PMFN clause has been recognized by most EU countries. However, before the promulgation of the Digital Markets Act, there was no unified understanding among EU countries regarding the narrow PMFN clause. Most countries believed that the narrow clause was a legal act, but Germany insisted on recognizing the broad MFN and narrow MFN clauses as illegal. The German FCO made a decision in the HRS case that the broad most favored nation clause was illegal, which was supported by the D ü sseldorf Higher Regional Court after appeal.[35]This does not conflict significantly with the views of other EU competition authorities. In a joint investigation into Booking.com, France, Italy, and Sweden jointly announced their acceptance of Booking.com's commitment to abandon the broad PMFN clause and retain only the narrow PMFN clause, thereby terminating the antitrust investigation against it. However, after a detailed investigation, Germany's Federal Cartel Office (FCO) rejected the condition of retaining the narrow PMFN clause.。[36]FCO expressed strong skepticism regarding the view held by competition authorities of three countries that the narrow Most-Favored-Nation clause could benefit online travel agencies[37].FCO believes that the restriction of hotels' pricing power itself violates relevant laws; moreover, narrow clauses cannot promote market competition because hotels are unwilling to be at a competitive disadvantage[38].FCO believes that Booking.com's narrow PMFN clause violates Article 101 of the Treaty on the Functioning of the European Union and the provisions of Germany's Anti-Restrictions of Competition Act, constituting a vertical monopoly agreement.

The viewpoint of the German FCO has attracted the attention of the European Union. Shortly thereafter, the legislative bodies of Austria, France, and Italy banned all most favored nation treatment, including both broad and narrow provisions. In the newly revised Regulation on Vertical Collective Exemption, the European Commission has narrowed the scope of the safe harbor for most favored nation treatment. Except for the broad most favored nation treatment clause, which no longer applies to collective exemption, if the narrow most favored nation

[32] See Case AT．40153 E-book MFNs and related matters (Amazon) .

[33] See OFT issues Statement of Objections against Booking.com, Expedia and Intercontinental Hotels Group: http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2012/65-12.

[34] See Bundeskartellamt, Case B9-66/10,20 Decemember 2013.

[35] See Bundeskartellamt, Case B9-66/10,20 Decemember 2013.

[36] See Philippe Chappate & Helen Townley, Online Hotel Bookings -A Joint European Approach ora Most Favoured Nation?, SLAUGHTER & MAY (May 2015), http://www.slaughterandmay.com/media/2497093/online-hotel-bookings-a-joint-european-approach-or-a-most-favoured-nation.pdf [http://perma.cc/X99Q-JSFC].

[37] See Id.

[38] See Bundeskartellamt,Booking.com B.V,B9-121/13,22 December 2015.

treatment clause affects a large number of platforms and platform users (resulting in cumulative effects) and there is no evidence to prove that the clause has an effect on improving efficiency, then collective exemption may still not be applicable.[39]After the promulgation of the Digital Market Law, stricter measures were taken against PMFN clauses, explicitly prohibiting all PMFN clauses (both broad and narrow) of gatekeepers. Regardless of their purpose and effect, as long as gatekeepers sign PMFN clauses, it constitutes illegal.[40]The reason why the European Commission has made such regulations is twofold: firstly, to unify the determination of the illegal nature of the most favored nation clause among EU member states; secondly, to strictly regulate and strengthen law enforcement of digital enterprises, especially gatekeepers.[41]

Regarding the regulation of the "agency exception" rule, the EU explicitly excludes "agency agreements" from vertical monopoly agreements in the "Vertical Restriction Guidelines".[42]However, the guidelines also point out that if the agency agreement promotes collusion, the agreement signed between the agent and the principal does not contain provisions for the agency relationship, or the agent assumes product risks, the provisions of Article 101 (1) of the EU Operational Regulation shall apply[43].The Court of the European Union holds that the determination of an 'agency' relationship is primarily based on the criterion of economic independence. In the CEPSA case in 2006, the Court of the European Union pointed out that the formal independence arising from the legal personality of an agent is not a decisive factor. Only when the operator is regarded as a subject with economic independence can Article 101 of the Treaty on the Functioning of the European Union be applicable.[44]From the perspective of the PMFN clause, it is obviously difficult for platform entities to be defined as economically non independent entities. The agreements they sign with sellers have already exceeded the agency relationship. Therefore, in the EU's antitrust practice, the PMFN clause is recognized as constituting a vertical monopoly agreement without much obstacle. The EU's new "Vertical Agreement Collective Exemption Regulation" and its accompanying "Vertical Restriction Guidelines" and "Digital Market Law" in 2022 have made PMFN more explicitly prohibited, which means that PMFN clauses are no longer troubled by the agency principle.

3.3 Japan

The existing laws in Japan apply the "Monopoly Prohibition Act" to regulate the PMFN clause, but it is currently unclear which type of regulation under the "Monopoly Prohibition Act" applies to the anti competitive behavior of this clause.[45]In addition, there are no specific provisions regarding agency issues in Japan's Monopoly Prohibition Law. But the situation regarding PMFN terms has also emerged in Japan, such as the OTA case of the three major Japanese companies. In this case, Lotte Travel, Booking.com, and Expedia require Japanese hotels that enter their platforms to provide them with the same or lowest price than on other platforms and their own platforms. The Japan Fair Trade Commission believes that the PMFN clause of the three major companies will harm fair price competition and distort the market. This constitutes the general designation of "restricted trading conditions" in the "Monopoly Prohibition Law", which violates Article 19 of the "Monopoly Prohibition Law" that prohibits operators from adopting unfair business practices[46].For the PMFN clause, Japan does not adopt horizontal monopoly or abuse of market dominance as a regulatory path, but instead identifies the clause as a vertical monopoly behavior, which means that Japan adopts the principle of reasonableness clause to analyze its

[39] See Commission Regulation (EU) 2022/720 of 10 May 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

[40] Digital Markets Act CHAPTER III Article 5.

[41] See Duan Wei, Antitrust Response to Most-Favored-Nation Clauses Under the Digital Markets Act: EU Experience and China's Path, in Theoretical Monthly, No. 9, 2023.

[42] Section 3.2.1 of the Guidelines on Vertical Restraints.

[43] Paragraph (31) of Section 3.2.1 of the Guidelines on Vertical Restraints".

[44] See Case C-217 /05, Confederación Espa ola de Empresarios de Estaciones de Servicio v. Compa ía Espa ola de Petróleos SA, Judgment of the Court (Third Chamber) of 14 December 2006.

[45] See Wang Jian & Yu Ruiwen, Regulation of Most-Favored-Nation Clauses in the Platform Economy by Japan's Antitrust Law, in Antitrust Studies, No. 1, 2021, p. 178.

[46] See JAL Press (Kōkū Shinbunsha), Fair Trade Commission Conducts On-Site Inspection of OTAs on Suspicion of Antitrust Law Violations (April 11, 2019), www.jwing.net/news/11810.

illegality. Although it is not yet clear which provision of the Exclusivity Prohibition Act should be used to regulate PMFN clauses, some Japanese scholars believe that it is not necessary to emphasize the specific provisions of the Exclusivity Prohibition Act, nor to consider what kind of restrictive behavior this provision may cause. Instead, it is only necessary to consider whether the most favored nation clause improperly excludes or restricts competition.[47]In addition, Japan also tends to adopt a commitment system to address PMFN provisions. In the three major OTA cases, after Lotte Company made a commitment to waive the most favored treatment and report to the Fair Trade Commission annually, the Fair Trade Commission accepted Lotte Company's commitment and terminated the investigation without imposing a penalty on it. In the Amazon shopping platform case in Japan, the Fair Trade Commission also accepted Amazon's commitment to waive the most favored nation treatment clause[48].

From the anti-monopoly practices of the United States, the European Union, and Japan, it can be seen that in terms of regulatory attitude, law enforcement agencies in various countries do not adopt a negative attitude towards the PMFN clause itself. Only when platform companies use this clause to engage in monopolistic behavior will they be regulated. Even the EU adopts a stricter regulatory attitude only because gatekeepers are more likely to use this clause to exclude or harm competition, and not all non gatekeeper companies are prohibited from using this clause. Generally speaking, for digital platforms, especially large Internet enterprises, the United States has always taken a prudent regulatory attitude, giving Internet enterprises enough room for development, so that they can continue to innovate and make progress in algorithm technology, business model, user experience and other aspects. The effect of PMFN clauses on promoting competition cannot be ignored by the American courts. Like the United States, although Japan currently does not have clear legal regulations, its regulatory attitude towards PMFN provisions is also based on an analysis of economic effects. The attitude of the European Union and its major member states towards this provision appears to be relatively strict. The EU has adopted a comprehensive ban on the behavior of the gatekeeper PMFN, making it no longer difficult to determine the illegality of PMFN behavior. As long as the behavior exists, it can be deemed illegal, greatly saving the cost of law enforcement and improving the efficiency of law enforcement. But this regulation reduces the motivation for gatekeeper companies to use PMFN clauses to restrict competition, while also ignoring the pro competitive aspect of PMFN clauses, which may have an excessive intervention effect. Secondly, from the perspective of anti-monopoly paths in Europe, America, and Japan, countries mainly use monopoly agreements for analysis. However, the EU and the United States have also analyzed the potential abuse of market dominance by the provisions. Therefore, it can be seen that the regulatory path of PMFN provisions is not a simple binary, and its harmful consequences should be comprehensively analyzed to choose the corresponding path for regulation. Again, from the practice of Europe and Japan, it can be seen that in order to solve the problem of high enforcement costs and possible neglect of the rationality of provisions, the EU and Japan have adopted a large number of commitment settlement systems to quickly restore competition order. Finally, from the perspective of the principle of agency exceptions, except for Japan which has no special regulations, after the new version of the Vertical Agreement Collective Exemption Regulation and the Digital Market Law came out, the European Union no longer considers the issue of agency exceptions in the competition regulation of PMFN clauses, while the United States analyzes it more based on the principle of reasonableness.

Table.3 Multi-dimensional comparison table

Country / Region	Regulatory Attitude	Core Legal Basis	Typical Case	Handling of PMFN Terms

[47] See Tsuchida Kazuhiro, Vertical Restraints and Competition Law in E-Commerce: A Comment, Paper Presented at the 2016 CPRC International Symposium of the Fair Trade Commission.

[48] See Fair Trade Commission, Handling of the Case Suspected of Violating the Antimonopoly Act Against Amazon Japan G.K.

USA	Caution (emphasizing the principle of reasonableness)	Section 1 of the Sherman Act (Monopoly Agreement)	Apple e-book case, American Express case	Not directly prohibited, but need to prove the 'collusion effect', with no obstacles for agency exceptions
European Union	Strict (with emphasis on gatekeeper)	Articles 101/102 of the TFEU, Digital Markets Act	Amazon e-book case, HRS case	Prohibit all PMFN of gatekeepers (including wide and narrow clauses), and the exception for agents does not apply
Japan	Mild (with a focus on commitment system)	Article 19 of the Anti-Monopoly Law (Unfair Trading Practices)	Three major OTA cases, Amazon case	Instead of imposing direct penalties, require the platform to commit to abolishing PMFN and submitting annual reports

This article is divided into three sections to describe national practices. The table can present the core differences and help readers quickly grasp the "spectrum of global regulation (from loose to strict)", providing a comparative reference for the "China strategy" in the following text.

4. Addressing Anti-Competitive Risks of PMFN Clauses: Strategies and Recommendations

Although there have been many behaviors that restrict market competition on digital trading platforms in China, law enforcement agencies based on the principle of prudent supervision have not yet initiated investigations into such monopolistic behaviors. Although law enforcement agencies regulated the basic MFN clause in the Eastman abuse of market dominance case, China's law enforcement agencies currently lack experience in regulating the basic MFN clause and PMFN clause. With the further development of China's digital platforms and economic globalization, the negative impact of PMFN clauses on competition will inevitably become an issue that cannot be ignored in the competition of China's digital platform market. Preventing and properly handling the monopoly problems caused by PMFN clauses can provide solid institutional guarantees for the development of China's digital platforms, create a policy environment and social atmosphere conducive to innovation, and accelerate the construction of a modern country.

From the perspective of the problems arising from the regulation of PMFN clauses and the anti-monopoly practices of various countries, this article believes that in the process of regulating PMFN clauses, the following aspects can be considered:

4.1 Clearly regulate the attitude towards PMFN clauses

Unlike European and American case law countries, as a written law country, China's clear legal provisions on PMFN clauses are the basis for anti-monopoly law enforcement agencies to enforce them in accordance with the law. Due to the clear classification and enumeration of anti-monopoly behaviors in China's anti-monopoly law, it is difficult to specify PMFN clauses with multi-level harmful behaviors in specific articles. Currently, China's anti-monopoly law does not involve direct recognition of agency. In Article 18 of China's Anti Monopoly Law, the subjects of vertical agreements are defined as operators and trading counterparties, and only fixed minimum

resale prices and maximum resale prices are listed. Therefore, from the limitations of the parties and regulatory content in Article 18, agency behavior clearly does not fall within the scope of vertical monopoly agreement regulation. However, this article believes that the PMFN clause is an important means for agency behavior to engage in anti competitive behavior. Agency behavior that does not include the PMFN clause is unlikely to have a harmful effect on the market. Therefore, the agency model cannot be used as a ground for illegal obstruction of the PMFN clause. Referring to the practice of EU competition law, the EU has incorporated this provision into its Digital Market Law, and China can also incorporate it into corresponding laws and regulations, such as the Platform Economy Anti Monopoly Guidelines, to recognize it from a normative perspective, ensuring that there is a legal basis and reducing conflicts between law enforcement and judiciary.

4.2 Pay attention to economic analysis and adhere to the principle of prudent and reasonable regulation

The regulation of PMFN clauses should adhere to the principle of prudent regulation and focus on case analysis. From the practical experience of Europe, America, and Japan, it can be seen that the United States adopts the principle of reasonableness, while Japan mainly analyzes the harmful effects of the terms on competition. The European Union has adopted a comprehensive ban on the behavior of gatekeepers PMFN. Although the EU's approach greatly saves law enforcement costs and improves enforcement efficiency, this regulation ignores the positive effects that PMFN clauses may have on competition, reducing the motivation for gatekeeper companies to use PMFN clauses to restrict competition. At the same time, it may also send a signal of the illegality of this clause to all platform companies. There are currently no relevant legislative provisions or case guidance in China. In the process of anti-monopoly supervision of PMFN provisions, the principle of inclusiveness and prudence should be adhered to, and economic analysis should be used to examine the competitive effects of individual cases. It is suggested to introduce a "market competition impact assessment model" and set 20 quantitative indicators from three dimensions: "market structure (such as platform market share), behavioral impact (such as merchant pricing flexibility), and consumer welfare (such as product price fluctuations)", to determine the competitive effect of terms through data modeling. We should be vigilant about the risk of competition damage caused by PMFN clauses, and also recognize the potential positive role of PMFN clauses in promoting market competition. We should take a comprehensive view of the anti-monopoly issues in the platform economy industry, and not ban PMFN clauses across the entire industry just because of the monopoly problems of a certain enterprise. When the competitive effect is unclear, we should adhere to the principle of non-interference, respect the self-regulation role of the market, and maintain a cautious and wait-and-see attitude.

4.3 Flexible choice of regulatory path

Although the PMFN clause appears to be a vertical restriction clause in form, the practical experience of major anti-monopoly regions also shows that there is no fixed path for anti-monopoly regulation of this clause. From the perspective of behavioral outcomes, it may lead to horizontal monopoly restrictions and the harmful consequences of abusing market dominance. The damage consequences caused by different monopolistic behaviors are different, and the regulatory subjects and paths are also different. Using a single regulatory path for analysis without considering the complex multi-level nature of clause regulation paths may allow illegal entities to escape sanctions, as in the Loudi Insurance case in Hunan Province, China[49]， This case appears to be a vertical agreement signed between the insurance industry association and various property and casualty insurance companies, but in reality, it is a horizontal price monopoly agreement reached with major insurance companies, with insurance companies as the main body. However, law enforcement agencies regulate relevant entities by forming horizontal monopoly agreements, and the punishment for insurance industry associations that play an organizational role as axis centers is slightly lighter. Therefore, when determining its illegality, one can consider

[49] See Hunan Price Supervision and Anti-Monopoly Bureau: 'Investigation into Monopolistic Practices in Loudi Insurance Industry', 'China Price Supervision', Vol. 3, 2013, p. 46.

the purpose of monopolistic behavior and analyze whether the damage belongs to "collusion" or "unilateral exclusivity". So as to adopt appropriate regulatory paths and avoid the risk of being trapped in regulations and unable to escape from them.

4.4 Emphasize the application of the commitment system in anti-monopoly law

From the perspective of law enforcement practice, it usually requires a lot of manpower and material resources for anti-monopoly law enforcement agencies to investigate whether PMFN clauses have anti competitive effects, the dominant market position of the actors, and the impact of anti competitive behavior. This is not cost-effective for the urgently needed restoration of market competition order. The most important aspect of the healthy development of the digital market is to nip any potential competition restrictions in the bud, ensuring that the market and business environment remain open and dynamic (Joaquin Almunia). Therefore, this article believes that in the regulatory process, we should learn from the regulatory experience of the European Union and Japan, attach importance to the application of the commitment system in Article 53 of China's Anti Monopoly Law, and for behaviors that are extremely difficult to investigate and may have reasonable purposes, after the digital platform makes a commitment to eliminate competition hazards and report annually, it can terminate the investigation. Specifically, the platform can be required to commit to "deleting all PMFN clauses within 3 months", "submitting merchant pricing data reports to law enforcement agencies every quarter", "establishing a consumer complaint rapid response mechanism", etc. At the same time, a "commitment performance supervision mechanism" should be set up, and a third-party organization should evaluate the platform's performance. If a breach is found, the investigation can be resumed and the punishment can be increased to reduce the time cost of law enforcement and quickly restore market competition order.

CONCLUSION

The competition in the digital economy market represented by digital platforms, due to the bilateral nature of the digital market and the transparency of competition, makes the analysis of the competitive effects of PMFN clauses in the market more complex than the MFN clauses in traditional markets. From the practical experience of anti-monopoly regulation under the PMFN clause, we need to return to the essence of digital platforms and explore the business operation model of digital platforms themselves for the regulation of monopolistic behavior under the PMFN clause. We need to comprehensively analyze various factors in the case, combine economic methods for quantitative analysis, and comprehensively evaluate its competitive effect. The competition in the digital economy market is a storm of creative destruction, and the development of this market requires laws to constantly self adjust and adapt to the needs of real development in order to solve traditional problems in the new environment. It should be emphasized that the agency mode of PMFN clauses does not constitute an obstacle to the regulation of this clause. It is precisely in this mode that platform enterprises use PMFN clauses to generate risk of anti competitive effects. Therefore, it is also necessary to pay attention to and regulate the anti competitive nature of this clause. However, in the process of regulation, we must accurately identify its obstacles and eliminate competition, correctly apply anti-monopoly laws for regulation, and fully recognize its potential to promote competition, reduce inappropriate intervention, improve the competitive efficiency of the digital platform market, and promote the high-quality development of China's platform economy market.

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