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Samir R. Gandhi, Rahul Rai, & Hemangini Dadwal[1]

I. INTRODUCTION

Most favored customer ("MFC")[2] clauses are emerging as an important tool through which purchasers ensure that suppliers match the best offer they make to any other purchaser of their goods and services. Although MFC conditions may afford greater bargaining power to purchasers, they have the ability to promote price uniformity, which in turn reduces the incentive to compete. In certain instances independently negotiated MFC conditions may reflect legitimate commercial interest. In certain others, MFC conditions have the ability to prejudice consumer interest, which forms the cornerstone of most antitrust laws, including the [Indian] Competition Act, 2002 ("CA02").

Typically, by insisting on an MFC condition, a purchaser seeks to secure a guarantee from a supplier that it has been offered the best price (and other terms of sale) when compared to offers made to other customers. If the purchaser were the end customer—for example, a bank purchasing a software solution on the guarantee that the software vendor has offered it the best price and terms of service that it may have offered to similar customers—the customer would not have to incur the transaction costs for ascertaining the best price. In this situation, the MFC condition may have certain pro-competitive benefits.

If the purchaser of a product/service insisting on an MFC condition is not the end consumer but a retailer, by securing products on MFC terms, it may be able to resell the products at prices more competitive than its peers who do not benefit from access to the same products on MFC terms. If the purchaser-retailer insisting on MFC conditions is not in a dominant position, and the resale market for the relevant product is competitive, then an individual purchaser-retailer's insistence on MFC conditions is unlikely to raise competition concerns.

However, the tables turn in online retail where it is possible that the online platform operators, which primarily serve to provide a platform for manufacturers/suppliers to meet with potential customers, may insist that the manufacturers/suppliers list their products on the platform at the best price/term they may have offered to some other platform. In this situation, the online platform operator does not act like a retailer engaging in purchase and resale transactions. Thus it does not necessarily fix the retail price of the goods that are listed on its platform for sale.

In this case, the platform operator may be said to act like an "agent" that allows manufacturers/suppliers to use its platform in return for a commission linked to the volume of

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[2] Also called "Most Favored Nation" ("MFN") clauses.

goods sold through the platform. The platform operator, by insisting on the MFC condition, ensures that the goods are listed on its platform at the best price that the manufacturer/supplier may have offered to others. This would help the platform operator route customer traffic to its platform. This business model is popularly referred to as "agency" model. In an agency model, the manufacturer/supplier retains the ability to set prices and pocket the proceeds of the sales. The quantum of an agents' (platform operators') revenue is linked to the volume of sales made on its platform. Sales would naturally increase if the agent were confident that the retail prices on its platform are the lowest, when compared to other platforms.

Unlike brick and mortar retailers, or traditional individual purchasers, online trading platforms have the inherent ability to monitor and ensure compliance with MFC conditions. The rather prohibitive cost of monitoring compliance for traditional physical retailers has meant that MFC conditions, even if negotiated, might not necessarily have been complied with. In contrast, monitoring prices for online retail sales is easier and perhaps much cheaper. Accordingly, MFC conditions are gaining currency in the field of online retail sales. In this article, we seek to examine the applicability of antitrust rules to MFC conditions, specifically in the context of online retail and its implications in India.

II. ANTITRUST APPLICABILITY IN THE UNITED STATES AND EUROPEAN UNION

Retail price MFC conditions inhibit the suppliers' incentive to reduce prices. A reduction in price for one online platform would mean a corresponding reduction on all other platforms, which may have tied the supplier with MFC conditions. This may lead to price uniformity across various online platforms and perhaps at higher levels. Despite potential competition concerns, at some level retail MFC conditions help align the interest of manufacturers/suppliers and online trading platform operators.

The manufacturers/suppliers would like to maximize their profits by charging higher prices, and online platform operators would like to ensure that their platform offers the products at a price no higher than the price at which rival platforms offer the products. This is easily achieved if the online platforms do not act as retailers of products but as agents that facilitate the interaction between manufacturers/suppliers and customers. In such situations, the manufacturers/suppliers do not have to mandate the retailer to necessarily sell the goods at a certain price—a practice that is generally known as resale price maintenance and attracts scrutiny if the manufacturers/supplier enjoys some degree of market power. Rather the manufacturer/supplier itself fixes the retail price at which its goods will be offered for sale on an online platform.

In other words, switching to an agency model allows manufacturers/suppliers the opportunity to determine retail prices without the risk of being scrutinized for imposing resale price maintenance conditions. However, antitrust agencies have been quick to notice this shift and acknowledge potential competition concerns in the agency model, which facilitates the acceptance of MFC conditions.

For example, in December 2011, the European Commission ("EC") initiated antitrust investigations against Apple, Inc. ("Apple") and four publishers, including Harper Collins (News Corp.) and Macmillan, for suspected concerted practices aimed at raising the retail prices for eBooks in the European Union. Similarly in April 2012, the United States Department of Justice

("DOJ") filed a suit against Apple and five publishers, alleging a conspiracy to raise the price of eBooks on Apple's iBookstore. Both competition authorities took note of what appeared to be a collusive switchover to the "agency" model agreement[3] by the publishers, leaving the publishers in charge of the sale price of eBooks. In both the European Union and the United States, the publishers reached a settlement with the antitrust agencies upon the acceptance of certain commitments offered by publishers.[4] However, Apple has preferred an appeal in the United States against the decision holding Apple's agreements with the publishers to be anticompetitive.[5]

The EC and the DOJ were concerned about the anticompetitive effects of the concerted switchover to the "agency" model by the publishers. Earlier each publisher let the online portals determine the sale price. Competition among the portals ensured that customers got the books at the most competitive price. The shift to an "agency" model meant that the online portals lost the ability to determine the retail price. The inclusion of MFC conditions led to uniform increases in prices across all portals—an outcome inimical to consumer interest. Essentially, by shifting to the "agency" model, the publishers took away the online retailers' ability to determine the price at which eBooks would be sold on their platforms.

III. ANTITRUST APPLICABILITY IN INDIA

While the motivation for the shift to the "agency" model in the United States and European Union could be strategic, the reasons for online platforms adopting the "agency" model in India may, to a large extent, be attributable to the government's foreign direct investment ("FDI") policy.

Although online trading platforms have existed in India for close to a decade, it is only in the recent past that they have gained in popularity. Increased consumer interest, as a result of greater internet penetration (that is expected to only grow further), has attracted foreign investment in companies operating online trading platforms. The infusion of foreign capital has necessitated a fundamental shift in the business model followed by most companies operating online trading platforms.

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[3] In an agency model, the publishers (suppliers) determine the price and list it for purchase on the online portal, which would retain a commission on the sale. In a reseller model, however, the online portal would purchase the books from the publishers and set the price (and other terms, including discounts and promotions) in respect of the sale of the book.

[4] The commitments included (i) the termination of agency agreements that were allegedly the result of collusive conduct; (ii) allowing e-retailers the ability to determine retail prices, including discounts and promotions; and (iii) preventing Apple and the publishers from entering into agreements with price MFC clauses for a period of five, years.

[5] On July 10, 2013, the United States District Court for the Southern District of New York found Apple to have violated Section 1 of the Sherman Act by conspiring with the Publishers to eliminate retail price competition and raise the price of eBooks. Apple entered into a conditional settlement with the Court according to which it will be required to pay damages if it loses in appeal before the Court of Appeals, along with other settlement terms including doing away with MFN clauses in its agreements with publishers. The hearings before the appellate court took place in December 2014 and the judgment is presently reserved.

Until November 2011, multi-brand retail in India was not open to foreign participation. While the 2012 FDI Policy[6] approved FDI in multi-brand retail up to a 51 percent cap on foreign shareholding in Indian companies, it has been made subject to fairly onerous local procurement requirements[7] that are difficult to comply with.

However, for online portals, it is possible that to work around the onerous conditions attached to FDI in multi-brand retail and yet benefit from foreign investment. Online portals do not engage in purchase and resale activity. Rather, these companies only provide an online market place, which facilitates the meeting of independent customers and sellers. By doing so, these companies operate as online market places that do not strictly engage in retail sale of goods or multi-brand retail.[8] Further, suppliers retain the flexibility to determine the price at which they wish to offer their products for sale.

However, in a rapidly crowding space, online portals may seek to distinguish themselves by offering a market place where goods are made available at the best possible price. To do so, some may goad the suppliers to offer their products at a certain price. In this process, a few online portals may insist, as a pre-condition to offering a supplier's products for sale on their platforms, that suppliers list their products at the same prices at which they may have listed their products on a competing platform. In doing so, they would risk antitrust scrutiny for the same reasons that the EC and the DOJ scrutinized MFC conditions in agency models adopted by eBook publishers in the European Union and United States, respectively.

Absent an agreement among companies operating online portals wherein they would all insist on MFC conditions in their dealings with suppliers interested in listing their products, an individual online portal's insistence on MFC condition is unlikely to be viewed as a cartel under Section 3(3)[9] of the CA02. However, an individual online portal's insistence that a supplier must agree to an MFC condition could potentially be examined under Section 3(4)[10] of the CA02 as a vertical restraint or under Section 4[11] of the CA02 as an abusive unilateral conduct.

Vertical restrictions under the CA02 are examined under the rule of reason. Therefore, absent market power, vertical restraints or unilateral conducts are unlikely to raise suspicion under the CA02. In addition, the Competition Commission of India ("CCI") has acknowledged

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[6] Press note no. 5 of 2012, issued by Department for Industrial Policy and Promotion, Ministry of Commerce and Industries, Government of India

[7] *Supra*, onerous conditions include a minimum necessary investment of U.S $100 Million and a requirement that at least 50 percent of total FDI brought in should be invested in 'backend infrastructure' within three years, etc.

[8] http://archive.financialexpress.com/news/ecommerce-major-flipkart-gets-clean-chit-from-ed-over-fdi-violation/1298837

[9] The Competition Act prohibits any agreement, arrangement, or action in concert between enterprises that are engaged in the same level of trade which results in (i) directly or indirectly fixing prices, (ii) limiting or restricting production, (iii) allocating markets or consumers, and (iv) bid-rigging, as they are presumed to cause an appreciable adverse effect on competition ("AAEC").

[10] Arrangements or agreements between entities engaged in different levels of the production or supply chain are prohibited if they result in an AAEC in India.

[11] Section 4 of the Competition Act prohibits an enterprise in a dominant position from abusing its dominant position by, *interalia,* (i) imposing unfair or discriminatory conditions with respect to the sale or purchase of goods and services or prices, (ii) limiting or restricting production or sale of goods, (iii) denial of market access, or (iv) using its position in one market to enter into or protect another market.

that there is ample competition among companies operating online platforms and no one platform may be said to be in a dominant position.[12] By acknowledging that online platforms lack market power, the CCI would find it difficult to examine an MFC condition as a vertical anticompetitive agreement or an abusive conduct by a dominant enterprise.

The CCI, however, is not shy of examining issues that its global peers may be grappling with. The CCI has also shown the propensity to both examine and, if appropriate in the Indian context, accept antitrust best practices and principles from across the globe, particularly in mature antitrust jurisdictions like the European Union and the United States. The ongoing churn in the Indian retail industry has seen brick and mortar retailers face-off with online trading platforms on several occasions. Moreover, with the growing popularity of a handful of online platforms, it is only a matter of time before their actions are subjected to antitrust scrutiny by the CCI and it would hardly be surprising if MFC conditions imposed by online trading platforms were to be scrutinized by the CCI.

However, given the CCI's recent decisions wherein it has recognized the competitiveness of online trading platforms, it remains to be seen how the CCI would deal with MFC conditions. It is possible that, with time, the landscape of online retail may change resulting in one or two online platforms enjoying sufficient market power to attract attention. This would enable the CCI to examine a MFC condition either as an anticompetitive vertical restraint under Section 3(4)[13] of the CA02 or as an unfair condition under Section 4 of the CA02[14]. On the other hand, if several online platforms **together** agree to insist on MFC conditions, the CCI is likely to construe such a conduct as a cartel under Section 3(3) of the CA02 and prohibit it.

[12] Mr. Ashish Ahuja vs Snapdeal.com through Mr. Kunal Bahl, CEO & Ors., Case no. 17/2014 and Mr. Mohit Manglani vs M/s Flipkart India Private Limited & Ors., Case no. 80 of 2014.

[13] The CCI has held in the past (*Automobiles Dealers Association, Hathras, U.P v. Global Automobiles Limited & Anr. [Case no. 33 of 2011]*) that in order for a vertical restraint to result in an AAEC, the concerned entities are required to possess sufficient market power.

[14] Section 4 of the CA02 deals with abuse of dominant position, for which, again, market power is essential.