MFN CLAUSES AND ANTITRUST ENFORCEMENT: ON A SLOW PATH TO CONVERGENCE?

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CPI ANTITRUST CHRONICLE
SEPTEMBER 2019

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I. INTRODUCTION

Parity clauses, also known as "most favored nation" or "MFN" clauses, used by online platforms to prevent their business users from offering their goods or services for better terms elsewhere, recently returned to the antitrust spotlight. MFNs had attracted scrutiny from competition authorities across the European Union ("EU") between 2010 and 2015. That scrutiny led to divergent approaches and outcomes in different jurisdictions, ranging from the prohibition of all, or only wide forms of MFNs, to restrictions based on the market power of the MFN's beneficiary. Recent developments are reopening the debate on the competitiveness (or lack thereof) of MFNs and whether it is appropriate to allow narrow versions of these clauses.

On April 4, 2019, advisers appointed by outgoing EU Competition Commissioner Margrethe Vestager to explore how EU competition policy should evolve in the digital age reported that, because large platforms have an important advantage, strict scrutiny of MFNs applied by platform businesses is appropriate.[2] We have already seen the report's impact on legislative fronts. On June 20, 2019, the EU Parliament and Council adopted a Platform-to-Business Regulation requiring platforms to justify restrictions imposed on their business users regarding offering better terms elsewhere.[3] Moreover, in the context of its review of its Vertical Block Exemption Regulation – which exempts vertical agreements that meet certain conditions from the prohibition on anticompetitive agreements – the European Commission is exploring ways to possibly streamline provisions on MFNs.[4]

Attention is also focusing on MFNs at the Member State level. On May 9 and June 4, 2019, the Stockholm Patent and Market Court of Appeal[5] and the Düsseldorf Higher Regional Court,[6] respectively, confirmed the lawful use by large incumbent online travel agents ("OTAs") of narrow MFNs that prohibit hotels from offering better rates on their own websites than they do on the platform. On June 11, 2019, the Danish hotel booking platform Nustay filed a complaint with the European Commission against Booking.com and Expedia for allegedly enforcing a new type of wide rate parity clause by imposing penalties on hotels if Nustay or other platforms are able to offer more competitive prices for accommodation.

These recent developments underscore the need for a clearer and more consistent approach to the application of competition rules to MFNs.

2 "Competition Policy for the Digital Era," a report by Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, 2019.

3 Regulation of the EU Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, June 20, 2019.

4 Mlex, "EU's vertical agreements review to include RPM, MFN, selective distribution, official says," June 13, 2019.

5 Hotellbranschen förlorar konkurrensmål mot Booking, Svea hovrätt, May 9, 2019 (in Swedish).

6 Higher Regional Court in Düsseldorf, VI Kart 2/16, June 4, 2019 (in German).

II. "WIDE" MFNS V. "NARROW" MFNS

Two types of MFNs have been examined by competition authorities in the context of online platforms: first, MFN clauses imposed by a platform requiring its business users not to offer or list lower prices or better terms on their own websites than they do on the platform ("narrow MFN clauses") and, second, MFN clauses imposed by a platform requiring its business users not to offer or list lower prices or better terms elsewhere – on their own websites, on other competing platforms, or on any other online or offline sales channels ("wide MFN clauses"). MFN clauses may also be non-price related, for example requiring a business user to offer the same (or at least equivalent) product range, customer services, or conditions on the platform than on its own website and/or elsewhere.

Between 2010 and 2015, several national competition authorities scrutinized both wide and narrow parity clauses imposed in the online hotel booking sector by Booking.com and Expedia. The examined clauses obliged hotels to offer the OTAs the same or better room prices as the hotels made available on all other online and offline distribution channels, effectively preventing hotels from offering their rooms at a lower price or on more favorable terms on their own websites as well as on other sales channels.

The European Commission declined to investigate, which led to diverging approaches and results across the EU member states.

Germany's Federal Cartel Office ("FCO"), for example, pursued a blanket prohibition approach. It prohibited MFN clauses used by German online travel agent HRS on December 20, 2013 – a decision that was confirmed on appeal by the Düsseldorf Higher Regional Court on January 9, 2015. The FCO then prohibited, on December 22, 2015, both wide and narrow MFN clauses used by Booking.com. In both cases, the FCO found that MFNs prevent the offering of lower hotel prices elsewhere, restrict competition between existing platforms, and make market entry for new platforms more difficult, as they prevent new platforms from offering hotel rooms at lower prices. In the case of Booking.com, the company had offered to narrow the scope of these wide clauses so as to limit best price restrictions to the hotels' own websites, but the FCO considered narrow MFNs to be equally restrictive of competition and prohibited both the wide and narrow varieties implemented by Booking.com in Germany. However, on June 4, 2019, the Düsseldorf Higher Regional Court adopted a different approach and annulled the FCO's decision to prohibit Booking.com's narrow MFN clauses. The court's press release indicated that narrow MFNs "*are not restrictive of competition*", but instead are "*necessary*" to ensure "*a fair and balanced exchange of services between the OTA and the hotels*," suggesting that the narrow clauses might in fact be ancillary, and thereby necessary, to platform-to-retail agreements. The court added that OTAs may use narrow MFNs to prevent a "*disloyal redirection of customers from the OTA's portal to the hotels' websites.*" The court will allow a further appeal only under strict conditions, which suggests that the ruling is final.

In contrast to the FCO's approach, in mid-2015 the French, Italian and Swedish competition authorities accepted commitments from Booking.com to narrow the scope of its wide MFN clauses. As a result of these parallel investigations, Booking.com changed its clauses across most EU member states beginning in July 2015; Expedia followed suit by the end of 2015. Similarly to the FCO, the three authorities determined that the use of wide parity clauses is likely to reduce competition between competing platforms, as an OTA has less reason to offer hotels low commissions than it would otherwise, leading to higher prices for hotel rooms. The authorities also determined that wide parity clauses may also have an adverse effect on the ability of smaller platforms to compete or enter the market, as they are not able to differentiate their offerings on price. In a joint statement, the authorities said that contrary to wide MFNs, narrow MFNs strike the right balance, as they help restore competition while simultaneously preserving user-friendly free search and comparison services and encourage the growth of the digital economy as a whole. On May 9, 2019, the Stockholm Patent and Market Court of Appeal confirmed the lawfulness of Booking.com's narrow MFN clauses and concluded that there is a lack of evidence that the narrow clauses restrict competition in the sector.

France and Italy, joined by Austria and Belgium, introduced legislation prohibiting all forms of MFN clauses in the online hotel booking sector (France adopted the *Loi Macron* for Economic Growth in August 2015, which renders null and void all parity clauses imposed by OTAs; Austria and Italy amended their competition rules in November 2016 and August 2017, respectively, banning all MFN clauses in the sector; on July 19, 2018, Belgium adopted an act on pricing freedom in the online hotel booking sector banning all MFNs). In all four of these jurisdictions it is now prohibited to restrict hotels from offering better prices and conditions on their own websites as well as on any other online and offline sales channels.

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In a joint report[7] on the impact of antitrust enforcement measures adopted in the online hotel booking sector in recent years, issued on April 6, 2017, the European Commission and the national competition authorities of 10 EU member states suggested that the changes made to MFN clauses generally – both the switch from wide to narrow MFN clauses and the prohibition of all MFN clauses in some jurisdictions – improved competition in the sector, and led to more choice for consumers and lower prices across the participating member states. But with the observed relative lack of awareness about these changes by hotels, and narrow MFNs still being widely used in several of these 10 jurisdictions, it was agreed that the sector should continue to be monitored to ensure that narrow parity clauses do not unnecessarily restrict competition.

The breadth of MFNs and their implications for competition law assessment have been the subject of broader discussion as well. In its final report on its market study on digital comparison tools, issued on September 26, 2017, the UK Competition and Markets Authority ("CMA") expressed its concerns about narrow MFNs becoming broader than is necessary to achieve the efficiencies they can bring, and suggested continued monitoring.[8]

III. ANTITRUST ASSESSMENT OF MFNS: A COMPLEX BALANCING EXERCISE

Across the EU, MFNs have largely been considered under the prohibition on anticompetitive agreements, but the use of wide MFNs by dominant platforms could also be found to constitute a breach of the prohibition on abuse of a dominant position because of the concerns it may raise about exclusionary effects. This was the approach taken by the European Commission in the *Amazon E-Books MFNs* case. The Commission had concerns about clauses in Amazon's e-book distribution agreements requiring e-book publishers and suppliers to inform Amazon about more favorable or alternative price and non-price related terms (such as alternative business models, including distribution models) given to competing platforms and to offer Amazon similar or better terms. The Commission determined that such clauses could strengthen Amazon's position on the relevant market by reducing the ability and incentive for e-books suppliers and competing platforms to develop new business models. On May 4, 2017, Amazon offered the Commission to terminate the use of such clauses.

The antitrust assessment of MFNs has become less clear since the *Amazon E-Books MFNs* case. As discussed above, on April 4, 2019, the European Commission published a report[9] prepared by three special advisers (the Advisers) appointed by outgoing EU Competition Commissioner Margrethe Vestager to explore how EU competition policy should evolve in the digital age. The Advisers, all academics, shared the view that MFN clauses may have both pro- and anti-competitive effects, depending very much on the specificities of the markets, making case-by-case analyses necessary. However, because in their view large platforms have an important advantage, they determined that "*strict scrutiny is appropriate.*" They added that where competition between platforms is sufficiently vigorous, it might be sufficient to prohibit wide MFN clauses while allowing narrow MFN clauses. Where competition between platforms is weak, and pressure on the dominant platforms can only come from other channels (e.g. in the online hotel booking sector, from direct sales by hotels on their own websites), they determined it would be appropriate to also prevent narrow MFNs. The Advisers, however, were of the view that given the variety of theories of harm and efficiency defenses that could apply to these practices, and the variety in rule-setting, functions, and designs of platforms, it is impossible to draw general rules about what should be allowed and what should not, and a case-by-case approach is therefore necessary.

While wide MFN clauses used by *large* incumbent online platforms have consistently been found to be problematic across the EU member states, the same might not be true for smaller platforms. The European Commission's Vertical Agreements Block Exemption Regulation ("VABER") exempts vertical agreements from the prohibition on anticompetitive agreements if the parties' market shares do not exceed 30 percent. In fact, in its May 2017 report[10] on the E-commerce sector inquiry, the European Commission suggested that in the absence of a hardcore restriction (e.g. price fixing or market partitioning), MFN clauses in vertical agreements are exempted by the VABER if the parties' market shares do not exceed 30 percent. Even where conditions for application of the VABER are not met (i.e. the parties' market shares exceed 30 percent), an MFN clause could still be subject to an individual exemption under Article 101(3) of the Treaty on the Functioning of the European Union ("TFEU") on the basis of its efficiency benefits (i.e. the clause contributes to promoting technical or economic progress; it benefits consumers; the restrictions imposed are indispensable to the objective pursued; the clause does not substantially eliminate competition in the market). In theory at least, one may argue that Article 101(3) TFEU should therefore apply to both wide and narrow MFNs, depending on the position and competitive rel-

7 Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016, European Competition Network, April 6, 2017.

8 Digital comparison tools market study, Final Report, September 26, 2017.

9 "Competition Policy for the Digital Era," *op. cit.*

10 Report from the Commission to the Council and the European Parliament. Final Report on the E-commerce Sector Inquiry, Commission Staff Working Document, May 10, 2017, p. 179, para. 621.

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evance of the beneficiary concerned, and even if that beneficiary is a platform. Some EEA member states are likely to adopt a more restrictive approach however when it comes to wide MFNs. In its *Booking.com* settlement decision, the French competition authority determined that where an agreement does not meet all the conditions for exemption under Article 101(3) TFEU, the VABER could be disregarded – which, the authority determined, is likely to be the case for wide MFNs, although it did not reach a firm conclusion on the question.

While the question remains open regarding wide MFNs, a number of national competition authorities have found that narrow MFNs do meet the requirements for individual exemption under Article 101(3) TFEU. For example, the CMA found in its 2014 final report[11] on the Private Motor Insurance market investigation that narrow MFNs in that sector meet all four conditions for an individual exemption. Similarly, in the context of the online hotel booking sector, the French, Swedish, and Italian competition authorities had recognized the consumer benefits of narrow MFNs. The Düsseldorf Higher Regional Court went even one step further and determined that narrow MFNs are *necessary*[12] to the platform-to-business relationship.

IV. PRACTICAL CONSIDERATIONS AND NEXT STEPS

The use of any form of MFNs in the online hotel booking sector has now been clearly prohibited in France, Italy, Austria, and Belgium, while narrow MFNs in the sector have become lawful in Sweden and Germany following recent court rulings. Both wide and narrow MFNs are still under close monitoring in other jurisdictions, however, including at the European Commission level, as well as in other sectors. Ongoing investigations include the CMA's examination into the use of wide MFN clauses in certain contracts restricting home insurers from quoting lower prices on rival comparison sites and other sales channels. Also, as discussed above, on June 11, 2019, the Danish hotel booking platform Nustay filed a complaint to the European Commission against Booking.com and Expedia for allegedly enforcing a new type of wide rate parity clause by imposing penalties on hotels if Nustay or other platforms are able to offer more competitive prices for accommodation. It remains to be seen whether and how the European Commission's approach will be influenced by the member states' decisions and the recent legislative initiatives and studies in relation to competitive implications of restrictions imposed by or on online platforms.

The decisions of the European Commission and member states have illustrated that MFN clauses are most likely to be problematic where used by large incumbent platforms. Divergence in approach to narrow MFN clauses remains, however, and recent enforcement and policy developments highlight the complex balancing exercise that an antitrust assessment of narrow MFN clauses require. The analysis of MFN clauses should take into account the benefits of user-friendly searches, price comparison and booking functionalities, reduced search cost, price transparency, increased consumer choice, enhanced investment and innovation, and lower entry barriers, and identify specifically circumstances in which a concern about price uniformity, reduced competition between platforms and higher barriers for market entry by smaller platforms is justified. An analysis of the permissibility of such clauses is heavily dependent on the specificities of the relevant market, the features of the platforms and the specific efficiencies they bring.

Given the growing international reach of online platforms, and their ever-growing importance to consumers, the clarity and certainty of the legislative and enforcement framework for online platforms is key. The ongoing debate regarding the application of EU competition rules to the digital sphere, the Nustay complaint, and ongoing review of the VABER, due to expire in May 2022, will provide important opportunities for clarification.

11 CMA private motor insurance market investigation, Final Report, September 24, 2014.

12 Higher Regional Court in Düsseldorf, *op. cit.*

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