

Platform Parity/MFN clauses under competition law

OECD Hearing on Across Platform Parity Agreements
October 28, 2015

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Legal assessment of MFNs

- Retail MFNs seem more likely to raise concerns where:
 - the supplier or the platform has market power; and
 - such clauses apply to a wide scope and are across platforms/suppliers
- ... there are efficiency considerations (e.g. hold-up, free-riding).
- What are the legal instruments to deal with retail MFNs on platforms under EU rules?
 - **Article 101 TFEU** – prohibiting anticompetitive agreements
 - **Article 102 TFEU** – abuse of dominant position

MFNs under Article 101 TFEU

- **Article 101 TFEU**
 - Horizontal Practices
 - Vertical Practices
- **Threshold Issues**
 - Appreciability and Effects on Trade
 - Single agreements v. cumulative effects of a “network of agreements”
Courage judgment, para. 34 “ *a contract might prove to be contrary to Article 85(1) of the Treaty [now Article 101 TFEU] for the sole reason that it is part of a network of similar contracts which have a cumulative effect on competition.*”
- EU v. National Competition Laws: case allocation issues?

Horizontal Issues Raised by MFNs under Article 101 TFEU

- **Collusive effects of MFNs:**
 - **Hub-and-spoke situations:** the DoJ/Commission investigation of e-book pricing
 - Amazon market position, kindle/e-book bundling, and new release \$ 9.99 offering
 - Windowing
 - Apple market entry: Apple “facilitation” role
 - Agency and MFNs
 - Signalling and facilitation of collusion

Vertical Issues Raised by MFNs under Article 101 TFEU

■ Block Exemption Regulation

- **Article 4(a):** “[...] the restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.”

■ Vertical Guidelines

- RPM is a hardcore restriction
- MFNs may constitute an “indirect mean” of achieving RPM

Para. 48: “Similarly, direct or indirect price fixing can be made more effective when combined with measures which may reduce the buyer’s incentive to lower the resale price, such as the supplier printing a recommended resale price on the product or the supplier obliging the buyer to apply a most-favoured-customer clause.”

Vertical Issues and Justifications under Article 101 TFEU

■ Efficiency considerations

- Vertical Guidelines on direct/indirect RPM

Para. 225: “[...] where a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer’s interest to promote the product. RPM may provide the distributors with the means to increase sales efforts and if the distributors in this market are under competitive pressure this may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers.”

“If enough customers take advantage from such services to make their choice but then purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier’s product. RPM may help to prevent such free-riding at the distribution level.”

- The e-book precedent:
 - Introduction of the eBook
 - The preservation of the brick & mortar channel

Vertical Issues and Justifications under Article 101 TEFU

- **The Agency Model:** “The Single Undertaking Concept”
 - In the context of an agency agreement MFNs would fall outside the scope of Article 101;
 - Vertical Guidelines. Key criterion: “*level of e financial or commercial risk borne by the agent in relation to the [relevant] activities*” (property and costs related to goods, stocks, product liability, promotion, market specific investments);
 - Agency exception may not apply where there is a cumulative foreclosure effect or where it facilitates collusion.

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Vertical Issues and Justifications under Article 101 TEFU

- **Main Conclusions:**
 - Under Article 101, MFNs on distributors may be questionable under EU rules if they constitute “indirect” RPM;
 - Assuming they do not constitute “indirect” RPM, MFNs may be exempted if buyer/distributor below 30% market share;
 - But possibility of withdrawal if cumulative effect of vertical agreements;
 - Efficiencies or agency may avoid the application of Article 101;
 - Law at this stage is unclear.

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MFNs under Article 102 TFEU

- No direct precedents (compare Hoffmann-La Roche “English clause”) + no reference to MFNs in 102 Guidance
- MFNs more of an Issue when buyer or seller have market power
- Individual v. collective dominance?
- Online platforms and “winner takes all” environment (E-books, OTAs, PCWs): network effects, DRM and inter-operability;
- Exclusionary effects
 - “MFNs can have exclusionary effects by raising the costs of rivals or entrants that attempt to compete by negotiating lower prices from suppliers of critical inputs, or by pioneering a different business model” S. Salop and F. Scott Morton (2013)
- Efficiency claims
 - MFNs and the “hold-up” issue (assuming competition among distributors)

EU E-Books – Amazon Investigation

- In June 2015, the Commission opened a formal investigation into Amazon’s contracts with E-Books publishers.
- Potential **abuse of a dominant position** and restrictive business practices.
- The focus of the investigation are non-price MFN clauses included in the contracts granting Amazon:
 - the right to terms and conditions at least as good as those offered to its competitors (**retail MFN clause**); and/or
 - the **right to be informed** of more favorable or alternative terms offered to its competitors.

MFNs and The Enforcement Riddle

- Multiple Legal Theories and Enforcement Choices
 - To what extent does Article 101 TFEU apply if most platforms are objectively “agents”?
 - Are MFN clauses really indirect RPM?
 - Are the Vertical and Horizontal approaches compatible (unilateral v. multilateral)?
 - Is the Article 102 TFEU approach preferable (efficiencies rarely accepted in the EU)?
- **The Enforcement Jungle:**
 - 14 NCAs involved in MFNs/Platform cases
 - A clear risk of regulatory fragmentation:
 - the hotel booking example: Germany v. France, Italy, UK, and Sweden;
 - the E-book case: US v. EU.

Conclusions

- Retail MFN is not a new practice, but one that may become common in the digital world
- There is little established jurisprudence, divergences amongst NCAs
- Nor a developed legal literature
- Some competitive risks are clear, but...
 - Efficiency justifications must be assessed **case-by-case**
 - Complex legal and economic considerations give rise to possible regulatory capture, procedural delays, and difficult enforcement choices



Overview

▪ **E-Books cases**

- **US** – District Court Judgment in 2013; Court of Appeals Judgment in 2015.
- **EU** – Commission Decisions in 2012 and 2013; new investigation in 2015.

▪ **Online Hotel Booking cases**

- **UK** – OFT Decision in 2014.
- **Germany** – Court of Appeals Judgment in 2012; BKartA proceedings in 2013; new investigation in 2015.
- **France, Italy and Sweden** – Decisions in 2015.

E-Books cases

- European Commission Summary Decision of 12.12.12 in the E-Books case (COMP/39.847):
[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC0313\(03\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC0313(03)&from=EN)
- European Commission Summary Decision of 25.07.13 in the E-Books case (COMP/39.847):
[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1224\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1224(04)&from=EN)
- European Commission press release of 11.06.15 on opening of formal investigation into Amazon's e-book distribution arrangements: http://europa.eu/rapid/press-release_IP-15-5166_it.htm

Online Hotel Booking cases – 1/2

■ UK

- UK commitments decision of 31.01.14 addressed to Booking.com, Priceline, Expedia, IHG and IHL:
http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofc.gov.uk/shared_ofc/ca-and-cartels/ofc1514dec.pdf
- OFT press release on the UK commitments decision:
<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofc.gov.uk/news-and-updates/press/2014/06-14>
- UK CAT Skyscanner judgment of 26.09.14:
http://www.catribunal.org.uk/files/1226_Skyscanner_Judgment_CAT_16_260914.pdf

■ Germany

- BKartA decision of 20.12.13 in case B9-66/10 HRS Bestpreisklausel:
<http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2013/B9-66-10.html>
- BKartA press release of 09.01.15 on Judgment of the OLG Düsseldorf of in the HRS appeal
http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html

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Online Hotel Booking cases – 2/2

■ Germany

- BKartA press release of 02.04.15 on statement of objections issued regarding Booking.com's 'best price' clauses:
http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/02_04_2015_Booking.html

■ Italy, France, and Sweden

- European Commission press release of 15.12.14 on joint market test by FR, IT, SE NCAs, with links to the NCA web pages: http://europa.eu/rapid/press-release_IP-14-2661_en.htm
- Decision of the French NCA of 21.04.15
<http://www.autoritedelaconurrence.fr/pdf/avis/15d06.pdf>
- Decision of the Italian NCA of 21.04.15
<http://www.agcm.it/concorrenza/concorrenza-delibere/open/41256297003874BD/660EE2E99780F7B5C1257E350039D1CD.html>
- Decision of the Swedish NCA of 21.04.15
http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_en_g.pdf

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MFNs – Articles

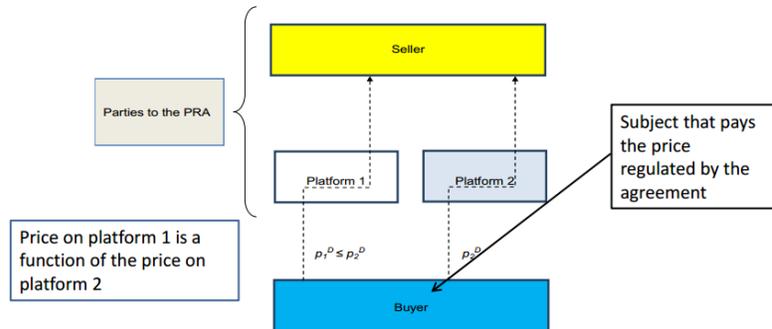
- **Developing an Administrable MFN Enforcement Policy** F. S. Morton & S. Salop
Antitrust Magazine 2013

Back-up Slides

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Across-Platform Parity Agreement / Retail Price MFN

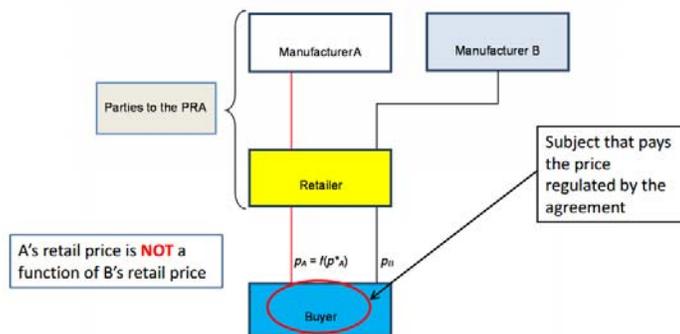
- Agreement between a seller and an electronic trade platform whereby the seller undertakes to charge on that platform a price that is not higher than the price charged on other platforms



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Resale Price Maintenance



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