

Retail Price MFNs: Are they RPM ‘at its worst’?

KEYWORDS: Retail Price Most Favoured Nation clauses, Retail Price Maintenance, anti-competitive effects, competition law

May 2014

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BACKGROUND

- A number of recent competition cases have involved a hitherto rarely observed form of Most Favoured Nation (MFN) clause in which sellers through an internet retail platform explicitly agree not to sell at a lower price elsewhere, including through other retail platforms. These are sometimes known as platform MFNs or platform parities.
- The economics literature on this topic is still nascent and the effects of these clauses have not yet been fully explored.
- Competition authorities in a number of jurisdictions including the EU, Germany, the UK and the US have been willing to take on such cases and push them to successful conclusions, with the parties either agreeing, or being required, to drop Retail Price MFN clauses.

METHODOLOGY

- The paper builds on existing literature on RPM and on MFN guarantees.
- The authors consider why Retail Price MFN clauses are deemed to be a cause of concern by setting out the key intuitions underlying findings from modelling work in the literature.
- Central to the investigation is the relationship between Retail Price Maintenance (RPM) and Retail Price MFN clauses.

KEY FINDINGS

- Three potential anti-competitive effects arise from Retail Price MFNs:
 - i. they act to soften competition between retailers on the margin they charge to suppliers;
 - ii. they can restrict entry at the retailer level; and
 - iii. in a market with asymmetric business formats where some retailers set their own prices, they can act to eliminate price competition at the retail level such that prices are set as if there was industry-wide RPM.
- Retail Price MFNs rely on some form of RPM for their existence: they can only work if suppliers set prices rather than the platform or retailer.
- More importantly, RPM embodies two elements:
 - i. the *vertical* element whereby an upstream firm sets final downstream retail prices, which is the pure and explicit element of RPM; and
 - ii. the *horizontal* element, sometimes incorporated more implicitly but standard within RPM as we typically observe it in actual cases, whereby the upstream firm sets identical retail prices across all downstream intermediaries/retailers.
- Many of the most egregious concerns arising from RPM cases relate to the horizontal element.
- Retail MFNs essentially mimic the horizontal element of RPM.

W: www.competitionpolicy.ac.uk

T: +44 (0)1603 593715

A: UEA, Norwich, NR4 7TJ

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POLICY ISSUES

- While RPM is no longer *per se* illegal in the US, it is still illegal by object in the EU and EU member states.
- As Retail Price MFN clauses essentially mimic the horizontal, and worst, element of RPM, it can be argued that such clauses should be treated no less harshly than RPM under competition law.

THE CCP

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ABOUT THE AUTHORS

- Amelia Fletcher is Professor of Competition Policy at the Norwich Business School, UEA, and a member of the ESRC Centre for Competition Policy
- Morten Hviid is Professor of Competition Law at the UEA School of Law, and Director of the ESRC Centre for Competition Policy

W: www.competitionpolicy.ac.uk

T: +44 (0)1603 593715

A: UEA, Norwich, NR4 7TJ