

A Competition Law Assessment of Platform Most-Favoured-Customer Clauses

KEYWORDS: online platforms, most-favoured-customer clauses, competition law, anticompetitive agreements, abuse of (collective) dominance, Booking.com

BACKGROUND

- Most-favoured-customer (MFC) clauses (also known as most-favoured-nation (MFN) clauses) adopted by online platforms have been one of the key concerns of competition authorities around the world in recent years. An MFC clause is a promise by one party, for example, a seller, to treat a buyer as favourably as that party treats its best customer. An online ‘platform’ can be seen as the online equivalent of a shopping mall where buyers and sellers meet to make purchases and examples include Apple’s iBookstore, Amazon, Expedia, Booking.com, etc. Currently, there are at least fourteen national competition authorities (NCAs) in Europe which are either investigating and/or have recently investigated the competition issues raised by platform MFC clauses. Different competition authorities around the world have adopted, or are in the process of adopting, diverging approaches to the legal treatment of these clauses, sometimes in proceedings against the same company.

METHODOLOGY

- This article examines the recent decisional practice from around the world concerning platform MFC clauses. The article provides a positive and normative analysis of the assessment of MFC clauses under competition law and in particular, EU competition law.

KEY FINDINGS

- The recent decisional practice of competition authorities treating platform MFC clauses as anticompetitive agreements in their investigations presents fundamental problems.
- The authorities have disregarded, or too easily dismissed, the possibility that online platforms are legally ‘agents’ of the suppliers selling through them. The consequence of this approach is that agreements between platforms and their suppliers are not covered by competition rules prohibiting anticompetitive agreements since the agreement is considered to take place within the same, single economic entity.
- In particular, those authorities which are applying EU competition rules alongside their national competition rules are in potential breach of Regulation 1/2003 as a result of applying Article 101 TFEU to agreements which may not be prohibited under EU competition law, due to the ‘agency’ exception.
- Many authorities which have applied Article 101 TFEU (and its national equivalents) to platform MFC clauses are creating an anomaly in competition law by pursuing their investigations and other proceedings against only one of the parties to the allegedly anticompetitive agreement. Although this may not be ‘illegal’, it blurs the lines between anticompetitive unilateral conduct and anticompetitive agreements (which are prohibited in different ways in different legal provisions). It also blurs the line between a theory of harm based on unilateral conduct and a theory of harm based on an anticompetitive agreement.
- The authorities in their recent decisional practice have not only arguably used the wrong legal rule to tackle platform MFC clauses, they have also concentrated their efforts on a practice which is arguably not the most anticompetitive practice used by platforms; authorities have not dealt with the ‘price matching guarantees’ offered by platforms directly to their consumers. The economics of price matching guarantees are

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better understood than the economics of MFC clauses, with the former being more than likely anticompetitive in many situations.

- The more principled and more economically sound approach to platform MFC clauses is to assess them under the rule prohibiting anticompetitive *unilateral* conduct (eg the prohibition of the abuse of a dominant position under Article 102 TFEU). Platform MFC clauses may be an example of potential abuse of collective dominance.
- The assessment of platform MFC clauses as a potentially anticompetitive *unilateral* conduct would enable one to avoid the agency exception; to focus on the instances where the clauses have the most potential to harm competition and welfare (ie where the platform is a gateway to a market as a result of market power); and, to appreciate that where the theory of harm is not horizontal collusion between platforms, the practice at stake is a vertical agreement between the platforms and suppliers with the implication that market power should be established before the vertical restraint can be found to be anticompetitive.

POLICY ISSUES

- Platform MFC clauses are a common phenomenon adopted by many businesses. For some of these businesses, these MFC clauses go to the heart of their business model. Many of these businesses are global businesses with operations across many jurisdictions which makes them subject to different sets of competition laws and the diverging applications of these laws.
- Different authorities around the world, and even within the EU, have adopted very different approaches to the competition law treatment of platform MFC clauses. Such different approaches reduce legal and business certainty not only for the platforms that have been investigated, but also other similar businesses.
- The importance of legal and business certainty cannot be underestimated. This is particularly the case in dynamic markets such as online markets which require much innovation, investment and risk-taking on behalf of the entrepreneur.
- The recent approach of some competition authorities might have led to decisional errors and to suboptimal legal outcomes.
- In order to rectify the situation, competition authorities should recognise and explain what exactly the theory of harm is; what exactly the infringing conduct is; and what exactly the supporting evidence is. This has not been done thus far and the globally diverging approach to these clauses is likely to lead to wasteful enforcement as well as to potentially negative effects on welfare and competition.

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