Confusion continues in the antitrust evaluation of Most Favored Nation provisions

Most Favored Nation provisions (MFNs) in dealings between buyers and sellers most often are (i) used by a buyer to require sellers to agree that they will offer the buyer the lowest price offered to other buyers, and (ii) used by a seller to require buyers to agree that they will buy from the seller at the highest price they pay other sellers. The law in both the US and EU on such vertical arrangements has varied widely jurisdiction by jurisdiction. Indeed, a decision just last week by the German Supreme Court has added to the confusion.

U.S. developments

Horizontal agreements among competitors to ensure that each obtains the most favorable price obtained by any of them have been challenged successfully as **per se** unlawful agreements in the US.[1] In fact, in **Apple, Inc. v. United States**,[2] the Second Circuit ruled in 2015 that the MFNs adopted by five e-book publisher defendants, allegedly at the dealer defendant Apple's urging, was part of a **per se** unlawful dealer-induced "hub and spoke" conspiracy in violation of §1 of the Sherman Act. Under the MFN variation involved, the publishers agreed that e-book retailers would become their "sales agents" rather than being purchasers for resale. The MFN adopted by all the publishers provided that their retailer "agents" would not sell e-books to consumers on behalf of the publishers at a lower price than was charged on their behalf by Apple, the organizer of the horizontal conspiracy.

Strictly vertical MFN pricing provisions are commonplace and have been of antitrust concern only when they involve a buyer or seller with market power or monopoly power. The federal enforcement agencies have obtained a number of consent decrees in suits against allegedly dominant buyers in the healthcare industry,[3] including one that obtained by the DOJ against Delta Dental of Rhode Island after a district court had denied Delta Dental's motion to dismiss the suit.[4] The most recent DOJ suit, brought against Blue Cross Blue Shield of Michigan ("BCBS"),

involved MFNs with hospitals that the DOJ claimed at times required the hospitals to provide even more favorable pricing to BCBS than to other health insurers ("MFN-plus").[5] The suit was voluntarily dismissed after BCBS's motion to dismiss was denied,[6] because the state involved (Michigan) had passed legislation prohibiting MFNs in insurance company agreements with healthcare providers.[7]

There have been mixed results, however, in private suits challenging MFNs imposed on sellers by dominant buyers. The only circuit court decision that has been uncovered which ruled favorably for a private plaintiff is **Reazin v. Blue Cross & Blue Shield of Kansas, Inc.**,[8] a 1990 Tenth Circuit decision, which upheld a jury verdict to the effect that a health insurer's MFN provision contributed to its monopoly power in the relevant health insurance market. There is a 2012 Michigan federal district court decision, however, denying a motion to dismiss a Sherman Act suit filed by a competitor challenging a dominant health insurance provider's MFNs.[9]

The circuit court decisions rejecting MFN suits against "power" buyers are quite strongly written. The First Circuit ruled in 1984 that a dominant healthcare insurance company did not violate §2 of the Sherman Act by imposing MFNs assuring that health care providers would provide their health care services to the defendant insurer at the lowest price offered to other insurers. The court concluded that the MFNs merely assured that the insurer could attract more subscribers because it could charge them lower insurance premiums.[10] Four years later in 1989, the First Circuit again reached the same result in a case also involving a dominant healthcare insurer's MFN imposed on providers of medical services.[11] The court stressed that the MFN ensured that suppliers would not overcharge the insurer for their services: "a policy of insisting on a supplier's lowest price—assuming that the price is not predatory or below the supplier's incremental cost—tends to further competition on the merits and, as matter of law is not exclusionary."

In 1995, the Seventh Circuit, in a decision authored by Judge Richard Posner, concluded that a medical clinic's MFNs in its agreements with affiliated physicians did not violate either §1 or §2 of the Sherman Act because the clinic lacked monopsony power in the relevant market and the arrangements were not anticompetitive.[12] The court declared that such provisions are "standard devices by which buyers try to bargain for lower prices," and as such are "the sort of conduct that the antitrust laws seek to encourage," acknowledging, however, that the DOJ believed that such provisions "are misused to anticompetitive ends in some cases."

EU developments

In 2013, both the UK Office of Fair Trading ("OFT") and German Bundeskartellamt ("BKA") investigated Amazon's policy prohibiting retailers selling their products on the Amazon Marketplace from offering those products on any other online platform at a lower price than offered by Amazon on their behalf on its Marketplace platform. Both investigations were closed after Amazon announced that it would discontinue the MFN policy.[13]

Also in 2013, the European Commission investigated the Apple MFN variation that was then in litigation in the US, as discussed above, under which five book publishers had agreed to assure that e-book retailers, which the publishers had agreed would become their "sales agents" rather than being purchasers for resale, would not sell e-books to consumers on behalf of the publishers at a lower price than was charged on their behalf by Apple. The Commission's investigation was closed after Apple and the publishers agreed to remove the MFN commitments from their agreements.[14]

Most other reported MFN investigations and cases in Europe have involved online retail platforms requiring what have been called "wide" and "narrow" MFNs. A "wide" MFN requires that the platform imposing the MFN must at the lowest price offered by the seller to other buyers as well as the price offered by the seller on its own

retail platform. A "narrow" MFN only requires a seller not to sell the applicable products on its own direct to consumerretail platform at a lower price than the price charged to consumers by the platform imposing the MFN. Two majorrecent investigations stand out.

First, in the UK, starting in 2017, the Competition and Marketing Authority ("CMA") investigated "wide" MFNs imposed by "marketplaces," online price comparison platforms. The CMA focused on ComparetheMarket ("CTM"), a Price Comparison Website that allows consumers to compare prices charged by home insurance providers. CTM, with a more than 50% market share, had imposed wide MFNs on 32 insurers, requiring them to quote on CTM prices that were no higher than were quoted for the same insurance product on competitive websites, including their own. CTM immediately responded to the investigation by limiting its prohibitions to narrow MFNs applying only to each insurer's own website. Nevertheless, the CMA brought an action and in November 2020 found that the original wide MFNs violated the UK Competition Act and Article 101 of the European Treaty.[15] The CMA declared that CTM had used its market power to protect itself from price competition, to the detriment of consumers. The CMA prohibited only wide MFNs and fined CTM 17.9 Million Pounds. CTM has appealed the ruling even though it did not prohibit narrow MFNs.

The second matter involved investigations by enforcement agencies in the UK, France, Italy, Sweden, and Germany of wide MFNs imposed by some large online travel agencies that prohibited hotels from offering better room rates and conditions to other travel agencies or on the hotels' own sales platforms. The Italian, French, and Swedish enforcement agencies closed their investigations in 2015 after obtaining a commitment from Booking.com that it would delete wide MFNs from its agreements with hotels. However, those enforcement agencies allowed narrow MFNs—relating only to a particular hotel's own website—on the ground that the narrow MFNs struck an appropriate balance between competitive concerns and the burgeoning digital economy.[16] In the UK, after a successful appeal by travel agencies from an unfavorable ruling by the CMA that the MFNs were comparable to "hard core" resale price maintenance agreements, the agency closed the investigation in September 2015 when both Booking.com and Expedia announced that they were abandoning their MFN practices.[17]

In Germany, however, the BKA's action was not resolved until just last week. Actually, in December 2013 the BKA had already banned a travel agency, Hotel Reservation Service, from using wide MFNs.[18] Although Booking.com thereafter had voluntarily modified its practice to only prohibit narrow MFNs limited to a particular hotel's own platform, in December 2015, the BKA prohibited Booking.com from engaging in both wide and narrow MFNs against hotels, the President of the agency declaring that the MFNs had "no apparent benefit for the consumer." This decision was reversed by the higher Dusseldorf regional court in June 2019, the court declaring that narrow MFNs were not anticompetitive, but their purpose of preventing free riding on a travel agreement's advertised prices was "necessary to ensure a fair and balanced exchange between portal operators and hotels."[19]

Then, last week on May 18th, the Federal Court of Justice, Germany's highest court, reversed the regional court's decision, reinstating the BKA's prohibition of Booking.com's narrow MFNs essentially on the ground that the risk that a hotel could "free ride" on Booking.com by booking rooms at a lower price on the hotel's own website did not excuse the narrow MFN adopted by Booking.com.[20] The BKA's President lauded the decision, stressing that even narrow MFNs result in higher prices for consumers. He added, however, that the validity of such clauses depends on the individual sector of the economy involved and the market position of the platform at issue.[21] His reference may have been to the fact that, except for "hard core" offenses, a vertical restraint imposed by a company with less than a 30% market share on a company that also does not have a 30% market share benefits from the safe harbor provided by its Vertical Block Exemption Regulation. But isn't the travel agency directly competing with a hotel constrained by the travel agency's MFN relating to the room rates that are to be charged by the hotel?

Conclusion

In sum, the law relating to vertically imposed MFNs both in the US and in Europe is in a state of flux. In the US, MFNs are tolerated unless they are imposed by buyers or sellers with market power or monopoly/monopsony power. The enforcement agencies have successfully challenged MFN imposers who meet this requirement, but other than successfully withstanding motions to dismiss, the agencies have obtained consent decrees that are not precedential. Private suits against monopolistic buyers have met with less success, although the trend may be changing.

In Europe, enforcement to date has focused on MFNs imposed where at least one side of the applicable market involved a monopsonist or tight oligopoly. Despite the European Commission's concerns that MFNs may reduce price competition, it also has noted that online platforms, in particular, should be able to avoid free riding and recover their investments. As a result, the Commission has determined that until now MFNs are to be assessed on a case-by-case basis, which has resulted in a web of diverging approaches in the member states. The Commission has recognized this, and has indicated that the upcoming revisions to its Vertical Block Exemption Regulation will address MFNs.

So, Watch this Space!

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Footnotes

[1] See, e.g., Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976); U.S. v. United Liquors Corp., 149 F. Supp. 609, 613 (W.D. Tenn. 1956), judgment aff'd, 352 U.S. 991 (1957).
[2] 791 F.3d 290 (2d Cir. 2015).
[3] See, e.g. U.S. v. Med. Mut. of Ohio,1999 WL 670717 (N.D. Ohio 1999) (consent decree) (healthcare insurer prohibited from entering into MFNs with hospitals); U.S. v. Oregon Dental Service, 1995 WL 481363 (N.D. Cal. 1995) (consent decree) (same); U.S. v. Delta Dental Plan of Arizona, Inc., 1995 WL 454769 (D. Ariz. 1995) (consent decree) (same); Matter of Rxcare of Tennessee, Inc., 1996 WL 33412062 (1996) (consent order) (retailer pharmacy network prohibited from entering MFN agreements with health care insurers).
[4] U.S. v. Delta Dental of Rhode Island, 943 F. Supp. 172 (D.R.I. 1996) (denying motion to dismiss); U.S. v. Delta Dental of Rhode Island, 1997 WL 527669 (D.R.I. 1997) (consent decree).
[5] United States & State of Michigan v. Blue Cross Blue Shield of Michigan, No.2:10-cv-14155-DPH-MKM (D. Mich. Oct. 18, 2010) (complaint).
[6] United States & State of Michigan v. Blue Cross Blue Shield of Michigan, 809 F. Supp. 2d 665 (E.D. Mich. 2011).
[7] Maryland has enacted similar legislation.
[8] 899 F.2d 951 (10th Cir. 1999).
[9] Aetna v. Blue Cross Blue Shield of Michigan, 2012 WL 2184568 (E.D. Mich. 2012).
[10] Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922, 929 (1st Cir. 1984).
[11] Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island, 883 F.2d 1101, 1110 (1st Cir. 1989).
[12] Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995), as amended on denial of reh'g, (Oct. 13, 1995).
[13] See Germany & United Kingdom antitrust cases against Amazon formally closed, http//ec.Europa.eu/competition/ecn.brief/05_2013.pdf (OFT Case CE,96/12).
[14] See OFT press release, Investigation into suspected anti-competitive arrangements relating to online retail

Case CE/96/12.

[15] See CMA Press Release, CMA Fines ComparetheMarket 17.9 Million Pounds for competition law breach (Nov. 19, 2020).

[16] See European Commission, Press Release, Antitrust: Swedish, French, and Italian competition authorities obtain commitments in online hotel booking sector, https://europa.eu/rapid/press-release_MFX-15-4819_en.htm (Apr. 21, 2015).

[17] See CMA, Press Release, CMA closes hotel online booking investigation (Sept. 16, 2015).

[18] See German Competition Decisions B-9-66/10 (Dec. 20, 2013).

[19] Dusseldorf Higher Regional Court Decision of 4 June 2019, case number VI (Larl) 2/(16) (V).

[20] See MLex Insight, Booking.com loses German antitrust case over "narrow" hotel-reservation clauses, May 18, 2021).

[21] See MLex Editorial. Booking.com ruling allows for nuanced look at price parity clauses, German regulator says (May 18, 2021).

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