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Price parity clauses and digital platforms: the rocky path to much needed clarity

Authors: Nicole Kar, Verity Egerton-Doyle

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Price parity clauses enable platforms to require that suppliers do not offer lower prices or better terms on other platforms or on their own websites. They have been a focus of antitrust enforcement in arrangements between companies at different levels of the supply chain (vertical agreements) over the past decade. National Competition Authorities across the EU and beyond have taken different and, in some cases, directly divergent approaches to their assessment. This has generated significant uncertainty for businesses.

In the UK, the Competition & Markets Authority recently issued its first significant fine in relation to price parity clauses. This came at a time when reforms to make the vertical competition rules "fit for the digital age" are being proposed both in the EU and the UK.

So where do we stand nearly a decade on from the first investigations into price parity clauses being opened?

The journey until now: convergence and divergence

EU competition authorities generally distinguish between "wide" and "narrow" price parity clauses. "Wide" clauses prevent a supplier from offering better terms on other sales channels, while "narrow" clauses only prohibit better offers on the supplier's own website.

The majority of online hotel bookings cases across Europe were settled with online travel agents agreeing to remove wide price parity clauses, but narrow clauses were retained. That is, online travel agents couldn't restrict hotels from offering better terms to their rivals but could restrict them from offering better terms on their own websites.

However, the Germans did not agree. The German competition authority has been vocal in its criticism of narrow price parity clauses. Its infringement finding against Booking.com for its narrow price parity clauses is currently under appeal, and we await the conclusion of this legal battle with interest.

Meanwhile in the UK

While the UK's CMA has considered price parity clauses in various market studies, until recently, it had not found an infringement or formally accepted commitments in any price parity case. But, in November 2020, the CMA issued an unprecedented fine of almost £18 million against an insurance price comparison website for its use of wide price parity clauses. The significant fine is an outlier, and the infringement decision is currently under appeal.

Globally, penalties for price parity clauses to date have been nominal, if imposed at all. And the CMA's approach is particularly aggressive because the company under investigation abandoned its wide price parity clauses two months after the CMA opened its investigation. The case is also notable because the CMA sought to show actual anticompetitive effects (rather than arguing the clause had an anticompetitive object). And this is the first case of its kind to result in a fine.

The vertical agreements rules: questions looking for an answer

One reason for the uncertainty about the approach to price parity clauses is the lack of clarity about how the EU (and UK) rules on "vertical" relationships apply to the relationship between an online platform and its sellers.

Could online platforms qualify as "*genuine agents*"?

Competition law does not apply to relationships where the distributor or dealer acts as a mere extension of the supplier, who retains all the commercial risk. This is known in competition law as a "genuine agency" relationship. Some digital platforms have argued that they are "genuine agents" and therefore that their price parity clauses are not covered by competition law.

However, online platforms sit in a grey zone. They are not traditional "resellers": they typically take no title to the good or service, much like genuine agents. On the other hand, they do typically make significant investments in technology and marketing. In the German case against Hotel Reservation Service, these platform level investments were used as the basis for excluding the possibility of a genuine agency relationship. In its recent case, the CMA found that the platform was not a genuine agent on a different basis: because it did not negotiate contracts on behalf of insurance providers.

However, there is no consensus on this point. The EC's ongoing review of its vertical rules recognises that there are divergent views on this topic, and some NCAs consider that online platforms may be genuine agents in some circumstances.

A safe-harbour – but for how long?

The EC's current vertical rules exempt vertical arrangements from competition law provided both parties' market share does not exceed 30% and they do not contain "hardcore" restraints like resale price maintenance. The EC has confirmed that vertical agreements containing both wide and narrow price parity clauses will benefit from this safe harbour.

However, the EC is currently re-considering its guidance on price parity clauses as part of a review of its vertical rules. Options include adding wide or even all price parity clauses to the list of excluded restrictions. This would mean that the safe harbour for market share would no longer apply and businesses would need to analyse the actual commercial effect of their price parity clauses on competition to be sure of compliance. But keeping the status quo is also on the table. Where these reforms will end up is not yet clear.

The path from here

Reforms to the vertical rules will aim to make them fit for a digital age. At least within the EU, new guidance will hopefully provide businesses with additional clarity and lead to greater harmonisation of approach between Member States. But there is no guarantee that the UK will follow suit. Given Brexit, any EU reforms will not apply automatically in the UK, and the current EU rules will continue to apply until changed. The CMA has also recently announced that it is commencing its own review of the vertical rules. The CMA is known for treading its own path, particularly when it comes to digital markets.

Scrutiny of price parity clauses in digital markets will likely remain a priority for competition regulators in the years to come – in Europe and the UK. The CMA's recent fine shows that the stakes are getting higher. Amid the uncertainty, one thing is clear: this is a key area to watch.