Platform ‘Most-Favoured-Customer’ (MFC) Clauses and Competition Law

Professor Pınar Akman

Director, Centre for Business Law and Practice
School of Law
p.akman@leeds.ac.uk
@drpinarakman


Competition Law Workshop, School of Law, University of Tokyo, 4 December 2018
Platform MFC clauses have been a matter of concern for several authorities.

- **MFC clause**: a promise by one party, eg supplier, that he will treat a given customer as well as the supplier treats his best customer.

- **Platform**: online equivalent of a shopping mall where sellers and buyers meet (ie two-sided). Eg Amazon, iBookstore, Booking.com, etc.

- **Platform MFC clause (aka platform parity clause)**: seller will charge no higher price on Platform A than on Platform B, ie promise to Platform A that it will get the best price across platforms.

- At least **sixteen** recent investigations in the EU by NCAs. In June 2015, European Commission also started investigating Amazon (which was recently resolved by commitments).

- Most recently, CMA sent an SO to PCW for MFCs concerning home insurance (Nov 2018) and accepted commitments from online auction platform to abandon MFCs (Jun 2017).
Platform MFCs are not ‘normal’ MFCs and are closer to Price-Matching-Guarantees.

**Normal MFC**

- **Seller**
  - **MFC**
    - p1
    - p2

**Customer 1**

**Customer 2**

\[ p_1 \leq p_2 \]

*Links prices between different customers of the same seller.*

**Platform MFC**

- **Seller**
  - **MFC**
    - **Platform 1**
      - p1
    - **Platform 2**
      - p2

**Customer 1**

\[ p_1 \leq p_2 \]

*Links prices for the same customer buying from different (competing) outlets.*
MFCs have potential procompetitive and anticompetitive effects.

**Procompetitive**
- Help buyers obtain inputs for less;
- Reduce the risks involved in making investments: prevent opportunism; deter rent-seeking delays and **hold out**; protect investments by preventing **free-riding** (eg investment in pre-sales advice, etc).

**Anticompetitive - Collusive or exclusionary**
- **Reduce incentive to lower price** to anyone – lower price will have to be offered to everyone;
- Facilitate collusion by reducing incentive to cheat (no gain from cheating);
- Foreclose the market by raising rival’s or entrant’s costs (impossible to undercut incumbent to gain market share).
Many questions concerning the competition law treatment of platform MFCs have to be answered.

- **Article 101 TFEU (on anticompetitive agreements and concerted practices)**
  - Are they covered by Article 101 at all? **Possibly not.**
  - If so, are they horizontal or vertical agreements? **Mostly vertical.**
  - If so, are they object or effect agreements? **Effect.**

- **Article 102 TFEU (on abuse of a dominant position)**
  - Are they examples of abuse? **Possibly exploitative and exclusionary.**
  - If so, is it single or collective dominance? **Possibly collective.**
Platform MFCs may fall outside the scope of EU prohibition of anticompetitive agreements.

The Agency problem

Are platforms retailers? Are they agencies? Or neither?

• Agreements between agent and principal are not covered by Article 101: agreement is within the same economic unit (CEPSA; DaimlerChrysler). ‘Single economic entity’ doctrine.

• Several factors indicate that platforms may be ‘agents’:
  • Platforms do not own the product and do not set the price for it.
  • Platforms do not buy and/or sell the product (ie they cannot be retailers either).
  • Platforms do not assume financial or commercial risks related to the sales or performance of the contract with third parties.
If platform MFCs are covered by the prohibition on anticompetitive agreements, difficulties lie in establishing how to treat them.

**Horizontal vs vertical?**

- Are they a concern as to the horizontal relation between platforms? Or, horizontal relation between sellers? Or, vertical relation between platforms and sellers? Or, all of these?

- Difficult assessment because platforms are **two-sided**.

- If they are vertical, then restrictions of **intra-brand** competition only a concern if **inter-brand** competition weak.
If platform MFCs are covered by the prohibition on anticompetitive agreements, difficulties lie in establishing how to treat them.

**Object vs effect?**

- Economics literature suggests that there are potential efficiency gains (e.g., prevention of free-riding by supplier or low-cost platform).

- Indeed, some MFCs are **vital for business model to function** as it operates on commission (see e.g., PCW; Booking.com commitments).

- In some jurisdictions, such as US, even RPM is treated under rule of reason after *Leegin*.

- Difficult to argue that they entail ‘by their nature’ ‘a sufficient degree of harm to competition’.
To the extent that platform MFCs have been treated as ‘agreements’, there is no uniform approach in case law.

- **Apple (US)** – ‘horizontal price fixing conspiracy’; *per se* infringement.
- **Apple (EU)** – concerted practice *by object*; commitments.
- **Booking.com/Expedia/IHG (UK)** – restrictions on discounting (*not* MFCs) *by object*; commitments.
- **HRS & Booking.com (DE)** – *vertical*; *by effect*; all MFCs banned.
- **Booking.com (FR, SE, IT)** – *vertical*; commitments for *wide* MFCs (ie those that seek parity between platforms and/or between platform and hotel’s offline sales channels). *Narrow* MFCs allowed (ie those that seek parity between platform and hotel website).
- **Booking.com/HRS/Expedia (CH)** – *vertical with horizontal effects*; *wide* MFCs banned.
- **PCW (UK)** – *vertical*; narrow MFCs good (in fact, *vital*), *wide* MFCs banned.

*Note that in DE, FR, SE, IT and UK, authorities are all applying the same rule.*
There is a mismatch between the theory of harm and the legal instrument.

- **HRS, Booking.com (DE), Booking.com (FR, SE, IT)** are all addressed to an **individual undertaking**.
- Yet, the **apparent theory of harm** is built on an ‘**agreement**’ under Article 101.
- This agreement is treated as a vertical agreement, but the concern is the fixing of prices **across platforms**.
- Thus, the underlying theory of harm appears to be **horizontal**.
  - If vertical agreement, then why is the decision not addressed to platform and trading partner (eg hotel)?
  - If horizontal collusion, then why is the decision not addressed to all platforms? **No allegation of collusion** between platforms in any decision.

Thus, the way in which the decisions are addressed to individual undertakings and the concern for foreclosure suggests that the **actual theory of harm** may be based on **unilateral** conduct.
Platform MFCs would be better dealt with under the prohibition of unilateral conduct.

- In the EU, it would avoid the agency problem since no need to identify ‘undertakings’ (*Suiker Unie*, [486]).

- **Market power** – correct focus for vertical restraints and foreclosure. Horizontal market power explicitly noted as a factor in *PCW*.

- Where platform is not a ‘gateway’, difficult to see how MFCs can distort competition. (Eg publishers and/or e-book retailers; online travel agencies; PCWs – **concentrated markets**.)

- Likely existence of **collective dominance**.
Platform MFCs would be better dealt with under the prohibition of unilateral conduct.

• Abuse of collective dominance?
  - **Exploitation:**
    Unfair trading conditions - MFCs *imposed* upon the contracting partner against their will (hotels; Amazon; insurance companies).
    Unfair pricing – excessive prices as a result of dampened competition;
    Discrimination – differential treatment of trading partners in similar positions.
  - **Exclusion:** – foreclosure at platform or supplier level.

• Potential objective justification – objective necessity/efficiencies; preventing free-riding, sustaining the business model, etc.
Platform MFCs should receive an effects-based analysis.

- **Market power** appears as an implicit issue in all of the cases so far.

- Where neither the input nor the output market is concentrated, coordination / foreclosure less likely to be a concern, even with MFCs (Salop and Scott Morton, 2013; LEAR Report [6.51]).

- Recent economics literature shows that platform MFCs operate as vertical restraints and where inter-brand (supplier) competition is strong, they are unlikely to cause harm (Johansen and Vergé, 2017).

- **Formalistic distinction** between narrow and wide MFC clauses does not appear appropriate.

- Current approach is based on either an underlying theory of collusion, but with enforcement directed against individual undertakings (HRS; Booking.com) or an underlying theory of foreclosure, but with Article 101 as the provision.

- Abuse of single or collective dominance is more appropriate given the facts of cases, state of economics and the legal provisions.