Algorithmic Enforcement of Price arity

Digital platforms seek to ensure that their business users do not offer lower prices elsewhere, in particular on competing platforms. The measures used to enforce such cross-platform price parity have evolved. After most- favored-nation clauses were prohibited by some authorities, platforms have begun implementing unilateral measures with the same effect. In July 2024, the Spanish competition authority fined Booking for algorithmically demoting hotels in search rankings if they offered lower prices on other hotel booking platforms. Similarly, Amazon has been accused in the US and the EU of linking the display of the 'Buy Box' on its marketplace to sellers' adherence of price parity. Impacting one of the most critical entrepreneurial assets in the digital era – the visibility of businesses for end users – such measures have become a new focus in antitrust scrutiny. This article outlines the concerns and the relevant criteria for an infringement.

MFN clauses in breach of antitrust law

To increase the attractiveness of their platform, online intermediation services typically seek to ensure that their business users do not offer or sell goods or services at a lower price elsewhere. To this end, initially, platforms implemented "most-favored- nation" clauses (MFN clauses) into their contracts with business users. MFN principles mandated that advantages granted to one trading partner must also be granted to all other contracting parties. Accordingly, online intermediation platforms ensured that competitors did not receive better contractual conditions from business users of the platform.

There are two types of MFN clauses: broad and narrow. The broad clauses are used by a platform to prohibit sellers from offering products on competing platforms or on the seller's own website at a lower price. The narrow clauses only prohibit lower prices on the seller's own website. In both variants, MFN clauses restrict the seller's freedom to set prices based on platform-specific economic considerations. The clauses posed an obstacle to innovation because they foreclosed price competition, *i.e.* competing platforms cannot compete for end users by lowering sellers' prices. Yet, without end users, platforms equally fail to attract sellers. Thus,

MFN clauses used by an established platform constitute a significant barrier to entry.[1] Ultimately, causing end users to pay higher prices than would be the case without the MFN clauses.[2]

Accordingly, the vast majority of competition authorities and courts in Europe have found MFN clauses to infringe competition law.[3] At the EU level, MFN clauses imposed by an online platform can constitute both an anti-competitive agreement under Article 101 TFEU, which is not exempted by the Vertical-Block Exemption Regulation (EU) 2022/720 (see Article 5(1)(d) of the Regulation[4]), and an abuse of dominance under Article 102 TFEU.[5] Most recently, on 29 July 2024, the Spanish competition authority *CNMC* fined Booking € 413 Mio. for the use of an MFN clause as abuse of dominance.[6] Merely the question of whether MFN clauses can be considered as "ancillary restraints" within the meaning of Article 101 TFEU and therefore excluded from its scope, is still disputed and currently before the ECJ.[7] Austria, France, Belgium and Italy have even explicitly prohibited MFN clauses.

Amazon has had its particular experiences with MFN clauses. In 2012, the German Bundeskartellamt launched an investigation against Amazon concerning a narrow MFN clause. In response, Amazon committed to removing the relevant clauses from its terms and conditions and to inform all sellers about the changes. Consequently, the Bundeskartellamt ceased the investigation but emphasized that Amazon's policy could not be justified under any circumstances.[8] This was particularly important given Amazon's dual role as both an online intermediary, granting shops the opportunity to sell on the Amazon Marketplace, and as an online retailer selling on the marketplace itself.

Things took a similar course at the EU level and to some extent in the US. After the European Commission (EC) had launched an investigation into an MFN clause for e- book sellers, Amazon committed to refraining from enforcing it. This brought the investigation to an end with a decision rendering such commitment binding.[9] In the US, Amazon took a similar step after a US senator called for antitrust scrutiny.[10] Legally, in the US, there was no established trend for a long time regarding the antitrust legality of MFN clauses. Some decisions indicated that the use is tolerated as long as the company does not have market power.[11] However, there are several antitrust cases against Amazon's MFN practices currently pending, including one brought by the state of California[12] and another by the FTC and seventeen states.[13] On 22 August 2024, the District of Columbia Court of Appeals found: "As the District plausibly alleges, in practice, [..] the price parity provisions [..] force third-party sellers to

incorporate Amazon's high fees and commissions by prohibiting third-party sellers from offering a higher price for their products on Amazon than on any other online marketplace, thereby artificially raising the price of goods for consumers."[14]

Circumvention through algorithmic demotion discouraging price disparity

In the EU, initially, the comprehensive ban on MFN clauses had the authorities' desired effects on competition. New entrants emerged and gained market shares. This is illustrated by the example of Nustay, a Danish hotel booking company that filed a complaint with the EC alleging that Booking breaches competition law.[15] Nustay had begun competing with Booking as a hotel reservation intermediation service. Its initial success could be traced back to a lower commission rate that hotels had to pay to Nustay compared to Booking. These savings per booking, in turn, allowed hotels to offer their rooms on Nustay at a lower price, which attracted more end users to Nustay, starting a virtuous circle.

However, shortly after MFN clauses were found to infringe EU law, Booking reportedly pursued a new approach, by penalizing hotels that were offering their rooms at a lower price on Nustay through the means of a lower ranking on Booking's own platform. Because Booking still had the largest market share in terms of relevant booking queries, the lower ranking meant that even though the hotels were able to generate slightly more revenue via Nustay, sales on Booking collapsed. Since the sales on Booking far exceeded those on Nustay, most hotels adjusted their prices back to those they were charging on Booking to escape their demotion.[16]

A similar pattern occurred on Amazon Marketplace. The platform displays a "Buy Box" on the detail page of selected product offers from online retailers. The 'Buy Box' is placed in the top right-hand corner of the website. Two clickable boxes labeled "Add to Cart" and "Buy now" stand out in color from the rest of the page. The consumer can therefore purchase the product with just a single click.[17] For sellers, the question of whether the "Buy Box" is displayed for their products is of immense importance. Because 98% of all transactions on Amazon are conducted via the "Buy Box", the likelihood of a sale largely depends on the display of the box.[18] Amazon now leverages this correlation to favor those who retain price parity. Sellers have noticed that their products, which initially had the "Buy Box", lost it as soon as they listed the product on a competing marketplace at a lower price. Because their own offerings and those of other sellers on Amazon remained unchanged, sellers assume that the

loss of the "Buy Box" can only be explained by their price reductions on other marketplaces, which Amazon consistently monitors by crawling such sites daily and reacts to. Such practices are also the subject of the two current US proceedings.[19] Both the California and the FTC complaints investigate the circumvention measures Amazon uses to enforce price parity.

Equal effects of MFN clauses and unilateral algorithmic demotion

Unilateral ranking measures implemented by platforms to penalize price disparity can have the same anti-competitive impact as the use of MFN clauses. They allow undertakings with market power to reinstate the effect of wide price parity clauses that have been found to violate competition rules. Due to saliency bias dictating Internet end user behavior, even minor downgrades of certain offers on central platforms can make such offers effectively invisible, shifting demand to rival offers.
Thus, algorithmic demotions have the effect of disciplining business users not to offer their products at lower prices on other platforms. This, in turn, can cause such competing platforms to lose the price as a key parameter to differentiate themselves from the incumbent platform using the demotion algorithms. Operators of core platforms are aware that business users cannot survive if they lose prominence on such platforms relative to their rivals, as their ranking determines who secures the sale.

A provider of a core platform service with market power may utilize its ranking to exert pressure, or incentivize its business users to apply a pricing policy based on offering the cheapest prices for their products on the platform, to the detriment of competing platforms.[20] Such practice is capable of restricting competition no less than explicit MFN clauses. Thus, an undertaking may secure price parity directly through a corresponding clause, or through indirect means, including incentives to observe a price parity or disincentives to offer lower prices elsewhere.

Legal consequences

Considering the equivalent effects, antitrust law should treat MFN clauses and algorithmic ranking penalties for price disparity equally. To be sure, where there is no MFN clause in place, there is no anti-competitive agreement to challenge (absent other collusion). However, for the finding of an anti-competitive unilateral conduct, whether the opportunity of offering lower prices on rival platforms is precluded contractually or *de facto* makes no difference. The crucial point is that both conducts deviate from competition on the merits, restrain competition

and lead to higher prices.

Relevant criteria

The main challenge for enforcement lies in identifying problematic links between a platform's ranking of its business users and their respective pricing policies.

Even platforms with market power may incentivize business users to sell their goods and services at a competitive price or to reduce their prices on the platform. In general, platforms are free in the selection of their ranking criteria. The variation of such criteria is the essence of competition between platforms.

However, if a platform incentivizes business users to apply price parity or disincentivizes to offer lower prices elsewhere, this can amount to an abuse of market power. This should be presumed, in particular, where a platform ranks a business user more favorably on the condition that it offers the lowest prices on the platform. An example of a disincentive to lower the price elsewhere would be where the platform blocks, delists or ranks the business user less favorably in response to it offering lower prices elsewhere, or threatens to do so. Although in principle such measures leave the business user free to sell at a lower price elsewhere, they penalize the user for doing so by restricting its visibility and ability to reach end users via the platform. A key parameter of price competition between platforms is thereby removed.[21]

An anti-competitive algorithmic demotion is apparent where the ranking is directly linked to the application of a price parity policy, i.e. where such parity is a ranking factor. However, a problematic link can equally be created indirectly, through algorithmic factors that make the offering of better visibility for the business user's goods or services on the platform, a lower commission rate, discounts or other commercial benefits dependent on the business user granting the platform price parity relative to competing platforms.[22] In general, every ranking factor that amounts to more relative prominence if a business user applies price parity is problematic. This is the case, whenever the ranking is linked to the typical effects of a business user offering lower prices elsewhere. This includes, for example, a ranking factor based on the number of bookings that a business user has secured on a platform, where such number typically depends on whether the business user offers the lowest prices on the platform or elsewhere. This is because, as outlined by the Spanish competition authority,

CNMC[23], such factor incentivizes the business user to follow, indirectly, a pricing policy based on offering the cheapest prices on the respective platform to the detriment of competing platforms, which restricts competition between those platforms.

Explicit prohibition in Europe's Digital Markets Act

One proposed solution to enhance legal clarity, is to consider explicit prohibitions. Since November 2022, in Europe such prohibition can be found in Article 5(3) of the Digital Markets Act (DMA). Among some 20 obligations imposed on "gatekeepers", the DMA prohibits MFN clauses and any unilateral measure that has an equivalent effect.

The obligations in the DMA apply only to undertakings designated as gatekeepers based on the criteria in Article 3 DMA. The EC has designated several companies, including Amazon and Booking.[24] These gatekeepers must comply with the obligations listed in Articles 5 to 7 DMA for their "core platform services", as equally designated by the EC under Articles 3(9) and (10) DMA. All the obligations are binding no later than six months after designation. For instance, Amazon Marketplace must implement its obligations by 7 March 2024, while Booking has until 14 November 2024.

According to Article 5(3) DMA, gatekeepers shall not prevent business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper. In short, for example, Amazon Marketplace must not prohibit sellers from offering their products on other platforms at a lower price.

Since Article 5(3) DMA prohibits any prevention of individual sellers, it is not limited to a contractual MFN clause but arguably implies a broad application. The anti- circumvention provision in Article 13(4) DMA further clarifies that gatekeepers shall not engage in any behavior that undermines effective compliance "regardless of whether that behavior is of a contractual, commercial or technical nature, or of any other nature, or consists in the use of behavioral techniques or interface design."

These DMA provisions suggest that the EU legislators agree on the need for an equal treatment of contractual clauses, algorithmic ranking demotions, and other *de*

facto discriminations to penalize price disparity. This is consistent, as the DMA's central objectives are fairness and contestability.[25] For contestability to be achieved, it is essential that there are no barriers to market entry for new companies. This implies that foreclosure strategies, such as contractual or *de facto* price parity requirements, are impermissible.

Administrative challenges for enforcement authorities

The fact that, at least for undertakings with market power, algorithmic demotions intended to enforce price parity are equally prohibited as contractual clauses may soon be reflected in the enforcement practices of authorities and claimants. They may increasingly focus on the connections established by dominant platforms between the prices that their business users charge elsewhere and the relative prominence these business users achieve on the platform. Claimants and enforcers are likely to argue that any connections that penalize lower prices elsewhere by assigning an inferior ranking on the core platform should be severed to restore full price flexibility for business users and ensure free choice among online platforms.

Consequently, competition authorities will need to examine and evaluate ranking algorithms more thoroughly to detect and challenge signals that merely serve to entrench the platform's market position. This includes looking out for measures aimed at identifying price-cutting business users, such as the price monitoring software to track the price offered on rival platforms.[26] In such circumstances, platforms risk that any identified correlation between the monitored pricing policy and the promotion of business users on a platform will be presumed to be motivated by anti- competitive objectives.

Conclusion

Attempts by core platform services to enforce price parity – whether through MFN clauses or by technically penalizing price disparity in rankings – risk being deemed anti-competitive and prohibited. Claimants and enforcers may face challenges in diligently monitoring compliance or by identifying algorithmic links between a seller's price disparity and its relative prominence on a platform. The "Brussels effect" could ultimately end price parity obligations beyond the visionary DMA. In fact, the concerns raised in both the California and FTC Amazon cases indicate that EU and US policies are already aligning more closely on this issue than some platforms might have hoped.

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Footnotes

[1] *Superior Court of the State of California*, California v. Amazon, CGC-22-601826, p. 40; *German Bundeskartellamt*, Decision of 20 December 2013, B 9-66/10 – *HRS*, para. 162.

[2] *European Commission*, Decision of 27 June 2017, AT.39740, para. 594 – *Google Shopping*; *CMA*, Online platforms and digital advertising, p. 70.

[3] *European Commission*, Decision of 4 May 2017, AT.40153 – E-Book MFNs and related matters; UK: *CMA*, Decision of 19 November 2020, Case 50505 (subsequently annulled Competition Appeal Tribunal, 1380/1/12/21, 8 August 2022); Germany: *Federal Court of Justice (BGH)*, Decision of 18 May 2021, KVR 54/20; Spain: *Comisión Nacional de los Mercados y la Competencia* (CNMC), Decision Booking S/0005/21 of 29 July 2004, S/0005/21 - BOOKING | CNMC. In Italy, Sweden and France, the broad MFN clause was prohibited: Report on the Monitoring Exercise Carried out in the Online Hotel Booking Sector by EU Competition Authorities in 2016, p. 4.

[4] "The exemption provided for in Article 2 shall not apply to [..] any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions via competing online intermediation services".

[5] Based on Article 101 AEUV: *CMA*, Decision of 19 November 2020, Case 50505; *German Federal Court of Justice (BGH)*, Decision of 18 May 2021 – KVR 54/20; *German Bundeskartellamt*, Decision of 20 December 2013, B 9-66/10 – *HRS*, para. 142-143; based on Article 102 AEUV: *European Commission*, Decision of 4 May 2017, AT.40153 – *E-Book MFNs and related matters*; *Comisión Nacional de los Mercados y la Competencia*, Decision Booking S/0005/21 of 29 July 2004.

[6] *Comisión Nacional de los Mercados y la Competencia* (CNMC), Decision Booking S/0005/21 of 29 July 2024, S/0005/21 - BOOKING | CNMC.

[7] See Case C-264/23 *Booking.com BV, Booking.com (Deutschland) GmbH v 25hours Hotel Company Berlin GmbH* ECLI:EU:C:2024:470, Opinion of AG Collins, para 51 et sub. (rejecting the claim that price parity clauses are generally ancillary restraints).

[8] *German Bundeskartellamt*, Press Release of 26 November 2013.

[9] *European Commission*, Decision of 4 May 2017, AT.40153 – *E-Book MFNs and related matters*.

[10] *Western District Court of Washington*, FTC et al. v. Amazon, 2:23-cv-01495, para 14.

[11] For more information see the Bulletin article by Irving Scher, Confusion continues in the antitrust evaluation of Most Favored Nation provisions.

[12] *Superior Court of the State of California*, California v. Amazon, CGC-22-601826.

[13] *Western District Court of Washington*, FTC et al. v. Amazon, 2:23-cv-01495.

[14] *District of Columbia Court of Appeals,* District of Columbia v. Amazon, 22-CV-0657, p. 18.

[15] Press Release, "Nustay files EU complaint against Expedia and Booking.com", https://mb.cision.com/Main/18017/2838250/1061022.pdf

[16] Ibid., *Mandrescu*, 29 June 2019, The return of the MFN clauses – platform ranking as an enforcement mechanism for price parity.

[17] *German Bundeskartellamt*, Decision of 5 July 2022, B 2 - 55/21, para. 449.

[18] *Western District Court of Washington*, FTC et al. v. Amazon, 2:23-cv-01495, para 14.

[19] *Scott Morton*, Amazon's pricing algorithms and the enforcement response in the US and Europe, Concurrences 2024 (1), p. 6.

[20] *Comisión Nacional de los Mercados y la Competencia* (CNMC), Decision Booking S/0005/21 of 29 July 2024, paras 654 et sub. S/0005/21 - BOOKING | CNMC.

[21] In this regard, an analogy can be drawn to measures taken to impose a minimum advertised price, see *European Commission*, Guidelines on Vertical Restraints, OJ C 284/1, 30.6.2022, para. 189.

[22] Cf. *European Commission*, Guidelines on Vertical Restraints, OJ C 284/1, 30.6.2022, para. 253 last sentence.

[23] *Comisión Nacional de los Mercados y la Competencia* (CNMC), Decision Booking S/0005/21 of 29 July 2024, paras 657, 677 S/0005/21 - BOOKING | CNMC.

[24] *European Commission*, Decision of 5 September 2023, Case DMA.100018 – *Amazon*; *European Commission*, Decision of 13 May 2024, Case DMA.100019 – *Booking*.

[25] Recital 7 of the DMA.

[26] On the use of such software see *European Commission*, Guidelines on Vertical Restraints, OJ C 284/1, 30.6.2022, para. 191.