MIRROR, MIRROR ON THE WALL, WHO'S THE FAIREST OF THEM ALL? MOST FAVOURED NATION CLAUSES FROM A COMPETITION LAW PERSPECTIVE.

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LEGAL BRIEF
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Most Favoured Nation ("MFN") clauses, also known as price parity clauses, or most favoured customer clauses, which appear in vertical agreements between suppliers and distributors, generally consist of an undertaking by the supplier to offer the distributor a price or rate no higher than the lowest price offered to other distributors.

INTRODUCTION

The competitive impact of MFN clauses has been widely debated around the world over the past few years. MFN clauses have come under the close scrutiny of EU competition authorities. The German Competition Authority, as well as competition authorities in France, Austria, Hungary, the UK, Switzerland, Sweden, Ireland, Australia and the US, have been, or currently are, investigating a number of hotel online booking platforms on account of the inclusion of MFN clauses in their contracts with hotels. In the hotel online booking sector, an MFN clause obliges the hotel to always give the platform with which it has signed the MFN clause, the best price for hotel online bookings.

The Turkish Competition Board, during January 2017, found Booking.com BV guilty of a contravention of the Turkish competition laws based on the inclusion of MFN clauses by Booking.com in their agreements. The Turkish Competition Board ruled that MFN clauses are effectively price protection mechanisms within supply contracts. As a protection mechanism, MFN clauses have the overall effect that the seller cannot offer a lower price to other potential customers, which inevitably has an exclusionary effect on the market. A similar and even broader approach was adopted in June 2016 by the Turkish Competition Board against the online platform, Yemeksepeti. The Turkish Competition Board concluded that the exclusionary effects of Yemeksepeti's MFN clauses meant that the platform abused its dominant market position. It also found that these clauses discouraged the offering of lower prices on any other online forum.

MFN CLAUSES IN EUROPE

This development in Europe and the rest of the world indicates that MFN clauses can often be regarded as anticompetitive. The general position taken in Europe specifically has been to allow "narrow" MFN clauses while prohibiting "wide" MFN clauses. Narrow MFN clauses generally only prohibit the supplier from undercutting prices on its own website, while allowing the supplier to offer better prices to certain customers. The fundamental approach in this regard is that a compromise between narrow and wide MFNs allows for a level of intra-brand competition, i.e. competition among distributors or retailers of the same product, that would not otherwise exist, while preserving the consumer benefits, such as increased convenience and information from the comparison such as user review functions, while at the same time mitigating against a potential freeriding problem.

Commentators have suggested that MFN clauses can restrict competition in various ways:

> they raise barriers to entry insofar as they prevent new entrants into the market from offering lower prices. This in itself could dampen competition;
> the existence of several agreements with MFN clauses, has the cumulative effect of aligning prices amongst competitors. Therefore the use of such clauses can support collusive actions by standardising different prices and commercial terms; and
> they could reinforce market positions and lead to an abuse of dominance depending on market share.

POSITIVE EFFECTS OF MFN CLAUSES

At the same time, MFN clauses can offer potentially positive effects. As an example, these clauses could favour competition insofar as the final client may be guaranteed the lowest possible price. MFN agreements may also afford buyers reduced negotiation cost, as well as the cost of researching the market in order to ensure that as a buyer they secure the best possible price.

However, the burden of providing that an MFN clause positively affects competition or outweighs the restrictive effects, lies with the contractual parties.

Knowing full well that MFNs are generally treated as vertical restraints, such provisions will be judged in terms of the rule of reason approach. In other words, the pro-competitive benefits of the MFN arrangement must be balanced against any anticompetitive effects that might exist.

An analysis of the potential anticompetitive effects resulting from an MFN provision will be very specific and largely driven by the particulars of the parties involved, the industry in which the provision is employed, and the size of the market in question. There are, however, some situations in which the likelihood that an MFN will be considered as anticompetitive, will be reduced, for example:

> MFNs provided for in unconcentrated markets will be less concerning than those provided for in highly concentrated markets; and
> MFNs are more likely to be pro-competitive in situations where they incentivise suppliers or customers to be early adopters of technologies or innovations that might otherwise not happen.

It is, however, a fact that MFN provisions employed in the context of more concentrated markets, involving parties with more substantial market shares, and/or involving certain mechanisms by which the parties will be able to strictly monitor or enforce the MFN provision, can raise grave concerns from a competition law point of view.

CONCLUSION

It is clear that there has been significant competition law focus on MFN clauses internationally. It is also clear that the South African Competition Commission, more regularly of late, follows trends set by international authorities.

Indeed, MFN clauses are commonly used or insisted on in commercial negotiations in several industries in South Africa. Companies wishing to include MFN clauses in their agreements should take into consideration competition law, and assess the level of risk from a competition law point of view against their desire to be treated as the “fairest of them all”.

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