



Assessing the Impact of MFNs or PPCs on Competition in Online Marketplaces: An Indian Competition Law Perspective

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***Summary:** This Article performs a competition assessment of Wide and Narrow Platform Parity Clauses (PPCs) imposed on sellers wanting to avail the services of online marketplaces and intermediaries. It analyses judicial decisions from across the globe, examining the efficiencies of PPCs in different online marketplaces, to conduct an antitrust analysis of the use of such clauses by e-commerce operators (like Amazon) from an Indian Competition Law perspective.*

Introduction

Platform Parity Clauses (PPCs) also known as Most Favoured Nation Clauses (MFNs), require the sellers/retailers to offer on an ecommerce platform or online marketplace, the lowest price or the best terms that are available on other platforms/marketplace or on the seller’s own website. Based on the scope and effect of PPCs, they can be classified into ‘wide’ and ‘narrow’ parity clauses. A ‘narrow PPC’ limits the seller’s obligations to providing price and terms which are at least as favourable as those offered on the seller’s website. Whereas a ‘wide PPC’ obligates a seller to provide price and terms which are at least as favourable as

those offered on the seller’s website or any other platform/marketplace.

The imposition of PPCs by e-commerce platforms on sellers is one of the key competition concerns that has come under the scrutiny of various competition law authorities all over the world.¹ Even the CCI in its Report on Market Study on Ecommerce in India² has recognised the use of platform parity clauses as a potential concern that can be challenged under section 3(4) and 4 of the Competition Act, 2002 (‘the Act’) for disrupting free competition among the ecommerce marketplaces in their relevant market. Therefore, as the CCI has already denied the applicability of section 4 in case of ecommerce platforms like Amazon in India due to none of them being a dominant

¹ Ariel Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2015) 11 *European Competition Journal* pp.488-519. <<https://www.tandfonline.com/doi/pdf/10.1080/17441056.2016.1148870>> accessed 20 November 2020. Jonathan Baker, and Fiona Scott Morton (2018) 33(1) *Antitrust Enforcement Against Platform MFNs. Yale Law Journal*, pp.2176–2202.

<https://www.yalelawjournal.org/pdf/BakerScottMorton_trhf5iiv.pdf> accessed 20 November 2020; ² Competition Commission of India, 'MARKET STUDY ON E-COMMERCE IN INDIA' (2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> [accessed 20 November 2020]

player³, it is still feasible to evaluate the use of PPCs by Amazon under section 3(4) by assessing their Appreciable Adverse Effect on Competition (AAEC) under section 19(3) of the Act.⁴ Hence, to determine the applicability of AAEC under section 3(4) it is necessary to determine their procompetitive and anti-competitive effects.

Procompetitive Effects

Ecommerce platforms have in many ways contributed to consumer welfare and augmenting competition by increasing information flow and transparency regarding price, product characteristics, quality, quantity, and suppliers.⁵

PPCs protect an ecommerce platform from the risk of sellers 'free riding' on its investment in various demand enhancing features and services such as marketing, advertising, after-sales support, advice and guarantees, customer reviews and ratings, instructions etc.⁶ 'Free riding' occurs when a seller offers a lower price for its product as compared to the ecommerce platform, and therefore, the customers merely use the ecommerce platform for the consumer friendly features to learn and compare the products and its characteristics, and ultimately purchase the product from the seller's website at a lower cost. As a result, the ecommerce marketplace loses out on its potential revenue, allowing the seller to profit from the benefits of its demand enhancing features. Hence, the protection offered by PPCs is crucial as it encourages ecommerce marketplaces to invest in such features and build a more consumer friendly platform that reduce search costs. Moreover, PPCs also

enhance certainty of availing the best price obtainable and therefore, also prevent transaction costs and delays.

It is significant to note that while for both wide and narrow PPCs, protection against free riding remains a procompetitive effect, wide PPCs provide a greater protection than narrow PPCs. This is because wide PPCs protect an ecommerce platform from the risk of free-riding by sellers through all other platforms including his own website, whereas, a narrow PPC limits this protection against free-riding through the seller's website only.

Anticompetitive effects of PPCs

Wide and narrow MFNs/PPCs have different anti-competitive effects that counter the procompetitive effect of shielding against free riding by sellers.

a. Wide PPCs

As ecommerce platforms earn through commissions, the use of Wide PPCs can result in foreclosure of competition on commission rates among the existing players. This is more likely when a significant player in the market imposes a PPC because all other players would have no incentive to reduce their commission rates to offer a lower price, as the significant player would also be offering the product at the same price by virtue of the PPC.⁷

It is apparent that because, ecommerce platforms heavily rely on network effects and access to consumer data, pre-existing players have a greater advantage over the new entrants.⁸ Therefore, offering lower prices

³ Mohit Manglani vs. Flipkart/Snapdeal and Others [Case No. 80 of 2014] [2015] 131 SCL 18 (CCI)

⁴ Federation of Hotel and Restaurant Associations of India vs. MakeMyTrip India Pvt. Ltd. and Ors (Case No. 14 of 2019)

⁵ Ariel Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2015) 11 European Competition Journal pp.488-519.

<<https://www.tandfonline.com/doi/pdf/10.1080/17441056.2016.1148870>> accessed 20 November 2020.

⁶ ibid

⁷ Fletcher, Amelia, and Morten Hviid. (2017). Broad Retail Price MFN Clauses: Are they RPM "at its Worst"? Antitrust Law Journal, 81(1), pp.61– 98 <https://www.americanbar.org/content/dam/aba/publishing/antitrust_law_journal/at_journal_81i1_fletcher_hviid.authcheckdam.pdf> accessed 20 November 2020

⁸ Bundeskartellamt, HRS-Hotel Reservation Service, Point 1 (Case B9-66/10) <http://www.bundeskartellamt.de/SharedDocs/Entscheidungen/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf?__blob=publicationFile&v=3>

becomes one of the most crucial strategies for a new player to establish a significant market position. However, the use of MFNs by a significant player in the market creates severe entry barriers for new entrants, thereby creating AAEC.

Moreover, due to softening of competition on commission rates, PPCs is also likely to induce coordination or a tacit understanding among the existing ecommerce platforms to stabilize or increase the prices by increasing or stabilizing the commission rates for the sellers.⁹ This is evident in the ebook cases against Apple¹⁰ where the use of MFNs led to a collusion among the publishers to increase prices of ebooks on all platforms.

The *HRS Case*¹¹ is a classic demonstration of the anti-competitive effects posed by PPCs enacted by a significant market player. In this case, the use of wide MFNs was completely disallowed by the Bundeskartellamt as it resulted in restriction on price competition among OTAs and hotels and also created entry barriers for new entrants and thereby hampered consumer welfare. Moreover, even Amazon came under the scrutiny of UK Office of Fair Trading (OFT) and the German Bundeskartellamt for its use of wide MFN in its agreements with sellers on ecommerce platforms. However, the cases were close when Amazon ended such price parity policies across the EU Marketplace.¹² Even in the *FRAHI Case*¹³ the CCI acknowledged the intensive anticompetitive restraints that wide parity clauses can impose on online commerce platforms, and this served as one of the factors for the order of

investigation under 26(1) of the Act against significant players like Make My Trip and OYO in the online hotel booking business.

b. Narrow PPCs

While narrow PPCs tackle with risk of free riding only against the seller's website, they also pose very limited anti-competitive effects on competition among ecommerce operators. Therefore, under a narrow MFN, the likelihood of the foreclosure of competition on commission rates and innovative demand-enhancing features among ecommerce marketplaces cease to exist. Similarly, new entrants can provide lower commission to offer lower prices for products so as to enter the market successfully. Due to minimal disturbance in the competition among the ecommerce platforms, narrow MFNs are unlikely to cause tacit collusion and price uniformity.

Nevertheless, narrow PPCs can also hamper price competition between the upstream supplier and the ecommerce platform. Generally, narrow PPCs also hamper the supplier to transfer the benefits of lack of commission costs to the consumers. AAEC due to such narrow PPCs can further occur when the supplier and the ecommerce operator are two of the most significant players of the market, and the e-commerce operator has unreasonably high commission leading to higher prices of the supplier's product in most of the market. Thus, without such MFNs the supplier would have the incentive to offer the product at a lower price on its direct website. Further, in cases where there are multiple players in the market and

⁹ *CCI* (n 2); *Ariel* (n 5), Désirée K.J, Bokemeyer B., Della R., Rafael B.N (2020) Thurman Arnold Project - 'Amazon's Theory of Harm' [Scholarly project]. <<https://som.yale.edu/sites/default/files/DTH-Amazon.pdf>> accessed 20 November 2020

¹⁰ *US vs Apple Inc* 2013 952 F. Supp. 2d 638; Case COMP/AT-39.847-E-Books, Commission Decision of 25/07/2013; Case AT.40153 – E-book MFNs and related matters, Commission Decision of 04/05/2017

¹¹ Bundeskartellamt, *HRS (Hotel Reservation Service) Case*, B 9 - 66/10, Translated decision <http://www.bundeskartellamt.de/SharedDocs/Entscheidungen/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf?__blob=publicationFile&v=3>

¹² *Ariel* (n 5); OFT, OFT Welcomes Amazon's Decision to End Price Parity Policy (OFT Press Release 60/13, 29 August 2013); European Commission, Germany and United Kingdom: Antitrust Cases against Amazon Formally Closed (European Commission Press Release, 2015); Bundeskartellamt, Amazon Abandons Price Parity Clauses for Good (Bundeskartellamt Press Release, 26 November 2013)

¹³ Federation of Hotel and Restaurant Associations of India vs. MakeMyTrip India Pvt. Ltd. and Ors (Case No. 14 of 2019)

the platform with narrow PPC increases its commission to high rates, the supplier might not want to undercut its own direct website (which might be most profitable route), and thus, increase the prices of its products on all marketplaces, which would ultimately replicate the anticompetitive effects of wide PPCs. Therefore, the anticompetitive effects of narrow PPCs will usually differ based on the dynamics of the relevant market.¹⁴

Accordingly, narrow MFNs have been accepted in several jurisdictions as balanced measures to tackle the concerns of free riding of OTAs without imposing significant competition restraint in the market. In the *Booking.com Case*¹⁵, an alteration of wide MFNs to narrow MFNs was accepted as a viable alternative by French, Swedish and Italian competition agencies.¹⁶ In 2019 the Düsseldorf Court of Appeals in Germany¹⁷ upheld narrow MFNs based on the ancillary restraints doctrine, wherein it held that MFNs were ancillary and necessary to execute the agreement between third-party only hotel booking platforms and hotel owners. However, the Federal Court of Justice (Germany)¹⁸ recently overturned this view and held that Booking.com's narrow PPCs were illegal and deemed unnecessary restraint on competition. The court opined that, based

on several financial reports of the platform after its removal of narrow PPCs, the problem of free riding did not seem to have any significant impact on its efficiency gains or revenues, and the market position of Booking.com, due to its attractive bundling of comparing and booking hotels functions, continued to strengthen despite the non-existence of narrow PPCs. Thus, the German Authorities have seemed to disfavor even narrow PPCs. It can therefore be said that the competitive impact of narrow PPCs differs from case-to-case basis and unlike wide PPCs, it is hard to arrive at a conclusive impact of narrow PPCs on competition in the free market economy.

Conclusion

While in India, the issue of Platform Clauses has mainly been acknowledged with respect to OTAs and online hotel booking platforms¹⁹, in several other jurisdictions, ecommerce platforms like Amazon has been scrutinized for the use of wide MFNs at multiple instances as mentioned above. In fact, in 2019, US Senator Blumenthal wrote a letter to the FTC²⁰ expressing concerns regarding Amazon using PPCs/MFNs as a response to which Amazon suspended its PPCs with third party sellers.²¹ However, a

¹⁴ *Ariel* (n 5)

¹⁵ Swedish Competition Authority, Bookingdotcom Sverige AB and Booking.com(unofficial translation) (15 April 2015) Ref: 596/2013, Point 30; French Competition Authority, Decision no 15-d-06 of 21 April 2015 ;

¹⁶ Italian Competition Authority, Commitments Offered by Booking.Com: Closed the Investigation in Italy, France And Sweden (Italian Competition Authority Press Release, 21 April 2015) <<http://www.agcm.it/en/newsroom/press-releases/2207-i779-commitments-offeredby-bookingcom-closed-the-investigation-in-italy-france-and-sweden.html>> accessed 21 November 2020; Booking.com, "Booking.com Announces Support of New Commitments in Europe" (Booking.com, 21 April 2015) <<http://news.booking.com/bookingcom-announcessupport-of-new-commitments-in-europe/>> accessed 21 November 2020

¹⁷ *Narrow best price clause II*, Booking.com BV v Bundeskartellamt (FCO), Judgment, VI-Kart 2/16 (V), OCL 256 (2019),

¹⁸ KVR 54/20, Courtesy translation of Press Release No 099/2021 published by the Bundesgerichtshof (Federal Court of Justice) on 18.05.2021 provided by the Bundeskartellamt. <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/18_05_2021_BGH_KVR_54-20_Booking.com.pdf?__blob=publicationFile&v=3> accessed 19.07.2021

¹⁹ *CCI* (n 2)

²⁰ Richard Blumenthal, Letter to FTC (December 19, 2018) <<https://www.blumenthal.senate.gov/imo/media/doc/12.19.18%20-%20FTC%20-%20Price%20Parity.pdf>> accessed 21 November 2020

²¹ Makena Kelly, Amazon silently ends controversial pricing agreements with sellers (March 11, 2019): <<https://www.theverge.com/2019/3/11/18260700/amazon-anti-competitive-pricing-agreements-3rd-party-sellersend>> accessed 21 November 2020

pending complaint against Amazon²² shows that instead of MFNs/PPCs Amazon has now imposed “fair pricing” provision²³, which essentially enforces the no longer-existent MFN clause with penalties against sellers who offer their products on a competing retail e-commerce channel at a lower price than on Amazon. Therefore, considering that Amazon is the world’s largest online e-retailer and even in India it has a significant market position²⁴, its use of MFNs on the Indian ecommerce platform can raise potential AAEC concerns in a particular product market.

Nevertheless, while assessing PPCs under section 3(4) with respect to ecommerce platforms for sale of consumer goods in India to determine AAEC under section 19(1), the scope and effects of PPCs (wide vs. narrow), the market strength of the ecommerce platform and the potential free riding concerns in the relevant market are some key considerations to analyze before determining a final conclusion.

Arpita AGARWAL

²² Frame-Wilson et al. v. Amazon Complaint (March 19, 2020) Case 2:20-cv-00424

²³ Amazon Seller Central, ‘Amazon Marketplace Fair Pricing Policy’
<https://sellercentral.amazon.com/gp/help/external/G5TUVJKZHUVMN77V?language=en_US&r

ef=efph_G5TUVJKZHUVMN77V_cont_521>
accessed 21 November 2020

²⁴ Mohit Manglani vs. Flipkart/Snapdeal and Others
[Case No. 80 of 2014] [2015] 131 SCL 18 (CCI)