

# Prohibition of MFN clauses

Florence Competition Summer Conference

The rise of global regulation of online platforms:

Positive v. negative obligations

13 - 14 June 2022

Andreas Mundt | President of the Bundeskartellamt ONLINE

Maria Alessandra Rossi | University of Chieti/Pescara

Viktorija Robertson | Vienna University / University of Graz

Björn Herbers | CMS

Enzo Marasà | Portolano Cavallo

Giacomo Calzolari | European University Institute

# Welcome to MFN/Price Parity Clauses

*Back in 2010...*

*Q. “Why would someone buy a book from Apple for \$14.99 if the same book was offered for \$9.99 by Amazon?”*

*A. “Well, that won’t be the case . . . . The prices will be the same.”*

How could have Steve Jobs been so sure answering that question when launching the iPad in 2010?

It was written in the contract between Apple and the book publishers: a PPC

# Price Parity Clauses

- MFN/PPC condition requiring a seller to offer a buyer conditions no less favorable than those offered to any other party (wide PPC), or than own sale channel (narrow PPC)
- In view of our conference, new regulations have been enacted as Negative Obligation on PPC: don'ts

# PPC: notable cases timeline

- 2013 Amazon investigation UK Bundeskartellamt
- 2015 Apple e-Books case US
- 2013-15 Bundeskartellamt Booking.com Expedia (no wide, yes narrow)
- 2015 French, Italian and Swedish NCC on Booking.com commitment (no wide, yes narrow)
- May 8 2021 German Federal Court ruled narrow PPC used online (Booking) violate antitrust law

# PPC: laws/regulations timeline

- France August 2015, Macron Law *banning all PPC* + Austria 2016 + Italy 2017 + Belgium + Switzerland
- May 10, 2022, new Vertical Block Exemption Regulation+Guidelines: Wide-PPC no more exempt (yes for narrow)
  - can still try to make an efficiency case 101 (3) welcome...
- CMA's 2022 proposal is stricter than EC: wide PPC is a hardcore restriction
- May 24, 2022, DMA Parliament and Council approval: art. 5(3-4) gatekeepers cannot impose *any* PPC (full ban, stricter than the initial EC's proposal)
  - Also forbidding other practices indirectly implementing a PPC (e.g. increasing fees when selling at discount elsewhere or delisting or demoting in recommendations)
  - Also imposing transparency, platforms cannot forbid sellers mention to buyers alternative channels to buy

# The Agency Business Model

- An intermediated market: Seller → Intermediary ← Buyers
- The Seller sets and directly earns the consumer price  $P$
- Intermediary/platform sets and earns a per-transaction fee  $F$
- Many platforms + Direct channel + Many suppliers
  
- What if Intermediary A decides to increase fee  $FA$ ?
  - **With no PPC:** Seller (facing higher cost  $FA$ ) increases price on A's platform  $PA > PB$  → Intermediary A loses many buyers → incentive to keep  $FA$  low
  - **Intermediary A imposes PCC:** Seller can only increase both  $PA$  and  $PB$  → Intermediary A loses fewer buyers → stronger incentive to high  $FA$  → high equil.  $FA$  and thus high consumers prices  $P$
- PCC powerful and clever business practice: as if Intermediary A could tax channel B

# PPC: Economics, Theory

- Tirole 2017 “if the platform is guaranteed the lowest price, there is no incentive for you to look anywhere else; you have become a ‘unique’ customer, and so the platform can set large fees to the merchant to get access to you”
- Boik and Corts (2016) Johnson (2017) Limiting competition between retailers/platforms: with PPC customers have no reason to search for better deals, demand less elastic, thus higher prices
- Wang and Wright (2020) Ronayne and Taylor (2020) dissuade consumers to search and use direct channel, higher fees and prices, but **without PPC platform may be dissuaded to invest in reducing search costs**
- Edelman and Wright (2015) Increase price of direct sales, reducing them and increasing those via platform that overinvests, all prices increase
- Calzada et al. (2019) induces sellers to delist from multi-homing and shut down direct channels
- Johansen and Vergè (2017) (Rey and Vergè 2020) possible procompetitive (PPC with secret c. + distorted linear pricing) : by delisting because too-high intermediation fees, sellers pay fewer fees, which reduces final prices
- Bisceglia, Padilla, Piccolo (2021) wholesale PPC buyers are retailers in multilayered airlines (PPC with secret c. + distorted final consumers linear pricing)
- Maruyama and Zenny (2020) **without PPC intermediaries may reduce/refrain investments thus reducing demand**
- Gomes and Mantovani (2020) rather than regulating PPC, cap-regulate platform fees with Pigouvian tax

**Solid justification of PPC: free-riding with showrooming and investment incentives**

# PPC: Economics, Empirics

- De los Santos and Wildenbeest (2017) eliminating PPC on US ebooks shifted from agency to wholesale model with sharp price decrease
- Hunold et al. (2018) hotel with elimination of PPC in Germany 2016-17, increased offer online and of distribution channels, lower prices for chain hotel in Germany vs other countries
- Ennis et al. (2020) 2014-16 hotel chains, EU switch from wide to narrow price parities associated with a price decrease on direct channels (using allowed loyalty discounts)
- Mantovani Piga Reggiani (2021) Quasi experiment Booking.com an inn France, price reduced, especially short run and for large chains (with strong websites)
- Bundeskartellamt 2020 study: elimination of the narrow PPC has not harmed Booking.com' success, hotel use more channels, consumers tend not to search



# DMA (May 2022): full (wide+narrow) ban

- *Art. 5(3) The gatekeeper shall not apply obligations that 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.*
- *Art. 5(4) The gatekeeper shall allow business users, free of charge, to communicate and promote offers, including under different conditions, to end users acquired via its core platform service or through other channels, and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper.*
- *Art. 6(5) The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party.*

# DMA full ban

- DMA full ban, wide and narrow PPC
- Black&White, no nuisance on in this in DMA
  
- Benefit 1: consistent with economic analysis
- Benefit 2: regulation instead of antitrust, for prompt action
- Benefit 3: allows coordinating within the EU, avoiding scattered antitrust decisions and laws, 10 confusing years
  
- **So problem solved?**

# What next?

1. How the market will look like post DMA's PPC ban?
  - Hotels especially if they have an effective website, make use of discounts on direct channels
  - Buyers seem not to search much in any case
  - Recommendation systems: even without considering manipulated recommendations (which would be covered under DMA), conversion rate is legitimately relevant for ranking, if consumers showroom → low conversion rate and hotels charging low prices in the direct channel will be organically ranked low
2. General question: differences between ex-ante regulation and ex-post approach
3. Extraterritorial effects: will platforms apply the ban on PPC worldwide?
  - What if they will not?

# Prohibition of MFN clauses

Florence Competition Summer Conference

The rise of global regulation of online platforms:

Positive v. negative obligations

13 - 14 June 2022

Andreas Mundt | President of the Bundeskartellamt ONLINE

Maria Alessandra Rossi | University of Chieti/Pescara

Viktorija Robertson | Vienna University / University of Graz

Björn Herbers CMS

Enzo Marasà | Portolano Cavallo

Giacomo Calzolari European University Institute