Competition - USA

FTC-DOJ workshop focuses on antitrust analysis of most-favoured-nation clauses

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Introduction

On September 10 2012 the Department of Justice (DOJ) and the Federal Trade Commission (FTC) held a joint, day-long workshop on the implications of most-favoured-nation (MFN) clauses for antitrust enforcement and policy. MFN clauses can take various forms, but in one common variation they involve contract clauses that require a seller to provide a buyer with the seller's lowest price. The workshop, which was well attended by over 200 practitioners and enforcers, featured panel discussions with DOJ and FTC officials, economists and lawyers.

Speaking at the workshop, the acting head of the DOJ Antitrust Division, Joseph Wayland, affirmed that the agencies will continue to investigate and challenge MFN clauses, declaring that they "have the potential to inflict significant harm to consumers and competitors". The DOJ is currently challenging MFN clauses in Blue Cross Blue Shield of Michigan's hospital contracts and in contracts between Apple and e-book publishers in federal court. There are also several ongoing agency investigations related to MFN clauses, as well as other private lawsuits around the country challenging their use. Wayland said that the workshop was intended to help enforcers to understand "industry perspectives to help us formulate appropriate policy initiatives".

Despite the recent surge in antitrust scrutiny of MFN clauses, the speakers generally recognised the dearth of case law on their legality. Although panellists noted that there are some cases recognising that MFN clauses can have either pro-competitive or anti-competitive effects, no litigated cases have determined the legality of MFN clauses on the merits. Therefore, panel discussions focused on economic theory, what the legal standard for MFN clauses should be and how MFN clauses are used in the real world.

Analysis

First, economists outlined both potential competitive harms and benefits of MFN clauses. They noted that MFN clauses could potentially exclude competitors by raising their costs or could facilitate collusion among competitors by discouraging price competition. However, they noted that MFN clauses can also have pro-competitive benefits, including facilitating investments that would not otherwise occur and reducing transaction costs. Steven Salop, professor of economics and law at Georgetown University, said that merely arguing that MFN clauses are intended to reduce costs is insufficient where there is evidence that prices have increased. Relatedly, both Salop and Fiona Scott Morton, the deputy assistant attorney general for economic analysis for the DOJ, asserted that the antitrust laws should protect the ability of less efficient rivals to obtain lower costs and should therefore prevent large buyers from protecting themselves through MFN clauses. The economists also discussed how empirical evidence on the effects of MFN clauses on price is generally inconclusive. They generally agreed that whether MFN clauses are anti-competitive is a fact-specific inquiry requiring case-by-case analysis.

Panellists also discussed what legal standards should apply to evaluate MFN clauses. Andrew Gavil, recently appointed FTC director of the Office of Policy Planning, suggested that courts should evaluate MFN clauses using existing antitrust theories under a traditional 'rule of reason' analysis, rather than creating new theories of harm. Others agreed, noting that enforcers should consider threshold requirements (eg, high market share) before challenging MFN clauses in order to provide certainty to businesses. Other panellists, however, argued for a more sweeping rule of reason analysis that is not confined to the limits of existing case law or market-power

thresholds. For example, Salop argued that a market-power threshold should not be required.

Panellists also addressed the use of MFN clauses in practice. Panellists argued that MFN clauses are extremely common in business contracts and are generally pro-competitive or neutral. Other panellists agreed that MFN clauses provide practical solutions for legitimate business problems, and that there should be a high bar for finding an antitrust violation. Panellists noted that enforcement may be in direct tension with other policies, such as Robinson-Patman Act enforcement and licensing on fair, reasonable and non-discriminatory terms. The panellists discussed several practical factors that may make antitrust scrutiny of MFN clauses more or less likely. For example, panellists said so-called 'MFN clause plus' provisions that require a seller to charge less to a particular buyer than all other buyers may face more scrutiny in light of the DOJ's case against Blue Cross Blue Shield of Michigan challenging those clauses. Other risk factors discussed include:

- high market share;
- MFN clauses that result in higher prices;
- MFN clauses adopted jointly among competitors;
- multiple MFN clauses covering a substantial portion of a market; or
- MFN clauses with strict or retroactive audit and/or recoupment rights.

In contrast, risks may be reduced where:

- market share is low;
- MFN clauses facilitate investment that would not otherwise occur; or
- there are other compelling business justifications.

Finally, the panellists discussed MFN clauses in the healthcare context. W Thomas McGough, chief legal officer for the University of Pittsburgh Medical Centre, argued that the problem is not necessarily MFN clauses, but "virtual [MFN clauses]" that arise when large health insurers demand that hospitals charge their lowest rates, in situations where insurers have no incentive to pass along these savings to consumers. Other participants said that MFN clauses in the healthcare context are potentially more problematic because provider costs are the bulk of insurance costs, and therefore an insurer could use MFN clauses to raise rival insurers' provider costs and exclude them from the market.

The DOJ and FTC were accepting public comments on MFN clauses through October 10 2012.

Comment

The DOJ and FTC will continue to investigate and challenge MFN clauses. The consensus among economists, enforcers and practitioners is that MFN clauses can potentially have both pro-competitive and/or anti-competitive effects. There is little consensus on the legal standards that should be applied to evaluate MFN clauses. MFN clauses may be subject to greater antitrust scrutiny where certain risk factors are present (as discussed above). They may also be subject to greater antitrust scrutiny in the healthcare industry (multiple states have statutes that ban or restrict them in healthcare contracts).(1)

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Endnotes

(1) Additional information about the workshop, as well as the materials prepared by the panellists, is available on the DOJ's website at www.justice.gov/atr/public/workshops/mfn/index.html.

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