OTA Case Turns Out to Be Less about MFNs and More about Agreement

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Back in September 2012, the potential anticompetitive aspects of most favored nation (MFN) clauses was the hot antitrust topic. While antitrust counselors (and courts) had found the clauses to be innocuous almost all the time, government officials made speeches and even held a workshop in front of an overflow crowd to discuss theories about when MFNs might actually be anticompetitive. Two live cases were thought to offer U.S. courts the opportunity to evaluate MFNs: the Justice Department's e-books case against Apple, and the private class action against the major hotel chains and online travel agents (OTAs).

Eighteen months later, however, the speeches seem to have ended, no report has come from the workshop, and at least the initial decisions of both cases ended up turning less on MFNs and more on the old-fashioned antitrust concept of "agreement." Much ink has been spilled on the opinion in the *Apple* case. Here, the focus will be on the *OTA* case and the decision by the court on February 18, 2014, to grant defendants' motion to dismiss the antitrust claims because they did not plausibly state an agreement.

In *Online Travel Company Hotel Booking Antitrust Litigation* (N.D. Tex.), the defendants were 12 hotel chains, nine OTAs and one travel industry news company that organized industry conferences. The defendants were charged with entering into an industry-wide conspiracy to impose "rate parity" across hotel room booking websites. As the court restated it, "Defendants allegedly conspired to eliminate,

on an industry-wide basis, intra-brand competition—that is, competition among each hotel's online distribution channels, including its own website and OTA-run websites." For example, the conspiracy alleged that the price of a room at the Dallas Marriott on all the sites would be the price established by Marriott, say $159, while the price of a room at the Dallas Hilton on all the sites would be the price established by Hilton, say $139.

Plaintiffs did not allege a horizontal interbrand conspiracy among the hotel defendants to affect prices; that is, they did not allege that Marriott and Hilton agreed that the price of a room in Dallas should be $149. They also did not separately challenge the individual vertical agreements (known as resale price maintenance (RPM) agreements) between each OTA and each hotel, although those were described as subagreements helping to hold the broader scheme together. As explained by the court, in those agreements the hotel chain established the "best available rate" and the OTA "could use [it] when selling rooms to consumers." Those individual vertical agreements contained the MFN clause: the rate established by the hotel chain "would be as favorable as the published rate offered to (a) any [OTA] competitor and (b) the rates published on the Internet site operated by the hotel itself."

Before getting the court to consider the effects of the MFN clause, the plaintiffs needed to sufficiently allege facts to support their claimed horizontal conspiracy. Not surprisingly, they alleged parallel conduct—"the uniform adoption of similar RPM agreements and the resulting rate parity these agreements created"—plus "factual enhancements" or "plus factors" that suggested such common actions were the result of a conspiracy. The court found the parallel conduct and identified factual enhancements insufficient to state a conspiracy claim.

First, the court saw legitimate explanations for the parallel conduct of each hotel-OTA pair entering such agreements. The hotel would prefer to control the price of its rooms in all online channels so as to control its brand image. Once the OTA gave that pricing power to the hotel, it would want an MFN for assurance that none of its OTA competitors could undercut it with a better price. Because this parallel conduct was at least as consistent with competitively-neutral behavior, the plaintiffs needed "factual enhancements" that would suggest a conspiratorial explanation instead. According to the court, several of those factual enhancements alleged by the plaintiffs were nothing more than a restatement of the parallel conduct itself: "coordinated pricing efforts" and the "coercion and

enforcement" that prevented other online competitors from offering lower prices were just individual defendants individually enforcing their individual agreements. In addition, the factual enhancement of "government investigations" was deemed irrelevant by the court. The actions by the U.K. and Swiss competition authorities were under different laws and, even more importantly, did not allege the same kind of industry-wide horizontal conspiracy alleged in this case, instead focusing on the anticompetitive effects of the vertical agreements.

The final major factual enhancement the plaintiffs put forward was, as is often true in Sherman Act Section 1 cases, communication among competitors. Specifically, plaintiffs alleged that discussions at certain industry conferences starting in 2004 and unspecified "private communications" were suggestive of a conspiracy. The court rejected the "private communications" allegations as ambiguous and overly generalized. The industry conference allegations were particularized but, the court pointed out, possibly irrelevant given that the alleged conspiracy supposedly began in 2003. Even if relevant, the complaint merely listed several opportunities for defendants to conspire but failed to suggest they actually used those opportunities and communicated with each other. Even the conference panels with "pricing issues" in their titles had non-conspiratorial explanations. For instance, "rate parity" in a topic title referred to a discussion of potential vertical arrangements for hotels to make to "successfully manage revenue across all your distribution channels." In sum, the allegations of competitor communication injected ambiguity but, according to the court, were "non-suggestive of an actual agreement."

The complaint was dismissed without prejudice, so there is a good chance that we will hear more about the potential anticompetitive effects of MFNs in this industry, either from this case, the non-U.S. investigations or other challenges to these practices.

In the meantime, this opinion offers up two lessons for antitrust counselors and litigators: first, when competitors all take the same actions, enforcers might get interested and lawsuits might be filed, but more will be needed to successfully state a claim; and, second, while sexy new theories of anticompetitive actions might make good law review and Beltway speech material, courts will insist on focusing first on the basic elements of an antitrust case, like an agreement in a Section 1 case.