Skadden

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

September 14, 2012

DOJ/FTC Ask if MFNs Are Anti-Competitive, and Get an Earful

The United States antitrust enforcement agencies — Department of Justice, Antitrust Division (DOJ) and Federal Trade Commission (FTC) — held a joint workshop this week on most-favored nation clauses (MFNs). Through a series of panels, the workshop facilitated a dialogue between enforcers, economists, academics, in-house counsel and the private bar. While the DOJ has become increasingly suspicious of MFNs, the majority of the panelists pushed back on the DOJ premise that MFNs are a serious antitrust concern.

In 2010, the DOJ sued Blue Cross-Blue Shield of Michigan (BCBS) over its use of MFN and MFN-plus clauses that the DOJ alleges are anti-competitive, raise rivals' costs and exclude entry. In April 2012, DOJ's head economist, Fiona Scott-Morton, Deputy Assistant Attorney General of Economic Analysis, speaking at a conference sponsored by Skadden, presented a paper expressing concern about the anti-competitive potential of MFNs. Most recently, it has been reported that the DOJ is investigating MFNs in the media industry. Finally, the workshop appeared to be a possible precursor to a policy announcement in which the DOJ and FTC might indicate their intent to become more active in bringing cases based on MFN clauses.

The workshop initially seemed to lump all MFNs together, but what became apparent during the later panels is that there is a wide variety of arrangements that are considered MFNs — such as buyer/seller business contracts containing MFNs, consumers as third-party "beneficiaries" to a retailer MFN/RPM, MFNs in settlement agreements (*e.g.*, antitrust class action and patent litigation), MFN-plus provisions, MFNs with and without audit rights, and MFNs to be applied retroactively and/or on a going-forward basis. Panelists stressed that MFNs are common within a number of industries. The majority of panelists observed that most MFNs that they had encountered were benign or pro-competitive. Panelists argued that MFNs encourage investment in a product, reduce transaction costs by encouraging longer-term contracts, provide insurance to a buyer wanting to reduce risk and facilitate "first movers." Panelists noted that there is little case law or empirical evidence on which to rely for clarity, because most enforcement actions involving MFNs have resulted in consent decrees. Although there has not yet been a fully litigated trial on the competitive effects of MFNs, BCBS is scheduled for trial next year.

It was suggested that MFNs are not a unique category of agreements that need to be isolated and that require a new set of standards by which to analyze them. Some view MFNs as simply a type of vertical restraint that should be analyzed under a basic rule of reason for pro-competitive justifications, anti-competitive effects and efficiencies. In this sense, it is a vertical restraint less restrictive than exclusive dealing.

The agencies were urged by many to proceed with caution on any policy position against MFNs as a group or large groups of MFNs. Such a position, practitioners warned, could have anti-competitive ramifications if the agencies take a position that make common MFNs too risky for the parties to engage in. While businesses and the private bar desire certainty, such as clear guidance, and particularly safe harbors, many noted that the difference between pro-competitive and anti-competitive MFNs are heavily fact dependent.

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Steven C. Sunshine
Washington, D.C.
202.371.7860
steve.sunshine@skadden.com

John H. Lyons
Washington, D.C.
202.371.7333
john.h.lyons@skadden.com

Matthew P. Hendrickson
New York
212.735.2066
matthew.hendrickson@skadden.com

Antoinette C. Bush
Washington, D.C.
202.371.7230
antoinette.bush@skadden.com

Tiffany Rider
Washington, D.C.
202.371.7329
tiffany.rider@skadden.com

* * *

1440 New York Avenue, NW,
Washington, D.C. 20005
Telephone: 202.371.7000

Four Times Square, New York, NY 10036
Telephone: 212.735.3000

WWW.SKADDEN.COM

While such factors as the industry structure, the prevalence of MFNs and the types of MFNs could matter as to whether a particular MFN has anti-competitive effects, one common factual variable that seemed to reappear was whether the party benefiting from the MFN, typically the buyer, has market power. This is particularly important as to whether an MFN has the potential anti-competitive effect of excluding entry. However, it was contended that MFNs not only have the potential to exclude potential entrants, but can also facilitate collusion. In cases of an MFN causing anti-competitive harm by facilitating collusion, the market participants do not necessarily have to possess market power. And, while many cited the common opinion that the largest customer is entitled to the lowest price and an MFN with that guarantee, Ms. Scott-Morton advocated that the largest customer is not always entitled to the lowest price, depending on what other competitors might be able to bring to the negotiating table.

While the workshop provided a useful forum for a dialogue on MFNs, the business community and private bar were left to wonder where the agencies will go from here. In his brief comments, Joe Wayland, Acting Assistant Attorney General of the Antitrust Division, indicated that the DOJ has found that MFNs can have significant anti-competitive harm. While the majority of speakers advocated that most MFNs are pro-competitive or benign and that the agencies should be cautious of condemning them, it is unlikely the agencies will give up their pursuit of what they view to be anti-competitive MFNs. With no bright lines for guidance in sight, companies should assess MFNs on a case-by-case basis mindful of the agencies' focus on these provisions and a more aggressive enforcement approach.

For more information, you can find the paper "Contracts that Reference Rivals" by Fiona Scott-Morton, Deputy Assistant Attorney General of Economic Analysis, at http://www.justice.gov/atr/public/speeches/281965.pdf and the agenda and presentations from the workshop at http://www.justice.gov/atr/public/workshops/mfn/.

Additional Partner Contacts in the Antitrust and Competition Group

Clifford H. Aronson	New York	212.735.2644	clifford.aronson@skadden.com
Simon Baxter	Brussels	32.2.639.0310	simon.baxter@skadden.com
Jess Biggio	New York	212.735.2060	jessica.biggio@skadden.com
Alec Y. Chang	Palo Alto	650.470.4684	alec.chang@skadden.com
C. Benjamin Crisman, Jr.	Washington, D.C.	202.371.7330	benjamin.crisman@skadden.com
Frederic Depoortere	Brussels	32.2.639.0334	frederic.depoortere@skadden.com
Paul M. Eckles	New York	212.735.2578	paul.eckles@skadden.com
Shepard Goldfein	New York	212.735.3610	shepard.goldfein@skadden.com
Peter E. Greene	New York	212.735.3620	peter.greene@skadden.com
Ian G. John	New York	212.735.3495	ian.john@skadden.com
James A. Keyte	New York	212.735.2583	james.keyte@skadden.com
Gary A. MacDonald	Washington, D.C.	202.371.7260	gary.macdonald@skadden.com
Jeffrey A. Mishkin	New York	212.735.3230	jeffrey.mishkin@skadden.com
John M. Nannes	Washington, D.C.	202.371.7500	john.nannes@skadden.com
Neal R. Stoll	New York	212.735.3660	neal.stoll@skadden.com
Ingrid Vandenborre	Brussels	32.2.639.0336	ingrid.vandenborre@skadden.com
James S. Venit	Brussels	32.2.639.0300	james.venit@skadden.com