

Most Favoured Nation-Clauses:

*A Comparison and an Examination of the Adequacy of the
Diverging Approaches taken to MFN-Clauses Across
Europe in Online Two-Sided Markets.*

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Abstract:

This dissertation examines the approaches taken by the different national competition authorities in dealing with the MFN-clause in the Online Travel Agencies-cases (OTAs). The classification of OTAs encompasses sites such as Booking.com and HRS.com or so-called search, compare and book sites. These cases are chosen because they represent the use of the clause in its most recent and relevant market circumstances; online transparent two-sided markets. In addition, the cases are particularly interesting to compare since diverging approaches have been taken by different national competition authorities in the EU. Germany has found the clause to be in breach of Art. 101 TFEU and thus banned them. Others, such as Sweden, Italy and France recognise some of the issues but has settled with accepting commitments narrowing the scope of the clause – at least initially. In this dissertation the possible effects of the clause generally and especially in online two-sided markets will be discussed, and the decisions in the OTA-cases analysed. This to assess the main questions of the dissertation; whether the market circumstances of transparency two-sided platforms influence the possible effects of the clause and therein the adequacy of the different approaches. Through this dissertation it will be argued that market transparency and two-sided platforms do influence the possible effects of the MFN-clause, mainly in increasing the risks of anti-competitive effects arising. It will also be argued that although the German approach seems to have taken these market circumstances more into consideration, and while the MFN-clause does have some unflattering similarities to for instance resale price maintenance, the approach of allowing the MFN-clause with a narrower scope is still to be preferred – as of today. This is largely due to the uncertainty and ambiguity that still surround the clauses in online two-sided markets. As long as these uncertainties remain, it will be argued that the most sensible – and therein most adequate – response to the clause is to avoid the risk of over-enforcement and obtain further information before going to such drastic measures as an outright blanket ban.

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Abbreviations:

BPG: Best Price Guarantee.

EEA: European Economic Area.

ETTSA: European Technology & Travel Services Association.

FCO: German Federal Cartel Office.

HRS: Hotel Reservation Service.

NCA: National Competition Authority.

OTA: Online Travel Agencies.

MFN: Most Favoured Nation.

PCW: Price Comparison Websites.

PPC: Price Parity Clause.

RPM: Resale Price Maintenance.

Chapter 1

1 Introduction, Presentation and Limitation of Subject Matter.

1.1 Background and research question.

1.1.1 In recent years the attention directed at MFN-clauses by competition authorities in Europe and in the U.S. has increased drastically.¹ The clause, which previously has gone seemingly unnoticed by competition authorities,² has quickly become one of the more popular “targets” for investigations and decisions by NCA across Europe. Moreover, as the Commission has not decided a case on MFN-clauses in online two-sided markets at EU level yet,³ the relationship with EU competition law remains inconclusive, and the approaches taken by the NCA are diverging.⁴ This dissertation will examine the treatment of MFN-clauses that has emerged in different EU member states, in the absence of a Commission decision. The *status quo* is that some NCA seemingly have serious concerns about the clause, whilst others have taken a more lenient approach, and accepted commitments to rectify the issue. The precedence on the issue is thereby contradictory, and this discrepancy makes the topic of the dissertation particularly interesting. The questions that will be examined are if certain market circumstances, (online transparent markets and two-sided platforms), influences the possible effects of the MFN-clause, and in turn the adequacy of the different approached taken by the NCA

¹ Vandendorre and M. J. Frese, ‘The Role of Market Transparency in Assessing MFN Clauses’ (2015) *World Competition*. Vol. 38(3). Page 333-348. Page 333.; D. Zimmer and M. Blaschczok, ‘Most-Favoured-customer clauses and two-sided platforms’ (2014) *JECLAP*. Vol. 5(4). Page 187-195. Page 187.; J. Baker and J. Chevalier, ‘The Competitive Consequences of Most-Favoured-Nation Provisions’ (2013) *Articles Law Reviews & Other Academic Journals*. Paper 277. Page 20-26. Page 20.

² V. Soye, ‘The Compatibility of MFN clauses with EU competition law’ (2015), *E.C.L.R.* Vol. 36(3). Page 107-111. Page 107

³ Press release from Commission issued 11/6-15. ‘Antitrust: Commission opens formal investigation into Amazon's e-book distribution arrangements’. http://europa.eu/rapid/press-release_IP-15-5166_en.htm Nothing has as of yet resulted from this investigation. (Accessed 4/7-16).

⁴ P. Akman, ‘A Competition Law Assessment of Platform Most-Favoured-Customer Clauses’ (2015) *CCP Working Paper 15-12*, University of East Anglia. Page 1-52. Page 3.

in dealing with the clauses. The fact that the clause is often applied in market with these characteristics makes the topic especially interesting. Online two-sided markets in many ways represent the future of worldwide and cross-border commerce, with platforms like Amazon, OTA-sites and E-bay revolutionising how people search and shop online, compared to merely a decade ago. The approach taken in dealing with the popular clauses in these markets could thereby be of influence not only to the cases in question, but also to the development of ecommerce as a whole.

1.1.2 The OTA-cases concern MFN-clauses, that function in the market circumstances mentioned above. Action has also been taken towards the clauses in different ways in different states. An analysis and comparison of these cases, following a general analysis of MFN-clauses in these types of markets, will therefore be the foundation for analysing the questions at hand. The dissertation is thereby not meant to be a full categorisation of action taken in EU against MFN-clauses.

1.2 Methods of examination and limitations.

1.2.1 The methods of examination used in this dissertation is the analysis of literature regarding MFN-clauses in general, and particularly in transparent two-sided markets, and analyses and comparisons of the decisions and commitments made by the different NCA in the OTA-cases.⁵ The dissertation is limited by some linguistic barriers, in that mainly information made accessible in English will be used and for some of the sources only unofficial translations are available. The author will notify in the footnotes which sources this concerns. Further, since this is a dissertation in law and not economics, for

⁵ OTA-cases: Booking.com and HRS.com in Germany, France, Italy and Sweden.

the parts that refer directly to economic theory regarding the effects of the clauses, the author will rely on the already established economic literature.

2 History and Application in Commercial Agreements

2.1 Historical Background.

2.1.1 The concept of the “Most Favoured Nation” clause stems from a type of agreement entered into between sovereign states in context of international trade. The agreement would entail that a state would be given as favourable trading conditions as the at any time most favoured state – meaning the best trading conditions.⁶

2.2 Application in Commercial Agreements and Competition Law.

2.2.1 In commercial relationships the term is used to describe the same contractual obligation between the parties to an agreement, normally taking the form of a price commitments. In practise this means that, the supplier is not free to offer another customer a better price, without extending the same courtesy to the other customer who is the beneficiary of the MFN-clause. Due to this application the clause is also referred to as a “Most Favoured Customer” clause and as a “Price Parity” clause.⁷

2.2.2 Further, MFN-clauses can be differentiated into sub-categories. In so-called “genuine” or “true” MFN-clauses, the parties are prohibited from offering better terms to another party.⁸ Whilst in “indirect” or “false” MFN-clauses, the party is allowed to deal with

⁶ I. Vandendorre and M. J. Frese, ‘Most Favoured Nation Clauses Revisited.’ (2014) E.C.L.R. Vol. 35(12). Page 588-593. Page 588

⁷ *ibid.*

⁸ Soyez. Page 107. [n 2].

others and offer them better terms, but they are then in turn obliged to offer the same term to the party with the MFN-clause.⁹ This latter form is the most common version of the MFN-clause.¹⁰

2.2.3 In terms of the application of EU competition law, MFN-clauses can be assessed under both TFEU Article 101 and 102.¹¹ Since the MFN-clause constitutes a vertical agreement, they are mainly assessed under Art. 101.¹² The question here is usually if the agreement has the effect of restricting competition by setting the prices. Although, as mentioned before, this area has not been clarified by the European Courts or the Commission.¹³ In addition to this, if the clause is imposed by a dominant undertaking the conduct can be considered as an abuse of a dominant position after Art. 102, at least according certain to certain commentators.¹⁴

⁹ Soyez. Page 107. [n 2]; Zimmer and Blaschczok. Page 189. [n 1].

¹⁰ Vandendorre and Frese, 'Most Favoured Nation Clauses Revisited'. Page 588. [n 6].

¹¹ Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47. Article 101 and 102.

¹² Vandendorre and Frese, 'The Role of Market Transparency in Assessing MFN Clauses' Page 336. [n 1].

¹³ Zimmer and Blaschczok. Page 191 [n 1]

¹⁴ *ibid.* Page 195.

Chapter 2

1 The Effects of the MFN-Clauses.

1.1 The Pro- and Anti-Competitive Effects of MFN-Clauses.

1.1.1 To be able to assess and compare the different approaches taken by the NCA in Europe it is necessary to first examine the possible effects of the clause, and particularly in what degree the characteristics of the market influences these. As mentioned above, there are different types of MFN-clauses. The type that is relevant in this dissertation is the so-called “indirect” clause. As this is the most common version of the clause, the analysis will focus on this version.

1.1.2 *Prima facie*, it might seem strange that the practise of extending the same conditions/price to all buyers could adversely affect competition, owing the characteristics of “fairness” these clauses may have.¹⁵

The opinions amongst commentators on whether MFN-clauses are harmful or beneficiary to competition are diverging.¹⁶ Some claim that the effects of the clause depends on the market-circumstances in which it is applied,¹⁷ others claim that the recent action taken against the clauses, marks ‘the beginning of the end’ for them, and that the notion that MFN-clauses can lead to lower prices, is a misconception disproven by economic literature.¹⁸ Adding to this uncertainty, is that fact that there is also very little

¹⁵Can ‘Fair’ Prices Be Unfair? A Review of Price Relationship Agreements (2012) by LEAR for Office of Fair Trading.

¹⁶J. Wu and J. Bigelow, ‘Competition and the Most Favored Nation Clause’ [2013] CPI Antitrust Chronicle. Vol. July 2013(2). Page 1-10. Page 9.

¹⁷Vandenborre and Frese, ‘The Role of Market Transparency in Assessing MFN Clause’ Page 334. [n 1]

¹⁸Soyez. Page 107. [n 2].

empirical studies done on MFN-clauses.¹⁹ The claim that the market circumstances are influential will be examined closer in the next sub-chapter, whilst the general theories of harm and benefits will be examined now. It must be remarked that this sub-chapter by no means attempts to catalogue and show all theories of harm and benefits associated with the clause, but rather it strives to describe the main theories that are repeated in the field. These theories form a basis for the further assessment of the importance of market conditions and platforms.

1.2 Pro-Competitive Effects.

1.2.1 The pro-competitive effects of MFN-clauses can roughly be divided in to four categories. Firstly, MFN-clauses is said to help solve the “hold-up” problem. The situation at hand here is that a party is reluctant to make relationship-specific investments, in fear of the other party increasing prices later on, once the investment is made.²⁰ This problem can be resolved, and investment opportunities created by including a MFN-clause in the contract. *Baker and Chevalier* prove a good example of the hold-up problem, which concerns a coal burning facility in connection with a coal-mine:

‘...Once the generating facility is built, the owner of the coal mine would be tempted to raise the price of coal to the generating facility, recognizing that the generator would bear substantial transportation costs in attempting to obtain coal from elsewhere. The threat of this hold-up possibility could discourage the initial investment ... to avoid this threat...the parties may write a long-term contract for the mine to supply coal to the generators. But a long-term contract specifying prices and quantities of coal cannot adjust flexibly to changing market conditions. To address this difficulty, the mine owner may agree to meet the generating facility’s coal requirements at the same price that the coal mine is receiving from its other buyers. The MFN provision allows the price to adjust

¹⁹ A. Fletcher and M. Hviid, ‘Retail Price MFNs: Are they RMP ’at its worst?’ (2014) ESRC Centre for Competition Policy University of East Anglia. Page 1-32. Page 9. (Unpublished). Available at: <http://competitionpolicy.ac.uk/documents/8158338/8199490/CCP+Working+Paper+14-5.pdf/0ec21eee-12ca-4bc8-b3ea-d5076ab264af> (Accessed 20/8-16).

²⁰ Baker and Chevalier. Page 21. [n 1].

when costs or demand change while limiting the ability of the mine to take advantage of the generator.... the most favoured customer clause operates as a substitute for including escalation and indexing provisions in the contract, and allows the contracting parties to pin the transaction price in the long-term contract to market price.²¹

This example shows that in such cases the inclusion of a MFN-clause can increase total welfare by encouraging investment and making development safer for the parties. In relation to online platforms, like those in the OTA-cases, the protection offered by the clause increases the motivation for the platforms to offer and develop further the service of the website. Without such assurance the platform will be less likely to receive a profit from their investments.²²

Secondly, the clause is said to reduce the delays in transactions.²³ In developing projects buyers will often strive to be one of the last persons to purchase, to receive the most favourable price from the seller, who might be a land developer – again an example from *Baker and Chevalier*. If the developer in this example, can promise the initial buyers that the prices will not sink, and if they do, they are entitled to a refund of the difference, there will be no economic sense in holding out till the very end, thus getting projects of the ground quicker.²⁴

Thirdly, MFN-clauses is also said to reduce the costs of transactions. The argument behind this advantage is simply with a MFN in place, there will be far less need for

²¹ *ibid.*

²² A. Ezrachi, 'Hearing on Across Platform Parity Agreements' Working paper submitted for the 124th OECD Competition Committee on 27-28 October 2015. Page 1-36. Page 5. Available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2015\)11&doclangua ge=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)11&doclangua ge=en) Regarding this source, it must be mentioned that the following information is given in the first footnote: 'The research, on which this paper is based, was financially supported by Slaughter and May, which acts for Booking.com.'

²³ Akman. Page 9. [n 4].

²⁴ Baker and Chevalier. Page 21. [n 1].

negotiation, in that the beneficiary knows that he will at any time receive the best terms given by the contracting party.²⁵

Finally, the use of MFN-clauses is also said to hinder price discrimination. If everyone has a MFN-clause, prices discrimination will not be possible, making prices more fair.²⁶ This underscores the argument made earlier, the granting of equal terms to all is *prima facie* fair. However, as will be seen, there is not much scratching of the surface needed to find discrepancies from this starting-point.

1.3 Anti-Competitive Effects.

1.3.1 The anti-competitive effects of MFN-clauses are also roughly divided into five categories. Firstly, there is the risk of coordinated effects occurring, meaning the risk that the use of MFN-clauses can facilitate coordination between competitors – also known as “the supreme evil of antitrust”.²⁷ This potential effect is quite obvious: MFN-clause is likely to deter the seller from offering more favourable prices to others/new customers, because that would mean he would have to lower the price equally for the customers who are beneficiaries of the clause – *de facto* making selective discounts much less attractive.²⁸ The seller can thereby not only calculate with the loss of lowering the price to one customer, but to all others benefiting from the clause. This has also been described as effectively “taxing” price-cutting for the seller.²⁹ Thereby, by employing MFN-clauses in the contracts, the seller will have a disincentive from cheating on

²⁵ *ibid.* Page 22.

²⁶ Akman. Page 9. [n 4].; Vandendorre and Frese, ‘Most Favoured Nation Clauses Revisited’ Page 590. [n 1].

²⁷ *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

²⁸ S. Salop and F. S. Morton, ‘Developing an Administrable MFN Enforcement Policy’ (2013) *Antitrust*. Vol. 27(2). Page 15-19. Page 15

²⁹ Baker and Chevalier. Page 23. [n 1].

agreements of collusion, since he will have to extend the same lower price to others, which might in turn make the cheating unprofitable or at least less profitable. This lowers the reward of cheating, possibly making it not worth the risk of being caught.³⁰ Further, the mere existence of a clause makes it easier to detect cheating. If competitors know that the other actors have MFN-clauses, news of individually granted rebates will easily indicate cheating.³¹ The presence of MFN-clauses could thereby have a stabilising effect of collusion/cartels.³² The vertical agreement that is the MFN-clause can thereby have horizontal effects on the market.³³

Secondly, the clause can also be used to reinforce vertical price fixing.³⁴ One of the most common forms of vertical price fixing is RPM, this is defined in the Commission's Guidelines on Vertical Restraints as: '...agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price...'³⁵ Further in the Guidelines it is stated that: '...However, RPM can also be achieved through indirect means...'.³⁶ And according to the Guidelines, these indirect ways of achieving RPM could be made *more effective* if combined with: '...measures which may reduce the buyer's incentive to lower the resale price, such as... a most-favoured-

³⁰ *ibid.*

³¹ *ibid.*

³² Vandendorre and Frese, 'Most Favoured Nation Clauses Revisited' Page 590. [n 1].

³³ J. Baker, 'Vertical Restraints with Horizontal Consequences: Competitive Effects of Most-Favoured-Customer Clauses', Business Development Associates, Inc. Antitrust 1996 Conference Washington, D.C. Available at: <https://www.ftc.gov/public-statements/1995/09/vertical-restraints-horizontal-consequences-competitiveeffects-most> Para. 3. (Accessed 22/8-16).

³⁴ Vandendorre and Frese, 'Most Favoured Nation Clauses Revisited' Page 590. [n 1].

³⁵ Commission Guidelines on Vertical Restraints. [2010] OJ C130/1. Para. 48.

³⁶ *ibid.*

customer clause...'.³⁷ It is further stated that these measures can make prices such as “recommended” or “maximum” prices in reality function as RPM.³⁸

In addition to reinforcing vertical price-fixing, MFN-clauses have been criticised for having many of the same effects as RPM altogether. Authors such as *Zimmer and Blaschczok* have stated that: ‘...a true MFN clause *de facto* sets a minimum price for that party’s goods or services...’.³⁹ Even though RPM and MFN-clauses have noticeable differences; such as the RPM is usually initiated by the supplier and MFN usually by the buyer, there are commentators who are claiming that the similarities are so striking that MFN-clauses should be treated as strictly as RPM.⁴⁰ This rather harsh conclusion is drawn firstly on the basis of the claim that MFN-clauses rely on some form of RPM to function; they only work if it is the supplier that set the prices, and not the platforms.⁴¹ This rings true for the OTA-cases, it is the hotels that set the prices for the platforms – but the clause ensures that the platform is given the best deal. And, secondly, that the horizontal part of the RPM (which is when the supplier aligns the prices for all downstream retailers), has much the same effect as the MFN-clause. This part of the RPM is the ‘worst’,⁴² seemingly because this applies the restraint to a whole level on the downstream market, as opposed to just one intermediary. This could also be true for the OTA-cases, since the clause requires the platform to be given as good a price as any other platform. And as will be seen later, the majority of platforms employ the MFN-clause, meaning that the effect of aligning prices for the same room could

³⁷ *ibid.* (Any emphasis added are the authors own.)

³⁸ *ibid.*

³⁹ *Zimmer and Blaschczok*. Page 189. [n 1]

⁴⁰ *Fletcher and Hviid*. Page 32. The issue of whether MFN-clauses should be considered a hard-core restriction, is discussed in literature, this question is however beyond the scope of this dissertation. The issue is though brought to attention to illustrate some of the current debate. [n 19].

⁴¹ *ibid.* Page 4.

⁴² *ibid.*

occur. The horizontal element that *Fletcher and Hviid* consider the worst of effect of RPM, does seem to be the similar for the MFN-clauses, at least the “wide” MFN-clauses. This distinction will be discussed further below.

As mentioned above, the standard version of a RPM is usually initiated by the supplier, but in the cases concerned here the MFN-clauses are enacted by the retailer (platform). However, this is not a mitigating circumstance as the effects of the RPM are inherently worse when it is the retailers that have the most negotiating power, and they would without such a limitation face harsh competition from each other on the downstream market.⁴³ The MFN-clause thereby does have some unflattering similarities to RPM, this will be discussed further later.

Thirdly, the use of the clauses can lead to dampening of the competition, either unilaterally or through coordinated conduct. Unilaterally, there is a risk that the actors in the market will compete less aggressively due to the MFN-clause.⁴⁴ The clause in itself removes the seller’s motives to cut prices.⁴⁵ This is the same as mentioned earlier under as a prerequisite for facilitating collusion, the clause in effect ‘taxes’ price-cuts made by the seller, thereby making the seller less likely to do so.⁴⁶ This can consequently lead to higher prices.⁴⁷

Fourthly, the effect of dampening competition can be described as more coordinated. This is by *Baker and Chevalier* described as a theory of ‘coordinated interaction’,

⁴³ *ibid.* Page 24.

⁴⁴ Baker and Chevalier. Page 23. [n 1].

⁴⁵ Salop and Morton. Page 15. [n 28].

⁴⁶ Cross reference: 1.3.1

⁴⁷ Soyez. Page 107. [n 2].

meaning that firms respond to a competitor's actions in the market in a certain way, without having an agreement with that competitor.⁴⁸ This is an effect similar to that often described as 'tacit collusion' in the EU.⁴⁹ It is described in the U.S. Horizontal Merger Guidelines as:

'Coordinated interaction includes a range of conduct...[it]...can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms. Coordinated interaction includes conduct not otherwise condemned by the antitrust laws.'⁵⁰

The narrative here is that a firm bound by a MFN-clause is less likely to compete aggressively. This because the firm knows it will have to extend the same price to all beneficiaries of the clause, and an undertaking might make such a commitment because it thinks a competitor will respond by also competing less aggressively – meaning it affects competition horizontally.⁵¹ These two factors combined are likely to dampen competition and thereby lead to higher prices.⁵² However, this effect is dependent on the assumption that competing firms will in response also adopt a more relaxed approach to competition. As argued by *Baker and Chevalier*, it is not certain that this will be the case. Rival firms could respond by attempting to increase market share and steal customers from the firm with the MFN-clause. The response of the competitors is

⁴⁸ Baker and Chevalier. Page 23. [n 1].

⁴⁹ A. Jones and B. Sufrin, *EU Competition Law, Text, Cases and Materials*. Fifth edition. (2014). Oxford University Press. Page 673.

⁵⁰ Horizontal Merger Guidelines, Issued August 19th 2010, By the U.S. Department of Justice and The Federal Trade Commission. Page 24-25, para 7.

⁵¹ Baker. Para. 5. [n 33].

⁵² Baker and Chevalier. Page 23. [n 1].

thereby of great importance, and it could go both ways.⁵³ A useful indicator could be to examine how the competitors have responded to actions taken in the market in the past.

The final theory of harm is that the employment of a MFN-clause can raise barriers to entry for new firms and for incumbent firms looking to expand.⁵⁴ This is due to the fact that a new entrant is unlikely to be able to strike a better deal with the suppliers, since they in turn, would have to give the same advantage to the already established actors. A new actor, perhaps a maverick-firm, that would out-compete the established firms by lowering its commission rates, cannot profit from this advantage to gain a better agreement with the supplier, and is in turn deterred from entering the market.

An example of this can be seen from a case in the U.S. where “MFN-Plus” clauses were employed by the health-care insurance provider BCBS.⁵⁵ A MFN-Plus clause entails not only the basic element of the clause, but also that others should at all times be given a certain degree of less favourable terms than the beneficiary. In this case, BCBS who was a big player in the market, had agreements with MFN-clauses over half of the hospitals in the state.⁵⁶ In addition to the MFN-clause, in certain agreements, there was an MFN-Plus clause stating that BCBS was to be given a certain percentage better terms than any other health-care insurance provider, in some cases as much as 40%.⁵⁷ Part of the Department of Justice’s complaint was that this would deter entry and expansion on the market for health insurance. The case originally survived the motion to dismiss brought by BCBS,⁵⁸ however, in 2013 the case was dismissed without

⁵³ *ibid.* Page 23-24.

⁵⁴ *ibid.* Page 24.

⁵⁵ Salop and Morton. Page 16. [n 28].

⁵⁶ *ibid.*: BCBS had a 60% market share.

⁵⁷ *ibid.*

⁵⁸ *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665 (E.D. Mich. 2011)

prejudice due to new legislation in the state of Michigan banning all use of the clause by amongst others health care insurers.⁵⁹

1.4 Semi-Conclusion:

1.4.1 As can be seen, the common feature amongst the possible anti-competitive effects is that they seemingly affect competition horizontally, even though the MFN-clause is a vertical agreement between actors on different level of distribution. This point was also made by *Baker* nearly two decades ago; the most concerning theories of possible harm from the vertical restraint that is the MFN-clause – is the possible *horizontal* effects.⁶⁰ This conclusion is also supported by *Vandenborre and Frese*, who stated that: ‘...MFN clauses are problematic where they reinforce a horizontal agreement in the upstream or downstream market segment, or where they are sued to reinforce upstream [RPM]...’.⁶¹ In any case, the possible effects of the MFN-clause range from being a benefit to competition to the completely opposite effect of facilitating coordination. This wide spectrum of possible effects might be some of the reason why different authorities have dealt differently with the clause. The next sub-chapter will focus on how market circumstances, such as transparency and two-sided platforms, influences the possible effects of the MFN-clause. This is very relevant, as the recent cases which have occurred have all been in online two-sided platform markets.⁶² Online markets are also highly representative for the future of commerce in the EU, and in the world for that matter, as an increasing degree of commerce is happening online, and the online market as a whole

⁵⁹ United States v. Blue Cross Blue Shield of Mich., Civil Action No.2:10-cv-14155-DPH-MKM (E.D. Mich. 2013)

⁶⁰ Baker. Para. 1. [n 33].

⁶¹ Vandenborre and Frese, ‘Most Favoured Nation Clauses Revisited.’ Page 593. [n 6].

⁶² For instance: Cases on Amazon, Apple E-Books (by both U.S. and NCA in Europe) and OTA (by NCA in Europe).

has increased dramatically over the last years.⁶³ In light of the recent cases, and this development in commerce general, it seems very relevant to examine the clause specifically under these circumstances.

2 The Importance of Market Structure and the Platform-MFN

2.1 Two-Sided Platforms.

2.1.1 Two-sided markets, such as the ones concerned in the OTA-cases, have some distinctive features that makes them different from traditional one-sided markets. They are characterised by the fact that they serve two groups of customers and the value of the platform for each group of customers depends on the number of customers on the opposite side.⁶⁴ The value that the parties put on the number of members on each side is known as indirect network effects.⁶⁵ An example of two-sided platforms is credit cards. For the user, the value of the card increases with the number of stores that accepts it, and for the stores, the number of customers that use the card is decisive for the value.⁶⁶ One can also draw an analogy to real life shopping malls; the value of the malls for the customers is the number of stores that are located there, and the value for the stores, is the amount of potential customers.⁶⁷ Another characteristic of two-sided platforms is its special pricing structure. As it serves two groups of customers, its pricing strategy

⁶³ European B2C E-commerce Report 2016 (light version). *Facts, Figures, Infographic & Trends of 2015 and the 2016 Forecast of the European B2C E-commerce Market of Goods and Services*. Page 5: ‘...The European e-commerce turnover managed to increase 13.3% to €455.3 billion in 2015. Compared to the 1.0% growth of general retail in Europe...’; News-entry published 17/9-15. ‘Global e-commerce turnover grew by 24.0% to reach \$ 1,943bn in 2014’: <http://www.ecommerce-europe.eu/news/2015/global-e-commerce-turnover-grew-by-24.0-to-reach-1943bn-in-2014> (Accessed 28/6-16.)

⁶⁴ J. Wright, ‘One-sided Logic in Two-sided Markets’ (2004) *Review of Network Economies*. Vol. 3(1). Page 44-63. Page 44.; Zimmer and Blaschczok. Page 187. [n 1].

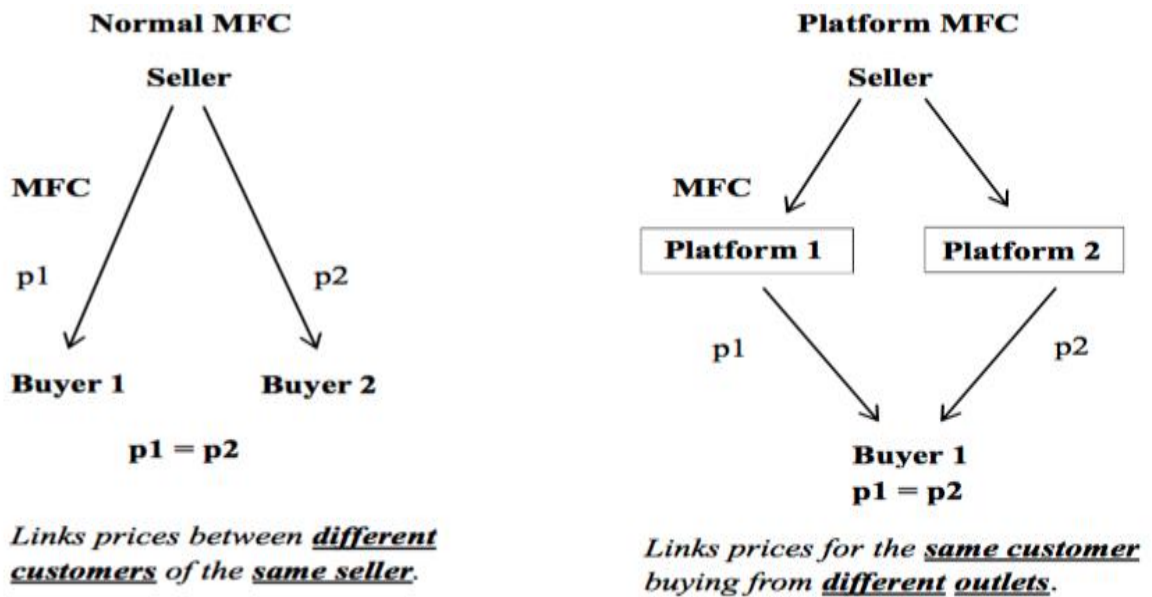
⁶⁵ Zimmer and Blaschczok. Page 187. [n 1].

⁶⁶ *ibid.* Page 188.

⁶⁷ D. Evans, ‘Competition and Regulatory Policy for Multi-Sided Platforms with Applications to the Web Economy’ (2008) *Concurrences* Vol. 2. Page 57-62. Page 60.

differs from one-sided markets. The platform can either charge both customer groups or only one, with the percentage most preferable to the platform.⁶⁸

In terms of how MFN-clauses function with two-sided platforms as opposed to with normal one-sided markets, this model created by *Akman* is illustrative:



Model I.⁶⁹

2.1.2 This model shows a supplier with MFN-clauses with a platform. As can be seen, instead of the seller and buyers being directly connected the platform acts as an intermediary with contact with both sides. The possible effects of MFN-clauses within such a structure will be further examined in this sub-chapter.

2.1.3 Generally, two-sided platforms are said to lower the cost of transaction and encourage transactions that would otherwise not have happened, by connecting parties that would

⁶⁸ D. Evans and R. Schmalensee, 'The Industrial Organization of Markets with Two-Sided Platforms,' (2007). Competition Policy International. Vol. 3(1). Page 151-179. Page 155.

⁶⁹ Akman, Annex. [n 4].

not have found each other without the platform.⁷⁰ In addition to this, they also create information flow and lower the search costs for the consumer.⁷¹ Due to the indirect network effect the prices elasticity of the platform is also dependent on how many users there at any time are on the other side. The side that is most sensitive to price change will often then be given preferential treatment, and a far reaching application of this is only charging one of the sides for use.⁷² This is how the platforms function in the OTA-cases: only the hotels pay to be on the websites. With this kind of unique pricing structure, the *strategy* of pricing, both concerning which groups that pay and at which percentage, are equally important as the price *level* itself.

2.1.4 As the platforms in the OTA-cases are two-sided the question is thereby if this structure influences the possible effects of the MFN-clause. It has already been mentioned that MFN-clauses can have the effect of dampening competition, either unilaterally or through coordinated effects, and with two-sided markets there is also a risks of “reinforcing the competitive standing” of the most popular platform.⁷³ This is because the presence of MFN-clauses between the already favoured platform and the sellers, offers the customers (on the other side) the best deal available, making it much more difficult for other actors on the market to attract customers.⁷⁴ Another actor on the market can thereby not attract new customers by promising a better price, because they will most likely not be able to offer it due to the obligations of the clause. This means

⁷⁰ Evans. Page 60. [n 67].

⁷¹ Ezrachi, Page 7. [n 22].

⁷² Zimmer and Blaschczok. Page 188. [n 1].

⁷³ *ibid.* Page 191.

⁷⁴ *ibid.*

that if a platform has a good competitive standing to begin with, this standing can be reinforced due to the market circumstances.

Implicitly this also affects barriers to entry and expansion. This because the indirect network-effects make two-sided platforms that are already popular even more attractive to both sides of customer groups, meaning that a newcomer on the market would have to win very large shares of customers to achieve the same network effect and become successful.⁷⁵ A new entrant's ability to attract new customers from the already popular established platform diminishes quickly when the newcomer, as mentioned above, cannot offer a better price due to the MFN-clause. The barriers to entry effect of MFN-clause is thereby seemingly amplified by the indirect network-effects.

However, two-sided platforms might also in some ways facilitate entry and expansion. This because the platforms allow the smaller suppliers to make themselves known to a much larger group of potential customers than if they only marketed themselves.⁷⁶ This effect can be seen as a manifestation of the claim made initially, that two-sided platforms make transactions possible by connecting parties. Another positive effect of the platform particular to small actors is the reduction of cost and risk connected with marketing. Small companies might not be able to afford to pay google to be one of the top hits on a certain search-term, but by being on a platform they can show themselves, be marketed and only pay the commission if a booking results of the search.⁷⁷ On this point, the risk

⁷⁵ D. Evans and R. Schmalensee, 'Failure to Launch: Critical Mass in Platform Businesses,' (2010) Review of Network Economics. Vol 9(4). Page 1-33. Page 1.

⁷⁶ Ezrachi. Page 10. [n 22].

⁷⁷ *ibid.* Page 9.

of adverse effects of the MFN-clause occurring is not increased, these facilitating factors are beneficial for competition, by strengthening the presence of small actors.

The risks mentioned above have all been “special” versions of the general risks associated with MFN-clauses. In addition, there is also a risk particular to two-sided markets, which is the risk of so-called “tipping”. The term tipping means: ‘...the risk inherent in network markets that a market will tip towards one company and the other companies will be forced into niches or completely off the market...’.⁷⁸ This means that due to the indirect network-effects, a big platform is fundamentally more valuable to customers on both sides, meaning that a big platform is likely to attract more new users on both sides, than competing smaller platforms. The effect of this is thereby that an already popular platform is likely to become even more popular – almost a ‘...self-reinforcing...spiral effect.’.⁷⁹ As seen earlier, the MFN-clauses increases the indirect network-effects of two-sided platforms, meaning that a MFN-clause employed on two-sided platforms could seemingly increase the risk of tipping.⁸⁰ The risk of tipping-effects occurring increases if the two-sided platform competes mainly with other two-sided platforms.⁸¹ This is the circumstance in the OTA-cases that will be examined closer in a following chapter. The OTA mainly compete with other OTA, in addition, they also slightly compete with direct booking with the hotel in question.

2.1.5 With some negative effects seemingly being exacerbated from the fact that a platform is two-sided, it must also be assessed if the phenomenon of “multi-homing” can mitigate

⁷⁸ Zimmer and Blaschczok. Page 192. [n 1]

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ *ibid.*

some of these. Multi-homing as a concept means that users, on either one or both sides of the platform, can rely on other platforms as well.⁸² The fact that the users can switch to another platform could possibly reduce the anti-competitive effects, in that the user simply chooses another platform. This seemingly rings true for the OTA-cases, where there are several platforms to choose from. For the end-users, who do not pay anything to use the market, the switching cost to another platform equals zero, although there might be some consumers who hold a preference for one platform.⁸³ Given this possibility, the anti-competitive effects could seem somewhat mitigated. However, this seemingly must require that there exists a *better* platform to switch to. As will be seen later, in the OTA-market all sizeable actors employ MFN-clauses,⁸⁴ meaning it is not likely that the consumers will find a better alternative platform to change to. The situation is the same for the hotels. The hotels pay a commission to the platforms, and this could of course be paid to someone else, but again, when nearly all the platforms employ the clause, the hotel is not likely to find a better deal by changing platform. So even though the parties on either side of the platform *prima facie* are free to change platform and “multi-home”, the *de facto* choice is slim when the market is filled with other actors with much the same terms and conditions. The absence of multi-homing as a mitigating effect, seemingly increases the risk of anti-competitive effects occurring. As pointed out by *van der Veer*, in traditional markets, MFN-clauses are not likely to result in anti-competitive effects if the buyer can use other suppliers.⁸⁵ An analogy from this to two-sided platforms would equate the effect described above. An interesting example of this is, that even as of today, when looking at booking-comparison sites, the

⁸² Evans and Schmalensee, ‘The Industrial Organization of Markets with Two-Sided Platforms’ Page 166. [n 68].

⁸³ *ibid.*

⁸⁴ Decision against HRS by the FCO B-9-66/10 of 20/12-13. (Unofficial translation). Para 176. The three biggest OTAs in Germany accounted for 90% of the relevant market and they all applied MFN-clauses.

⁸⁵ J.P. van der Veer, ‘Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis’ (2013) JECLAP. Vol 4(6). Page 501-505. Page 503.

differences between the prices for a room on different platforms, usually just varies with a few Pounds, if even that. This illustrates the issue, even though the platform facilitates information flow and reduction in costs, this effect cannot be taken advantage of when the market is covered in the same conditions.

2.1.6 In conclusion, although the platform does also create some circumstances which are beneficial to competition, it would seem that two-sided markets might exacerbate the adverse effects of MFN-clauses. The effects that have been explained here seemingly increases the platforms market power, through indirect network effects, creating/reinforcing barriers to entry, and tipping-effects. This, in turn also increases their ability to produce anti-competitive effects; the more market power a platform has, the more difficult it is for a hotel to negotiate or avoid being on the platform. Moreover, as mentioned earlier, in these cases the actors have quite a bit of market power to begin with, this is seemingly needed to be able to obtain a MFN-clause at all. As pointed out by *van der Veer*, ‘...only strong buyers are able to extract an MFN commitment from a seller...’.⁸⁶ Thereby, the combined effect is market actors who are already powerful, being able to secure even more market power, and as a derivative of this, create barriers to entry and dampening price competition. The increasing of market power is thereby a factor, although without necessarily meaning the firms are “dominant”, as will be mentioned later on.

⁸⁶ *ibid.* Page 502.

2.2 Transparent Market Structure.

2.2.1 As seen above, the theories of harm and efficiencies of MFN-clauses cover a wide spectrum of effects. Given this ambiguity, it has been argued that the likelihood of a MFN-clause being applied and the effects of it, largely depends on market circumstances, such as market transparency,⁸⁷ and that market transparency therefore is crucial to assess when looking at the effects of MFN-clauses.⁸⁸ This is also supported by the LEAR report, that points out several circumstances in which make up the likelihood of a MFN-clause being applied in a market, amongst others: ‘...the characteristics of the environment (for instance degree of transparency)...’.⁸⁹

2.2.2 The logic behind the theory that market transparency is essential to assessing the possible effects of the clause is quite simple. As explained by *Vandenborre and Frese*: The higher the degree of transparency in a market is, the lower the cost of monitoring and enforcement are for the participants. Meaning that if prices are easy to monitor, MFN-clauses are more likely to be applied than if they are not as easily visible.⁹⁰ Naturally, in the online markets transparency is very high, making the clauses more easily enforceable.

2.2.3 It is a short step from acknowledging that market transparency affects visibility of prices and conditions, thereby making the enforcement easier, to discussing the effects of such transparency on the above-mentioned theory of facilitating/stabilizing collusion. As

⁸⁷ Vandenborre and Frese, ‘The Role of Market Transparency in Assessing MFN Clauses’ Page 334. [n 1].

⁸⁸ *ibid.* Page 342.

⁸⁹ LEAR Report. Para. 3.9. [n 15].

⁹⁰ Vandenborre and Frese, ‘The Role of Market Transparency in Assessing MFN Clauses’ Page 343. [n 1].

described above, there is a theory of harm describing that the presence of MFN-clauses is likely to deter cheating for participants in collusive agreements or cartels, this due to the fact that the cheating will have to be offered to all beneficiaries.⁹¹ In relation to transparency, it would seem logical to assume that this effect would be strengthened. The likelihood of the cheating being detected would increase as market transparency increases, again further deterring cheating. However, this assumption is not without its counter-arguments. According to *Vandenborre and Frese* this theory is largely dependent on the assumption that ‘it is easier for the cartelists’ customers to detect cheating in relation to an MFN commitment than it is for cartelists to detect cheating in relation to a cartel agreement’.⁹² Further claiming that it is only if the downstream market which is subject to a MFN-clause, is much more transparent than a upstream market, which is subject to a cartel agreement, that a MFN-clause can make detection of cheating easier.⁹³ Therefore, seemingly dependent on the already existing market structure surrounding the collusion, the MFN-clause can in fact deter cheating and thereby have a stabilizing effect.

2.3 Semi-Conclusion.

2.3.1 Concerning transparency, in relation to enforcement of a MFN-clause with or without the presence of collusion or cartels, it seems obvious that market transparency would make enforcement and monitoring easier. If one examines the market-structure in the OTA-cases, there are the hotels selling rooms to the platforms (subject to MFN-clauses), and the platforms in turn selling rooms to the final customers. The different platforms

⁹¹ Cross reference: 1.3.1.

⁹² Vandenborre and Frese, ‘The Role of Market Transparency in Assessing MFN Clauses’ Page 343. [n 1].

⁹³ *ibid.*

do not know the agreements the hotels have with the other platforms, meaning that this part of the market is not transparent. They can, however, by examining the prices the other platforms charge the end consumer, decipher the prices given to them by the hotels, and thereby detect if they are not being given the best customer price as agreed to in the clause. The presence of the MFN-clause on the market between the hotels and the platforms, and the transparency on the downstream market to the final customers, seemingly makes both sides of the market transparent, either directly or through deciphering. The transparency thereby makes enforcement of the MFN-clause and a potential cartel/collusion-situation easier. In addition, this transparency could also increase the risk of unilateral dampening of competition, as explained above, as it makes competitors actions visible.⁹⁴

Further, concerning the two-sided structure of the market, the fact that the platforms are two-sided seems to increase or help maintain the market position of the platform. When this occurs in a market that is already filled with a small number of powerful actors, this is simply put facilitating the possibility for the large to grow larger in the relevant market.

The combined effect of this could thereby result in a relevant market with few actors with large market shares that have very good abilities to see what pricing level its competitors (both hotels and platforms) are at, adjust to this as they see fit, and to effectively enforce and negotiate the agreements they have with the hotels.

⁹⁴ Cross reference: 1.3.1

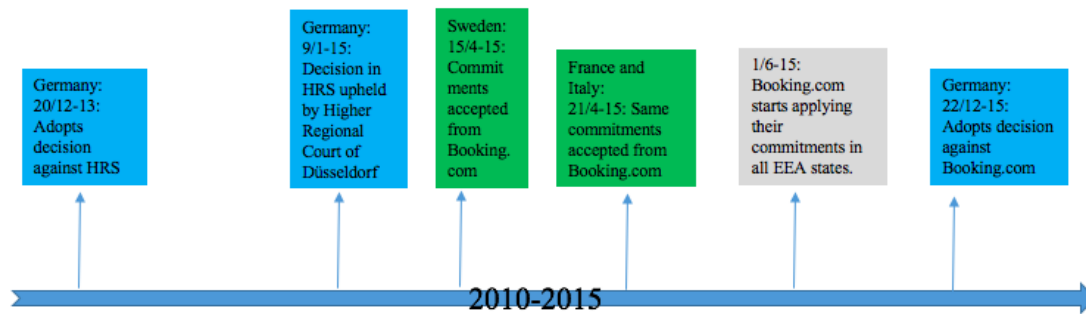
Chapter 3

1 Presentation and Comparison of the OTA-Cases

1.1 Introduction to the cases.

1.1.1 As the possible effects of the MFN-clause generally, and in transparent and two-sided markets in particular, now have been examined, the next phase is diving into the core of the research questions presented initially. Given these market circumstances, how adequate are the approaches taken by the different NCA across Europe, how do they compare to each other and the theories of harm and benefits presented above?

1.1.2 The cases that will be examined is the action taken by the German FCO in the HRS and Booking.com-cases, and the case against Booking.com treated jointly by competition authorities in Italy, France and Sweden under coordination of the Commission.



Model II. ⁹⁵

⁹⁵ Model II: Timeline of enforcement made by author.

1.2 The Content of the MFN-Clause in the OTA-Cases.

1.2.1 Before going into the analysis a short explanation of the content of the MFN-clauses applied is needed. The case against HRS in Germany was the first case in Europe where a formal decision of infringement was issued. HRS adopted MFN-clauses in their agreements with the hotels. The latest edition of the clause came in 2012 and contained the following obligations for the hotels:⁹⁶

Firstly, it contained a “best price and availability guarantee”. This means that the hotels are obliged to offer HRS the best “end price” – meaning price after taxes and fees.⁹⁷ This means that HRS requires its hotels to offer them at least as cheap prices as the hotel at any time offers to other booking-platforms and that the hotel itself offers through their own booking systems.⁹⁸

Secondly, HRS also required the hotels not to treat HRS “unfairly” compared to other platforms with regards to availability. This means that if rooms are made available to other platforms they must be made available to HRS as well.⁹⁹

Finally, HRS also required not to be treated “unfairly” compared to other sales channels when it comes to booking and cancellation policies. This means that the best booking and cancellation policy granted other platforms or by the hotel itself, must also be granted to HRS.¹⁰⁰

⁹⁶ Decision B-9-66/10 Para. 28-38. [n 84]

⁹⁷ *ibid.* Seemingly including the platforms commission.

⁹⁸ *ibid.* Para. 40 et seq.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

The terms of the MFN-clause was also enforceable by HRS by a term stating that any breach gives HRS the right to “directly and temporarily block the hotel from receiving any additional bookings”.¹⁰¹ Meaning *de facto* that the hotel would be removed from the platform. The terms in the MFN-clause can thereby be summarised into three categories: best or equal terms to other platforms and the hotel on price, availability and terms and conditions for booking and cancellations. These terms equate what has later been dubbed as “wide” MFN-clauses. The terms employed by the other OTA are largely identical to those of HRS.¹⁰² Due to this similarity the terms for each of the platforms will not be reiterated here.

1.3 Germany: FCO v. HRS.

1.3.1 Of the cases mentioned above it is perhaps the case in Germany with HRS that started the ball rolling for MFN-clause enforcement in the EU.¹⁰³ The HRS-platform was one of the leading hotel platforms in Germany, with a market share of over 30%.¹⁰⁴ The case began with a complaint being filed from a hotel in 2010 regarding the practises of HRS.¹⁰⁵ This investigation ended with a decision of infringement, which to this date is the only finding of an infringement in Europe regarding MFN-clauses in the OTA-cases. This decision was in addition upheld by the Higher Regional Court of Düsseldorf.¹⁰⁶ For the analysis this decision is particularly interesting as a basis for comparison, to see for what reasons the FCO found an infringement and why they did not deem commitments as sufficient, as some of the other NCA have accepted.

¹⁰¹ *ibid.*

¹⁰² *ibid.* Para. 48 et seq.

¹⁰³ Although investigation was started earlier in the UK.

¹⁰⁴ Decision B-9-66/10. Para 16 and 192. [n 84].

¹⁰⁵ *ibid.* Para 53.

¹⁰⁶ OLG Düsseldorf, Decision of 9 January 2015, Case VI – Kart 1/14 (V).

1.4 The legal assessment of the HRS-case.¹⁰⁷

1.4.1 According to the FCO it could be argued that the agreement is not a restriction by object, but it is *in any case* a restriction of competition by effect contrary to Art. 101 TFEU and the domestic equivalent.¹⁰⁸ It also concludes that the application of the clause is in an abuse of dominance according to the domestic legislation.¹⁰⁹

1.4.2 First the restraints on competition between hotel platforms are assessed. The first issue addressed is the competitive situation for the booking fees. The issue here is that the MFN-clause reduces the platforms motivation to offer/compete on lower commission-rates payable to the hotels, and further offer these rooms at a lower cost to the end consumers.¹¹⁰ When the clause ensures that HRS is offered the best conditions, there is no incentive to compete, no other portal will be cheaper anyway. According to the decision, this has an effect similar to that of collusion between the portals, meaning behaviour leading to a minimum price for a hotel room, which HRS profits from.¹¹¹

This effect correlates well with the theory of harm presented above about dampening competition by removing the firm's incentive to reduce prices, as well as with the theory of coordinated interaction.¹¹²

¹⁰⁷ The decisions from the FCO are very comprehensive, a full analysis of every argument made in a dissertation like this is not possible, however the author will strive to analyse and highlight the parts most relevant.

¹⁰⁸ Section 1 of the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen "GWB"); Decision B-9-66/10 Para. 152. [n 84].

¹⁰⁹ *ibid.* Para. 236. (Section 20 of GWB.) [n 108].

¹¹⁰ *ibid.* Para 156 et seq.

¹¹¹ *ibid.*

¹¹² Cross reference 1.3.1

Secondly, the issue of restriction on competitive advances by competitors is assessed. The authorities claim that new strategies for sale are discouraged due to the clause. As an example of this, it is shown to the fact that HRS had removed 40 hotels from their website due to the fact that the hotels had allowed rooms that originally had been sold as a package to tour operators, to be sold in different platforms at rates that were lower than that of HRS.¹¹³

Thirdly, the FCO claim that the clause hinders market access. As mentioned earlier the best price guarantee in the clause refers to end prices.¹¹⁴ This effectively means that a new competitor cannot offer lower prices by charging a lower commission per sale.¹¹⁵

It is natural to assume that as a newcomer in an already established market with big actors, one would have to offer something different to attract customers, and without being able to charge a lower price, this is very difficult. The effect described in the decision has support in the literature on two-sided platforms. As mentioned above, when there are a few large platforms, the indirect network effects make it even more difficult for a newcomer to win over customers.¹¹⁶ This is because a new platform with few users is less worth for the parties on the opposite side. The use of a MFN-clause on top of this could seemingly be the last nail in the coffin for newcomers. As the decision states ‘...Ultimately, the use of MFN clauses by HRS is particularly damaging for

¹¹³ Decision B-9-66/10 Para. 158. [n 84].

¹¹⁴ Cross reference 1.2.1

¹¹⁵ Decision B-9-66/10 Para. 160 et seq. [n 84].

¹¹⁶ Cross reference: 2.1.4

competition, because it protects an established enterprise against innovative offers from newcomers...'.¹¹⁷

After the effects of the clause have been explained, the FCO go on to explain that these negative effects are enhanced further by the fact that the same clause is applied by other hotel platforms on the market.¹¹⁸ As mentioned, all the major actors on the relevant market employed MFN-clauses, around 90% of the market was covered by OTAs with MFN-clauses.¹¹⁹ This, according to the decision will make new entry into the market 'not impossible but much more difficult'.¹²⁰

Other possible effects of this, not mentioned in the decision, is firstly the fact that the majority of the market is covered in MFN-clauses eliminates the possibility for consumers or hotels to mitigate the effects by "multi-homing" – there is, *de facto*, no escaping the clause.¹²¹ The fact that the FCO has acknowledged the issue of the market being covered in the clause, could indicate that they implicitly have seen that multi-homing is not an option here. Further, as one can see from the market shares in the relevant market, the actors are quite large, meaning that the aforementioned risk of "tipping" would be present, especially since the platforms mainly compete with each other.

¹¹⁷ Decision B-9-66/10 Para. 161. [n 84].

¹¹⁸ *ibid.* Para. 163.

¹¹⁹ *ibid.* HRS had a market share of around 30%, Booking.com of 40-50% and Expedia of 10-20%.

¹²⁰ *ibid.*

¹²¹ Cross reference 2.1.5

The FCO seems to here take into consideration the special risks associated with two-sided online markets, and the fact that the relevant market is occupied by a few very large actors.

1.4.3 After assessing the competitive effects between the platforms, the decision goes on to assess the competitive effects between the hotels. Firstly, the decision argues that the clause negatively affects hotel room prices. The rationale here is when the hotels are not free to set the prices, or give other incentives such as free breakfast etc., and that this hinders intra-brand competition between the hotels.¹²² The decision also points to the fact that in latest years the prices of hotel rooms have been very similar across different sales channels, and that this indicates that the portals enforce their price parity claim rather efficiently.¹²³ In this case, HRS monitored around 80% of their partner hotels by using so-called “google crawlers” to search the web daily to see what prices are being charged.¹²⁴

The last part mentioned regarding the “effective enforcement” increasing the effect of the clause conforms well with the previous arguments made that the transparent characteristics of the market is an important factor in determining the effect or possible damage of the clause. This is also explicitly recognised in the decision.¹²⁵ Without such outright market transparency as the online market provides, the clause would be much more difficult to enforce effectively, and not to mention, much more expensive to monitor, thereby possibly deterring parties from employing it at all.

¹²² Decision B-9-66/10 Para. 166. [n 84].

¹²³ *ibid.* Para. 168.

¹²⁴ *ibid.*

¹²⁵ Cross reference: 2.2.; Decision B-9-66/10 Para. 153. [n 84].

The restriction on competition is also widened to cover also offline sales, which according to the decision, means that the hotels cannot sell off unoccupied rooms at cheap prices for last minute walk-in customers.¹²⁶

Finally, again, the decision stresses that the effect of the restriction is worsened by the fact that the clauses are applied by the vast majority of platforms on the relevant market. The hotels in Germany are likely to cooperate with all of the three major portals, again having the effect that most of the market is covered in the MFN-clauses.¹²⁷

1.4.4 After the restrictions of competition are established the decision goes on to assess if the restriction can be exempt under either the block exemptions or under the individual exemptions in TFEU Art. 101(3) or the domestic equivalent.¹²⁸

1.4.5 The block exemptions set out certain criteria, which if fulfilled, automatically exempts the vertical agreement from Art. 101.¹²⁹ The agreement in question is a vertical agreement, since the hotels and the platforms operate on different levels of distribution, and the agreement is therefore, *prima facie*, eligible for exemption in the regulation.¹³⁰

Firstly, the decision mentions the issue of whether a MFN-clause should be considered a hard-core restraint, which would effectively disqualify it from block exemption.

¹²⁶ Decision B-9-66/10 Para. 173. [n 84].

¹²⁷ *ibid.* Para. 175 et seq.

¹²⁸ Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. [2010] L102/1.

¹²⁹ *ibid.* Article 2.

¹³⁰ Decision B-9-66/10 Para. 179 et seq. [n 84].

However, the authorities do not answer this question, as the requirements for exemption are not fulfilled either way, as HRS in any case exceeds the 30% market share threshold set for undertakings wishing to make use of the block exemptions.¹³¹ It is, however, worth mentioning that the FCO do consider the effect of the MFN-clause similar to that of a hard-core restraint.¹³²

1.4.6 Since the block exemption cannot be used, the evaluation moves on to the TFEU Art. 101(3) individual exemption. For an exemption under Art. 101(3) to be granted four cumulative criteria must be fulfilled. Firstly, the agreement must lead to an improvement in the production or distribution of goods or the promotion of technical or economic progress – i.e., there must be efficiency gains. Secondly, the agreement must allow a fair share of the resulting benefits to go towards the consumers. Thirdly, the restriction on competition must be “indispensable”, meaning it cannot be reached with other means less intrusive on competition. And finally, the agreement must not give the parties the possibility of eliminating competition altogether.¹³³

The decision finds that in any case the three first criteria are not fulfilled and therefore they do not need to examine the fourth one conclusively.¹³⁴ The efficiency gain claimed by HRS is mainly that the use of a MFN-clause prevents so-called “free-riding” on the platforms investments, and that this in turn leads to better quality portals.¹³⁵

¹³¹ Regulation 330/2010. Article 3. [n 128].

¹³² Decision B-9-66/10 Para. 181-187. [n 84].; See also: Kluwer Competition Law Blog. By Heinz. Published 20/1-16 ‘The FCO prohibits booking.com’s “narrow” best-price clause’: <http://kluwercompetitionlawblog.com/2016/01/20/the-fco-prohibits-booking-coms-narrow-best-price-clause/> Which makes note of the fact that a now abolished law in Germany pre 2004, banned ‘any restriction of an undertaking’s pricing freedom as [RPM]’. This illustrates the legal history of such restrictions in Germany.

¹³³ Jones and Sufrin, Page 252-262. [n 49].

¹³⁴ Decision B-9-66/10 Para. 196 et seq. [n 84].

¹³⁵ *ibid.*

The free-riding issue is explained simply that customers take advantage of an outlets investment, such as a service, to make their decision on whether to purchase, and then purchase from another outlet, which is cheaper since it does not offer said service. The narrative told by HRS here is roughly that if they have to bear the cost of maintaining/developing user-friendly portals where users can search and compare, but the hotels can sell them cheaper, less people will book on the platform and “free-ride” on the investment.

It is interesting that the free-riding problem is the efficiency gain HRS claims, because this is also one of the main arguments used in attempts to justify RPM – a hard-core restraint. And as mentioned earlier, there are authors who claim that the MFN-clause embodies the worst features of the RPM, and should therefore be treated the same.¹³⁶ *Prima facie*, the employment of such an argument could, merely by its connotations, support the thought that the effects are also similar. Although RPM is a hard-core restriction, and thereby presumed not to be justifiable after Art. 101(3), the free-riding problem is still acknowledged in the Guidelines on Vertical Restraints:¹³⁷

‘If enough customers take advantage from such services to make their choice but then purchase at a lower price with retailers that do not provide such services...high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level.’¹³⁸

Although the problem of free-riding is acknowledged, and the authorities in Germany did not decline the argument as such, it did not find that it was proven that such a

¹³⁶ Cross reference: 1.3.1

¹³⁷ Guidelines on Vertical Restraints. Para. 223. [n 35].

¹³⁸ *ibid.* Para. 225.

problem existed. Stating that there are ‘hardly adequate indications’ of a free-rider problem.¹³⁹ In any case, according to the decision, the connection between the employment of MFN-clauses and the quality of the platform is ‘at best weak’.¹⁴⁰

On this point it is however interesting to note that facilitating investment is one of the acknowledged advantages to MFN-clauses.¹⁴¹ The Court upheld the finding that free-riding was not an issue, stating something to the effect that since the value of the platform would increase the more users it attracted on both sides, the platform would still have incentive to ‘invest in the quality of the portals offering’.¹⁴² This assessment has been criticised. *Ezrachi* stated that: ‘...overtime, it seems reasonable to expect that under the existing agency model, such free riding would undermine the [OTA’s] profitability and subsequently its investment downstream.’¹⁴³ The opinions on whether free-riding is an issue thereby differ.

The decision further addresses that the restriction in any case is not indispensable. To illustrate this, the decision points to viable alternative business-models HRS could use, instead of the current business-model, where the hotels pay a commission to HRS for each booking conducted on their site. Alternative approaches are for instance to charge the hotels a fixed monthly fee for the service of being on the portal, which could also be supplemented with a variable fee for the number of bookings.¹⁴⁴

¹³⁹ Decision B-9-66/10 Para. 200. [n 84].

¹⁴⁰ *ibid.* Para. 209.

¹⁴¹ Cross reference: 1.2.1; *Ezrachi*, Page 5. [22]

¹⁴² *Ezrachi*. Page 20. [n 22].

¹⁴³ *ibid.*

¹⁴⁴ Decision B-9-66/10. Para. 217 et seq. [n 84].

The fact that the FCO here suggests alternative models for generating income is interesting and highlights the point made above that in two-sided markets the pricing *structure* is equally as important as the price *level*.¹⁴⁵ Here a different structure is suggested, which the FCO argues will lead to less restrictions on competition.

Finally, it does not find that the consumers are allowed a fair share of the benefits. Thereby no exemption was given.¹⁴⁶

The approach of the FCO is thereby a decision of infringement as they found that the time-limited commitments offered by HRS were not sufficient to meet their concerns. They also found that only a finding of infringement could ensure that the clause was removed and ensure legal certainty.¹⁴⁷ As mentioned earlier, the decision was upheld on appeal by the Higher Regional Court of Düsseldorf.

The next subchapter will examine the approaches taken by the Italian, French and Swedish competition authorities in the case of Booking.com.

1.5 Italy, France and Sweden: NCA v. Booking.com.

1.5.1 In this investigation the three NCA cooperated under the coordination of the Commission, and jointly accepted the commitments offered. In this relation a joint statement was given:

¹⁴⁵ Cross reference: 2.1.3

¹⁴⁶ Decision B-9-66/10 Para. 223. [n 84].

¹⁴⁷ *ibid.* Para. 265.

‘With coordination from the European Commission, our three authorities have collaborated in an unprecedented way in our investigations into online hotel reservation platforms. Today, we can announce that we have decided to approve commitments offered to us by the market leader, Booking.com. The commitments have been significantly improved following a market test. These new commitments limit Booking.com's use of price parity as part of its commission-based business model and substantially increase the hotels' margin for maneuver. The commitments offered by Booking.com strike the right balance for consumers in France, Italy and Sweden, restoring competition while at the same time preserving user-friendly free search and comparison services and encouraging the burgeoning digital economy.’¹⁴⁸

1.5.2 Booking.com was one of the biggest OTA in Sweden, with a market share well over 30%, meaning they as HRS, were excluded from the possibility of benefiting from the block exemptions.¹⁴⁹ And like HRS, they also employed MFN-clauses in their agreements with partnering hotels. In April 2015, meaning *after* the decision of the FCO was upheld by the Higher Regional Court of Düsseldorf, the NCA in Italy, France and Sweden accepted commitments from Booking.com in a case concerning nearly identical clauses.¹⁵⁰

1.6 Legal Assessment of the Clause in the Booking.com Case.

1.6.1 The NCA divides their preliminary assessment into the competitive effects of the clause between Booking.com and other platforms and between Booking.com and the hotels. They thereby apply a method of comparison slightly different from the FCO, by not comparing the intra-brand effect between hotels.

¹⁴⁸Press release from the Swedish Competition Authority, “Konkurrensverket”, issued 21/4-15. ‘Commitments given by Booking.com benefit consumers’: <http://www.konkurrensverket.se/en/news/commitments-given-by-booking-com-benefit-consumers/> (Accessed 29/7-16.)

¹⁴⁹ Decision of the Swedish Competition Authority, ”Konkurrensverket”. Dnr. 596/2013 of 15/4-15. Para. 18. (Unofficial translation).

¹⁵⁰ For this part of the analysis the Swedish decision will be used as the ground for assessment, this because the author can read Swedish, and thereby read the assessment in its original language, however both versions is used, in addition, the author has not found translations from the other NCA. The assessments are however likely to be very similar as the NCA did cooperate and accept the same commitments.

1.6.2 With regards to the competition between platforms the assessment recognises this as affecting competition between actors on the same level of the market, meaning horizontally. This has the effect that the price for the same room is likely to be the same across platforms, and that Booking.com can raise commissions without risk of losing clients, as the clause demands parity in end prices.¹⁵¹ This fact is found to be limiting to competition between platforms. In addition, the situation is worsened by the fact that the competitors of Booking.com also employ the clause. This addition leads to the competition between platforms regarding prices and commissions being ‘severely restricted’, thus also leading to higher commissions and higher prices.¹⁵² Further it is noted that this also creates barriers to entry, as newcomers cannot market themselves by offering lower prices made possible by lower commission-rates.¹⁵³

So far, the assessment follows that of the FCO in the HRS-case quite precisely, the competitive situation between the platforms is clearly compromised.

1.6.3 When it comes to the competitive situation between Booking.com and the hotels the assessment is quite another. Here the clause has the effect that the hotel cannot offer the same room at a cheaper price through their own sales channels than through Booking.com. This, according to the assessment, does not affect the competition between platforms, as mentioned above. Further, since the hotel and Booking.com work

¹⁵¹ Decision 596/2013. Para. 21. [n 149].

¹⁵² *ibid.* Para. 22.

¹⁵³ *ibid.* Para 23.

on different levels of the market, in different relevant markets, the clause does not restrict competition between them.¹⁵⁴

A crucial difference to the assessment made in the HRS-case is that the competition between the hotels, who act at the same level of the market, is seemingly not assessed here. This lack of analysis is a weakness in the Swedish assessment.¹⁵⁵

Further the assessment goes on to explain how the service provided by Booking.com is useful for the consumers, stating that it makes search, comparison and instant booking possible. This argument regarding the advantages of the clause conforms well with the pro-competitive effects explained above regarding making transactions that would otherwise not happen, possible. It also corresponds well with the general advantages derived from two-sided platforms such as facilitating information flow and lowering transaction costs.¹⁵⁶

Further, it underscores that with the current business-model, the hotels do not pay anything for this service unless a booking is produced as a result of the search. And that this model contributes to market transparency, which in turn heightens competition and is useful to consumers.¹⁵⁷

¹⁵⁴ *ibid.* Para. 25.

¹⁵⁵ As this is only an *assessment* and not a decision with a finding of an infringement the reasoning is less comprehensive than the FCO decision, giving less grounds for analysis. This is however the only published reasoning from the Swedish competition authority on this case.

¹⁵⁶ Cross reference: 2.1.3

¹⁵⁷ Decision 596/2013. Para. 27 et seq. [n 149].

As will be remembered, the FCO criticised HRS for their business-model, suggesting alternative approaches less restricting on competition. The point regarding transparency was also made in the HRS-case, however, the argument there is that the transparency is of little use when the clause causes price parity across the market. Stating that the: ‘...Hotel customers are offered an illusion of transparency...’¹⁵⁸ This is again also the reason why multi-homing does not have a mitigating effect.

The conclusion that is drawn from this is that since the hotels do not pay if a booking does not happen, and if they were free set their own prices, they would “free-ride” on the investments made by Booking.com.¹⁵⁹ The authorities thereby recognise the claim made by Booking.com that the clause is necessary to provide the consumers with these advantages, and that a MFN-clause decreases the risk of free-riding on Booking.com.¹⁶⁰

As will be remembered, in the HRS-case the free-riding problem was not considered proven, and in any case there was a weak causality with the quality of the platform. It is perhaps a bit surprising when this assessments, seemingly so quickly accepts the justification that was completely dismantled by the FCO. However, one will do well here to recall the criticism directed at the FCO and the Court in the HRS-case for seemingly “down-playing” the risk of free-riding.¹⁶¹

¹⁵⁸ Decision B-9-66/10 Para. 227. [n 84].

¹⁵⁹ Decision 596/2013. Para. 28. [n 149].

¹⁶⁰ *ibid.* Para. 30.

¹⁶¹ Cross reference: 1.4.6

1.7 The Commitments made by Booking.com.

1.7.1 To meet these competitive concerns, Booking.com offered the NCA to enter into commitments to last for five years.¹⁶² Firstly, it must be noted that an acceptance of commitments is not equal to a finding of an infringement or an admission of guilt from Booking.com.¹⁶³

1.7.2 The commitments made by Booking.com to the NCA in Italy, France and Sweden have informally been dubbed as allowing a “narrow” MFN, as opposed to a “wide” MFN, which was the original clause – and what was the case in HRS. As put by *Ezrachi*, the narrow MFN ‘...only concern the relationship between a single web-aggregator and a single supplier, and do not govern the relationship between that supplier and other [OTAs]...’.¹⁶⁴ The meaning of this more precisely is that Booking.com no longer requires price parity with other platforms at all, or with the hotels sales – as long as these are not marketed online.¹⁶⁵ For instance, Booking.com will no longer require price parity with other platforms, but they are however still free to require price parity with the hotels own *online* sales. However, the hotel will be free to offer better prices offline, meaning for instance via telephone, fax, e-mail and walk-in at reception. The scope of the clause is thereby narrowed.

As it can be seen above, the NCA were most concerned about competition between the platforms, and not the strictly vertical part, between the platform and the hotel.

Following this, it is perhaps not surprising that they accepted commitments banning the

¹⁶² Decision 596/2013. Para. 34. And Annex. [n 149].

¹⁶³ *ibid.* Appendix 1. [n 149]

¹⁶⁴ *Ezrachi*. Page 22. [n 22].

¹⁶⁵ Decision 596/2013. Annex. Para. 1.2. [n 149].

price parity between platforms, but not on online sales between platform and partner hotel. The effect on competition between the platforms is horizontal, and those are precisely the type of effects that are concerning with the MFN-clause,¹⁶⁶ so the commitments do to a degree address these concerns. However, it is a weakness that the intra-brand competition between hotels is not assessed.

The overall reasoning for accepting the commitments seems to come out of two main arguments. Firstly, Booking.com was successful in convincing the NCA that free-riding was a problem, which without the MFN-clause they could not overcome. And secondly, the platform's services to consumers are so advantageous, that it is a priority to be able to keep it, meaning again free-riding must be prevented. The advantages seemingly make the free-riding argument successful, some sort of "price" must be paid for having such a good service offered free of charge to the consumers.¹⁶⁷

The conclusion that the application seemingly strikes the right balance between consumers and platform is supported by *Ezrachi*, who states that with the "narrow" clause: '...PCWs still retain protection against direct free-riding by their supplier and thus incentivised to offer demand-enhancing features. Further, as they compete horizontally against other PCWs, they are incentivised to improve the scope and quality of their service.'¹⁶⁸

1.7.3 Compared these decisions show that all the NCA had issues with the effect of the "wide" MFN-clause, this version of the clause is from this point on probably down for the count,

¹⁶⁶ Cross reference: 1.4.1

¹⁶⁷ Decision 596/2013. Para. 30. [n 149].

¹⁶⁸ *Ezrachi*. Page 23. [n 22].

however the authorities opted to deal with the restrictions in different ways. The German approach seemingly struck harder down on the MFN-clauses, whereas Italy, France and Sweden accepted it as necessary to obtain the advantages the platforms provide for consumers. Due to this discrepancy it is particularly interesting to examine what happened in the case brought by the FCO against market leader Booking.com.

1.8 Germany: FCO v. Booking.com.

1.8.1 The decision from the FCO to prohibit also the “narrow” MFN-clauses adopted by Booking.com,¹⁶⁹ following the commitments made to other NCA came as a shock to many: ‘The FCO has ended the year 2015 with quite a bang when it prohibited internet hotel portal booking.com to continue to use its “narrow” best-price clauses...’.¹⁷⁰ Following the commitments entered into with other NCA and employing these new clauses all over the EEA,¹⁷¹ Booking.com had probably hoped to avoid the limelight of a FCO investigation, however, they had no such luck. In addition, the commitments entered into were at this point beginning to crumble. Firstly, in July 2015, France adopted a law banning all use of parity clauses in the sale of hotel rooms.¹⁷² This effectively prohibits the use of all MFN-clauses and makes the commitment previously entered into seemingly obsolete. In Italy action was underway that might lead to a

¹⁶⁹ Decision against Booking.com by the FCO: B 9-121/13 of 23/12-15. (Unofficial translation.)

¹⁷⁰ Kluwer Competition Law Blog: <http://kluwercompetitionlawblog.com/2016/01/20/the-fco-prohibits-booking-coms-narrow-best-price-clause/> (Accessed: 27/7-16.) [n 132].

¹⁷¹ Press release by Booking.com issued 25/6-15. ‘Booking.com to Amend Parity Provisions Throughout Europe’: <https://news.booking.com/bookingcom-to-amend-parity-provisions-throughout-europe> (Accessed 18/8-16).

¹⁷² Press release by HOTREC Hospitality Europe issued 9/7-15. ‘France forbids rate parity clauses by law another crucial step for hotels in Europe to regain control over their offer’: <http://www.hotrec.eu/newsroom/press-releases-1714/france-forbids-rate-parity-clauses-by-law-another-crucial-step-for-hotels-in-europe-to-regain-control-over-their-offer.aspx> (Accessed: 29/7-16.)

prohibition here as well. The decision accepting the commitments have been appealed and action has been taken by the House of Representatives, but not yet the Senate.¹⁷³

1.8.2 Since the conclusion is the same as the HRS-case, the considerations made by the FCO will not be reiterated as detailed, but rather particular parts that differ will be pointed out. Like the case of HRS this investigation was also instigated following a complaint, this time from the German Hotel Association.¹⁷⁴

1.8.3 Again the analysis is divided, initially the competitive situation between platforms is analysed, and then the situation between the hotels. Firstly, the decision addresses that even the “narrow” MFN-clauses limits the hotels motivation to offer different prices to the hotel platforms. The FCO claim that hotels, even though they now have the formal ability to differentiate, will be very reluctant to do so. This due to the fact that if Hotel X wants to offer another platform a lower price than Booking.com, it will because of the clause, still not be able to offer a price lower than that given to Booking.com on its own website. This means that the hotels’ prices online will have to be higher than the prices given other platforms.¹⁷⁵ A further effect of the lack of incentive for the hotels to use their option to price differentiate between platforms, is that the motivation for the platform to compete for lower prices from hotels through lowering commissions etc. is also reduced.¹⁷⁶ And as in the HRS case, the FCO also claim that the stable commission prices amongst platforms over the latest years shows anti-competitive effects, and this

¹⁷³ Decision B 9-121/13. Para. 70 et seq. The new French law goes by the nick-name of “Loi Macron”. [n 169]

¹⁷⁴ *ibid.* Para. 55.

¹⁷⁵ *ibid.* Para. 192-194.

¹⁷⁶ *ibid.* Para. 213.

conclusion is not ‘fundamentally changed’ by adapting the MFN-clauses as “narrow”.¹⁷⁷ This because of the assumption that the hotels will not make use of the new formal ability to price differentiate. This conclusion is in the decision supported by a hotel survey carried out by the FCO show that hotels would not ‘...undercut the prices on their own website on any of the hotelportals...’.¹⁷⁸

Secondly, the decision points at the restraints on competition are amplified by the fact that there are additional clauses on availability and BPG. The BPG will when practised lead to less provision per booking. Since the commissions are reduced when this happens, the presence of a BPG reduces the incentive even further for competition/reductions on commission rates between the platforms.¹⁷⁹

Next, the FCO also find barriers to entry with the “narrow” MFN. The argument used here is almost the same as in HRS, when the newcomer cannot compete on lesser commission and lower prices it will be very difficult to enter the market. And even though there now is a formal possibility for a hotel to grant lower prices to another platform, due to the reasons explained above, the hotels are not likely to use this option, leaving the situation for the newcomer much the same as under the original MFNs.

1.8.4 After this the competitive situation for hotel rooms is examined. Booking.com’s view on this point is that since price parity is not required on offline sales the hotels are free to compete.¹⁸⁰ However Booking.com is not heard with this argument. The FCO states

¹⁷⁷ *ibid.* Para. 214-215.

¹⁷⁸ *ibid.* Para. 204.

¹⁷⁹ *ibid.* Para. 217-219.

¹⁸⁰ *ibid.* Para. 227.

that the “narrow” MFN-clause, as mentioned before, leads to the hotels not being able to offer cheaper room rates online than they have given Booking.com. This reduces the incentive to lower prices. According to the decision, the clause largely ‘disable the price as a competition parameter between hotel booking portals and direct online sales by hotels’.¹⁸¹

Lastly, the issue of amplification of anti-competitive effects is discussed. As mentioned in the HRS-case, the effects of the clause were thought to be worsened by the fact that it was applied across the market. It is taken into consideration that HRS does no longer apply their wide MFN-clauses after the decision of infringement was upheld by the Court and that Expedia has vowed to only enforce a “narrow” MFN-clause.¹⁸² However, this question is left unanswered. The conclusion is given that there would be ‘noticeable competition-restraining effects’ even if only one of the biggest actors on the market had MFN-clauses.¹⁸³

1.8.5 Like in the HRS-case, no exemption is given either under the block exemptions or Art. 101(3).¹⁸⁴ As with the HRS-case, the decision finds that the free-riding problem is not sufficiently proven,¹⁸⁵ and in any case the measure is not indispensable due to other possible business-models, also as mentioned in HRS.¹⁸⁶

¹⁸¹ *ibid.* Para. 231.

¹⁸² *ibid.* Para. 239.

¹⁸³ *ibid.* Para. 243. Booking.com in this case alone has a market share of 50-55%.

¹⁸⁴ *ibid.* Para. 245-255.

¹⁸⁵ *ibid.* Para. 268 et seq.; Cross reference: 1.4.6, to avoid repetition, please see the paragraph on individual exemption in the HRS-case.

¹⁸⁶ *ibid.* Para. 288 et seq.

As can be seen generally through the assessment in this case, the FCO relies mainly on the arguments made in the case of HRS, which had later on been upheld by the Court. This reliance has been criticised by commentators for reading too much into the verdict. As pointed out by *Ezrachi*:

‘...the decision...focused solely on wide parity, the Court did not engage in an analysis of likely effects of narrow MFNs; and did not consider a proposal for an alternative narrow parity on a permanent basis...With that in mind, the [FCO’s] reading of the judgement seems overly wide. Its conclusions regarding narrow parity do not flow naturally for the...judgement, nor do they reflect its substantive analysis...The conclusions seem to ignore the risk of free riding which narrow parity addresses and the danger that an absolute ban would diminish investment downstream and increase inefficiencies...’¹⁸⁷

Booking.com has appealed the decision against them, and it will be very interesting to see the outcome of this appeal. Does the Court hold the same opinion on the “narrow” MFNs as the “wide”, or did the FCO in fact stretch the narrative of the judgement too far?¹⁸⁸

Following the analyses of the first two cases it could at least be concluded that all involved authorities had issues with the “wide” MFNs. However, after this last decision against Booking.com the FCO took the enforcement one step further and banned the use of “narrow” MFNs as well. We are thereby left with the situation at hand today, with two quite diverging approaches to the same issue.

¹⁸⁷ *Ezrachi*. Page 30-31.[n 22].

¹⁸⁸ Kluwer Competition Law Blog: <http://kluwercompetitionlawblog.com/2016/01/20/the-fco-prohibits-booking-coms-narrow-best-price-clause/> To the authors knowledge nothing has resulted of this appeal as of yet. (Accessed: 2/8-16.) [n 132].

Chapter 4

1 Comparisons and Closing Remarks

1.1 Diverging Enforcement of EU Law.

1.1.1 What in any case is clear is that the situation at hand today is deeply unsatisfactory for all parties involved, but especially the businesses who have to adapt to different enforcement of the same rule in different jurisdictions. In addition, it is certainly not advantageous to facilitate the progress of e-commerce throughout the EU, which the Commission is particularly concerned about these days.¹⁸⁹ Some development is on the horizon. The ETTSA has rendered a complaint to the Commission regarding the legality of ‘Loi Macron’,¹⁹⁰ and as mentioned, the Commission has launched an investigation into the E-Books sector.¹⁹¹ However, nothing has as of yet resulted from these processes, and until such a time one is left with the inadequate situation of today, where there are two diverging approaches.

The striking question that remains is which approach is preferable to deal with the issue. In the previous sub-chapter, the approaches were compared and commented on, but no conclusion reached. With this being a question that European competition authorities have not been able to agree upon, one dissertation cannot answer the question in full. However, the different aspects of the decisions will be discussed, critiqued and assessed

¹⁸⁹ Press release from Commission issued 6/5-15. ‘Antitrust: Commission launches e-commerce sector inquiry’: http://europa.eu/rapid/press-release_IP-15-4921_en.htm (Accessed: 1/8-16.)

¹⁹⁰ ETTSA on 14/9-15. ‘European Travel Distributors file complaints with the European Commission to review incompatibility of Loi “Macron” with EU law’: http://www.etsa.eu/index.php?mact=Mediaroom.cntnt01.default,0&cntnt01types=pressrelease.etsane_ws&cntnt01returnid=18 (Accessed: 19/8-16.)

¹⁹¹ Cross reference: 1.1.1

against general principles and more familiar areas of competition law, and the surrounding relevant literature.

1.2 Market Concentration and Market Power in Combination with Transparency and Two-Sided Markets.

1.2.1 An element that requires further attention is the role of market power in the assessments of effects. Although it is not made into the cornerstone of any of the assessments or decisions, it is unavoidably a factor that the markets at hand in these cases are occupied by a few relatively large actors who all employ the same clause.

As mentioned by *Faull and Nikpay*, one of the factors indicating if a MFN-clause raises competitive issues is market concentration. The more concentrated a market is, the more probable anti-competitive effects are.¹⁹² And, the greater market share covered by the clause, the higher risk of foreclosure-effects.¹⁹³ The markets at hand in these cases employ these incumbent risk-factors. In addition to this, the fact that the platforms are two-sided does seem to reinforce the competitive standing of already powerful actors.¹⁹⁴ This market circumstance may make the platforms more powerful than they would be in other market circumstances.

In addition to this, the market is as mentioned highly transparent. This increases the risk of collusion, coordinated interaction and general dampening of competition.¹⁹⁵ The

¹⁹² J.Faull & A. Nikpay, *The EU Law of Competition*, third edition (2014) Oxford. Page 1741.

¹⁹³ Ibid.

¹⁹⁴ Cross reference: 2.1.6

¹⁹⁵ Cross reference: 2.3

incumbent risk factors of the MFN-clause are thereby exacerbated by the market circumstances of transparency and two-sided platforms.

This means that when considering the possible effects of a MFN-clause, these market circumstances must be taken into consideration, and it is not sufficient to rely on theories relating to the “classic” MFN-clauses. With these exacerbating market circumstances being present, it could be argued that a strict approach, á la the German one, is to be preferred. One could argue that there might be disagreement regarding the details of the effects, but with these market circumstances the risk for anti-competitive effects is such that a strict approach is more sensible.

1.3 Incorporation of Market Circumstances in the Assessments.

1.3.1 When it comes to some of the special features of transparent two-sided markets, the decision adopted by the FCO in the HRS-case, in some areas, does incorporate these more into the consideration than the other NCAs assessments. Two examples are equipped to illustrate this.

Firstly, when it comes to pricing strategy in two-sided markets, this is as mentioned above, as important as the pricing level itself.¹⁹⁶ This factor is seemingly recognised by the Germans in both their decisions when they discuss alternative business-models, which would entail another pricing strategy with less anti-competitive impact.¹⁹⁷ The fact that the Germans recognise the pricing structure as an important factor in assessing the competitive effects in two-sided platforms correlates well with literature on the

¹⁹⁶ Cross reference 2.1.3

¹⁹⁷ Cross reference 1.4.6

subject. It is not primarily the conclusions reached on this issue, but merely the fact that is recognised and considered. The Swedes fail to discuss this, and merely approve the business-model employed.

Secondly, as mentioned above on the effect of transparency, this market feature increases the efficiency of enforcement of the MFN-clause because it reduces the cost of monitoring. In the decision against HRS the FCO specifically mention how the enforcement of the clause is made effective by the fact that the market is online and that HRS employs so-called “google-crawlers”.¹⁹⁸ By recognising that the online placement of the market makes enforcement much easier, the FCO seemingly address the effect of transparency to a greater degree than that of the other NCA. Again, in the Swedish decision this is not discussed, apart for as an advantage for consumers to create transparency on the market.

As concluded in the sub-chapter discussing these circumstances, they seemingly increase the risk of anti-competitive effects arising from the MFN clause.¹⁹⁹ The decisions vary on other grounds as well, but on these particular issues the decisions by the FCO seems to pick up on threads recognised in the surrounding literature that the other assessments simply do not mention. This could indicate that the assessment by the Germans has taken more account of the current market circumstances, suggesting their rather strict approach might be preferable.

¹⁹⁸ Cross reference: 1.4.3

¹⁹⁹ Cross reference: 2.3

1.4 Similarities to Exclusivity and English-clauses.

1.4.1 Literature surrounding MFN-clauses in online two-sided markets is as mentioned, not that well-developed yet. Due to this fact, it could be useful to compare MFN-clauses to more established parts of competition law, such as exclusivity and English-clauses. As mentioned earlier, certain commentators claim that MFN-clauses also can be assessed under Art. 102 TFEU as a possible abuse of dominance. The actors in the cases are as mentioned quite large, some of them could *possibly* be considered dominant, and it is therefore useful to examine similarities to other conduct which could be deemed abusive under Art. 102.²⁰⁰

1.4.2 From the application of MFN-clauses by undertakings who could be deemed “dominant” in the EU, there can be drawn a parallel to the application of exclusivity agreements. It is *de lege lata* established in the EU that the application of exclusivity agreements by dominant undertakings in most cases constitutes an abuse of dominance.²⁰¹ Exclusivity agreements do have some common elements with the MFN-clause, as put by *Soyez*: ‘...exclusivity agreements which in essence have a similar – but more intensive – effect to MFN clauses. Whereas MFN clauses prohibit dealings with competitors on better terms, exclusivity agreements prohibits dealings with competitors at all...’.²⁰² The exclusivity clause thereby has much in common with a “true” MFN-clause.²⁰³

²⁰⁰ In Case 27/76 ‘*United Brands Company and United Brands Continental BV v Commission of the European Communities*’. [1987] E.C.R. 207. United Brands was held to be dominant with a market share of 45%.

²⁰¹ Case 85/76 ‘*Hoffmann-La Roche & Co. AG v Commission of the European Communities*’. [1979] E.C.R. 461. Para. 89.

²⁰² *Soyez*. Page 111. [n 2].

²⁰³ Cross reference: 2.2.2 (N.B. this was not the kind used in the OTA-cases).

Further, there are similarities to the effects of the so-called English-clause.²⁰⁴ The English-clause entails that the distributor can deal with other suppliers who offer better prices, if the original supplier after being informed of this better offer does not want to match them.²⁰⁵ English-clauses can have anti-competitive effects due to the fact that they make the markets more transparent; the customer tells the supplier which competitor is offering better prices.²⁰⁶ The theory of harm is one of alignment, similar to that of the MFN-clause. More concretely the risk is that when competitors are able to know the prices and terms of each other, especially in very concentrated markets, this could result in ‘parallelism of conduct’ to reduce competition on price on the market.²⁰⁷ In these terms, the MFN-clause in transparent markets may be a more “sophisticated” version of the English-clause. It is not reliant on the customers reporting the prices, due to the inherent transparency of the internet, this is visible to the bare eye. In addition, the risk of “parallel conduct” without collusion conforms well with the theory of “coordinated interaction” explained above.²⁰⁸

However, a crucial difference from MFN-clauses to both English and exclusivity-clauses is that their objective is to limit the retailer to only deal with one supplier, whilst with the MFN-clause, the hotels can be present on all platforms should they wish to do so, as it is an “indirect” MFN-clause.

Whether or not the assessment of the agreement is better placed under Art. 102 rather than Art. 101 TFEU is a discussion for Courts, NCAs and academics to develop further.

²⁰⁴ Soyez. Page 111. [n 2].

²⁰⁵ C. Bellamy & G. Child, *European Union Law of Competition*, Seventh edition, Oxford University Press. (2013) Page 481.

²⁰⁶ Faull & Nikpay. Page 422. [n 192]

²⁰⁷ *ibid.*

²⁰⁸ Cross reference: 1.3.1

Most of the application by NCA has been under Art. 101, and in the U.S. the assessment is also under Section 1 of the Sherman Act.²⁰⁹ It is however interesting to see that some of the effects that concern competition authorities regarding these clauses have parallels to possible effects of the MFN-clause. This does not contribute much to the clarifying of the preferable approach; on another note it does however signal that large undertakings should think twice before employing a MFN-clause.

1.5 Similarities to RPM.

1.5.1 Another comparison that can be drawn is that to RPM. As mentioned earlier it is a topic up for debate if the ‘Retail Price MFNs’ – which is the same as a ‘Platform MFN’, encompasses the worst features of RPM,²¹⁰ this by creating the same effect as the ‘horizontal’ part of the RPM.²¹¹ This view is not reserved for only these commentators, others have called the MFN the ‘...second cousins of RPM...’, and state that they seemingly do facilitate the same kinds of restrictions on competition.²¹² Many of the restrictions that can occur as a result of RPM, are similar to those discussed in detail above regarding MFN, from the Commission Guidelines on vertical restraints the following are particularly similar:

‘...RPM may facilitate collusion between suppliers by enhancing price transparency in the market, thereby making it easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price...RPM also undermines the incentive for the supplier to cut its price...as the fixed resale price will prevent it from benefiting from expanded sales. This negative effect is in particular plausible if the market is prone to collusive outcomes ...a significant part of the market is covered by RPM...Secondly, by eliminating intra-brand price competition, RPM may also facilitate collusion between the buyers, i.e. at the distribution level. Strong or well organised distributors may be able to force/convince one or more suppliers to fix their resale price above the

²⁰⁹ Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1–7.

²¹⁰ Cross reference: 1.3.1

²¹¹ *ibid.*

²¹² L. Atlee & Y. Botteman, ‘Resale Price Maintenance and Most-Favored Nation Clauses: The Future Does Not Look Bright’ [2013] CPI Antitrust Chronicle. Vol. November 2013(1). Page 1-7. Page 2.

competitive level and thereby help them to reach or stabilise a collusive equilibrium...Thirdly, RPM may more in general soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them...Fourthly, the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand. ...Sixthly, RPM may be implemented by a manufacturer with market power to foreclose smaller rivals...Lastly...RPM may prevent more efficient retailers from entering the market...'²¹³

The effects above are strikingly similar to the theories of harm explained above, and of many of the conclusions reached by the FCO. And as pointed out by *Fletcher and Hviid*, whilst the economic literature surrounding the MFN-clause is still nascent, the literature and the effects of the RPM is much more established.²¹⁴ With these inherent similarities in possible effect, it could be argued that one should in this phase of ambiguity, rely on the clearer *de lege lata* surrounding the RPM as a basis for how to react against the MFN-clause.

There are, however, counter-arguments to this similarity to RPM. Firstly, with the “narrow” MFN-clause, the hotels do, at least formally, have the opportunity to differentiate between platforms, should they use this, the horizontal effect would be weakened. Secondly, as opposed to many RPM-cases, where consumers pay a higher fixed price and get nothing in return, in the circumstances at hand the consumer actually obtains an advantage: the platforms services. This advantage must be acknowledged irrespective of if the free-rider-argument is accepted as a justification for the restrictions. This means that even if the theory of price alignment on the market is true and the horizontal element of RPM is present also for MFN-clauses, the total sum of negative effects are likely to be less than with RPM.

²¹³ Guidelines on Vertical Restraints Para. 224. [n 35].

²¹⁴ Fletcher and Hviid. Page 2 and 9. [n 19].

In addition to this, it is worth mentioning that not all jurisdictions consider RPM as harmful as the European. In the U.S., the world's oldest antitrust regime, RPM is considered under the "rule of reason" approach, and it is thereby accepted that RPM can have benefits to it.²¹⁵ Amongst the benefits recognised in the *Leegin*-case is preventing free-riding, and it is also mentioned that if price is not a competitive factor, the retailers can compete on services.²¹⁶

The similarities to RPM are at least *prima facie* disturbing, but it does not give a clear-cut answer. In addition, there is something slightly uneasy with using RPM as grounds for parallel treatment of MFN-clauses, when this is an approach that does not have uniform support amongst comparable competition law regimes.

1.6 Error 'Type I' vs. 'Type II'.

1.6.1 The strongest argument suggesting that allowing the "narrow" MFN-clauses is most beneficial, is the fact that the error at risk here is "type II". The type II error refers to the risk of failing to recognise and thereby not taking action towards competitive restraints. This is also known as 'under-enforcement' which is according to *Jones and Sufrin*: 'failing to prohibit such things [for instance agreements] where there is anti-competitive harm...'.²¹⁷ Strictly speaking, the NCA in Italy, France and Sweden do consider the agreements a restriction, hence the commitments. But they consider them *less* restricting than for instance Germany, and thereby apply less invasive measures. The risk is thereby

²¹⁵ H. Hovenkamp, *Federal Antitrust Policy the Law of Competition and its Practice*, fourth edition, West, (2011). Page 516.; This approach followed the *Leegin*-case: '*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*', 551 U.S. 877 (2007).

²¹⁶ *Leegin*. Page 11.

²¹⁷ Jones and Sufrin. Page 57-58. [n 49].

closer to a type II error – if they have underestimated the anti-competitive effects of the clause the reaction would constitute under-enforcement. Although this might not seem beneficial, it is, compared to the German approach, a much less serious mistake to make than an error of “type I”. The type I error means put simply that a competitive situation has been mistakenly classified as anti-competitive, and the action taken thereafter. The predominant view is that errors of type I, over-enforcement, is more harmful to competition than type II errors, this because it dampens ‘pro-competitive activity and stunts innovation’.²¹⁸

The argument that can be derived from this point of view is that as long as there are so diverging views on the effect of the clause, it is better to take a “light hand” approach, until more information can be gathered and the NCA have sufficient information to know to a more certain degree, the level of competitive harm.²¹⁹ Such information gathering is already underway, just recently it was announced that France together with nine other NCA have started a survey to assess the effect of the remedies following the Booking.com-case.²²⁰ On this point the diverging approaches might actually be an advantage, so the two approaches can be compared.²²¹ And research is also being conducted in other jurisdictions to bring more clarity to the effects. For instance, the

²¹⁸ *ibid.*

²¹⁹ See e.g.: Press release from the UK issued 16/9-15. ‘CMA closes hotel online booking investigation’: <https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation> : ‘...It is too soon to tell whether or not the changes made by Booking.com and Expedia will materially change how hotel rooms are priced on the internet. We will continue to watch this closely and welcome views about how the market is developing in light of these changes.’ (Accessed: 19/8-16).

²²⁰ E-Competitions Bulletin July 2016, Art. N° 80148. Published 2/7-16. ‘French Competition Authority, The French Competition starts, in collaboration with 9 National Competition Authorities and the EU Commission, a survey among hoteliers to assess the remedies implemented in the hotel booking sector’: <https://www.concurrences.com/bulletin/news-issues/july-2016/the-french-competition-starts-in-collaboration-with-9-national-competition?lang=en> (Accessed: 1/8-16.)

²²¹ Getting the deal through. By Plankensteiner, Créquer and Levin. Published 24/3-16. ‘Most Favoured Nation Clauses’: <https://gettingthedealthrough.com/area/41/article/28952/vertical-agreements-favoured-nation-clauses/> (Accessed: 3/8-16.)

Norwegian competition authorities, who has not yet taken action against the clauses, recently granted funding to an independent research project examining the effects of the clause in particular in relation to the OTA-cases.²²² From this it is quite evident that the strongest argument against the stringent approach taken by Germany, is that in this phase of uncertainty, the approach may mistakenly overestimate the competitive harm and thus over-enforce.

2 Final Conclusion

2.1 Ambiguity, Risk of Over-Enforcement and Individual assessment.

2.1.1 Regarding the conclusions reached in this dissertation, the author cannot preclude that a wider grounds of sources would have influenced the result. The conclusions are limited to the decisions analysed, and that the translations used were unofficial. In addition, only academic literature available in English was used.

2.1.2 As can be seen from the abovementioned arguments, there are irreconcilable discrepancies in how the competition authorities assess the possible effects of the clause, and that the literature regarding MFN-clauses in transparent two-sided markets and “narrow” MFNs has not developed sufficiently to reconcile or give one of them the upper hand. However, it can certainly be concluded that the market circumstances examined in this dissertation does influence, at least to some degree, the possible effects of the MFN-clauses, mainly in seemingly increasing the risks for adverse effects. The answer to this part of the research question is thereby that these circumstances do affect the adequacy of the approaches taken. This also highlights the fact that the MFN-clause

²²² Link to webpage of Norwegian competition authority, ‘Konkurransetilsynet’, showing granting of research funds to: ‘Web portals’ project published 6/3-15: <http://www.konkurransetilsynet.no/nb-NO/vedtak-og-avgjorelser/vedtak-og-avgjorelser/2015/forskningsmidler-2015/> (Accessed 1/8-16.)

should be subject to individual assessment in each case within the market circumstances in which it functions. However, if this effect is so prominent as to justify the strictest approach of banning the clause altogether, is another issue.

The increased risks of adverse effects and the parallels that can be drawn to the “less flattering” parts of competition law do not bode well for the MFN-clause. However, the situation is in any case that there is no escaping the *ambiguity* of the possible effects. As long as this uncertainty prevails, one cannot reasonably conclude anything but that the more lenient approach of allowing the “narrow” MFN-clause, is the most sensible – at least as of today. It is, as mentioned, well established that over-enforcement is more damaging to competition than under-enforcement. The approach that makes the most sense under these circumstances of ambiguity is to take the enforcements in steps. As mentioned there is research being conducted into the effects of the commitments, and if this show that the commitments are insufficient to deal with the issue, the authorities can adopt stricter approaches on more solid grounds. The fall out of this is at worst a five-year period of under-enforcement, as opposed to years of over-enforcement. Facing a choice of the two, under-enforcement represents the lesser of two evils.

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