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# Most Favoured Nation clauses and online platforms: competitive effects and EU competition law

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# Contents

<b>SUMMARY</b>	<b>1</b>
<b>ABBREVIATIONS</b>	<b>2</b>
<b>1 Introduction</b>	<b>3</b>
<b>2 Background</b>	<b>6</b>
<b>2.1 Most Favoured Nation Clause</b>	<b>6</b>
<b>2.2 Narrow or wide MFN clauses</b>	<b>7</b>
<b>2.3 Online platforms</b>	<b>7</b>
<b>3 Competitive effects</b>	<b>9</b>
<b>3.1 Competitive harm</b>	<b>9</b>
3.1.1 Barriers to entry	9
3.1.2 Resale price maintenance?	10
<b>3.2 Pro-competitive effects</b>	<b>12</b>
3.2.1 Introduction	12
3.2.2 Freeriding	12
<b>4 National Competition Authorities EU</b>	<b>15</b>
<b>4.1 Introduction</b>	<b>15</b>
<b>4.2 Germany's HRS decision</b>	<b>15</b>
4.2.1 Introduction	15
4.2.2 Relevant market	15
4.2.3 Agency model	17
4.2.4 By effect	17
<b>4.3 Sweden, France and Italy</b>	<b>19</b>
4.3.1 Narrow MFN's allowed	19
4.3.2 The French twist	20
<b>5 EU Competition Law</b>	<b>22</b>
<b>5.1 Introduction</b>	<b>22</b>
<b>5.2 Market definition</b>	<b>22</b>
<b>5.3 Article 101 TFEU</b>	<b>25</b>
5.3.1 Genuine agent under article 101(1) TFEU	25
5.3.1.1 Article 101(1) TFEU not applicable	25
5.3.1.2 Exceptions to the non-applicability of article 101(1) TFEU	27
5.3.2 Price fixing	30
<b>5.4 Article 102 TFEU</b>	<b>31</b>
5.4.1 Dominant position	31
5.4.2 Abuse	33
5.4.3 Objective justification	35

5.4.4 EU Commission towards a dominant position approach	36
<b>6 Concluding remarks</b>	<b>38</b>
<b>BIBLIOGRAPHY</b>	<b>40</b>
<b>TABLE OF CASES</b>	<b>43</b>

# Summary

Most Favoured Nation clauses are often incorporated into agreements between online platforms and suppliers. These MFN clauses entail that the prices that are set by suppliers on these platforms, are not higher than the prices on other platforms or the suppliers' own websites. In this thesis it will be discussed what the competitive effects of MFN clauses are and how they should be assessed under EU competition law. National Competition Authorities within the EU have assessed these clauses in different ways and there is a no clear guidance from the Commission on how to assess MFN clauses under EU competition law. It will be argued that the application of article 102 TFEU regarding the abuse of a dominant position would be the best suitable option. Furthermore, it will be argued that it is necessary that the Commission provides more guidance to end the situation of a differentiating approach within the European Union.

# Abbreviations

ECJ	European Court of Justice
EU	European Union
EUMR	EU Merger Regulation
GWB	Gesetz gegen Wettbewerbsbeschränkungen
MFN	Most Favoured Nation
NCA	National Competition Authority
OTA	Online Travel Agent
PCW	Price Comparison Website
RPM	Resale Price Maintenance
SSNIP	Small but Significant Non-transitory Increase in Price
TFEU	Treaty on the Functioning of the European Union

# 1 Introduction

On the 6<sup>th</sup> of May 2015, the European Commission launched the sector inquiry into e-commerce. This was a part of the Digital Single Market Strategy.<sup>1</sup> Two years later on the 10<sup>th</sup> of May 2017, the Commission published their final report.<sup>2</sup> E-commerce is a growing sector within the European Union. Internet shopping increased from 30% in 2007 to 55% in 2016.<sup>3</sup> This growth has had a high impact on the behaviour of both consumers and companies.<sup>4</sup> This relatively new environment and change of behaviour has also led to new challenges in EU competition law.<sup>5</sup>

A phenomena related to e-commerce and EU competition law that has been under discussion within literature<sup>6</sup>, by national competition authorities<sup>7</sup> and the European Commission<sup>8</sup> is the so called ‘Most Favourite Nation clause’ that is often incorporated by online platforms, such as Amazon, Booking.com, Expedia etc., into their agreements with suppliers. A MFN clause entails, in short, that a supplier is not allowed to charge a lower price for his product on his own website or, in some cases, on any other online platform than on the platform that has an MFN clause in its agreement with this supplier.<sup>9</sup>

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<sup>1</sup> Commission Decision of 06.05.2015, see:

<sup>2</sup> Final report on the E-Commerce Sector Inquiry, 10.05.2017, SWD(2017) 154 final. See also: Kramler, Thomas, *Journal of European Competition Law & Practice*, 2017, p. 81-82.

<sup>3</sup> Of the people aged between 16 and 74, see: final report on the E-Commerce Sector Inquiry, paragraph 3.

<sup>4</sup> Final report on the E-Commerce Sector Inquiry, paragraph 10.

<sup>5</sup> Ibid, 73 and further.

<sup>6</sup> See for example: Akman, *Journal of Competition Law & Economics* 2016, pp. 781-833, Gürkaynak, Gönenç and others, *European Journal of Law and Economics* 2015, pp. 129-155, Ezrachi, Ariel, *European Competition Journal* 2015, pp. 488-519, Heinz, Silke, *Journal of European Competition Law & Practice* 2016, pp. 530-536, Hunold, Matthias, *Journal of Competition Law & Practice* 2017, pp. 119-125.

<sup>7</sup> See for example Germany: Decision of the Bundeskartellamt on 20.12.2013, B 9 – 66/10, *HRS*, Sweden: Decision Konkurrensverket, 15.04.2015, Dnr 596/2013.

<sup>8</sup> Press release 04.05.2017: < [http://europa.eu/rapid/press-release\\_IP-17-1223\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1223_en.htm)>.

<sup>9</sup> See chapter 2 for a more detailed explanation.

National competition authorities have in some cases prohibited these kind of clauses to a certain extent based on article 101(1) TFEU.<sup>10</sup> However, the approach of the different competition authorities has not been uniform. Besides that, the Commission has recently addressed the issue of MFN clauses based on article 102 TFEU instead.<sup>11</sup>

Because of these inconsistencies and because of the growth of the e-commerce sector, it is necessary to analyse in which way possible competition problems related to MFN clauses should be addressed. The central question in this thesis is therefore:

*What are the anticompetitive effects of Most Favourite Nation clauses adopted by online platforms and how should they be assessed under EU competition law?*

In order to answer this question it is necessary to first analyse the different forms of MFN clauses and in which business model they are used. It is also necessary to address the issues related to platforms being on a two-sided market. After this, in chapter 3, it will be analysed what the anticompetitive effects of MFN clauses can be and what the procompetitive effects are. Special notice will be taken to the problem of freeriding. In chapter 4 it will be discussed and analysed how national competition authorities within the EU have been dealing with cases regarding online hotel portals and MFN clauses, especially how not all NCA's are applying the same approach. In the fifth chapter, the application of EU competition rules will be further analysed. The focus will be on market definition, the problems with applying article 101 TFEU and the option of applying article 102 TFEU instead. Finally there will be a conclusion.

In order to properly address and analyse these issues, several sources will be studied. Mainly this is the existing literature in the field of MFN clauses and

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<sup>10</sup> See footnote 7.

<sup>11</sup> Press release 04.05.2017: < [http://europa.eu/rapid/press-release\\_IP-17-1223\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1223_en.htm)>.

EU competition law, general EU competition law literature, literature on competition economics, decisions from NCA's, guidelines and other documents from the European Commission, European Competition law provisions and EU case law. EU case law will be limited to case law regarding general competition law issues, as there is currently no existing EU case law regarding MFN clauses in specific.

This thesis will be limited to the European Union. This thesis will also be limited to online platforms that apply MFN clauses and mostly to those that apply the agency model.

# 2 Background

## 2.1 Most Favoured Nation Clause

To be able to analyse Most Favourite Nation clauses in relation to EU competition law, it is necessary to first establish what a MFN clause is. The clause that is under discussion in this thesis goes by different names. Some use the term ‘parity clause’.<sup>12</sup> Another variation is ‘most favourite customer clause’.<sup>13</sup> In this thesis, all these names can be used for the same concept.

An MFN clause is a clause that can be incorporated into an agreement between suppliers and online platforms. The key point is that the online intermediary secures that its platform will receive the best terms from the supplier and that no other platform gets a better deal.<sup>14</sup> This also entails that the platform, that has included an MFN clause in the agreement with the supplier, gets the best price.<sup>15</sup>

In the case of online platforms (think for example of websites like Booking.com or Amazon), the MFN clause can lead to the prices offered on these website being the lowest prices for customers for the given product or service.<sup>16</sup> Akman calls these kinds of MFN clauses unusual because the customer that pays this lowest price is not a party in the agreement. The agreement is concluded between the online platform and the supplier, but it is the customer that buys the product or service for this price.<sup>17</sup> It seems at first glance that these kinds of clauses would be beneficial for consumers because they would be sure that they would pay the lowest price and receive the best conditions when they are using a platform that has negotiated an

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<sup>12</sup> See for example: Ezrachi, *European Competition Journal* 2015, p. 488.

<sup>13</sup> For example: Akman, *Journal of Competition Law & Economics* 2016, p. 781.

<sup>14</sup> Ezrachi, *European Competition Journal* 2015, p. 488

<sup>15</sup> Colangelo, *Journal of European Competition Law & Practice* 2017, p. 4.

<sup>16</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 782.

<sup>17</sup> *Ibid*, p. 785.

MFN clause. However, later on, it will be shown that this is not necessarily the case. MFN clauses can have negative effects on competition and on the prices that consumers pay for their product or service.

## 2.2 Narrow or wide MFN clauses

MFN clauses can be divided into narrow and wide clauses. A narrow MFN clause, in the case of online platforms, entails that the online platform will not have a higher price or worse conditions than the supplier provides on its own website for the same product.<sup>18</sup>

With a wide MFN clause, the online platform does not only get a price guarantee in relationship to the supplier's own website, but also in comparison to any other platform.<sup>19</sup> This would mean that the supplier guarantees that he will match the prices and conditions on the platform with the prices and conditions on its own website and on other online platforms.<sup>20</sup> From this it follows that if a supplier would have an MFN clause in his contract with multiple platforms, the prices on those platforms would be the same. Since a lowering of the price on one of the platforms would automatically result in the lowering of the prices on other online platforms with an MFN clause. This will be further discussed in chapter 3.

## 2.3 Online platforms

The case of online platforms can be seen as differentiating from a situation with an offline retail construction. Online platforms are two-sided markets. This means that they have customers on two sides.<sup>21</sup> On the one side there are the consumers who buy services or products, for example they book

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<sup>18</sup> Ezrachi, *European Competition Journal* 2015, p. 489.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 818.

hotel nights. On the other side there are the suppliers, for example hotels. They are customers of the online platform as well since they want to use the service of the platform to promote and sell their services or products. Under the agency model there can be identified two different contractual relationships. There is a contract between the supplier and the consumer and there is a contractual relationship between the online platform and the supplier.<sup>22</sup> On two-sided platforms there are indirect network effects. This means that more users on one side result in more users on the other side of the platform.<sup>23</sup>

In an (offline) retail model, it is often the store buying products from the supplier and then selling those products to their customers for a higher price. This can be defined as the wholesale model.<sup>24</sup> They have to find their profit in the difference in price between the supplier's price and the retail price. The retailer sets the retail price.<sup>25</sup> On two-sided online platforms, it is often the supplier that sets the final price for the consumer. The supplier then pays the platform for the services it provides.<sup>26</sup> This is the agency model.<sup>27</sup> For example, from the Terms and Conditions of Booking.com B.V. it becomes clear that Booking.com is the legal agent for its suppliers. In the terms it states that a customer enters into a legally binding contractual relationship with the supplier and that Booking.com B.V. acts as an intermediary.<sup>28</sup> This thesis is focussed on online platforms that are using the agency model because the agency model is often used by online platforms and suppliers and it is under this model that MFN clauses are adopted and can have an effect on competition.<sup>29</sup>

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<sup>22</sup> See the Figure 1 in: Solano Díaz, Pablo, *European Journal of Legal Studies* 2016, p. 50.

<sup>23</sup> Graef, Inge, *Internet Policy Review* 2015, fetched online 22-03-2017, p. 2.

<sup>24</sup> Ezrachi, *European Competition Journal* 2015, p. 489.

<sup>25</sup> Fletcher, Amelia, HVIID, Morten, *Antitrust Law Journal* 2016, (accessed online).

<sup>26</sup> *Ibid.*

<sup>27</sup> Ezrachi, *European Competition Journal* 2015, p. 489, See also: Munday, Roderick, 2013, p. 1, the agent acts on behalf of and under control of the principal.

<sup>28</sup> See Terms and conditions of Booking.com BV (English version) as valid on 23.05.2017: < <https://www.booking.com/content/terms.en-gb.html> >

<sup>29</sup> Ezrachi, *European Competition Journal* 2015, p. 489.

# 3 Competitive effects

## 3.1 Competitive harm

### 3.1.1 Barriers to entry

MFN clauses in agreements with online platforms and suppliers can cause competitive harm. It is for this reason that the clauses are a subject of interest for competition authorities. One of these possible competitive harms is the barriers to entry.<sup>30</sup>

MFN clauses can result in high barriers to enter the market. The reason for this is that new entrants will not be able to have lower prices than the existing retailers with MFN clauses.<sup>31</sup> If the new entrant is willing to receive a lower fee from the supplier for its services on the platform, this could normally result in the supplier offering lower prices on this new platform. The supplier could offer a lower price on the platform and still receive the same remuneration (after fees) for that product as he would receive through other platforms for which he has to pay higher fees and therefore charges a higher price. If the new entrant could charge a lower price on its platform, customer would potentially switch to this new platform. This could give the entrant the opportunity to establish itself on the market and therewith trigger network effects.

However, the existence of a wide MFN clause in contracts between existing platforms and suppliers would make this strategy difficult. If the supplier would be willing to lower the price on the new platform, the MFN clause would result in the lowering of prices on platforms with MFN clauses as well. The result would be that the supplier has to charge lower prices on all platforms with MFN clauses, even though those platforms might charge higher fees than the new entrant. The wide MFN clause would make it

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<sup>30</sup> Ezrachi, *European Competition Journal* 2015, p. 498.

<sup>31</sup> Solano Díaz, Pablo, *European Journal of Legal Studies* 2016, p. 48

impossible for the supplier to match the lower charges of the new entrant with the prices it offers on that specific platform.<sup>32</sup> The result would therefore be that the prices on the new platform are exactly the same as the prices on the existing platforms. The new entrant can therefore not use this strategy to enter the market.<sup>33</sup>

However, as Ezrachi argues, the new entrant could also use an MFN clause in its own advantage. If the new entrant would adopt a business model with an MFN clause itself, it would at least be certain that it could invest in the platform without risking that other platforms would undercut its prices. A wide MFN clause would give the new entrant the same ‘price matching’ advantages as the existing platforms.<sup>34</sup> On the other hand, it is in my opinion that it might potentially be difficult for new entrants to negotiate an MFN clause into their agreements with suppliers. The reason for this is that the suppliers will be more likely to accept an MFN clause if they think that being on the platform will increase the supplier’s sales.<sup>35</sup> A new entrant with a lower amount of customers might not be attractive enough for a supplier to allow a MFN clause. Even if the new entrant is more efficient and can charge lower costs, this could still be a risk. If the new entrant would have an MFN clause in its contracts, it could increase its fees towards the suppliers later. As Akman also argues, the possibility for platforms to increase their fees towards suppliers would lead to higher costs for suppliers and therefore could lead to suppliers increasing their prices all together.<sup>36</sup>

### **3.1.2 Resale price maintenance?**

A wide MFN clause in an agreement between an online platforms and a supplier can lead to more uniformity in the prices for certain products.<sup>37</sup> As discussed earlier in this thesis, it leads to uniform prices on different online

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<sup>32</sup> Ezrachi, *European Competition Journal* 2015, p. 498 and 499.

<sup>33</sup> *Ibid*, p. 499.

<sup>34</sup> *Ibid*.

<sup>35</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 791.

<sup>36</sup> *Ibid*, p. 792.

<sup>37</sup> Ezrachi, *European Competition Journal* 2015, p. 499.

platforms since a lowering of the price on one platform would lead to the lowering of the price on another platform. This would result in less intra-brand competition. As long as there is still inter-brand competition, this would not necessarily have a high impact on competition.<sup>38</sup> If there is a lot of inter-brand competition, the supplier would still need to keep the prices of his products low enough because otherwise consumers might switch to another supplier.<sup>39</sup>

It can be argued that wide MFN clauses can be seen as resale price maintenance. Minimum RPM falls under article 101 TFEU and is currently considered a restriction by object in vertical agreements.<sup>40</sup> There are different variants of RPM, but the most harmful one for competition is probably the fixed retail price.<sup>41</sup> Fletcher and HVIID argue that wide MFN's are "RPM at its worst".<sup>42</sup> They argue that harmful RPM includes both a vertical and horizontal element. The vertical element being the supplier deciding the retail price. The horizontal element is that the supplier sets identical retail prices at all retailers. It can be argued that MFN clauses have both this horizontal and vertical element because the suppliers set the final retail price. However, because of the wide MFN clauses, this results in uniform price among the retailers (the online platforms).<sup>43</sup> This could be a potential problem for competition because of the network effects of online platforms. Some consumers might automatically go to one or a few specific platforms for certain products (for example hotel nights). However, it will be discussed in chapter 5 that it is difficult to use article 101(1) TFEU to prohibit these possible uniform prices.

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<sup>38</sup> Bishop & Walker 2010, p. 197.

<sup>39</sup> Ezrachi, *European Competition Journal* 2015, p. 499.

<sup>40</sup> Jones & Sufrin 2014, p. 789.

<sup>41</sup> Ioannidou, Maria & Nowag, Julian, *European Competition Journal* 2015, p. 344.

<sup>42</sup> Fletcher, Amelia, HVIID, Morten, *Antitrust Law Journal* 2016 (accessed online).

<sup>43</sup> *Ibid.*

## 3.2 Pro-competitive effects

### 3.2.1 Introduction

Online platforms can be a very useful tool for consumers to compare prices and conditions of certain products. It is easy for consumers to gain information over the Internet. It is hard to make consumers pay a higher price if they have easy access to prices of others. The existence of online platforms or price comparison websites can therefore promote competition.<sup>44</sup> However, these platforms want to earn back their investments and need to limit the risk of freeriding.<sup>45</sup>

### 3.2.2 Freeriding

The problem of freeriding can occur when retailers lift on the services or advertising that is provided by other retailers. An example in which freeriding occurs is when stores offer pre-sales services like well-trained staff that can inform and explain the product to the customers. This can be argued as valuable for consumers and suppliers since the consumer gets to know more about the product and the product can become more popular, so it is beneficial to suppliers as well. When freeriding occurs, it means that another retailer that sells this product, might not offer any pre-sales services, but lifts on the service that is given by the first retailer. In that case the second retailer can have lower costs and a lower price, but still free ride on the fact that the customer is informed about this product by another retailer that offers pre-sales services.<sup>46</sup>

According to Bishop and Walker, it is beneficial for some retailers to not offer pre-sales services. However, they argue that it would become a problem if all or most retailers stop offering pre-sale services. This would be likely to happen if there are no measures taken since retailers would be less

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<sup>44</sup> Ezrachi, *European Competition Journal* 2015, p. 492.

<sup>45</sup> Colangelo, *Journal of European Competition Law & Practice* 2017, p. 5.

<sup>46</sup> Bishop & Walker 2010, p. 196.

likely to offer pre-sales services if they know that other retailers would free-ride on those services and it would be more beneficial for themselves to also free-ride instead of offering the service themselves. This would then lead to a decrease of pre-sales services and would be unfavourable for the supplier.<sup>47</sup> A solution to this problem could be a system of selective distribution, so the supplier only distributes the product through retailers that offer adequate pre-sales services.<sup>48</sup>

The same thing can occur with advertisement. If one retailer advertises a certain product or service, it can increase the popularity of that product as a whole. In this way, retailers that do not advertise can benefit from the retailers that do advertise. This could again lead to less advertisement for the product overall and therefore lower sales of the product. This would be a disadvantage for the supplier. It would again be an option for the supplier to use a selective distribution system to avoid this.<sup>49</sup> The use of a selective distribution system might be anti-competitive since it could reduce intra-brand competition. This could be a problem especially when inter-brand competition is weak.<sup>50</sup>

In the case of online platforms, the free-riding problem can also occur. The website Booking.com can be taken as an example. On this website, customers can book hotel nights all over the world. On the website, the consumer can search on a specific city, for example Stockholm, for certain dates. The customer then gets a list of hotels available for those dates with their prices. It is possible to filter the search, to get for example only hotels with four stars or more, or a sauna. On the website the customer can also read what services the hotel offers exactly, where it is located and what other travellers thought about the hotel.<sup>51</sup> In this way the website connects consumers with suppliers (in this case the hotels). This also creates indirect network effects; the more hotels are offered on the website, the more

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<sup>47</sup> Bishop & Walker 2010, p. 196.

<sup>48</sup> Ibid, p. 197.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Go to: Booking.com.

travellers will use the website to find hotels and so on.<sup>52</sup> The online platform wants to make a profit and therefore it for example can charge the hotels for using its services and/or receive a percentage of the price the customer pays or a fee per booking.<sup>53</sup> Part of the reason why the hotels and travellers use the platform, is because it is easy to get a good overview of the available options and prices. However, if the platform's prices are higher than the price offered on the hotel's own website or other websites, this can lead to the customer using the information on the platform to find the perfect hotel and then booking it through another website. This is relatively easy, since all the searching occurs online and a consumer can easily search on more than one website.<sup>54</sup> From an economic point of view, this could be harmful for the online intermediary, since it will not be able to earn back the whole investment that has been done to create the well functioning, consumer friendly platform.<sup>55</sup>

An MFN clause can be a possible solution for the freeriding problem for online platforms.

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<sup>52</sup> Colangelo, Margherita, *Journal of European Competition Law & Practice*, 2017, p. 4.

<sup>53</sup> *Ibid*, p. 7.

<sup>54</sup> *Ibid*.

<sup>55</sup> Bishop & Walker 2010, p. 197.

# 4 National Competition Authorities EU

## 4.1 Introduction

Several National Competition Authorities in the EU have been dealing with MFN clauses and their competition law problems. In this chapter it will be shown that the approach of the different National Competition Authorities is differentiating.

## 4.2 Germany's *HRS* decision

### 4.2.1 Introduction

Germany is one of the European countries in which there has been a national competition authority that has taken a decision about MFN clauses and their validity under competition law. The Bundeskartellamt has decided on 20 December 2013 that *HRS*, an online hotel-booking portal, was not allowed to continue with its MFN clauses where it would affect German hotels.<sup>56</sup> The Düsseldorf Higher Regional Court confirmed this decision on 9 January 2015.<sup>57</sup>

### 4.2.2 Relevant market

The Bundeskartellamt has established the relevant product market as being the 'hotel portal market'. It distinguishes between online and offline sales, arguing that they complement each other and are not substitutable by each

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<sup>56</sup> Press release 20.12.2013:  
<[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20\\_12\\_2013\\_HRS.html?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html?nn=3591568)>.

<sup>57</sup> Press release 09.01.2015:  
<[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09\\_01\\_2015\\_hrs.html;jsessionid=CC8F5715BC923E4B488B3A2D9BFC03D3.1\\_cid371?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html;jsessionid=CC8F5715BC923E4B488B3A2D9BFC03D3.1_cid371?nn=3591568)>.

other.<sup>58</sup> The Bundeskartellamt strengthens this argumentation by pointing out that a fairly high price increase from *HRS* towards its suppliers and a stronger MFN clause, did not lead to hotels wanting to cancel their cooperation with *HRS*.<sup>59</sup> It is then also compared with the selling of flights through price comparing websites (PCW's). The Commission has earlier established that online travel agents (OTA's), and airline's own websites, are part of one single market.<sup>60</sup> The Bundeskartellamt argues that this is not the case for online hotel portals in comparison to hotels' own websites. The reason for this would be that there are many different hotels in comparison to the amount of airlines. The names of the airlines are more known by consumers than the names of all individual hotels.<sup>61</sup>

In my opinion the Bundeskartellamt has raised an interesting point. Consumers would not find as many hotels if they would not use the hotel portals. Also unlike airlines, there would be lower barriers to start a hotel. Hotels come in all sizes and shapes. Some hotels just have a couple of rooms, while others are part of a big chain. For airlines it would be harder to be particularly small. However, it can be argued that also for the hotel bookings, it is the same consumer group that books through the online portals and the hotel's website. If there would not be any MFN clauses, customers might easily switch from the hotel portal to the hotel's own website.

The geographical market is established as Germany.<sup>62</sup> It is argued that the hotel portal market is not a European market or a worldwide market because of the local staff and services that are offered on the portal.<sup>63</sup>

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<sup>58</sup> Decision of the Bundeskartellamt on 20.12.2013, B 9 – 66/10, *HRS*, English translation, not authentic, paragraph 74.

<sup>59</sup> *Ibid*, paragraph 86.

<sup>60</sup> Comp/M. 6163, 30.05.2011, paragraph 28.

<sup>61</sup> Decision of the Bundeskartellamt on 20.12.2013, B 9 – 66/10, *HRS*, English translation, not authentic, paragraph 90.

<sup>62</sup> *Ibid*, paragraph 1.

<sup>63</sup> *Ibid*, paragraph 7.

### 4.2.3 Agency model

The business model used by HRS can be categorised as the agency model. *HRS* charged 15% of the final price of a hotel room per booking to the hotel. The customer can book directly through the *HRS* portal and the 15% charge that the hotel has to pay to *HRS* is already included in the final room price that is shown on *HRS*'s website.<sup>64</sup>

The Bundeskartellamt argues that the MFN clauses are probable to affect trade between Member States and therefore both German, article 1 GWB and EU competition law, article 101 TFEU, apply.<sup>65</sup>

The Bundeskartellamt claims that *HRS* cannot be seen as a genuine agent, in which case article 101(1) TFEU would not apply. It is argued that in this case it is not the principle (the hotel) that restricts the agent (*HRS*) but the opposite. Also *HRS* is not dependent on the hotels, but it carries its own economic risks.<sup>66</sup> However, it will be discussed in chapter 5 that there are also arguments to support that *HRS* could be a genuine agent.

### 4.2.4 By effect

The Bundeskartellamt then continues to argue that there are competitive restraints by effect. It is argued that MFN's make it more difficult to enter the market.

Furthermore, MFN clauses result in collusion between the different hotel portals. The hotel portals will be reluctant to lower the commission they charge to the hotels if they know that the hotels will not be able to heighten the prices on the hotel portals.<sup>67</sup> Also it is not possible for the hotels to have

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<sup>64</sup> Decision of the Bundeskartellamt on 20.12.2013, B 9 – 66/10, *HRS*, English translation, not authentic, paragraph 2 and 3.

<sup>65</sup> *Ibid*, paragraph 8.

<sup>66</sup> *Ibid*, paragraph 148.

<sup>67</sup> *Ibid*, paragraph 157.

a different sales strategy.<sup>68</sup> Besides, the hotel cannot offer different prices on different channels. The Bunderkartellamt states that the negative effects on competition are increased by the MFN clauses of Booking and Expedia, which are other large hotel portals and therefore direct competitors of *HRS*.<sup>69</sup> These three portals together covered around 90% of the hotel portal market in Germany at the time of the decision.<sup>70</sup>

The German NCA argues also that there are anticompetitive effects between the hotels. Hotels are not able to adjust their pricing on different market circumstances.<sup>71</sup> Also is it not possible for hotels to offer special discounts on one place for example.<sup>72</sup>

According to the NCA, the exemption of article 101(3) TFEU in combination with article 2(1) of the Vertical Restraints Block Exemption Regulation does not apply since *HRS*' market share is more than 30%.

Furthermore is it argued that there is no individual exemption based on article 101(3) TFEU because the positive competition effects do not compensate the anticompetitive effects.<sup>73</sup> The problem of free riding is limited and the positive effects of avoiding free riding, such as improved quality of the portals, does not reflect fairly towards the consumers. The quality of the portals is so crucial for their business that it would not be much lower without the MFN clauses.<sup>74</sup>

The Bundeskartellamt concludes that the effect of MFN clauses is anti-competitive even though it could potentially reduce the search costs for consumers and be a solution for the problem of freeriding.<sup>75</sup>

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<sup>68</sup> Ibid, paragraph 9.

<sup>69</sup> Ibid, paragraph 137.

<sup>70</sup> Ibid, paragraph 163.

<sup>71</sup> Ibid, paragraph 165.

<sup>72</sup> Ibid, paragraph 166.

<sup>73</sup> Ibid, paragraph 198.

<sup>74</sup> Ibid, paragraph 199-205.

<sup>75</sup> Ibid, paragraph 154.

*HRS* offered a commitment based on article 32b GWB. However, the NCA has not accepted this commitment. The commitment that *HRS* offered was limited to 2 years, later extended to 5 years.<sup>76</sup> The Bundeskartellamt did not find this sufficient.<sup>77</sup>

On 23 December 2015, the Bundeskartellamt decided on another case regarding MFN clauses. This time it was Booking.com that was prohibited from continuing to apply their MFN clauses. In this decision, the NCA made clear that the change from a wide to a narrow MFN clause was not enough. It is argued that it is still an infringement on the hotel's freedom to set its own prices. Also it will be less likely for the hotel to lower the prices on their online portals if they have to keep a higher price on their own website. This also makes it harder for new portals to enter the market.<sup>78</sup> These last arguments seem to be a bit less convincing. It will be shown that other NCA's had a different opinion on the wide versus narrow MFN clauses.

## **4.3 Sweden, France and Italy**

### **4.3.1 Narrow MFN's allowed**

As mentioned earlier, not all NCA's have approached the MFN clauses in relationship to competition law in the same way. The Swedish NCA, Konkurrensverket, decided on 15 April 2015 that Booking.com commitments to have a narrow MFN clause rather than a wide MFN clause were sufficient.<sup>79</sup> Booking.com had also committed to allow hotels to have

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<sup>76</sup> Ibid, paragraph 61 and 62.

<sup>77</sup> Ibid, paragraph 263.

<sup>78</sup> Press release 23.12.2015:

<[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23\\_12\\_2015\\_Booking.com.html?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html?nn=3591568)>.

<sup>79</sup> Decision Konkurrensverket, 15.04.2015, Dnr 596/2013 (available in Swedish), paragraph 40.

discounts through their own websites if this was limited to certain customers or customer groups as well as through offline sales.<sup>80</sup>

Konkurrensverket stated that the problem with MFN clauses lays in the problem for the hotels to heighten their price on a specific platform as a reaction to a raise in the commission that is charged by that platform. In this way, platforms with MFN clauses could keep on increasing their commissions without losing customers to other platforms.<sup>81</sup> The Swedish Competition Authority seems to make a distinction between vertical and horizontal restraints. Narrow parity clauses would lead to vertical restraints while wide parity clauses would cause horizontal concerns.<sup>82</sup> Konkurrensverket clearly takes a different point of view than the German Bundeskartellamt. Interesting is that it is the same company (Booking.com) that is under review and yet the outcome differs in different EU countries. So whereas it was accepted by the Swedish NCA to adopt a narrow parity clause, in Germany Booking.com had to take different measures. There are more countries than just Sweden and Germany that have dealt with MFN clauses and competition law.<sup>83</sup>

### 4.3.2 The French twist

The French NCA decision was also directed to Booking.com. The commitments of Booking.com to change its MFN clauses into narrow clauses and to allow the hotels to have their own offline prices and discounts for particular customer groups, were accepted by the French NCA as well. Furthermore, France, Sweden, Italy and the Commission have been cooperating closely on this matter.<sup>84</sup> Interesting and somewhat surprising is

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<sup>80</sup> Ibid, paragraph 40.

<sup>81</sup> <[http://www.konkurrensverket.se/globalassets/english/competition/fact-sheet\\_hotels\\_monitoring\\_170406\\_eng.pdf](http://www.konkurrensverket.se/globalassets/english/competition/fact-sheet_hotels_monitoring_170406_eng.pdf)>.

<sup>82</sup> Ibid, see also: Solano Díaz, Pablo, *European Journal of Legal Studies* 2016, p. 52.

<sup>83</sup> See also Colangelo, *Journal of European Competition Law & Practice* 2017, p. 9 regarding Italy.

<sup>84</sup> Press release 21.04.2015:

<[http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=607&id\\_article=2535](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=607&id_article=2535)>.

that France has later accepted a new law in which all MFN clauses are practically prohibited.<sup>85</sup> This leads to more incoherence and is not practical for the online platforms such as Booking.com that have to apply different policies and structures depending on which country it is regarding, even though these countries fall under the same competition law, namely EU competition law.<sup>86</sup> In the next chapter it will be analysed how MFN can be assessed under EU competition law.

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<sup>85</sup> LOI n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques, Akman, *Journal of Competition Law & Economics* 2016, p. 783, see also footnote 9 in the article.

<sup>86</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 802 and 803.

# 5 EU Competition Law

## 5.1 Introduction

Apart from the EUMR and the state aid rules, the two main paragraphs in EU competition law are articles 101 and 102 TFEU. Article 101 is about agreements that harm competition, while article 102 forbids abuse of a dominant position. In this chapter it will be analysed if and how MFN clauses can be forbidden under EU competition law.

## 5.2 Market definition

Defining the relevant market is a key step in competition assessments. A narrow market definition can lead to higher market power and the other way around. Market power is essential when judging whether an undertaking can be considered to be violating article 102 TFEU regarding the abuse of a dominant position. The relevant market definition is also needed to test the competitive restraints.<sup>87</sup>

It is necessary to identify both the relevant product market and the geographical market.<sup>88</sup> The Commission defines the relevant product market as follows: “A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use”.<sup>89</sup> The relevant geographical market is defined as follows: “The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas

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<sup>87</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03).

<sup>88</sup> Ibid.

<sup>89</sup> Ibid, paragraph 7.

because the conditions of competition are appreciably different in those area”.<sup>90</sup> Ezrachi mentions that the market definition is mostly based on economics.<sup>91</sup>

When deciding the relevant market, it can be looked at demand-substitution and supply substitution. Demand-substitution should be seen from the consumer’s point of view. Would the consumer switch to another product? The supply substitution looks at the side of the supplier. Would the supplier be able to switch to producing another product? To define the relevant market, both demand- and supply-substitution must be taken into account, although the Commission has its main focus on demand-substitution.<sup>92</sup>

One of the tools that can be used to assess the demand-substitution is the so-called SSNIP-Test. “SSNIP” means “Small but Significant Non-transitory Increase in Price”.<sup>93</sup> It works as follows: if the price of product A raises with a small amount in area C, will consumers then switch to buying product A in area D instead, then area C and D are both included in the geographical market. If consumers would also switch to buying product B instead of product A, then product A and B belong to the same product market.<sup>94</sup>

Filistrucchi and others argue however that the SSNIP-Test cannot be applied in the same way to two-sided markets. Two-sided markets have two different sides and on each side there are different products or services sold. Besides that, there are also two different customer groups.<sup>95</sup> On the one hand for example consumers that want to book a hotel night and on the other side hotels that want to promote and sell their hotel rooms. Filistrucchi and others argue that there is a different approach depending on whether there is a ‘transaction market’ or a ‘non-transaction’ market. On a non-

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<sup>90</sup> Ibid, paragraph 8.

<sup>91</sup> Ezrachi, Ariel, 2014, p. 32.

<sup>92</sup> Jones & Sufrin 2014, p. 66.

<sup>93</sup> Ibid, p. 67.

<sup>94</sup> Ibid, p. 67.

<sup>95</sup> Filistrucchi, Lapo and others, *Journal of Competition Law & Economics* 2014, p. 295.

transaction market, there is no transaction between the two sides of the markets. An example of a non-transaction market is a media-market, such as a newspaper. Advertisers place their ads in a certain newspaper and the buyers of these newspapers read the newspaper including the ad.<sup>96</sup> The reader and the advertiser are in that way somehow connected, but there is no actual transaction between them and the reader might not be interested in a certain ad at all. The kind of online platforms that are in the scope of this thesis, fall under ‘transaction markets’. For example on the website Booking.com, there is a transaction between the consumer and hotel. The same applies for a website such as Ebay or Amazon.<sup>97</sup> Here the buyer actually uses the website to buy the product or service from the supplier.

It is then argued that in the case of a transaction market, only one market should be defined.<sup>98</sup> It is argued that the market consists of the possibility to do the transaction on this online platform.<sup>99</sup> In the Commission Decision *Google/ Double click*<sup>100</sup>, the Commission had to establish the relevant market that was related to (online) advertisement. First of all, the Commission argued that online and offline advertising is not belonging to the same relevant market due to the specific characteristics of each of them.<sup>101</sup> Also, the Commission argued in this case that there is a separate market for intermediation in online advertising.<sup>102</sup> It is argued that smaller publishers have a hard time to manage the high fixed costs that come from direct sales.<sup>103</sup> Furthermore it is argued that larger publishers sell some of their (less attractive) advertisement space through intermediaries as well due to lower costs even though some other (more attractive) advertisement space is sold directly.<sup>104</sup>

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<sup>96</sup> Filistrucchi, Lapo and others, *Journal of Competition Law & Economics* 2014, p. 298 and 301. See also: Graef, Inge, *Internet Policy Review* 2015, p. 4, fetched online 22-03-2017.

<sup>97</sup> Filistrucchi, Lapo and others, *Journal of Competition Law & Economics* 2014, p. 298-299.

<sup>98</sup> Ibid, p. 302.

<sup>99</sup> Ibid, p. 303.

<sup>100</sup> Case No COMP/M.4731, 2008, *Google/ DoubleClick*.

<sup>101</sup> Ibid, paragraphs 45 and 46.

<sup>102</sup> Ibid, paragraph 68.

<sup>103</sup> Ibid, paragraph 65.

<sup>104</sup> Ibid, paragraph 67.

A parallel can be drawn to the earlier discussed *HRS* case in which the German competition authority defined the relevant market as the ‘hotel portal market’.<sup>105</sup> Filistrucchi argued one relevant market should be defined in case of two-sided platforms when there is a transaction between both sides of the platform.<sup>106</sup> The actual relevant market definition depends on the specific market circumstances. As seen above, online markets can often be separated from offline markets. However, not always can intermediaries be seen as a separate market from direct sales.<sup>107</sup>

Defining the relevant market in the case of an online intermediary can therefore be a challenging first step for the Commission in assessing MFN clauses.

## **5.3 Article 101 TFEU**

### **5.3.1 Genuine agent under article 101(1) TFEU**

#### **5.3.1.1 Article 101(1) TFEU not applicable**

Article 101 TFEU prohibits “...agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market...”.

One of the first issues that come up when assessing MFN clauses under article 101 TFEU is the business model that is used by online platforms. In chapter 2 it was established that many online platforms have adopted the ‘agency model’. This brings authors to question whether MFN clauses

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<sup>105</sup> See chapter 4.

<sup>106</sup> See footnote 98.

<sup>107</sup> See Comp/M. 6163, paragraph 28 and the discussion in chapter 4 regarding the sales of flights.

would fall within the scope of article 101 TFEU at all.<sup>108</sup> Article 101 TFEU requires an agreement between undertakings. MFN clauses are incorporated into the agreements between the online platform and the suppliers. It is therefore important to establish whether this can be considered to be an agreement between undertakings. If the agent and the principal are a part of the same ‘economic unit’, there might not be an agreement between undertakings for the purpose of article 101(1) TFEU.<sup>109</sup>

The agreement between an online platform and a supplier is a vertical agreement. The Commission has laid down guidelines regarding the assessment of vertical restraints.<sup>110</sup> In these guidelines, the commission also clarifies which agreements fall outside of the scope of article 101(1) TFEU.<sup>111</sup> The Commission says that in case there is an agency agreement for the application of article 101(1) TFEU, “...all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1).”<sup>112</sup> This entails that in case the online platform is a so called ‘genuine agent’ of the supplier, in principle, the agreements between the online platform and supplier fall outside the scope of article 101(1) TFEU.<sup>113</sup>

To decide whether there is an agency agreement under the application of article 101(1) TFEU, the Commission looks at who carries the financial or commercial risk.<sup>114</sup> If the agent carries the financial or commercial risk, the agent is considered to be independent and the agreement would fall within the scope of article 101(1) TFEU.<sup>115</sup> Akman concludes that the online platforms can be considered legal agents for the purpose of article 101(1)

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<sup>108</sup> See for example: Colangelo, *Journal of European Competition Law & Practice* 2017, p. 10, Akman, *Journal of Competition Law & Economics* 2016, p. 805.

<sup>109</sup> Jones & Sufrin 2014, p. 773.

<sup>110</sup> Commission Notice, Guidelines on Vertical Restraints 2010, OJ C 130 (hereinafter: VBER Guidelines).

<sup>111</sup> VBER Guidelines, paragraphs 8-22.

<sup>112</sup> Ibid, paragraph 18.

<sup>113</sup> Jones & Sufrin 2014, p. 776.

<sup>114</sup> VBER Guidelines, paragraph 13.

<sup>115</sup> Ibid, paragraph 21.

TFEU.<sup>116</sup> He refers to the VBER Guidelines and case law and gives the following arguments.<sup>117</sup> The suppliers set the prices, not the online platforms.<sup>118</sup> The platform does not buy any products.<sup>119</sup> If products are not sold then the only financial risk for the platform is that it does not receive any commission, but this is not, according to the Commission, a financial risk that makes the ‘agent’ independent.<sup>120</sup> The online platform does not carry the risks for the product itself etc.<sup>121</sup> Basically it is the supplier that decides important things such as pricing and it is also the supplier that carries the financial and commercial risks other than the risks that are inherent in being an agent.<sup>122</sup>

Provisions in the agency agreement regarding the way in which products are purchased and sold, are considered to be inherent parts of the activities of the principal.<sup>123</sup> These activities, that include: pricing, limitations on the territory and customer groups for the sale of the products, are considered activities related to the way in which the products are purchased and sold.<sup>124</sup> These activities are necessary for the principal to be able to carry the financial risks and decide the commercial strategy. Therefore the provisions that regulate these activities, fall outside the scope of article 101(1) TFEU.<sup>125</sup>

### **5.3.1.2 Exceptions to the non-applicability of article 101(1) TFEU**

However, the Commission gives two exceptions to the rule that agreements between agent and principal do not fall within the scope of article 101(1) TFEU. The first consists of provisions that regulate the relationship between

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<sup>116</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 812.

<sup>117</sup> Ibid.

<sup>118</sup> See also VBER Guidelines, paragraph 18.

<sup>119</sup> Ibid, paragraph 16.

<sup>120</sup> Ibid, paragraph 15.

<sup>121</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 812.

<sup>122</sup> See VBER Guidelines, paragraph 16.

<sup>123</sup> Ibid, paragraph 18.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

the principal and agent.<sup>126</sup> The second consists of provisions in an agency agreement that would facilitate collusion.<sup>127</sup>

As regards to the first exception. These provisions do not discuss the way in which the products are sold but rather the relationship between the principal and agent. These provisions that regulate the relationship between the principal and agent, do fall within the scope of article 101(1) TFEU and could therefore be prohibited.<sup>128</sup>

An example of a provision that regards the relationship between the principal and agent is a provision that prohibits the principal from using additional agents for the sale of the same product. This is called an exclusive agency provision. The agent wants to be the only agent for the principal for a specific transaction. This provision would fall within the scope of article 101(1) TFEU, but the Commission argues that exclusive agency provisions usually do not give anticompetitive effects and therefore they would still not be prohibited under article 101(1) TFEU.<sup>129</sup>

An example of a provision that could be prohibited under article 101(1) TFEU is when the principal does not allow the agent to also be an agent for competing suppliers, so called single branding provisions.<sup>130</sup>

According to Akman this exception does not apply to MFN clauses.<sup>131</sup> MFN clauses do not regulate the relationship between the agent and the principal as such. MFN clauses do not say anything about whether the principal or agent is allowed to have any agency agreements with others.

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<sup>126</sup> Ibid, paragraph 19.

<sup>127</sup> Ibid, paragraph 20.

<sup>128</sup> Ibid, paragraph 19.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 813, footnote 173.

The other exception is an agency agreement that enables collusion.<sup>132</sup> As Akman discusses, this would mean that MFN clauses could fall under article 101(1) TFEU if they facilitate collusion between suppliers.<sup>133</sup> As Akman notices, this causes an implication for applying article 101(1) TFEU to MFN clauses since the problem here seems to be a possible collusion between platforms rather than between suppliers.<sup>134</sup> He claims that the National Competition Authorities have wrongfully applied article 101(1) TFEU in regards to vertical restraints on MFN clauses because the online platforms should be seen as genuine agents and the MFN clauses fall under the exclusion of the application of article 101(1) TFEU.<sup>135</sup>

Although it has to be analysed case-by-case whether there is a genuine agent for the purpose of article 101(1) TFEU, it is in my opinion that with the current guidelines and literature, online platforms that apply MFN clauses, would often be considered an agent for the purpose of EU competition law as argued by Akman. This would result in the exclusion of the application of article 101(1) TFEU to MFN clauses. It seems from the wording of the guidelines that the Commission argues here from the point of view that it is the agent that needs to be protected against the possible anticompetitive behaviour of the principal, rather than the other way around. The situation with MFN clauses seems to be slightly different from the agency agreements the Commission had in mind when drafting the Guidelines. If the Commission is of the opinion that MFN clauses should fall under vertical restrictions prohibited by article 101(1) TFEU, it would be good to adjust the VBER Guidelines or come with new guidelines more specified towards the application of competition law to online platforms and MFN clauses.

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<sup>132</sup> VBER Guidelines, paragraph 20.

<sup>133</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 813.

<sup>134</sup> Ibid.

<sup>135</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 814.

### 5.3.2 Price fixing

As discussed earlier, wide MFN could potentially result in retail price maintenance. There are however also some issues with applying this theory to article 101(1) TFEU. If online platforms are to be considered agents, then the supplier is not directly fixing the retail price of a distributor.<sup>136</sup> After all, it is in the agency model that the supplier directly sets the prices for the customers. The problem of price-fixing can normally occur in a distribution model where the supplier would directly or indirectly set the price that is charged by the independent distributors.<sup>137</sup>

Fletcher and HVIID argue that the result of a wide MFN clause could be a uniform price. It would however be complicated to prohibit this under article 101(1) TFEU.<sup>138</sup> It seems rather that it is inherent to an agency model that the supplier can set the prices. The competition problem comes rather from the online platform itself that indirectly makes online (platform) prices uniform. It would be interesting to see what would happen if MFN clauses would oblige a supplier to make sure that prices are the same or lower on the online platforms with MFN clauses in comparison to all online and offline retailers, even the ones that use a distribution model. If a supplier would have to enforce this, he would have to fix the prices on those other retailers or lower his prices on the online platforms with MFN clauses whenever any retailer (that is not an agent) decides to lower its prices. This would be problematic for a supplier since he has no control over the prices that retailers (that are not an agent) set.

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<sup>136</sup> Jones & Sufrin 2014, p. 789.

<sup>137</sup> Ibid.

<sup>138</sup> Fletcher, Amelia, HVIID, Morten, *Antitrust Law Journal* 2016, (accessed online).

## 5.4 Article 102 TFEU

### 5.4.1 Dominant position

Although the national competition authorities have applied article 101(1) TFEU to MFN clauses, above analysis has shown that this might not always be the best legal path. Another option would be to consider the application of article 102 TFEU instead.<sup>139</sup> Akman argues that this would be a more appropriate tool. First of all, the problem of the agency model under article 101(1) TFEU does not exist under article 102 TFEU. As discussed earlier, the existence of the agency relationship between supplier and online platform, can result in article 101(1) TFEU not being applicable since the agent and the principal form an economic unit.<sup>140</sup> Whereas article 101(1) requires an agreement *between* undertakings, article 102 is based on the unilateral behaviour.<sup>141</sup> Besides this, Akman states that article 102 moves the focus to the existence of market power. He argues that market power is crucial for a competition law assessment of MFN clauses because high market power could mean that there is low inter-brand competition. He states that vertical restraints are often not considered to be problematic if inter-brand competition is high. He therefore argues that market power is a key step in prohibiting an MFN clause under EU competition law.<sup>142</sup>

Article 102 TFEU regards the abuse of a dominant position. To be able to assess the dominance of an undertaking it is first necessary to establish the relevant product and geographical market. As has been addressed earlier, this is not an easy exercise. In *United Brands*<sup>143</sup> the ECJ has defined a dominant position as “...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an

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<sup>139</sup> See for example: Colangelo, *Journal of European Competition Law & Practice* 2017, p. 11 and 12 and Akman, *Journal of Competition Law & Economics* 2016, p. 788.

<sup>140</sup> See paragraph 5.3.1.

<sup>141</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 824.

<sup>142</sup> *Ibid.*

<sup>143</sup> Case 27/76, *United Brands v. Commission* [1978].

appreciable extent independently of its competitors, customers and ultimately of its consumers.”<sup>144</sup> The dominant position can also consist of multiple undertakings together having market power, in other words, collective dominance.<sup>145</sup>

In the *HRS* case for example, the German Bundeskartellamt had established that the combined market share of Booking, HRS and Expedia was approximately 90%.<sup>146</sup> This could be an indication of a collective dominant position.<sup>147</sup> The existence of a dominant position has to be assessed case by case and therefore there cannot be drawn an overall conclusion whether online platforms with MFN clauses have a dominant position.

Jones and Sufrin also argue that the establishment of a dominant position in ‘new economy markets’ should take into consideration the dynamics of these of markets. As discussed earlier, network effects play an important role in regards to two-sided markets such as online platforms.<sup>148</sup> While it is sometimes argued that this creates a need for competition authorities to step in before the networks become too large, it can also be argued that consumers would still switch to other networks if they were considered to be better.<sup>149</sup> It was argued in the *France Télécom*<sup>150</sup> case that it should be looked at both the potential and actual competition.<sup>151</sup> The ECJ stated however, that market shares at the time, were a good indicator for the existence of dominance.<sup>152</sup> Jones and Sufrin argue that the strategy of the Commission to deal with these issues mostly by Commitments Decisions

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<sup>144</sup> Ibid, paragraph 65.

<sup>145</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 826.

<sup>146</sup> Decision of the Bundeskartellamt on 20.12.2013, B 9 – 66/10, *HRS*, English translation, not authentic, paragraph 163.

<sup>147</sup> See also: Jones & Sufrin 2014, p. 344.

<sup>148</sup> Ibid, p. 362.

<sup>149</sup> Ibid, p. 362.

<sup>150</sup> Case T-340/03, *France Télécom SA v. Commission* [2007], see also Jones & Sufrin 2014, p. 363.

<sup>151</sup> Case T-340/03, *France Télécom SA v. Commission* [2007], paragraph 110.

<sup>152</sup> Ibid, paragraph 111.

results in a situation in which it is unclear how a dominant position should be established in these kinds of markets.<sup>153</sup>

## 5.4.2 Abuse

Merely having a dominant position in a relevant market is not prohibited by article 102(1) TFEU. It becomes prohibited once a dominant undertaking or undertakings abuse this position.<sup>154</sup> Abuses can be divided into two categories: exploitative abuses and exclusionary abuses.<sup>155</sup> Exploitative abuses relate to the harm of customers. Exclusionary abuses relate to the harm of competitors of the undertaking or undertakings that are holding a dominant position.<sup>156</sup>

There are a few potential abuses that can be identified in the cases regarding MFN clauses. First of all, as stressed earlier in this thesis, an online platform is a two-sided market. This entails that there are also two different customer groups. One can conclude from this that exploitive abuse can go in two directions, towards the suppliers and towards the customers that buy the end product.

It can be argued that there is a potential of excessive pricing towards suppliers.<sup>157</sup> Excessive pricing means that the prices that are charged have no “reasonable relation to the economic value of the product supplied”.<sup>158</sup> It can be argued that the prices that online platforms charge towards suppliers could be excessive because when a wide MFN clause is in place, suppliers could not calculate a heightening in the charges from the online platform into the price that is charged on that online platform. The (wide) MFN clause would ensure that the prices are still matched with the other

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<sup>153</sup> Jones & Sufrin 2014, p. 363.

<sup>154</sup> Ibid, p. 366.

<sup>155</sup> Ibid, p. 367.

<sup>156</sup> See: Jones & Sufrin 2014, p. 367 and Akman, *Journal of Competition Law & Economics* 2016, p. 828.

<sup>157</sup> See also article 102(a) TFEU.

<sup>158</sup> See Whish & Bailey 2015, p. 762 regarding Case 27/76, *United Brands v. Commission* [1978].

platforms.<sup>159</sup> However, excessive pricing as an abuse of a dominant position is a controversial concept. It can sometimes be argued that excessive pricing is pro-competitive rather than anti-competitive.<sup>160</sup> The reason for this is that it can be encouraging for new competitors to enter the market if prices on the market are high. It could also be an incentive for investments.<sup>161</sup> Besides this, as Jones & Sufrin argue, competition authorities, including the Commission, are not easily willing to regulate free price competition.<sup>162</sup> Furthermore, it is very difficult to establish what an excessive price is because it is complicated, or often impossible, to establish what a ‘fair’ price would have been.<sup>163</sup>

Akman mentions that MFN clauses can lead to higher prices for consumers and in this way there could be a potential exploitive abuse towards the customers on the other side of the market, the ones that buy the end product. This could lead to unfair pricing, which is one of the abuses explicitly mentioned in article 102(a) TFEU.<sup>164</sup>

An example of an exclusionary abuse can be that MFN clauses can create barriers to entry and therefore the foreclosure of the market as discussed in chapter 3. Akman argues that because of the MFN clauses, it can be harder for a new platform to enter the ‘platform market’ because they will not be able to have lower prices than the already existing (dominant) platforms.<sup>165</sup> This would make it hard to obtain the same network effects as the existing platforms. It can be argued that suppliers will not immediately switch to these new platforms even if they charge lower fees to the suppliers since the reason for a supplier to be on a platform would be to attract customers. If the new platform is not known and cannot undercut the prices of other platforms, it will be hard to attract customers and therefore hard to attract

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<sup>159</sup> Ezrachi, *European Competition Journal* 2015, p. 497.

<sup>160</sup> Jones & Sufrin 2014, p. 575.

<sup>161</sup> Ibid, p. 575-576.

<sup>162</sup> Ibid, p. 575-576.

<sup>163</sup> Ibid, p. 576.

<sup>164</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 828.

<sup>165</sup> Ibid, p. 829.

suppliers, due to network effects. A new entrant could try to distinguish itself from the existing platforms and therewith attract customers and suppliers. As discussed in chapter 3, it is in my opinion that it would be hard to enter the market in the case that dominant platforms have wide MFN clauses with suppliers.

Akman also suggests that competition between suppliers can be softened because suppliers that would not agree to have a MFN clause in their agreements with the platforms would be potentially banned from those platforms.<sup>166</sup> If the platforms have a (collective) dominant position then this could entail that the suppliers will not be able to reach enough customers anymore and therefore be excluded.<sup>167</sup> This could mean that if platforms were an important way for suppliers to reach their potential customers, suppliers would be forced to agree to an MFN clause.

### 5.4.3 Objective justification

Even if a potential abuse can be found, it is still possible that there is an objective justification.<sup>168</sup> In the *Post Danmark*<sup>169</sup> case, the ECJ has stated that the “conduct is objectively necessary...or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers...”.<sup>170</sup> Furthermore, it is up to the dominant undertaking to prove this objective justification. It should be shown that the efficiency outweighs the possible negative effects on consumer welfare and competition in the relevant market. It must be necessary for the achieving the efficiency and it must not remove all or almost all, actual or potential competition that exists in the relevant market.<sup>171</sup>

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<sup>166</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 829.

<sup>167</sup> Ibid, p. 829.

<sup>168</sup> See: Akman, *Journal of Competition Law & Economics* 2016, p. 830 and Jones & Sufrin 2014, pp. 386 and further.

<sup>169</sup> Case C-209/10, *Post Danmark A/S v. Konkurrencerådet* [2012].

<sup>170</sup> Ibid, paragraph 41.

<sup>171</sup> Ibid, paragraph 42.

A potential justification could be the free riding problem. MFN clauses would take away the problem of free riding as discussed in chapter 3. One argument, as mentioned by Akman, can be that without MFN clauses, the quality of platforms could go down because of the free-riding problem. Another reason he mentions is that platforms would lose their incomes if customers would use their platform for information and then buy the product somewhere else because the platforms usually earn a fee per transaction.<sup>172</sup> However, in my opinion it remains questionable whether freeriding justification would be accepted. As discussed earlier on, websites such as Booking.com have committed to limit their MFN clauses to narrow MFN clauses.<sup>173</sup> This could imply that at least for some platforms it is still possible to operate without a wide MFN clause. It seems therefore that it would be hard to objectively justify wide MFN clauses. However, this has to be decided on a case by case basis.

#### **5.4.4 EU Commission towards a dominant position approach**

Interesting is to see that the Commission has seem to have accepted the article 102 TFEU approach to the use of MFN clauses by dominant online platforms. In June 2015, the Commission opened proceedings against Amazon regarding the use of MFN clauses in their contracts with e-books suppliers.<sup>174</sup> In this first press release, the Commission already mentions ‘abuse of a dominant position’, but still mentions more commonly both article 101 TFEU and article 102 TFEU. Amazon had proposed commitments to stop using MFN clauses and on the 4<sup>th</sup> of May 2017, the Commission has announced that they accept the commitments from

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<sup>172</sup> Akman, *Journal of Competition Law & Economics* 2016, p. 830.

<sup>173</sup> See for example Decision Konkurrensverket, 15.04.2015, Dnr 596/2013 (available in Swedish).

<sup>174</sup> Press release 11.06.2015: <[http://europa.eu/rapid/press-release\\_IP-15-5166\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5166_en.htm)>.

Amazon.<sup>175</sup> Interesting here is that the Commission in this last press release only mentions article 102 TFEU and therefore seems to have started on a new path. Whereas the NCA cases as discussed in chapter 4 have been regarding article 101(1) TFEU, the Commission seems to have confirmed now that the abuse of a dominant position may also be a way to address the competition issues that are connected with MFN clauses. It is unfortunate however that this has not provided a clear analysis of how these cases should be assessed under article 102 TFEU since the Commission has accepted the commitments and therewith closed the case.<sup>176</sup> There are authors that suggest the Commission should provide guidelines regarding the assessment of MFN clauses under EU competition law.<sup>177</sup> In my opinion, this would indeed be very useful and it could make an end to the inconsistent competition law assessment within the European Union.

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<sup>175</sup> Press release 04.05.2017: < [http://europa.eu/rapid/press-release\\_IP-17-1223\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1223_en.htm)>.

<sup>176</sup> See also: Akman, *Journal of Competition Law & Economics* 2016, p. 831, he suggested in his article already that the Commission in 2015 has hinted to apply article 102 TFEU to MFN cases.

<sup>177</sup> See for example: Gürkaynak, Gönenç and others, *European Journal of Law and Economics*, 2015, pp. 129-155 or Pablo, *European Journal of Legal Studies* 2016, p. 59-60.

## 6 Concluding remarks

Online platforms have shown to be a way for suppliers and consumers to come together. However, the incorporation of MFN clauses in the contracts between online platforms and suppliers have turned out to cause competitive concerns, since it can lead to barriers to the entrance of new platforms and potentially overall higher prices for consumers.

Several NCA's and the EU Commission have addressed these concerns. However, there is a high inconsistency in regards to the competition law assessments. Whereas Germany has prohibited both wide and narrow MFN clauses, other NCA's have accepted the switch from wide to narrow MFN clauses. This makes it difficult for companies to comply with competition law since they must act differently in different EU countries.

Unfortunately the Commission has not yet made an end to this inconsistent practice. It would be very useful if the Commission would present guidelines regarding the assessment of MFN clauses under EU competition law. Another way of gaining more clarification would be if the Commission would bring a case before the ECJ.

It seems from the recent proceedings against Amazon, that the Commission has opened the door towards an assessment of MFN clauses under article 102 TFEU rather than article 101 TFEU. It is in my opinion that the article 102 TFEU approach would be the better way of assessing MFN clauses under EU competition law. Article 102 TFEU is applicable in situations where there is a genuine agent. That article 102 TFEU requires a (collective) dominant position is a merit. It is in my opinion that in the case of a dominant position it is more likely that the anticompetitive effects of MFN outweigh the pro-competitive effects.

Furthermore, the Commission should take the special market circumstances of online platforms into consideration when it establishes in which way MFN clauses should be assessed under EU competition law.

It will be interesting to see how the application of EU competition law will adapt to the rapidly changing online market. The E-commerce Sector Inquiry seems to be a step in the right direction.

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