Most Favoured Nation Clauses Revisited

Ingrid Vandenborre
Partner, Skadden, Arps, Brussels

Michael J. Frese
Associate, Skadden, Arps, Brussels

Anti-competitive practices; EU law; Germany; Most favoured customer clauses

1. Introduction

Antitrust enforcement in the European Union has recently focused on Most Favoured Nation (MFN) clauses. Also outside of Europe, there is an increasing interest in the competitive relevance of these clauses, including most recently in China. The recent investigations by competition authorities throughout the European Union have already resulted in a number of prohibition or commitment decisions, with several investigations still under way. However, the competition law assessment of MFN clauses is only gradually taking shape. Unlike most developments in EU competition policy, developments in the area of MFN clauses are at this stage still very much driven by the enforcement actions taken by Member State competition authorities.[1] In addition, the assessment of the competitive impact of an MFN clause is highly fact-specific and dependent on the market position of the parties, the characteristics of the market, and the manner in which the MFN clause is implemented. This article revisits the function and effects of MFN clauses and attempts to define the circumstances under which competition law scrutiny is warranted.

We will start off by describing the origins, definition and applications of MFN clauses. Section 3 then provides an overview of potential competitive effects. Case precedents are discussed in section 4. Section 5 draws on the earlier sections and provides suggestions on how to deal with MFN clauses under the current EU legal framework.

2. Origin, definition and applications

The term Most Favoured Nation originates from international trade agreements, where it refers to a clause granting the contracting nations trading conditions equivalent to those granted to the most favoured nation i.e. the most liberal trading conditions available to any nation. In the context of conventional commercial agreements, MFN clauses typically refer to price commitments, although MFN clauses may also relate to other terms and conditions. By virtue of an MFN clause, the seller in principle commits not to offer more favourable prices to other customers. These clauses are also known as most favoured customer clauses or price parity clauses. Genuine MFN clauses relate only to the seller's prices charged to different customers. These types of clauses should be distinguished from lowest-price guarantees or price match guarantees, which compare prices charged by different sellers.[2]

In practice, MFN clauses typically do *not* limit the seller's commercial freedom. The seller usually remains free to offer more favourable prices to other customers, provided this favourable treatment is extended to the beneficiary of the MFN clause. The contractual rights of the beneficiary can be more or less extensive. A retroactive MFN clause grants the beneficiary a right to be repaid the difference between the price it had to pay and the lower price offered to another customer. The longer the reference period, the higher the "penalty" for the seller to offer lower prices to a third party. MFN clauses may also be contemporaneous. In this case, the MFN clause essentially lowers the contractual price for as long as the seller offers this lower price to other customers. A distinction can also be made between MFN clauses that refer to an applicable unit price and clauses that refer to a total purchase value, taking into account also the quantity and even the quality of the products sold. The rights and obligations associated with an MFN clause may therefore vary considerably from contract to contract.[3]

MFN clauses can be used in a variety of contractual arrangements. Although MFN clauses may feature most frequently in supply agreements for intermediate goods, a lot of the recent attention to MFN clauses in the European Union has gone to platform agreements and—to lesser extent—agency agreements. In a supply agreement for intermediate goods, the beneficiary of the MFN clause and the buyer of the goods are the same. In a platform agreement, the MFN rights are granted to the platform providers whereas the products concerned are purchased by the customers of the platform, who are the indirect beneficiaries of the MFN clause. The interest of the platform provider is to generate sales (or traffic) through its platform, on which it typically earns a commission (or advertisement fees). The MFN clause guarantees that the platform provider can offer the lowest prices for the seller's products or services. The same rationale applies to MFN clauses in agency agreements.

The practical effects of MFN clauses may differ widely depending on the parties and the markets involved. For example, even without an MFN clause in place, a buyer may initiate price negotiations when he learns that competing buyers are able to buy at lower prices. In fact, if the buyer has a considerable share on the buying

[1] The Commission is reportedly closely monitoring and coordinating the enforcement actions of the Member States but so far has not initiated an EU proceeding.
[2] For a discussion on lowest-price guarantees or price match guarantees, see LEAR Report, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements* (September 2012), available via *www.learlab.com* [Accessed October 8, 2014].
[3] For ease of reference however, we will use the term price commitments to refer to any type of contractual MFN commitment.

market, he may even be able to obtain a discount or compensation for higher purchase prices that applied in previous periods. We will discuss the potential effects of MFN clauses in more detail in the next section.

3. Overview of the pro- and anti-competitive effects of MFN clauses

The welfare effects of MFN clauses are a much-debated topic.[4] MFN clauses—like almost all vertical restraints—can have pro- and anti-competitive effects. Whatever the ultimate assessment, they limit opportunities for price discrimination, which—depending on the circumstances—may be pro-competitive, anti-competitive, or without any material competitive effect at all.

3.1 Pro-competitive effects

The purpose of the MFN clause is to control, and in some cases reduce, input prices. This is particularly relevant in cases where the volume of potential sales to price sensitive third parties is sufficiently large compared to the sales made to the beneficiary of the MFN. An MFN clause may provide the buyer (e.g. a manufacturer of finished products or a distributor) with a degree of certainty that it will be able to recoup its sunk costs, by ensuring it gets the best purchase price that is available in the market. Without this assurance, the buyer may be exposed to rent-seeking behaviour by the seller and/or be faced with competition from other buyers who do not necessarily have better products or are able to produce more cost-effectively, but are simply able to purchase at lower prices—benefiting from the fact that the supplier has already recouped its fixed costs on the basis of its (higher priced) sales to the first buyer. In anticipation of these consequences, the buyer may not be willing to make significant relationship-specific investments, so that in turn new, better or cheaper products might not enter the market. This situation is known as the "hold up problem".[5] An MFN clause is able to solve this problem by guaranteeing that competing buyers will not be able to obtain products at more favourable rates. Indirectly, this also limits the seller's rent seeking incentives and results in lower prices for the buyer's customers. In this respect, an MFN clause can have pro-competitive effects.

A seller may also offer MFN clauses as a means to address demand uncertainty caused by consumers who delay their purchases for perishable goods in anticipation of last minute price drops.[6] The MFN clause could convince buyers not to delay their orders, thereby facilitating the seller in making efficient production and capacity decisions.[7] Also in this respect, MFN clauses can have positive welfare attributes.

An MFN clause may also limit transaction costs. By offering an MFN clause, the seller guarantees that competing buyers will not be able to buy at lower prices, thus reducing the possibility that the buyer will be outcompeted on the downstream market simply on the basis of lower purchase prices. By offering an MFN clause at an early stage of the negotiations, parties can avoid protracted price negotiations. In addition, by including an MFN clause in a supply agreement, parties will be more willing to agree on a long-term agreement, thus avoiding the need to engage in periodic renegotiations. By reducing transaction costs, MFN clauses may result in lower prices and quicker product launches.[8]

So MFN clauses can have a variety of pro-competitive effects, all of which are dependent on the factual context.

3.2 Anti-competitive effects

MFN clauses may also have anti-competitive effects. For example, MFN clauses may reduce the seller's incentive to lower prices to prospective buyers. This will be the case where a significant portion of the seller's sales are already subject to MFN clauses. In this case, the seller would have to repay the price difference to the beneficiaries of an MFN clause over a large portion of its sales, which could make the price decrease and the additional sales unprofitable. This may result in higher prices for the prospective buyers and—in addition—could block downstream entry and innovative product launches or business models.[9] However, competitive harm would only arise if there is (or remains) limited competition upstream, for instance in the case of parallel networks of MFN clauses. Otherwise, prospective buyers can simply turn to the seller's competitors.

"MFN plus" clauses may even result in higher input prices for the beneficiary, as well as for the rest of the market, as such a clause requires the seller to charge *higher* prices to prospective buyers.[10] Seller and beneficiary may then share the competitive advantage resulting from the clause based on a higher sales price for the seller's products to other buyers.[11] Again,

[4] For an overview of the relevant economic literature, see LEAR Report, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements* (September 2012), available via *www.learlab.com* [Accessed October 8, 2014].

[5] Cf. Steven C. Salop and Fiona Scott Morton, "Developing an Administrable MFN Enforcement Policy" (2012–2013) 27 *Antitrust* 15; Jason J. Wu and John P. Bigelow, "Competition and the Most Favoured Nation Clause" (July 2013) 2 *CPI Antitrust Chronicle* 5; Jan Peter Van der Veer, "Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis" (2013) 4(6) *Journal of European Competition Law & Practice* 501, 502.

[6] Wu and Bigelow, "Competition and the Most Favoured Nation Clause" (July 2013/2) *CPI Antitrust Chronicle* 6.

[7] Wu and Bigelow, "Competition and the Most Favoured Nation Clause" (July 2013/2) *CPI Antitrust Chronicle* 6.

[8] However, monitoring and litigation costs are likely to increase. This would result in some off-setting welfare losses. See: Jonathan B. Baker and Judith A. Chevalier, "The Competitive Consequences of Most-Favoured-Nation Provisions" (2012–2013) 27 *Antitrust* 20, 22.

[9] See Salop and Scott Morton, "Developing an Administrable MFN Enforcement Policy" (2012–2013) 27 *Antitrust* 15, 16, describing the US *Delta Dental* case, in which an entrant insurer tried to build a low-cost narrow network plan offering dentists incremental volume in exchange for lower prices, but was blocked as a result of the MFN provision between the incumbent insurer and the dentists, which made in uneconomical for dentists to sign up.

[10] See Salop and Scott Morton, "Developing an Administrable MFN Enforcement Policy" (2012–2013) 27 *Antitrust* 15, 16.

[11] See Salop and Scott Morton, "Developing an Administrable MFN Enforcement Policy" (2012–2013) 27 *Antitrust* 15, 16; Van der Veer, "Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis" (2013) 4(6) *Journal of European Competition Law & Practice* 501, 502.

competitive harm is only to be expected if there is (or remains) limited competition upstream, as prospective buyers would otherwise turn to the seller's competitors.

MFN clauses may also lead to an increase in market power on the downstream market. For example, a powerful beneficiary of an MFN clause would not only benefit from the favourable terms and conditions it has managed to negotiate, but also from any better terms its competitors, in selected cases, would obtain. This may drive competitors out of the market and may ultimately lead to higher prices.[12] However, similar to the earlier scenarios, competitive harm is only to be expected if there is limited competition upstream.

3.3 Limiting price discrimination

MFN clauses also limit price discrimination. In fact, if all customers benefit from an MFN clause, price discrimination will be excluded entirely. Although it is generally accepted that price discrimination may increase output and thus enhance allocative efficiency, under EU competition law price discrimination may be deemed problematic.[13] Pursuant to art.102 TFEU, undertakings with a dominant position are prohibited from applying dissimilar conditions to equivalent transactions if this places some trading parties at a competitive disadvantage compared to others. From this perspective, the welfare effects of MFN clauses are ambiguous.[14]

3.4 Facilitating devices

MFN clauses could also facilitate anti-competitive practices. For example, the Commission Guidelines on Vertical Restraints mention that MFN clauses can be used to make vertical price-fixing more effective.[15] This would be the case where the seller requires the buyer to apply MFN clauses in the downstream market. In this scenario, the MFN clause would reinforce upstream resale price maintenance.

MFN clauses could also function as a facilitating device for a cartel.[16] Indeed, the literature on MFN clauses seems to consider this as one of the clause's most problematic features.[17] As MFN clauses may reduce the incentive to lower prices (see section 3.2), they also may reinforce a collusive agreement between competitors by deterring cartelists from "cheating".[18] In particular, by agreeing on MFN clauses with their customers, selective price cuts by a cartelist may become very expensive and therefore less likely.[19] However, the stabilising effect of MFN clauses on cartels crucially hinges on the implied 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. There is no apparent reason why this would be the case. In practice, the stabilising effects of MFN clauses may thus be very limited.

3.5 MFN clauses without teeth

In some cases MFN clauses may have no competitive relevance at all. An MFN clause may merely formalise the standard business practice that if a buyer finds out that competing buyers are able to buy at lower prices, he will normally demand the same (whether during or at the end of the contract) and may even be able to obtain a refund for prices paid in the previous periods. Moreover, the MFN clause does not as such make it more likely that the buyer finds out about the prices charged to competing buyers. In practical terms, it may therefore be completely irrelevant whether a MFN clause is explicitly agreed upon.

Moreover, an MFN clause may be negotiated even though the seller is not even able to offer lower prices to other buyers. This will be the case if the buyer is powerful, but unaware of the seller's costs of production. The MFN clause would then replace the need for the seller to convince the buyer that it cannot lower its prices any further. Also in this scenario, the MFN clause has no effects on competition, although it may reduce transaction costs (see section 3.1).

4. EU case precedents

As indicated in the introduction, there have been several recent investigations into MFN clauses. The most prominent cases undoubtedly are the Bundeskartellamt's (BKartA) prohibition decision in the area of hotel online bookings and the EU Commission's commitment decision in the *E-Books* case. In addition, Amazon agreed to abandon its MFN requirements for its Marketplace platform, following which the BKartA and the UK Competition and Markets Authority (CMA) closed their respective investigations. Several other investigations by national authorities are pending in relation to the use of these clauses in contracts governing the online sale of hotel accommodation. Finally, the CMA has recently issued a decision, prohibiting MFN clauses between car insurers and price comparison websites.[20] This section

[12] See also Van der Veer, "Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis" (2013) 4(6) *Journal of European Competition Law & Practice* 501, 503.
[13] See Richard Whish and David Bailey, *Competition Law*, 7th edn (Oxford: Oxford University Press, 2012), 759–763.
[14] For a more detailed discussion of the welfare effects of MFN clauses from the perspective of price discrimination, see LEAR Report, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements* (September 2012), available via *www.learlab.com* [Accessed October 8, 2014].
[15] Commission Guidelines on Vertical Restraints [2010] OJ C130/1, 48.
[16] See George A. Hay, "Oligopoly, Shared Monopoly, and Antitrust Law" (1981–82) 67 Cornell L. Rev. 439, 455–456; Thomas E. Cooper, "Most-Favoured-Customer Pricing and Tacit Collusion" (1986) 17(3) Rand J. Econ. 377.
[17] Cf. Baker and Chevalier, "The Competitive Consequences of Most-Favoured-Nation Provisions" (2012–2013) 27 *Antitrust* 20, 22; Wu and Bigelow, "Competition and the Most Favoured Nation Clause" (July 2013/2) 2 *CPI Antitrust Chronicle* 3.
[18] Baker and Chevalier, "The Competitive Consequences of Most-Favoured-Nation Provisions" (2012–2013) 27 *Antitrust* 20, 22–23.
[19] While MFN clauses increase the price of cheating, they also increase the price of retaliation. It is therefore not obvious that MFN clauses will indeed stabilize cartels.
[20] See: *www.gov.uk/government/news/cma-finalises-changes-for-car-insurance* (last accessed on 26 September 2014)

details the circumstances under which the MFN clauses in the German *Hotel Online Bookings* case and the EU Commission's *E-Books* case were prohibited.[21]

4.1 Hotel Online Bookings

On December 20, 2013, the BKartA rendered a decision finding that the MFN clauses included in agreements between German hotels and HRS-Hotel Reservation Service Robert Ragge GmbH (HRS) infringed on art.101 TFEU and equivalent German law provisions.[22] Under the MFN clauses, HRS was granted at least as favourable prices and price conditions as those offered to other internet platforms and via the hotel's own channels, including bookings directly at the reception. The hotels also had to ensure that the other distribution partners such as tour operators committed to comply with the MFN clause. Further, the hotels had to compensate customers of HRS for any price difference resulting from the hotels' failure to respect the MFN clause.

The BKartA concluded that the MFN clauses restricted competition between online booking platforms and between hotels. In particular, competing booking platforms could not—by accepting a lower commission than HRS—offer hotel rooms at lower prices. This would lead to higher prices and it would block entry. In addition, hotels would not be able to adapt their prices and conditions to the respective distribution channel. Importantly, the BKartA emphasised that the anti-competitive effects of the MFN clauses were exacerbated by the existence of MFN clauses in agreements between hotels and HRS's two biggest competitors.

The BKartA also addressed HRS's arguments regarding the efficiencies of the MFN clauses. According to HRS, differences in the price of a hotel room across different channels would negatively impact the portal's incentives to make investments and affect the quality of its service offering. The BKartA considered that the contract-specific investments—and hence the risk of free-riding—were limited. It further considered that MFN clauses would only have a limited effect on the portal's incentive to invest in quality. The BKartA concluded that in any event the negative competition effects resulting from the application of rate parity would outweigh any potential efficiencies.

The prohibition decision was based on HRS's strong market position, which made the Vertical Restraints Block Exemption Regulation (VBER)[23] inapplicable, and the fact that HRS used a highly effective and aggressive method to enforce the rate parity clause. The BKartA defined the market as consisting of the provision of hotel portal services, as distinct from other hotel room distribution services such as online travel agency distribution or wholesale distribution. It estimated that, on this basis, HRS had a market share in excess of 30 per cent by revenue and by number of hotel nights booked. Based on this conclusion, the BKartA did not have to decide whether the rate parity clauses constituted vertical price fixing, which would have excluded the application of the VBER altogether. The BKartA also found that HRS actively monitored and enforced the MFN clause. HRS used internet crawlers that automatically searched for actual rates offered by the hotels to check on hotels in its system for any violations of rate parity. It would also threaten hotels, orally or in writing, with exclusion from the HRS portal in case of deviations.

The BKartA ordered HRS to delete the relevant clauses from its contracts and general terms and conditions, but no fine was imposed. HRS has appealed the decision.

4.2 E-Books

On December 12, 2012, the Commission prohibited MFN clauses in agreements between various international publishing houses and retailers, in particular Apple.[24] By virtue of the MFN clauses, Apple was given the assurance that the prices of the publishers' e-books would not be cheaper in any third party retail operation. The Commission's prohibition was laid down in a commitment decision adopted pursuant to art.9 of Regulation 1/2003.[25] A commitment decision allows the Commission to close an investigation after rendering legally binding the commitments offered by the parties under investigation. As a result, the illegality of the practices giving rise to a commitment decision and the need for the commitments is not de jure established. Nevertheless, the *E-Books* case is a valuable precedent as it indicates under what circumstances the Commission may consider an MFN clause to be problematic.

In the *E-Books* case, the Commission had taken the view that the MFN clauses included in the agency agreements that publishers had concluded with Apple were part of a combined effort of the publishers and Apple to raise the prices of e-books and exclude price competition at the retail level. Indeed, there was evidence that the publishers had discussed strategies to increase retail prices after Amazon—Apple's main competitor—started selling their e-books below cost.[26] There was also evidence that the publishers had engaged

[21] In a recent commitment decision, the UK OFT (now CMA) stated that its decision did *not* involve an assessment of the competitive impact of MFN clauses in relation to online bookings of hotel accommodation in the UK. See *Booking.com B.V., priceline.com, Expedia, Inc, InterContinental Hotels Group Plc and Hotel Inter-Continental London Limited* , Decision of 31 January 2014, OFT 1514dec. It follows from the subsequent appeal that these MFN clauses were widespread in the industry. See *Skyscanner v CMA* [2014] CAT 16.
[22] BKartA, *HRS-Hotel Reservation Service Robert Ragge GmbH*, B.9 — 66/10.
[23] Commission Regulation (EU) 330/2010 of 20 April 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] OJ L102/1.
[24] Case COMP/AT.39847 — *E-Books*. On July 25, 2013, the Commission adopted another commitment decision (under the same case number), this time addressed to Penguin, which initially was not willing to offer commitments. The Commission's E-Books investigation proceeded in tandem with the US E-Books investigation.
[25] [2003] OJ L1/1.
[26] Amazon was willing to (temporarily) incur a loss on every e-book sold, as low e-book prices would increase the sales of Amazon's Kindle e-reader device, which would ultimately offset the losses on e-books.

in direct contact with each other regarding their respective discussions with Apple and the envisaged commercial model for selling e-books to consumers through Apple, which entailed switching from the traditional wholesale model to an agency model.

Each of the publishers ended up signing agency agreements with Apple, containing the same key terms, including the payment of a commission to Apple equal to 30 per cent of the retail price paid by a consumer for an e-book purchased from the iBookstore, maximum retail price grids, and an MFN clause. The MFN clause provided that, in the event another retailer were to offer a lower price for a particular e-book, including in situations where that retailer was operating under a wholesale model and thus was free to set retail prices, the publisher would have to lower the retail price of that e-book in the iBookstore to match that other lower retail price. The Commission took the view that Apple and each of the publishers understood that the MFN clause created a strong incentive for each of the publishers to convert Amazon (and other major retailers) to the agency model in order to avoid the costs of having to match Amazon's lower retail prices under the Apple agency contract. Thus, the Commission viewed the MFN clause as a facilitating device through which each of the publishers separately could credibly threaten Amazon to accept the agency model or be denied access to its e-books. Amazon indeed accepted the agency model, and prices—at least in some markets—seem to have gone up.

Although the parties disagreed with the Commission's preliminary views, they ultimately offered, for a period of five years, to terminate the agency agreements and to abide by certain rules when renegotiating their commercial arrangements for e-books, including a ban on MFN clauses.

5. Applying EU competition law to MFN clauses

At the outset, it should be noted that the *Hotel Online Bookings* case and the *E-Books* case were both characterised by very specific facts that suggested the potential for anti-competitive effects as outlined in the sections above. In the *E-Books* case, the MFN clauses were alleged to form part of a strategy through which publishers implemented their horizontal agreement. In the *Hotel Online Bookings* case, the monitoring system covered all online offers and the MFN clauses were aggressively enforced. Moreover, the MFN clauses were deemed to cover a material portion of market supply. Finally, the BKartA found that the beneficial effects of the MFN clauses in terms of product development were insufficient to outweigh the anti-competitive harm.

Given the specific circumstances in *Hotel Online Bookings* and *E-Books*, these precedents cannot be easily extrapolated to other MFN commitments. In fact, in the current EU framework, MFN clauses are in principle valid and enforceable. MFN clauses are not considered hardcore restrictions[27] and are therefore exempted from the application of art.101 TFEU, provided that the parties' market shares remain below 30 per cent.[28] This EU framework equally applies for assessment by Member State authorities and courts.

The application of the exemption can be withdrawn by EU regulation, where "parallel networks of similar vertical restraints cover more than 50% of the relevant market,"[29] or by decision with respect to individual MFN clauses, when "in any particular case [the clause] has certain effects which are incompatible with Article [101(3) TFEU]".[30] Whether withdrawn by regulation or decision, the legal effects in terms of the validity of the clauses and the liability for fines do not cover the periods prior to the withdrawal. The MFN clauses in question then become subject to a case by case assessment.

The same is true when the parties' market shares exceed the 30 per cent threshold. There is no presumption that these clauses run counter to art.101(1) TFEU.[31] An authority must therefore establish with sufficient evidence that the clause restricts competition or that there is a significant likelihood of anti-competitive effects resulting from its application.[32] The anti-competitive nature of an MFN clause is largely dependent on: (i) the market position of the contract parties; (ii) market characteristics including for example the wide spread application of MFN clauses in the market and a sufficient degree of market transparency supporting application and enforcement of the clause; and (iii) actual enforcement and monitoring of the clause's application. In order for the buyer to enforce the clause (or be considered likely able to enforce the clause), information needs to be available about the price the seller charges to competing buyers.[33] Without market transparency, MFN clauses lack the ability to produce anti-competitive effects.

Moreover, even if an authority has established that the conditions of art.101(1) TFEU are fulfilled, the parties may still benefit from the exception under art.101(3) TFEU. As indicated above, an MFN clause may result in various efficiencies (e.g. entry and cost reductions), which could outweigh the clause's restrictive effects. In this

[27] Articles 4 and 5 VBER. Cf. BKartA, *HRS-Hotel Reservation Service Robert Ragge GmbH*, B.9 — 66/10, where the BKartA suggested that MFN clauses might have to be considered "hard core" restrictions.
[28] Articles 2 and 3 VBER.
[29] Article 6 VBER.
[30] Article 29 Regulation 1/2003.
[31] Recital 9 of the Preamble to the VBER.
[32] Article 2 Regulation 1/2003.
[33] Notably, the communication of prices applied by the seller to other buyers may under certain conditions in and of itself be viewed as part of an infringement of art.101 TFEU.

respect, the economic literature notes that an MFN clause may be seen as a less-restrictive alternative of more rigid supply structures like an exclusive supply agreement.[34]

6. Conclusion

Despite the recent focus of antitrust enforcement on MFN clauses, the anti-competitive effects of MFN clauses are generally limited to certain factual scenarios. Both the current EU legal framework and case practice reflect that apart from these circumstances MFN clauses in and of themselves are largely unproblematic and—under particular circumstances—may even be considered pro-competitive. MFN clauses are problematic where they reinforce a horizontal agreement in the upstream or downstream market segment, or where they are used to reinforce upstream resale price maintenance. Absent these circumstances, MFN clauses in and of themselves should not be viewed as anti-competitive unless the parties involved benefit from significant market positions and/or the use of the clauses is widespread, and the clauses are effectively monitored and applied so as to create a price floor.

[34] Baker and Chevalier, "The Competitive Consequences of Most-Favoured-Nation Provisions" (2012–2013) 27 *Antitrust* 20, 21.