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The Role of Market Transparency in Assessing MFN Clauses

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Recent years have shown increased antitrust attention to most favoured nation clauses. However, it is widely recognized that MFN clauses may have both pro- and anticompetitive effects. This article argues that MFN clauses should be assessed under a 'by effect' standard and that market transparency should play a role in this assessment. Market transparency not only determines the likelihood that an MFN clause is actually applied, it also determines the competitive conditions in the absence of the MFN clause. Both of these aspects play a crucial role in assessing the anticompetitive effects of MFN clauses, and precede the question whether potential procompetitive effects may offset potential anticompetitive effects. The importance of market transparency is illustrated with several case precedents, both within the area of MFN clauses and outside. It is also borne out by the fact that all the recent investigations are concentrated in the online sector, where markets are typically very transparent. Nevertheless, even in the online sector, market transparency is only the starting point of the analysis and does not prejudice the competitive implications of MFN clauses.

1 INTRODUCTION

MFN clauses are receiving bad press lately. Recent investigations show that competition authorities in the EU are becoming increasingly suspicious of contractual commitments by which a seller promises a buyer to grant the latter its most favourable conditions. These commitments are known as 'most favored nation' or 'MFN' clauses.¹ Although past investigations related to very particular markets and contractual arrangements, some authors predict that the recent developments mark the end of the tolerant views toward MFN clauses.² This would be an unfortunate development. It is far from clear that MFN clauses generally (or even most of time) restrict competition. In fact, there are a number of

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¹ 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. In contracts between companies, MFN clauses typically refer to price commitments, although MFN clauses may also relate to other terms and conditions. These clauses are also known as most favoured customer clauses or price parity clauses.

² Volker Soyez, *The compatibility of MFN clauses with EU competition law* 36(3) E.C.L.R. 107 (2015).

circumstances in which MFN clauses are entirely procompetitive, have no effects at all, or have countervailing benefits. Whether an MFN clause should be deemed problematic is entirely dependent on the market circumstances.

This article aims to contribute to the discussion on MFN clauses by examining the role of market transparency in assessing MFN clauses, both from a normative and a legal standpoint. Market transparency plays an important role in the counterfactual analysis and determines the likelihood that an MFN clause is applied. Therefore, market transparency can and should be taken into account in assessing the anticompetitive effects of MFN clauses. To this end, we will first revisit the theories of harm and efficiency (section 2) and the prevailing legal framework (section 3) and then consider the relevance of market transparency (section 4) and the possibility of integrating market transparency in the analysis under EU competition law (section 5). We conclude with a few considerations for further thought (section 6).

2 THEORIES OF HARM AND EFFICIENCY

MFN clauses come in various shapes and forms. Typically, the seller promises to extend to the buyer any more favourable sales conditions (e.g., price) granted to competing buyers. A retroactive MFN grants the beneficiary a rebate covering the difference between the purchase price and the lower price offered to other customers. The reference period determines the volume of sales covered by the rebate. A contemporaneous MFN does not include a rebate, but merely promises the buyer the lowest price offered to competing buyers.

As set out in more detail elsewhere, MFN clauses can have both pro- and anticompetitive effects.³ The potential procompetitive effects include lower prices (e.g., through a rebate), downstream and upstream entry (e.g., by solving ‘hold-up problems’ and allowing entrants to recoup sunk costs), reduction of transaction costs (e.g., by allowing for flexible long-term contracts and facilitating price negotiations), production efficiencies (e.g., by avoiding delays in purchase orders in anticipation of potential price drops), information efficiencies (e.g., by signalling information about product life-cycle or characteristics of supply), and product differentiation (by allowing sellers to commercialize their MFN commitment).⁴ MFN clauses may also have anticompetitive effects. They may reduce the seller’s incentive to lower prices for prospective buyers, which could limit competition on

³ Ingrid Vandendorpe and Michael J. Frese, *Most Favoured Nation Clauses Revisited*, 35(12) E.C.L.R. 588 (2014).

⁴ See also Steven C. Salop and Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27 *Antitrust* 15 (2012–2013); Jason J. Wu and John P. Bigelow, *Competition and the Most Favoured Nation Clause*, CPI *Antitrust Chron.* (July 2013/2); Jan Peter van der Veer, *Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis*, 4(6) *J. Eur. Comp. L. & Prac.* (2013).

the downstream market (e.g., by hindering an alternative downstream business model).⁵ ‘MFN plus’ clauses, requiring the seller to charge *higher* prices to prospective buyers, could even elevate price levels.⁶ MFN clauses may also strengthen the beneficiary’s market power and ultimately lead to higher end-consumer prices (e.g., by allowing an already powerful customer to benefit from the terms and conditions negotiated by its competitors).⁷ Furthermore, MFN clauses can be used to reinforce horizontal price fixing (e.g., by raising the costs of ‘cheating’)⁸ and minimum resale price maintenance (e.g., where the seller requires the buyer to apply MFN clauses in the downstream resale market). Finally, the effective application of MFN clauses will come with monitoring and enforcement costs.⁹

The ambiguous implications of MFN clauses are reflected in the limited available empirical evidence. In their survey of the empirical literature, the authors of the LEAR report (commissioned by the UK Office of Fair Trading) conclude: ‘the empirical papers that we have surveyed do not find any evidence that MFCCs [MFN clauses] have anticompetitive effects.’¹⁰ This conclusion is based on the fact that most papers show that MFN clauses are associated with price reductions, whereas the only paper that finds a price increase ‘studies a very specific and unusual case’: a government-imposed MFN regime.¹¹

To assess whether any of the above identified pro- and anticompetitive effects arise and which of these effects dominate, it is important to analyse the economic reality in which the MFN clause is applied. For example, many of the competitive harms identified above will only materialize in the absence of sufficient alternative

⁵ See Steven C. Salop and Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27 Antitrust 15, 16 (2012–2013), 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 it uneconomical for dentists to sign up.

⁶ Seller and beneficiary may share the competitive advantage bestowed on the beneficiary. See: Steven C. Salop and Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27 Antitrust 15, 16 (2012–2013); Jan Peter van der Veer, *Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis*, 4(6) J. Eur. Comp. L. & Prac. 502 (2013).

⁷ See also Jan Peter van der Veer, *Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis*, 4(6) J. Eur. Comp. L. & Prac. 503 (2013).

⁸ See George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 Cornell L. Rev. 439, 455–456 (1981–1982); Thomas E. Cooper, *Most-Favored-Customer Pricing and Tacit Collusion*, 17(3) Rand J. Econ. 377 (1986); Jonathan B. Baker and Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 Antitrust 20 (2012–2013); Jason J. Wu and John P. Bigelow, *Competition and the Most Favored Nation Clause*, CPI Antitrust Chron. (July 2013/2).

⁹ Jonathan B. Baker and Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 Antitrust 20, 22 (2012–2013).

¹⁰ LEAR Report, *Can ‘Fair’ Prices Be Unfair? A Review of Price Relationship Agreements* (September 2012), at 4.49, www.learlab.com (accessed 15 Jun. 2015).

¹¹ LEAR Report, *Can ‘Fair’ Prices Be Unfair? A Review of Price Relationship Agreements* (September 2012), at 4.50.

sources of product not bound by MFN commitments. As will be established below, the degree of market transparency is another relevant factor to consider.

3 ASSESSING MFN CLAUSES UNDER EU COMPETITION LAW

Despite the number of recent investigations, there is relatively little guidance on the assessment of MFN clauses under EU competition law. Case precedents are limited and none of the EU guidelines provide an assessment of MFN clauses in circumstances where they may be deemed anticompetitive. The guidance that does exist shows that MFN clauses are more likely to be assessed as a restrictive agreement than as unilateral abusive conduct. It also suggests that the prohibition of MFN clauses will remain limited to exceptional cases.¹²

3.1 LEGAL FRAMEWORK

Agreements that restrict competition and have an effect on trade between EU Member States can be contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU). MFN clauses can be caught by this prohibition. However, similar to most vertical agreements, MFN clauses are in principle exempted from this prohibition provided that the parties' market shares do not exceed 30% on the relevant selling and buying markets.¹³

The German Federal Cartel Authority (FCA) and the UK Competition & Markets Authority (CMA) have questioned whether 'agency MFNs' are covered by the exemption.¹⁴ Agency MFNs are MFNs that are negotiated by a party who neither sells nor buys the products involved but earns a commission on sales executed on its platform. Both authorities have suggested that agency MFNs qualify as fixed or minimum resale price maintenance (RPM). Pursuant to the relevant EU guidelines, even indirect forms of RPM lead to the exclusion of the whole agreement from the scope of the Block Exemption Regulation.¹⁵ In addition, the CMA has underscored that vertical agreements between competitors are not covered by the exemption. The Block Exemption Regulation and the Guidelines on Vertical Restraints do not seem to support the analogy between

¹² This view is not undisputed, see Volker Soyez, *The compatibility of MFN clauses with EU competition law* 36(3) E.C.L.R. 107 (2015).

¹³ Articles 2 and 3 of Commission Regulation (EU) No. 330/2010 of 20 Apr. 2010 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 23.4.2010, L 102/1 ('VBER').

¹⁴ *HRS-Hotel Reservation Service Robert Ragge GmbH*, B.9 – 66/10; *Private motor insurance market investigation (final report)*, appendix 12.1, <https://www.gov.uk/cma-cases/private-motor-insurance-market-investigation> (accessed 15 Jun. 2015).

¹⁵ Commission Guidelines on Vertical Restraints, OJ 19.5.2010, C 130/1, at 47–48.

RPM and MFN clauses.¹⁶ However, it will be important to carefully define the relevant markets where the MFN applies, so as to establish whether buyer and seller are competitors and thus whether the Block Exemption Regulation would apply.

For those MFN clauses that are covered by the Block Exemption Regulation, the exemption can be withdrawn for particular markets (in case of parallel networks of similar vertical restraints covering more than 50% of the market)¹⁷ or with respect to individual MFN clauses (when the effects of the clause are incompatible with Article 101(3) TFEU, e.g., because consumer benefits do not outweigh the restrictive effects).¹⁸ The MFN clauses in question then become subject to a case-by-case assessment, without any presumption of illegality. However, under the current EU framework, MFN clauses remain in principle valid and enforceable.

In the context of the case-by-case assessment (whether by virtue of the parties' market shares, their competitive relationship, or subsequent to the withdrawal of the exemption), the claimant or the investigating authority must establish with sufficient evidence that the MFN clause restricts competition.¹⁹ Although agreements can be deemed restrictive both 'by object' and 'by effect', the only types of coordination that can be qualified as by object infringements are those for which an effects analysis would be redundant in light of the likelihood of competitive harm.²⁰ In all other cases, the claimant or investigating authority will have to prove that competition has in fact been prevented, restricted or distorted to an appreciable extent.²¹ It should be noted that a potential anticompetitive effect may already qualify as a by effect restriction.²² Given the ambiguous theoretical and empirical implications, MFN clauses should not be considered by object infringements and thus require a full effects analysis before they can be prohibited in an individual case.²³ This entails that 'the competition in question should be assessed within the actual context in which it would occur in the

¹⁶ For example, the Commission Guidelines on Vertical Restraints seem to distinguish RPM from MFN clauses by holding that 'direct or indirect price fixing can be made more effective when combined with measures which may reduce the buyer's incentive to lower the resale price, such as the supplier printing a recommended resale price on the product or the supplier obliging the buyer to apply a most-favoured-customer clause.' (at 48).

¹⁷ Article 6 VBER.

¹⁸ Article 29 Regulation 1/2003.

¹⁹ Article 2 Regulation 1/2003.

²⁰ Case C-67/13 P *Groupement des cartes bancaires (CB) v. Commission*, nyr, para. 51.

²¹ Case C-67/13 P *Groupement des cartes bancaires (CB) v. Commission*, nyr, para. 52.

²² Case T-35/92 *John Deere v. Commission* [1994] ECR II-961, para. 92.

²³ The conclusion that MFN clauses should not be considered by object infringements is not uncontested. Notably, the UK CMA has indicated that it could not be ruled out that MFN clauses qualify as by object infringements. See *Private motor insurance market investigation (final report)*, appendix 12.1, at 20.

absence of the agreement in dispute'²⁴ and that 'it is necessary to take into consideration the actual context in which the relevant coordination arrangements are situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question'.²⁵ This may be different only when it is clear that the MFN clause was meant to reinforce a horizontal agreement. Even if an appreciable restriction of competition is proven, the parties may still benefit from an individual exemption under Article 101(3) TFEU. This requires *inter alia* that the defendant is able to prove that the MFN clause has resulted in countervailing consumer benefits. As will be detailed in sections 4 and 5, market transparency is an important aspect of the case-by-case assessment.

3.2 CASE PRECEDENTS

There have been several recent investigations into MFN clauses. The most prominent investigations undoubtedly are the ones in the hotel online bookings and e-books sectors. In addition, MFN clauses in contracts between private motor insurance companies and price comparison websites have been subject to investigation.²⁶ Although most of these investigations resulted in the termination of the MFN clauses, there is currently only one formal prohibition decision under EU competition law. This decision was adopted by the German FCA and related to the German market for hotel online bookings. A common feature in all of these investigations is that it involved 'agency MFNs' negotiated by a party who neither sells nor buys the products involved but earns a commission on sales executed on its platform. This subsection details the circumstances under which the MFN clauses in the above markets were deemed problematic.

MFN Clauses in the E-Books Sector

On 12 December 2012, the Commission adopted a commitment decision that excluded MFN clauses in agency agreements between Apple and various international publishing houses.²⁷ Although the parties disagreed with the

²⁴ Case C-382/12 P *MasterCard v. Commission*, nyr, para. 161.

²⁵ Case C-382/12 P *MasterCard v. Commission*, nyr, para. 165.

²⁶ Another investigation related to the MFN clauses applied by Amazon, who agreed to abandon its MFN requirements for its Marketplace platform, following which the German FCA and the UK CMA closed their respective investigations.

²⁷ Case COMP/AT.39847 – *E-Books*. 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.

Commission's preliminary views, they ultimately committed, 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.

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. 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. 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. There was also evidence that the publishers had engaged in direct contact with each other regarding their respective discussions with Apple and the envisaged agency model. Each of the publishers ended up signing agency agreements with Apple, containing the same key terms. The Commission thus viewed the MFN clause as a facilitating device for a horizontal agreement.

MFN Clauses in the Hotel Online Bookings Sector

There have been several investigations in the hotel online bookings sector, all of them conducted by national competition authorities, and some of them still unresolved. With one exception,²⁸ all of these investigations targeted the MFN clauses in contracts between hotels and online booking platforms, notably Booking.com, Expedia and HRS-Hotel Reservation Service. A number of probes have been concluded with commitment decisions.²⁹ The only formal prohibition decision to date stems from the German FCA.³⁰ This decision has been upheld on appeal by the Higher Regional Court of Düsseldorf.³¹

The prohibition decision related to MFN clauses in agreements between German hotels and HRS-Hotel Reservation Service Robert Ragge GmbH

²⁸ See *Booking.com B.V., priceline.com, Expedia, Inc, InterContinental Hotels Group plc and Hotel Inter-Continental London Limited*, Decision of 31 Jan. 2014, OFT 1514dec.

²⁹ See press releases of the French, Italian and Swedish Competition Authorities of 21 Apr. 2015.

³⁰ *HRS-Hotel Reservation Service Robert Ragge GmbH*, B.9 – 66/10.

³¹ OLG Düsseldorf, 9 Jan. 2015, AZ.VI – Kart. 1/14 (V).

(HRS). Pursuant to the MFN clauses, HRS was granted at least as favourable prices and conditions as those offered to other Internet platforms and via the hotel's own channels, including bookings directly at the hotel reception. Additionally, the hotels 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 FCA concluded that the MFN clauses restricted competition between online booking platforms and between hotels. In particular, hotels and booking platforms could not – by agreeing on a lower commission fee – offer hotel rooms at lower prices. This would lead to higher prices and block entry. In addition, hotels would not be able to adapt their prices and conditions to the respective distribution channel. The FCA emphasized that the anticompetitive effects of the MFN clauses were exacerbated by the widespread use of MFN clauses in the industry. The FCA ordered HRS to delete the relevant clauses from its contracts and its general terms and conditions. No fine was imposed.

MFN Clauses in the Online Private Motor Insurance Sector

On 18 March 2015, the UK CMA published an order *inter alia* prohibiting the use of certain MFN clauses in agreements between private motor insurance companies (PMIs) and price comparison websites (PCWs), as well as behaviour by large PCWs which seek to replicate the effect of these MFN clauses (e.g., threatening to delist PMIs if lower prices are offered on other PCWs).³² The MFN clauses were deemed to have 'adverse effects on competition', thus running counter to UK competition law.³³

Unlike the rebate system applied in the German hotel online bookings sector, the MFN clauses agreed on by the PCWs and PMIs actually seemed to prevent

³² *The Private Motor Insurance Market Investigation Order 2015*, at 4 and 5, <https://www.gov.uk/cma-cases/private-motor-insurance-market-investigation> (accessed 15 Jun. 2015).

³³ Pursuant to s. 134(1) of the Enterprise Act 2002, the applicable UK standard is whether 'any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom'. It can be concluded with the CMA that '[t]he identification of anti-competitive features of a defined market (for instance, the structure of the market or unilateral conduct) in a market investigation or the imposition of remedies to address the adverse effects on competition arising from those features, does not mean that individual market participants have infringed existing competition law(s), in particular the prohibitions contained in Articles 101 and 102 of the TFEU' (see: *Private motor insurance market investigation (final report)*, appendix 12.1, at 7). Nevertheless, the CMA pointed out that 'there is a potential overlap between a finding of an AEC and a finding of a restriction of competition within the meaning of Article 101 [TFEU]' (*ibid.* at 17). The CMA ultimately reached the conclusion 'that agreements between PMI providers and PCWs containing wide MFNs . . . are also within the scope of Article 101(1) [TFEU] on the basis that they have a material adverse effect on competition' (*ibid.* at 24).

the PMIs from offering lower prices through other distribution channels. As described by the CMA:

The first PCWs gathered prices by ‘screen-scraping’ from PMI providers’ websites As relationships with PMI providers developed, PCWs linked into the back-office systems of PMI providers to obtain quotes. At this point, . . . MFNs started to be introduced into standard contracts with PMI providers. As the market developed further, MFN clauses were then sometimes widened to include sales through other PCWs and other sales channels.³⁴ (internal footnotes omitted)

The MFN clauses stated that prices on the PMI’s own website and/or other sales channels could never be cheaper.³⁵ In this respect, the MFN obligation for the UK PMIs seems to have been somewhat more restrictive than the MFN obligation for the German hotels.

The CMA distinguished between price parity with the PMI’s own website (‘narrow MFN clauses’) and price parity requirements covering all sales channels, including competing PCWs (‘wide MFN clauses’) and concluded that only the latter resulted in an ‘adverse effects on competition’. In particular, it found that a wide MFN prevented a retail customer from finding the same PMI policy more cheaply on a competing PCW, thus reducing the incentives for the latter to seek better PMI prices for its retail consumers and to apply commission reductions.³⁶ With respect to narrow MFN clauses, the CMA concluded that the restrictive effects were unlikely to be significant, as PMIs had stronger incentives to price competitively on PCWs than on their own websites.³⁷ Moreover, the restrictive effects were necessary for the viability of the efficiency-enhancing PCW business model and reduced the search costs for retail consumers.³⁸

The CMA prohibited PCWs and PMIs from entering into MFN clauses that contain ‘a restriction’ from offering better-priced products through third party platforms. In addition, large PCWs are prohibited from engaging in unilateral behaviour that would seek to replicate the same effects. In light of the wording of the CMA order and the wording and working of the MFN clauses, it is unclear whether these prohibitions cover rebate-based MFN clauses like those identified in the hotel online booking sector.

³⁴ *Private motor insurance market investigation (final report)*, at 8.29.

³⁵ *Private motor insurance market investigation (final report)*, at 8.27.

³⁶ *Private motor insurance market investigation (final report)*, summary, at 58.

³⁷ *Private motor insurance market investigation (final report)*, at 8.68.

³⁸ *Private motor insurance market investigation (final report)*, summary, at 60–61.

4 THE RELEVANCE OF MARKET TRANSPARENCY FOR THE ASSESSMENT OF MFN CLAUSES

Apart from the fact that all recent investigations involved agency MFNs, they share another distinguishing feature: they were applied in online market sectors. Few sectors are as transparent as the online sector, where sales prices can be easily monitored. The importance of market transparency is reflected in the FCA's prohibition decision in the hotel online bookings sector. The finding that the MFN clauses at issue restricted the hotels in determining booking rates across online portals, thereby limiting competition between portals, was based on the particular market characteristics which included the prevailing degree of market transparency.³⁹ In this respect, the FCA also noted that HRS actively monitored and enforced the MFN clause by using internet crawlers that automatically searched for actual rates offered by the hotels.⁴⁰

Market transparency plays an important role in examining the effects of MFN clauses. An MFN clause affects competition by disincentivizing the seller from lowering prices. In the literature, the MFN is sometimes described as a penalty that the seller suffers if it offers a lower price to competing buyers, as the same lower price will then need to be extended to the beneficiary of the MFN. This penalty is a function of the volume of sales covered by the MFN commitment, the difference between the prices offered, and the probability that the MFN clause will effectively be applied.⁴¹ As pointed out by the LEAR report, the probability that the MFN clause will be applied depends on various factors, including the legal context in which a claim for application of the clause has to be made (e.g., burden of proof, admissibility of evidence, etc.), the characteristics of the buyers, and the characteristics of the market.⁴² The latter two factors are closely related and – for the purpose of this article – will be grouped together under the term market transparency. A higher degree of market transparency results in lower monitoring and enforcement costs and a higher probability that the MFN clause will be applied. Conversely, if prices are not observable, the probability that the MFN clause will be applied is very low. In such a context, a seller is not likely to be dissuaded from lowering prices.

³⁹ *HRS-Hotel Reservation Service Robert Ragge GmbH*, B.9 – 66/10, at 153 ('Auf Grund der im online-Vertrieb bestehenden Transparenz [sic] kann die Einhaltung der Klauseln von HRS auch effektiv überprüft und sanktioniert werden. . . . In dem konkreten Marktumfeld sind die Bestpreisklausel geeignet und auch darauf ausgerichtet, den Wettbewerb zwischen den Hotelportalen zu beschränken und Markteintritte zu erschweren . . .').

⁴⁰ *HRS-Hotel Reservation Service Robert Ragge GmbH*, B.9 – 66/10, at 168.

⁴¹ LEAR Report, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements* (September 2012), at 3.6.

⁴² LEAR Report, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements* (September 2012), at 3.9.

Apart from monitoring and enforcement costs, the specificity of the sales contracts and the scope of the MFN commitment also determine the likelihood that an MFN commitment will be activated. If the relevant products (including the terms and conditions under which a sale is made) are customized products and/or the MFN commitment covers multiple contractual terms, then it becomes increasingly difficult to determine whether the MFN commitment has been breached. This complexity in verifying the application of an MFN clause is another aspect of market transparency.

Although market transparency enhances the probability that the MFN clause will be applied, it does not necessarily result in anticompetitive effects. First, the seller may not have an interest in disadvantaging one buyer over the other, regardless of whether an enforceable MFN clause is agreed upon.⁴³ This may be the case if the seller fears that a discriminatory price policy could create a dominant buyer. Second, market transparency also enhances the probability that a buyer not covered by an MFN will reinitiate price negotiations when he finds out that competing buyers are able to buy at lower prices. He may even be able to obtain a discount or compensation for higher purchase prices that applied in previous periods.⁴⁴ In other words, market transparency needs to be taken into account not only when analyzing the clause's restrictive potential, but also in conducting the counterfactual analysis.

Market transparency also plays an important role in analyzing the stabilizing effects of MFN clauses on cartels. Although MFN clauses are liable to make selective price cuts by a cartel member more expensive and therefore less likely,⁴⁵ the stabilizing effect of MFN clauses crucially hinges on the implied assumption that it is easier for the cartels' customers to detect cheating in relation to an MFN commitment than it is for cartels to detect cheating in relation to a cartel agreement.⁴⁶ Unless the downstream market where the MFN applies is significantly more transparent than the upstream market that is the subject of a cartel arrangement,⁴⁷ there is no reason to believe that cheating in relation to an MFN commitment is easier to detect.

⁴³ See Judith A. Chevalier, *Efficiencies from MFNs: Economic Theories*, Presentation prepared for the DOJ/FTC Workshop on Most-Favored-Nations Clauses and Antitrust Enforcement and Policy (10 Sep. 2012).

⁴⁴ Ingrid Vandenborre and Michael J. Frese, *Most Favoured Nation Clauses Revisited*, 35(12) E.C.L.R. 588, 589 (2014).

⁴⁵ Jonathan B. Baker and Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 Antitrust 20, 22–23 (2012–2013).

⁴⁶ Ingrid Vandenborre and Michael J. Frese, *Most Favoured Nation Clauses Revisited*, 35(12) E.C.L.R. 590 (2014).

⁴⁷ Cf Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 18.10.2008, C 265/6, at 86: 'Vertical integration may facilitate coordination by increasing the level of market transparency between firms through

A commitment to grant the buyer the most favourable sales terms does not, as such, make it more likely that the buyer finds out about the prices charged to competing buyers. However, MFN clauses may be accompanied with contractual rights and obligations that enhance transparency. For example, the seller may commit itself to inform the buyer of more favourable sales to competing buyers or the buyer may be granted audit rights.⁴⁸ This was the case with the pricing policies of GE and Westinghouse in the period between 1963 and 1972 in the US turbine generator market, where GE customers were permitted to audit GE's books for sales in the six months subsequent to their own purchase.⁴⁹ The existence of audit rights makes it more likely that an MFN clause restricts competition or can be used as a stabilizing device.⁵⁰ However, as this conveys commercially sensitive information about competing buyers, audit rights may themselves raise concerns under EU competition law, thus limiting the likelihood that parties will adopt these transparency-enhancing devices.⁵¹ Moreover, audit rights only enhance observability, but do not address the issue of verifiability (*supra*).⁵²

One may question why a buyer would negotiate an MFN clause if the level of market transparency hinders him from effectively enforcing this contractual right. Baker and Chevalier suggest that the MFN may sometimes function as a 'trophy' that the company representative uses to impress his employer.⁵³ Another possibility is that the buyer overestimates the seller's commitment to comply with the MFN clause. For example, the parties may have different views on the seller's

access to sensitive information on rivals or by making it easier to monitor pricing. Such concerns may arise, for example, if the level of price transparency is higher downstream than upstream. This could be the case when prices to final consumers are public, while transactions at the intermediate market are confidential. Vertical integration may give upstream producers control over final prices and thus monitor deviations more effectively.

⁴⁸ Cf Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 5.2.2004, C 31/5 at 51: 'In some markets where the general conditions may seem to make monitoring of deviations difficult, firms may nevertheless engage in practices which have the effect of easing the monitoring task, even when these practices are not necessarily entered into for such purposes. These practices, such as meeting-competition or most-favoured-customer clauses, voluntary publication of information, announcements, or exchange of information through trade associations, may increase transparency or help competitors interpret the choices made.'

⁴⁹ These audits rights are discussed in: George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 Cornell L. Rev. 439, 473 (1981–1982); Thomas E. Cooper, *Most-Favored-Customer Pricing and Tacit Collusion*, 17(3) Rand J. Econ. 377, 385 (1986).

⁵⁰ Steven C. Salop and Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27 Antitrust 15, 18 (2012–2013).

⁵¹ Although parties could set up third party audits to address the antitrust risk, this is likely to raise the costs and thus reduces the likelihood that parties will agree to this.

⁵² See also Jonathan B. Baker and Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 Antitrust 20, 22 (2012–2013).

⁵³ Jonathan B. Baker and Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 Antitrust 20, 22 (2012–2013).

long-term strategic interests and the likelihood of creating a dominant buyer by disadvantaging competing buyers. It is also possible that the buyer overestimates the enforceability of the MFN clause. Finally, the seller may unilaterally adopt an MFN policy to attract customers. In any event, the absence of a convincing rationale for the MFN clause does not seem to justify a presumption of anticompetitive intent, let alone a presumption that the clause restricts competition, as any such presumption would disregard the various procompetitive purposes.⁵⁴

Article 101(1) TFEU requires the claimant or investigating authority to establish a restrictive effect, before requiring the defendant to prove countervailing benefits. Whether an MFN clause generates a restrictive effect largely depends on the level of market transparency. The next section discusses the possibility to integrate market transparency in the analysis under Article 101 TFEU.

5 THE ROLE OF MARKET TRANSPARENCY IN THE ASSESSMENT OF AGREEMENTS UNDER ARTICLE 101 TFEU

In its Guidelines on Vertical Restraints, the Commission indicates that it undertakes a ‘full competition analysis’ and lists a number of factors that are ‘particularly relevant’ to establish whether a vertical agreement brings about an appreciable restriction of competition.⁵⁵ Market transparency is not mentioned, but the list of relevant factors is not exhaustive. The possibility to integrate market transparency in the analysis of MFN clauses under EU competition law finds support in the German FCA’s prohibition decision in the hotel online bookings sector, where this was a critical consideration (*supra*). This section serves as a reminder that market transparency has been a relevant factor in the assessment of competition law infringements by the Commission and the EU Courts.

The Court of Justice has repeatedly held that it is necessary to look at ‘the actual context in which the relevant coordination arrangements are situated’ and that this includes ‘the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in

⁵⁴ It should be noted that a restriction of competition in the sense of Art. 101 TFEU, even by object restrictions, cannot be based on anticompetitive intent alone. Cf Case C-67/13 P *Groupement des cartes bancaires (CB) v. Commission*, nyr, para. 54.

⁵⁵ Commission Guidelines on Vertical Restraints, at 111: ‘The following factors are particularly relevant to establish whether a vertical agreement brings about an appreciable restriction of competition under Article 101(1): (a) nature of the agreement; (b) market position of the parties; (c) market position of competitors; (d) market position of buyers of the contract products; (e) entry barriers; (f) maturity of the market; (g) level of trade; (h) nature of the product; (i) other factors.’

question'.⁵⁶ The Court has further indicated that competition should be assessed 'within the actual context in which it would occur in the absence of the agreement in dispute'.⁵⁷ Market transparency has been identified as an important aspect of the economic and legal context in which a practice or agreement is applied, and has repeatedly been taken into account in assessing the competitive effect of practices or agreements.

In several cases dealing with the restrictive object of information exchanges, the Commission and the EU Courts had to deal with market transparency. In *Aalborg*, the Court of Justice concluded that the exchange of publicly available information could amount to an infringement of Article 101 TFEU if it underpins another anticompetitive arrangement.⁵⁸ This will be the case if the circulation of information has the effect of increasing transparency on a market where competition is already much reduced and of facilitating control of compliance with the anticompetitive arrangement.⁵⁹ In *Bananas*, the Commission adopted a different approach, holding that the exchange of publicly available information did not amount to an infringement of Article 101 TFEU,⁶⁰ but that the availability of this information did form part of the relevant context against which the relevant practices had to be examined, as a result of which it was 'all the more important that the remaining uncertainty as to competitors' future pricing decisions should be protected'.⁶¹ The General Court supported this approach, pointing to the fact that the exchange system enabled the undertakings to become aware of that information more simply, rapidly and directly.⁶² The Commission and the General Court dismissed arguments that the exchange of information added little to the prevailing level of market transparency.⁶³

The existing degree of market transparency is also relevant for the assessment of collective dominance and tacit collusion. As reflected in *Airtours*, three conditions are necessary for a finding of collective dominance: (i) each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; (ii) the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the

⁵⁶ Case C-382/12 P *MasterCard v. Commission*, nyr, para. 165.

⁵⁷ Case C-382/12 P *MasterCard v. Commission*, nyr, para. 164.

⁵⁸ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and others v. Commission* [2004] ECR I-123, para. 281.

⁵⁹ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and others v. Commission* [2004] ECR I-123, para. 281.

⁶⁰ Case COMP/39188 – *Bananas*, at 272–273.

⁶¹ Case COMP/39188 – *Bananas*, at 272.

⁶² T-588/08 *Dole v. Commission*, nyr, paras 403 and 405.

⁶³ Case T-53/03 *BPB v. Commission* [2008] ECR II-1333, paras 112–114; *Car glass*, Summary of Commission Decision of 12 Nov. 2008, Case COMP/39.125, at 446.

market and; (iii) the foreseeable reaction of current and future competitors, as well as of consumers, should not jeopardize the results expected from the common policy.⁶⁴ As confirmed by the Court of Justice in *Bertelsmann and Sony*, the issue of market transparency is mainly relevant for the first condition: '[t]here must . . . be sufficient market transparency for each undertaking concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving.'⁶⁵ The Court further held that 'the assessment of . . . the transparency of a particular market should not be undertaken in an isolated and abstract manner, but should be carried out using the mechanism of a hypothetical tacit coordination as a basis.'⁶⁶ The Court overturned the first instance judgment by holding that the General Court 'did not carry out its analysis . . . by having regard to a postulated monitoring mechanism forming part of a plausible theory of tacit coordination'⁶⁷ but 'was content to rely . . . on unsupported assertions relating to a hypothetical industry professional.'⁶⁸

Also in another type of effects-based analysis, market transparency may be taken into account. In the context of private damages actions, the level of market transparency may determine whether particular economic operators have suffered harm from an infringement of EU competition law. This is particularly relevant for so-called 'umbrella damages claims', initiated against the participants in an infringement by economic operators who contracted with parties not forming part of the cartel. In this context, Advocate General Kokott expressed the view that 'the more homogenous and transparent the relevant product market is, the easier it is for an operator not party to the cartel to be guided by the business practices of the cartel members when determining his own prices.'⁶⁹ This view was echoed by the Court of Justice who held that:

the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently⁷⁰

The above examples demonstrate that market transparency plays an important role in the assessment of practices under EU competition law. Particularly in relation to MFN clauses, which can have procompetitive or anticompetitive effects

⁶⁴ T-342/99 *Airtours v. Commission* [2002] ECR II-2585, para. 62; Case C-413/06 P *Bertelsmann and Sony* [2008] ECR I-4951, para. 124.

⁶⁵ Case C-413/06 P *Bertelsmann and Sony* [2008] ECR I-4951, para. 123.

⁶⁶ Case C-413/06 P *Bertelsmann and Sony* [2008] ECR I-4951 para. 126.

⁶⁷ Case C-413/06 P *Bertelsmann and Sony* [2008] ECR I-4951, para. 130.

⁶⁸ Case C-413/06 P *Bertelsmann and Sony* [2008] ECR I-4951, para. 131.

⁶⁹ Case C-557/12 P *Kone and Others*, per AG Kokott, nyr, para. 48.

⁷⁰ Case C-557/12 P *Kone and Others*, nyr, para. 34.

depending on the market context and the circumstances in which they are applied, the correct assessment of market transparency is critical.

6 CONCLUSION

We have sought to demonstrate that market transparency is a critical factor in the assessment of the anticompetitive effects of MFN clauses under Article 101 TFEU. We have also pointed out that the EU Commission and the EU Courts have already acknowledged the importance of market transparency in the assessment of other anticompetitive agreements and practices. It is therefore not surprising that the recent enforcement efforts against MFN clauses are situated in the online sector, where market transparency and competitive impact tends to be greater.

No further guidance exists at this stage as to how MFN clauses should be assessed, what role market transparency plays, and what type of market transparency is considered to affect their application. We would offer a few considerations for further thought. First, the relevance of MFN clauses will tend to be more important for markets where product and price offerings are more transparent and less differentiated. The key example of a transparent market is of course an online market where product pricing is instantly available to all. Second, however, the role of market transparency is only the starting point, and is not determinative of the competitive analysis of MFN clauses. For example, even in markets with great degrees of market transparency – like the online market – the application of an MFN clause can be (entirely or on balance) procompetitive. Moreover, a high degree of market transparency may have an impact on the counterfactual situation against which the potential anticompetitive effects of the MFN clause need to be assessed. It remains to be seen how authorities and courts will integrate the presence or absence of market transparency in the assessment of future cases.

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