Antitrust Assessment of Most Favoured Nation Clauses in the European Union

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Most favoured nation (MFN) clauses in the context of vertical agreements are, strictly speaking, most favoured customer clauses, and consist essentially of arrangements between suppliers and distributors whereby the supplier grants the distributor a price that will not be less favourable than the prices granted to its other customers (see European Commission press releases IP/11/257 and IP/05/710). From this concept, different structures of MFN clauses have emerged.

MFN clauses can be reversed into ‘most favoured supplier’ clauses, whereby a buyer guarantees to the suppliers commercial terms that are better than, or at least as good as, those agreed with another supplier (eg, IP/04/1314 and case COMP/M.6458). They also bear similarities to ‘English clauses’, which require buyers to report to their suppliers any better offers made by competing suppliers, and allow them to accept such offers only if the initial suppliers do not match them (European Commission Guidelines on Vertical Restraints, OJ C 130 of 19 May 2010, page 1, paragraph 129; ECJ, case 85/76). These clauses are usually considered unlawful as they lead to artificially fixing prices.

The growing importance of internet platforms as essential distribution channels in various sectors has led competition authorities in Europe to assess MFN clauses present in the contracts between these increasingly unavoidable partners and the providers of goods or services who use – and need – platforms to be visible and reach consumers worldwide. Regulators in the EU have yet to create a common and legible framework to assess the pro-competitive or anticompetitive effects of such clauses and provide legal certainty for undertakings. The outcome of recent cases and the implementation of new decisions and laws in the near future will undoubtedly be highly instructive in creating such a framework and better understanding the needs of these new forms of cooperation.

Cross-platform parity clauses: the current ‘state of the art’

The use of sales platforms for e-commerce has triggered the development of ‘retail MFN’ arrangements that provide assurance to the platform that the supplier will not sell its products or services at lower prices via another platform. In the last year, European competition authorities have focused their scrutiny on the e-book market, hotel booking platforms and price comparison websites.

E-books

On 12 December 2012 and 25 July 2013, the European Commission adopted decisions accepting commitments from five major publishers and Apple that provided for the prohibition of restrictions on the platforms’ ability to set retail prices for e-books and an explicit ban on retail MFN clauses for a period of five years (COMP/AT 39847). The European Commission considered that the MFN clauses had effects similar to resale price maintenance (RPM) clauses, namely facilitating collusion by increasing price transparency, softening competition between rivals, encouraging price increases and preventing the emergence of lower prices.

After Amazon decided to end its Marketplace price parity restricting arrangements in various sectors, the European Commission opened a formal investigation for a possible abuse of a dominant position against Amazon in June 2015 that concerned similar clauses in Amazon’s contracts with e-book publishers, preventing the latter from offering better conditions (both price and non-price services) to competing online booksellers (IP/15/5166).
L311-5 et seq of the French Tourism Code. Under these new provisions, hotels and OTAs are obliged to conclude a mandate contract whereby the hotel retains full freedom in setting its prices.

While narrow MFN clauses may be considered vital for PCWs’ credibility, even more so than for OTAs whose main function is not only comparison but rather a comprehensive offer and the possibility to make direct bookings, a German PCW in the energy sector, Verivox, nevertheless decided in June 2015 to remove all MFN clauses from its contracts with energy providers to comply with the Bundeskartellamt’s HRS decision and avoid further investigation by the NCA.

Guidance: criteria for assessing MFN clauses
Article 101(1) of the TFEU prohibits agreements between companies that have as their object or effect the restriction of competition. Article 101(3) of the TFEU exempts, under certain conditions, such agreements if they create efficiencies or promote technical or economic progress. Similar provisions exist at national level. Under EU competition law, vertical agreements may also be exempted under the vertical agreements block exemption regulation (No. 330/2010) if certain conditions are met and if the agreement does not contain hard-core restrictions.

Divergences in assessment by NCAs raise the question of whether an analysis of MFN clauses as vertical restraints is necessarily the most appropriate approach. For instance, when a platform operator is also a distributor on its own platform (such as in Amazon’s case) there are undeniable horizontal effects. Moreover, if OTAs qualify as agents, this could call into question the applicability of article 101 TFEU, which does not apply to agent–principal relationships.

Since most investigations seem focused on a single player holding significant market power, the abuse of dominance approach could be more appropriate. Without one party having market power, or in markets that are not dominated by a limited number of big players, MFN clauses seem rather unlikely to raise competition concerns. When it comes to internet platforms with the goal of providing a ‘one-stop shop’ for consumers, it seems natural that the market should be dominated by a limited number of big companies, since the proliferation of small entities would defeat the purpose of providing a unified offer to consumers.

Potential anticompetitive object or effect of MFN clauses
In the European Commission’s Guidelines on Vertical Restraints, MFN arrangements are not analysed as a stand-alone restriction, but as a means of reinforcing the effectiveness of RPM policies by reducing the buyer’s incentive to lower the resale price (Guidelines on Vertical Restraints, paragraph 48). If they are used to create or facilitate RPM, MFN clauses are considered as having as object the restriction of competition and qualify as a hard-core restriction under article 4(a) of Regulation No. 330/2010. In other cases, MFN arrangements may be a way of carrying out a wider anticompetitive agreement, for example, when they are used to soften rivalries, facilitate collusion and increase price transparency between competitors.

Except in these cases, MFN clauses will generally not be considered anticompetitive by object, but may restrict competition by their effects. Indeed, recent decisional practice at the very least demonstrates that MFN clauses are likely to have pro-competitive effects, and the fact that their competitive analysis is ultimately factual and dependant on the sector and economic context in which they are implemented seems to exclude their qualification as a restriction by object.

A typical restrictive effect of MFN clauses is foreclosure of new entrants and raising barriers to entry. A retailer wishing to enter the market by offering lower prices to end users will try to negotiate lower prices with suppliers. Such a strategy will not be successful if the existing retailers benefit from MFN clauses from the same supplier. This effect will be strengthened in a concentrated market where MFN clauses are generalised.

In addition, MFN clauses typically restrict sellers in their ability to discriminate between customers, which is economically legitimate, except in a situation of dominance. Indeed, setting different prices for different sales channels is a legitimate way of reacting to differing distribution costs or levels of competitive pressure. Application of MFN clauses may result in uniform prices being applied to all customers, unless the seller retains the possibility to increase prices for certain customers by not agreeing to MFN clauses with them. A seller restricted in its freedom to discriminate will most probably lose the incentive to lower prices to buyers, and subsequently raise its prices.
In the hotel booking platforms cases in Europe, NCAs agree that wide MFN clauses are at least likely to have an anticompetitive effect through reducing competition between platforms or foreclosing entry of new platforms on the market that will not be able to attract hotels by offering lower commission rates. MFN clauses also have an overall commission-raising effect, since raising commissions will not result in room rates being higher than the rates applied in other sales channels covered by price parity clauses.

In assessing potential anticompetitive effects of MFN clauses, it is always necessary to take into consideration the situation on the market. MFN clauses are more likely to lessen competition in a market where buyers or sellers, individually or collectively, have sufficient market power. Buyers who are able to use their negotiating strength to impose restrictions on a seller, in order to ensure they are receiving the best terms available, will in turn strengthen their market power.

MFN clauses are also more likely to be harmful in highly concentrated markets rather than in markets involving an important number of actors competing fiercely. Indeed, in a concentrated market, a seller using MFN clauses enabling it to increase its prices will have less risk of losing its customers to competing sellers. The cumulative effect of MFN clauses in a highly concentrated market will increase such restrictive effects.

Potential positive effects of MFN clauses
The typical positive effect of MFN arrangements is to provide buyers with a certain protection against price increases by suppliers. They also allow buyers to reduce costs of frequent negotiations and market research to find out whether they are getting the best price available.

MFN clauses may also be a legitimate way of protecting specific investments incurred by buyers on request of the seller, as they provide such buyers with a further incentive to commit to investments by granting extra assurance of recouping costs over time.

In this respect, some NCAs appear to be attempting to fine-tune their analyses of MFN clauses, differentiating between wide and narrow MFNs, admitting that the latter may be necessary to protect the business model of online platforms such as hotel booking portals or price comparison websites. Such platforms invest significant amounts to offer high-quality services, such as attractive platforms, improved presentation of products and quality user comments.

In any case, if MFN clauses are scrutinised by European competition authorities and considered as potentially restrictive of competition, the onus lies upon the parties to prove that their pro-competitive effects outweigh any restrictive effects.

Conclusion
When concluding vertical agreements containing MFN clauses, parties must be cautious in assessing whether the efficiency gains that are sought sufficiently outweigh any potential anticompetitive effect of the MFN clause. Contracts containing MFN clauses therefore require case-by-case analysis at an early stage by companies to avoid or at least anticipate scrutiny by competition authorities.

In the online hotel booking platforms sector, diverging approaches among NCAs, in particular between a severe prohibition of all MFN clauses and a more lenient approach authorising narrow MFN clauses, and new national legislations, will at least enable NCAs to observe the effects of both approaches on prices and competition between OTAs and hotels, which may in the end be the solution for determining the fairest and least restrictive solution.