

# Competitive effects of most-favoured nation clauses

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Most-favoured nation clauses (MFNs, also called parity clauses) are vertical arrangements whereby the terms and condition of supply are set by reference to the terms and conditions applicable to other supply relationships.

MFNs have recently come under the scrutiny of antitrust authorities in the EU, in particular in the online space (**E-books I**, **E-books II**, *Booking.com*, etc). But these cases do not mean that MFNs are systematically anti-competitive. In fact, their competitive effects are often ambivalent and require a careful case-by-case analysis.

## Types of MFNs

### Due diligence and timescales

The concept of MFNs covers a wide range of business configurations. MFNs can be classified in different ways:

- across-sellers MFNs and across-customers MFNs
  - across-sellers agreements are MFNs whereby the seller's price is constrained by the price charged by rival sellers; in particular, the seller undertakes that, if the buyer finds a rival seller offering the same product at better terms, the seller will match or beat those terms
  - across-customers agreements are MFNs whereby the seller's price is constrained by the price charged by the same seller to other customers. In particular, the seller undertakes to sell to a buyer at the best price it offers to any other buyer
- price MFNs and non-price MFNs. To date, most enforcement has focused on price MFNs. However, in the recent **E-books II** case, the Commission took issue with a series of non-price MFNs that Amazon imposed on editors. These MFNs imposed parity in relation to *'many aspects that a competitor can use to differentiate itself from Amazon, such as an alternative business (distribution) model, an innovative e-book or a promotion'*. The Commission closed the investigation in 2017 after Amazon offered commitments aimed at scraping such MFNs
- MFNs supporting an agency model and MFNs supporting a wholesale model
  - under a wholesale model, a supplier sells its products to a distributor, who resells it to end consumers; in this scenario, MFNs aim at ensuring that distributors get the best deal possible, but do not have a direct impact on the price paid by end-consumers

- under a common agency model, a seller uses a platform to resell its products to end consumers (eg Booking.com). In this case, the MFN is usually imposed by the platform to the seller to ensure that products sold through the platforms are offered under competitive price and conditions. Therefore, the MFN has an impact on the retail price. For this reason, MFNs imposed in the context of an agency model are more likely to attract antitrust scrutiny
- retail MFNs and wholesale MFNs
  - the European Commission investigated wholesale MFN clauses in the Hollywood studios case. The Commission closed the investigation in 2011 following the deletion of a MFN clause from the contracts studios entered into during the roll-out of digital projection equipment in Europe. The film distributors financing it had agreed with the integrators of the equipment that the distributors would benefit from the most favourable terms (including lower payments) agreed between a given integrator and film studio or distributor
  - more recently, EU antitrust authorities have focused their efforts on retail MFNs, which have a direct impact on the price or the terms and conditions offered to consumers at retail level. This may be due to at least two factors: (i) in a number of cases, enforcers have associated retail MFN clauses with resale price maintenance (RPM), which is considered to be a restriction by object, and (ii) since prices at the retail level are usually more transparent, retail MFN cases lend themselves more easily to analysis from an evidentiary perspective. For these reasons, this Practice Note focuses mainly on retail MFNs
  - in the digital space, antitrust authorities have identified two sub-categories of retail MFNs: (i) 'wide' MFNs, where the platform gets the lowest price relative to the other channels, including the supplier's own channel, or (ii) 'narrow' MFNs, where the platform gets a lower price than the supplier's own channel

**References:**  
[Commission press release IP/11/257—Commission closes probe into Hollywood studios after they change terms of contracts for digitisation of European cinemas](#)

**References:**  
[Commission press release IP/14/2661—European Commission, press release IP/14/2661—Commission announces the launch of market tests in investigations in the online hotel booking sector by the French, Swedish and Italian competition authorities](#)

## Economic rationale of MFNs

MFNs have become prevalent in a number of economic sectors, including (online) retail, because they serve a number of purposes, including:

- preventing hold-up problems and protecting investment. Where a retailer engages significant investments to further its relationship with a supplier (eg by setting-up a dedicated, ad hoc distribution system), there is a risk that the retailer will not be able to recoup its investment if the supplier sells its products to a competing retailer at a lower price. The conclusion of an MFN between the supplier and the retailer helps preventing this 'hold-up' scenario
- limiting free-riding. Free-riding scenarios are frequent in the online space, where consumers may be incentivised to search a service online, via online platforms, only to subsequently buy this service directly to the service provider at a cheaper rate. As a result, the service provider would be free-riding on the investments engaged by the online platforms in terms of marketing, online referencing, after sale services, etc. In this scenario, online platforms may impede free-riding by imposing an MFN to service providers, ensuring that they will offer their best rate on the online platform
- reducing transaction costs. An MFN may allow a buyer to ensure that it gets the best conditions possible from its supplier, without having to engage into lengthy research and negotiations

## Theories of harm

While MFN clauses may generate economic efficiencies (see section above), they have also recently become a source of concern for a number of competition authorities. These concerns include: (i) facilitating collusion between platforms; (ii) foreclosing market entry or expansion of other platforms; and (iii) softening competition between platforms. Specifically:

- a retail MFN clause may facilitate collusive practices among retail platforms: (i) the advantage of deviating from the collusive scheme would be diminished, as any platform-usage fee reduction would also be passed to buyers using other platforms for their purchases, rather than being reflected in the product's retail price; and (ii) the retail MFN clause would increase transparency in pricing and facilitate the platforms' ability to check for deviations. This was, for example, the concern of the Commission in the context of the investigation in **Apple, Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Penguin (E-books I) (AT.39847)** (see below).
- a retail MFN clause may impede entry of a rival platform on the market, by not allowing the latter to compete on prices. This was, for example, the concern of the former Office of Fair Trading (OFT) and the CMA in the UK in the context of the **Hotel online booking** investigation (see below).
- a retail MFN clause may lead to an increase in the fees retailers pay the platforms and, as a consequence, the prices retailers charge the buyers. This was, for example, the concern of both the former OFT in the UK and the Bundeskartellamt (BKA) in Germany as regards the retail MFN policy of Amazon (see below).

## Enforcement to date

Retail MFN clauses have recently come under scrutiny by antitrust authorities, both at the EU and national levels—in particular, as regards online sales. A brief overview of the most notable cases on retail MFN clauses in recent years is provided below.

### Amazon

In 2013, both the former OFT in the UK and the BKA in Germany investigated Amazon's retail MFN policy.

Amazon enforced a retail MFN policy that prohibited retailers from offering products through any other online platform at lower prices than the ones at which they would sell on Amazon Marketplace.

The competition authorities were concerned that Amazon's policy limited retailers' ability to determine their prices and hampered competition among online platforms. Retailers pay online platform operators a percentage of the prices of their products. Amazon's MFN clause limited retailers' ability to pass-on other online platform operators' better terms in the form of better prices for consumers.

The investigation was closed after Amazon announced that it would abolish its retail MFN policy.

### E-books I

In **Apple, Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Penguin (E-books I) (AT.39847)**, the Commission investigated agency agreements concluded between Apple and five major publishers.

**References:**  
[OFT Case CE/96/12 Investigation into suspected anti-competitive arrangements by Amazon relating to online retail](#)

The five publishers, together with Apple, planned to jointly switch the sale of e-books from a wholesale model (where the retailer determines the retail prices) to an agency model (where the publisher determines the retail prices), on a global basis and on the same key pricing terms.

The agency agreements with Apple would include a retail price MFN clause, whereby each of the publishers would have to match on Apple's iBookstore any lower prices for the same e-book titles from other online retailers (regardless if the retailers were able to independently set the retail price or if the publisher did). Presumably, the retail MFN clause would act as a 'joint commitment device' amongst the publishers to ensure that they would force Amazon and other large online retailers to switch to the agency model. As a result, the publishers would be able to set the retail price of e-books, therefore eliminating retail price competition.

The investigation was closed in July 2013 with the Commission accepting commitments offered by the parties. The commitments included the removal of the retail MFN clause.

## E-books II

In **Amazon (E-books II) (AT.40153)**, the Commission investigated price and non-price MFNs imposed by Amazon in the distribution of e-books.

The Commission launched an investigation under **Article 102** TFEU (contrary to the E-books I case, which was examined under **Article 101** TFEU), over concerns that Amazon may have abused its dominant position by imposing price and non-price MFNs to e-books publishers.

Amazon's market share on the e-books market was above 70%, thus characterising a situation of dominance.

Non-price MFNs under investigation were pervasive and related to '*many aspects that a competitor can use to differentiate itself from Amazon, such as an alternative business (distribution) model, an innovative e-book or a promotion*'. The Commission considered that such clauses could make it more difficult for other e-book platforms to compete with Amazon by reducing publishers' and competitors' ability and incentives to develop new and innovative e-books and alternative distribution services.

The Commission closed the investigation in May 2017 after Amazon offered commitments aimed at deleting such MFNs.

## Private motor insurance

In the UK, the CMA investigated the *private motor insurance* market. A number of price comparison websites imposed on insurers a retail MFN clause that required parity with other competing price-comparison websites, as well as with the insurer's direct channel of sale. Such MFNs were pervasive: 80% of the insurance policies sold through comparison websites included them. In its final report on remedies, published in September 2014, the CMA banned wide retail MFN clauses (ie retail MFN clauses that require parity with other competing price-comparison websites) from the private motor insurance market. However, the CMA found that narrow retail MFN clauses (ie retail MFN clauses that require parity with the insurer's direct channel) are not anti-competitive because they prevent insurers from 'free-riding' on the platform's investments.

## Online hotel booking sector

A number of National Competition Authorities (NCAs), including those of Germany, France, Italy and Sweden, have investigated the *online hotel booking* sector. The NCAs were concerned that a number of large online travel agencies (OTAs), such as Booking.com and Expedia, constrain their hotel partners by not allowing them to offer better rates and conditions through smaller OTAs or through their own.

References:  
[CMA—final report on the private motor insurance market investigation](#)

The BKA has issued a prohibition decision against Booking.com in 2015, ordering it to delete from its contracts with hotel partners a retail MFN clause that obliges the hotels to always offer on Booking.com their lowest room prices and most favourable booking and cancellation conditions available on the internet and on their own website. The prohibition decision applies equally to wide and narrow MFNs, the BKA having considered that *'[t]hese so-called narrow best price clauses also restrict both competition between the existing portals and competition between the hotels themselves'*. The BKA's decision is currently under appeal before the Düsseldorf Higher Regional Court.

In France, Italy and Sweden, the relevant NCAs rendered legally binding a commitment by Booking.com to delete wide MFNs from its contracts with hotels. Narrow MFNs, whereby hotels are prohibited from advertising better terms and conditions on their own websites, remain permitted. According to the NCAs, this commitment struck the right balance between *'restoring competition while at the same time preserving user-friendly free search and comparison services and encouraging the burgeoning digital economy'*.

In the UK investigation into **Hotel online booking**, the hotel partners were not only under an obligation to offer their best rates to Booking.com and Expedia; but also other OTAs were subject to restrictions on discounting the prices of hotel rooms. In its decision, the OFT considered that the restrictions on other OTAs' ability to offer discounts were a form of RPM. The OFT only touched upon the retail MFN clauses insofar as they created restrictions on discounting. Booking.com and Expedia committed not to enforce retail MFN clauses that would prevent hotel partners from offering discounts to the members of their 'closed groups' (eg members of a loyalty program). The OFT's decision was appealed before the Competition Appeal Tribunal (the CAT) by **Skyscanner v CMA**. Skyscanner argued that the OFT's decision: (i) did not resolve the competition concerns, and (ii) harmed consumers because price-comparison sites do not have access to the OTAs' discounted prices. The CAT quashed the OFT's decision and referred the case back to the CMA for reconsideration, although the CMA closed the investigation in September 2015 following earlier announcements by both Booking.com and Expedia that they were abandoning price, availability and booking conditions (partly as a result of commitments accepted by competition authorities in other EU member states), meaning all the CMA's concerns have been addressed.

**References:**  
[Press release of the French Competition Authority—21 April 2015: Online hotel booking sector](#)

## Lessons to be learnt from past cases

At the EU-level, MFNs are analysed within the general framework of national and EU competition law, and particularly Article 101 and **Article 102** TFEU (note: national singularities exist and are examined in the next section).

Based on past enforcement (see above), a number of bright lines emerge.

First, enforcement to date has focused on rather 'extreme' cases: the retail MFNs under examination were applied in a systematic and pervasive way; at least one side of the market was characterized by monopsony or tight oligopoly, with less concentrated markets on the supply side; and, the MFNs created a risk of collusive outcome and/or raised barriers to entry.

Second, in most cases, MFNs were examined under **Article 101** TFEU (with some notable exceptions, eg **E-books II**):

- under certain circumstances, MFNs may be regarded as hard core restrictions, for instance when they act as a facilitation device to RPM. In this regard, the EU Guidelines on Vertical Restraints explicitly state that measures which may reduce the buyer's incentive to lower the resale price may facilitate RPM. RPM refers to agreements or concerted practices that have as their direct or indirect object the establishment of a fixed or minimum price or a fixed or minimum price level to be observed by the buyer.
- outside the hardcore restriction scenario:
  - MFNs should be subject to an effect based analysis, on the basis of a number of criteria, including: whether the MFN is widespread in the industry or not; whether it is used by a large incumbent or a new entrant; the market characteristics (level of market concentration, existence of barriers to entry, degree of market transparency); the harm to competition; the benefits or efficiencies of the MFN scheme.
  - MFNs may benefit from an exemption under the Vertical Restraints Exemption Regulation (VRBER). In Germany, Cologne's Regional Court rejected a hotelier's complaint against MFNs introduced by an online booking portal. The German Court noted, *inter alia*, that the MFN qualified for exemption under the VBER since the online booking portal's market share did not exceed 30%.

References:  
[European Commission guidelines on vertical restraints, para 48](#)

References:  
[Landgericht Köln, 88 O \(Kart\) 17/16](#)

### Beware of national singularities

MFN clauses may be subject to specific rules under national law. For instance, MFN clauses are prohibited under French law. According to the French Commercial Code, *'[a]ny contract or clause allowing a producer, a retailer, an industrial or any person registered in the commercial register to benefit automatically from most favourable conditions granted to its competitors by the co-contractor is void'*.

Austria, France and Italy have also enacted specific legislation prohibiting the use of narrow MFNs in the relationship between booking platforms and hotels.

References:  
[French Commercial Code, Article L.442-6, II, d](#)

References:  
[French Tourism Code, Art. L. 311-5-1](#)  
[Article 50 of the Italian Competition Law](#)

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