RETAIL MFNS AND ONLINE PLATFORMS UNDER EU COMPETITION LAW: A PRACTICAL PRIMER

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CPI ANTITRUST CHRONICLE
SEPTEMBER 2019

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I. INTRODUCTION

Much has been written about most favored nation clauses or agreements ("MFNs") in the context of online platforms, and the challenges faced by competition authorities in assessing the potential anti-competitive nature of such agreements. The perceived absence of a clear legal framework, and the lack of co-ordination between competition authorities in their approach to assessing such clauses, has resulted in significant uncertainty. This uncertainty is felt most keenly by companies and businesses struggling to understand whether the MFNs they have agreed to are on the right side of the law. This article aims to build upon the existing literature and provide a practical framework for the assessment of retail MFNs in the context of online platforms under EU competition law.

The article proceeds as follows: a recap on retail MFNs in the context of online platforms; the application of the Vertical Block Exemption Regulation ("VBER") to retail MFNs (including an assessment of whether retail MFNs are equivalent to RPM); an assessment of retail MFNs under Article 101 TFEU (including whether retail MFNs should be considered as object or effect infringements, and the challenges associated with wide and narrow retail MFNs); and an assessment of retail MFNs under Article 102 TFEU. The article then concludes with a suggested policy approach for the treatment of retail MFNs.

II. A RECAP ON MFNS: WHOLESALE, RETAIL, AND THE ONLINE PLATFORM MODEL

MFNs are not a new concept. There have been agreements akin to MFNs for many years, and the European Commission (the "Commission") has been considering agreements that contain MFNs for over 50 years.[2] However, earlier consideration of MFNs generally focused on what can be described as "wholesale" MFNs, i.e. an MFN relating to the wholesale price of a good. This type of MFN may be to the advantage of a seller (a most favored supplier clause, in which the buyer agrees not to offer more favorable terms to other sellers) or to the advantage of a buyer (a most favored customer clause, in which the supplier agrees not to offer more favorable terms to other customers).

With the proliferation of online platforms, this business model has given rise to a new type of MFN – the so-called retail or platform MFN. The fundamental difference between the traditional wholesale MFN and the retail MFN is the identity of the customer. While wholesale MFNs are generally agreed in the context of B2B transactions, i.e. a supplier selling a product to a buyer not active in the retail market, a retail MFN is agreed in the context of a B2C transaction, i.e. it relates to the price charged to the end consumer. In a wholesale model, the agreement governs the price at which the supplier will sell to the retailer, but the retailer determines the final retail

2 Bostoen, F. (2017), "*Most Favoured National Clauses: Towards an Assessment Framework Under EU Competition Law*", European Competition and Regulatory Law Review 2017, Volume 1(3).

price to the consumer. In contrast, in a retail model (sometimes called an agency model – discussed further below) the supplier determines the final retail price that the product will be sold for on the online platform and will then pay a commission to the online platform for each sale made.

Another important distinction between wholesale and retail MFNs is the bifurcation of a retail MFN in an online setting into two types: wide and narrow. A wide MFN is an agreement between an online platform and a retailer that prevents the retailer from offering a better deal on another online platform. A narrow MFN prevents the retailer from offering a better deal on its own direct to consumer website. Usually the MFN will focus on restricting price, but it may go further and restrict non-price offerings. MFNs are often prevalent across a market (as online platforms may agree MFNs with most or all of their retailers). This results in a network of agreements that, taken together, can effectively prevent retailers from providing a more competitive offering on alternative sales channels.

The distinction between wholesale and retail MFNs is important to make, as it may partially explain the renewed focus on MFNs by competition authorities. While wholesale MFNs were on the Commission's radar, they never really became an enforcement priority. However, that could potentially be explained by competition authorities tending to be less incentivized to investigate undertakings involved in pure B2B transactions than for B2C transactions. Competition law is, after all, focused largely on the concept of the consumer welfare standard, and competition authorities are consequently motivated predominantly by the benefits for consumers. With the significant increase in e-commerce and the dramatic rise in the use of online platforms by consumers,[3] it is not unexpected that competition authorities have demonstrated a new-found interest in retail MFN clauses. Wholesale MFNs are arguably not as problematic as retail MFNs because retailers retain their freedom to vary their retail prices across all channels. In contrast, in retail MFNs, suppliers determine the final retail price (rather than retailers), and the online platforms then require suppliers not to offer lower final retail prices through any other online channels.[4] Retail MFNs have therefore been shown to result in higher prices, whereas the same effect has not been seen in MFNs within a wholesale model.[5]

Assessing retail MFN clauses under competition law is challenging because it is not straightforward. Indeed, much of the literature on retail MFNs focuses on the absence of a clear legal framework for assessing such clauses, and on the lack of co-ordination between competition authorities in their approach, with the risk of inconsistent outcomes.[6] While some comment that a framework is emerging,[7] and that recent case law does demonstrate more convergence than divergence, there remains insufficient legal certainty. This results in significant challenges for companies in carrying out an assessment of the legality of these clauses and the very real prospect of both Type I and Type II errors i.e. both under and over enforcement.

This article, while acknowledging the limitations of current case law in this area, aims to provide a practical framework for the assessment of retail MFNs, and a policy proposal for guidance in this area.

3 European Commission, "*Final Report on the E-commerce Sector Inquiry*," (Staff Working Document) SWD (2017) 154: e-commerce in the EU has grown from 30 percent in 2007 to 55 percent in 2016, page 10 https://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf.

4 See Fletcher, A. & Hviid, M. (2014), "*Retail Price MFNs: Are they RPM 'at its worst'?*," CCP Working paper 14-5.

5 See Johnson, J. (2017), "*The agency model and MFN clauses*," The Review of Economic Studies, Volume 84(3).

6 See Akman, P. & Sokol, D. (2016), "*Online RPM and MFN under Antitrust Law and Economics*," Review of Industrial Organization.

7 See Bostoen, *supra* note 2.

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III. STEP 1: ASSESSMENT UNDER THE VBER: A NEED FOR CLARITY

Strictly speaking, a retail MFN is a vertical agreement between a supplier and a retailer. As such, if the market share thresholds are met i.e. both the supplier and retailer are under 30 percent, then the MFN should benefit from the VBER.[8] However, the VBER and the Guidelines on Vertical Restraints ("VGL")[9] are both silent on the issue of MFNs.[10] The Commission's current VBER consultation has identified the lack of clarity around MFNs as being one of the major trends motivating the need for a revision of the VGL, and this is something that has been reflected in the submissions received by the Commission as part of the public consultation on the VBER. Specifically, respondents have commented on the insufficient legal certainty in the treatment of MFNs under the VBER, the incoherent application of the current rules and the fact that MFNs may not generate efficiencies.[11] However, there is unlikely to be any real clarity on whether the Commission intends to amend the VBER to provide more guidance on the treatment of retail MFNs until 2020.[12] In the meantime the VBER provides no clear guidance as to whether it offers protection for retail MFNs or not.

A. Are Retail MFNs Just Another Form of RPM?

In recent years, various academics and commentators have suggested that MFNs should have the same legal treatment as resale price maintenance ("RPM") because of the similar anti-competitive effects that both produce. In fact, it has been argued that some retail MFNs are worse than RPM and therefore even more harmful to competition.[13] This is because retail MFNs have both a vertical element, where the supplier sets a final retail price, and a horizontal element where the supplier sets identical retail prices across all online platforms. While RPM agreements only affect the relationship between a supplier and a customer, retail MFNs have the aim of manipulating the minimum price across all online platforms (a wide MFN), and in some cases the direct to consumer channel as well (a narrow MFN). This feature of retail MFNs was identified as a concern in a 2013 OECD Roundtable in which the UK competition authority emphasized that retail MFNs "*have the potential to exacerbate the possible harm from RPM by explicitly introducing a horizontal element to an otherwise vertical agreement.*[14] Consequently, it is argued that retail MFNs should not be treated any less harshly than RPM.

In the EU, RPM is considered to be an object infringement and is therefore a hardcore restriction under the VBER.[15] If a vertical agreement contains a hardcore restriction, then the entire agreement is excluded from the VBER and will have to be individually assessed under Article 101. In principle, it is possible to justify the restriction under Article 101(3), and the efficiencies of RPM have been recognized by the Commission, for example where a manufacturer introduces a new product.[16] However, there remains a presumption that the conditions for an efficiency justification will not be met, and there has been no EU Court judgment or Commission decision in which it has been confirmed that RPM is objectively necessary to achieve a legitimate aim. Therefore, in practice, RPM is presumed to restrict competition and cannot benefit from the VBER.

As yet there have been no cases brought by competition authorities in which a retail MFN clause has been explicitly stated to be equivalent to RPM. However, there is a growing body of thinking which equates the harm caused by retail MFNs to that of RPM, and there remains a realistic prospect of a competition authority adopting this approach.[17] Indeed, the VGL suggest that MFNs could be considered as "*supportive*" measures

8 Commission Regulation (EU) No.330/ 2010 ("VBER").

9 Commission Guidelines on Vertical Restraints OJ C 130 (2010) ("VGL").

10 See Schmidt, J.P. (2013), "*Antitrust Developments in the Food Sector in the EU*," 34 ECLR 5.

11 See European Commission, *Factual Summary of the Contributions received in the context of the open public consultation on the evaluation of the Vertical Block Exemption Regulation (EU) No 330/ 2010*, https://ec.europa.eu/competition/consultations/2018_vber/factual_summary.pdf.

12 European Commission, *EU competition rules on vertical agreements – evaluation,* https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981_en.

13 See Fletcher & Hviid, *supra* note 4.

14 See United Kingdom, *"Policy Roundtable on Vertical Restraints for On-line Sales*," (Written Submission) DAF/COMP (2013)13 at page 149 http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf.

15 VBER, *supra* note 8, article 4(a) and VGL, *supra* note 9, at paragraphs 47-48.

16 VGL, *supra* note 9, at paragraph 225.

17 In Case B9-66, *HRS-Hotel Reservation Service*, December 20, 2013 ("HRS"), the *Bundeskartellamt* left open the question whether MFN clauses are non-exemptible hardcore restrictions at page 4 https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf%3F__blob%3DpublicationFile%26v%3D3.

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enabling indirect RPM to be more effective.[18] The VGL does go on to note that the use of such supportive measures "*is not considered in itself as leading to RPM.*" However, it nonetheless seems unwise for companies to rely on the protection of the VBER for retail MFN clauses. There is currently insufficient evidence to suggest retail MFNs would benefit from the VBER's safe harbor, and a real risk that certain retail MFN clauses could be considered equivalent to RPM, a hardcore restriction, meaning the protection of the VBER falls away. It should also be recognized that, as retail MFN clauses are generally agreed with large online platforms, such platforms are likely to exceed the 30 percent market share threshold,[19] so the VBER would not apply in any event.

IV. STEP 2: APPLICATION OF ARTICLE 101: OBJECT OR EFFECT?

If the VBER does not apply, the next step is to consider the application of Article 101 and whether retail MFNs should be considered as infringements by object or by effect. To date, there has been a notable reluctance by EU competition authorities to qualify retail MFNs as restrictions by object, and competition authorities have been consistent in assessing retail MFNs as restrictions of competition by effect. However, there does appear to be a consensus that certain retail MFNs are likely to be very problematic from a competition law standpoint, even if the competition authorities stop short of confirming them to be an object infringement. Nonetheless, the somewhat inconsistent approaches by competition authorities, in particular to the treatment of wide and narrow MFNs, has left considerable uncertainty as to how Article 101 should be applied.

A. Narrow v. Wide MFNs: A Competition Law Catch 22

The Commission published its Final Report on the E-commerce Sector Inquiry (the "Report") in 2017. Although the Commission did not formally draw a distinction between narrow and wide retail MFNs, the Report found that MFNs "*can provide disincentives for retailers to compete*" and concluded that this "*may ultimately lead to a reduction of intra-brand competition*," meaning competition between different retailers to sell the same branded product.[20] The Commission also found that MFNs may reduce competition between online platforms and retailers and make entry for new online platforms more difficult. However, at the same time, the Commission acknowledged the necessity for online platforms to recoup their investments and the need to avoid free-riding. The Commission concluded that MFNs should be analyzed and assessed on a case-by-case basis.

The UK *Competition and Markets Authority* ("CMA") considered both wide and narrow retail MFNs as part of the Private Motor Insurance Market Investigation ("PMI"). On March 18, 2015, the CMA issued an Order banning wide MFNs between online platforms and insurers. The CMA found that, by restricting an insurer's ability to set different prices on different sales channels, wide MFNs limited price competition and innovation, and could restrict entry into the market.[21] In its Final Report on the Digital Comparison Tools Market study ("DCT"), the CMA appears to build on this view, stating that wide MFNs are likely to be anti-competitive because they "*soften competition between [online platforms] and lead to higher prices to consumers.*"[22] In November 2018, the CMA issued a statement of objections to ComparetheMarket Ltd. ("CTM") alleging a breach of UK and EU competition law as a result of the wide retail MFNs imposed by CTM in certain contracts with home insurance providers. After reviewing the evidence, the CMA provisionally found that the MFNs "*could be causing customers to miss out on better home insurance deals.*"[23] This investigation builds on the CMA's work in the sector following the DCT market study. It should be noted that while the CTM case has been brought under Chapter I of the Competition Act 1998 ("CA98") and Article 101, the investigations into PMI and DCTs were both under the CMA's market investigation regime, which allows the CMA to investigate markets without applying either Chapter I or Chapter II of CA98.[24]

18 VGL, *supra* note 9, paragraph 48.

19 See *HRS*, *supra* note 17, at page 58.

20 Final Report on E-commerce Sector Inquiry *supra* note 3, at paragraph 622.

21 Competition & Markets Authority, "*Private motor insurance market investigation*," (Final report) 2014 ("PMI") at paragraphs 8.35-8.39 https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf.

22 Competition & Markets Authority, *"Digital Comparison tools market study*," (Final report) 2017 ("DCT") at paragraph 4.94 https://assets.publishing.service.gov.uk/media/59c93546e5274a77468120d6/digital-comparison-tools-market-study-final-report.pdf.

23 Competition & Markets Authority, "*ComparetheMarket home insurance deals could deny people better prices*," https://www.gov.uk/government/news/comparethemarket-home-insurance-deals-could-deny-people-better-prices.

24 Market Investigation References: Guidance about the making of references under Part 4 of the Enterprise Act, OFT 511, March 2006, paragraphs 2.2 to 2.4.

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The CMA and the German *Bundeskartellamt* ("BKA") have also both investigated Amazon's use of wide retail MFNs, which imposed on sellers an obligation that their products be offered at the most favorable price via Amazon Marketplace compared to other online platforms. Only when Amazon announced that it would eliminate the MFN clause did the CMA and the BKA close their investigations.[25]

The CMA has therefore been relatively consistent in its approach to wide retail MFNs. However, the approach to narrow retail MFNs is less clear. Although narrow retail MFNs clearly raise competition concerns in at least some markets, they may also lead to efficiencies and prevent free riding. In the Final Report on the PMI investigation, the CMA stated that the restriction on competition imposed by narrow retail MFNs "*was unlikely to be significant.*"[26] Additionally, narrow retail MFN clauses "*might be necessary*" for the viability of the current online platform business model, and "*might play a role*" in reducing consumer search costs.[27] They were therefore excluded from the CMA's Order prohibiting wide retail MFNs. Following the DCT market study, the CMA did not find that narrow retail MFNs gave rise to an adverse effect on competition. However, the CMA stated that it would remain interested in these clauses because "*they could go beyond what is necessary to achieve the efficiencies they bring.*"[28] In 2017, the CMA closed[29] a parallel investigation into Online Travel Agents ("OTA") following a European Competition Network ("ECN") report on the monitoring of pricing practices in the online hotel booking sector.[30] The CMA considered it too early to reach any conclusions on whether narrow retail MFNs give rise to competition concerns, but did not rule out taking action in the future.[31]

Across the rest of the EU, the approach to wide and narrow retail MFNs remains uncertain as well. In 2015, the French, Italian, and Swedish competition authorities, in coordination with the Commission, closed their proceedings after accepting commitments from Booking.com.[32] These commitments made Booking.com abandon the wide retail MFNs but allowed them to retain the narrow retail MFN clauses. In Germany, the BKA has gone one step further and in December 2015 banned both wide and narrow retail MFNs.[33] The BKA found that narrow retail MFNs were equally as harmful as wide retail MFNs, since they disincentivize lower prices overall and prevent new online platforms from entering the market. The President of the BKA, Andreas Mundt, also stated that narrow retail MFNs offer "*no apparent benefit for the consumer.*"[34] Since the Booking.com case, various Member States seem to be moving closer to the German view that narrow retail MFNs can have the same restrictive effect as wide retail MFNs. Indeed, in spite of their settlement with Booking.com (which permitted narrow retail MFNs), both France and Italy have since introduced legislation which provide for an absolute ban on retail MFN clauses (both narrow and wide) in contracts between hotels and OTAs.[35]

B. The Pros and Cons: Anti-competitive Effects and Efficiencies of MFNs

The different approaches taken by competition authorities towards retail MFNs creates significant uncertainty as to whether this type of conduct infringes Article 101. However, there are clearly some types of retail MFNs that are problematic from a competition law perspective, particularly

25 European Competition Network Brief, "*Germany and United Kingdom: Antitrust Cases against Amazon formally closed*," https://ec.europa.eu/competition/ecn/brief/05_2013/brief_05_2013.pdf.

26 PMI Investigation, *supra* note 27, at paragraph 8.68.

27 *Ibid.* paragraph 61.

28 DCT study, *supra* note 22, at paragraph 4.101.

29 Competition & Markets Authority, "*Hotel online booking: monitoring of pricing practices of online travel agents*," https://www.gov.uk/cma-cases/online-travel-agents-monitoring-of-pricing-practices.

30 European Commission, "*Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities*," (2017) https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

31 Competition & Markets Authority, "*CMA closes hotel online booking investigation*," https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation.

32 European Commission, "*Antitrust: Swedish, French and Italian competition authorities obtain commitments in online hotel booking sector*," https://europa.eu/rapid/press-release_MEX-15-4819_en.htm.

33 *Bundeskartellamt*, Case B 9-121/12, *Booking.com*, 23 December 2015 https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-121-13.pdf?__blob=publicationFile&v=2.

34 *Bundeskartellamt*, "Narrow 'best price' clauses of Booking also anticompetitive," https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html.

35 See France, Article 133 of *LOI no. 2015-990 du 6* août 2015 pour la croissance, l'activité et l'égalité des chances économiques (also known as Macron Law); and Italy, Article 1(166) of the Legge 4 agosto 2017, n. 124, annuale per il mercato e la concorrenza.

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MFNs that have the following effects:[36]

- Creating barriers to entry and/or impeding market entry of new platforms;
- Facilitating collusion or dampening oligopoly competition;
- Price uniformity;
- Dampening of incentives to invest and innovate;

Nonetheless, a number of pro-competitive efficiency arguments for MFNs have also been identified, including:[37]

- Reduction of "free-riding" problems;
- Lowering of sales costs and sales prices;
- Mitigation of hold up problems;
- Increased price transparency for consumers;
- Reduction of transaction and (re)negotiation costs;
- Reduction of delays associated with contractual negotiations.

Since retail MFNs are characterized by both pro and anti-competitive effects, there is a relatively strong body of opinion that they should be assessed as "by effects" restrictions.[38] However, the focus on effects may be explained by insufficient experience on the part of competition authorities in analyzing these "newer" retail MFN clauses, and a lack of economic evidence demonstrating clearly that this conduct should be qualified as an object restriction.[39] If retail MFNs were to be considered as equivalent to RPM, then this would place them firmly in the object infringement box. Nonetheless, in the absence of any guidance or case law confirming this approach, the assessment of MFNs remains focused on restrictions of Article 101 by effect.

C. Online Platforms and the Agency Model: Exemption from Article 101?

An additional consideration in assessing retail MFNs under Article 101 is whether the online platform could, or should, be considered an agent of the suppliers for the purposes of competition law. An agent is defined as a "*legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent's own name or in the name of the principal*" for the purchase (sale) of products/services (supplied) by the principal.[40] Article 101 only applies to agency agreements where both parties to the agreement are "*independent economic operators,*" i.e. the agent assumes some level of financial or commercial risks linked to the sale of the products or services.[41] Otherwise, agency agreements fall outside Article 101 because, in effect, the agent is part of the same economic unit as the principal

36 See Dias, F.G. & Bennett, M. (2015), "*The law and economics of most-favoured nation clauses*," 1 Competition Law & Policy debate 26; Akman, P. (2016), "*A competition law assessment of platform most-favoured-customer clauses",*" 12 Journal of Competition Law and Economics 781; and Ezrachi, A. (2015), "*The Competitive Effects of Parity Clauses on Online Commerce*," Oxford Legal Studies Research Paper No. 55/2015.

37 See Dias & Bennet, *supra* note 36; and Bostoen, *supra* note 2.

38 See Akman, *supra* note 36 and Ezrachi, *supra* note 36.

39 See Peeperkorn, L. (2015), "*Defining restrictions 'by object*'," Concurrences Review No. 3-2015, Art. No 74812.

40 VGL, *supra* note 9, at paragraph 12.

41 See Case C-217/ 05, *Confederación Española de Empresarios de Estaciones de Servicio (CEEES) v. Compañía Española de Petróleos AS*, ECLI:EU:C: 2006:784 at paragraph 38.

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and therefore not an undertaking for the purposes of competition law.[42] The VGL also note that the determining factor in defining an agency agreement for the application of Article 101 is the commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent.[43] The question of risk has to be analyzed on a case-by-case basis, taking into account "*the real economic situation rather than the legal classification of the contractual relationship in national law.*"[44]

There has been some suggestion that online platforms are in practice independent contractors who are agents of their suppliers.[45] Although many online platforms are unlikely to characterize themselves as agents for their various suppliers (for example Amazon's terms and conditions explicitly say that nothing in the agreement between Amazon and third party sellers on Amazon marketplace should be construed as creating an agency relationship between the parties[46]) the assessment should be conducted on the basis of the real commercial context. The question, therefore, is whether the criteria for an agency arrangement is met in practice,[47] and whether that arrangement should consequently be exempted from Article 101. It is argued that for many online platforms the criteria are indeed met, as:[48]

- There is no ownership of the products or services for which the online platforms facilitate transactions, and all online platforms exclude liability in relation to the performance of the contract between the supplier and the customer.
- There is no market-specific investment, nor investment in sales promotion for particular products/services of their suppliers.
- There is no assumption of significant financial or commercial risks related to the sales or performance of the contract with third parties.
- Standard terms and conditions make clear that the contract is formed between the supplier and the customer, and not the online platform.
- Remuneration is only received by the online platform when a sale is made.

These factors taken together suggest that online platforms only agree to use "reasonable" efforts to facilitate transactions for the suppliers, rather than committing to a particular outcome, and this may consequently be in line with the principles of an agency relationship. As yet, there is no case law or guidance from EU competition authorities to confirm or contest this approach. Companies and practitioners may therefore be unwilling to rely on this theory when assessing the legality of retail MFNs. However, if online platforms were to be considered as agents for their suppliers then Article 101 would not apply, and it may be that MFN clauses would need to be assessed under Article 102.

V. STEP 3: APPLICATION OF ARTICLE 102: RETAIL MFNS AS AN EXCLUSIONARY ABUSE

For Article 102 to apply, the online platform would have to be considered dominant in the relevant market, with the retail MFN clause being an instance of an exclusionary abuse. It is argued that retail MFN clauses should be assessed under Article 102 as:[49]

- Retail MFN clauses are usually imposed on trading partners against their will and the imposition of "*unfair trading conditions*" is an abuse under Article 102(a);
- Retail MFN clauses potentially lead to higher prices and this may constitute an abuse of "unfair pricing" under Article 102(a);

42 See Joined Cases 40 to 48, 50, 54 to 56, 113, 114-73, *Cooperatieve Vereniging "Suiker Unie" UA and others v. EC Comm'n*, ECLI:EU:C 1975:174 at paragraph 480.

43 VGL, *supra* note 9, at paragraph 13.

44 See *CEEES*, *supra* note 41, at paragraph 46.

45 See Akman, P. (2019), "*Online Platforms, Agency, and Competition Law: Mind the Gap*," Fordham International Law Journal at page 57.

46 Amazon Services Europe Business Solutions Agreements, Section 14 (cited in Akman, *supra* note 45, at page 43) https://sellercentral.amazon.co.uk/gp/help/external/201190440?language=en_GB&ref=efph_201190440_cont_521.

47 VGL, *supra* note 9, at paragraphs 13-17.

48 See Akman, *supra* note 45, at pages 59-68.

49 See Akman, *supra* note 36, at pages 828-829.

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- The difference in treatment between trading partners that agree to retail MFN clauses and trading partners that do not agree to retail MFN clauses may put some trading partners at a competitive disadvantage which is prohibited under Article 102(c);

- Retail MFN clauses may have a foreclosure effect by hampering the entry of new online platforms, which is prohibited under Article 102(b); and

- Retail MFNs clauses may potentially exclude competition at the trading partner level if the lack of compliance with the retail MFN clause leads to the trading partner's exclusion from the market, which is prohibited under Article 102(b);

Article 102 cases are notoriously hard for competition authorities to bring. However, there are some examples of retail MFN cases which competition authorities have brought under Article 102. The Commission's investigation into Amazon's e-book distribution arrangements is perhaps the most notable. The focus of the Commission was on wide retail MFN clauses contained in the contracts between Amazon and its e-book suppliers. The retail MFN clauses allowed Amazon to protect itself from competition from other e-book distributors. The investigation ended in 2017 with a commitment decision in which Amazon agreed to no longer enforce, introduce, or change the terms of its agreements with its suppliers. According to the Commission, the retail MFN clauses may have led to "*less choice, less innovation and higher prices for consumers due to less overall competition in the EEA.*"[50] The Commission separated the European e-book market per language, defined the relevant market as the "*retail distribution of English and German language e-books to consumers*"[51], and considered Amazon to be dominant in the relevant market, although it did not provide market share figures.

In the UK, there is an interesting example of a Chapter II MFN case that was brought in the online auction sector.[52] In November 2016, the CMA opened a formal investigation into ATG Media, the leading supplier of live online bidding services in the UK. The CMA raised concerns that ATG Media may have infringed Chapter I and/or Chapter II of CA98 as a result of, amongst other things, "*clauses that required the auction house to offer 'no less favourable terms' to bidders using competing, or their own, live online bidding auction platforms.*"[53] In 2017, the CMA accepted commitments from ATG Media and closed its investigation into whether ATG had entered into anti-competitive agreements or abused a dominant position. In its decision, the CMA noted that the retail MFN clauses may be capable of "*foreclosing ATG Media's competitors given that such restrictions are likely to discourage the use by auction houses of competing [live online bidding] auction platforms.*"[54] The CMA was, ultimately, concerned that the retail MFNs made it harder for alternative online platforms to compete effectively in the market.

It is notable that the CMA's concerns regarding the retail MFN clauses in the online auction market involved the potential application of both Chapter I and Chapter II.[55] The case has since been cited as an example of an abuse dominance case.[56] However, it is clear that competition authorities, while aware of the potentially anti-competitive effects of retail MFNs, are struggling with how best to deal with them, and whether to apply Article 101 or Article 102. If competition authorities themselves are not entirely sure of the legal framework, then this leaves little hope for companies looking to understand whether they are on the right side of the law.

50 European Commission, "*Antitrust: Commission accepts commitments from Amazon on e-books*," https://europa.eu/rapid/press-release_IP-17-1223_en.htm.

51 *E-book MFNs and related matters* (Case COMP/ AT.40153) Communication from the Commission [2017] OJ C26/ 2 at page 13 http://ec.europa.eu/competition/antitrust/cases/dec_docs/40153/40153_4392_3.pdf.

52 See Chisholm, S & Long, S & Parker H. (2019), "*Interim Measures in the UK: Lessons from the Online Auction Services Case,"* International In- house Counsel Journal 2019, Volume 12(46).

53 Case number 50408: CMA Notice of intention to accept binding commitments offered by ATG Media in relation to live online platform services, decision of 30 May 2017 at paragraph 2.3 https://assets.publishing.service.gov.uk/media/5954be5c40f0b60a44000092/auction-services-commitments-decision.pdf.

54 *Ibid.* at paragraph 3.15.

55 From the period 2014-2018, the CMA only opened 5 cases involving both Chapter I and Chapter II CA98, "CMA annual report and accounts," (years 2014 – 2018).

56 UK Furman Report, *Unlocking digital competition,* Report of the Digital Competition Expert Panel (2019), paragraph 3.116 (footnote 21). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

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VI. CONCLUSION: SHOULD RETAIL MFNS BE ASSESSED UNDER AN *EX ANTE* CODE OF CONDUCT?

The biggest challenge facing competition authorities and companies alike is the absence of infringement decisions or judgments relating to retail MFNs. Aside from the HRS case in Germany, all other Commission and national competition authority cases have closed with commitments. A quick resolution through commitments can save both time and cost for the competition authority and companies concerned. However, importantly, the offering of commitments by a company under investigation does not result in an infringement decision.[57] This means that there is no clarity as to whether competition law has actually been infringed, either under Article 101 or Article 102. There does appear to be a broad consensus across the EU that wide retail MFNs are likely to be problematic from a competition law perspective. However, the approach to narrow retail MFNs remains uncertain and inconsistent.

It is unquestionable that assessing retail MFNs is complicated. A careful balancing act is required to ensure that the interests of increased competition by retailers is weighed against the need to protect and encourage investment by online platforms. But suggesting a case-by-case analysis could also be read as simply putting retail MFNs in the "too difficult" box. MFNs have now been considered in various investigations by a number of competition authorities and a large cloud of uncertainty still hangs over the legality of these business practices. This is unsettling for retailers and online platforms alike, as businesses like nothing less than uncertainty.

One potential solution could be the introduction of an *ex ante* code of conduct for retail MFN clauses, similar to that proposed in the Furman Report.[58] The aim of the Furman code of conduct is to provide clarity to digital platform businesses (deemed to have strategic market status) about the "*boundaries of acceptable competitive conduct.*" [59] Although retail MFNs are not referred to specifically, one illustrative example of the type of behavior that could be considered unfair or unreasonable is "*an online platform penalising a business user for providing a more attractive offering on another site.*"[60] The proposals put forward in the Furman Report have been widely discussed, with practitioners, academics, and competition authorities all alive to the fact that the digital economy and the rise of e-commerce presents relatively unique challenges for the existing legal framework. Indeed, following the Furman Report, the CMA has acknowledged that "*enforcement action is no longer enough to address the wider concerns in online markets, and that ex- ante regulation in some form is likely to be required.*"[61]

Taking the Furman Report code of conduct proposal and applying it to retail MFNs could provide a stepping stone to legal clarity, while we await a fully reasoned infringement decision or judgement in this area. There is arguably sufficient consensus around the anti-competitive effects of wide MFNs to set out certain types of clauses that should be presumed problematic within a code of conduct. The presumption would be rebuttable, thus avoiding the categorization of these clauses as object infringements – something that competition authorities appear reticent to do. But more explicit *ex ante* guidance would provide much needed clarity as to how retail MFNs should be treated under EU competition law.

57 The Commission is able to adopt decisions whereby, without a finding of infringement, commitments given by undertakings as to their future behaviour are made binding upon them (Article 9 of Council Regulation (EC) No 1/2003).

58 UK Furman Report *supra* note 56.

59 *Ibid.* at page 55 at paragraph 2.8.

60 *Ibid.* at page 61 at paragraph 2.36.

61 Competition & Markets Authority, "*CMA Letter to BEIS*," (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788480/CMA_letter_to_BEIS_-_DCEP_report_and_recommendations__Redacted.pdf.

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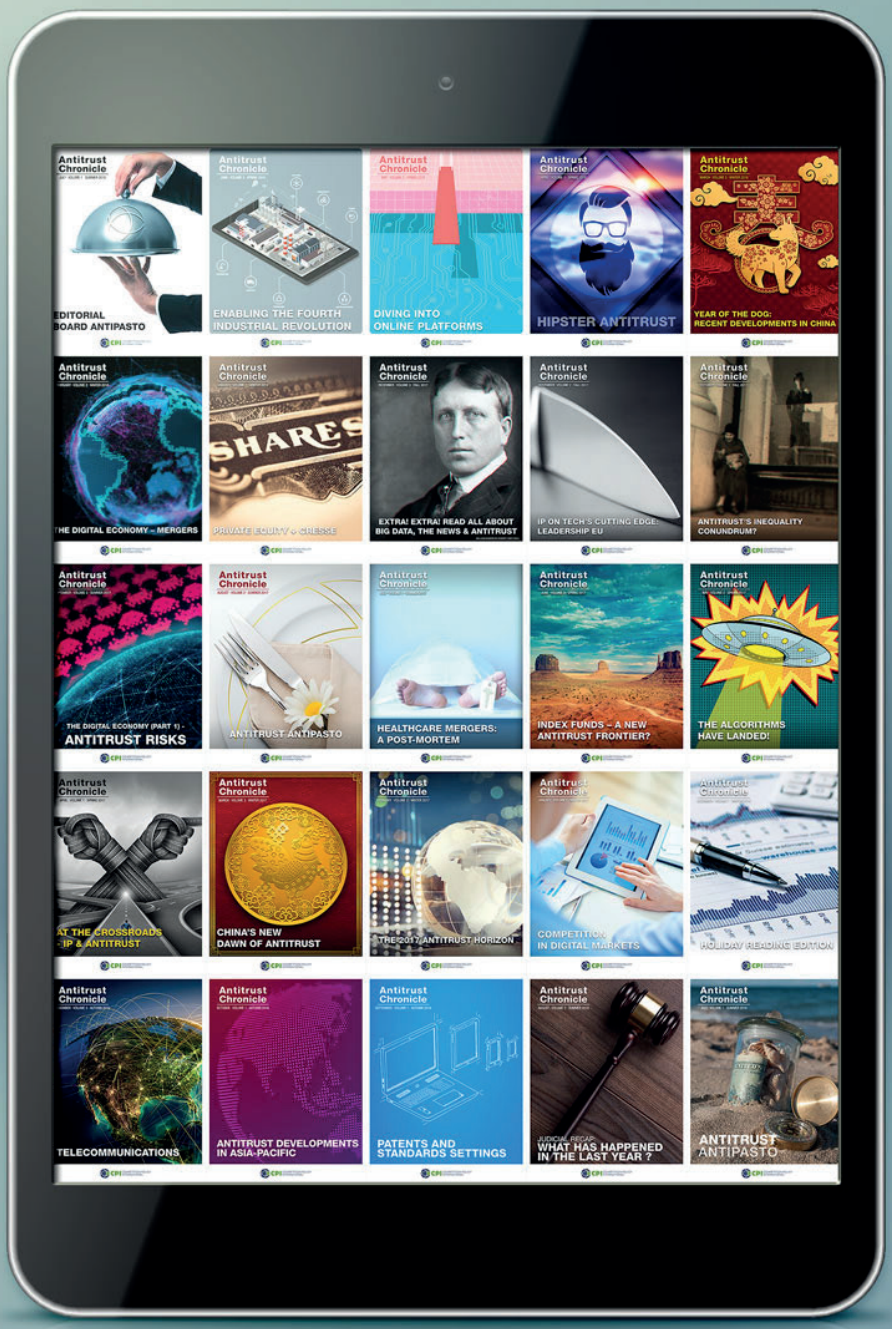
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