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A Competition Law Assessment of Platform Most-Favoured-Customer Clauses

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Abstract

Most-favoured-customer (MFC) clauses adopted by online platforms in their relevant contractual relationships guarantee to an online platform that a supplier will treat the platform as favourably as the supplier's most-favoured-customer concerning price, availability and similar terms of a given transaction. These clauses are a fundamental aspect of the business models of some of the world's leading companies such as Apple, Amazon, Expedia, etc. The competition law implications of these clauses have been one of the key concerns of over a dozen competition authorities around the world in recent years. The competition authorities involved have adopted different approaches and reached different substantive and procedural outcomes, sometimes in proceedings that concern the application of the same legal rule to the same practice of the same company. This is best demonstrated by the line of investigations against certain online travel agents in Europe. This article posits that such diverging approaches lead to legal and business uncertainty, as well as to procedurally unfair and substantively incorrect assessments. In an effort to rectify this suboptimal situation, the article provides a comprehensive, principled approach for the assessment of platform MFC clauses under competition law – in particular, under EU competition law.

JEL Codes: K21, L41, L42

I Introduction

Most-favoured-customer (MFC) clauses (also known as most-favoured-nation (MFN) clauses) adopted by online platforms have been one of the key concerns of competition authorities around the world in recent years. An MFC clause is a promise by one party, for example, a seller, to treat a buyer as favourably as that party treats its best customer.[1] When related to prices, the clause ensures that the customer whose contract contains an MFC clause will not pay a higher price than the seller's 'most-favoured-customer'.[2] An online 'platform' can be deemed as the online equivalent of a shopping mall where buyers and sellers meet to

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[1] JB Baker 'Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favoured-Customer" Clauses' (1996) 64 Antitrust Law Journal 517, 519.

[2] P Akman and M Hviid 'A Most-Favoured-Customer Clause with a Twist' (2006) 2 (1) European Competition Journal 57, 57.

make purchases.[3] MFC clauses have recently come under the scrutiny of competition law enforcers in the context of online platforms such as online travel agents (OTAs), price comparison websites (PCWs), online marketplaces, etc. These platforms include companies such as Amazon marketplace, iBookstore, Booking.com, Expedia, etc. When adopted by such platforms in their contracts with the providers or sellers seeking to reach consumers through the platforms, MFC clauses ensure that the provider or seller does not charge a higher price on one platform than it does on another platform. Thereby, the clauses ensure that the platform to which the promise is made gets the best price available for customers purchasing on that platform for the same item across platforms. Consequently, such clauses provide 'price parity' across platforms.[4]

Currently, there are at least fourteen national competition authorities (NCAs) in Europe alone which are either investigating and/or have recently investigated the competition issues raised by such clauses. In addition, in June 2015, the European Commission opened its own investigation into certain practices of Amazon including MFC clauses.[5] Commitments have been reached between some NCAs led by the authorities in France, Sweden and Italy and an OTA, namely Booking.com limiting the use of such clauses by Booking.com, while investigations into Expedia regarding the same practice continue.[6] Commitments were also reached in the UK concerning discount parity clauses adopted by Booking.com, Expedia and a major hotel chain, but these have been reversed on appeal and the investigation was eventually closed.[7] In contrast, the Bundeskartellamt in Germany has adopted an

[3] For the shopping mall analogy, see 'Can "Fair" Prices be Unfair? A Review of Price Relationship Agreements' A Report prepared for the Office of Fair Trading by LEAR (OFT1438) September 2012 [6.37]; M Bennett 'Online Platforms: Retailers, Genuine Agents or None of the Above?' (2013) Competition Policy International Europe Column 8-9.

[4] A Fletcher and M Hviid 'Retail Price MFNs: Are They RPM "at its worst"?' ESRC Centre for Competition Policy Working Paper 14-5, 2.

[5] See European Commission, Press Release, 'Antitrust: Commission opens formal investigation into Amazon's e-book distribution arrangements', Brussels, 11 June 2015 (IP/15/5166). The Commission also started a sector inquiry into e-commerce; see European Commission, Press Release, 'Antitrust: Commission launches e-commerce sector inquiry', Brussels, 06 May 2015 (IP/15/4921).

[6] Italian Competition Authority, Press Release, 'Commitments offered by Booking.com Closed the Investigation in Italy, France and Sweden', 21 April 2015. On 1 July 2015, Expedia has voluntarily announced that it will apply the commitments that Booking.com offered and will abandon the use of parity clauses with its hotel partners for 5 years. See http://www.expediainc.com/news-release/?aid=123242&fid=99&yy=2015. Booking.com has also announced that it will apply the terms of the commitments that it entered into with the French, Italian and Swedish NCAs to all its hotel partners in Europe; see Booking.com, Press Release, 'Booking.com to Amend Parity Provisions throughout Europe', Amsterdam, 25 June 2015, http://news.booking.com/bookingcom-to-amend-parity-provisions-throughout-europeesp.

[7] See OFT Decision Hotel Online Booking: Decision to Accept Commitments to Remove Certain Discounting Restrictions for Online Travel Agents, OFT1514dec, 31 January 2014 (Booking.com/Expedia/IHG) reversed on appeal in Skyscanner Ltd v Competition and Markets Authority [2014] CAT 16. For the announcement of the

infringement decision against a major OTA, namely Hotel Reservation Service (HRS) and against Booking.com regarding the same clauses that are the subject of the commitments agreed between Booking.com and the French, Swedish and Italian NCAs, whilst continuing its investigation against Expedia.[8] Separately, after the commitments by Booking.com were accepted, the French Constitutional Council has adopted legislation that bans all types of parity clauses including the ones that were allowed under the commitments made binding against Booking.com by the French Competition Authority, thereby undermining the commitments.[9]

The lack of action at EU level by the EU Commission has led to different NCAs in Europe reaching different conclusions and solutions on the basis of different approaches.[10] These European solutions also differ from solutions adopted in other major jurisdictions, such as the US, in similar cases. What aggravates the current situation in the EU is that the companies subject to the investigations and/or the practices involved in these different cases as well as the applicable legal rule are practically the same. Further, the way in which some of the authorities have handled these clauses opens up the possibility of creating a legal anomaly in the laws concerning the prohibition of anticompetitive agreements (such as Article 101 TFEU and its national equivalents). This is because the investigations of the NCAs into anticompetitive 'agreements' are directed against only one party to the agreement and the

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CMA's closure of the investigation, see Press Release 'CMA closes hotel online booking investigation', 16 September 2015 available at https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation.

[8] See Bundeskartellamt HRS-Hotel Reservation Service, 9th Decision Division, B 9 – 66/10, 20 December 2013; Bundeskartellamt Meistbegünstigstenklauseln bei Booking.com, 9th Decision Division, B 9-121/13, 22 December 2015; Bundeskartellamt, Press Release, 'Bundeskartellamt Issues Statement of Objections Regarding Booking.com's "Best Price" Clauses', 2 April 2015; Bundeskartellamt Press Release 'Narrow "best price" clauses of Booking also anticompetitive' 23 December 2015 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html. The other European countries in which these clauses are being/have been assessed from a competition law perspective are Austria, Switzerland, Ireland, Hungary, Poland, the Czech Republic, Denmark, Belgium, Greece; see M Newman and L Crofts 'Swiss to Wrap Up Hotel-Pricing Probe by Year-End' MLEx, 5 August 2015, and, L Crofts and M Newman 'Booking.com, Expedia to Avoid Full Antitrust Scrutiny in Greece' MLex, 22 September 2015.

[9] See Article 133 of LOI n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques (also known as 'Macron Law') banning restrictions on hoteliers' pricing freedom. For discussion, see M Newman 'Comment: French Law on Hotels Exposes Cracks in EU's Competition Network', MLex, 14 August 2015.

[10] The outcome of the Commission's Amazon investigation may clearly have a significant impact on the development of the law in this area but does not change the fact that competition authorities in the EU have already adopted diverging approaches with different substantive assessments and may continue to do so before the Commission takes any action at all against Amazon.

decisions taken are addressed to only one of the parties.[11] Where the anticompetitive practice is that of an anticompetitive 'agreement', investigating the conduct of only one of the parties to the agreement and addressing the decision to only one of the parties (as opposed to all of the parties) creates a mismatch between the authorities' theory of harm and their action, and thereby raises questions as to whether they are operating on the basis of the correct theory of harm. This is because addressing the decision to one of the parties to the agreement suggests that the theory of harm is based on unilateral conduct, despite the legal action being pursued under a provision prohibiting multilateral conduct, namely an 'agreement'. In fact, this article demonstrates that the theory of harm based on the prohibition of anticompetitive agreements as adopted by all the NCAs in the EU dealing with these clauses is inferior to a theory of harm based on a potential abuse of (collective) dominance. A uniform approach to MFC and similar clauses adopted by online platforms that is based on the correct legal premise is essential for business and legal certainty for global companies operating in the online world, as well as for the consistent application of EU competition law rules across different Member States and for avoiding global divergence in competition policy concerning such prevalent business practices.

It should be noted at the outset that platform MFC clauses are unusual MFC clauses to the extent that they do not correspond to the traditional scope of those clauses (see Annex for a diagram demonstrating the difference). Normally, by providing a promise to a buyer that the buyer will be treated as favourably as the seller's most-favoured-customer, MFC clauses link prices between different customers of the same seller. For example, the retailer Barnes and Noble would promise to Customer A that the price at which it sells Harry Potter to her is no higher than the price at which it sells Harry Potter to Customer B. The benefit of the MFC clause is subsequently realised by the contract party (Customer A) to whom the promise is made. In contrast, platform MFC clauses are 'third-party agreements'; such clauses link prices for the same customer for purchases from different outlets. For example, the publisher of Harry Potter would promise to Apple that the price of Harry Potter on Apple's iBookstore will be no higher than the price of Harry Potter on Amazon.com. The effect of such an agreement between the publisher and the platform is realised on a third-party, namely the

[11] See eg HRS (n 8); Swedish Competition Authority Decision Ref. No. 596/2013 Bookingdotcom Sverige AB 15 April 2015. Note that the commitments were agreed between the Swedish, Italian and French competition authorities and Booking.com. Due to lack of availability in English of the decisions by the Italian and French authorities, the Swedish decision will be used throughout this article as representative of all three commitment decisions.

customer who is not a party to the agreement. To be a traditional MFC clause, the clause would have to create a link between the prices of the same or similar products from the same outlet offered to different customers rather than create a link between the price of the same or similar products from different outlets offered to the same customer.[12] For example, in Apple, major publishers were practically matching the price of the same book sold to the same customer via different agents, where the agents (eg iBookstore and Amazon) were in competition with one another. Therefore, the MFC clause had the effect of matching the prices of competitors, despite the fact that these were not the sellers' (ie publishers') but the intermediary's (ie agent's) competitors. Thus, the categorisation of such platform parity clauses as MFC clauses when they are very different to genuine MFC clauses might be an impediment to understanding their real operation and potentially, their effects on competition. This is because the anticompetitive effects of 'price-matching-guarantees' (PMGs) which involve promises by a seller to match the prices of competitors for the same customer – as opposed to (platform) MFC clauses – are better established in the literature.[13] Indeed, it is clear that the publishers involved in the US Apple litigation, thought of the MFC clause as a 'price-matching' clause.[14] A worrying aspect of the ongoing decisional practice in Europe concerning the OTAs is that the NCAs by their decisions may have pushed the market from a less-anticompetitive-equilibrium to a more-anticompetitive-equilibrium due to a lack of understanding the differences in the operation of these different clauses. For example, in the commitments agreed between three NCAs and Booking.com, despite agreeing not to impose MFC clauses on its hotel partners, Booking.com remains free to enforce its 'Best Price Guarantee' to consumers by which it will 'match any lower price that may be found on another booking website' – a clause that seems not to have concerned the relevant NCAs in their investigations.[15] In fact, the commitments in question expressly allow Booking.com to continue the use of the PMGs which for the jurisdictions concerned, legalises these promises for the duration of the commitments.[16] Given that Expedia and HRS also have such a 'Best

[12] Akman and Hviid (n 2) 65. Akman and Hviid identified the discounts offered in the case of R v Secretary of State for Trade and Industry, ex p Thomson Holidays [2000] ECC 321 concerning UK tour operators, travel agents and package holidays to be also closer to price-matching-guarantees than MFC clauses.
[13] Akman and Hviid (n 2) 71-72.
[14] See United States v Apple Inc 952 F. Supp. 2d 638 (SDNY 2013) 666; 672 n 38; 674.
[15] See Booking.com Press (n 6) explaining that Booking.com will continue its Best Price Guarantee. The Bundeskartellamt has identified these guarantees as supporting the impact of the MFC clauses in question but has not banned them; HRS (n 8) [42]-[43].
[16] See Bookingdotcom (n 11) Commitments, Article 3.

Price Guarantee',[17] it is likely that the competition law intervention in this market has banned the potentially less-anticompetitive clause (MFC clause) thereby pushing the hotels to make more use of their potentially more-anticompetitive clause (PMG). Instead of obliging the hotels to offer them the same prices, the online platforms can now use their unilateral promise to consumers to make the consumers (ie hotel guests) inform them of the better prices on other platforms with the possible consequence that eventually such 'better' prices will cease to exist. Subsequently, at best, the recent intervention of the NCAs in this market will have been without effect since they have not addressed the more disconcerting practice in their enforcement. At worst, they may have moved the industry closer to a potentially more anticompetitive equilibrium by focalising the platforms' options where the consumers – rather than the hotels – will be used to sustain and facilitate a collusive outcome by taking away the possibility of using a potentially less-anticompetitive contract clause.[18] These recent developments demonstrate how important it is to correctly understand the operation of such contractual clauses and subsequently, to correctly identify the optimal competition law assessment of these clauses in order to avoid any potential perverse outcomes.

None of this is to say that PMGs or MFC clauses are always anticompetitive. However they are categorised, contractual clauses containing promises to buyers that they will receive the best price or be treated as favourably as the seller's best customer can have both procompetitive and anticompetitive effects. At first glance, they provide reassurance to buyers who might be faced with certain risks in investing in a relationship with the particular seller and thereby facilitate trade that would not otherwise take place. In contrast, they may also be a mechanism that facilitates price fixing and collusion, as well as the foreclosure of the market due to the impossibility of entrants agreeing better deals than the deal an incumbent has in its contract with an important input supplier containing an MFC clause.

[17] See Expedia, 'Our Best Price Guarantee' at http://www.expedia.co.uk/daily/price-guarantee/default.aspx. See HRS website at http://www.hrs.de and http://hotelexperte.hrs.de/.

[18] It is interesting that the OTAs appear to believe that their best price guarantees can work without MFC clauses being imposed on the hotels: the OTAs do not set the prices of the rooms that they sell, so it is striking that they can still promise to offer the consumers the best rate when surely the lowest reduction that they can offer to match a competitor's rate without selling below cost is the amount of their commission. For the different business models of Booking.com and Expedia, see Booking.com/Expedia/IHG (n 7) 4.17 et seq. Booking.com operates under the commission model where the hotel guest pays the hotel directly and Booking.com is paid a commission off this rate by the hotel. Expedia operates predominantly under the merchant model although to a lesser extent it also uses the commission model. Under the merchant model, the portal offers the accommodation at a mark-up against the net rate paid by the portal to the hotel; the difference between the rate paid by the consumer and the net rate that the portal needs to remit to the hotel constitutes the revenue of the portal. It is this margin that can be used by the portal to offer reductions in the rate. See Bookingdotcom (n 11) [10] confirming that it is the hotel that decides on and uploads the prices to be displayed to consumers on the platform.

Such difference in potential effects coupled with the fact that platforms are two-sided markets with sellers on the one side and buyers on the other side render the competition law assessment of platform MFC clauses a complicated matter. There is a danger that on the basis of different theories of harm or different assumptions, different authorities around the world and even within the EU will reach different conclusions concerning the same practice. As this article will demonstrate, this has already happened to some extent and such contradictory treatments and outcomes cannot be conducive to legal certainty for businesses in such rapidly evolving markets as online markets.

This article aims to propose and explain the correct application of EU competition law to platform MFC clauses with a view to promoting a uniform approach that would not only eliminate the differences between Member State applications of the same law, but also provide greater legal certainty to the undertakings subject to the European competition rules. As such, this article fills a gap in the literature by providing a comprehensive positive and normative analysis of platform MFC clauses under competition law and in particular, under EU competition law.[19] In order to achieve this aim, section II provides an explanation of the current state of economics concerning MFC clauses, as well as similar clauses, where relevant. Section III examines some of the recent cases that have involved platform MFC clauses across different jurisdictions. Section IV critically assesses the potential application of Articles 101 and 102 TFEU to platform MFC clauses. It finds that although much of authority enforcement action concerning platform MFC clauses has been based on Article 101 and/or its national equivalents, due to several factual and legal obstacles, such enforcement action should rather focus on the application of Article 102 to these clauses. The crux of the preference for the use of Article 102 is that, first, platforms are legally 'agents' of the suppliers with which they enter into contracts containing these MFC clauses. This renders Article 101 inapplicable to these agreements since there are not two separate undertakings, which is essential for its applicability. Second, without market power held by at least one of

[19] For the developing legal literature on the topic, see eg JP van der Veer 'Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis' (2013) Journal of European Competition Law & Practice (Advance Access); D Zimmer and M Blaschczok 'Most-Favoured-Customer Clauses and Two-Sided Platforms' (2014) Journal of European Competition Law & Practice (Advance Access); I Vandenborre and MJ Frese 'Most Favoured National Clauses Revisited' [2014] ECLR 588; V Soyez 'The Compatibility of MFN Clauses with EU Competition Law' (Case Comment) (2015) 36 (3) ECLR 107; I Vandenborre and MJ Frese 'The Role of Market Transparency in Assessing MFN Clauses' (2015) 38 (3) World Competition 333. For the US perspective, see eg JB Baker and JA Chevalier 'The Competitive Consequences of Most-Favored-Nation Provisions' (2013) 27 (2) Antitrust 20; SC Salop and F Scott Morton 'Developing an Administrable MFN Enforcement Policy' (2013) 27 (2) Antitrust 15.

the parties to the agreement such as the platform, these clauses are unlikely to raise competition concerns. Section V concludes by arguing that, first, from a normative point of view, the treatment of platform MFC clauses under Article 102 represents the more appropriate approach, and second, the thus-far treatment of these clauses under Article 101 and the diverging approaches of several NCAs across Europe risk leading to inconsistent, incorrect and unfair outcomes with the consequent undesirable reduction in legal and business certainty.

II Current State of Economics

Where sellers commit to pricing policies that limit their freedom and link their prices to other prices charged for the same or similar competing products, these policies do not determine absolute price levels but set pricing relativities.[20] These commitments can be across-sellers such as PMGs or across-customers such as MFC clauses.[21] According to a report prepared for the Office of Fair Trading (OFT) (now the Competition and Markets Authority (CMA)), these clauses have the potential to both harm competition and generate efficiencies, leading to the conclusion that the question of whether these clauses are good or bad for consumers cannot receive a clear-cut answer.[22] The benefit or harm to consumers depends on the characteristics of the market affected, the specificities of the clause and the nature of the seller(s) who offers it.[23] A review of the economics literature suggests that the risks of softening competition and foreclosing new entrants are lower with across-customers clauses than with across-sellers price guarantees.[24] In this respect, it is important to reiterate that the clauses that have been scrutinised as MFC clauses by the competition authorities in various recent investigations are in fact closer to PMGs (ie across-sellers guarantees) than genuine MFC clauses (ie across-customers clauses).[25] It should, however, also be remarked that even if they are treated as PMGs, this in itself does not eliminate the potential for these clauses to entail procompetitive gains. As will be seen in section III, it has been confirmed by several NCAs in Europe that a particular type of such platform MFC clauses is vital for such platforms to survive as businesses.[26] Finally, it should also be noted that the literature –

[20] LEAR Report (n 3) [0.1].
[21] LEAR Report (n 3) [0.1].
[22] LEAR Report (n 3) [0.24].
[23] LEAR Report (n 3) [0.24].
[24] LEAR Report (n 3) [0.24].
[25] This would not be the first time that the competition authorities wrongly examined PMGs as MFC clauses. See Akman and Hviid (n 2) on the examination of MFC clauses that were the subject of the UK Monopolies and Mergers Commission's decision on foreign package holidays.
[26] See text around n 116 and n 125 below.

including the economics literature – on platform MFC clauses indeed examine these clauses as MFC clauses rather than PMGs.[27] A review of the economics literature suggests that the potential procompetitive and anticompetitive effects of PMGs and MFC clauses, as well as other similar clauses are by their nature the same or similar with differences as to the degree and likelihood of the effects rather than their nature.[28]

Regarding their procompetitive potential, MFC clauses can enable new products to enter the market and enhance competition.[29] For example, they can be used to prevent opportunism where one of the parties makes relationship-specific investments to create a new product or improve an existing product.[30] MFC clauses can also be used to deter rent-seeking delays and hold out problems where important market information can be discovered after some contracts are concluded.[31] In this context, MFC clauses reduce the risks involved in making investments. Another efficiency argument is that MFC clauses help buyers lower their costs by purchasing inputs for less.[32] Other efficiency arguments include that the MFC clauses enable buyers to get the best deals that they can;[33] they provide assurance to smaller buyers that they would not be placed at a competitive disadvantage against bigger buyers;[34] they reduce transaction costs by guaranteeing that the contracting party will receive the best price without undertaking costly negotiations;[35] they provide 'fairness' in guaranteeing that if the price of the product is reduced in future, the buyer with the contractual clause can benefit from it, too; [36] and, they avoid the perception of unfairness that different prices might lead to.[37]

[27] See in general the literature in n 19. Exceptionally, in a recent article, Buccirossi emphasises the similarities of platform parity clauses with across-sellers pricing policies such as PMGs; see P Buccirossi 'Parity Clauses: Economic Incentives, Theories of Harm and Efficiency Justifications' (2015) 1 (3) Competition Law and Policy Debate 43.
[28] See LEAR Report (n 3) [2.15]; [3.12].
[29] Baker and Chevalier (n 19) 20-21; Salop and Scott Morton (n 19) 15.
[30] Salop and Scott Morton (n 19) 15.
[31] Salop and Scott Morton (n 19) 15; Baker (n 1) 533.
[32] Baker (n 1) 531. Baker argues that the greater the fraction of buyers who obtain MFC protection, and the larger their size, the less plausible it becomes that these clauses will help buyers obtain inputs for less; ibid.
[33] Blue Cross and Blue Shield United of Wisconsion v Marshfield Clinic 65 F.3d 1406, 1415 (7th Cir 1995).
[34] EI Du Pont de Nemours & Co v Federal Trade Commission, Ethyl Corp v Federal Trade Commission 729 F.2d 128, 134 (1984) .
[35] Baker and Chevalier (n 19) 22.
[36] Akman and Hviid (n 2) 61.
[37] On the perception of unfairness, see eg L Xia, KB Monroe and JL Cox 'The Price is Unfair! A Conceptual Framework of Price Fairness Perceptions' (2004) 68 (October) Journal of Marketing 1, 4 and ET Anderson and DI Simester 'Does Demand Fall When Customers Perceive That Prices are Unfair? The Case of Premium Pricing for Large Sizes' (2008) 27 (3) Marketing Science 492.

The anticompetitive effects of MFC clauses can be collusive or exclusionary: they can facilitate coordination or dampen oligopoly competition by making it impossible to offer selective discounts, or they can lead to exclusion by raising costs of rivals or entrants that attempt to compete by negotiating lower prices from suppliers of critical inputs, etc.[38] MFC clauses can facilitate coordination since coordination works better if firms have little incentive to cheat to begin with and MFC clauses provide that condition by reducing the incentive to deviate from a coordinated horizontal agreement since the firm cannot limit its discounts to a single customer.[39] That is, any discount given to one customer would have to be given to all customers with MFC clauses in their contracts, which increases the cost of the overall discount for the supplier.[40] In short, MFC clauses could be anticompetitive because they create a financial incentive for the seller not to lower its prices.[41] MFC clauses can also harm competition through exclusion by preventing an incumbent's rivals (including entrants) from bargaining with input suppliers or distributors for a low price since when the suppliers or distributors have MFC clauses in their contracts with the incumbent, they would lose too much from the deal they make with a small rival or entrant.[42] Although this harm to competitors does not in itself imply harm to competition, if the MFC clause prevents suppliers or distributors from giving a better price to enough of the firm's significant rivals (including entrants), it could be used to confer or protect market power.[43]

As for platform MFC clauses specifically, the LEAR Report surveyed the developing literature and found that the most relevant competitive effects of such across-platforms parity agreements are likely to occur in the market where the platforms compete against each other.[44] Possible effects that these agreements can have on platform competition include foreclosing entry of other platforms; softening competition between platforms; facilitating collusion between platforms, and signalling information about platforms' costs.[45] Such agreements can lead to foreclosure: if a platform ties a substantial share of sellers it can impede the effective entry of rival platforms.[46] This is because if sellers cannot charge lower prices on the new platform, a new platform cannot attract buyers by providing them the same

[38] Salop and Scott Morton (n 19) 15.
[39] Baker (n 1) 520.
[40] Baker and Chevalier (n 19) 23.
[41] Salop and Scott Morton (n 19) 15.
[42] Baker and Chevalier (n 19) 24.
[43] Baker and Chevalier (n 19) 24.
[44] LEAR Report (n 3) [6.44].
[45] LEAR Report (n 3) [6.45].
[46] LEAR Report (n 3) [0.34].

goods at lower prices.[47] These agreements may foreclose entrants that are even more efficient than the incumbent: if the entrant were to adopt the strategy of charging a lower transaction fee (eg lower commission) to sellers so as to allow them to charge lower prices on the new platform, the incumbent's platform MFC clause would prevent this.[48] However, sellers would only sign such agreements if they think that being on the platform, even with the price parity requirement, allows them to increase their sales more than not being on it with complete pricing freedom.[49] According to the LEAR Report, '[s]uch situation is more likely the stronger the market power of the platform, though it may not require that the platform enjoys a dominant position in an antitrust sense'.[50] An across-platforms parity agreement can also soften competition between platforms, thereby increasing the fees paid by the sellers and consequently the prices charged by the sellers to the buyers.[51] This is because an increase in fees by one platform will lead to an increase on the prices on the other platform and a decrease in fees by one platform will not lead to an increased market share for the same platform due to the parity agreements.[52] Such agreements can also facilitate collusion between platforms.[53]

A potential efficiency of such agreements is that they may help platforms to protect any investments they may have made to provide pre-purchase services to buyers (eg reviews, advice, etc).[54] An across-platforms parity agreement may help a high-cost/high-quality platform to defend its quality investments by preventing other platforms from free-riding on them.[55] If buyers use the high-cost/high-quality platform to search and then buy on a lower-cost/lower-quality platform, the former will not be able to obtain a return from its investments.[56] The overall effect on welfare depends on the benefits buyers obtain from the quality/reputation on the one side and on the possible harm due to a lower degree of

[47] LEAR Report (n 3) [0.34].
[48] LEAR Report (n 3) [6.49].
[49] LEAR Report (n 3) [6.51]. Another reason for which sellers might agree to these are side payments flowing from the platform to the retailers which would compensate the retailer for any loss of profits whilst increasing the overall profits; ibid [6.52].
[50] LEAR Report (n 3) [6.51].
[51] LEAR Report (n 3) [6.54].
[52] LEAR Report (n 3) [6.54] et seq. This is because as a result of the platform MFC clause, the seller paying the higher fee will not be able to charge a higher price on the platform demanding the higher fee. Consequently, the seller will have to spread the higher fee charged by that platform across prices on all platforms; ibid [6.55]-[6.56]
[53] LEAR Report (n 3) [6.62]-[6.63].
[54] LEAR Report (n 3) [0.37]; [6.47].
[55] LEAR Report (n 3) [6.71].
[56] LEAR Report (n 3) [6.72].

competition among platforms on the other side.[57] Moreover, there may be alternative ways for these benefits to be realised that would not have the same possible harm from reduced competition.[58] A different efficiency argument also related to the prevention of free-riding concerns the platforms which are intermediaries whose primary function is to allow buyers and sellers to find the most appropriate match (eg OTAs).[59] For such platforms, once the right match has been found, the two parties do not actually need the intermediary to conclude the transaction and with an intermediary charging a transaction-based fee, the parties can free-ride on the intermediary's services by trading directly.[60] This would threaten the entire business model of the intermediary and if the intermediary performs a socially efficient economic activity, then preventing such free-riding would constitute a valid efficiency justification.[61] The LEAR Report finds that although the economics literature concerning across-sellers and across-customers price relationship agreements (PRAs) has obtained some sufficiently solid results that can be used to provide guidance to competition authorities, the same cannot be said for across-platforms parity agreements and pricing relativities.[62]

The literature that has developed since the LEAR Report does not appear to propose sufficiently general results that can guide competition authorities either. Rather, it appears to suggest that much depends on the context and the operation of the MFC clauses adopted by platforms in terms of their potential effects. For example, one study finds that under certain conditions, such MFC clauses may raise prices, but under other conditions they may also increase choice for consumers without increasing prices.[63] Similarly, another study finds that depending on the substitutability between the incumbent platform and the entrant platform, these clauses may increase or decrease industry profits, as well as encourage or discourage

[57] LEAR Report (n 3) [6.75]. Buccirossi calls for caution in accepting this efficiency argument since a platform (unlike a manufacturer imposing these restraints on retailers) benefits from reduced competition in the platform market. Therefore, there is no reason to believe that the platform will adopt the restrictive policy only to protect the ancillary services that consumers value; see Buccirossi (n 27) 51.
[58] LEAR Report (n 3) [6.75].
[59] Buccirossi (n 27) 51.
[60] Buccirossi (n 27) 51.
[61] Buccirossi (n 27) 51.
[62] LEAR Report (n 3) [8.2]-[8.3].
[63] See eg Johnson suggesting that if MFC clauses are used alongside an agency model, this leads to higher prices, but MFC clauses do not have the same effect if the wholesale model is used. Yet, even with the agency model, MFC clauses may have potentially procompetitive effects when retailers face market-entry costs and when profit-sharing rather than revenue-sharing is used between the suppliers and retailers. This is because in such a scenario, their main effect is to transfer profits from suppliers to retailers, thereby increasing post-entry profits and thus pre-entry incentives of retailers. The differentiation between retailers thereby increases choice for consumers without a negative impact on retail prices; JP Johnson 'The Agency Model and MFN Clauses' Working Paper 2014 available at http://dx.doi.org/10.2139/ssrn.2217849 2, 3, 4, 21, 16-19.

entry.[64] It has similarly been argued that the same clauses can foreclose entry when the firm adopting them is the incumbent but they can encourage entry if the firm adopting them is the new entrant (and particularly so if the entrant operates a high quality/high fee business model).[65] It has also been suggested, in line with the LEAR Report, that where neither the input not the output market is concentrated, coordination is less likely to be a concern even with MFC clauses.[66] Where only one market is unconcentrated, MFCs can raise barriers to entry or facilitate coordination.[67] In the same vein, where the MFC clauses are adopted by a large supplier with market power, then there is a greater concern that the MFC clauses could have an anticompetitive purpose and effect.[68] This suggests that a case-by-case approach is appropriate and that any successful finding of an anticompetitive effect arising from a particular MFC clause has to demonstrate how this effect results from the wording of the clause.[69] Whether the procompetitive or anticompetitive effects will dominate in a given case depends both on the wording of the clause and on the specifics of the industry.[70]

III Recent Decisional Practice

There are currently at least fourteen different European countries alone whose NCAs have been and/or are investigating platform MFC clauses.[71] As things presently stand, some of these authorities have reached infringement decisions and some have accepted commitments in these cases. Some are still continuing investigations into the same practice adopted by different platforms than those which have already been subject to an investigation. Interestingly, there is no unified legal approach to the problem. Across the world, some authorities deem the same practices to be restrictions by object that are harmful to competition by their nature; some find them to be restrictions by effect whose anticompetitive effects have to be demonstrated before enforcement action can be taken; some consider them to be a competition law issue as horizontal practices between competitors and some consider

[64] A Boik and KS Corts 'The Effects of Platform MFNs on Competition and Entry' Working Paper 2013 available at http://economics.yale.edu/sites/default/files/corts_17-oct-2013.pdf 2, 16.
[65] Buccirossi (n 27) 50. Buccirossi also notes that although the platform parity clauses may effectively complement an entry strategy, their effects nonetheless stem from the fact that they soften competition; ibid 50-51.
[66] Salop and Scott Morton (n 19) 18.
[67] Salop and Scott Morton (n 19) 18.
[68] Salop and Scott Morton (n 19) 18. See also RL Smith and A Merrett 'Playing Favourites: The Competition Effects of Preferred Customer Arrangements' (2011) 7 (2) European Competition Journal 179, 186 for the argument that anticompetitive effects are most likely where at least one of the parties possesses substantial market power.
[69] Akman and Hviid (n 2) 64.
[70] Akman and Hviid (n 2) 63-64.
[71] See n 8 and text around n 6 above.

them to be a concern as vertical practices between undertakings on two different levels of the production chain. This section provides an overview of some of the recent and important decisional practice concerning online platform MFC clauses with a view to demonstrating the approach adopted by different enforcers in these cases. An analysis of the legal reasoning in these cases is left for section IV.

A Apple

In Apple, the US Department of Justice (DOJ) and thirty-three states and US territories brought a civil action alleging that Apple and five book publishers conspired to raise, fix and stabilise the retail price for newly released and best-selling e-books.[72] The publishers settled with the DOJ and other claimants; only Apple proceeded to trial. The US District Court of Southern District of New York found a per se infringement of Sherman Act, Section 1. The violation was that Apple facilitated a conspiracy between publishers to raise certain e-book prices, particularly by eliminating the price reductions offered by Amazon. Key to the violation was the move from the existing wholesale model – where the publisher received the wholesale price for a book and the retailer set the retail price – to an agency model – where the publisher set the retail price and the retailer sold the book as the publisher's agent.[73] The agreements Apple entered into with the publishers also included MFC clauses which required that publishers match in iBookstore any lower retail price of an e-book offered by any other e-book retailer.[74] It must be noted that Apple was a new entrant on the e-book market at the time – in fact, it had not yet entered the market – and according to Apple, without the security provided to it by the MFC clauses, it could not have entered and/or survived on this market, where Amazon practically had a monopoly and was potentially using certain books as loss-leaders.[75] Yet, the Court concluded that Apple's entry into the market brought less

[72] Apple (n 14) 645.
[73] Apple (n 14) 648.
[74] Apple (n 14) 662, 664.
[75] See eg Apple (n 14) 698; 699-700; 700; 701; 708. See also US v Apple Inc Appellant Apple Inc's Opening Brief (Case: 13-3857) 22. For the possibility of Amazon selling e-books as loss-leaders, see eg Apple (n 14) 708; Apple Inc's Opening Brief, ibid 24. Arguably, before Apple's entry Amazon was selling controlling 9 out of 10 e-book sales, whereas two years after Apple's entry, Apple and Barnes & Noble together accounted for between 30% to 40% of e-book sales; Apple Inc's Opening Brief, ibid 1; 8. According to the expert before the District Court, because of Apple's low market share and the fact that the MFC applied to only a subset of publishers' titles, the actual effect of the MFC was less than one percent of publisher sales; ibid 44. As such, arguably the economic effects of the MFC on publishers were so small that it is an 'economic fiction' to claim that such effects compelled or controlled publishers' conduct vis-à-vis Amazon; ibid 44. For the suggestion that when used by the entrant (as opposed to the incumbent) platform MFC clauses can encourage entry (despite simultaneously softening price competition), see Buccirossi (n 27) 50-51.

competition and higher prices,[76] which implies that a less concentrated market is worse than a monopoly.[77] Apple has appealed the judgment without success.[78] The majority on the US Court of Appeals affirmed the finding of per se infringement whereas the dissent argued that given the vertical relationship between Apple and the publishers, the per se rule could not apply to the case as it is reserved for horizontal restrictions of competition.[79]

In the EU, concerning the same practices, the EU Commission opened proceedings against the book publishers and Apple, all of whom have offered commitments which were made binding in 2012 and 2013.[80] In its Preliminary Assessment, the EU Commission's competition concerns related to a concerted practice between and among the publishers and Apple in relation to a common global strategy for the sale of e-books with the aim of raising retail prices or avoiding lower retail prices.[81] In their commitments, Apple and publishers have agreed to terminate the relevant agency agreements and abandon the use of MFC clauses in their agreements.

B Booking.com, Expedia and IHG

In 2014, the OFT accepted commitments from two major OTAs (Expedia and Booking.com) and a major hotel chain (the largest hotel company in the world, IHG) which removed the restrictions on the offering of discounts on room prices by OTAs.[82] In its SO, the OFT had alleged that the parties had entered into arrangements which restricted the OTAs' ability to

[76] Apple (n 14) 708.
[77] The Dissenting Opinion in the appeal of the judgment also seems to find this proposition odd in arguing that Apple's entry into the e-books market vindicated its conduct by deconcentrating that market, introducing more choice and reducing the barriers to entry by others; Dissenting Opinion in United States et al v Apple Inc et al No 13-3741 (2nd Cir 2015) 28-29.
[78] See Apple (appeal) (n 77). Apple lost the appeal in a majority judgment with a harsh dissent. Apple sought a review of the judgment from the US Supreme Court but the Supreme Court has not allowed this application; see R Parloff 'Apple will ask Supreme Court to hear its ebooks price-fixing case', Fortune, 17 September 2015 available at http://fortune.com/2015/09/17/apple-ebooks-price-fixing/; L Hurley 'Supreme Court rejects Apple e-books price-fixing appeal' Reuters, 7 March 2016, available at http://www.reuters.com/article/us-usa-court-ebooks-idUSKCN0W91LQ.
[79] Dissenting Opinion (n 77) 15-16. The dissenting opinion builds this holding on Leegin where the Supreme Court stated that to the extent a vertical agreement setting minimum resale prices is entered upon to facilitate a cartel among manufacturers or among retailers, it would need to be held unlawful under the rule of reason; Leegin Creative Leather Prods, Inc v PSKS, Inc 551 US 877, 893 (2007). According to the dissent, after Leegin one cannot apply the per se rule to a vertical facilitator of a horizontal price-fixing conspiracy and such an actor must be held liable, if at all, under the rule of reason; Dissenting Opinion (n 77) 18. The dissent further found that Apple's conduct did not violate the Sherman Act under a rule of reason analysis either; Dissenting Opinion (n 77) 26.
[80] See Case COMP/AT.39847-E-books 12/12/2012 for the commitments from four publishers and Apple. See Case AT.39387 – E-books 25/7/2013 for commitments from Penguin.
[81] E-books (2012) (n 80) [10]; E-books (2013) (n 80) [15].
[82] Booking.com/Expedia/IHG (n 7).

discount the rate at which room-only hotel accommodation bookings were offered to consumers.[83] It had alleged that the agreements between OTAs and the hotel chain under which the OTA agreed to offer accommodation at that chain at a day-to-day room rate set and/or communicated by the hotel chain and not to offer rooms at a lower rate constituted agreements and/or concerted practices which had the object of preventing, restricting, or distorting competition under UK Competition Act, Chapter I and Article 101.[84] In the commitment decision, the OFT explained its competition concerns as a restriction of intra-brand competition and a possible increase in barriers to entry that result from the restrictions on discounting.[85] The MFC clauses involved in the agreements provided that a hotel would provide an OTA with access to a room reservation (for the OTA to offer to consumers) at a booking rate which is no higher than the lowest booking rate displayed by any other online distributor.[86] Such MFC clauses have not been considered by the OFT and are not subject of the commitments, save to the extent that such clauses could prevent either hotels or OTAs from offering such discounts as are allowed for by the commitments. This prevention could be indirect, for example, if a hotel is required to offer an OTA the same discounted booking rate as the hotel or another OTA is offering to closed group customers.[87] A third-party price-comparison website (Skyscanner) successfully appealed the commitments at the Competition Appeal Tribunal (CAT) and the case was remitted to the CMA which eventually decided to close the investigation in September 2015.[88]

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[83] Booking.com/Expedia/IHG (n 7) 1.3. The Statement of Objections has not been published. See OFT Press 'OFT issues Statement of Objections against Booking.com, Expedia and Intercontinental Hotels Group', 31 July 2012.

[84] Booking.com/Expedia/IHG (n 7) 5.1-5.3.

[85] Booking.com/Expedia/IHG (n 7) 1.4. In their commitments, the parties agreed that OTAs will be free to offer reductions off headline room rates to members of a 'closed group' where the end-user making the booking has joined a closed group and has made a single previous booking with that OTA; ibid 1.9. With the commitments, hotels will also be free to offer reductions off their own headline rates to closed group members; ibid. 'Intra-brand competition' refers to competition between different outlets selling the same brand/product, etc whereas 'inter-brand competition' refers to competition between different brands producing similar (competing) products.

[86] Booking.com/Expedia/IHG (n 7) 1.10 n 9, 4.16.

[87] Booking.com/Expedia/IHG (n 7) 1.10 and 1.10 n 10. The OFT's commitments have been described as a 'huge failure in assessment' by the complainant skoosh.com, whose founder has argued that the conditions imposed by the OFT would reinforce Booking.com or Expedia's dominance and would discourage new consumers from using smaller, unknown websites rather than Booking.com or Expedia: consumers would not want to pay for a full-rate room, to qualify for the discount rooms, from a new website such as Skoosh; See P Stephens 'OFT moves to try to boost competitive hotel deals online', 31 January 2014, http://www.bbc.co.uk/news/business-25975746.

[88] CAT [2014] CAT 16. The appeal was successful on the grounds that the commitments will have adverse effects on the meta-search sector and/or inter-brand competition (particularly due to reduced price transparency resulting from the establishment of closed groups) and the OFT did not properly take this concern into account before accepting the commitments; ibid [6], [63], [100]. The CAT also found that the OFT had acted irrationally in reaching its decision; ibid [159]. At the appeal, the CMA argued that the main reason why the restriction on disclosure was so important was because of the prevalence of rate parity obligations (MFC clauses) which were

C Price Comparison Websites

In its market investigation, the CC defined a PCW as an Internet platform that facilitates the buying and selling of motor insurance.[89] The CC categorized MFC clauses used by PCWs into two broad types: 'wide' and 'narrow'.[90] Wide MFC clauses specify that the premium may not be lower on any other PCW or on the insurer's own website (and, in some cases, in any sales channel at all); narrow MFC clauses specify that the insurer's own website will not offer policies at a lower premium than available on the PCW.[91] In its investigation, the CC found that narrow MFC clauses (ie clauses providing parity between PCW and insurer's own website) may be necessary for PCWs to survive.[92] CMA, which has taken over the market investigation from the CC, has banned price parity agreements between PCWs and insurers (wide MFC clauses) which stop insurers from making their products available to consumers elsewhere more cheaply, while allowing the PCWs to continue the use of narrow MFC clauses.[93]

The CC found that wide MFC clauses soften price competition between PCWs: with a wide MFC clause in place, a PCW does not face the possibility that a retail customer will find the same policy more cheaply on a competing PCW.[94] There is little incentive for a PCW facing a competitor with a wide MFC clause to seek better prices for their retail consumers from insurers because that better price would be passed on to the competitor also.[95] There is, therefore, little reward for price reductions. Conversely, a PCW with a wide MFC clause need not be concerned when it raises commission fees. It is safe in the knowledge that this

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often triggered by the display of public rates for hotel rooms; ibid [139]. This begs the question why the OFT did not directly tackle the MFC clauses in its decision to accept commitments. For the announcement of the CMA's closure of the investigation, see CMA Press Release (n 7).

[89] Competition Commission 'Private Motor Insurance Market Investigation' Provisional Findings Report (December 2013) [4.21] (PCW). On the PCWs market the CC identified that some of the contracts between insurers and PCWs contained conditions that limited price competition, reduced innovation and restricted entry; ibid Summary [6]. The CC found the PCWs to constitute a distinct market; ibid Summary [34]. The CC identified two features of the market that have an adverse effect on competition: i- information asymmetries between motor insurers and consumers in relation to the sale of add-ons; and ii- the point-of-sale advantage held by motor insurers when selling add-ons; ibid Summary [65].

[90] PCW (n 89) Summary [73].

[91] PCW (n 89) Summary [73].

[92] PCW (n 89) Summary [82]; [9.68]-[9.79].

[93] CMA 'Private Motor Insurance Market Investigation Order 2015' (18 March 2015) available at https://assets.digital.cabinet-office.gov.uk/media/5509879f40f0b613e6000029/Order.pdf.

[94] PCW (n 89) Summary [74].

[95] PCW (n 89) Summary [74].

will not make sales through its channel less competitive compared with sales through other PCWs.[96] Narrow MFC clauses will not usually have the same impact on competition because they maintain the possibility of premiums varying on different PCWs.[97] In fact, the CC considered that narrow MFC clauses, but not wide ones, may be necessary for the survival of PCWs as a business model. A narrow MFC provides some credibility to the proposition that the policies found on the PCW cannot be purchased more cheaply simply by going to the website of the provider. Without that reassurance, consumers would learn that PCWs could not be trusted to be a better alternative to direct search and demand for their services might disappear.[98] For a search among insurers to be valuable to the retail consumer – and to contribute to rivalry among insurers – it must return the identity of the seller, and so necessarily has to return the information needed by the consumer to bypass the PCW and go to the direct website. Without narrow MFC clauses there is a risk that retail consumers might undermine the business models of PCWs.[99] The insurance providers could free-ride on the advertising that PCWs provide and narrow MFCs provide reassurance to consumers that the prices on PCWs cannot be beaten by searching directly on insurers' websites.[100] The CC found that PCWs enhance rivalry in the insurance market.[101] A risk to the existence of PCWs from the absence of narrow MFC clauses would therefore be damaging to competition.[102] The CC also found that there was no alternative way for PCWs to provide customer assurance on their truthfulness regarding the statements on price (ie credibility for PCWs), although there were alternative mechanisms other than MFCs to prevent free-riding by insurers.[103]

D HRS

[96] PCW (n 89) Summary [74].
[97] PCW (n 89) Summary [75]. The CC identified one special case in which narrow MFC clauses can lead to a substantial softening of price competition but found that this applies only for brands which are listed both on PCWs and on a strong direct sales channel, and whose competitiveness against PCW channels the insurer wishes to maintain. They found that the number of brands meeting these conditions is small; ibid Summary [75].
[98] PCW (n 89) Summary [80].
[99] PCW (n 89) Summary [81].
[100] PCW (n 89) [9.70], [9.74].
[101] PCW (n 89) Summary [82].
[102] PCW (n 89) Summary [82].
[103] PCW (n 89) [9.77]-[9.79]. The CC further noted that PCWs have a degree of market power by virtue of the number of single homing consumers (ie, consumers who do not shop around between PCWs); ibid Summary [6]. According to the CC, about 23 per cent of all business is conducted through PCWs and about 55 to 60 per cent of new business comes through PCWs; ibid Summary [68]. According to the CC, under the agency pricing model where insurers set prices to final consumers while PCW-to-insurer negotiations set commission fees, MFC clauses directly constrain the prices consumers pay; ibid [9.29].

In HRS, the Bundeskartellamt took action against a leading online hotel portal in Germany (with worldwide operations), namely HRS, concerning the use of MFC clauses similar to those identified (but not directly investigated) by the OFT in Booking.com, Expedia and IHG. These MFC clauses agreed with hotel partners required that the hotel guaranteed that the HRS price was at least as low as the cheapest rate offered by or for the hotel on other online booking and travel platforms, as well as the hotel's own webpages.[104] In case the MFC clause was breached, the agreement provided that HRS could bar the hotel in question immediately or temporarily prevent it from receiving further bookings.[105] According to the Bundeskartellamt, the MFC clauses obliged the hotel partners to adjust the prices of their hotel rooms on other portals at the same level as at HRS and prevented the hotels from passing on lower commissions of other portals to customers.[106] Somewhat contradictorily, while the OFT found restrictions on the OTAs' discounting freedom imposed by the hotel partner to be anticompetitive in Booking.com, Expedia and IHG (implying that prices should be set freely by the OTAs), in HRS the Bundeskartellamt held that '[p]rice setting should always be decided by the hotels since they bear the sales risk'.[107]

The Bundeskartellamt chose to impose fines over accepting commitments which it considered were inadequate for two reasons: they were time limited and thus incapable of permanently eliminating the serious concerns of the Authority; and, they would have had no precedence effect.[108] The Higher Regional Court of Düsseldorf has upheld the Bundeskartellamt's decision.[109] HRS has not appealed to the Federal Court of Justice, and Bundeskartellamt has sent an SO to Booking.com for the same conduct in April 2015, whilst also continuing its investigation into Expedia for the same type of conduct.[110] Following its decision in HRS, in December 2015, Bundeskartellamt adopted a prohibition decision against Booking.com finding the same clauses that the French, Italian and Swedish competition authorities found to be legal under commitments offered by Booking.com (namely, narrow parity clauses) to be anticompetitive.[111] This is returned to below in Section III.E.

[104] HRS (n 8) [30]; [40].
[105] HRS (n 8) [32]; [41].
[106] HRS (n 8) [185].
[107] HRS (n 8) [167].
[108] HRS (n 8) [14].
[109] Case VI-Kart 1/14 (V) – HRS – Higher Regional Court of Düsseldorf, 9 January 2015.
[110] See Bundeskartellamt Press Release (n 8).
[111] Booking.com had already ceased using the wide parity clauses in Germany in line with its commitments to the French, Italian and Swedish competition authorities. For the infringement decision, see Booking.com (n 8). Booking.com has appealed the decision to the Higher Regional Court of Düsseldorf; see 'Booking.com Chef

E Booking.com

In December 2014, Booking.com offered commitments to the French, Swedish and Italian competition authorities which were investigating the MFC clauses found in the agreements between Booking.com and hotels in their jurisdictions.[112] By the initial commitments offered, Booking.com undertook to remove the pricing parity clause from its contracts which oblige hotels to offer Booking.com conditions that are at least as favourable as those offered on competing platforms.[113] After market testing, commitments were revised by Booking.com and in April 2015 these commitments were made binding on Booking.com for a period of five years from 1 July 2015.[114] Interestingly, the commitments require Booking.com to abandon the MFC clauses that seek parity with Booking.com's competitors and that seek parity with the hotels' own offline sales.[115] This means that Booking.com will still be free to impose MFC clauses that seek parity between the prices on Booking.com and the online prices offered by the hotels themselves (on the hotel website, etc).[116] Thus, similar to the

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kritisiert das Bundeskartellamt' Wirtschafts Woche 7 April 2016 available at http://www.wiwo.de/unternehmen/dienstleister/hotelportal-booking-com-chef-kritisiert-das-bundeskartellamt/13416882.html.

[112] For the commitment proposal, see Autorite de la concurrence, Press Release, 'Online Hotel Booking Sector' (English version) 15 December 2014.

[113] Press Release (n 112). Booking.com had further offered to extend this commitment to all EEA countries; ibid.

[114] Bookingdotcom (n 11) (n 11)

[115] Bookingdotcom (n 11) [40]. Offline sales are those that do not involve the use of the Internet, such as those made in person at the reception, over the phone, or at a bricks and mortar travel agency; ibid Commitments, Article 9.

[116] Bookingdotcom (n 11) (n 11) [41]. As noted above, recent legislation in France bans all types of MFC clauses in the hotels market and therefore, the commitments are arguably no longer valid in France; see n 9 above. In the commitments decision, the Swedish Competition Authority noted that Booking.com and the hotels do not operate on the same relevant market; ibid [16]; [25]. The same view is held by the Bundeskartellamt in HRS since the Authority found that '[t]he website of hotels offering real-time booking are not part of the same product market as hotel portals' and that the hotel websites are not substitutes for hotel portals since the former do not offer the same bundles of services as hotel portals; HRS (n 8) [88]. The Bundeskartellamt also noted that '[t]he sale of hotel rooms via hotels' own websites cannot be compared with the sale channels for flights via the own websites of airlines' in relation to the holding of the European Commission that travel websites offering flights are substitutes for airlines' own websites; see HRS (n 8) [90] and Case COMP/M.6163 Commission Decision AXA/ PERMIRA/OPODO/GO VOYAGES/EDREAMS, C(2011) 3913 final, 30 May 2011 available at http://ec.europa.eu/competition/mergers/cases/decisions/m6163_20110530_20310_1852583_EN.pdf 25 et seq. Although these findings of the Swedish, Italian and French authorities and of Bundeskartellamt regarding the relevant market somehow explain why the Swedish, Italian and French authorities did not deem the clauses seeking parity between the OTAs and hotels' own websites to be a problem (as a result of their not being on the same market), they are particularly noteworthy in relation to the Bundeskartellamt's approach which banned all types of parity clauses including those covering OTAs and hotels' own websites and which also found that the parity clauses of OTAs restrained competition between the hotels on various online channels as well as offline channels (see HRS (n 8) [164]; [169] et seq). For a different perspective, see Flight Centre Limited v Australian Competition and Consumer Commission [2015] FCAFC 104 for a decision of the Full Court of Australia on appeal finding that a travel agent selling airline tickets does not compete with the airlines in a market for distribution and booking services; [8]. This followed from the fact that the travel agent supplied any booking

decision of the UK Competition Commission (CC) (now the CMA) in Price Comparison Websites examined above, clauses providing parity between the online prices of the platform and the principal (ie narrow parity clauses) were not found to be a competition concern in the assessment of the Swedish, French and Italian competition authorities. Oddly, the implication of the commitments for consumers is that should they wish to make use of any more advantageous rates, they will need to contact hotels individually by phone or in writing which not only increases the costs of search and transaction for a consumer who is savvy and wishes to receive a better price, but also defies the convenience of having PCWs in the first place since the consumer would have to contact hotels separately to make use of their potentially better offline rates. As mentioned above, the authorities in accepting these commitments do not seem to have been concerned about the potentially more anticompetitive promise, namely the 'Best Price Guarantee' offered to consumers by Booking.com and in fact, have legally endorsed this promise by including in the commitments a provision that allows Booking.com to continue using these promises.[117]

Interestingly, the Bundeskartellamt sent an SO to Booking.com on 2 April 2015 before the announcement of the acceptance of the commitments concerning the same conduct by the French, Swedish and Italian NCAs on 10 April 2015. According to Bundeskartellamt, following the fact that MFC clauses such as those in question have been determined to be anticompetitive by a final judgment of a court in Germany in proceedings against HRS, 'a less stringent course of action against the market leader Booking.com', (ie accepting commitments) did not appear to be the right approach in Germany.[118] In the infringement decision against Booking.com that followed, similar to its decision in HRS, the Bundeskartellamt prohibited all types of MFC clauses including those that seek parity between the price on HRS and the price on the hotel's own online channels such as the hotel's website.[119] In contrast, the commitments accepted by the French, Italian and Swedish NCAs allow Booking.com to continue imposing such MFC clauses that seek parity between the price on Booking.com and the hotels' online channels. Thus, Booking.com is obliged to adopt different arrangements regarding its MFC clauses in contracts with its hotel partners in different EU Member States (a position further complicated by the new legislation in France

services as an 'agent' of the airlines on behalf of the airlines; ibid [154]. Consequently, the agent's attempts to induce the airlines into a price fixing agreement was not an anticompetitive agreement; ibid [182].

[117] See Bookingdotcom (n 11) Commitments, Article 3.

[118] See Bundeskartellamt Press Release (n 8).

[119] See HRS (n 8) [30].

banning all types of MFC clauses[120]) despite the fact that the competition provisions that all these national authorities are applying and the conduct under investigation are practically identical. It might also be the case, as argued by Booking.com, that the company is subjected to different legal arrangements in markets with no materially different characteristics that would justify adopting such different approaches.[121]

IV The Assessment of Platform MFC Clauses under Articles 101 and 102

This section provides a legal assessment of platform MFC clauses with a view to establishing their correct legal treatment from a competition law perspective. The assessment is both positive and normative: whilst explaining the recent competition law treatment of these clauses, the analysis points out the deficiencies of this treatment before moving onto assessing how these clauses should be treated. The main focus is EU competition law with reference also to US antitrust law where relevant, but the principles derived from the analysis are valid for any competition law that has similar provisions to those found in EU and US competition laws (namely, a rule prohibiting anticompetitive agreements and a separate rule prohibiting anticompetitive unilateral conduct).

At the EU level (as opposed to the national level), in terms of theories of harm in the existing case law, the predominant competition concern arising from price parity clauses has been foreclosure: matching competition clauses adopted by dominant undertakings in their contracts or included in a vertical agreement by an undertaking with significant market power have been deemed likely to lead to foreclosure.[122] Foreclosure was the main concern also in most cases where the across-customers PRAs were considered to be a means to ensure that competitors could not obtain a key input at better conditions.[123] In Europe, the legal treatment of MFC clauses is that there is a strict position when these are combined by a dominant

[120] See text to n 9 above.

[121] See 'Booking.com Announces Intent to Appeal Bundeskartellamt Ruling' 23 December 2015 available at http://www.prnewswire.com/news-releases/bookingcom-announces-intent-to-appeal-bundeskartellamt-ruling-563356891.html.

[122] See Case 85/76 Hoffmann-La Roche & Co v EC Commission [1979] ECR 461; Case COMP/13.133 – Soda Ash – Solvay (2003/6/EC); Case COMP IV/29.021 - BP Kemi – DDSF (79/934/EEC) cited in LEAR Report (n 3) [7.8]. In the US, MFC clauses have been analysed both from a foreclosure and a softening competition/collusion perspective; see LEAR Report (n 3) [7.7].

[123] LEAR Report (n 3) [7.9] with reference to Case COMP/38307 E.ON Ruhrgas - Gazprom and Digitisation of European cinemas (notice of closure in European Commission, Press Release, 'Antitrust: Commission closes probe into Hollywood studios after they change terms of contracts for digitisation of European cinemas' IP/11/257, 4 March 2011).

player with loyalty mechanisms, such as rebates.[124] The only EU case in which collusion has been explicitly considered is Hollywood Studios, about which no documentation other than a press release is available.[125] In the US, at the time of the LEAR Report, no antitrust case on across-sellers PRAs was decided and regarding MFC clauses, the approach is one of rule of reason.[126] Consequently, unless they are adopted by an agreement among competitors, MFC clauses are normally evaluated under the rule of reason in the US.[127]

In contrast foreclosure rather than collusion being the main concern regarding MFC clauses in EU case law, in all of the recent cases concerning platform MFC clauses the NCAs involved have adopted a theory based on collusion. As such, Article 101 and/or its national equivalent on anticompetitive agreements and concerted practices have been the legal provision used to investigate and/or prohibit the relevant MFC clauses. This section seeks to show that this choice of legal provision is unfortunate for several reasons. Moreover, the section seeks to establish that from a normative perspective Article 102 and/or its national equivalents on the prohibition of abuse of dominance is the more appropriate legal provision with which to scrutinise the MFC clauses in question.

A Assessment as an anticompetitive agreement or concerted practice

In terms of the legal assessment of platform MFC clauses, the first issue that one faces is whether these clauses are covered by Article 101 at all due to the potential argument that platforms are 'agents' of suppliers with the implication that agreements between them and the suppliers are not covered by Article 101 for failing to be agreements between 'two or more undertakings'. If they are found to be covered by Article 101, the second issue that arises is whether they should be treated as horizontal or vertical practices. Finally, a further question arises as to whether they should be treated as restrictions by object or by effect.

[124] LEAR Report (n 3) [7.16]. The situation is less clear in cases with non-dominant undertakings, particularly when the incumbent cannot ascertain who is making the competing offer; ibid [7.17].
[125] LEAR Report (n 3) [7.9]. Similar to the case law, few references to PRAs are found in EU soft law, which also arguably reflects the main concern as being foreclosure, ibid [7.10]. For example, the Verticals Guidelines deal with MFC clauses in the context of single branding and, according to these, English clauses can have the same effect as a single branding obligation, particularly when the buyer has to reveal who made the better offer; European Commission, Guidelines on Vertical Restraints [2010] OJ C130/1, [129]. A so-called 'English clause' requires the buyer to report any better offer to the supplier and allows the buyer only to accept such an offer when the supplier does not match the better offer; ibid. The LEAR Report notes that the reference to potential facilitation of collusion that was present in the 2000 Guidelines on Vertical Restraints has been removed; LEAR Report (n 3) [7.12]. See Commission, Guidelines on Vertical Restraints [2000] OJ C291/1, [152] which stipulated that by increasing the transparency of the market, English clauses might also facilitate coordination between suppliers.
[126] LEAR Report (n 3) [7.19].
[127] Salop and Scott Morton (n 19) 17.

i. Are platform MFC clauses covered by Article 101 at all? Genuine agency

The first – and potentially formidable – hurdle that needs to be overcome regarding the assessment of platform MFC clauses under Article 101 (as well as under Sherman Act, Section 1) relates to the fact that platforms may legally be 'agents' of the suppliers who sell on the platforms. For the purposes of EU competition law, an 'agent' is 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 goods/services (supplied) by the principal.[128] The implication of platforms being 'agents' is that the platform MFC clauses would not be covered by Article 101 at all. This is because Article 101 does not apply to agreements between principals and genuine agents. This stems from the doctrine according to which Article 101 does not apply to agreements between two or more legal persons that form a 'single economic entity' since the application of the provision requires an agreement between separate undertakings.[129] In the same vein, Sherman Act, Section 1 does not apply to agreements within a single entity and this doctrine can cover agreements between a principal and an agent under certain circumstances.[130] The particular significance of the agency exception in the EU is that under Regulation 1/2003, Member States are obliged not to prohibit agreements and concerted practices by their national competition rules if the same practice is not prohibited in EU competition law provided that there is an 'effect on trade between Member States'.[131] There is an effect on trade between Member States in the recent cases concerning the platform MFC clauses adopted by, for example, the OTAs with the implication that if the agency exception means that these clauses are not prohibited under EU competition law, then they cannot be prohibited by the Member States' application of their domestic competition laws either.[132]

[128] Verticals Guidelines (n 125) [12]. For the assessment of whether an intermediary is an 'agent', it is not material how the parties or national legislation qualify the agreement between the parties in question; ibid [13].

[129] On the case law establishing the doctrine, see eg Case 15/74 Centrafarm BV and Adnaan De Peijper v Sterling Drug Inc [1974] ECR 1183, [41]; Case 22/71 Béguelin Import v GL Import Export [1971] ECR II-5049, [8]; Case 30/87 Corinne Bodson v Pompes Funèbres des Régions Libérées SA [1988] ECR 2479, [19]; Case C-73/95 P Viho Europe VB v Commission [1996] ECR I-5457, [16].

[130] See the discussion in E Elhauge and D Geradin Global Competition Law and Economics (2n ed, Hart Publishing, Oxford, 2011) 814-816 and the case law cited therein.

[131] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1, Article 3(2).

[132] For a finding of effect on trade between Member States on the facts, see eg Bookingdotcom (n 11) [14]; HRS (n 8) [142]-[143]. The application of Article 3(2) Regulation 1/2003 is not dependent on whether the European Commission considers there to be an effect on trade between Member States or not since once the NCAs have found there to be an effect on trade between Member States (as they have in practice), then they are bound by that provision in their application of their domestic competition law.

This raises questions concerning, for example, the compatibility of the Bundeskartellamt decision in HRS with EU law obligations arising out of Regulation 1/2003.

In CEPSA, the Court of Justice (CoJ) reaffirmed that vertical agreements are covered by Article 101 only where the operator (agent) is regarded as an independent economic operator and there is thus an agreement between two undertakings.[133] The Court noted that the formal separation between two parties resulting from their separate personality is not conclusive, the decisive test being the unity of their conduct on the market.[134] Agents can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal's undertaking.[135] Thus, the key issue is whether the agent assumes the financial and commercial risks linked to sales or the performance of contracts entered into with third parties.[136] Examples provided by the CoJ are the risks relating to costs of distributing the products; maintaining stock at the agent's expense; assuming responsibility for any damage caused to/by the products by/to third parties; investments specifically linked to the sale or advertising of goods, etc.[137] In short, in order to determine whether Article 101 is applicable, the allocation of the financial and commercial risks between the principal and the agent has to be analysed on the basis of such criteria as stipulated by the CoJ.[138] The Court also noted that the fact that the intermediary bears only a negligible share of risks does not render Article 101 applicable.[139]

Some of the NCA decisional practice discussed above have explicitly considered agency as an issue whereas some others have only indicated factors that suggest platforms might be agents. For example, in Booking.com/Expedia/IHG the OFT noted that OTAs do not take title or hold inventory to hotel accommodation.[140] This suggests that the OTAs are the agents of hotels. Similarly, in PCW the CC noted that PCWs are not wholesalers of insurance – they do not set retail prices: PCWs earn a commission on insurance policies that are sold through

[133] Case C-217/05 Confederacion Espanola de Empresarios de Estaciones de Servicio v Compania Espanola de Petroleos SA [2006] ECR I-12018, [38].
[134] CEPSA (n 133) [41].
[135] CEPSA (n 133) [43].
[136] CEPSA (n 133) [44]-[45]; [46].
[137] CEPSA (n 133) [51]-[59].
[138] CEPSA (n 133) [60].
[139] CEPSA (n 133) [61]. See also Verticals Guidelines (n 125) [15] which stipulate that the intermediary may bear some insignificant risks but still be considered an 'agent'.
[140] Booking.com/Expedia/IHG (n 7) 4.3.

their intermediation.[141] Again, this suggests that PCWs are agents. In contrast, the Bundeskartellamt explicitly found HRS not to be a genuine agent 'because the [MFC] clauses do not bring about any restraints of competition which emerge from a principal – in this case the hotel partners –, but from the agent HRS'.[142] However, with respect, in the legal assessment of whether the relationship is one of agency, the source of the restraint (which is the conduct under investigation) cannot be the correct, relevant criterion. Whether the relationship between two companies is one of agency should be decided on the basis of objective factors concerning that relationship such as ownership; price-setting power; risks involved; etc rather than who the source of a restraint is. Moreover, in the Bundeskartellamt's decision that source is stated to be HRS which has 'unilaterally' decided to amend the general terms and conditions.[143] This begs the question how any one party can unilaterally modify a contract – such unilateral modification would have to involve either so-called 'economic duress', or possibly abuse of a dominant position.[144] According to the Bundeskartellamt, the hotel partners do not exert influence on the activities of HRS since they do not make demands on HRS either relating to the sales area or to the customers, nor do they influence further

[141] PCW (n 89) Summary [69].

[142] HRS (n 8) [147]. The Bundeskartellamt also found that MFC clauses are not ancillary agreements which are required to safeguard the main purpose of a contract and which would be exempt from violating competition law; ibid [150]. The Bundeskartellamt's disqualification of HRS as an 'agent' for competition law purposes has been endorsed by Goffinet and Puel on the grounds that the disqualification is based on the CoJ case law stipulating that one condition of being an 'agent' is that the agent operates as an 'auxiliary organ forming an integral part of the principal's undertaking'; see P Goffinet and F Puel 'Vertical Relationships: The Impact of the Internet on the Qualification of Agency Agrements' (2015) 6 (4) Journal of European Competition Law & Practice 242, 247-248. However, there are several problems with this argument. First, the case law referred to sustain the argument does not actually support such a proposition. The cases referred to, namely Volkswagen AG and Suiker Unie to which that judgment refers to, discuss the criterion concerning the auxilary nature of the agent as part of the discussion concerning risk. In other words, they discuss the auxiliary nature of the agent as a factor in deciding whether the agent bears any significant risks resulting from the contracts negotiated on behalf of the principal. This is in contrast to Goffinet and Puel's interpretation that bearing of risks and being an auxiliary organ of the principal are separate and cumulative conditions for qualifying as an agent; see Goffinet and Puel, ibid 246-247. In the relevant paragraphs, Volkswagen AG and Suiker Unie note that the 'agents' in question assume the financial risks linked to the transactions and compare such 'agents' to independent dealers (who clearly would not be 'genuine agents'); see Case C-266/93 Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH [1995] ECR I-3477, [19] and Joined Cases 40/73-48/73 and others Coöperatieve Vereniging *"Suiker Unie" UA and others v EC Commission* [1975] ECR 1663, [541]-[542]. Second, the paragraph on which Goffinet and Puel rely on from Volkswagen AG refers to Suiker Unie at [539] and [539] of Suiker Unie merely states that 'if such an agent works for his principal he can in principle be regarded as an auxiliary organ forming an integral part of the latter's undertaking bound to carry out the principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking' which in no way supports the argument that there are two separate and cumulative conditions of qualifying as a genuine agent.

[143] HRS (n 8) [147].

[144] Economic duress is a doctrine in common law that renders contracts entered into under illegitimate pressure imposed by a party with superior economic power on the other party voidable. For the relationship between economic duress and abuse of dominance, see P Akman 'The Relationship between Economic Duress and Abuse of a Dominant Position' [2014] Lloyd's Maritime and Commercial Law Quarterly 99.

activities of HRS.[145] Accordingly, '[t]he activities of HRS do not depend on the hotel partners of HRS. The [MFC] clauses do not restrict the conduct of the alleged agent, but rather that of the alleged principal'.[146] Yet, it must still be the principal (ie hotel owner) who carries the risk of not selling a particular room. According to the Bundeskartellamt, HRS is not a dependent agent since it bears its own financial and economic risk.[147] Examples given to support this position are HRS investment in advertising the HRS brand; establishing a network with hotels and cooperation partners; developing the HRS website; cooperating with Internet providers; etc.[148] However, this confuses the fact that the agency business has its own costs and risks itself as a business with the decision on whether the business acts as an agent of another party in a given transaction with a third party: the mere fact that the agency business has costs cannot disqualify the business from being an agency.[149]

In HRS, the Bundeskartellamt noted that HRS is similar to a travel agent with reference to VVR and HRS does not act in the interest of a single principal, but sells rooms for more than 250,000 different hotels worldwide.[150] In VVR the CoJ had found that a travel agent that sells travel organised by a large number of different tour operators where the tour operator also sells through a very large number of agents must be regarded as an 'independent agent who provides services on an entirely independent basis'.[151] In contrast, the Verticals Guidelines indicate that it is not material for the assessment whether the agent acts for one or several principals.[152] One commentator notes that the Court's assessment in VVR should be correct from an initial economic viewpoint since when a firm is an agent to multiple, competing principals, it will be difficult to perfectly satisfy all their wishes simultaneously and these demands will require the agent to make its own independent decision regarding which principals' instruction to prioritise over others.[153] If the agent is making such independent decisions, then ceteris paribus, it will be more difficult to argue that it is a genuine agent because it acts as a single economic unit with the principal. However, there is an important

[145] HRS (n 8) [147].
[146] HRS (n 8) [147].
[147] HRS (n 8) [148].
[148] HRS (n 8) [148].
[149] See Verticals Guidelines (n 125) [15] stipulating that risks related to the activity of providing agency services in general, eg the risk of the agent's income being dependent on its success as an agent or general investments in personnel, premises, etc, are not material to the assessment of whether the intermediary bears risks of the type that would render the agency exception inapplicable.
[150] HRS (n 8) [149].
[151] Case C-311/85 VZW Vereniging van Vlaamse Reisbureaus v VZW Sociale Dienst van de Plaatsekijke en Gewestelijke Overheidsdiensten [1987] ECR 3801, [20].
[152] Verticals Guidelines (n 125) [13].
[153] Bennett (n 3) 7.

difference in the factual scenario between the operation of a brick-and-mortar travel agent as was the type in VVR and that of an OTA or other online platform. Although in the brick-and-mortar type the agent has some scope for influencing the consumer's decision on the basis of, for example, which transaction will render the highest commission for the agent, in the online platform situation, the platform has no real scope for such influence. Unless the results are manipulated by the platform, the platform presents to the consumer the full list of, for example, hotels that meet the consumer's preferences on the basis of the information that the consumer provides and at the same time also displays full information on price, location, etc. The decision is ultimately made by the consumer with no input from the platform unlike the situation with, for example, a brick-and-mortar travel agent.[154] Thus, irrespective of how many hotels are represented on the platform, the platform does not make any decision as to whose orders should be prioritised in promotion efforts, etc since by definition, the search results display the full list of hotels that meet the consumers' preferences and it is ultimately the consumer that makes the choice between the different principals.[155] Thus, the analogy with a brick-and-mortar travel agent as adopted by the Bundeskartellamt is not appropriate given the factual context of online platforms.[156]

[154] This is the case for the 'organic' results displayed on the platform as opposed to the 'sponsored' results or paid-for results which might appear as advertisements. Provided that it is clear to consumers that the sponsored results are paid-for, then the platform still has no real scope in terms of influencing the consumer's decision amongst the list of 'organic' results displayed in order of relevance on the basis of the consumer's revealed preferences.

[155] If a full list is not displayed, then presumably this might be first, a potential breach of the contract between the hotel and the platform with relevant consequences. Second, the platform succeeds as a business on bringing together two sides of the market, eg hotels and consumers. Manipulating results in order to favour a hotel room which would render a higher commission may eventually lead to consumer dissatisfaction with the platform's results and lead to consumers not using the platform. Moreover, it is difficult to imagine that either the less-favoured hotel will be relegated in terms of ranking and become invisible to the consumer or that only favoured hotels will be presented in the list. The search facility on platforms normally allows the consumer to rank the results in order of price, location, etc nullifying the effect of relegating a given result and there is normally only a limited number of available hotel rooms that will meet the criteria of a given customer at a given time. Furthermore, it is unlikely that the platform will only present favoured hotels when there is no interaction with the consumer which implies that the consumer may end up not making a purchase on the platform at all if the consumer is unhappy with the offering of the platform. In contrast, at a physical travel agency, the agent always has the possibility – as a result of the physical interaction with the consumer – to expand the available offering to the consumer once the agent realises that the consumer is not going to enter a transaction with the agent's favoured offering. Such a possibility does not exist in the online context where there is no direct interaction or communication between the platform and the potential consumer which implies that the platform risks losing the custom of the consumer (and thereby, its commission) altogether if it seeks to manipulate the results.

[156] Taking into account the particular factual context of online platforms, the CoJ has held in cases concerning trade mark law that the platform functions as an intermediary and does not, for example, 'use' the trade marks that it displays on its website to the consumers as a result of a query since such use is carried out by the advertiser. This interpretation of the CoJ suggests that the CoJ does not consider such platforms as undertakings independent from those to whom they provide a service (eg advertisers, suppliers, etc) since if it did, it would have found the display of trademarks on such platforms to constitute 'use' of those trademarks irrespective of whether the advertisers also 'use' the trademarks. See Joined Cases C-236/08 to C-238/08 Google France SARL

In DaimlerChrysler, the General Court (GC) decided that where an agent, although having separate legal personality, does not independently determine his own conduct on the market, but carries out the instructions of his principal, Article 101 does not apply to the relationship between the agent and the principal.[157] According to the GC, where the principal sells the product and takes, on a case-by-case basis, the decision to accept or reject the orders negotiated by the agent, the agent has extremely limited commercial freedom in relation to the sale of products: the agent is thus not in a position to influence competition on the market in question, which in DaimlerChrylser was the retail market for Mercedes passenger cars.[158] The GC gives the example that if a customer orders a product but the sale does not proceed, the financial implications and thence the risks associated with the transaction remain with the principal, as well as all the risks associated with non-delivery, defective delivery and customer insolvency, etc.[159] Overall, it is the principal which determines the conditions applying to all sales, in particular the sale price, and which bears the main risks associated with that activity.[160] Consequently, the agent sells the products in all material respects under the direction of the principal, with the result that he should be treated in the same way as employees and considered as integrated in that undertaking and thus forming an economic unit with it.[161] This conclusion was not undermined by the fact that the agents were required to undertake certain activities and assume certain financial obligations under the agency agreement.[162] Contrasting this with the situation of Mercedes-Benz dealers in Spain and Belgium, the Court noted that an independent dealer is in a position to determine, or at the very least to influence, the terms on which the sales are made, as he is the seller, who bears the main share of the price risk in the vehicle and who maintains a stock of the vehicles.[163] It is that negotiating margin of the dealer, which comes between the manufacturer and customers, that exposes the dealer to a risk that Article 101 might apply to his relationship with the manufacturer.[164] In the case of online platforms, for example, OTAs, the platform does not bear any risks associated with the transaction, for example, the sale not proceeding

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v Louis Vuitton Malletier SA and others [2010] ECR I-2417 and Case C-324/09 L*'Oréal SA and others v eBay* International AG and others [2011] ECR I-6011.

[157] Case T-325/01 DaimlerChrysler AG v EC Commission [2005] ECR II-3319, [88].

[158] DaimlerChrysler (n 157) [100].

[159] DaimlerChrysler (n 157) [101].

[160] DaimlerChrysler (n 157) [102].

[161] DaimlerChrysler (n 157) [102].

[162] DaimlerChrysler (n 157) [113].

[163] DaimlerChrysler (n 157) [118].

[164] DaimlerChrysler (n 157) [118].

(ie the hotel guest does not honour the booking) or customer insolvency (ie the hotel guest cannot pay). Most importantly, the platform does not set the price (ie the rate for the hotel room).[165] All the important parameters of the transaction with the third party are determined by the principal who also bears all the risks related to that transaction.

According to the Verticals Guidelines, the determining factor in defining an agency agreement for the application of Article 101 is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent and it is immaterial for the assessment whether the agent acts for one or several principals.[166] For the purposes of applying Article 101, the agreement will be qualified as an agency agreement if the agent does not bear any or bears only insignificant risks in relation to the contract concluded and/or negotiated on the behalf of the principal, in relation to market-specific investments for the field of activity, and in relation to other activities required by the principal to be undertaken on the same product market.[167] The risks that relate to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an agent or general investments in premises or personnel, are not material to this assessment.[168] Thus, an agreement will be generally considered an agency agreement where property in the contract goods does not vest in the agent or the agent does not himself supply the contract services and where the agent does not contribute to the costs relating to the supply of goods/services; does not maintain at its own cost or risk stock of the contract goods; does not undertake responsibility towards third parties for damage caused by the product; does not take responsibility for customers' non-performance of the contract, with the exception of the loss of the agent's commission; is not obliged to invest in sales promotion; does not make market-specific investments in equipment, premises, personnel, etc; does not undertake activities within the same product market required by the principal, unless they are fully reimbursed by the principal; etc.[169]According to the Guidelines, since the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods and services, all obligations imposed on the agent in relation to the

[165] This is the case for the platforms operating on the commission model. This is to a degree also the case for platforms operating under the merchant model since even under the merchant model, the base rate is set by the hotel and the platform adds a mark up to that rate which together make up the final price to the consumer. For the two models, see above n 18.
[166] Verticals Guidelines (n 125) [13].
[167] Verticals Guidelines (n 125) [15].
[168] Verticals Guidelines (n 125) [15].
[169] Verticals Guidelines (n 125) [15].

contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1).[170] As one of the obligations that will be considered an inherent part of an agency agreement, the Guidelines note 'the prices and conditions at which the agent must sell or purchase' the contract goods/services.[171]

Considering the case law and the principles set out in the Verticals Guidelines, the online platforms considered in this article appear to be legally 'agents' for the purposes of competition law. This is because platforms do not buy the products from the suppliers to resell it to consumers; they do not set the price of the products; they do not bear any of the risks related to not selling the products other than lack of receiving a commission; they do not bear any of the risks related to the sale of the products to the consumers; they get remunerated by the suppliers when a sale is concluded with the consumer; they do not make market-specific investments or invest in sales promotion for particular goods, etc.[172] All in all, crucially, platforms do not assume any financial or commercial risks related to the sales or performance of the contract with third parties. The implication is that the relationship between the third party and the platform cannot be legally explained in any other way than that the platform acts as the agent of the principal in that transaction with the third party.

According to the Verticals Guidelines, there are two situations in which Article 101 might become applicable to the clauses agreed between a principal and an agent. In other words, there are two exceptions to the rule that Article 101 does not apply to the relationship between a principal and an agent. Only one of these exceptions is relevant to the subject

[170] Verticals Guidelines (n 125) [18].
[171] Verticals Guidelines (n 125) [18].
[172] In the literature, it has been suggested that the key economic question is whether the agent will make the same decision as the principal, or whether it will make its own decisions independently of the principal, ie to what extent are the principal's and agent's incentives aligned; Bennett (n 3) 5. Whereas in resale price maintenance (RPM) these incentives are split (the retailer has ownership but the manufacturer controls the price), in a genuine agency, both ownership of the product and control of the price remain with the principal; Bennett (n 3) 6. Similarly, Lianos argues that if it is the principal who maintains property rights over the goods, there is a presumption that the agreement is a genuine agency falling outside the scope of Article 101; I Lianos 'Commercial Agency Agreements, Vertical Restraints, and the Limits of Article 81(1) EC: Between Hierarchies and Networks' (2007) 3 (4) Journal of Competition Law and Economics 625, 663. Offering a different perspective, Zhang remarks that the appropriate inquiry when discerning genuine agency should focus on the business justifications for the parties' adoption of the agency model: the real question is whether agency rather than distribution is a more efficient contractual form for the parties, ie whether they would choose the contractual form of agency instead of distribution in the absence of a desire to get around the competition rules; AH Zhang 'Toward an Economic Approach to Agency Agreements' (2013) 9 (3) Journal of Competition Law and Economics 553, 576, 590. To the extent that the literature is built on the premise that the agent is physically selling/distributing a product, it does not apply to a sale that takes place over an online platform as a result of the context and nature of online transactions.

matter of this article.[173] An agency agreement may infringe Article 101 where the agency agreement facilitates collusion.[174] The examples provided for such collusion are situations where a number of principals use the same agents while collectively excluding others from using these agents, or where they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals.[175] Thus, the MFC clauses adopted in the contracts between platforms and suppliers could be challenged under Article 101 – despite the fact that platforms are agents – provided that they facilitate collusion between the principals. Interestingly, in the context of this article, this would require proof of facilitating collusion between suppliers (eg hotel owners) rather than collusion between platforms (eg OTAs) who are agents. This is akin to the situation in the US Apple litigation, but is much removed from the situation in the current and ongoing European cases where the theory of harm relates to the competition between the agents (ie the platforms) and not the principals (ie the hotels, insurance companies, etc). Thus, the exception provided in the Guidelines does not neatly provide support to the European cases but the Guidelines only provide examples and it can be envisaged that a competition authority could use the Guidelines to support a case of collusion between platforms in seeking to bring these agreements within the scope of Article 101. In any case, this would be done through establishing an exception to the rule that these agreements are not covered by Article 101 and would require proof of collusion (amongst platforms or amongst suppliers) which has not been the case thus far in the recent investigations in Europe. Consequently, the recent European investigations have all been based on erroneous legal grounds in applying Article 101 to agreements between a principal and its agent, and are in breach of the applicable EU law.

ii. Are they horizontal (inter-brand) restrictions or vertical (intra-brand) restrictions?

[173] The other exception relates to the fact that since 'the agent is a separate undertaking from the principal' the relationship between the agent and principal may infringe Article 101. In particular, provisions preventing the agent from acting as an agent or distributor to undertakings which compete with the principal and post-term non-compete provisions, which concern inter-brand competition, may infringe Article 101 if they lead to or contribute to a cumulative foreclosure effect on the relevant market where the contract goods or services are sold or purchased; Verticals Guidelines (n 125) [19]. Thus, to the extent that any clauses such as MFC clauses between a platform and the supplier does not relate to the relationship between the platform and the supplier as such or contribute to or lead to a cumulative foreclosure effect on the relevant market where the contract goods or services are sold or purchased (eg the hotels/e-books/motor insurance market as opposed to the platform market), this is not relevant for the platform MFC clauses under examination.
[174] Verticals Guidelines (n 125) [20].
[175] Verticals Guidelines (n 125) [20].

Given that the recent decisional practice has disregarded the agency exception to the application of Article 101 to agreements, this article will continue to investigate the other problems related to the application of Article 101 to platform MFC clauses. One of these issues is whether these clauses should be treated as horizontal or vertical restrictions, a matter on which different authorities around the world have demonstrated different approaches. For example, in Germany, the Bundeskartellamt prohibited these clauses as vertical restraints in HRS.[176] Similarly, in the UK, such clauses adopted by insurance PCWs were treated as vertical restraints in PCW.[177] In Sweden, France and Italy the commitments accepted in Booking.com also suggest that the theory of harm in these Member States was based on a vertical restraint.[178] Strikingly, in HRS as well as in Booking.com the authorities have dealt with the platforms individually rather than collectively by addressing their decisions to a single undertaking. This requires further elaboration.

Had the theory of harm related to a horizontal restriction, one would have expected the authorities to consider commitments from all the platforms together since a horizontal anticompetitive practice could only effectively be brought to an end if all the parties to the practice (ie all the horizontal competitors) changed their practices. For example, the OFT's commitments in Booking.com/Expedia/IHG were indeed addressed against both platforms, namely Booking.com and Expedia. Yet, the fact that the hotel group IHG was also an addressee of the decision and that the conduct in question concerned the 'separate arrangements' that Booking.com and Expedia 'each entered into',[179] again suggests that the theory of harm was based on a vertical restraint (ie between Booking.com and IHG, and Expedia and IHG) rather than a horizontal one (ie between Booking.com and Expedia which was facilitated by IHG).[180] Indeed, the OFT noted these to be 'vertical arrangements between hotels and OTAs' in its decision.[181] What is noteworthy is that in its commitments decision, the Swedish Competition Authority, after qualifying the relevant agreements as vertical agreements, went on to note that it is the horizontal parity (ie parity between prices offered by different OTAs) rather than the vertical parity (ie parity between prices offered by a hotel and

[176] HRS (n 8) [10].
[177] PCW (n 89) Section 9.
[178] See Bookingdotcom (n 11) [18] for the Authority's brief dismissal of the application of VBER which suggests that they treat the contracts containing the MFC clauses as vertical agreements.
[179] See Booking.com/Expedia/IHG (n 7) [1.3].
[180] See Booking.com/Expedia/IHG (n 7) [1.3].
[181] Booking.com/Expedia/IHG (n 7) [3.1].

by an OTA) that negatively affects competition.[182] Similarly, according to the Bundeskartellamt, the economic effect of MFC clauses is similar to direct collusion between hotel portals, namely concerted behaviour regarding the sale of a specific room at a specific minimum price.[183] This is most interesting because the legal instruments used suggest that the Bundeskartellamt as well as the Swedish Competition Authority perceived the case to be one of vertical restraints (hence, the discussion of Verticals Block Exemption Regulation (VBER), etc in the decisions).[184] Yet, the underlying theory of harm appears to be a horizontal one of collusion. Yet again, the decision is only addressed to HRS or Booking.com individually, which constitutes only one of the parties to this arguably collusive horizontal arrangement, and not to the other allegedly colluding parties at the same time.

The problem of the addressee persists irrespective of whether the restrictions in question are deemed to be horizontal or vertical agreements: one would expect the decision to be addressed to at least two parties to an 'agreement' (or to more parties in the case of a hub-and-spoke arrangement) if the anticompetitive practice in question is an 'agreement or concerted practice' falling under Article 101 and/or its national equivalents. None of the authorities other than the OFT and the US DOJ have pursued their investigations of these 'agreements' against all the parties to the agreement and none of them have addressed their decisions to all the parties to the agreement. This risks creating an anomaly in the application of competition law: enforcement of Article 101 and/or its national equivalents revolves around an 'agreement or concerted practice' that must have more than one undertaking party to it since otherwise it would not be an 'agreement or concerted practice'.[185] Thus, if the

[182] Bookingdotcom (n 11) [20], [24].
[183] HRS (n 8) [157].
[184] Commission Regulation 230/2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices [2010] OJ L102/1 (VBER). For the discussion of the VBER, see eg HRS (n 8) [177] et seq; Bookingdotcom (n 11) [18].
[185] In defence of the Bundeskartellamt and the other authorities, it should also be noted that the Commission itself has on occasions addressed such decisions concerning an infringement of Article 101 to only one of the undertakings to the agreement concerned rather than to all; see eg Case C-74/04 P Commission v Volkswagen AG [2006] ECR I-6586. In BMW this policy of the Commission (ie that of addressing the decision to all parties to an agreement in some cases and to only one party in other cases) was found not to infringe the principle of non-discrimination by the CoJ; Joined Cases 32/78, 36/78 to 82/78, etc BMW Belgium SA and others v EC Commission [1979] ECR 2435, [52]-[53]. It must also be remarked the cases in which the Commission chose to address the decision to only one of the infringing undertakings concerned dealership agreements between car manufacturers and dealers where a certain degree of economic dependence existed between the two groups. The relationship between online portals and their suppliers cannot be deemed equivalent to the relationship between a car manufacturer and dealers whose main source of income is dependent on the success of their relationship with the manufacturer. In the UK, the possibility of the CMA addressing its infringement decision to fewer than all of the parties to the agreement is stipulated in The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014 No 458) Article 5(3).

theory of harm is based on a practice falling under Article 101 and/or its national equivalents, investigating the practices of individual undertakings followed by decisions addressed to individual undertakings does not fit within the framework of the legal provision.[186] It is impossible to understand (and remains unexplained by the relevant authorities) why the decisions are not addressed to the platforms and their contracting partners (ie the hotels) or to all the relevant platforms adopting the same clauses which thereby lead to the alleged restriction/distortion of competition in these cases by using 'agreements' that fall under Article 101. The correct legal instrument to use for unilateral practices of individual undertakings is Article 102 and/or its national equivalents prohibiting the abuse of a dominant position. As will be argued below, the exercise of unilateral market power is indeed the correct and better tool to use in these investigations. The current approach of the authorities mixing and matching vertical and horizontal as well as unilateral and multilateral theories of harm with the wrong legal instruments is an undesirable development in competition law which should not stand judicial scrutiny.

[186] The Bundeskartellamt explains its decision to treat the issue in HRS as one concerning an anticompetitive 'agreement' by the fact that the Authority has found the agreements in question to be covered by the expression in the Verticals Guidelines that 'agreements' also cover expressions of will which provide for or authorise a company to adopt unilateral conduct which is binding on the other company; HRS (n 8) referring to Verticals Guidelines (n 125) [25]. There are several problems with this interpretation of the Guidelines and potentially with the statement in the Guidelines itself. For a start, at face value, by this expression the Bundeskartellamt appears to accept that the conduct in question is unilateral which begs the question why the Authority did not consider pursuing the conduct as a unilateral practice under Article 102 in the first place. Second, the expression in the Guidelines is more complicated than presented in HRS. The Guidelines stipulate that '[i]n case there is no explicit agreement expressing the concurrence of wills, the Commission will have to prove that the unilateral policy of one party receives the acquiescence of the other party'; Verticals Guidelines (n 125) [25](a). This clearly does not cover the situation in HRS since in that case, there was an explicit agreement expressing the concurrence of wills found in the shape of the contracts between HRS and hotels. Thus, this was not a situation in which the stipulated paragraph of the Guidelines was applicable. In the presence of such an explicit agreement, the correct legal approach would have been to address the decision to all parties to that agreement. Moreover, it is difficult to explain why the hotel partners were not worthy of prosecution for breach of competition law if they did indeed acquiesce to the demands of HRS. Furthermore, where the hotel partners are resisting and opposing the imposition of such clauses, it is also difficult to argue that the hotel partners acquiesced to the unilateral policy of HRS, which legally would leave one with only a unilateral policy and not an agreement in any sense that would render the application of Article 101 possible. That the hotels were not willingly acquiescing to the policy of HRS is evidenced by their non-compliance with the MFC clauses and the threats they received from HRS in order to ensure compliance; see eg HRS (n 8) [60]; [32]; [34]; [41]; [39]. As for the reference to such unilateral policy becoming an 'agreement' by acquiescence of another party, it must be noted that the judgment to which the Guidelines refer to in support of this legal point actually involved the annulment of a Commission decision in which the Commission had found that Volkswagen had breached Article 101 by way of an agreement (which was erroneously established on the basis of circulars and letters sent to its dealers concerning the pricing of a particular vehicle model); Volkswagen (n 185). Moreover, the question of acquiescence in the absence of relevant contractual provisions was not elaborated on by the CoJ in Volkswagen as it was not relevant to the case; ibid [46]-[47]. Furthermore, the judgment to which Volkswagen refers to in making the particular legal point is a judgment addressed to BMW Belgium and forty-seven Belgian BMW dealers which signed a circular that constituted an agreement breaching Article 101 by imposing an export ban; see BMW (n 185).

In contrast to some of the NCAs in the EU, in Apple, the US District Court and the majority on the US Court of Appeals found Apple liable under the per se rule rather than rule of reason despite the relationship between Apple and the relevant publishers being a vertical one: according to the court, the agreement was, at root, a horizontal price restraint subject to per se analysis.[187] The Court found that Apple directly participated in a horizontal price-fixing conspiracy and relied on MFC clauses in the agency agreements as proof of horizontal price-fixing.[188] Consequently, its practices were explicitly treated as a horizontal restriction that was entered into not just by Apple but by Apple and the relevant publishers, hence the action being pursued against the publishers and Apple together unlike the national cases in the EU pursued against individual platforms. Interestingly, as noted above, the EU Commission, in accepting commitments from Apple and five publishers for the same practices that were the subject matter of the US District Court judgment, treated (preliminarily) the conduct to be a concerted practice with the aim to increase the price of the publishers' products (ie e-books). This suggests that there is a clear horizontal element in the EU Commission's reasoning as well, despite the fact that it is not entirely clear whether the concerted practice is purely horizontal, or a mix of horizontal and vertical elements.

There is a stark difference between the horizontal theory of harm as pursued in Apple and the theory of harm underlying the investigations of the European NCAs into platform MFC clauses. This difference is important because – apart from the problem discussed above concerning the use of wrong legal instrument – depending on whether the clauses are treated as vertical restraints or horizontal restraints, the legal treatment of the clauses will involve different assessments. Particularly in the EU, their treatment as vertical restraints opens up the possibility of their being covered and exempted by the VBER. Similarly, economic thinking on when and how vertical restraints can harm competition is substantially different to when and how horizontal restraints can harm competition. Part of the difficulty in establishing whether they are horizontal or vertical agreements is due to the fact that the platforms are two-sided markets: they offer their services to two different customer groups

[187] Apple (n 14) 706-707; Apple (appeal) (n 77) 71 et seq. Cf Dissenting Opinion (n 77) 15-16.

[188] Apple (n 14) 706-707. In its appeal, Apple argued that far from being part of the conspiracy, publishers actively resisted the MFC; Apple Inc's Opening Brief (n 75) 42. The legal basis of Apple's ongoing application to the US Supreme Court to review the US Court of Appeals' judgment is that per se liability was wrongly imposed since the practice in question was vertical; see Apple Inc v United States of America an others, No.15A015A301 in the Supreme Court of the United States, Application for Extension of Time Within Which to File a Petition for A Writ of Certiorari to the United States Court of Appeal for the Second Circuit, 16 September 2015.

and indirect network effects exist between the two groups.[189] The network effects imply that the value of the services of the platform for one customer group depends on the number of members of the other group.[190] This two-sided nature of the markets inevitably puts the platforms in a vertical relationship with their suppliers and customers, but platforms also compete with other platforms and they are in a horizontal relationship with these other platforms. Therefore, any agreement between a platform and a supplier can have effects on that vertical relationship between them and/or on the horizontal relationship between the platforms.[191] What is important is that economics suggests that vertical restraints should be treated more leniently than horizontal restraints due to their potential procompetitive effects and a key factor in the potential harmful effects of vertical restraints is the holding of market power by at least one of the parties to the vertical restraint.[192] The need for market power arises from the economic argument that restrictions of inter-brand competition are more important in terms of a restrictive effect on competition and where inter-brand competition is strong (ie there is no market power), restrictions of intra-brand competition should be less of a concern.[193]

Regarding the decisional practice discussed above, the horizontal infringement theory in Apple suggests that the District Court's concern was inter-brand competition, namely competition between different publishers which in turn implies competition between different titles. Yet, interestingly, in Apple the competition issue potentially related to intra-brand competition rather than inter-brand competition because any given book has (and can technically have) only one publisher at one time and the scrutinised practices concerned the

[189] See Zimmer and Blaschczok (n 19) 1 and references in n 3.
[190] Zimmer and Blaschczok (n 19) 1.
[191] In his dissenting opinion in Apple, Judge Jacobs argued that Apple's conduct should have been treated as a vertical restraint since Apple was not in competition with the publishers; it was only in competition with Amazon and its agency agreements including the MFC clauses was a legitimate means of competing with Amazon; see Dissenting Opinion (n 77) 21-23. In the literature, Fletcher and Hviid (n 4) 17 et seq argue that this mix of horizontal and vertical effects is common with these clauses, if implicit.
[192] For the economics literature on vertical restraints, see eg M Motta Competition Policy: Theory and Practice (Cambridge University Press 2004) 32, 343, 348; S Bishop and M Walker The Economics of EC Competition Law: Concepts, Application and Measurement (3rd ed Sweet & Maxwell 2010) 190 et seq; This is the rationale behind the market share threshold of the VBER; see VBER (n 184) Article 3.
[193] See eg Bishop and Walker (n 192) 195. This is also the position adopted in the Commission's Verticals Guidelines; see Verticals Guidelines (n 125) [102], [153], [177]. Cf eg Cases 56 and 58/64 Etablisssements Consten SaRL & Grundig-Verkaufs-GmbH v Commission [1966] ECR 299, 342 which does not display such a position but is focussed on the single market imperative and barriers to trade. On the position that restrictions of inter-brand competition are more problematic for competition than vertical restrictions in the online platform context, see Bookingdotcom (n 11) [20]. In the US, horizontal restrictions of competition are per se unlawful under Sherman Act Section 1 whereas vertical restraints are subject to the rule of reason analysis meaning that they are unlawful only if an assessment of market effects reveals that they unreasonably restrain trade; Apple (appeal) (n 77) 51.

price of individual books sold on different outlets, which presumably had no relevance for inter-brand competition (ie, competition between publishers for different titles or competition between different titles). This is because the competition between, for example, Harry Potter and the Da Vinci Code as different titles and the competition between publishers to be able to receive the right to publish such titles presumably remain unaffected by restrictions concerning the price of an individual title agreed between a publisher and a retailer. Taking the example further, it is difficult to imagine that consumers would decide to buy the Da Vinci Code if the price of Harry Potter went up. This means that the book titles (and therefore the publishers) do not compete on price against each other since they are not substitutable, particularly in the relevant market in Apple which comprised new releases and best-sellers (in other words, a subset of titles across all genres rather than a particular genre of books). In Apple the publisher defendants' CEOs noted that the publishers did not compete with each other on price, but rather on authors and agents.[194] It is indeed accepted by the District Court in Apple that there is no evidence that the publishers have ever competed with each other on price.[195] Yet, the entire judgment and theory of harm in Apple turn on the increase in prices of the books rather than any other aspect of competition. This suggests that there is a disjoint between the theory of harm and the legal tool used as well as the facts of the market in Apple similar to the recent European cases concerning platform MFC clauses: the judgment treats books as homogenous/substitutable products and the publishers as producers of homogenous/substitutable products who compete on price, which is clearly not true on the facts.[196]

[194] Apple (n 14) 651.
[195] Apple (n 14) 694.
[196] In the literature, Fletcher and Hviid suggest that retail price MFC clauses can be seen as equivalent to the worst of RPM and should not be treated any less harshly than RPM: if RPM is to be seen as an infringement by object under EU competition law, then so should retail price MFCs; Fletcher and Hviid (n 4) 32. They define retail price MFC clauses as those clauses that primarily arise in the context of online platforms by which the suppliers (as opposed to the retailers) set the final retail prices and by which suppliers are required not to offer lower final prices through any other retailer. The argument is that such clauses contain not only a vertical restriction equivalent to RPM, but also a horizontal element whereby the upstream firm sets identical retail prices across all downstream intermediaries. Thus, this suggests that the horizontal element concerns the downstream level rather than the upstream level (ie the intermediary level rather than the supplier level). In competition law terms, this would still constitute intra-brand competition and a vertical agreement since it relates to the sale of the same product through different retailers. In other words, it does not concern inter-brand competition which would relate to competition between suppliers (and which would need to be proven as an agreement or concerted practice between suppliers in order to be considered a horizontal restraint of inter-brand competition). Other authors also treat these MFC clauses mainly as vertical restraints; see eg Zimmer and Blaschczok (n 19); van der Veer (n 19); Vandenborre and Frese (2015) (n 19).

The implication of the discussion concerning the distinction between horizontal and vertical restrictions is that if platform MFC clauses are found in contexts in which the restriction of competition law is a vertical one – and the decisional practice suggests that it mostly is – then the application of competition law to these clauses needs to consider that specific context. This means that, in the EU, these agreements would need to be assessed under the exemption provided by VBER. More importantly, in any jurisdiction that incorporates modern economic thinking into its competition law assessment, one has to incorporate a market power analysis in the examination of these clauses and the agreements in which they are found due to the important distinction between restrictions of intra-brand competition and restrictions of inter-brand competition.

iii. Are they non-exemptible hard-core restraints under VBER Article 4(a)?

Vertical agreements are block-exempted from the application of Article 101 provided that they meet certain criteria.[197] Under Article 4(a) VBER, the exemption provided for in VBER does not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their 'object' the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.[198] On the possible application of this exclusion to platform MFC clauses, as Bundeskartellamt noted in HRS, on a technical reading of Article 4(a), the conditions of that provision are not fulfilled (meaning that the restraints are not non-exemptible): if the hotels are 'suppliers' and the platforms are 'buyers', it is then not the buyers whose freedom to set price is restrained by the MFC clauses, but the 'suppliers' (hotels).[199] If the hotel portals (ie platforms) are suppliers, then the hotels are buyers of these services, but they do not 'resell' the services of the portals.[200] Therefore, Article 4(a) does not appear to cover the platform MFC clauses in question.

Arguably, the competitive impact of MFC clauses is similar to that of a hard core restriction under Article 4(a), since the aim of that provision is to preserve the price setting freedom of

[197] For the criteria, see VBER (n 184) Articles 2 and 3.
[198] VBER (n 184) Article 4(a).
[199] HRS (n 8) [183].
[200] HRS (n 8) [183].

the 'buyer'.[201] Indeed, the Verticals Guidelines note that RPM can be achieved through indirect means, one of which is by linking the prescribed resale price to the resale prices of competitors.[202] Moreover, 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 obliging the buyer to apply an MFC clause.[203] This runs into the problem, as above, that the platforms do not 'buy' from the suppliers in order to 'resell' and the suppliers do not 'resell' any services that they receive from the platforms. Thus, even if a platform were deemed to be a supplier (of a service) and the sellers on the platform were treated as 'buyers' in the sense of Article 4(a) VBER, the platform MFC clauses at issue would still not be covered under Article 4(a) VBER.[204] This is because Article 4(a) VBER concerns the resale of the purchased goods/services, whereas platform MFC clauses are used to set the price of products/services sold on the platform (which are not being resold by platforms) rather than the price for the platform services itself.[205] Thus, should platform MFC clauses be assessed under VBER, they would not legally fall under Article 4(a) implying that they are not non-exemptible hard-core restrictions.

iv. Are they restrictions by object or by effect?

Another question that one needs to address regarding the treatment of these clauses under Article 101 is whether they are restrictions by object or by effect. Similar to the assessment of whether they are horizontal or vertical agreements, different authorities around the world have come to different conclusions about whether they are restrictions by object or by effect.

In the US case against Apple, the conduct at issue was treated as a horizontal price fixing conspiracy subject to the per se prohibition (which in the EU would roughly suggest a restriction by object). In its appeal, Apple opposed this categorisation by arguing that '[r]esort to per se rules is confined to restraints … that would always or almost always tend to restrict competition,' 'have manifestly anticompetitive effects,' and lack 'any redeeming virtue'.[206] The dissenting opinion in Apple also seems to share the same position.[207]

[201] HRS (n 8) [184].
[202] Verticals Guidelines (n 125) [48].
[203] Verticals Guidelines (n 125) [48].
[204] Zimmer and Blaschczok (n 19) 6-7. See also Vandenborre and Frese (2014) (n 19) 592 arguing that they are not hard-core restrictions and will be covered by the VBER provided that the market share, etc conditions are fulfilled.
[205] Zimmer and Blaschczok (n 19) 7.
[206] Apple Inc's Opening Brief (n 75) 47 citing Leegin (n 79) at 886 and In re Sulfuric Acid Antitrust Litig 703 F.3d 1004 (7th Cir. 2012) at 1011-12.

Moreover, Apple argued that the prices in question were price caps which restricted prices as 'protection against excessively high prices that could either alienate [Apple's] customers or subject [it] to ridicule'.[208] In the commitments offered by Apple and the same publishers subject to the US antitrust procedure explained above, the Commission also expressed its preliminary findings and assessment of the infringement as being one of a concerted practice by object.[209] As noted above, it is not entirely clear whether this is a horizontal or vertical concerted practice, or a mix of the two. Similarly, in the UK, in its preliminary assessment, the OFT treated the restrictions on discounting (and indirectly, the MFC clauses which had the same effect) imposed by certain hotel chains in their contracts with OTAs as restrictions by object.[210]

In contrast, other authorities have treated platform MFC clauses as restrictions by effect. For example, this was the approach of the CC in PCW.[211] In Germany, in HRS, the Bundeskartellamt left open the question whether the MFC clauses are restrictions by object.[212] The Bundeskartellamt found that there were significant restraints of competition by effect and pursued the case accordingly.[213]

The distinction between 'restrictions by object' and 'restrictions by effect' arises from the fact that certain types of collusion can be regarded, by their very nature, to be injurious to the proper functioning of normal competition.[214] The test adopted by the CoJ regarding restrictions by object is that the restriction should entail 'by its nature'/'in itself' 'a sufficient degree of harm to competition'.[215] These restrictions have such a high potential for negative effects on competition that it is unnecessary to demonstrate any actual or likely effects on the market for the purposes of applying Article 101.[216] This is due to the serious nature of the restriction and experience showing that such restrictions are likely to produce negative effects

[207] Dissenting Opinion (n 77) 16 et eq.
[208] Apple (n 14) 670.
[209] E-Books (2012) (n 80) [87]-[88].
[210] Booking.com/Expedia/IHG (n 7) [5.3].
[211] See PCW (n 89) [9.65]-[9.67] for a summary of anticompetitive effects.
[212] HRS (n 8) [1], [8], [9], [152] et seq.
[213] HRS (n 8) [9]. See also Booking.com (n 8) [164] et seq.
[214] European Commission 'Guidance on restrictions of competition by "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice' SWD(2014) 198 final, 25 June 2014, 3 referring to Case C-226/11 Expedia Inc v Autorité de la concurrence and Others ECLI:EU:C:2012:795, [36] and case law cited therein.
[215] Case C-67/13 P Groupement des cartes bancaires (CB) v European Commission (11 September 2014) ECLI:EU:C:2014:2204, [49], [57], [58], [75], [90].
[216] Commission Guidance (n 214) 3.

on the market and to jeopardise the objectives pursued by the EU competition rules.[217] Considering the economics literature discussed in section II above, regarding both the potential for procompetitive and anticompetitive effects of these clauses as well as the underdeveloped nature of the state of economics on platform MFC clauses and the lack of experience concerning these clauses, it is impossible to reach the conclusion that platform MFC clauses should be deemed as restrictions of competition by object.[218] It has now been officially accepted by at least four European NCAs (UK, France, Sweden, Italy) that some types of platform MFC clauses (ie those that seek parity between the price on the platform and the price on the supplier's own online channels) are necessary for the platform business model to function and are acceptable under competition law.[219] When so much depends on context and the operation as well as the wording of the clause, and when it is accepted that certain types of these clauses are necessary for a legitimate business model to function, it is impossible to state that these clauses should be treated as restrictions by object because they are 'by their nature' harmful to competition. Therefore, platform MFC clauses require an effects-based analysis under Article 101.

B Assessment as an abuse of a dominant position

Compared to the assessment of platform MFC clauses under Article 101, their treatment under Article 102 may be legally more appropriate and sound. This option has not been tried in any of the recent cases concerning platform MFC clauses at NCA level. Yet, there are several reasons for which approaching these clauses using Article 102 is superior to using Article 101 and this section provides a normative analysis of such an approach. The first and most pragmatic reason to prefer Article 102 is that the agency problem that occurs under Article 101 would be avoided if the assessment is conducted under Article 102 since there is no need to identify an agreement or concerted practice between two 'undertakings' (as defined by EU competition law) for the application of Article 102. The single economic entity doctrine limiting the application of Article 101 is not applicable in case of Article 102. In fact, the CoJ has explicitly held that a practice to which Article 101 is not applicable due to the single economic entity doctrine may still be challenged as an abuse under Article 102.[220] Second, and more importantly, an assessment under Article 102 shifts the focus of the inquiry

[217] Commission Guidance (n 214) 3.
[218] See also Vandenborre and Frese (2015) (n 19) 337. Cf Soyez (n 19) 108.
[219] See text around n 116 and n 125 above.
[220] Case 66/86 Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v Zentrale zur Bekampfung unlauteren Wettbewerbs eV [1989] ECR 803, [35]; Viho (n 128) [17]. See also A Jones and B Sufrin EU Competition Law: Text, Cases, and Materials (5th ed OUP 2014) 136-137.

to the existence and exercise of market power. The existence of market power is not only important for the assessment of vertical restraints given the economics of vertical restraints, it also appears to be the correct basis for establishing when platform MFC clauses may harm competition. Particularly, if these restraints appear to be restricting intra-brand competition, economics suggests that for the effects on competition to be harmful, inter-brand competition should be weak.[221] Thus, it might be that only where inter-brand competition is weak on at least one side of the market due to concentration on the market, these clauses might be harmful to competition under an effects-based analysis. In fact, all of the cases discussed in this article suggest or demonstrate the existence of potential market power on at least one side of the relevant two-sided market.

For example, in HRS, while noting that the anticompetitive effects of MFC clauses of HRS on competition are exacerbated by the application of MFC clauses by other portals, such as Booking.com and Expedia, it is stated that the three OTAs reach a market share of roughly 90% in Germany on the hotel portal market.[222] Indeed, given that individual hotels have permitted rooms to be sold more cheaply elsewhere and have been expelled from the HRS site,[223] this begs the question why any of the hotels would want to stay on the HRS site if HRS is not a 'must have'/dominant player. Clearly, in the German scenario HRS does not seem to envisage or be threatened by all hotels pulling out of the platform, which suggests that either HRS is a 'must have'/dominant player and/or there is insignificant buyer power or a coordination problem within buyers (ie they cannot all pull out at the same time). This suggests that these platforms might be critical 'gateways' to the relevant market. It is also noteworthy, as mentioned above, that the Bundeskartellamt decision is only addressed to HRS and not to HRS and its hotel partners or to HRS and other portals implying that what is at issue is unilateral conduct. In the UK, the OFT decision was addressed to the OTAs and a hotel chain, rather than to either of these on their own. However, the hotel chain in question (IHG) is the largest hotel company in the world (by number of rooms), and Booking.com and Expedia together may have market power on the relevant market in the UK. Thus, there could be market power and/or dominance on at least one side of the market in the UK as well. In fact, in its decision, the OFT noted that the relevant market is 'likely to be characterised by

[221] See eg Bishop and Walker (n 192) 195-96; Motta (n 192) 348.
[222] HRS (n 8) [163].
[223] HRS (n 8) [158].

significant limits to price competition and barriers to entry'.[224] This suggests the existence of market power on the relevant market.[225] It should be noted that the OFT does not seem to have considered the possibility of MFC clauses potentially breaching Article 102 since the only reference they make in this context is to a potential breach of Article 101 by restrictions on discounting.[226] In contrast, the CC examined concentration and market power in the PCW market and held that it was the horizontal market power that allowed the PCWs to negotiate effective MFC clauses.[227] In fact, the CC noted that PCWs appear to enjoy a degree of market power by virtue of single-homing consumers and the negotiation and enforcement of MFC clauses with insurers is one 'use of this market power'.[228] Finally, in the cases involving publishers and Apple on both sides of the Atlantic, the publishers involved collectively had significant market shares on the relevant market. The five publisher defendants and Random House represented the six largest publishers of trade books in the US (the Big Six) and titles from these publishers accounted for over 90% of all US New York Times Bestseller book sales in 2010.[229] The publishers sold over 48% of all e-books in the US in the first quarter of 2010, and on the retail side Amazon 'dominated' the e-book retail market, selling nearly 90% of all e-books through 2009 (until Apple's entry into the market).[230] Thus, in this case, possibly both sides of the two-sided market were concentrated.

Regarding the treatment of platform MFC clauses under Article 102, clearly a hurdle that would not exist for their assessment under Article 101 is the requirement to establish that there is a dominant position on the relevant market. It should be noted that this dominant position does not have to be held by a single undertaking and one can envisage there being a position of collective dominance in these cases. For example, it might be that OTAs, insurance PCWs, or publishers collectively occupy a dominant position in the markets for

[224] Booking.com/Expedia/IHG (n 7) [5.11]. The OFT did not define the relevant market in the decision but referred to the 'hotel online booking sector' in which Article 101 had possibly been infringed; see ibid [3.2].
[225] This is not to suggest that the market for the supply of hotels is concentrated or that IHG has market power on this market due its being the largest hotel company in the world. It is more likely to be the OTAs market that is concentrated. In fact, in the context of increasing barriers to entry, the OFT mentions the prevention of new OTAs from entering the market; Booking.com/Expedia/IHG (n 7) [1.4].
[226] Booking.com/Expedia/IHG (n 7) [6.39], [6.42].
[227] PCW (n 89**Error! Bookmark not defined.**) Summary [72]. The CC found that there is some constrain on the big four PCWs from potential entry or expansion but it is restricted by the need for high levels of mass advertising and the difficulty of entering with a differentiated offering; ibid [9.23].
[228] PCW (n 89**Error! Bookmark not defined.**) [9.24].
[229] Apple (n 14) 648. Plaintiffs have defined the market as trade e-books without any objection from Apple in this case; ibid 694 n 60. Trade books consist of general interest fiction and non-fiction books and are to be distinguished from 'non-trade' books such as academic textbooks, etc; ibid 648 n 4. The alleged anticompetitive conduct appears to have related in particular to the pricing of NYT Bestsellers and New Releases.
[230] Apple (n 14) 649.

OTAs, insurance PCWs or publishing. Subsequently, the imposition of MFC clauses on their trading partners can be considered an exercise of such collective dominance that could potentially be abusive. Alternatively, a collectively dominant position may exist vertically in the relevant markets: it might be that, for example, the publishers and Apple, or the OTAs and IHG together occupy a collectively dominant position. The possibility of platform MFC clauses constituting the abuse of a collectively dominant position provides a more legally sound option for assessing such clauses under competition law than approaching them under Article 101.

In EU competition law, a joint (collective) dominant position consists in a number of undertakings being able together, in particular, because of factors giving rise to a connection between them, to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers.[231] Importantly, the undertakings holding a joint dominant position can be in a vertical commercial relationship with each other.[232] Mere independence of undertakings from one another does not prevent the possibility of their holding a joint dominant position.[233] What is required for the existence of collective dominance is 'economic links' uniting such independent entities that together hold a dominant position on a specific market.[234] According to the Commission, such economic links may be satisfied by the existence of the 'kind of interdependence which often comes about in oligopolistic situations'.[235]

In Compagnie maritime belge the CoJ confirmed that the existence of an agreement or of other legal links is not indispensable to a finding of a collective dominant position.[236] Such a finding may be based on other 'connecting factors' and would depend on an economic assessment, and particularly, on an assessment of the structure of the relevant market.[237] According to the Court, collective dominance implies that a dominant position may be held by two or more economic entities legally independent of each other if from an economic point of view they present themselves or act together on a particular market as a collective

[231] Case T-228/97 Irish Sugar plc v EC Commission [1999] ECR II-2969, [46].
[232] Irish Sugar (n 231) [61], [63].
[233] Irish Sugar (n 231) [49].
[234] Cases T-68/89 etc Società Italiano Vetro SpA v Commission [1992] ECR II-1403, [358].
[235] Commission Notice on Access Agreements in the Telecommunications Sector [1998] OJ C265/2 [79].
[236] Joined Cases C-395/96 P and C-396/96 P Compagnie maritime belge transports SA and others v EC Commission [2000] ECR I-1365, [45].
[237] Compagnie maritime belge (n 236) [45].

entity.[238] Thus, it has been argued that it is possible for firms to be held to be collectively dominant where the oligopolistic nature of the market is such that they behave in a parallel manner, thereby appearing to the market as a collective entity.[239] The essence of collective dominance is thus parallel behaviour within an oligopoly.[240] It is at least arguable that there existed collective dominance on the markets scrutinised for platform MFC clauses discussed in this article. It is explicit that regarding OTAs, all major OTAs have the same MFC clauses in their contracts with the hotels as well as the same 'Best Price Guarantee' to consumers;[241] all major PCWs have the same MFC clauses in their contracts with insurers;[242] and all of the publishers had the same MFC clauses in their contracts with e-book retailers.[243] Notably, all of these markets are also oligopolistic with around three or four major operators (with the exception of the publishers market in Apple with six operators).

Undertakings occupying a joint dominant position may engage in joint or individual abusive conduct; it is sufficient that abusive conduct relates to the exploitation of the joint dominant position which the undertakings hold on the market.[244] However, what qualifies as an abuse of collective dominance is underdeveloped in the case law.[245] Parallel behaviour in itself is not abusive.[246] The platform MFC clauses discussed in this article might be the prime example of an abuse of collective dominance as discussed below. There is indeed also jurisprudence from the CoJ finding that clauses imposed by a dominant undertaking on its agents may constitute abuse.[247] This could potentially be reversed to apply to the situation of the platforms where the agent imposes abusive conditions on its principal if dominance is found on the agent-side of the market.

[238] Compagnie maritime belge (n 236) [36].
[239] R Whish and D Bailey Competition Law (8th ed OUP 2015) 614.
[240] Whish and Bailey (n 239) 614.
[241] See Bookingdotcom (n 11) [22]; HRS (n 8) [9]; [174]. For the best price guarantee see n 15 and n 17 above.
[242] PCW (n 89) [9.25].
[243] Apple (n 14) 666.
[244] Irish Sugar (n 231) [66]. For a broader discussion of Irish Sugar and collective dominance, see G Monti 'The Scope of Collective Dominance under Article 82 EC' (2001) 38 CMLR 131.
[245] Whish and Bailey (n 239) 579. Despite the underdevelopment, there have been cases in which abuse of collective dominance was established. See eg Compagnie maritime belge (n 236); Irish Sugar (n 231); Commission Decision (Case IV/32.450) French-*West African Shipowners' Committees* [1992] OJ L134/1; Commission Decision (Cases IV/D-1/30.373 and IV/D-1/37.143) P & I Clubs [1999] OJ L125/12; Commission Decision (Case IV/35.134) Transatlantic Conference Agreement (TACA) [1999] OJ L195/1 partly upheld on appeal Case T-191/98 Atlantic Container Line AB v Commission [2003] ECR II-3275.
[246] Whish and Bailey (n 239) 616.
[247] Case 40/73 *Cooperatieve Vereniging 'Suiker Unie' UA and others v EC Commission* [1975] ECR 1663, [486].

The abuse of a dominant position under EU competition law is usually considered to comprise 'exploitative' and 'exclusionary' abuse. Whereas exploitative abuse refers to those practices of a dominant undertaking by which the customers of the dominant undertaking are disadvantaged, harmed, etc, exclusionary abuse refers to the practices of a dominant undertaking that harm the competitive position of that undertaking's rivals.[248] In terms of establishing abuse, in the cases mentioned throughout this article, one could argue that there are potentially both exploitative and exclusionary abuses although establishing either an exploitative or an exclusionary abuse would suffice for breach of Article 102 under the existing jurisprudence.[249]

First, the MFC clauses appear to be usually imposed on trading partners against their will. For example, hotels, insurance companies, Amazon all seem to have objected to the imposition of these clauses in their contracts with platforms/suppliers and some have been threatened by delisting from the platform/cut off of supply in case of not complying with the clauses.[250] Under Article 102(a) the imposition of 'unfair trading conditions' is an example of abuse and the imposition of MFC clauses against the will of the platforms' trading partners may be assessed as such a practice. Second, if – as suggested by the recent cases – platform MFC clauses lead to higher prices for the products in question than would be the case in the absence of such clauses, there may also be an abuse of 'unfair pricing' which is also prohibited by Article 102(a).[251] Third, the difference in treatment between trading partners that agree to MFC clauses and that do not agree to MFC clauses may constitute a prime example of discrimination which puts some trading partners at a competitive disadvantage as prohibited under Article 102(c). This would particularly be the case if the trading partners discriminated against are prevented from providing the relevant products/services to their customers. Fourth, the MFC clauses have the potential to foreclose the market at the platform level by hampering the entry of new platforms which cannot gain market share by undercutting the incumbent since the MFC clauses prevent this possibility. Fifth, the MFC clauses also have the potential to exclude competition at the trading partner level if – similar

[248] On the concept of abuse, see P Akman The Concept of Abuse in EU Competition Law: Law and Economics Approaches (Hart Publishing, Oxford, 2012).
[249] This author has argued elsewhere that exploitation and exclusion must both be present and accompanied by proof of lack of an increase in efficiencies before 'abuse' can be established; see Akman (n 248) Chapter 8.
[250] See eg HRS (n 8) [44], [60]; [66], [153], [168], [246]; PCW (n 89) [9.31]; Apple (n 14) 671-673.
[251] For the MFC clauses leading to higher prices for hotel rooms, see eg Bookingdotcom (n 11) [21]. For a discussion of whether prohibiting such excessive prices would be tantamount to prohibiting 'natural' conduct in an oligopoly, see R Whish and B Sufrin 'Oligopolistic Markets and EC Competition Law' (1992) 12 Yearbook of European Law 59, 74-75.

to the discrimination scenario – the unacceptance of or incompliance with MFC clauses of the incumbent lead to the trading partner's exclusion from the market as a result of not being able to reach the customer base provided by the incumbent. Both of these instances can be covered under Article 102(b) which prohibits the limitation of production, markets or technical development to the prejudice of consumers. In fact, foreclosure appears to be one of the main concerns of all competition authorities that have had to recently deal with these clauses.[252] Regarding MFC clauses, as mentioned above, foreclosure has indeed been the concern of the EU Commission and Courts in the few cases that exist at EU level.[253] Exercise of market power has been the concern with MFC clauses in other jurisdictions as well.[254]

A final element of establishing abuse under Article 102 concerns 'objective justification'. If the dominant undertaking can prove that its conduct is objectively justified, then its conduct would not be found to breach Article 102. According to the case law, an 'objective justification' provided by a dominant undertaking for an allegedly abusive conduct can prevent the finding of an infringement under Article 102.[255] Such objective justification can take the form of proving that the dominant undertaking's conduct is either objectively necessary or is justified due to the efficiencies that it produces which outweigh any anticompetitive effects.[256] The burden to prove an objective justification by providing all the necessary evidence is on the dominant undertaking.[257]

In the context of platform MFC clauses, an objective justification could take the shape of both an objective necessity defence and an efficiency defence. Using the information

[252] For example, Swedish Commitments identify the effect of the MFC clauses both as restricting the competition between Booking.com and its competitors and as potentially constituting a barrier to entry for potential competitors; Bookingdotcom (n 11) [22]-[23]. See also HRS (n 8) [9]; [160]-[162]; Booking.com/Expedia/IHG [5.9]; PCW (n 89) [9.50]; [9.55]; [9.67]; Press Release (n 112) 2-3.
[253] See text around n 122 above.
[254] See eg the Australian Safeway case in which the supermarket Safeway's ability to demand MFC clauses was found to be indicative of its market power and enforcing its rights as a most-favoured-customer was found to amount to an exercise of that market power; Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited (2003) 129 FCR 339 discussed in Smith and Merrett (n 68) 184.
[255] On objective justification, see eg Case 27/76 United Brands Company and United Brands Continentaal BV v Commission [1978] ECR 207, [184]; Case 311/84 *Centre Belge d'études de marché* – Télémarketing (CBEM) v Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB) [1985] ECR 3261, [27]; Case C-95/04 P British Airways v Commission [2007] ECR I-2331, [69], [86].
[256] Case C-209/10 Post Danmark A/S v Konkurrenceradet EU:C:2012:172, [41]; European Commission 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C45/7, [28].
[257] Post Danmark (n 256) [42].In the context of enforcement at EU level, Commission would make the ultimate assessment of whether the conduct is not objectively necessary or whether the anticompetitive effects outweigh any efficiencies; Guidance (n 256) [31].

available from the recent investigations, one could argue that, for example, the MFC clauses that seek parity between a platform and the supplier's own online channels is objectively necessary since if the consumers can always find the same product more cheaply on the supplier's own website, this would defy the entire business model of the platforms in question as they would lose credibility in the eyes of consumers. Moreover, if the consumer searches for the product on one platform and then makes a purchase on another platform or on the supplier's own online channel both of which free-ride on the advertisement provided by the first platform, then the first platform will be deprived of any remuneration for its services since its remuneration is any commission that it would earn on any actual sales which in turn enables the platform to offer its services to consumers. The necessity and/or usefulness of requiring parity between a platform and the supplier's own online channels for reasons such as preventing free-riding has indeed been accepted by several competition authorities in Europe as a justification.[258] Another necessity defence might arise from an argument that certain platforms offer higher quality services as they provide consumers with feedback on products from previous purchasers, with detailed information on the qualities of the product in question, etc that enable prospective purchasers to make more informed decisions. The MFC clauses imposed by the platforms can be deemed necessary to prevent free-riding by lower quality platforms on such additional services provided by higher quality platforms. This can also be considered to be an efficiency defence since such free-riding can undermine the incentive for the higher quality platforms to invest in these services which consumers may find useful and valuable.[259] Similarly, one can envisage an efficiency defence in the context of a given sector which would be justified by the peculiarities of the industry concerning price-setting, etc. According to the Commission, the proof of objective necessity requires proving that the conduct is proportionate, and the proof of an efficiency defence requires proving that the conduct is indispensable to the realisation of the relevant efficiencies and that the conduct does not eliminate effective competition.[260] Clearly, the existence or absence of an objective justification needs to be assessed on a case-by-case basis, but there are certainly potential objective justifications that the online platforms might be able to establish in the scrutiny of their conduct under Article 102.

[258] See eg Bookingdotcom (n 11) [24] et seq; [30]; PCW (n 89) [9.72] et seq. The Bundeskartellamt in contrast rejected any such efficiencies gains as 'at best limited' despite accepting that there could be a free riding problem in this context; HRS (n 8) [199]. The prevention of free-riding is also listed in the Verticals Guidelines (n 125) [107] as a potential procompetitive effect of vertical restraints.
[259] In this vein, see eg arguments put forward by Booking.com and Expedia in Booking.com/Expedia/IHG (n 7) Annexe 2 [1.2].
[260] Guidance (n 256) [29], [30].

Overall, the abuse of a collective dominant position either individually or collectively or the abuse of a single dominant position represents a potentially viable and appropriate legal basis for the competition law assessment of platform MFC clauses. This avenue has oddly not been explored by any of the competition authorities mentioned in this article thus far and it can only be hoped that this will change in future proceedings. It is therefore welcome that – without commenting on the substance of the investigation – in the recently announced investigation into Amazon, the Commission appears to be considering a potential infringement of Article 102.[261]

V Conclusion

Platform MFC clauses have become a contentious issue for competition law authorities not only in Europe, but also around the world. The law in this area is certainly developing whilst different authorities are adopting different approaches to the treatment of identical practices, sometimes of identical parties whilst applying (practically) identical legal provisions. In order for the law in this area to develop in a sound manner, the authority enforcement in these cases needs to be based on a principled approach. Currently, there is no such principled approach. In the EU, from a competition policy perspective, it can be argued that the EU Commission should have taken on the cases concerning OTAs rather than leave them to the NCAs to devise a uniform, coherent European approach to the issue of platform MFC clauses.[262] Leaving the application of EU competition law to a novel issue of major economic significance to NCAs with their different interpretations of the same rules and their different choice of decisional instruments is a suboptimal use of the decentralised enforcement mechanism, as demonstrated by the substantive discussion in this article. Bearing in mind that platform MFC clauses are also the subject matter of ongoing and potentially upcoming cases in Europe as well as in other jurisdictions around the world, there is a risk that the piecemeal approach of different authorities around the world will lead to global divergence

[261] See Press Release (n 5) above.

[262] Under Article 11/6 Regulation 1/2003 (n 131), the initiation by the Commission of proceedings for the adoption of a decision under shall relieve the NCAs of their competence to apply Articles 101 and 102. If an NCA is already acting on a case, the Commission shall only initiate proceedings after consulting with that NCA. According to the Commission Notice on cooperation within the Network of Competition Authorities, the Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States and the Commission is particularly well placed to deal with a case if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement, etc; 'Commission Notice on cooperation within the Network of Competition Authorities', [2004] OJ C101/43, [14], [15].

on the competition law and policy treatment of such clauses. This can have negative effects not only on businesses due to the increased costs of compliance and uncertainty, but also on consumers if some of the decisions are erroneous (which they might be, if different authorities are adopting substantially different approaches and decisions concerning the same practice).

This article has sought to provide a principled approach to the issue of platform MFC clauses by arguing that the focus of the assessment should shift from the current emphasis on the prohibition of anticompetitive agreements and concerted practices to the prohibition of abuse of (collective) dominance. The reason for this shift is not least because in the EU (and possibly in the US), due to the single economic unit doctrine the agreements between platforms and their suppliers are not covered by rules prohibiting anticompetitive agreements as platforms are technically 'agents' of the suppliers. Even if the agency exception was not a problem, regarding the European NCA practice, there would still be the issue of pursuing proceedings against individual undertakings for anticompetitive agreements or concerted practices where the other party to the agreement is not being pursued for an infringement whilst no case is being made by the authority involved to justify that choice. This clearly raises concerns about the fairness and procedural correctness of the approach. Where there are no proceedings against the vertical contracting parties and no allegation that there is horizontal collusion between platforms or between the suppliers, the substantive approach of using Article 101 and/or its national equivalents in these cases is difficult to justify.

It is noteworthy that most of the markets which have raised issues concerning platform MFC clauses contain a few competitors which together hold a substantial share of the relevant market. Indeed, in HRS the Bundeskartellamt also found that the implementation of the MFC clauses constituted an unfair hindrance of the small and medium-sized hotel partners which are dependent on HRS on the basis of abuse of 'relative market power'.[263] Moreover, the practice of the European NCAs addressing their decisions to only the powerful platforms individually rather than the platforms and their contracting parties also supports the position that what is at stake is unilateral conduct. It is striking that HRS is essentially based on an exceptional understanding of 'agreement' under which one undertaking acquiesces to the

[263] HRS (n 8) [12]; [236].

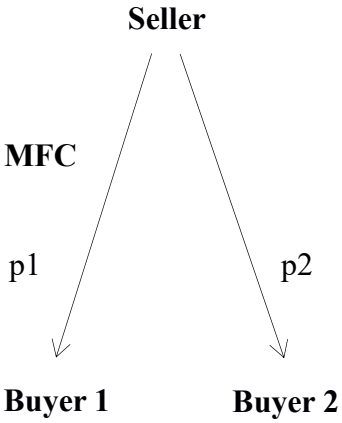
unilateral policy of another undertaking.[264] Indeed, from an economic point of view, it is difficult to perceive what the harm to competition can be from the practices of platforms if the platforms are not gateways to the customers and if the platforms do not hold some market power which enables them to restrict competition by foreclosure at the platform and/or trading partner (supplier) level. If the platforms market is competitive or if the suppliers have many other ways of reaching consumers and the suppliers' market is also competitive, it is hard to imagine how the conduct of individual platforms would be relevant for the state of competition. It must be reiterated that the platform MFC clauses ultimately concern intra-brand competition because they relate to the price and other sales conditions of the same product (eg same book, same hotel room, same insurance policy, etc) through different outlets (ie different platforms).

All in all, the prohibition of abuse of dominance provides a more appropriate legal tool to tackle the competition law problems arising from platform MFC clauses, particularly in the context of EU competition law. It is the more fitting provision in terms of the factual context as well as the state of economics. Whatever legal provision the authorities choose to use, it is important that they adopt a principled approach that provides sufficient legal certainty to the undertakings involved or may be involved in such investigations lest they risk chilling competition in several industries where such clauses are common practice. It is also crucial that the authorities scrutinise these clauses on the basis of their effects rather than their form since it is clear that their potential to harm competition is fact-dependent. Although it is welcome that the Commission might be on the right track in its recent investigation into Amazon at least concerning the choice of legal instrument, the damage to the correct and consistent application of competition law across Europe has been done to a degree and can only be hoped to be remedied by judicial scrutiny of the authority decisions. Given that many of the relevant decisions are commitment decisions which lack any judicial scrutiny, some of the damage may be irreparable.

[264] See n 186 above.

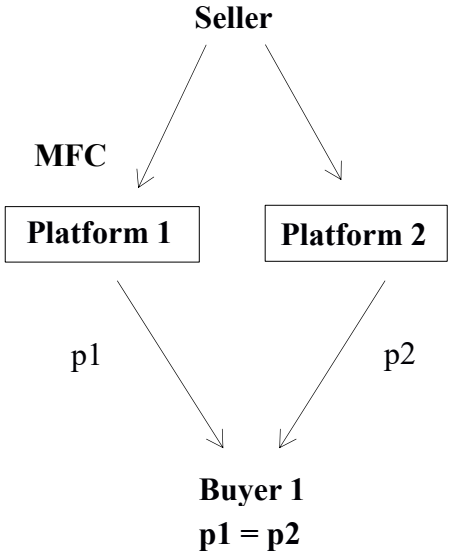
ANNEX

Normal MFC



*Links prices between **<u>different customers</u>** of the **<u>same seller</u>**.*

Platform MFC



*Links prices for the **<u>same customer</u>** buying from **<u>different</u>** **<u>outlets</u>**.*