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**„MOST FAVORED NATION CLAUSES IN ONLINE PLATFORMS  
COMPARISON BETWEEN US ANTITRUST AND EU  
COMPETITION LAW”**

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## **List of Abbreviations**

APPA	Across Price Parity Agreement
CMA	Competition and Market Authority
EC	European Commission
DOJ	Department of Justice
FTC	Federal Trade Commission
GWB	Gesetz gegen Wettbewerbsbeschränkungen
HRS	Hotel Reservation Service
IHG	Inter Continental Hotel
Inc.	Incorporation
ICA	Italian Competition Authority
MFC	Most Favored Customer
MFN	Most Favoured Nation
OFT	Office of Fair Trading
OTA	Online Travel Agency
PCW	Price Comparison Website
RPM	Resale Price Maintenance
SO	Statement of Objection
TFEU	Treaty on the Functioning of European Union
VBER	Vertical Block Exemption Regulation

## ZUSAMMENFASSUNG

Die Entwicklungen auf dem Online-Markt brachten weltweit viele Probleme unter den Händlern mit sich. Da der Handel im E-Kommerz-Sektor sich stetig erweitert, wurde es notwendig, erforderliche Regelungen bezüglich rechtlicher Fragen des Wettbewerbes in der Online-Branche zu treffen. Die Meistbegünstigungsklauseln haben noch vor kurzer Zeit für heiße Diskussionen auf dem Online-Markt gesorgt. Mit Einführung der Meistbegünstigungsklauseln wird der Wettbewerb zwischen E-Kommerz-Händlern durch vertragliche Preisstellungen eingeschränkt. Online-Zwischenvermittler bringen solche vertraglichen Klausel in ihre Vereinbarungen mit ihren Lieferanten hinein, die jedoch zu wettbewerbswidrigen Auswirkungen führen und den Wettbewerb auf dem Markt verzerren können. Bezüglich der Vertragsklauseln leiteten die nationalen Wettbewerbsbehörden neben Vermittlern wie, Amazon, Apple, usw., auf EU-Ebene eine Untersuchung unter den Online-Buchungsplattformen ein. In Bezug auf relevante Fälle in Ländern der europäischen Gemeinschaft bildeten sich verschiedene Meinungen und es wurden verschiedene Lösungen vorgeschlagen. So konzentriert sich der Hauptaugenmerk auf die unterschiedlichen Ansätze der nationalen Wettbewerbsbehörden und die Online-Märkte durch eine kurze Information über die Anwendung von Artikel 101 AEUV sowie die Auswirkungen der Klauseln über Online-Plattformen in Kenntnis zu setzen.

Außerdem, auch wenn die Analyse der Meistbegünstigungsklauseln seit Jahren auf Offline-Märkten in den USA gleichbleibend ist, die Art wie es umgesetzt wird, schließt eine kurzfristige Umsetzung im Online-Sektor aus. Entsprechend betont die USA, dass die Meistbegünstigungsklauseln bezüglich mancher Aspekte unter den Parteien in der EU unterschiedlich festgelegt werden. Sie würden die Vertragslaufzeiten auf Online-Plattformen nicht so tiefgründig bewerten wie es in der EU der Fall ist. Jedoch haben die Meistbegünstigungsklauseln eine gewisse Rolle bei der Verletzung des Sherman-Gesetzes, Absatz 1, welches das Hauptproblem in Fällen in den USA darstellt. Unter diesem Gesichtspunkt wird die Herangehensweise der Gerichte und Bewertung des Sherman-Gesetzes, Absatz 1, sowie manche Kontrastsituationen im Kartellrecht der USA, auf Vereinbarkeit mit dem traditionellen Ansatz der US-Gerichte diskutiert. Wenn man all diese Aspekte in Betracht zieht, gibt es auch einige Differenzierungen zwischen den USA und der EU in Bezug auf die Beurteilung der Meistbegünstigungsklauseln. Ihre

Perspektive wird in dieser Masterarbeit durch eine vergleichende Analyse diskutiert werden.

## **I. INTRODUCTION**

### **A. ONLINE INTERMEDIATION**

Intermediation is the formation of an agency which acts on behalf of the another company, takes place as a middleman and triggers communication with other agents in the market that leads to financial and social effect through operations.<sup>1</sup> This is also how it works in online markets. Internet intermediaries facilitate many advantages such as “providing infrastructure, collection, organization, evaluation dispersed information, facilitating a market process, taking into account the needs of buyers/sellers and advertisers.”<sup>2</sup> They have been used for many other functions as many different kinds of intermediaries such as internet service providers, internet search engines, web hosting and data processing, payment systems, participative networked platforms and e-commerce. In this context, the topic is e-commerce intermediaries.

#### **1. E-commerce Intermediaries**

“E-commerce is a way of doing real-time business transactions with telecommunication networks, when the merchant and the customer are in different geographic places.”<sup>3</sup> E-commerce provides a wide variety of products for costumers to purchase through different payment methods<sup>4</sup> whereas the seller introduces its products to consumers even living people in the other side of the world. In e-commerce, there are three types of online distribution model that businesses can trade.<sup>5</sup> Firstly, companies who have the brick and mortar shops have also sold their products on their website.<sup>6</sup> Today, many brand owners implement this model, and they increase their profits through selling online. Second business model is distributing products of other producers<sup>7</sup>. Retailers sell the goods supplied by the third parties. In one aspect, they act as a “reseller”<sup>8</sup>. The Last model is simple platforms that goods are being traded in a website which provides the

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<sup>1</sup>OECD, ‘The Economic and Social Role of Internet Intermediaries’ (2010) 6  
<<https://www.oecd.org/internet/ieconomy/44949023.pdf>> 23 August 2016.

<sup>2</sup> ibid 6.

<sup>3</sup> Hyuksoo Cho- Patriya Tansuhaj, ‘Electronic Intermediaries; Research and Practicer of Electronic Intermediaries in Export Marketing’ (2011) 7(3) Innovating Marketing 62, 62.

<sup>4</sup>ibid 62.

<sup>5</sup> Lars Kjolbye, Alessio Aresu, Sophia Stephanou, ‘The Commission’s e-commerce Sector Inquiry- Analysis of Legal Issues and Suggested Practical Approach’ (2015) 2.  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2620569](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620569) 23 August 2016.

<sup>6</sup> ibid 2.

<sup>7</sup> ibid 2.

<sup>8</sup> ibid 2.

variety of products like a shopping mall do.<sup>9</sup> These platforms act as an intermediary in two or multisided platforms. As it is seen, there are many enterprises sell its products online in different methods.

There are online travel agencies, price comparison websites. Recently, people prefer these platforms because they provide wide range of possibilities. To give an example, hotel booking platforms, provide only hotel rooms that tourists can reach wide variety of hotels from different regions and various qualities of hotels. These are intermediaries between hoteliers and consumers. Secondly, the other type of OTAs also act as a middleman which provides promotion to its customers through one website such as flight, room and etc.<sup>10</sup> However, its structure a bit different than online hotel booking reservation websites. This kind of intermediaries that gathers variety of different priced products together and help consumers to understand the prices and the quality of the services. On the other hand, price comparison websites' structure is a bit different. For instance, Skyscanner can be an example which lists the prices of the flight tickets and consumers can see the price differentiation through one click. Additionally, they have been used in many sectors such as energy, insurance and etc. Although there are differences, their main purpose is the same which tries to offer the cheapest prices to consumers.

Intermediaries- PCWs help to make a comparison and contrast between the platforms.<sup>11</sup> They grant users to huge choice factors such as price, quality, and venue. So, consumers can make the best deal among the offers. It helps consumers to buy the things cheaper on certain platforms without searching costs. Additionally, PCW does not only provide comparing the prices but also some alternatives regarding the purchasing procedure. Besides, it assists consumers to reach multiple products on a website.<sup>12</sup> These intermediaries also offer to know a different kind of good and services through switching

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<sup>9</sup> ibid 2.

<sup>10</sup> Margherita Colangelo, Vincenzo Zeno-Zencovich, 'Online Platforms, competition rules and consumer protection in travel industry' (2016) 5(2) Journal of European Consumer and Market Law pp75-86, 76.

<sup>11</sup> -- <http://www.icaew.com/archive/library/subject-gateways/marketing-and-sales/small-business-update/what-can-your-business-learn-from-price-comparison-sites> >1 March 2013, Accessed 23 August 2016.

<sup>12</sup> -- <http://www.icaew.com/archive/library/subject-gateways/marketing-and-sales/small-business-update/what-can-your-business-learn-from-price-comparison-sites> >1 March 2013, Accessed 23 August 2016.

language to their owns which has been marketed in other countries by paying an only small amount of costs.<sup>13</sup> The consumers can buy anytime they would like to during the day without going to a brick and mortar shops. As it is seen, they have beneficiaries to consumers.

## **2. Two-sided market structure of the intermediaries**

Online intermediaries have two- sided market structure. According to the majority in the economic literature, “an economic sector is two-sided when a platform offers its services to two or different consumer groups and indirect network effects exist between these two group”.<sup>14</sup> More consumers use the intermediaries, bring more valuable intermediaries who have been interiorized and lead to increase in the indirect network effects.<sup>15</sup> To put in other words , when the number of consumers who uses these platforms increase, the possibility of a matching increase<sup>16</sup> and these indirect network effects are called ‘positive indirect network effect.’<sup>17</sup> For example, OTAs provide access to manufacturers which help to differentiate the choices and also provide manufacturers introduce their goods to a large amount of end users.<sup>18</sup> This is why online intermediation is called ‘two-sided’ markets.<sup>19</sup>

### **B. RELATION BETWEEN ONLINE INTERMEDIATION and COMPETITION LAW**

During the decades, the impact of the trade between undertakings has been assessed in offline markets. However, antitrust concerns and consumer law have discussed alleging that trade in online channels distorts the market recently.<sup>20</sup> So, According to this, European Commission initiated sector inquiry about the trading online

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<sup>13</sup>Ariel Ezrachi, ‘The competitive effects of parity clauses on online commerce’ (2015)11(2-3) European Competition Journal 488-519, 493. Para1.

<sup>14</sup>Daniel Zimmer, Martin Blaschzok, Most-Favored-Customer Clauses and Two-Sided Platforms (2014) 3 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2749044](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2749044) Accessed 23 August 2016.

<sup>15</sup>Colangelo, Zencovich (n-10) 76.

<sup>16</sup>Zimmer, Blaschzok, (n-14) 5.

<sup>17</sup>Zimmer, Blaschzok, (n-14) 5.

<sup>18</sup>Colangelo, Zencovich (n-10)75.

<sup>19</sup>Colangelo, Zencovich (n-10)75.

<sup>20</sup>Howard A. Shelanski, ‘*Information Innovation and Competition Policy for the Internet*’ (2013) 161(6) University of Pennsylvania Law Review 1663-1704. <  
[http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1025&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1025&context=penn_law_review) >  
 Accessed 23 August 2016.

platforms.<sup>21</sup> European Commission will gather information about constraint of competition and investigate cases.<sup>22</sup> One of the reason that these two-sided platforms are under the scrutiny since the suppliers of the products sell their products in online platforms, and they determine the retail prices which are sold on these platforms<sup>23</sup> according to the imposed strategy. That is the reason why “antitrust authorities in the world have been engaged in price parity clauses in online platforms since these clauses may dampen the competition between the platforms”.<sup>24</sup>

Taking all points into consideration, MFN clauses in the online platform will be assessed in detail. First of all, the definition, the operation models and the types of MFN clauses will be discussed. Secondly, under the economic framework, the pro-competitive and anti-competitive effects of them will be explained relating to the certain model. In the third section, MFN clauses will be analyzed under Article 101 TFEU and Sherman Act Section 1. Lastly, due to the recent investigation by the national competition authorities in EU, the differentiation will be discussed among the European competition authorities. Additionally, although the US did not assess the MFN as a contractual clause, recently there has been a court decisions including the role of MFN clauses between the platforms. These are the subject matter of this thesis respectively.

## **II. MOST FAVORED NATION CLAUSES**

### **A. HISTORICAL AND TRADITIONAL MFN CLAUSES**

Most favored nation clauses have been used for hundreds of years ago in international trade treaties which have been covered between the states. They can be defined as a country which gives a promise to another country’s investors not to provide better treatment any other countries’ investors than that country’s investors through another treaty.<sup>25</sup> These treaties consisting MFN clauses are manipulated between the traders in EU and US for several years. These types of terms can be decided upon ex parte

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<sup>21</sup>Kjolbye, Aresu, Stephanou (n-5)1.

<sup>22</sup>Kjolbye, Aresu, Stephanou (n-5)1.

<sup>23</sup>Jan Peter van der Veer, ‘Antitrust Scrutiny of Most Favored Customer Clauses: An economic Analysis’ (2013) 4(6) Journal of European Law & Practice 501-505, 505.

<sup>24</sup>OECD, ‘Hearing on Across Platform Parity Agreements’ (2015, Note by Germany) 2 [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2015\)56&doLanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)56&doLanguage=en) Accessed 23 August 2016.

<sup>25</sup>Tony Cole, ‘The Boundaries of Most Favored Nation Treatment in International Investment Law’ (2012) 33(3) Michigan Journal of International Law’ 538-585, 539.

or mutual consent of the parties explicitly<sup>26</sup>. Correspondingly, the meaning of it is not basically different in the way it is used today in different areas of law. According to competition law terminology, Most Favored Nation Clauses (MFNs) can be defined as follow “agreements whereby a seller agrees that a buyer will benefit from the terms that are at least as favorable as those offered by the seller offered to any other buyer.”<sup>27</sup>.

Besides, most favored nation clauses can be manipulated in different ways than a standard way of its definitions. In contemporaneous MFN, in given period, the price offered to the customer cannot be lower compared to other prices provided to other customers. Addition to this, in retroactive MFN, it also takes into consideration past prices granted to others.<sup>28</sup> For example, there is MFN clause between glass blower and brewer. When glass blower promised not to offer a cheaper price to other brewers in a given period, it is contemporaneous MFN. However, if the glass blower provides a discount to other brewers, bottle maker has to pay the differences between costs to the brewer and this type turns to be retroactive MFN.<sup>29</sup> So, MFN clause can be manipulated by the parties in different ways.

## **B. MFN CLAUSES IN ONLINE PLATFORMS**

In recent years, MFN clauses have been investigated across the US and Europe in offline markets. However, the usage of the online platforms as a trade channel has increased recently. MFN clause’s definition can be defined as MFN clauses like a guarantee given by the supplier to the platforms not to sell the products at a lower rate through the other platforms which works vertically<sup>30</sup> and leads to restriction of suppliers’ liberty while providing the goods.<sup>31</sup> However, there is no uniformity about the name of

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<sup>26</sup>Francisco Enrique Gonzalez-Diaz, Matthew Bennett, ‘The law and economics of Most-Favored Nation Clauses’ (2015) 1(3) Competition Law& Policy Debate 26-42, 28.

<sup>27</sup>Diaz, Bennett (n-26) 26.

<sup>28</sup>Jan Peter van der Veer, ‘Antitrust Scrutiny of Most Favored Customer Clauses: An economic Analysis’ (2013) 3(6) Journal of European Competition Law& Practice, 501-505, 501.

<sup>29</sup>Jonathan B. Baker, Judith A. Chevalier, ‘The competitive consequence of Most-Favored Nation Provisions’ (2013) 27(2) American Bar Association, 20-26, 20.

<sup>30</sup>Noelle Lenoir, Marco Plankensteiner and Elise Crequer, ‘Increased Scrutiny of Most Favored Nation Clauses in Vertical Agreements’ (2014) Kramer Levin,3.

<[http://www.kramerlevin.com/files/Publication/df2b4f0c-3367-40d0-86c1-00008ba6d2ca/Presentation/PublicationAttachment/8226c124-c4f5-4f90-be1f-01fa9e35239b/140410\\_GTDT\\_Vertical%20Agreements\\_French%20chapter\\_MFN%20Clauses\\_Article.pdf](http://www.kramerlevin.com/files/Publication/df2b4f0c-3367-40d0-86c1-00008ba6d2ca/Presentation/PublicationAttachment/8226c124-c4f5-4f90-be1f-01fa9e35239b/140410_GTDT_Vertical%20Agreements_French%20chapter_MFN%20Clauses_Article.pdf)>Accessed 23 August 2016.

<sup>31</sup>Ezrachi (n-13)490.

MFN clauses by the scholars. They are also known as “most favored customer clauses, price parity clauses, best price clauses, retail MFN clauses”<sup>32</sup> which may also lead to uncertainty.

In the trade, it has been used in many areas such as by the hotels, books, insurance and energy sectors<sup>33</sup> in vertically integrated markets. For instance, MFN clauses have recently been used in Amazon, online travel agencies, Apple and any kind of platforms which sell the products as an intermediary. These intermediaries want to present the best purchase price to costumers by having the cheapest selling prices. Since the platforms want to make the best profits, they would like to find the best alternative to maximize their profits. Recently, with the rising concern of the e-commerce in online platform has given a start to sharp competition between the platforms. In this situation, most favored nation clauses have been investigated by competition authorities recently for the protection of the competition and the interests of the consumers in the online market.

However, it must be clearly stated that MFN clauses are not compatible with the standard range of the provisions as it is used in offline markets. In online markets, MFN clauses are “third-party” agreement in the platforms. MFN clauses provide different purchase prices to the various costumers in different platforms. For instance, e-book publisher will make a promise not to provide a lower price to any other platforms such as Amazon. In this situation, the effect of the clause will be on the consumer rather than the parties of the contract. On the other hand, in offline markets, the effect is seen on one of the parties of the agreement. For instance, when a supplier and retailer made a commitment to the purchase price of a book and supplier guarantee it not to sell it to a lower price in any other market and the effect is seen on the supplier.<sup>34</sup> As it can be

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<sup>32</sup> Gönenç Gürkaynak, Ayşe Güner, Sinan Diniz, Janelle Filson, ‘Most-Favored-Nation Clauses in Commercial Contracts: Legal and Economic Analysis and Proposal For a Guideline’ (2016) 42(1) European Journal of Economics 129-155.

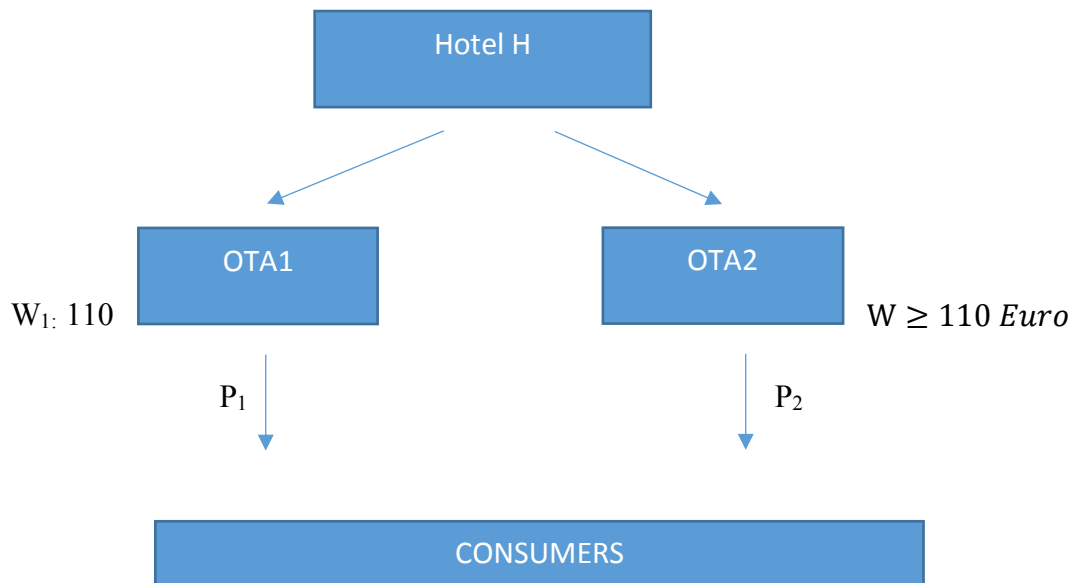
<sup>33</sup> Oxera, Most-Favored-Nation Clauses: Falling out of Favor? (November,2014) 1-2 <<http://www.oxera.com/Latest-Thinking/Agenda/2014/Most-favoured-nation-clauses-falling-out-of-favour.aspx>> Accessed 23 August 2016.

<sup>34</sup> This is because to be an 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. Pinar Akman, ‘A Competition Law Assessment of Platform Most Favored Customer Clauses’ (2015), CCP Working Paper 15-12,4 para2 <<http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62>> Accessed 23 August 2016.

understood, mostly online platforms are not the owner of the goods that are being sold. Taking whole these points into consideration, an analyze of MFN clause in online platforms are going to be assessed in a different way compared to traditional MFNs.

## 1. Distribution Models of Most favored nation clauses

### a. Merchant (Wholesale) Model



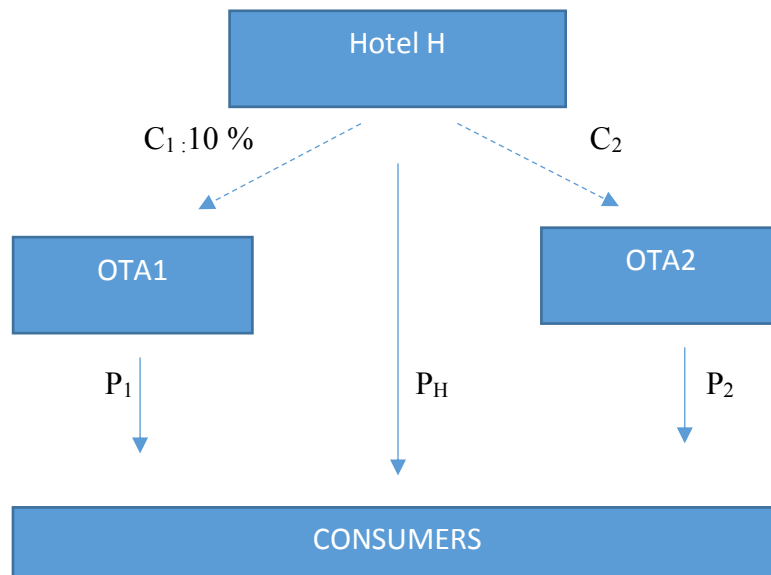
In the merchant (wholesale) model, the goods' prices that are being offered by a supplier to intermediary but the price is set by the intermediary.<sup>35</sup> Above, in the figure, hotel (H) provides room to OTA1 and OTA2. Hotelier stipulates to OTA1 is allowed to offer any price to its customers above 100 Euro. OTA1 offers to its costumers 110 Euro. OTA2 is also free to set any price to its costumers as well, but it cannot be cheaper than what the hotelier offers. However, the main point is that OTA1 and OTA2 decide which price is going to be fixed rather than the supplier. OTA2 can fix a price 110 or a higher price. This model which is called as a wholesale model is not seen as a problematic situation<sup>36</sup> by the competition authorities because it also protects the competition in the online market.<sup>37</sup>

<sup>35</sup> Ezrachi (n-13)489.

<sup>36</sup> Oxera, (n-33)1.

<sup>37</sup> Ezrachi (n-13)489.

## b. Agency Model



The agency model is different from the merchant model. In agency agreements, platforms are the agents of the suppliers and they do not set any price to end users.<sup>38</sup> Additionally, platforms are not the owner of the products.<sup>39</sup> Suppliers set the purchase price for the customers and the intermediaries have to sell the rooms to the costumers from that price. In the given figure above, hoteliers (H) offers rooms to OTA1 and OTA2. After that, OTAs will be paid commission<sup>40</sup> depends on the contractual terms that are decided by the parties. It might be agreed to pay a commission depending the amount of booked rooms or any other way can be determined between the parties.

The difference between operation models is that in merchant model, the OTAs set the price for the retailer to advertise on its website to consumer whereas in the agency model, hotels set the price to advertise on their website. Intermediaries are mostly working under an agency model rather than a wholesale model. The reason may be that they maximize their profits under agency model compared to the wholesale model.<sup>41</sup> According to Johnson, “ under the agency model, retailers capture profits associated not

<sup>38</sup> Oxera, (n-33)1.

<sup>39</sup> Ezrachi (n-13) 489.

<sup>40</sup> Oxera, (n-33) 2.

<sup>41</sup> Justin P. Johnson, ‘The Agency Model and MFN Clauses’ (14 February 2014) 3  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2217849](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217849)> Accessed 23August2016.

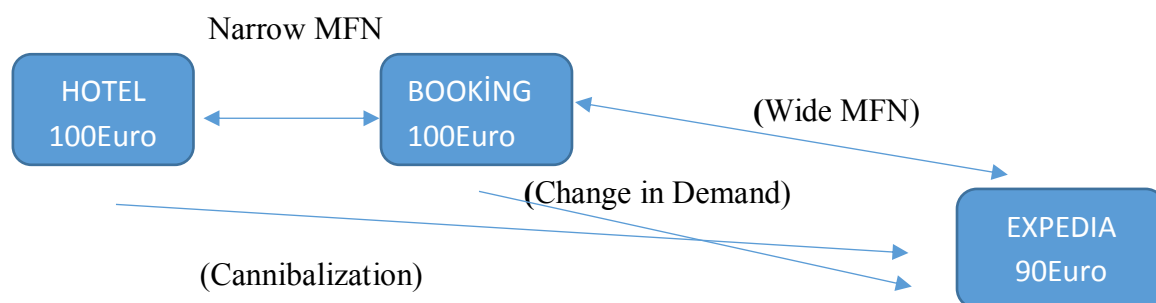
only with their own differentiation but also with that suppliers.”<sup>42</sup> That is why many online operators use MFN clauses through agency models such as Amazon, E-bays, Apple and booking platforms. The most problematic one is considered to be the agency model and that is why competition authority made a focus on them.

### c. Combination of Agency and Wholesale Model

Parties may agree on using the two models together. For instance, the supplier of the goods can the platform can agree on merchant model by an agreement that the supplier decide on the price which is going to be sold by the intermediary. However, intermediaries get a commission from the sale which is agreed upon between the parties.<sup>43</sup>

## 2. Types of MFN clauses

Two types of MFN clauses are being widely used in online platforms which are called wide and narrow parity clauses.



Diagram<sup>44</sup>: Autorite de la Concurrence

### a. Narrow MFN Clauses

Narrow MFN clauses, the price that is offered in manufacturer’s website cannot be cheaper than the prices offered intermediaries’ website.<sup>45</sup> However, this price competition does not consist the other intermediaries’ website.

<sup>42</sup>ibid4.

<sup>43</sup> Ezrachi (n-13) 489.

<sup>44</sup>Autorite de la Concurrence, ‘Narrow MFN Cluses’  
<[http://www.competitioneconomics.org/dyn/files/basic\\_items/571-file/L%20Schulz-ACE-2015-25112015.pdf](http://www.competitioneconomics.org/dyn/files/basic_items/571-file/L%20Schulz-ACE-2015-25112015.pdf)> Accessed 23 August 2016.

<sup>45</sup> Ezrachi (n-13) p489.

### **b. Wide MFN clauses**

Wide MFN clauses also contain narrow parity clause inside. In this model, the price which is offered to the platform cannot be higher than any other rivals competing in the platforms including the manufacturers' website.<sup>46</sup> For example, in the given figure above, since the hotel cannot offer any lower price on its own website, the usage of hoteliers' website is not preferred by the consumers. Additionally, Booking offers 100 Euro for a hotel room whereas Expedia offers 90 Euro. Furthermore, the narrow parity clause between Booking and Hotel is also cannibalized by Expedia. There will be a shift in the demand by the consumers. This model is a bit problematic and mostly assessed its effect by the competition authorities because it is thought that they have similar effects to RPM.<sup>47</sup> This discussion will take place in details in the fourth chapter.

## **III. ECONOMIC FRAMEWORK**

MFN clauses may have both anti-competitive and pro-competitive effects in online platforms. However, it must be underlined that both anti and pro-competitive effects may occur at the same time.<sup>48</sup> On one hand, pro-competitive conducts can be illustrated as follow: the reduction of the free-riding problem, decrease in transaction and negotiation costs and the reduction of delays in transaction. On the other hand, anti-competitive conducts are creating a barrier to enter into the market for the new intermediaries, increase in the price. Although MFN clauses are concluded between different level of trader, their anti-competitive effects may be seen in horizontal level. Additionally, MFN clauses may damage the market especially in concentrated markets compared to markets having lots of rivals because platforms having a high share has flexible to mark up the costs in the market<sup>49</sup> So, they have more anti-competitive conduct in these concentrated markets. Furthermore, market transparency is also another important factor while assessing the impacts of MFN clauses in online platforms which should be taken into consideration.<sup>50</sup>

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<sup>46</sup> Oxera, (n-33)2.

<sup>47</sup> Ezrachi (n-13) 489.

<sup>48</sup> Jonathan B. Baker, Judith A. Chevalier, 'The competitive Consequences of Most-Favored-Nation Provisions' (2013) 27(2) *Articles in Reviews& Other Academic Journals* 277, 277.

<sup>49</sup> Lenoir, Plankensteiner, Crequer (n-30) 5, para 2.

<sup>50</sup> Ingrid Vandenborre, Michael J. Frese, 'The Role of Market Transparency in Assessing MFN clauses' (2015) 38(3) *World Competition* 333-348. 344.

As it is illustrated in the previous section, there are two types of MFN operating under different models. Since the competition authorities have been scrutinized recently, there is no competitive assessment of MFN clause by the European Commission and Supreme Court in online platforms. However, by the national competition authorities in EU, these are investigated. In EU, whereas some scholars say that there is a distinction between wide and narrow parity clauses' impacts, some of them stated that their effects are different in some aspects. However, most of the scholars analyzed its effect under wide MFN clause. On the other hand, although MFN clause was an issue in offline markets in the US, they did not differentiate wide and narrow parity clauses. Additionally, regarding the operation model, most of the scholars has take agency model as a basis because most of the intermediaries have operated under agency model recently. So, regarding the pro and anti-competitive effect of the MFN clauses, wide MFN clauses are assessed under agency model rather than narrow price parity clauses.

## **A. PRO- COMPETITIVE EFFECTS**

### **1. Reduce in free riding**

To begin with, MFN clauses not only at the retail level but also in the context of wholesale model reduce the 'free riding'. Since online platforms are a two-sided market, both consumers and retailers may be attracted by the features of MFN clauses. For example, in the booking platforms, the end users do not pay any searching costs to find the best hotel for themselves. However, the hoteliers pay a fee to platforms when the end users reserve for a hotel in booking platforms. In this situation, the hoteliers want customers to book directly from their' web page instead of the platforms since they do not want to pay any fee to these intermediaries.<sup>51</sup> If there were no MFN clauses between them, suppliers (e.g. hoteliers) would be able to charge lower prices in their website and platforms would not be able to get any profit which would cause free riding. MFN prevents this situation by offering lower prices to end users in online intermediaries' websites. Wang and Wright call this type of free-riding as a 'show rooming'.<sup>52</sup> According

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<sup>51</sup> Diaz, Bennett, (n-26) 34, para4.

<sup>52</sup> In their paper, PPAs annihilate the incentive for parties to contract on another platform. They find that showrooming constrains platform fees, which is positive for consumers, provided that platforms remain viable. According to Wang and Wright, showrooming can be prevented through less restrictive ways than PPAs (and certainly through less restrictive agreements than wide PPAs). Their result on narrow PPAs is more nuanced. These can be beneficial for consumers when platforms cannot be viable without them and

to them, this free-riding can be prevented less strict ways than broad parity clauses such as narrow MFN clause. On the other hand, Johansen and Verge do not distinguish broad and narrow parity terms since they have the same effect on the market.<sup>53</sup> Taking all these points into account, although there is no uniform approach regarding the effects of MFN clause in online platforms, it is generally considered that the both narrow and wide parity clauses leads to prevention of the free riding in the market.

## **2. Protecting Investment**

MFN clauses also protect high-cost platforms against low-cost platforms. In the absence of MFN clauses, a customer can search on the highest platform but then buy it from the lowest cost platform. In this situation, high cost platform cannot make a profit<sup>54</sup> as it is explained in free-riding part. However, through MFN clauses near the protection of free-riding, it protects high-cost platforms' investment<sup>55</sup> because through MFN clause low –cost sellers are not able to sell their products in this platforms with lower prices. So, with the assistance of MFN clause, high-cost platforms also stay on the platforms.

## **3. Reducing search costs**

In the presence of MFN clauses, consumers are not in the need of research for cheaper prices through other platforms.<sup>56</sup> Addition to this, due to the transparency in pricing, it can fortify inter-brand competition through decrease in search cost.<sup>57</sup>

## **4. Limiting transaction costs and transaction delays**

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when competition between platforms is sufficiently effective. In a slightly different setting, Johansen and Verge' (2015) find that wide and narrow MFNs have the same effect (at least when diversion ratios between platforms are not too different from the diversion ratios between a platform and direct sales).

Nicolas Sahuguet, Jacques Steenbergen, Thibaud Verge, Alexis Walckiers, 'Vertical Restraints: Toward Guidance to Iron out Perceived Enforcement Discrepancies Across Europe?' (2016) 7(4) Journal of European Competition Law & Practice 274-279, 278.

<sup>53</sup> ibid 278.

<sup>54</sup> Office of Fair Trading, 'Can 'Fair Prices be unfair? A Review of Price Relationship Agreements' (Lear Report 2012) 103, para 6.72 <[http://www.learlab.com/wp-content/uploads/2016/04/Can-'Fair'-Prices-Be-Unfair\\_-A-Review-of-Price-Relationship-Agreements.pdf](http://www.learlab.com/wp-content/uploads/2016/04/Can-'Fair'-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf)> Accessed 23 August 2016.

<sup>55</sup> Ibid 103, para 6.72.

<sup>56</sup> Sebastian Wismer, 'A note on Price Parity Clauses in Platform Markets' in Surblyte Gintane, Competition on the Internet' (vol23) MPI Studies on Intellectual Property and Competition Law 2015 41-52,49.

<sup>57</sup> OECD, 'Hearing on Across Platform Parity Agreements, Note by France' (2015) 7 para3 <[http://www.autoritedelaconcurrence.fr/doc/accordsinterplateformes\\_uk.pdf](http://www.autoritedelaconcurrence.fr/doc/accordsinterplateformes_uk.pdf)> Accessed 23 August 2016.

Minimization of negotiation costs is one of the positive impacts that MFN clauses brings through an indemnification of the lowest price.<sup>58</sup> Due to existence of MFN clause, the retailer does not need to conclude the contract again with supplier since he will get the discount by itself when the other platform has a price cut.<sup>59</sup> Addition to this, decrease in transaction costs also bring the good launches.<sup>60</sup> Furthermore, MFN clauses also prevent delays in transactions.

## **B. ANTI-COMPETITIVE EFFECTS**

### **1. Creating barrier to enter into market:**

First of all, as it is stated in the pervious section, platforms act in two-sided market structure, and they have indirect network effects. Due to this reason, it is more likely to create a barrier in a concentrated market and barriers for new entrants in this kinds of markets.<sup>61</sup> Those who have already involved in the market had the advantage of being known by the end-users and because of this situation, the new intermediaries which desire to enter into the market have to attract the costumers providing additional facilities, discounts and etc. which is called as ‘price reduction’ in economic terms.<sup>62</sup> However, this situation is problematic when MFN is granted between the incumbent and the supplier in the market since the supplier has already made a promise not to offer a lower price to others. When intermediary has multiple agreements with the suppliers, it creates a barrier for entry to the market.<sup>63</sup> Since suppliers cannot grant lower price to new entrants,<sup>64</sup> new platforms cannot be interesting for shopping because of the high prices.<sup>65</sup> New comers cannot earn any profits, and they may exit the market in a short time. So, when the new

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<sup>58</sup> Akman (n-34)9.

<sup>59</sup> Moreover, the inclusion of an MFN may make it more attractive fort the parties to enter into a long-term contract, thereby eliminating the need for periodic renegotiations. Diaz, Bennett (n-26) 35.

<sup>60</sup>Ingrid Vandenborre, Micheal J. Frese, ‘Most Favored Nation Clauses Revisited’ (2014) European Competition Law Review issue12 588-593 p589.

<sup>61</sup> Martha, Samuelson, Nikita Piankov, Brian Ellman, ‘Assessing the Economic Effects of Most Favored Nation Clause’ (2012) 1 <  
[http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/samuelson\\_mfn\\_springaba\\_2012.pdf](http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/samuelson_mfn_springaba_2012.pdf)> Accessed 23 August 2016.

<sup>62</sup> Fiona M. Scott Morton, ‘Contracts that Reference Rivals’ (2013) 27(3) The American Bar Association 72-79 76, para 1 <<http://www.crai.com/sites/default/files/publications/Contracts-that-reference-rivals.pdf>> Accessed 23 August 2016.

<sup>63</sup> Akman (n-34)10.

<sup>64</sup> Akman (n-34)10.

<sup>65</sup> Akman (n-34)10.

entrant would like to operate in the market, it will be very difficult since he cannot get the cheaper price like the incumbents due to the MFN clause.<sup>66</sup>

Additionally, this situation may also prevent innovation because new goods and services are not able to meet with the end-users. However, Verge completely thinks differently. According to him, the trade on the platforms may be improved thanks to price parity clauses and this may decrease barriers for the new entrants and helps the development of the trade.<sup>67</sup> For example, he has underlined the situation that the consumers can easily reach those platforms and they are able to find wide range of hotels. Thus, they can increase the attention of the customers to the platforms.<sup>68</sup> This also helps other small businesses structures to enter into market and leads to increase the competition in the market.<sup>69</sup> As it is seen, scholars also have different perspective about the similar issue.

## **2. Facilitating Collusion-Cartel**

Most relevant competitive effects of across platform parity agreements generally occurs where the platforms compete against each other.<sup>70</sup> Beside, MFN clauses enhance price transparency depending on the exchange of information about the price.<sup>71</sup> MFN clauses support this coordination, not only in online platforms but also when they had started being used in offline markets. They were used by the competitors not to involve in aggressive pricing strategy individually<sup>72</sup> which diminish the competition between the platforms and facilitate collusion. Collusion occurs especially when an entrepreneur's prices are higher compared to any other rivals in the market. Retailers decrease the variety of prices tacitly or explicitly offered by the seller which may lead to collusion between the platforms.

### **a. Tacit Coordination**

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<sup>66</sup> Van der Veer (n-23) 503, para3.

<sup>67</sup> Nicolas Sahuguet, Jacques Steenberg, Thibaud Verge, Alexis Walckiers, 'Vertical Restraints: Towards Guidance to Iron Out Perceived Enforcement Discrepancies Across Europe?' (2016) 7(4) Journal of European Competition Law & Practise 274-279, 278.

<sup>68</sup> *ibid* 278.

<sup>69</sup> *ibid* 278.

<sup>70</sup> Akman (n-34)10.

<sup>71</sup> Gürkaynak, Güner, Deniz, Filson (n-32)142.

<sup>72</sup> *ibid* 142, para 2.

Tacit coordination may be agreed not only to intermediaries' level but also suppliers level. For instance, if one of the platform is granted a lower price by another supplier, the supplier offers the same price or the platform may have right to exit the contract.<sup>73</sup> It seems to be an advantage on the its side. When those act as a group, harmful effects occur mostly. Each platform may agree to conclude such a clause in their contracts.<sup>74</sup> Correspondingly, suppliers may be in favor of tacit collusion since they would like to involve in the market and among tacit collusion, not only one supplier will make the best profit but whole of them participating in the market get 'supra-competitive' benefits.<sup>75</sup> Yet, parties of the contract, it is very easy to get out of the tacit coordination for the parties. However, MFN clauses prevent suppliers to deviate from the coordination because it would cost much.<sup>76</sup>

### **b. Explicit coordination**

In explicit collusion, parties who participate in collusion want to be sure that no one grants any discount so that they can set the prices at the same level. However, it is also very easy for cartelists to get out of such a collusion<sup>77</sup> because the cartel agreements lead to increase in the price and in this situation one of the cartelist can easily get out of the cartel agreement and give discounts to its customer to have a significant market share in the relevant market<sup>78</sup>. However, MFN prevents such a situation and leads to higher prices in the market.

## **3. Increase in Price**

If MFN clauses are imposed to intermediaries by the suppliers, the suppliers are not willing to lower the prices which lead to high prices in the market. The reason is that if they do it for one intermediary, they have to do it for the whole of them who has a

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<sup>73</sup>Murilo Lubambo, 'Vertical Restraints facilitating horizontal collusion: Stretching Agreements in a Comparative Approach' (2015) UCL Journal of Law and Jurisprudence 135-161, 148.

<<http://discovery.ucl.ac.uk/1464073/1/Murilo%20Lubambo%20Vertical%20Restraints%20w%20DOI.pdf>> Accessed 23 August 2016.

<sup>74</sup>ibid 147-148.

<sup>75</sup> Jan Peter Van der Veer, 'Anti-trust Scrutiny of Most-Favored-Customer Clauses: An economic Analysis' (2013) 4(6) Journal of European Competition Law Practice 501-505,504.

<sup>76</sup> ibid 504.

<sup>77</sup>Diaz, Bennett (n-26)37.

<sup>78</sup>Jason J. Wu & John P. Bigelow, 'Competition and the Most Favored Nation Clause' (July 2013(2) CPI Antitrust Cronicle 4 <<https://www.competitionpolicyinternational.com/assets/Uploads/WuBigelowJuly-132.pdf>>Accessed 23 August 2016.

contractual MFN clause.<sup>79</sup> Additionally, since there is price transparency in online platforms, it also induce the increase in price.<sup>80</sup> According to US Department of Justice report, “A firm that is required to reduce prices to some only at the cost of reducing prices to all may well end up by reducing them to none”.<sup>81</sup> So, platforms have to be offered nearly the same prices by the suppliers due to MFN clauses. So, when there is a price restriction, suppliers are not willing to decrease the price<sup>82</sup> because more or less prices will be similar in the market. As it is seen, MFN clauses bring higher and similar pricing in online platforms.

An increase in price has also anti-competitive effects for the consumer. When no MFN clause is signed between upstream market and the platform, the upstream market is free to offer any price by paying a commission to it. However, the platforms can increase their market share being provided lower commissions by upstream supplier<sup>83</sup>. Yet, due to MFN clauses between the parties, one of the platforms cannot even get the cheapest price.<sup>84</sup> Therefore, platforms do not also want to lower the commission rate. When the commission rate is not decreased, suppliers cannot decrease to retail prices which are offered to platforms because of the MFN clauses with other platforms.<sup>85</sup> Correspondingly, Sahuguet, Steenbergen and Verge reasons this situation as follow; “The reason is that platforms cannot pass on lower commissions to hotel customers and differentiate themselves with lower prices.”<sup>86</sup> In this situation the prices are higher in the platforms and consumers have to buy the goods more expensively. Accordingly, this leads consumers not to use the platform anymore.<sup>87</sup>

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<sup>79</sup>Ezrachi (n-13) 499.

<sup>80</sup>Ezrachi(n-13) 496 para 4.

<sup>81</sup> Lenoir, Plankensteiner , Crequer (n-30) 4.

<sup>82</sup> The empirical work on MFNs appears to show that MFNs may lead to higher prices, particularly when the buyer subject to the MFN has a higher market share. Arbatskaya, Hviid and Schaffer conducted a case study on price match and low price guarantees for tires, and found that the more widespread MFNs were in this industry, the higher prices were- the positive impact of the extent to which LPG are widespread in a given market is highly significant... the effect of all LPG in a market is found to be an increase in prices of about 10% percent.” They went on to conclude that “if price coordination is enhanced by a widespread adoption of LPGs, then the share of firms that have a price-matching or price beating guarantee in the market may play an important role in the price formation.” Diaz, Bennett (n-26) 3 para3.

<sup>83</sup> OECD (n-57) 5, para 21.

<sup>84</sup> *ibid*5, para22.

<sup>85</sup> *ibid*5 para22.

<sup>86</sup> Sahuguet, Steenbergen, Verge, Walkiers (n-52) 277.

<sup>87</sup> OECD (n-57) 5, para 23.

Additionally, in different platforms, different pricing strategy may be chosen by the supplier for platforms in the absence of MFN clause. The price of the same hotel in one platform may be higher compared to other platforms since a high commission decided by the supplier.<sup>88</sup> In this situation, consumer may be encouraged to search for the lower price platforms to book which offers cheaper price and compare the prices between the different platforms to find the best price due to the high transaction costs.<sup>89</sup> When the supplier is subject to MFN clause and raise the commission which also leads to increase in the price rate will cause to raise in price automatically to other platforms competing in the same market.<sup>90</sup> In this situation, since the prices do not differ that much, the consumers will not switch the platform for the other. This situation leads platforms not to earn any profits and even cause to exit the market.<sup>91</sup>

Taking all these points into consideration, although there is no uniform understanding of pro and anti-competitive effects of MFN clause in online platform, the effects of it are tried to be analyzed briefly. However, it must be noted that the pro and anti-competitive effects of MFN clause may have different effects in different cases. For instance, it cannot be considered directly that MFN clause increase innovation. The structure of the market, the incumbents in the market, the market share of the enterprises have to be also assessed under the circumstances. That is why according to Akman, the impacts have to be assessed case by case. Additionally, the turn of phrase of the MFN clause and the characteristics of the market must be taken into account.<sup>92</sup>

#### **IV. LEGAL FRAMEWORK**

##### **A. GENERAL COMPARISON OF ARTICLE 101 OF TREATY OF FUNCTIONING EUROPEAN UNION AND SHERMAN ACT SECTION 1**

“Article 101(1) Treaty on Functioning of EU bans any form of agreements (whether written or oral, and formal or informal) between undertakings that have as their object or effect the restriction, prevention or distortion of competition within the EU and

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<sup>88</sup> Diaz, Bennett (n-26) p31.

<sup>89</sup> OECD (n-57) 10, para49.

<sup>90</sup> OECD, ‘Hearing on across platforms parity clauses, note-by Sweden’ (2015) 4, para 12.<  
[http://www.konkurrensverket.se/globalassets/om-oss/2015\\_hearing-on-across-platform-parity\\_daf-comp-wd201557-en.pdf](http://www.konkurrensverket.se/globalassets/om-oss/2015_hearing-on-across-platform-parity_daf-comp-wd201557-en.pdf)> Accessed 23 August 2016.

<sup>91</sup> Diaz, Bennett (n-26) 35.

<sup>92</sup> Akman (n-34) 13.

which have an effect on trade between EU Member States.”<sup>93</sup> Correspondingly, Article 101 (2) stated that “any agreement pursuant to this article all be automatically void.”<sup>94</sup> Under the third paragraph, TFEU provides an exemption to the application of the Article 101(1) under some circumstances. Additionally, it also supports to implementation of these exemptions with some guidelines and regulations which will be discussed in the following sections.

Although US Sherman Act Section I is not as detailed as Article 101 TFEU, the first paragraph of Art 101 and US Sherman Act Section 1 have common points. Sherman Act Section 1 states that “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”<sup>95</sup> Article 101 TFEU and Section 1 Sherman Act regulates ban on general issues.<sup>96</sup> On the other hand, in the US Antitrust law there is less rules<sup>97</sup> compared to Article 101(1) TFEU. For instance, Sherman Act did not show the exemption like TFEU does and US court decisions shape the antitrust law due to the deficiency in the Sherman Act. Accordingly, European Court of Justice and trial courts also improved in many ways principles of European competition law.<sup>98</sup> Lastly, Article 101 TFEU and Sherman Act 1 both apply to vertical and horizontal agreement. The assessment of Article 101 will be according to vertical agreements since APPAs are agreed between the different level of traders.

### **1. Vertical Agreements in the Context of Article 101 TFEU and US Sherman Act Section 1**

Traders may operate in different level of an identical markets. For example, manufacturer and the retailer do business in different level of trade. The manufacturer and retailer might agree on a document in writing or exchange of information may lead

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<sup>93</sup> K&L Gates, ‘An Overview of Competition Issues Impacting Vertical Commercial Agreements’ LexisNexis,1 <[http://www.klgates.com/files/Publication/21f7413f-a5b7-4838-80b5-d5b807be9b4b/Presentation/PublicationAttachment/1978153d-5051-4c46-8121-d7b43ffe2cd8/An%20Overview%20of%20Competition\\_Vertica\\_Agreements.pdf](http://www.klgates.com/files/Publication/21f7413f-a5b7-4838-80b5-d5b807be9b4b/Presentation/PublicationAttachment/1978153d-5051-4c46-8121-d7b43ffe2cd8/An%20Overview%20of%20Competition_Vertica_Agreements.pdf)> Accessed 23 August 2016.

<sup>94</sup> Treaty of Functioning of European Union (2012) OJ C 326 47-390 Article 101.

<sup>95</sup> 15 U.S.C & 1 (1890).

<sup>96</sup> Anna Maria Baumgartner, ‘Antitrust Issues in Technology Transfer: A comparative Legal Analysis of Patent Licenses in the EU and the US’ (2013) TTLF Working Paper No:18-20, 21. <[https://fsi.stanford.edu/sites/default/files/baumgartner\\_wp18.pdf](https://fsi.stanford.edu/sites/default/files/baumgartner_wp18.pdf)>Accessed 23 August 2016.

<sup>97</sup> Alden Abbot, ‘The University of Oxford Centre for Competition and Law Policy’ (2005) 5 <[https://www.law.ox.ac.uk/sites/files/oxlaw/ccpl\\_1\\_02-05.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/ccpl_1_02-05.pdf)>Accessed 23 August 2016.

<sup>98</sup> Baumgartner(n-96)21.

to an agreement in the vertical context under Article 101 TFEU.<sup>99</sup> However, it is more complicated when there is implicit collusion between traders competing vertically.<sup>100</sup> ECJ interpreted that everything can be an agreement including the ‘meeting of minds’ or ‘concurrence of will’.<sup>101</sup> Correspondingly, in US Sherman Act I also arranged in a similar way like EU. The intent of the parties is also a critical implication in both legislations. So, relating to the understanding of the vertical agreements, they have similar attitudes. However, regarding the assessment of vertical agreements, EU is more stringent compared to the US.<sup>102</sup> In the US, claimant has to show that the vertical agreement has a detrimental effect on competition and cause financial welfare<sup>103</sup> whereas European Commission has less role to prove.<sup>104</sup>

## **2. Assessment of Online Markets Under Article 101 TFEU and Sherman Act Section 1**

The assessments of online sales are not in a different way than it is assessed in offline markets such as implication of the VBER and guideline.<sup>105</sup> So, whole assessment will be in a similar way under this section. However, according to some, due to the structure of online markets (two-sidedness) it might not be that easy the analyze whereas the other scholars think that traditional structure which applies to offline markets can be also implemented on online markets as well.<sup>106</sup> Although different scholars have some different ideas, generally they have been assessed in a similar way under antitrust concern.

### **a. APPA’s Assessment under Article 101 and Sherman Act Section 1**

The assessment of Article 101 will be according to vertical agreements due to the fact that APPAs are agreed by the different level of traders and seen as vertical restraints

<sup>99</sup> Kjolbye, Aresu, Stephanou (n-5) 5.

<sup>100</sup> Kjolbye, Aresu, Stephanou (n-5) 5.

<sup>101</sup> Kjolbye, Aresu, Stephanou (n-5) 5.

<sup>102</sup> Howard Langer, ‘*Competition Law of the United States*’ (Kluwer Law International, 2012) ISBN 978-90-411-4702-8 119, para 324.

<sup>103</sup> James C. Cooper, Luke M. Froeb, Daniel P. O’ Brien and Michael G. Vita, ‘A comparative study of US and European Union Approaches to Vertical Policy’ (2005) *Geo. Mason Law Review* 13(2) 289-308 289.

<sup>104</sup> *ibid* 289.

<sup>105</sup> OECD, ‘Vertical Restraints for Online Sales’ (2013) 75 <http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf> Accessed 23 August 2016.

<sup>106</sup> Pier Luigi Parcu, Maria Luisa Stasi, Marco Botta, ‘Antitrust Enforcement in Traditional V. Online Platforms’ (2016) *Issn 2016 /02 European University Institute* 5, para 4.

by the scholars. However, in some way, it is not clear whether they are purely horizontal or vertical. The reason is the two-sided market structure of online platforms.<sup>107</sup> On one hand, upstream market and downstream market is in a competition. On the other hand, downstream market also competes against each other. As a matter of fact, two sided market structure proves that APPAs are in the context of the vertical agreement.<sup>108</sup> In the context of EU, APPAs are investigated in the context of vertical agreements rather than horizontal agreement. However, in the US, it has been investigated as a horizontal agreement. This situation leads some differences about the assessments of the APPAs because, in EU law, horizontal agreements are per se whereas vertical agreements are not always per se. In the US, the supreme court also more lenient<sup>109</sup> toward the assessment of vertical agreements compared to horizontal agreements. Yet, the agreement is between retailers and the manufacturer they should be assessed under vertical agreements.

#### **b. Single Economic Unity**

In vertical agreements, it is very important to analyze whether enterprises in a different level of trades do businesses as a separate undertaking or as a single economic unit. The ground is if there is a uniformity between the entrepreneurs, they will be exempted from the scope of Article 101(1) TFEU.<sup>110</sup> European Court of Justice relied on company governance compared to individual decision making to analyze whether there was single economic unity or not.<sup>111</sup> The European Court of Justice also approved in “Viho v. Commission”<sup>112</sup> that parent company and the company who is acting as its branch is immunized from the scope of Article 101 (1)TFEU.<sup>113</sup> So, it is important for both undertakings to do business independently in the context of Article 101(1). The US law also has a similar approach to this issue like EU. However, the US Supreme Court relies on individual decision making more compared to EU.

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<sup>107</sup> Akman (n-34) 36.

<sup>108</sup> Akman (n-34) 36.

<sup>109</sup> Akman (n-34) 36.

<sup>110</sup> Richard Whish, David Bailey, ‘*Competition Law*’ (7<sup>th</sup> Edition, Oxford University Press, 2015) 620.

<sup>111</sup> Pieter Van Cleynenbreugel, ‘Single Entity Tests in US Antitrust and EU Competition Law’ (2011)39. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1889232](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889232) Accessed 23 August 2016.

<sup>112</sup> C-73/95 Viho Europe BV v Commission (1996)

<sup>113</sup> Whish, Bailey (n-110) 620.

## i. Agency agreement

According to definition in Guideline on Vertical Restraints 2010,

*“Agency agreements are vertical agreements where a legal or physical person (the agent) is 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 of goods or services by the principal or the sale of goods or services supplied by the principal.”*<sup>114</sup>

In this situation, only one undertaking exists since the other acts on behalf of the other. Regarding the understanding of agency agreements EU and US both have particular attitude.<sup>115</sup> For the assessment of the agreement under Article 101, it should not constitute a ‘genuine’ agency.<sup>116</sup> In other words, under EU competition policy, if there is an agency agreement, some limitations do not apply according to Article 101 TFEU<sup>117</sup> similar to the US.

European Commission has brought some criteria relating to the agency agreements in Guidelines on Vertical Restraints 2010. According to the Guidelines, the way to analyze the role of the party, the responsibilities of enterprises have to be tested to understand to whether it bears an economic or commercial risk or not.<sup>118</sup> Correspondingly, the US has the similar approach. In both legislations, it is important to illustrate the risk that the genuine agent bear regarding the products which is being circulated.<sup>119</sup> However, the way the European Commission ruled is stricter compared to the US. US case law provides that only a few or no financial risk should be born on a ‘genuine agency’ at the time of distribution.<sup>120</sup> On the other hand, EU says that there has to be no risk or only unspecified amount of rate risk on the agents.<sup>121</sup> European

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<sup>114</sup> EU Commission, Guidelines on Vertical Restraints, 2010 O.J. (C 130) 2010 para 12.

<sup>115</sup> Colangelo, Zencovich (n-10) 79.

<sup>116</sup> OECD (n-57) 13, para61.

<sup>117</sup> K&L Gates, ‘Agency Under EU Competition Law’ LexisNexis 1. <  
[http://www.klgates.com/files/Publication/4c16bb0f-e76a-4acc-8514-8d57530e2cae/Presentation/PublicationAttachment/dfa1cc5b-7abf-4314-aac5-96f6d68066a6/Agency\\_Under\\_EU\\_Competition\\_Law.pdf](http://www.klgates.com/files/Publication/4c16bb0f-e76a-4acc-8514-8d57530e2cae/Presentation/PublicationAttachment/dfa1cc5b-7abf-4314-aac5-96f6d68066a6/Agency_Under_EU_Competition_Law.pdf)> Accessed 23 August 2016.

<sup>118</sup> Pierre Goffinet, Frederic Puel, ‘Vertical Relationship: The impact of the Internet on the Qualification of Agency Agreement’ (2015) Journal of European Competition Law& Practice 6(4) 242-249, 243.

<sup>119</sup> Angela Huyue Zhang, ‘Toward an Economic Approach to Agency Agreements’ (2013) 9(3) Journal of Competition Law and Economics 553-591, 554.

<sup>120</sup> *ibid* 554.

<sup>121</sup> *ibid* 554.

Commission is not able to explain what it emphasizes by it.<sup>122</sup> All in all, European Commission's and US's test seems the same, but there is difference of opinions regarding the rate of the risk. Taking all these points into consideration, the analysis has to be done case by case to understand whether it is an agent or not. If the distributor acts as an agent since it will be a subsidiary of the enterprise, the vertical relation between two parties cannot be judged under Article 101 of TFEU and Sherman Act Section I.

## **ii. Are Platforms Genuine Agency Agreements or Traditional Distributors?**

In EU law, the concept of agency agreements is debated under online platforms. There are different opinions through scholars regarding the relation between the platforms and the suppliers. Some of the scholars says that they are re-seller. However, some scholar thinks that to give an example OTAs cannot be re-seller due to the commission paid to intermediaries and the risk is not born on the intermediary.<sup>123</sup> According to Bennett, under genuine agency agreement, online intermediaries cannot be considered as a distributor or a seller as it is analyzed in offline markets.<sup>124</sup> The reasoning is that regarding the role of online platforms, existence of MFN clause and market specific investment is a way of pricing prohibit the existence of agency agreement.<sup>125</sup> However, according to Akman, these terms are exempted from the scope of Article 101 due to the existence of agency agreement between two parties. Additionally, since the national competition authorities cannot enact stricter codes compared to EU legislation due to the effect between the members of EU, these clause cannot fall under the scope of Article 101 TFEU.<sup>126</sup>

There is no uniform understanding with respect to the relation between the intermediary and the supplier in this topic in EU in the online platforms. Concerning the criteria of agency agreements in offline markets, the same approach can be adopted for online platforms. If the platform acts as an agent of a supplier, the platform cannot be seen as a separate undertaking under Article 101 in the context of the TFEU. In this

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<sup>122</sup> *ibid* 554.

<sup>123</sup> Colangelo, Zencovich (n-10)79.

<sup>124</sup> Matthew Bennett, 'Online Platforms: Retailers, Genuine Agents or None of the Above?' (2012) Competition Policy International <https://www.competitionpolicyinternational.com/assets/Uploads/EuropeJune.pdf> Accessed 23 August 2016.

<sup>125</sup> Colangelo, Zencovich (n-10)79.

<sup>126</sup> Akman (n-34) 23.

situation, the MFN clause between the parties cannot be assessed under Article 101(1) because of a single economic entity. Yet, it cannot be concluded that the limitations on the agents are legal itself.<sup>127</sup> For instance, if MFN clause causes an exclusivity between the agent and the supplier, its legality may be taken into consideration under 101 of the TFEU.<sup>128</sup> Regarding this point, APPAs have to be analyzed case by case, and its effects on the market and the limitation of the competition must be assessed although there is even an agency relation between the platform and the supplier.<sup>129</sup>

### **3. MFN Clauses in the US and Vertical Block Exemption Regulation in EU**

Vertical agreements between undertakings are exempted from the scope of Article 101(1) if some requirements are fulfilled under Vertical Block Exemption Regulation. According to the regulation, market share and the exemption from the hardcore restriction should be assessed under particular provisions. Since APPAs are vertical agreements, they can be also benefit from Vertical Block Exemption Regulation. As it is mentioned, there is no such a regulation in US. However, similar criteria such as market share and the relevant market are important factor for the assessment as well.

#### **a. Market share**

VBER says that exemption depends on the market share of the undertaking in the relevant market. In Article 3(1) it is stated that where their market shares exceed %30 percent of the relevant market they cannot benefit from VBER according to Article 2(1).<sup>130</sup> However, if the market share is low, it is more likely to create efficiencies in the market<sup>131</sup>. if the market share is high, it is less likely to produce pro-competitive effects.<sup>132</sup> Besides abuse of dominant position since in the existence of MFN clause above %30 market share of the retailer may prevent small businesses from entering into market in online platforms, the high market share of an undertaking dampen the competition.<sup>133</sup> On the other hand, if the market share of the retailers is below 30% in the relevant market

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<sup>127</sup> OECD (n-57)14. para 66.

<sup>128</sup> OECD (n-57) 14, para 66.

<sup>129</sup> Matthew Bennett, 'Online Platforms: Retailers, Genuine Agents or None of the Above?' (2012) 11< <https://www.competitionpolicyinternational.com/assets/Uploads/EuropeJune.pdf> >Accessed 23 August 2016.

<sup>130</sup> Commission Regulation (EU) 330/2010 On the Application of Article 101(3) of TFEU TO to Categories of Agreements and Concerted Practices (VBER) Art.3.

<sup>131</sup> OECD (n-57) 15, para71.

<sup>132</sup> OECD (n-57) 15, para71.

<sup>133</sup> OECD (n-57) 16, para75.

and the conduct may even have anti-competitive effects in the market, they are still exempted from the scope of 101(1).<sup>134</sup> Regarding the market share, the US has higher share market criteria<sup>135</sup> in contrast to implementation in EU, US has less stringent way toward vertical agreements toward undertaking which have dominant market power in the market.<sup>136</sup>

#### **i. Relevant Market**

To understand whether market share has over or below %30, the relevant market has to be well-analyzed. Firstly, while assessing the relevant product market, interchangeability is the main criteria. If the goods are preferred instead of each other by the consumers, it means that those goods are in the same market.<sup>137</sup> This criteria will also applicable to online platforms. Accordingly, there are other issues to be considered. For instance, it must be considered whether the online market has to be considered as a separate market from the offline markets or they must be regarded as a unique market or not. Accordingly, it must be answered that how many markets involve in online platforms.<sup>138</sup> These are left open questions. In contrast to all these, there is only uniformed understanding about the requirement of implementation of SSNIP test regarding the two-sided platforms.<sup>139</sup>

European geographic market is defined as national basis generally not as a whole European country. Correspondingly, in the US, regarding the online intermediation, United States was taken as a geographic market.<sup>140</sup> However, because e-commerce is a newly being shaped, it needs to be assessed more in details. Addition to this, since the relevant market has not been investigated in online platforms deeply<sup>141</sup>, there is no unifying understanding in EU regarding the relevant market definition like US. For example, in Google/ Double Click case, it has been investigated under one market

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<sup>134</sup> OECD (n-57) 16, para77.

<sup>135</sup> Copper (n-104) 299.

<sup>136</sup> Copper (n-104) 299.

<sup>137</sup> Gönenç Gürkaynak, Derya Durlu, Margaret Hagan, 'Anti-Trust on the Internet A Comparative Assessment of Competition Law Enforcement in the Internet Realm (2013) 14(1) Business Law International 51-90, 54, para 1.

<sup>138</sup> Parcu, Stasi, Botta(n-106) 2.

<sup>139</sup> Parcu, Stasi, Botta (n-106) 2.

<sup>140</sup> Gürkaynak, Durlu, Hagan (n-137) 62, para 3.

<sup>141</sup> Jared Kagan, Bricks and Mortar and Google: Defining the relevant Anti trust market for Internet –Based Companies, 2010/11, Volume 55, 271-292, 277, para 2 < [http://www.nyslawreview.com/wp-content/uploads/sites/16/2013/11/55-1.Kagan\\_.pdf](http://www.nyslawreview.com/wp-content/uploads/sites/16/2013/11/55-1.Kagan_.pdf) > Accessed 23 august 2016.

whereas in MasterCard more than one market.<sup>142</sup> Taking all these points into consideration, because of the fact that there are no specific criteria, the assessment has to be considered the particular nature of the case.<sup>143</sup>

### **b. Hardcore Restriction**

Another condition to be exempted is that the restriction mustn't fall under the hardcore restriction which is stated under Article 4 in VBER in EU. According to Article 4 (a), in the case of purchaser's price constraint to decide its marketing price which is maximum or recommended marketing price excluding imposed fixed or minimum lead to hardcore restriction.<sup>144</sup> As it is seen resale price maintenance and minimum price leads to restriction of the competition and they are ruled under the restriction by object prohibition. However, if there is even hardcore restriction stated in VBER in 4 Article, individual exemption is still possible under Article 101(3) TFEU. In this context, it is debated whether APPAs fall within the scope of Article 4(a) or not.

#### **i. Are APPAs Assessed Like Hardcore Restriction and Like RPM?**

RPM is a restriction in the downstream market to give a minimum resale price by retailers while they distribute the goods of the upstream market.<sup>145</sup> On the other hand, as it is stated in the second part, MFN clause may lead to a restriction on the upstream market not to offer the lower price to others competing in the downstream market. Regarding APPAs, there is no uniform understanding the way of understanding neither in Vertical Block Exemption Regulation nor guidelines on vertical restraints. There is only an implicit implication in the guideline. Yet, generally different point of views has been discussed between the scholars. Guideline on vertical restraints states in paragraph 48

*“Similarly, direct or indirect price fixing can be made more effective when combined with measures which may reduce the buyer's incentive to lower the resale price, such as the supplier printing a recommended resale price on the product or the supplier obliging the buyer to apply a most-favored nation*

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<sup>142</sup> Parcu, Stasi, Botta (n-106) 2, para2.

<sup>143</sup> and may be determined the several factors, such as the features of goods or services sold online compared with those available offline and the level of prices applied. Colangelo, Zencovich (n-10) 77.

<sup>144</sup> Vertical Block Exemption Regulation Article 3.

<sup>145</sup> Daniel M. Garret, Michelle Burtis and Vandy an Howell, 'Economics of Antitrust: Economic Analysis of RPM' 2008 3, para2 <  
[https://www.google.at/search?client=safari&rls=en&q=Daniel+M.+Garret,+Michelle+Burtis+and+Vandy+an+Howell,+Economics+of+Antitrust:+Economic+Analysis+of+RPM,+2008&ie=UTF-8&oe=UTF-8&gfe\\_rd=cr&ei=cZO0V\\_mGNOyk8wfxgZboBA](https://www.google.at/search?client=safari&rls=en&q=Daniel+M.+Garret,+Michelle+Burtis+and+Vandy+an+Howell,+Economics+of+Antitrust:+Economic+Analysis+of+RPM,+2008&ie=UTF-8&oe=UTF-8&gfe_rd=cr&ei=cZO0V_mGNOyk8wfxgZboBA) > Accessed 23 August 2016.

*clause*”<sup>146</sup>

This is what the guideline includes regarding the MFN clause. So, Guideline on Vertical Restraints provides limited information about MFN implicitly which may cause to facilitate indirect RPM.<sup>147</sup> It means that if they are assessed like RPM, they are restriction by object and analyzed as a hardcore restriction under Block Exemption Regulation paragraph 4 (a).<sup>148</sup> Since the horizontal structure and also their anti-competitive impacts of RPM resembles APPAs, APPAs should be considered like RPM.<sup>149</sup> Correspondingly, they cannot be exempted from Block Exemption Regulation according to some scholars. Amelia Fletcher and Morten Hviid<sup>150</sup> also consider that due to their horizontal effect they must be assessed like RPM.<sup>151</sup> Correspondingly, Zimmer and Blaschczok, the most distinctive element is to know the purchaser and the seller. According to them, platforms can be seen as buyers in the context of Article 4(a).<sup>152</sup> In this situation, they will not be exempted from the scope of it due to the fact that MFN constraint the independence of the price formation of the intermediaries and manufacturers have to be bound by this clause when they offer price to other platforms.<sup>153</sup>

However, Gürkaynak analyzed MFN clause in a different way compared to his colleagues mentioned above. MFN is not a price restraint on intermediaries whereas it is a kind of limitation on supplier<sup>154</sup> not to offer lower price the other intermediaries. What is more, MFN forces the manufacturers to give the same discount. As it is seen, in contrast

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<sup>146</sup> Commission Notice, Guideline on Vertical Restraints, 2010/C OJC 130/01 (2010) para 48.

<sup>147</sup> Sahuguet, Steenbergen, Verge, Walckiers (n-52) 3 para4.

<sup>148</sup> Marco Plankensteiner, Elisa Crequer, Most Favored Nation Clauses (2016) <https://gettingthedealthrough.com/area/41/article/28952/vertical-agreements-favoured-nation-clauses/>

<sup>149</sup> OECD (n-57) 15, para 73.

<sup>150</sup> In considering the potentially harmful effects of APPAs Professor Hviid identified both direct and indirect effects. In regards to the direct effects he said that APPAs act as the worst element of RPM. This is because RPM and APPAs share the same explicit vertical element, but APPAs make explicit the horizontal price parity that is common but only implicit in RPM. He therefore recommended that APPAs be treated no less harshly than RPM. He also identified that APPAs could indirectly harm consumers by facilitating a move to agency model which might raise prices if the seller market is less competitive than the retail market. OECD, ‘Across Platform Parity Clauses’ (Morten Hviid, 2015) 3, para5 < <http://competitionpolicy.ac.uk/documents/8158338/9254690/M.Hviid+OECD+Report+October+2015.pdf/43b56ad0-6fd2-40e9-af66-537e7c60f399> > Accessed 23 August 2016.

<sup>151</sup> Amelia Fletcher, Morten Hviid, ‘Retail Price MFNs: Are they RPM at its worst?’ (2014) CCP Working Paper 4 < <http://competitionpolicy.ac.uk/documents/8158338/8199490/CCP+Working+Paper+14-5.pdf/0ec21eee-12ca-4bc8-b3ea-d5076ab264af> > Accessed 23 August 2016.

<sup>152</sup> Zimmer, Blaschczok (n-10) 18.

<sup>153</sup> Zimmer, Blaschczok (n-10) 19.

<sup>154</sup> Gürkaynak, Güner, Diniz, Filson (n-32) 134.

to RPM, there is no limitation regarding the price.<sup>155</sup> Correspondingly, Vandenboorre and Frese also consider that VBER and Guidelines on Vertical Restraint do not encourage the affinity between resale price maintenance and MFC.<sup>156</sup> I think his approach is more lenient compared to other scholars and give possibility to assess under the rule of reason in contrast to the assessment like RPM. All in all, MFNs are not explicitly mentioned in primary and secondary EU law. This is the main reason why it leads some controversies between the competition authorities.

#### **4. Article 101 (3) TFEU**

Even if there is no exemption from the scope of VBER, Under Article 101(3) TFEU, there are four cumulative reasons to be exempted individually from the scope of Article 101(1).<sup>157</sup> VBER states that, if the agreement gives support to the improvement of the goods or provide the enhancement in technic or finance, the agreement can be exempted.<sup>158</sup> Secondly, if the consumers get benefit from the agreement, it can be exempted from the scope of Article 101(1).<sup>159</sup> Thirdly, the restriction must be ‘indispensable’ to achieve the attainment of the objectives.<sup>160</sup> Lastly, it shouldn’t afford to eliminate competition in the market.<sup>161</sup> These four conditions have to be cumulatively satisfied to be exempted from the scope of Article 101 (1). So, it has to be proved that they have beneficiaries that surpass anti-competitive side.<sup>162</sup>

#### **5. Point of View in the EU and US Regarding Other Price Restraints**

Vertical agreements are not considered per se by its nature. However, they are distinct from each other with respect to price and non-price restraints in EU and US. In EU legislation, price restraints are assessed strictly as other vertical agreements compared to US. For instance, minimum price maintenance, resale price maintenance is considered as restriction by object whereas whole vertical price restraints in US are considered as rule of reason. In this point, it might be considered that MFN clauses are also more likely to be assessed under rule of reason in US compared to European approach. However,

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<sup>155</sup> Gürkaynak, Güner, Diniz, Filson (n-32) 134.

<sup>156</sup> Ingrid Vandenborre, Michael J. Frese, ‘The role of Market Transparency in Assessing MFN clause’ (2015) 38(3) World Competition Law and Economic Review 333-348, p336.

<sup>157</sup> Whish (n-110) 152.

<sup>158</sup> Whish (n-110) 152.

<sup>159</sup> Whish (n-110) 152.

<sup>160</sup> Whish (n-110) 152.

<sup>161</sup> Whish (n-110) 152.

<sup>162</sup> Vandenborre, Frese (n-60) 592.

although RPM is subject to rule of reason, some scholars focus on the anti-competitive impacts of it. All in all, there is no uniform attitude by competition authorities regarding MFN clauses nor in Europe neither in US perspective in the concept of online sales.

## **6. Assessment of Restriction by Object and Effect in The US and EU regarding MFN clauses**

In EU legislation, according to By Object Guidance, since specific agreements between the parties may lead to harm competition, their effects in the market are not assessed and this certain type of collusion lead to harm competition “by their nature.”<sup>163</sup> Additionally, due to the fact that collusion generally has negative effects in the market, there is no need to assess their potential effects.<sup>164</sup> In US Antitrust law, instead of restriction by object it is called per se. Regarding the main difference between EU and US, even an agreement between is restriction by object it can be justified in 101 (3) of TFEU whereas in US there is no such a possibility.<sup>165</sup> Due to the EU’s approach is stable compared to US and US’s point of view is shaped more through the court decisions<sup>166</sup> compared to EU. In US, a claimant has to prove the agreement has ‘genuine adverse effect’ on competition under rule of reason.<sup>167</sup> If there is pro-competitive effect prevailing the anti-competitive side, it is analyzed under rule of reason.<sup>168</sup> EU also has the same attitude toward the assessment of restriction by effect. In the light of these explanations, the nature of MFN clauses under different enforcements across the Europe and US will be analyzed.

Since APPAs are new type of restriction and recently debated, there is no uniform approach whether they are restriction by object or effect. Some scholars think that APPAs are restriction by object which leads to no justification from the defendant’s

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<sup>163</sup> Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD (2014) 198 final.

<sup>164</sup> Akman (n-34) 41.

<sup>165</sup> Saskia King, ‘Agreements that Restrict Competition by Object Under Article 101(1) TFEU: Past Present and Future’ (2015) 32, para2 <[http://etheses.lse.ac.uk/3068/1/King\\_Agreements\\_that\\_restrict\\_competition\\_by\\_object\\_under\\_Article\\_101.pdf](http://etheses.lse.ac.uk/3068/1/King_Agreements_that_restrict_competition_by_object_under_Article_101.pdf)> Accessed 23 August 2016.

<sup>166</sup> Calep Vesey, Per se Rules in US and EU Antitrust/ Competition Law <<http://www.eucomplaw.com/comparing-eu-and-us-competition-law/per-se-rules/>> Accessed 23 August 2016.

<sup>167</sup> Cooper, Froeb, Brien, Vita (n-103) 289, p295.

<sup>168</sup> Gabriele Accardo, ‘TTLF Working Papers, No:12, Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution under EU and US Competition Laws’ (2012) 107 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038239](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038239)> Accessed 23 August 2017.

side.<sup>169</sup> According to Akman, MFC clauses must be analyzed under the rule of reason because of the fact that these clauses are bound by the wording of the clause, the context that they have been used. Additionally, they may also serve a lawful reason as well.<sup>170</sup> Correspondingly, according to Vandenborre, MFN clauses should not be analyzed under restriction by object and the reasons he states are corresponded to what Akman says but she only brings an exception to the clause where MFN clause facilitate horizontal conspiracy.<sup>171</sup> Similarly, Luc Peeperkorn reckons that the content of the agreement and what kind of restriction that the clause has should be analyzed. For instance, a restriction on the end user to examine another platforms' goods in the market can be seen as a restriction by object.<sup>172</sup> As it is seen different opinions patrol through different scholars about the assessment of MFN clause.

## **V. ENFORCEMENT**

### **A. ENFORCEMENT OF MFN CLAUSES IN THE US**

#### **1. Online Travel Company Hotel Booking Antitrust Litigation**

##### **a. Facts**

Two consumers sued to hotel chains and OTAs alleging that the conspiracy led to restriction of competition between hotels due to the conclusion of MFN and RPM clause between the hoteliers and OTAs. MFN clause stipulated that hoteliers cannot set lower prices on their website compared to OTAs' websites and cannot permit other OTAs in their online channels.<sup>173</sup> Due to this pricing strategy, private damage action was pursued by two consumers to OTAs alleging that they have cooperated with each other and also set MFN clauses to limit the intra-brand competition.<sup>174</sup> Addition to this, plaintiff also wanted to challenge RPM and alleging that it has harmful effects for the

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<sup>169</sup> Parcu, Stasi, Botta (n-106) 6.

<sup>170</sup> Akman (n-34) 41.

<sup>171</sup> Vandenborre, Frese (n-156) 338 first para 1.

<sup>172</sup> Luc Peeperkorn, 'Defining "by Object" Restrictions' (2015) N 3-2015 Concurrences 40-50, 44, para25 <[http://www.concurrencia.pt/LisbonConference2015/assets/05.concurrences\\_3-2015\\_doctrines\\_peeperkorn.pdf](http://www.concurrencia.pt/LisbonConference2015/assets/05.concurrences_3-2015_doctrines_peeperkorn.pdf)> 23 August 2016.

<sup>173</sup> In re Online Travel Company (OTC) Hotel Booking Antitrust Litigation Case no 3:12-cv-03515 (18 February 2014) 3, para 1.

<sup>174</sup> Colangelo, Zencovich (n-10) 80.

consumers. This issue was brought to the US District Court Northern District of Texas Dallas by two consumers.

### **b. The Court's Ruling**

US District Court Northern District of Texas Dallas accepted the existence of RPM and price parity agreements between the parties<sup>175</sup> and acknowledged that the parity agreements between the parties are horizontal not a vertical one.<sup>176</sup> The court dismissed the case and did not admit that MFN clause infringes Sherman Act Section 1 and also ruled that the existence of the conspiracy was not accurate. Addition to this, the Judge Jane J. alleged that parties in each side of the contract earned something.<sup>177</sup> And the court focused on the benefits to the consumer since the agreement gives a guarantee to the consumers that they would not find a lower price on any other website and also by provided a penalty.<sup>178</sup> However, due to the fact that the OTAs' market was a highly concentrated market and the MFN clause lead to increase in the price it was surprising for some the dismissal of the case by the court.<sup>179</sup>

## **2. United States v. Apple Case**

### **a. Facts**

In 2007, Amazon.com Inc. produced an equipment "Kindle" consist of copies of the books on the internet called e-books. Amazon promoted its costumers to purchase the electronic copies of books (new releases and New York Times bestsellers) from 9.99 Dollars.<sup>180</sup> On the other hand, Apple was planning to produce iPad in 2009 and it wanted to sell e-books in its marketplace which is called iBook store. So, Apple wanted to agree with six book publishers in the US which are Macmillan, Penguin, Simon & Schuster, HarperCollins, Hachette, Random House.<sup>181</sup> According to the agreement between Apple

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<sup>175</sup>In re Online Travel Company (OTC) Hotel Booking Antitrust Litigation Case 3:12-cv-01382 (18 February 2014) 13, para52.

<sup>176</sup> Hviid (n-150) 11, para 47.

<sup>177</sup> Hviid (n-150) 15-16 para 50,

<sup>178</sup> Colangelo, Zencovich (n-10) 80.

<sup>179</sup> Hviid, (n-150) 15-16 point50.

<sup>180</sup> United States v. Apple Inc, Case 13-3741-cv (L) , (2015) 4.

<sup>181</sup> ibid5.

and the publishers, publishers would be able to decide the prices in the retail platform through the agency model. After all, Apple and five book publishers agreed on the terms.

Until Apple entered into the market, book publishers operated under the wholesale model which was the traditional type for the publishers for years.<sup>182</sup> Under this model, book publishers are allowed to set the prices to consumers according to the quotation of prices offered by publishers and the price of e-books had to be %20 cheaper due to lack of some expenses compared to hardcover books.<sup>183</sup> Amazon did not quit the traditional wholesale model for a long time. It sold e-books a bit lower prices for New York Bestsellers and determined a stable price which is 9.99 Dollars.<sup>184</sup> For the book publishers, it was a big threat because, in a limited time, they would not be able to make a profit because of the low prices offered by Amazon on the Internet.<sup>185</sup> So, since publishers thought that it was not a problem individually but collectively, it would make sense to act together and they tried to find a way to regain the dominance to decide about pricing.<sup>186</sup> Then, five book publisher and Apple chose to involve in a conspiracy to gain the control again in the market. However, only Random House did not want to collaborate with Apple.<sup>187</sup>

Willingly, to find the better alternative for themselves, the parties switch into agency model where the publisher would be able to determine the retail costs instead of retailers but the retailers would be paid %30 commission per sale.<sup>188</sup> On the other hand, this model brought another problem. Now on, since the prices would be set by the publishers, Apple may face higher prices compared to Amazon which would be a disadvantage for Apple. So, Apple desired publishers to change into agency model with Amazon and also with other operators in the same level which would cause to restrict the

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<sup>182</sup> *ibid* 11, para 2.

<sup>183</sup> *Ibid* 12.

<sup>184</sup> *Ibid* 12.

<sup>185</sup> *Ibid* 13-14.

<sup>186</sup> *Ibid* 14, para 2.

<sup>187</sup> Jordan Travis, 'E-book Conspiracy: The rule of reason & Department of justice v. Apple & Price- Fixing' (2014) Law School Student Scholarship 1 <[http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1500&context=student\\_scholarship](http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1500&context=student_scholarship)> Accessed 23 August 2016.

<sup>188</sup> *United States v. Apple* (n-180) 23, para 2.

competition<sup>189</sup>. After that, alteration of the business model also brought some other issues between the book publishers and Apple.

#### **b. Apple Inc. and MFN clause**

Through the adaptation of agency model, Apple also wanted to adopt MFN clause in its agreement with the publishers. The agency model was a kind of encouragement to use MFN clause in the market. Apple set such a contractual clause to the agreement as below

*“if, for any particular New Release in hardcover format, the... Customer Price (in the iBook store) at any time is or becomes higher than a customer price offered by any other reseller..., then (the) Publisher designate a new, lower Customer Price (in the iBook store) at any time is or becomes higher than a customer price offered by any other reseller..., then (the) Publisher designate a new, lower Customer Price (in the iBook store) to meet such lower (customer price).”<sup>190</sup>*

This is the main reason why publishers switched into agency model with Amazon. This term would lead suppliers to set the same price for e-books as they did to Amazon in the online platforms. Yet, no profit would be granted by e-book publishers under the wholesale model with Apple and cause no return in a short period.<sup>191</sup> However, through MFN clause, book publishers would be able to decide the price offered to Amazon with the adaptation of agency model. Apple’s aim was to remove the price competition between the other book retailers at the time when it entered the market.<sup>192</sup> However, this situation also led to some other consequences such as conspiracy between book publishers.

#### **c. Apple’s MFN Clause Led to Publishers’ Conspiracy**

Department of Justice and 33 states sued Apple and the five book publishers in the US District Court for the Southern District of New York since they involved in a conspiracy which leads to violation of Sherman Act section 1 under per se prohibition.<sup>193</sup>

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<sup>189</sup> Ibid 24.

<sup>190</sup> Ibid 26.

<sup>191</sup> Ibid 28, para1.

<sup>192</sup> Ibid 29.

<sup>193</sup> Ibid 6.

Before the court proceedings, HarperCollins and Simon & Schuster agreed on the settlement which prohibited e-book publishers to involve in MFN for five-year period and also not to involve in any agreement with any retailer for two years.<sup>194</sup> Similarly, later on, Penguin and MacMillan settled the dispute.<sup>195</sup> Yet, Apple went through the trial. United States District Court for the Southern District of New York gave a verdict on the actions of Apple alleging violation of Sherman Act Section 1.

However, this decision was appealed by Apple in the US Court of Appeal for the second circuit which was ended up with the confirmation of district court's decision. Apple defended itself by stating that its behavior was vertical. Due to deal more than one e-book publishers, it cannot be illustrated as an orchestrated conspiracy to increase the prices by the court. Even it has organized such a conspiracy, it would have been analyzed as rule of reason despite the intention to increase in the prices.<sup>196</sup> So, according to Apple, in every circumstance, its conduct cannot be analyzed as a per se. Apple defended itself that it tried to provide the cheapest e-book prices for end-user consumers through MFN clause.<sup>197</sup> However, the court did not accept its defenses.

#### **d. US Court of Appeals for the Second Circuit Court's Point of View Regarding Vertical Agreement**

It is clear that there is a confusion regarding the assessment of vertical agreements by the court. In 2007, the high court ruled in *Leegin Creative Leather Products v. PSKS*<sup>198</sup> Inc., that even the agreement between different level of traders approve the coordination between competitors at the same level, it must be admitted that it is still a vertical agreement.<sup>199</sup> It means that the assessment of the case would be under the rule of reason. As it is discussed in fourth part, US has a lenient approach toward vertical agreements. Correspondingly, through *Leegin* case, it is approved that none of the vertical agreements

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<sup>194</sup> Steve Cernak, Tal Chaiken, Schiff Hardin, Most Favored Nation Clauses, 4 <[http://www.schiffhardin.com/Templates/media/files/publications/PDF/Cernak\\_Chaiken\\_Most-Favored-Nation-Clauses\\_20130311.pdf](http://www.schiffhardin.com/Templates/media/files/publications/PDF/Cernak_Chaiken_Most-Favored-Nation-Clauses_20130311.pdf)> Accessed 23 August 2016.

<sup>195</sup> Ibid 4.

<sup>196</sup> *US v. Apple* (n-180) 53.

<sup>197</sup> Jason J. Wu, John P. Bigelow, 'Competition and the Most Favored Nation Clause' (2013) *CPI Antitrust Chronicle* 9. <<https://www.competitionpolicyinternational.com/assets/Uploads/WuBigelowJuly-132.pdf>> Accessed 23 August 2016.

<sup>198</sup> *Leegin Creative Leather Products, Inc v. PSKS, Inc.*, 551 U.S 877 (2007)

<sup>199</sup> Errin Garrity, 'A new Chapter in Antitrust Law: The Second Circuit Holds Hub-and-Spoke Conspiracy Per Se Illegal' (2016) 57(6) *Boston College Law Review* 84-103, 94.

can be assessed under per se rule. In 2007, the Supreme Court shifted its opinion about price restraints by stating that the analyze of minimum prices are set under rule of reason by overruling *Dr. Miles Medical Co v. John D. Park & Sons Co.*<sup>200</sup> It is very interesting that despite the fact that price and non-price restraints are analyzed under the rule of reason in the US, it seems that the NY court and second circuit have ignored supreme court's decision by overruling the way two previous court's decision. All in all, with these aspects, this situation has started some controversies about the US's approach recently.

Correspondingly, dissent opinion also alleged that it cannot be assessed under per se rule since the agreement between book publishers and Apple was vertical.<sup>201</sup> Book publishers considered that they could limit Amazon's dominant position by switching their agreements into agency model. Through it, they would also raise the price offered to Amazon and also protect the sale of hardcover books.<sup>202</sup> Apple also alleged that since Amazon is dominant in the market, its conspiracy with book publishers is not anti-competitive to destroy Amazon's pricing cap but supreme court alleged that since it led to a price-fixing conspiracy between same level competitor, it was not needed to be justified.<sup>203</sup>

#### **e. Assessment of MFN Clauses in the US**

During thirty-five years, MFC clauses are assessed because of their anti-competitive effects in the US.<sup>204</sup> MFN clauses were not alleged as anti-competitive by FTC or DOJ but recently, they have been scrutinized as anti-competitive especially in the health-care industry<sup>205</sup> in traditional markets. Although DOJ claimed that they have anti-competitive effects in the market, the court never rendered a judgment as per se up to 2013.<sup>206</sup> In the United States, in 2013, the court brought in a verdict that Apple and five of the six publishers involved in the conspiracy through an agency sales agreement and the

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<sup>200</sup> Ibid 95 ; *Dr.Miles Medical Co. v. John D. Park & Sons*, 220 U.S 373(1911).

<sup>201</sup> Akman (n-34) 15.

<sup>202</sup> Babur De Los Santos, Matthijs R. Wildenbeest, *E-book Pricing and Vertical Restraints* (2014) 6. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2506509](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506509) > Accessed 23 August 2016.

<sup>203</sup> Cernak, Chaiken, Hardin (n-194) 3, para1.

<sup>204</sup> Jennifer D. Lee, 'Post U.S. v. Apple: How should most-Favored Nation Clauses be treated now?' (2015) 33(237) *Cardozo Arts & Entertainment* 237-259, 239.

<<http://www.cardozoelj.com/wp-content/uploads/2014/01/Lee-Final.pdf> > Accessed 23 August 2016.

<sup>205</sup> Cernak, Chaiken, Hardin (n-194) 3, para1.

<sup>206</sup> Wu, Bigelow (n-197) 8, para 4.

agreement contain MFN clause. For the first time, the court found MFN clause anti-competitive. So, this case has an immense importance due to the fact that it brought scrutiny about MFN clause in the US and raise the possibility to be ruled as per se.

However, MFN clause was not considered as per se or rule of reason in the case. The Judge Cote stated that MFC clause a tool to organize to illegal conspiracy<sup>207</sup> between the publishers. According to her, lawful contracts may even consist an MFN clause.<sup>208</sup> Besides this, the court convicted that if the publisher does not switch their operation model with Amazon, they would face a kind of economic sanction through MFN. if Amazon does not make any change in its price in the existence of MFN terms, book publishers cannot offer any higher price than 9.99 Dollars to Apple. That is the reason why the operation model between book publishers and Amazon has been changed.<sup>209</sup> Additionally, if Apple did not adopt MFN clause under agency model, in the market, there would be no possibility to increase the price and riddle competition in the market.<sup>210</sup> And book publishers would not be able to make any profit. So, this situation leded five book publishers to involve in conspiracy. They had to make a profit and without agency agreement with Amazon it seemed to be impossible.

On the other hand, since the main issue was not MFN<sup>211</sup>, the court did not analyze the pro or anti-competitive effects of MFN clauses and did not make any decision about the legality of MFN clause in online platforms. As it is understood from the case analyze, MFN clauses have been assessed very differently compared to how it used to be considered.<sup>212</sup> Taking all these points into consideration, MFN clause is not known whether it is per se or rule of reason under Apple case. However, it prohibited being used of MFN clause by Apple. The court ruled that the restriction on the book retailers is two years not to limit e-book publishers' price policy whereas the use of MFN clause is

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<sup>207</sup> Winston, Strawn, 'Federal Court Ruling Calls Most-Favoured-Nation Clauses into Question by Deeming Apple's Use of MFN a Per Se Unlawful Violation of the Antitrust laws' para 2 < <http://www.lexology.com/library/detail.aspx?g=d74a4764-2b22-47c9-b186-b1e91dbf1613> > Accessed 23 August 2016.

<sup>208</sup> Ibid para 2.

<sup>209</sup> van der Veer (n-23) 505, para 2.

<sup>210</sup> Lee (n-204) 244, para 3.

<sup>211</sup> Gürkaynak, (n-32) 143, para 1.

<sup>212</sup> Richard M. Stever, United States: Two things you need to know about the Apple/E-books Case/ 2014 <<http://www.mondaq.com/unitedstates/x/306310/Antitrust+Competition/Two+Things+You+Need+to+Know+About+the>> Accessed 23 August 2016.

banned for five years.<sup>213</sup> Apple appealed the decision of the US Second Circuit. However, supreme court did not examine the decision of second circuit again<sup>214</sup> and confirmed court of appeal's decision.

As it is seen, in this model, there is not a uniform understanding about MFN in online platforms in the US. Additionally, this new paradigm with the combination of agency model has been a recent issue. So, according to most of the scholars, their effect should be assessed case by case. However, it is still a question whether it will be ruled a per se or rule of reason in online platforms. Through the Apple case, it is the focus of the economists and also scholars in the US the analyze of MFN clause. In offline markets, although they are assessed under the rule of reason, the impact on the online market and the assessment of retail MFN clauses will be the same or not, has not been known yet.

## **B. ENFORCEMENT IN EU**

### **1. E-book Case**

Like in the US, the same issue has been investigated by European Commission on December 2011 and the same problems assessed by European Commission. Commitment between the e-book publisher and the MFN's role has been considered as against to Art. 101 TFEU. Before the commitment, not only the US but also the UK, France and Germany, book publishers and Amazon concluded agency agreement in Europe.<sup>215</sup> However, it was solved by commitment in December 2012<sup>216</sup> without trial. European Commission, Apple and publishers made a commitment which led to similar consequences in the US. Correspondingly, according to the commitments between Apple, publishers and the Commission, the agency agreement is terminated and two-year ban is issued on the publishers not to restrict the ability of e-book retailer to decide on their own pricing strategy and five-year ban is issued on MFN clauses.<sup>217</sup> Like in the US, no anti

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<sup>213</sup> Santos, Wildenbeest, (n-202) 5.

<sup>214</sup> Adam Liptak, Vinu Goel ' Supreme Court Declines to hear Apple's Appeal in E-book Pricing Case' (7 March 2016) <http://www.nytimes.com/2016/03/08/technology/apple-supreme-court-ebook-prices.html? r=0> Accessed 23 August 2016.

<sup>215</sup> Diaz, Bennett (n-26) 28.

<sup>216</sup> Hviid (n-150) 10, para 32.

<sup>217</sup> Ezrachi (n-13) 502, para 3.

and pro-competitive effects of the situation has been analyzed in online platforms by the European Commission.

## **1. Enforcement in Online Booking Sector**

### **a) HRS Case**

#### **i) Facts**

HRS is an online intermediary hotel service which provides different variety of hotels with various qualities in different costs in Germany and the world as well.<sup>218</sup> Beside HRS, there are other online platforms serve in the same area with a little difference like Expedia, Booking and some insignificant platforms in the online market.<sup>219</sup> So, regarding the hotel portal, these three intermediaries are the one who have distinct market shares in Germany. Each of them has agreements with the hotels including some special clauses regarding the commission rate, the prices and the number of hotels etc. For instance, HRS concluded a contract with the hotels to sell the hotel rooms on its website. According to contract, HRS earns 15% commission per room that it reserved on behalf of the hotels the remuneration was made monthly by them.<sup>220</sup> Beside, MFN clause has been a part of the agreement between HRS and the hoteliers since 2006 which is the main issue of the case.<sup>221</sup>

#### **ii. HRS's MFN Clause**

In 2010, MFN clauses have been issued by HRS to hoteliers as follows: According to pricing strategy of HRS, it required that the hoteliers had to provide the lowest price compared to its competitors and hoteliers should not have set a lower price on their own website. When hotels gave any discount the others, HRS would be also benefited from this discount.<sup>222</sup> Additionally, these opportunities were not only in the context of the price but also in the framework of any opportunity that was provided to other platforms would

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<sup>218</sup> Bundeskartellamt, HRS-Hotel Reservation Service Robert Ragge GmbH, (B9-66/10) 7, para 16 < [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf?\\_\\_blob=publicationFile%26v%3D3](http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf?__blob=publicationFile%26v%3D3) > Accessed 23 August 2016.

<sup>219</sup> *ibid* 9.

<sup>220</sup> *ibid* 8, para 19.

<sup>221</sup> *ibid* 10 point 28.

<sup>222</sup> *ibid* 11 para 4.a.

be equally benefited by HRS.<sup>223</sup> Last but not least, every discount in the price offered to other platforms will be notified to HRS in time.<sup>224</sup> So, no discrimination would be among the others and HRS such as termination of the hotel reservation etc.

However, these contractual clauses were changed in 2012 by HRS and new ones has been enacted between HRS and the hotels. There were only insignificant changes except some points. Firstly, tax fees and other costs would be included in cheapest room price. Additionally, the rise in commission rate from %13 to %15 and a penalty provided by HRS to hotels stating that in the case of violation of MFN clause, the contract between the hotelier and HRS would be terminated for a lasting period or a short time.<sup>225</sup> As it is seen, HRS foresee a kind of penalty for the hoteliers who does not obey MFN clauses' wording. All in all, these contractual clauses have been stood for years until it came to judgment.

### **iii. Legal Assessment**

The first complaint was in January 2010 against the MFN clause by the hotels.<sup>226</sup> Then, HRS was demanded an explanation regarding MFN clause by the Decision Division based on its objection and HRS prepared explanations.<sup>227</sup> Between HRS and Decision Division several states of objections had been sent. Lastly, HRS did not make any further explanation about the SO of Decision Division and in 2013, HRS offered commitment to them for the cancellation of MFC terms for two years. Then, no such a clause will be involved in the agreement but it was not admitted by the Decision Division<sup>228</sup> and ruled in December 2013 that HRS infringed 1GBW /Art.101 of TFEU and Section 20 (1) GWB. It is clear that MFN clause restrict competition under German codes and TFEU.

### **iv. Is HRS genuine an Agent?**

However, before the discussion about the breach of Article 101 and 1GWB, it must be clarified that whether HRS is a genuine agency or not which is a preliminary

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<sup>223</sup> ibid 11 para 4c-d.

<sup>224</sup> ibid 11 para2.

<sup>225</sup> ibid 14-15.

<sup>226</sup> ibid 17 para 53.

<sup>227</sup> ibid 17 para 54.

<sup>228</sup> ibid 62, para 61.

issue about the assessment under Article 101 TFEU. First of all, European Court of Justice stated: “the ban on anti-competitive agreements is to be applied to travel agents which sell tourist services, including hotel rooms.”<sup>229</sup> Accordingly, HRS is not a genuine agent.<sup>230</sup> So, there is no reason not to assess it in competition law due to the fact that HRS carries its own financial risks. For example, it is stated that regarding the general clauses, HRS was able to alter them by itself without asking its hoteliers and HRS also act independently. Addition to this, MFN clause does not have any restrictive element on HRS whereas it has an effect on its hoteliers. Lastly, HRS introduces its own title.<sup>231</sup> Taking into all these points into account, HRS would be assessed under Article 101 TFEU without hesitation according to Bundeskartellamt.

#### **v. The Relevant Market**

Addition to this, one of the most important issue is to assess the market condition before analyzing the case under Article 101(3) and Vertical Block Exemption Regulation. Market definition is problematic in online sales as it is discussed in the previous chapter. Bundeskartellamt examined that the relevant market in HRS case only includes “hotel portals”<sup>232</sup>. According to Bundeskartellamt, the offline and online markets have to be examined separately.<sup>233</sup> Regarding the HRS case, the hotels cannot be considered in the same relevant market because of the fact that they do not provide a variety of hotel rooms from different brands.<sup>234</sup> They only present consumers their own brand hotels. Additionally, online travel agencies are not covered because they provide extra services such as “package tours”, “booking of flights”.<sup>235</sup> Meta search engines and also tour operator portals also do not involve in the same market with hotel portals.<sup>236</sup> The relevant market is only taken as Germany. On the other hand, HRS’ point of view is that relevant market must be Europe-wide and consisting whole brands selling hotel rooms which is inconsistent with the opinion of Bundeskartellamt. Düsseldorf High Regional Court

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<sup>229</sup> *ibid* 54, para 149.

<sup>230</sup> *ibid* 52, para 145.

<sup>231</sup> *ibid* 53.

<sup>232</sup> *ibid* 62, para 176.

<sup>233</sup> *ibid* 26 para 74.

<sup>234</sup> *ibid* 33 para 88.

<sup>235</sup> *ibid* 34 para 93.

<sup>236</sup> *ibid* 35-36.

approved the approach of Bundeskartellamt.<sup>237</sup> To sum up, in the case, the relevant market is assessed as only the “hotel portals”<sup>238</sup> in Germany.

**vi. Is MFN Clause is Exempted from the Scope of Vertical Block Exemption Regulation?**

Under Block Exemption Regulation, since the market share of HRS is not below %30, it cannot benefit from the Article 3 (1) in Vertical Block Exemption Regulation. According to analyze of the market share of the hotel portals, HRS had 30-40% market share in the relevant market in 2012.<sup>239</sup> Additionally, HRS’s MFN is assessed under Article 4 of Vertical Block Exemption Regulation to understand whether it is a hardcore restriction or not. FCO says that the effect of MFN clause is similar to the first paragraph of 4<sup>th</sup> Article. It clearly states that

*“.. the MFN clauses do not set a fixed price level. However, The MFN clauses have the de facto effect of minimum prices, considering the market position of HRS, the system of price monitoring which HRS operates, and the sanctions imposed by HRS in case of breaches of the MFN clauses”<sup>240</sup>*

So, FCO stated that MFN can be assessed similar to the way it is defined in Article 4(a) Vertical Block Exemption regulation. However, FCO also leaves open the situation whether it can be exempted from the scope of hardcore restriction or not.<sup>241</sup>

**vii. Is MFN exempted from the scope of 2(1) GWB and 101(3) TFEU?**

According to Bundeskartellamt, MFN clause does not satisfy the conditions which have been stated under Article 101 (3) TFEU except the last condition which is “namely no possibility of eliminating competition in respect of a substantial part of the product.”<sup>242</sup> Although it is not clearly stated whether it eliminates competition or not<sup>243</sup> since the other three criteria have not been fulfilled under Article 101 (3) TFEU, it can be said that there is even no need to assess it. However, it is clear that HRS’s MFN clause eliminate the

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<sup>237</sup> Bundeskartellamt Booking.com, 9<sup>th</sup> Decision B.V 9-121/13 5, para6 < [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-121-13.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-121-13.pdf?__blob=publicationFile&v=2) > Accessed 23 August 2016.

<sup>238</sup> Bundeskartellamt (n-218) 62, para 176.

<sup>239</sup> Bundeskartellamt (n-218) 66, para 191.

<sup>240</sup> Bundeskartellamt (n-218) 64, para 184.

<sup>241</sup> Bundeskartellamt (n-218) 65, para 187.

<sup>242</sup> Bundeskartellamt (n-218) 69-70, para 197.

<sup>243</sup> Bundeskartellamt (n-218) 70, para 197.

competition due to the fact that other hotel portals such as JustBook or BookitNow are not able to compete with the other existent hotel portals for a long time because of lower prices of HRS to consumers.<sup>244</sup> The most importantly, parties cannot prove the indispensability of the MFN clause in the market.<sup>245</sup> Anyway, since four criteria under Article 101 is not fulfilled cumulatively, there is no exemption from the scope of Article 101(1) TFEU.

To begin with, it is not easy to answer relation to the question of the existence free-riding issue in HRS case.<sup>246</sup> Bundeskartellamt does not mention about its pro-competitive effects of MFN clause but it rather states anti-competitive effect in the market such as “reduction in the investment by hotel portals, the quality of the service and lower quality hotel portals”<sup>247</sup>. Beside it, it is irrelevant that consumers take the advantage of the MFN clause due to the fact that they could make a comparison and contrast between different platforms.<sup>248</sup> Some important points are neglected relating to this point. If there is MFN clause between the hoteliers and online booking sites, the consumer does not have any choice to make a comparison and contrast between the platforms since whole the prices would be close to each other.<sup>249</sup> This situation would lead to a decrease in the quality of the service and also expensive booking prices from the consumers’ perspective. So, under vertical block exemption regulation, it cannot be said that MFN have benefits for the consumer<sup>250</sup>. Taken these points into account, Bundeskartellamt reasoned why HRS’s MFN clause cannot be exempted from the scope of Article 101(3) in this way.

#### **viii. Conclusion**

Bundeskartellamt prohibited HRS setting MFN clause in their contracts with its hoteliers. As it is understood, MFN clause satisfies the criteria stated neither in vertical Block Exemption Regulation nor Article 101(3) TFEU. HRS took an appeal to the Düsseldorf Higher Regional Court which has been dismissed and approved the

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<sup>244</sup> Bundeskartellamt (n-218) 83, para 235.

<sup>245</sup> Margherita Colangelo, ‘Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking’ (2016) *Journal of Competition Law & Practice* 7.

<sup>246</sup> Bundeskartellamt (n-218) 70, para 200.

<sup>247</sup> Bundeskartellamt (n-218) 71, para 201.

<sup>248</sup> Bundeskartellamt (n-218) 7, para 22.

<sup>249</sup> Bundeskartellamt (n-218) 7, para 22.

<sup>250</sup> Bundeskartellamt (n-218) 7, para 22.

Bundeskartellamt's opinion in January 2015. However, Düsseldorf Higher Regional Court did not mention about the impact of the narrow parity clauses.<sup>251</sup> It can be easily said that through the Decision of Bundeskartellamt and Higher Regional Court, two types of MFN has been completely banned in Germany.

#### **b. Investigations to Booking and Expedia**

Booking.com is a US company which provides different variety of accommodation, acts as a middleman over the internet, offers various chances to end-users across the Europe.<sup>252</sup> Concerning the agreement between hotels, hostels, etc. and Booking.com earns commission from the service that it offers to the consumers in its website without any payment obligation on consumers to platform.<sup>253</sup> For years, Booking sets a contractual MFN clause in its agreements with the hoteliers which lead to some restriction on them. Until the 30<sup>th</sup> of June 2015, Booking set wide MFN clauses.<sup>254</sup> Booking imposed on the hoteliers that lower costs and better opportunities would be provided to Booking including the sorts of services.<sup>255</sup> In case of breach of the contractual clause, a penalty would be imposed on the hoteliers.<sup>256</sup> Lastly, the rule was not to recommend a lower price to any other intermediaries whereas the exception is in the case of providing that Booking's prices also would be decreased.<sup>257</sup> However, after June 2015, Booking went through a differentiation about its pricing strategy. Correspondingly, Expedia is one of the leading OTAs which has a high market share in the online booking platforms like Booking. However, Expedia provides rental of cars and also flights compared to Booking.com which also set price parity clauses in its agreements.

#### **i. Approach of the European Countries**

Italy, Sweden, France had initiated an investigation against Booking's MFN clause in 2013.<sup>258</sup> Booking.com offered commitment with a ban on wide MFN clause for five years in April 2015. Correspondingly, Expedia also deleted its wide MFN clause for

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<sup>251</sup> Ezrachi (n-13) 513.

<sup>252</sup> Bundeskartellamt (n-237) B9-121/13 7, para17.

<sup>253</sup> *ibid* 7, para 18.

<sup>254</sup> *ibid* 9, para22.

<sup>255</sup> *ibid* 9, para23.

<sup>256</sup> *ibid* 10, para24.

<sup>257</sup> *ibid* 10-11, para27.

<sup>258</sup> Hviid (n-150) 14, para45.

the same period in June 2015.<sup>259</sup> Booking would not impose wide MFN clause anymore. Instead, it would impose narrow parity clause to hoteliers. According to converted MFN clause, although some parts survived including penalty clause<sup>260</sup>, its MFN clause was comparable only based on the hoteliers' prices after all. However, it seems that Booking still insists on the best parity provisions by reimbursing the difference in price in case of better price offers on any other channels.<sup>261</sup>

In many countries booking's MFN clause was scrutinized by National Antitrust Authorities such as France, Italy, Ireland, Sweden, Poland, Greece, Denmark, Hungary, the Netherlands and Switzerland but after commitments, they have persuaded what Booking offered and the court procedures stopped for the most of them. Additionally, after the commitment Expedia also entirely deleted its MFN clause from its agreements with the hoteliers. However, although commitments different points of views have been declared by the antitrust authorities, some of them thought that MFN clauses must be completely banned whereas the other narrow MFN clause was even found pro – competitive by some of them. These differences between the national antitrust authorities will be discussed.

## **ii. France**

France initiated an investigation in 2013 against online booking intermediaries because of a complaint by hotels especially targeting Booking.com.<sup>262</sup> After Booking asked for a commitment to France and two draft versions have been assessed, France accepted the commitment concerning only narrow MFN clauses due to its reformatory impact on competition and detractional impact on free-riding<sup>263</sup>. However, French Competition Authority did not appreciate with the narrow MFN clauses since narrow MFN clauses were a still barrier for hotels to decrease the prices in their own online channels<sup>264</sup> and started to assess the impacts of MFN clauses. So, France considered

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<sup>259</sup> Hviid (n-150) 14, para 45.

<sup>260</sup> Bundeskartellamt (n-237) 13, para 33.

<sup>261</sup> Bundeskartellamt (n-237) 13, para 33.

<sup>262</sup> Gonzalez-Diaz (n-26) 32, para 4.

<sup>263</sup> Gonzalez-Diaz (n-26) 32, para 5.

<sup>264</sup> Kathie Claret, François- Xavier, 'Most Favored Nation Clauses under the Microscope in France: Act III' (3 November 2015) <<http://eu-competitionlaw.com/most-favored-nation-clauses-under-the-microscope-in-france-act-iii/>> Accessed 23 August 2016.

enacting a stricter code which eliminates all kind of MFN clauses between the hotels and online booking platforms called “Loi Macron Law”<sup>265</sup>. In June 2015, they passed a law on prohibition of MFN clause which also covers a 150.000 Euro penalty imposed by Parliament in the case of breach of the law.<sup>266</sup> So, in France, two type of MFN clauses have been prohibited.

However, there are still some uncertainties regarding some points while assessing MFN clause. French Assembly also tried to elucidate the uncertainty about the relation between the online platforms and the hoteliers. However, there has been no clear understanding yet. It is stated that OTAs are the agency of the hotels in the existence of an agreement which is also called mandate contract<sup>267</sup> but Autorite de Concurrence considers that the concept of it and the agency model do not match correctly.<sup>268</sup> Correspondingly, the relevant market understanding of French Competition Authority is not still clear. All in all, despite left opened questions, MFN clauses are banned in France.

### **iii. Sweden**

In Sweden, before an investigation to Booking platform’s parity clause, in 2013, Expedia’s parity clauses started to be investigated by Swedish Competition Authority whether its MFN clause breached Chapter 2 Section 1 of the Swedish Competition Act and correspondingly Booking’s MFN clause was under the scrutinized in the same period of time. However, before Court ruled, the Antitrust Authority made a commitment with Booking.<sup>269</sup> After the commitment, Expedia also changed its parity clauses compatible with Booking’s clause<sup>270</sup> and Swedish Competition Authority did not need to rule on Expedia’s MFN clause at all.<sup>271</sup> So, Swedish Antitrust Authority assesses wide MFN clauses as a restriction whereas narrow MFN clauses are pro-competitive.

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<sup>265</sup> Bundeskartellamt (n-237) 24, para 71.

<sup>266</sup> Sean O’Neill, ‘French Parliament Kills Rate Parity, and Booking Predicts Hotel Price’ (2015) <https://www.tnooz.com/article/french-parliament-kills-rate-parity-and-booking-predicts-hotel-price-war/#sthash.vt1VpIS0.dpuf> Accessed 23 August 2016.

<sup>267</sup> Claret, Xavier (n-263).

<sup>268</sup> OECD, (n-57) 1, para 68.

<sup>269</sup> Konkurrentverket Swedish Competition Authority Ref 595/2015 (10/05/2015) 1.

< <http://www.konkurrentverket.se/globalassets/konkurrents/beslut/13-0595e.pdf> > Accessed 23 August 2016.

<sup>270</sup> *ibid* 4, para 2.

<sup>271</sup> *ibid* 4, para2.

#### **iv. Italy**

Italy initiated investigation against Booking and Expedia in 2014. After that, Booking wanted to solve this problem through the commitment and the commitment became binding in Italy on 25 April 2015 while the investigation toward Expedia is still pending. Beside the commitment with Booking, there has been no investigation related to MFN clause by Italian Competition Authority (ICA).<sup>272</sup> The approach of MFN clause will be decisive about ICA's approach. Yet, IAA also examines the pro and anti-competitive effects of MFN, and legislative assembly has worked on a draft code about prohibition of MFN clauses recently as it is stated below;

“agree not to offer to final consumers, by means of any methods or instruments, better prices, terms and conditions than those made through third parties, irrespective of the law governing the contract”.<sup>273</sup>

If Senate confirms it, the usage of MFN clause between the intermediaries in the given format would be abolished. Until the precise approach, the assessment of MFN clauses' effect in the market has to be done case by case.<sup>274</sup> After a while, the MFN clauses are also abolished in Italy. Lastly, the authority's market analysis includes only online market hotel booking channels in Italy.<sup>275</sup>

#### **v. Germany**

Near HRS, Booking and Expedia also have MFN clauses in their contracts with its hoteliers. After HRS has been obliged to remove the price parity clauses from its contract with the hoteliers, Booking ignored the decision of FCO and kept the parity clauses in its agreement. Yet, Booking transformed its clause into narrow MFN clause from wide one in July 2015<sup>276</sup> to make a commitment with National Antitrust Authorities in Europe. However, Germany did not accept the offered commitment by Booking. Its

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<sup>272</sup> Osborne Clarke, 'Hotel Rate Parity Clauses- Legal Developments in France and Italy' (7 March 2016) para 4 <<http://www.osborneclarke.com/connected-insights/blog/hotel-rate-parity-clauses-legal-developments-france-and-italy/>> Accessed 23 August 2016.

<sup>273</sup> *ibid* para 12.

<sup>274</sup> OECD, 'Hearing on Across Platform Parity Clauses, Note by Italy' 4, para 13.

<sup>275</sup> Caterina Migani, 'The Italian Competition Authority Launches an Investigation for Alleged Vertical Agreements Entered into with Their Partner Hotels in Violation of Article 101(1) TFEU (Booking.com and Expedia)' (2014) Art. N 67856 e- Competitions Bulletin 2014 2, para 3-4.

<sup>276</sup> Bundeskartellamt (n-237) 4, para 4.

claims are entirely based on the ideas stipulated in HRS case.<sup>277</sup> Bundeskartellamt considers that every contractual type of MFN clause restricts the competition under 1 GWB and Article 101(1) TFEU and it was consistent with its decision that is made for HRS. To conclude, every type of MFN clause is prohibited in Germany.

### **c. Booking, Expedia and IHG**

In 2010, Some OTAs reported to the UK Antitrust Authority that they are not allowed to set lower prices because of the restrictive behaviors of some hotels in the market.<sup>278</sup> In 2012, Office of Fair Trading (OFT) prepared an SO because of Booking, Expedia, Intercontinental Hotels Group Plc's restrictive behaviors on the hotels which affect the hotels' pricing method on the other OTAs.<sup>279</sup> In its statement of objection, OFT alleged that OTAs' behaviors lead to breach of Article 101 TFEU and the UK Competition Act.<sup>280</sup> In January 2014, Commitment was accepted by OFT with Booking and Expedia and IHG about non-coverage of MFN clause in their agreement. Because of the commitments between the parties, the investigation was closed and parties were bound with it for two years.<sup>281</sup>

Additionally, OFT also made some points regarding the MFN clauses 'effects and its assessment. OFT considered that the restriction of hotels' ability to lower their prices leads to RPM which is analyzed anti-competitive and cannot be ignored the MFN's potential anti-competitive nature as well.<sup>282</sup> Additionally, in the commitment, OFT underlined that MFN clauses limits intra-brand competition and also entry foreclosure on the new OTAs to enter into the market.<sup>283</sup> On the other hand, OFT was aware of the

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<sup>277</sup>Bundeskartellamt (n-237) 38, para 125.

<sup>278</sup> OECD, 'Vertical Restraints in Online Sales', 29, para 3 <<http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>> Accessed 21 August 2016.

<sup>279</sup><http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2012/65-12> Accessed 23 August 2016.

<sup>280</sup> Akman (n-34) 15.

<sup>281</sup> Slaughter and May, 'Online Platforms- who can set the price and are most favored nation clauses compatible with competition rules?' (2014) 2 <https://slaughterandmay.com/media/2052292/online-platforms-who-can-set-the-price-and-are-most-favoured-nation-clauses-compatible-with-competition-rules.pdf> Accessed 23 August 2016.

<sup>282</sup> Ibid 1, last para.

<sup>283</sup> 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. 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 commitment. This prevention could

situation that commitment does not help to eliminate the all existent risks between the OTAs and hoteliers.<sup>284</sup> OFT excepted commitment because at least because control mechanism is given to hoteliers rather than the OTAs which can be thought as a pro-competitive side of the commitment.<sup>285</sup>

However, Competition and Markets Authority has revised the commitment decision due to the appeal by Skyscanner which is a 'price comparison' or 'metasearch' website and does not provide any booking service but guide its customer to other booking intermediaries in return of a commission paid by the hotels.<sup>286</sup> Skyscanner alleged that commitment leads to worsening the market situation for the consumer since they are not able to make a comparison and contrast through 'meta-search' sites and also leads to decrease the competition between the competitors in different brands.<sup>287</sup> The CAT did not say that its own assessment and sent it to the CMA to give its own ruling.<sup>288</sup> CMA ended its investigation in 2015 and did not make any decision about the infringement of the competition law but have kept observing the impacts of the commitments which were made by the European countries to come to final decision.<sup>289</sup>

### **3. The UK Motor Insurance Case<sup>290</sup>**

#### **a. Facts**

On September 2014, the Competition and Market Authority(CMA) published a report on the investigation of the private motor insurance companies in the UK.<sup>291</sup> Car

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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. Akman (n-34)15-16.

<sup>284</sup>Diaz, Bennett (n-26) 29, para 6.

<sup>285</sup>Diaz, Bennett (n-26) 29, para 6.

<sup>286</sup> Edwards Wildman Palmer, 'Skyscanner Ltd. v. Competition and Markets Authority' (2014) 14(6) E-commerce Law Reports' 17-18. 17 <[https://www.cooley.com/files/ECLR%20-%20Volume%2014%20Issue%206%20pg%2017-18\\_McGrath\\_Dec%202014.pdf](https://www.cooley.com/files/ECLR%20-%20Volume%2014%20Issue%206%20pg%2017-18_McGrath_Dec%202014.pdf)>Accessed 23 August 2016.

<sup>287</sup> Skyscanner Ltd v. Competition and Markets Authority,1226/2/12/14 102, para41 <[http://www.catribunal.org.uk/files/1226\\_Skyscanner\\_Judgment\\_CAT\\_16\\_260914.pdf](http://www.catribunal.org.uk/files/1226_Skyscanner_Judgment_CAT_16_260914.pdf)> Accessed 23 august 2016.

<sup>288</sup> Van Bael &Bellis, 'VBB on Competition Law' (2014) 2014 (9) Ch. Vertical Agreements 12.

<sup>289</sup> Margherita Colangelo, 'Parity Clauses and Competition Law in Digital Marketplaces: The case of Online Hotel Booking' (2016) Journal of European Competition Law & Practice 6.

<sup>290</sup> Competition and Markets Authority, 'Private Motor Insurance Market Investigation' (Final Report, 24 September, 2014) <[https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final\\_report.pdf](https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf)> Accessed 23 August 2016.

<sup>291</sup> Andrzej Kmiecik, Van Bael &Bellis, UK: CMA Assesses MFN clauses in contracts between Motor Insurance Companies and Price Comparison Websites' (2014) 1, para 1

insurance companies were allowed to sell the insurance contracts through their websites or PCWs.<sup>292</sup> CMA ruled that there was a wide MFN clause between the motor insurance companies and price comparison websites (PCW)<sup>293</sup>. In the contract, it is stipulated that motor insurers cannot sell their policies cheaper on any other platforms including their own websites which is called wide MFN clause. According to the contract between PCWs and motor insurance providers, MFN clause led to anti-competitive conduct in the market and in this report, the two types of MFN clauses are discussed intensely by distinguishing their pro and anti-competitive effects in the market.

Before the assessment of the impact of MFN clauses, there are three issues to be mentioned. CMA assessed relevant market as “the market or markets for the supply or acquisition of Private Motor Investigation and related goods or services in the UK.”<sup>294</sup> In this perspective, the relevant geographic market is the UK. Additionally, the other issue whether there is an agency agreement between the motor insurance policy providers and PCWs. In the final report, it is not directly analyzed whether there is agency agreement or not. However, while assessing the pro-anti competitive effects of retail MFN clauses, they assessed as if they are under the agency model to analyze the current situation. So, it is more likely to understand the UK considers that there is an agency agreement between PCWs and private motor insurance providers.

#### **b. Analyzes of MFN Clause by CMA**

As it is mentioned, CMA distinguished wide and narrow MFN clause and declared that the wide one is problematic compared to narrow MFN.<sup>295</sup> Their effects have been analyzed differently from the perspective of MFN clause by CMA. According to CMA, wide MFN clause leads to more anti-competitive effects whereas the narrow MFN clause

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<<http://www.mondaq.com/x/345548/Antitrust+Competition/CMA+Assesses+MFN+Clauses+In+Contracts+Between+Motor+Insurance+Companies+And+Price+Comparison+Websites>> Accessed 23 August 2016.

<sup>292</sup> Competition Commission, ‘Private Motor Insurance Market Investigation, theory of harms 5: impact of MFN clauses in contracts between PCWs and PMI providers’ 1 para 1

<[https://assets.publishing.service.gov.uk/media/5329dedbe5274a226b000251/130802\\_toh\\_5\\_impact\\_of\\_mfn\\_clauses\\_in\\_contracts\\_between\\_pcws\\_pmi\\_providers.pdf](https://assets.publishing.service.gov.uk/media/5329dedbe5274a226b000251/130802_toh_5_impact_of_mfn_clauses_in_contracts_between_pcws_pmi_providers.pdf)> Accessed 23 August 2016.

<sup>293</sup>OECD ‘Hearing on Across Platform Parity Agreements, Note by United Kingdom’ (2015) 5 para 1. <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2015\)66&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)66&doclanguage=en)> Accessed 23 August 2016.

<sup>294</sup> Final Report (n-290) p1-2, 24, para 1.7.

<sup>295</sup>Hans W. Freiderisick, Ela Glowicka, ‘Competition Policy in modern retail markets’ (2016) 4 Journal of Antitrust Enforcement 42-83 70, para5.

is not that much. In wide MFN clauses, platforms are not able to compete with each other because of the similar prices in the platforms. Additionally, it is found that wide MFN clause has anti-competitive effects such as prevention of new market entrants, increase in the commission paid to PCWs.<sup>296</sup>

On the other hand, despite of the fact that narrow MFN clauses have an anti-competitive impact, they are not as effective as wide MFN clauses in the market.<sup>297</sup> Narrow MFN clauses does not cause a decrease in competition in vertical context and also between the PCWs.<sup>298</sup> However, the impacts of narrow MFN clauses are thought to create efficiency. Thanks to narrow MFN clauses, the consumers can make a comparison and contrast between PCWs and private motor insurance companies websites.<sup>299</sup> Additionally, it motivates customers to use these platforms<sup>300</sup> and increases the trust to PCWs. Besides, it also prevents free-riding whereas there is not such an effect created by wide MFN<sup>301</sup> in the market and raises the inter-brand competition<sup>302</sup>. These effects cannot be seen under wide MFN clauses. So, because of this situation, wide MFN clauses have been banned and stated that except narrow MFN clauses, all type of MFN clauses<sup>303</sup> which causes similar effects in the market is prohibited by CMA.<sup>304</sup> For these reasons, wide MFN clauses are prohibited in the UK in the light of the assessment by CMA.

#### **4. Amazon Marketplace Investigation**

Amazon is the biggest platform doing business online with the highest market share in Germany.<sup>305</sup> Amazon does not only provide companies to sell their own products through the platform but also in return of 10 or 15 percent of its marketing price acting

<sup>296</sup> Final report (n-290) 13, para 59.1.

<sup>297</sup> Final report (n-29) 14, para 60.

<sup>298</sup> 'Summary Record, Annex to the Summary Record of the 124th Meeting of the Competition Committee' (27-28 October 2015) 9, para 1 < [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M\(2015\)2/ANN2&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)2/ANN2&docLanguage=En) > Accessed 23 August 2016.

<sup>299</sup> Final Report (n-290) p8-25 para 8.87.

<sup>300</sup> Final Report (n-290) p8-25 para 8.90.

<sup>301</sup> Final Report (n-290) p8-30, para 8.106.

<sup>302</sup> Final Report (n-290) 8-30, 8.109, para

<sup>303</sup> Final Report (n-290) 12-29 para 12-128(a).

<sup>304</sup> Final Report (n-290) p12-29, para 12-128(b).

<sup>305</sup> OECD (n-24) 4 para 2.

as an intermediary in two-sided platform between the seller and the consumer.<sup>306</sup> Besides, Amazon marketplace imposes on the suppliers that sell their goods through its online shops cannot propose a lower price not only in other online intermediaries but also in their own online stores.<sup>307</sup> Since many merchandisers suffered from the situation, Munich District Court imposed an interim injunction except books sold online and Amazon also sued by the other online intermediaries which are called Hood in Germany.<sup>308</sup>

In Germany, Bundeskartellamt declared that 2.400 merchandisers are affected negatively due to MFN clause imposed by Amazon in 2013. After that, an investigation has initiated by FCO in Germany against the clause. Correspondingly, OFT has also initiated an investigation toward Amazon in 2013 and cooperated with FCO<sup>309</sup> regarding the wide MFN clauses effect in the online market which may lead to the violation of Article 101 due to the anti-competitive effects in the market such as prevention of new entrepreneurs to enter into the market and the increase in the price.<sup>310</sup> During the analyze of MFN clause, OFT and FCO also were cooperated with each other and finally Amazon decided not to cover MFN clause in their agreements as a contractual clause anymore.<sup>311</sup> Eventually, last year, on the 11<sup>th</sup> of July a new investigation has been opened about online e-book sales to analyze the contractual clauses between Amazon and publishers.<sup>312</sup> However, there has been no decision so far.

## VI. OUTCOME

Across the Europe, there is no uniform way of understanding MFN clauses. Although the most countries in Europe accepted commitments, they are even prepared to enact a law to prohibit both types of MFN clauses such as Italy and France. The most stringent antitrust authority is Germany. From the beginning of the discussion, it is against to MFN clause in online platforms since the anti-competitive effects of MFN clauses prevail pro-competitive effects. However, it can be stated that the commitments do not

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<sup>306</sup> Zimmer, Blaschzok (n- 14) 8, para 2.

<sup>307</sup> Amazon Abandons Price Parity Clauses Following Investigations (Competition News Letter, September 2013)< [https://www.ashurst.com/publication-item.aspx?id\\_Content=9545](https://www.ashurst.com/publication-item.aspx?id_Content=9545) > 23 August 2015.

<sup>308</sup> Wismer (n-56) 43.

<sup>309</sup> Diaz, Bennett (n-26) 32, para 7.

<sup>310</sup> Diaz, Bennett (n-26) 32, para 8.

<sup>311</sup> Diaz, Bennett (n-26) 33 para 10.

<sup>312</sup> OECD (n-57) 4, para15.

solve the problem precisely, it has just a solution for a period of time between the platforms and the national competition authorities. So, European Commission's point of view gains importance so much regarding the issue to come to a common point between the competition authorities.

Additionally, the definition of online markets, agency agreement, resemblance to RPMs are the other problematic areas which have been not precisely analyzed and not known by the national competition authorities as well. These points are also vital to examine the MFN clauses in a correct way. Additionally, the understanding of the relevant market and geographic market are critical issues because it will also affect the way of analyzing of the market share in the particular area. For example, Booking.com offers same contractual clauses in Europe but European countries ignores them and territorially interprets.<sup>313</sup> Furthermore, due to the lack of any guideline and no emphasize on MFN clauses in any other regulation or guideline, many controversies exist in the countries and among the scholars as well. According to Gürkaynak, because of the uncertainties mentioned above, it is necessary to prepare a Guideline on MFN clauses.<sup>314</sup>

However, in the US, the approach of the court toward MFN in e-book case and Online Travel Agency are very interesting due to the traditional approach to vertical restraints under Sherman Act Section 1. Compared to EU, the court's assessment is not mainly focus on MFN clauses. It concentrated on the way that MFN's role in the conspiracy (horizontal effects). So, in the US, in online platforms, it is not known whether it is per se prohibited or not as well. Although the assessment of MFN clause is examined under the rule of reason and DOJ has a complaint about MFN so much recently, they haven't successfully ruled under per se in offline markets. However, when RPM is taken into account and it is known that the rule of reason binds the assessment of RPM and other price restraints. If MFN is ruled as per se, it will be very interesting and it might be considered as a new shift regarding the vertical price restraints in the US. Additionally, the approach of the US is more lenient toward online markets compared to EU. Besides, European Commission also investigated e-book case like the US and they have common approaches to the same problem. Like the US, European Commission also did not

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<sup>313</sup> OECD, (n-24) 9, point 32.

<sup>314</sup> Gürkaynak, Güner, Diniz, Filson (n-32)

examine the effects of MFN clauses in the market. In Europe, the stringent understanding of MFN can be understandable due to the approach the price restraints in the vertical context. If it is assessed as a restriction by object, I do not think that it surprises scholars and the national competition authorities as well.

As it is seen, not only in Europe but also in the US, the assessment of MFN clauses in online platforms is very controversial. So, for the evaluation of it, many points have to be taken into consideration to make a correct analyze of MFN. According to Colangelo “these cases should be examined on a case-by-case basis and that a generalized approach and regulatory interventions which may stifle innovation in digital markets, which are fast-moving by nature should be avoided.”<sup>315</sup> Akman also supports the idea of the case by case analysis.<sup>316</sup> Kjolbye, Aresu and Stephanou agree with what the scholars say and add that if MFN clauses are assessed as having restriction by object, it means that pro-competitive impacts of them will be passed over.<sup>317</sup> So, the scholars’ point of views are more or like similar about the restriction of MFN clauses.

To sum up, it is not known whether MFN clauses in online platforms (retail MFN, price parity clauses) are analyzed as a restriction by object or effect. So, for the assessment of it, many points have to be taken into consideration to make a correct analyze of MFN. European Commission launched an investigation to Amazon on 11 June 2015. In Europe, it might be decisive to make a uniform approach. So, European Commission may make a statement about the effects of MFN clauses and give more considerable perspective. Correspondingly, in the US, it is also the subject matter of curiosity although its analyze is a bit different compared to EU. All in all, in online markets, the controversy in MFN clauses in online platforms needs to be solved as soon as possible by the competition authorities.

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<sup>315</sup> Colangelo, Zencovich (n-10) 12.

<sup>316</sup> 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. 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. Akman (n-34) 13.

<sup>317</sup> Kjolbye, Aresu, Stephanou (n-5) 10.

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