



## A LEGAL ASSESSMENT OF RETAIL MFN CLAUSES\*

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### *ABSTRACT*

Retail online platforms such as Amazon, E-bay, and Booking.com have become increasingly relevant in today's world economy and trade. Their emergence and development have had inherent repercussions in the legal arena, particularly in the competition area. Indeed, the rise of Platforms has been accompanied with an increase in the use of retail most favoured nation agreements (Retail-MFN); which has, in turn, unfolded a debate on

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the impact that these clauses can have on the market. This paper analyses such debate, and argues that, under the European Union competition Law, Retail-MFN should be considered as an object restriction to competition; albeit recognizing that said clauses can also bring efficiencies to the market that need to be protected in the light of the exception of article 101(3) TFEU.

**Key words:** *E-commerce; retail-MFN; European Union competition Law.*

## ***UNA EVALUACIÓN LEGAL DE LAS CLÁUSULAS NMF MINORISTAS***

### RESUMEN

Las plataformas minoristas en línea como *Amazon, E-bay y Booking.com*, se han vuelto cada vez más relevantes en la economía y el comercio mundiales. Su surgimiento y desarrollo han tenido repercusiones inherentes en el ámbito legal, particularmente en el área de competencia. De hecho, el aumento de las Plataformas ha ido acompañado del aumento en el uso de acuerdos de nación más favorecida (*Retail-MFN*); lo que a su vez ha desencadenado un debate sobre el impacto que estas cláusulas pueden tener en el mercado. Este documento analiza dicho debate y argumenta que, en virtud de la Ley de competencia de la Unión Europea, el Comercio minorista-NMF debe considerarse una restricción objetiva a la competencia; si bien reconoce que dichas cláusulas también pueden generar eficiencias en el mercado que deben ser protegidas a la luz de la excepción del Artículo 101 (3) del TFUE.

**Palabras clave:** Comercio electrónico; Clausulas de la Nación más favorecida; Derecho de la competencia de la Unión Europea.

## INTRODUCTION

E-commerce has changed the competitive landscape of virtually all industries in the world. In fact, it is estimated that currently Amazon offers 30 times the number of items “sold by Walmart, the world’s biggest traditional retailer”<sup>1</sup> while more than 20% of all hotel reservations in Europe was generated through online platforms (Platforms)<sup>2</sup>. Overall, in the European Union (EU) online retail sales rocketed from 5 Billion Euros in the early 2000s to more than 200 Billion by 2014<sup>3</sup>, and the global “e-commerce market” is now worth around 1.3 Trillion Euros<sup>4</sup> and keeps even growing. Underneath this fast-growing business model, the proliferation of most favoured nation agreements (Retail-MFN)<sup>5</sup> has been raising concerns among Competition Authorities (CAs) all around the world. Indeed, in the EU no least than 14 authorities<sup>6</sup> have initiated large-scale investigations against Platforms like

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- 1 The Economist.(2014). How far can Amazon go? <http://www.economist.com/news/leaders/21604550-it-has-upended-industries-and-changed-way-world-shops-it-should-beware-abusing>
  - 2 European trade association of hotels,(2016). 2016 HOTREC hotel distribution study. <http://www.horesca.lu/uploads/files/d-0616-196-dm->
  - 3 Kramler, T.(2016). E-commerce and EU competition law. ABA 64th Antitrust Law Spring Meeting, Power Point Presentation. Washington.
  - 4 Op. Cit., The Economist.(2014).
  - 5 Retail-MFN means the agreements by which suppliers oblige Platforms to refrain from offering their products or services at a lower price through their own website or competing Platforms. Contrary to what occurs in wholesale MFN agreements (where distributors buy products to resell them independently at any price, see. OFT Report 1438 “Can ‘Fair’ Prices Be Unfair: A Review of Price Relationship Agreements”), Retail-MFN’s main characteristic is that the Platforms act as a channel to match suppliers and consumers, and Supplier set the final price while paying the Platform “for its services”. See: Fletcher, A., & Hviid, M. (2014). Retail Price MFNs: Are they RPM ‘at its worst’? *ESRC Centre for Competition Policy*. P.7.
  - 6 Akman, P. A.(2015). Competition Law Assessment of Platform Most-Favoured-Customer Clauses (Vols. CCP Working Paper 15-12). Leeds: University of Leeds.P.2.

iBookstore, Amazon, Booking.com and Expedia to assess the legality of this kind of contractual arrangements.

The aim of those investigations has been to shed light on the real nature and effects on the market of Retail-MFN, which, on one hand, can serve the instrumental function<sup>7</sup> of protecting the investment and innovation of Platforms, while on the other, can soften competition, raise barriers to entry and harm consumers<sup>8</sup>. Yet, there is no consensus on what should be the legal treatment of Retail-MFN in the light of EU competition law<sup>9</sup>.

Thus, fundamental questions like should Retail-MFN be treated as an object or effect restriction in the light of article 101(1) TFEU?<sup>10</sup>; should Retail-MFN be treated in the same way as similar vertical agreements like Resale Price Maintenance (RPM)?; to what extent Retail-MFN should benefit from the article of 101(3) TFEU? Remain unsettled and have become highly debated topics amongst competition law commentators and economists nowadays.

This essay aims to participate in the current debate by presenting the author's views regarding the nature and legality of Retail-MFN's. Specifically; it is argued that Retail-MFN should be consider as an object restriction to competition in the terms of article 101(1). Notwithstanding, it also states the salience of balancing the proposed stance towards Retail-MFN by applying the exception of article 101(3) in cases where such obligations are truly necessary to protect the investments of and innovation by Platforms.

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7 Ezrachi, A.(2015). The Competitive Effects of Parity Clauses on Online Commerce. *OECD HEARING ON ACROSS PLATFORM PARITY AGREEMENTS*.P.17.

8 Op.Cit. Fletcher, A., & Hviid, M.(2014).P.7

9 In fact, the vast majority of those investigations were prematurely closed due to commitments or voluntary withdrawal of the MFN clauses by the investigated parties.

10 This essay focuses on the analysis of Retail-MFN as potential anticompetitive agreements. The analysis in the light of article 102 TFEU falls outside the scope of this study.

For such purposes, this essay is divided into 4 chapters: the first chapter explains the legal test defined by the latest case-law in order to assess when an agreement is considered a restriction by object; the second chapter argues that Retail-MFN should be considered an object restriction to competition; the third chapter explains why the categorization of Retail-MFN as a restriction by object should be balanced with measures to make feasible the exception of article 101(3) for Retail-MFN cases. Finally, the fourth chapter presents the conclusions.

## I. RESTRICTIONS BY OBJECT

Article 101(1) condemns as “*incompatible with the common market*” the agreements that “*have as their object or effect the prevention, restriction or distortion of competition*”. Because object and effect are alternative categories<sup>11</sup>, “if an agreement is anticompetitive by object, there is no need to prove that it has restrictive effects”<sup>12</sup>.

According to the European Court of Justice, the object category should be interpreted restrictively<sup>13</sup>. This means that the mere potentiality of an agreement to prevent, restrict or distort competition is not enough<sup>14</sup> to demonstrate that it has the purpose of doing so. In opposition, the concept of restriction, prevention or distortion to competition by object is reserved exclusively to those agreements that, taking into account their “*legal and economic context*”<sup>15</sup>, reveal in themselves “a sufficient degree of harm to

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11 C-56/65 Société Technique Minière V MaschinenbauUlm[1966].P249.

12 Nazzini, R., & Nikpay, A.(2015). Object Restrictions and Two-sided Markets in EU Competition Law after Cartes Bancaires. *Competition Policy International*.P.1.

13 Case C-67/13 P, Groupement des cartes bancaires ECLI:EU:C:2014:2204.Para.58.

14 Lamadrid, A., & Ibáñez, P.(2014). 10 Comments on the ECJ’s Judgment in Case C-67/13 P, Groupement des Cartes Bancaires. *Chillin’ Competition*.

15 Op.Cit. C-67/13 P, Groupement des cartes bancaires.

competition”<sup>16</sup>. Agreements that do not reveal such level of damage, should be treated as restrictive by effect, and therefore the plaintiff or the CA bears the burden of demonstrating that such agreements are likely to bring realistic anticompetitive effects in the relevant market<sup>17</sup>.

Defining if an agreement reveals “*sufficient degree of harm*” requires a two-step test<sup>18</sup>: Firstly, the “*obvious restriction test*”<sup>19</sup> according to which the agreement must be “*by its nature a restriction of competition*”<sup>20</sup>. Secondly, the sufficiency test, in which it is necessary to verify whether the restriction to competition poses a grave enough risk to hinder competition in the market<sup>21</sup>. The obviousness part of the test is conducted by examining previous experiences, the relevant case law and the content of the agreement, including its wording, and objectives. In addition, CAs and Courts could also consider the parties’ intention<sup>22</sup> with the purpose of understanding the nature and scope of the agreement<sup>23</sup>.

As for the sufficiency step, it is necessary to verify whether the restriction, distortion or prevention to competition created by the relevant agreement poses a risk, which is so serious that examining its particular impact is not necessary<sup>24</sup>. Importantly, such “sufficient degree of harm” should reveal from the agreement itself without the need of conducting any verification of market power, price increases, or consumer deprivation. Indeed, those

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16 Op.Cit. Nazzini, R., & Nikpay, A.(2015).P.8

17 Op.Cit. C-56/65 Société Technique Minière v Maschinenbau Ulm

18 Op.Cit. Nazzini, R., & Nikpay, A.(2015).P.8-15.

19 Ibid.

20 Ibid.

21 Ibid.

22 Op.Cit. C-67/13 P, Groupement des cartes bancaires.Para.55.

23 Ibid.

24 Ibid.

corroborations should only take place whenever the analysed agreement is a restriction by effect<sup>25</sup>.

Lastly, legitimate reasons or justifications for the restriction are irrelevant for determining whether an agreement is anticompetitive by object or not<sup>26</sup>. In fact, those justifications are only important for assessing the compliance of the conditions established in article 101(3)<sup>27</sup>. Thus, an agreement that complies with the aforementioned two-step criteria must be considered restrictive by object, regardless of the reasons or justifications that the parties had when entering into the agreement.

In sum, according to the relevant case-law<sup>28</sup>, the object test only requires determining whether, in its context, the agreement is an obvious restriction to competition that is grave enough to be judged as incompatible with article 101(1); without the need of conducting any further verification in the market.

Notwithstanding, despite the recent developments on this matter, it is not difficult to see that the legal test for defining if an agreement is anticompetitive by object is still ambiguous and subject to interpretation, especially in cases where there is limited case-law and economic literature available, as it happens with Retail-MFN's. In those situations, it becomes more difficult to determine whether the harm to competition is sufficient or not. Moreover, it is unclear the extent and deepness with which the factual, legal, and economic context need to be analysed<sup>29</sup> without crossing the line of examining the actual effects on the market.

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25 Wish, R., & Bailey, D.(2015). *Competition Law* (Vol. 8). Oxford: Oxford University Press.P121.

26 King, S.(2015). *Agreements that restrict competition by object under Article 101(1)TFEU*. The London School of Economics and Political Science.P.63.

27 Op.Cit. Nazzini, R., & Nikpay, A.(2015).P.8-15.

28 See also, C-345/14 SIA Maxima Latvija v Konkurences padome.

29 Op.Cit.Lamadrid, A., &Ibáñez, P.(2014).

Such difficulty enhances the importance and the urgency of engaging in the discussion on whether Retail-MFN should be treated as a restriction by object, in order to bring legal certainty to the online retail markets. Currently, Platforms and their suppliers (Suppliers) bear the burden and immense risk of guessing whether the Retail-MFN in their contracts are contrary to article 101, given that neither the CAs nor the academia have provided a consistent framework of analysis. In the following Chapters, this essay aims to provide legal guidance on what should be the legal treatment of Retail-MFNs.

## II. RETAIL-MFN AS AN OBJECT RESTRICTION TO COMPETITION

Although the literature regarding the legal treatment of Retail-MFN is still scarce, most commentators<sup>30</sup> and CAs<sup>31</sup>, seem to be inclined to think that Retail-MFN are not an object restriction to competition. Some acknowledge this premise expressly, and some others suggest it by affirming that the effects of Retail-MFN are context-dependent and that to determine whether such clauses are “damaging or beneficial”<sup>32</sup> it is necessary to analyse, *inter alia*, the parties market power, the barriers to entry to the market, and the market transparency; a verification that is certainly solely required, and possible, in the field of an effects-based investigation.

Other scholars have acknowledged that there are two kinds of Retail-MFN. Firstly, Wide Retail-MFN, namely, those clauses by which Suppliers promise that their products will not be sold at a lower price elsewhere<sup>33</sup>. Secondly, Narrow Retail-MFN by which

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30 See for instance: Gonzales-Diaz, F., & Bennett, M.(2015). The Law and economics of most-favored nation clauses. SYMPOSIUM: PARITY CLAUSES. And Op.Cit. Akman, P. A.(2015).

31 Sweden Italy and France. This statement will be explained later in this essay.

32 Op.Cit. Gonzales-Diaz, F., & Bennett, M.(2015).P.42.

33 Op.cit. Fletcher, A., & Hviid, M.(2014).Note.15



the Suppliers are only obliged to refrain from offering a lower price through their own website<sup>34</sup>. Such differentiation is important, because in the opinion of some academics, regardless of what the legal treatment of Wide Retail-MFN is, at least Narrow Retail-MFN cannot be considered an object restriction to competition<sup>35</sup>.

Contrarily, this essay argues that the purpose, objectives, and nature of both Wide and Narrow Retail-MFN are restriction of competition by object. For such purpose, this chapter explores the findings of the relevant economic literature (first section), reviews the findings of the CAs investigations in the EU (second section), and uses those findings to support the conclusion that Retail-MFN reveal “in itself a sufficient degree of harm to competition” (third section).

## 1. WHAT DO WE KNOW FROM THE ECONOMIC LITERATURE?

The economic study of Retail-MFN is still at an embryonic stage<sup>36</sup>. Yet, economists have produced some valuable contributions that can be used to understand the nature and effects of Retail-MFN. Those findings are analysed below.

### *a. Retail-MFN softens competition*

Usually, Platforms generate their income by charging commissions per sale<sup>37</sup>. Therefore, the economic theory suggests that, in a contested market, Platforms will have the incentive of reducing their commission rate in order to gain market share<sup>38</sup> and, in turn,

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34 Ibid.

35 See Op.Cit. Ezrachi, A.(2015).Note.91.

36 Hviid, M.(2015). Hearing on across platform parity agreements. *OECD*.P.43.

37 Op.Cit.Ezrachi, A.(2015).

38 Op.Cit.Hviid, M. (2015).P.43.

Suppliers (i.e. hotels, book publishers etc.) would be motivated to attract consumers to low-commission Platforms by offering lower retail prices than the ones presented in other more expensive distribution channels<sup>39</sup>. Conversely, if Platform charges high commissions, Suppliers will set higher retail prices for that specific Platform, thus making it less attractive to end-consumers<sup>40</sup>. This situation should lead to a vigorous competition among Platforms, lower commission rates charged to Suppliers and, presumably, better retail prices for end-users.

The core concern that Retail-MFN is generating among economists is that, if Suppliers do not have the freedom to set higher retail prices in those Platforms that charge them high commission rates, Platforms will be able to raise their commission fees knowing that Suppliers would not react<sup>41</sup> by setting a comparative higher retail price in such Platform, because it would breach the Retail-MFN clause. Thus, under this stance, it could be expected that in “fairly general conditions<sup>42</sup>” Retail-MFN would raise commission prices above the competitive level<sup>43</sup>. Indeed, the CA of France observed this effect in the hotel online booking market. According to such authority, Retail-MFN has given Platforms the ability to set high Commissions “(10 to 30% of the retail price including VAT for reserved stays), thus ensuring them high levels of profitability, in a context of a significant increase in the number of bookings”<sup>44</sup>.

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39 France/OECD.(2015). Note by France. *Organisation for Economic Co-operation and Development*.P.5.

40 Op.Cit. Fletcher, A., & Hviid, M.(2014).P.5-7.

41 Ibid.

42 Ibid.

43 Ibid.P.11.

44 Op.Cit.France/OECD.(2015).P.6.

In turn, the Suppliers will have the incentive of transferring the commission extra-cost to the consumers by charging them higher retail prices in order to maintain their profits. Hence, by virtue of the Retail-MFN, Suppliers would be forced to increase the retail price in all other selling channels to the extent that price competition for the products of the same supplier would be eliminated, leading to the setting of homogeneous supra-competitive prices offered to the end-consumer<sup>45</sup>.

This is better explaining with a hypothetical situation:

- Supplier-A has a Retail-MFN obligation with Platform-B;
- Supplier-A is offering its products at 110 in Platform-B (Platform-B's commission is 10);
- Platform-B decides to raise its commission from 10 to 20;
- In order to maintain its margins, Supplier-A will have to raise the price offered in Platform-B from 110 to 120;
- Nevertheless due to the Retail-MFN obligation Supplier-A wants to raise the price in Platform-B, it will be forced to raise the price in all the other Platforms;
- Consequently, Platform-A can raise its commission fees without bearing the consequences, and Supplier-A will tend to set a uniform price of 120 across all Platforms.

*b. Retail-MFN raises barriers to entry and expansion*

*The aforementioned situation would also raise the barriers to entry and expansion in the market for those undertakings willing to compete with prices. In a competitive situation, if the incumbent Platforms decide to charge high commissions, potential competitors would have the incentive to enter the market by offering a lower commission rate that would attract Suppliers. In turn, Suppliers would be able to offer lower retail prices through this entrant Plat-*

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45 Op.Cit.Fletcher, A., & Hviid, M.(2014). P.5-7.

*form. Yet, if Retail-MFN exists in the market, Suppliers would be unable to offer a better price through this cheaper Platform, which means that lower commission-rates would not result in better retail prices, thus killing all incentives to offer a lower commission*<sup>46</sup>.

Also, on the Supplier side, the capacity of actual or potential competitors to offer better prices to the public would be undermined by the impact that the high commission rates have on Suppliers' margins. The higher the commission, the more difficult for Suppliers to offer low prices to consumers. Consequently, Retail-MFN has the potential effect of pushing up the retail prices of the whole market<sup>47</sup>.

Thus, at both the Platform and Supplier level, potential or actual competitors with low-end business models would be prevented from winning customers from the incumbent Platforms by cutting down their "margin and offering lower prices"<sup>48</sup>. Moreover, even if entry occurs, Retail-MFN could have "the effect of distorting the entrant's choice of business model towards a model more similar to that of the incumbent"<sup>49</sup>, meaning that price competition would be naturally limited.

This anticompetitive situation was verified by the German CA, which considered that Retail-MFN gave Booking.com the capacity of undermining price competition in the market to the extent that, notwithstanding it was increasing its commission rate from 13% to 15%, it kept gaining market share in the German online hotel booking market<sup>50</sup>, evidencing the lack of power of potential competitors to react to high commission rates.

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46 Op.Cit.France/OECD.(2015).P.6-8.

47 Op.Cit.Fletcher, A., & Hviid, M.(2014).P.9.

48 Ibid.P.9

49 Boik, A., & Corts, K. S.(2013). The Effects of Platform MFNs on Competition and Entry. University of Toronto.P.19

50 Germany/OECD.(2015). Note by France. *Organisation for Economic Co-operation and Development*.P.6.

The United Kingdom CA also found evidence of this situation in the Private Motor Insurance (PMI) market offered through Price Comparison Websites (PWC), another way to refer to Platforms. According to their analysis:

*“Wide MFN’s also reduce the incentives for incumbents and entrants to innovate. PCWs could innovate in ways which lower the costs of business for a PMI provider selling through their PCW, eg by offering better fraud detection measures. Without wide MFN constraints, such innovation would lead to the PMI provider offering lower premiums through that PCW, reflecting the cost savings to the provider of the PCW’s innovation. However, if the PMI provider cannot offer policies cheaper to innovative PCWs because of wide MFN clauses with other PCWs, this would reduce the incentive for the PCW to innovate, as it would not receive any advantage over its competitors. (...) Retail consumers would have no price inducement to use the better technology”<sup>51</sup>.*

*c. Retail-MFN can facilitate collusion*

Retail-MFN can also facilitate collusion inasmuch it increases the price transparency and predictability in the market. This risk was verified in the e-books investigation where different CAs, both in EU and in the US, found that Retail-MFN was consciously used by Apple and 5 major e-book publishers for the purposes of orchestrating “a conspiracy”<sup>52</sup> in order to fix the prices of the e-books. This case will be analysed in more depth in the next section of this chapter.

*d. Even Narrow Retail-MFN can distort competition*

All the above-mentioned effects are explained in the terms of a Wide Retail-MFN. However, it is also important to evaluate the

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51 [https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final\\_report.pdf](https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf)

52 Op.Cit. Ezrachi, A.(2015).P.17.

effects of Narrow Retail-MFN. It could be argued that, competition would only be constrained in the case of a Wide Retail-MFN because, in case of a Narrow Retail-MFN, the Platforms would still have to face the risk of Suppliers offering products at a cheaper price through those Platforms that are not covered by the clause<sup>53</sup>. Indeed, the CAs of France, Italy, and Sweden closed their online booking investigations after accepting the same remedy package by which the investigated parties agreed on eliminating the Wide Retail-MFN clauses, while being allowed to maintain Narrow Retail-MFN obligations in their contracts<sup>54</sup>.

Nevertheless, although it seems undisputable that Wide Retail-MFN's pose a higher risk to competition than Narrow Retail-MFN's; arguing that the latter are harmless is unconvincing. The mere ability of Platforms to restrict Suppliers' ability to offer lower prices through their own website has the potentiality to significantly affect competition. Deirdre Trapp explains this point by referring to the following hypothetical scenario<sup>55</sup>:

- *Platform 1 has an 'own website' narrow MFN with manufacturer, M;*
- *M displays a price on Platform 1 of £120 (£20 is Platform 1's commission);*
- *Due to the 'own website' narrow MFN, M cannot offer a price on its website which is cheaper than £120 (despite in principle being able to offer a price of £100);*
- *If Platform 2 asks for a commission of £10, M will only display a price of £110 on Platform 2 if M is willing to undercut its own website;*

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53 Op.cit. Germany /OECD.(2015).P.9.

54 Italy/OECD.(2015). Note by Italy. *Organisation for Economic Co-operation and Development*.

55 Trapp. D.(2016). E-commerce and EU competition law. American Bar Association 64th Antitrust Law Spring Meeting, Oral Presentation . Washington.

- *If it is undesirable for M to undercut its own website, M will not display a price lower than £120 on any other channel*
- *M's website is 'frozen' to parity with the price offered on the most expensive Platform with which it has a narrow MFN.*
- *'Narrow' MFN = potentially wide effects, (...)*

Following a similar analysis, the German CA disagreed with the position of France, Italy, and Sweden's CA's, and ascertained that the economic evidence demonstrates that Narrow Retail-MFN's have anticompetitive effects on the market because "*hotels may not be willing to always be at least as expensive as the most expensive*"<sup>56</sup> Platform, or to punish a Platform that increases its commission since they are usually "*unavoidable trading partners*"<sup>57</sup> and have the power "*to disadvantage hotels that offer them worse conditions by lowering their ranking or excluding them from preferred-partner programs*"<sup>58</sup>. Hence, even Narrow Retail-MFN has the potentiality to distort competition.

*e. The effects of Retail-MFN are independent of the Platform's market share*

Another relevant finding of the economic studies is that, although Retail-MFN included by Platforms with high market power would be more dangerous than ones executed by Platforms with low power, as usually happens with all anticompetitive agreements, the negative effects on the market are not "*necessarily linked to the market power of the*"<sup>59</sup> Platforms. In fact, even a Platform with a small market-share, which applies a Retail-MFN

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56 Op.Cit.,Germany/OECD.(2015).P.9.

57 Ibid.

58 Ibid.

59 Op.Cit. France /OECD.(2015).P.8.

to a substantial share of its Suppliers, ensures “that all competing platforms, and even all distribution channels, will display higher prices for a significant proportion of Suppliers present on these platforms”<sup>60</sup>. Thus such competing Platforms would have no incentive to reduce the commission fee. Furthermore, they would be inclined to also impose Retail-MFN in order to ensure that their retail prices are not higher than those displayed in competing Platforms are. Therefore, Retail-MFN’s create a set of incentives, which scope “extends beyond the market share of the platform that imposes it”<sup>61</sup>.

*f. Bargaining position*

It is necessary to acknowledge that the risk of softening competition of Retail-MFN has been studied in cases where the Suppliers have a strong negotiating position (i.e. Amazon, Booking.com, Expedia, etc.). However, even the most critic commentators recognize that the situation could be different in cases where “bargaining power is more evenly distributed between” Suppliers and Platforms<sup>62</sup>. It is also important to assess, on each case, whether Suppliers have the reasonable possibility of leaving the Platform when the requested commission fees are high<sup>63</sup>.

Nevertheless, in the e-commerce context, Platforms usually have a dominant negotiation position with respect to Suppliers, “since they deliver the much-needed customer access”<sup>64</sup>. In general, terms, Retail-MFNs are usually imposed by Platforms as

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60 Ibid.

61 Ibid.

62 Op.Cit. Fletcher, A., & Hviid, M.(2014).P.11.

63 Op.Cit. France /OECD.(2015).P.

64 Op.Cit.Fletcher, A., & Hviid, M.(2014).P.12



*“a ‘take it or leave it’ offer, and Suppliers may sign-up to them to gain the benefit of dealing with the retail platform”<sup>65</sup>.*

*g. Retail-MFN has similar effects than RPM*

Given that the economic literature on Retail-MFN is still embryonic, Fletcher and Hviid suggest constructing the economic theory of this kind of relationships by highlighting the linkages between Retail-MFN and RPM. These authors present a set of compelling arguments to prove that Retail-MFN and RPM have similar effects on the market and that, therefore, both kind of agreements should raise the same concerns<sup>66</sup>.

RPM refers to a vertical contractual relationship by which the supplier imposes a minimum price at which the wholesaler or distributor is allowed to sell the products to end-users. In the EU, RPM is considered as an object and a hard-core restriction to competition. The underlining reason for such belligerent treatment to RPM<sup>67</sup>, comes from the belief that this kind of agreements poses the following risks to competition: “a) facilitate collusion downstream; b) restrict entry or expansion downstream; c) soften competition downstream; d) facilitate collusion upstream; e) restrict entry or expansion upstream; f) protect monopoly rents upstream; g) soften or eliminate competition both upstream and downstream”<sup>68</sup>. According to the economic literature, those anti-

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65 Ibid.P.8.

66 Ibid.

67 Such harsh treatment of RPM by the EU Competition Law has become contested among commentators and CAs after the US Supreme Court decided to adopt a more permissive approach in the US. Whether the EU competition policy towards RPM is adequate or should be more tolerant falls outside the scope of this essay. However is herein argued that RPM and Retail-MFN should be treated in the same way due to the likeness of their effects.

68 Ibid.P.9.

competitive effects are the consequence of two linked but distinguishable elements of RPM: a vertical element where Suppliers set final retail prices, and a horizontal dimension, “*whereby the upstream firm sets identical retail prices across all downstream intermediaries/retailers*”<sup>69</sup>.

Retail-MFN entails a combination of the same elements: as for the vertical element it is clear that Retail-MFN “*can only work if suppliers set prices, rather than the platform or retailer*”<sup>70</sup>, and if seen from the bottom up, Retail-MFN is a sort of reversed RPM since the Platform sets a minimum price to the Supplier. As for the horizontal element, it is important to note that the main effect of Retail-MFN, and its sole purpose, is to have identical or at least a minimum price in the different Platforms. In fact, it is especially illustrative that the OECD refers to Retail-MFN as ‘Across Platform Parity Agreements’, which is a name that captures perfectly the horizontal dimension of this kind of agreements.

Therefore, given that RPM has the same effects and characteristics of Retail-MFN, it can be reasonably expected that the latter would have “*similar anti-competitive effects and also similar efficiency benefits*”<sup>71</sup> on the market. Hence, for public policy purposes, Retail-MFN should be treated in the same way as RPM’s.

#### *h. Retail-MFNs efficiencies*

Now, regardless of all the risks that Retail-MFN entail to competition, the economic literature has also recognized that the existence of Platforms in the market is normally regarded as positive and pro-competitive, since they improve the flow of information by aggregating the relevant data of Suppliers; make such infor-

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69 Ibid.P.5.

70 Ibid.

71 Ibid.P.31

mation available to consumers, therefore, reducing searching costs; reduce switching costs by empowering consumers; bring security to online transactions; promote innovation; and finally, help Suppliers to enter or expand in the market by reducing advertising costs, among others<sup>72</sup>.

In order to operate, Platforms may have to constantly invest and innovate as to provide state of the art advertising services for Suppliers and better-designed search facilities for consumers with the purpose of increasing the volume of visits and transactions conducted through their website<sup>73</sup>. Amazon, for instance, has earned its place in the world by making clear to the market and especially to its shareholders that “*given a choice between making a profit and investing in new areas, it will always choose the latter*”<sup>74</sup>.

Sometimes these investments are supplier-specific, including, *inter alia*, special distribution channels and training of employees in order to better promote one of the Supplier’s brands. The rationale behind these investments is that, by promoting the Supplier’s brands, Platforms attract more customers, increase their sales volume and gain more commissions<sup>75</sup>.

The problem arises when Suppliers use a Platform to advertise their products or services but bypass such Platform by selling the advertised-products directly to the final consumers or through another Platform. They do this by letting the Platform advertise their products at the same time they offer consumers better prices if they make the sale directly on the Supplier’s website.

The same difficulty encountered in the differences between “*full-function*” Platforms and “*low-cost*” Platforms<sup>76</sup>. Suppliers

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72 Op.Cit. France /OECD.(2015).P10-12.

73 Ibid.

74 Op.Cit. The Economist.(2014).

75 Op.Cit.Gonzales-Diaz, F., & Bennett, M.(2015).P-35

76 Ibid.P-5

use the former as a billboard to market their products while encouraging buyers to purchase them from a low-cost platform that charges the Supplier a lower commission. This phenomenon is known as “the free-riding risk” or the “billboard effect”<sup>77</sup>.

An interesting study measured the increase of direct sales made by hotels because of being listed on Expedia.com. The “study found that when the hotels were listed on Expedia, they saw an increase in reservations from their own distribution channels (that is, not through Expedia)”, see table below<sup>78</sup>:

Property	Average Daily Reservations		Percentage Increase
	Display ON	Display OFF	
Branded Hotel 1	39.4	36.6	7.5%
Branded Hotel 2	54.8	49.7	9.1%
Branded Hotel 3	39.1	34.2	14.1%
Independent Hotel	28.2	22.3	26%

The above figures provide evidence of the Supplier’s ability to take advantage of the Platforms investments and efforts to promote the brand of the formers without paying the applicable consideration.

In the short term, consumers would benefit from a free-riding situation by getting cheaper products and services and Suppliers would save in commission fees. However, in the mid to long run this can have negative effects on competition. Indeed, with time, Platforms will have fewer incentives to innovate and make investments, the market will lose transparency to the detriment

77 Anderson, C. (s.f.). ‘The Billboard Effect: Online Travel Agent Impact on Non-OTA Reservation Volume’. *Cornell University Center for Hospitality*.P.7-14.

78 Ibid.

of consumers (who will have to navigate through all the disaggregated information of Suppliers), and price competition will ultimately chill.

In the light of the above, Platforms ascertain that all they seek with Retail-MFN is to mitigate the free-riding problem and protect their investments by limiting Suppliers' freedom to set lower prices elsewhere<sup>79</sup>. By limiting the Suppliers' ability to set lower prices elsewhere, Platforms can "rest assure"<sup>80</sup> that Suppliers will not "free-ride" on the Platforms searching facilities by offering a better value somewhere else, thereby ensuring the existence of the incentives to keep innovating and investing in the market.

Indeed, the free-riding problem has been well documented by the economic literature as a threat to innovation and competition. It has even being recognized by the European Commission (Commission) as a possible legitimate justification for RPM whenever the benefits of avoiding free-riding outweigh the anticompetitive effects of the analysed agreement<sup>81</sup>.

#### *i. Other claimed pro-competitive effects*

Another argument in favour of Retail-MFN is that by creating price parity on the side of Suppliers, Retail-MFN reduces consumer search and negotiation costs, thus promoting inter-brand competition. In the absence of "price uniformity"<sup>82</sup>, consumers have to assess the various values offered by each Supplier. This, in turn, confuses costumers, thereby allowing Suppliers "to be in less frontal competition and further reduce the incentive for

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79 Op.Cit.Ezrachi, A.(2015).P.3-5.

80 Op.Cit.Gonzales-Diaz, F., & Bennett, M.(2015).P.5.

81 See, Commission's Guidelines on Vertical Restraints.Para.225.

82 Op.Cit. France /OECD.(2015).P.12

consumers to use [P]latforms for purchasing their products”<sup>83</sup>. In other words, price uniformity of a Supplier’s products across different Platforms places costumers are in a better position to find the best deal. However, this is not a strong defence because the reduction of the searching costs is unlikely to overcome the negative effects that Retail-MFNs can potentially have in the market<sup>84</sup>.

## 2. ¿WHAT DO WE KNOW FROM THE CASE-LAW?

Most investigations conducted in the EU have been closed prematurely upon commitments or the withdrawal of the relevant Retail-MFN clauses. Furthermore, in all of them, the CAs avoided offering a definitive answer to the question of Retail-MFN as an object or effect restriction. Nevertheless, the facts and findings of some of these cases are useful for the purposes of understanding the nature of these clauses.

### *a. e-books case*

The e-books case clearly exemplifies the role that Retail-MFN can have on facilitating collusion and fixing prices at the supply level. Traditionally, e-books publishers sold their products to Platforms under a wholesale model, meaning that Platforms (mainly Amazon) bought the e-books and afterwards resold them at whichever price the Platform considered convenient. As part of its commercial strategy, Amazon started to offer bestselling e-books at a very low price (9.99)<sup>85</sup>.

Such commercial policy raised concerns, not only on the e-book publishers that were preoccupied by the impact of such ex-

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83 Ibid.

84 Op.Cit.Gonzales-Diaz, F., & Bennett, M.(2015).P.5.

85 EU E-Books, Case COMP/39.847(European Commission 2013).P.8-15.

cessively low price on the sales of their hard-back copies, but it also turned on potential competitors, such as Apple, which was in the process of launching its own e-book Platform (iBookstore)<sup>86</sup>.

As part of the strategy for regaining control over the e-books prices and opening the market for Apple, the publishers shifted their business model from wholesaling to an agency model whereby the publishers set the retail price and paid a commission per sale to Amazon. Simultaneously, those publishers subscribed Retail-MFN agreements with Apple. By means of such contracts, they obliged themselves to refrain from offering e-books through any Platform, including Amazon, at a lower price than the one offered at the iBookstore<sup>87</sup>.

As a result, the publishers were able to increase prices to a level that wasn't prejudicial for their hard-copy business, and Apple ensured that Amazon would not undercut its prices. The best way to summarize the effects of this strategy is by quoting Steve Jobs himself, who was asked on camera "Why would someone buy a book from Apple for \$14.99 if the same book was offered for \$9.99 from (its key competitor) Amazon?"<sup>88</sup>. He answered, "*well that won't be the case.... The price will be the same*"<sup>89</sup>.

The Commission considered that the strategy implemented by Apple and the publishers was anticompetitive by object. The corresponding case was closed after the investigated parties voluntarily committed themselves to, *inter alia*, refraining from using Retail-MFN in their contracts<sup>90</sup>.

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86 Ibid.

87 Op.Cit.Gonzales-Diaz, F., & Bennett, M.(2015)P.28.

88 Op.Cit.Fletcher, A., & Hviid, M.(2014).P1

89 Ibid.

90 This conduct was also investigated by the US Department of Justice, the publishers settled with said authority. Apple did not settle and faced an injunctive order from the District Court, upheld by the US Court of Appeals for the Second Circuit, prohibiting it to enter into any kind of agreement restricting the publishers freedom to set prices. See, Op.Cit.Hviid, M.(2015).P.10-11

It is clear that the decision of considering the e-book strategy as an object restriction to competition is irrelevant for this essay inasmuch the Retail-MFN clauses were just a small part of a wider anticompetitive conspiracy that included a cartel among publishers. Nevertheless, it provides a useful example of the potentiality of Retail-MFN to: (i) facilitate collusion among the Suppliers; (ii) create price parity across Platforms; and (iii) raise expansion barriers because Amazon's possibility to expand in the market based on price competition was undermined.

Furthermore, it also provides the grounds for the discussion regarding the importance of Retail-MFN for preventing free-riding and protecting Platforms' investments. As it was stated by a commentator, it is unclear whether Apple would have ever entered the e-book market "without the guarantees provided by MFN's, which possibly would have left Amazon unchecked, and consumers and publishers with fewer options"<sup>91</sup>.

### *b. Amazon Marketplace*

Paradoxically, shortly after the e-books case, it was Amazon that was under scrutiny for its Retail-MFN clauses. Such provisions prevented Suppliers from selling "a product, including the delivery charge, for a lower price on its own website or on another retail platform such as eBay or play.com"<sup>92</sup>. Both the United Kingdom (UK) and the German CAs initiated investigations against Amazon. At first, Amazon argued that Retail-MFN were "critical to preserve fairness for Amazon customers"<sup>93</sup>. However, none of the CA's accepted the argument; contrarily all of them required Amazon to drop the Retail-MFN practice.

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91 Johnson, J. P.(2014). The Agency Model and MFN Clauses.P.21.

92 Op.Cit.Fletcher, A., & Hviid, M.(2014).P.2.

93 Ibid.



Initially, Amazon notified “that it would no longer apply” Retail-MFN to “Amazon Marketplace, and made the necessary changes to its general terms and conditions for some retailers”<sup>94</sup>. The German CA responded that it was expecting Amazon to abandon the Retail-MFN practice totally and across all Europe<sup>95</sup>. The investigations in the UK and in Germany were closed after Amazon complied with the requirement of the German CA and removed the Retail-MFN clauses from its contracts. No analysis or statement regarding whether Retail-MFN is an object or an effect restriction was made in these cases, however it is indicative of the German CA strict position towards Retail-MFN.

*c. Private Motor Insurance*

The PMI market report, a study conducted by the UK CA to assess the effects of certain practices on the said market, including Retail-MFN, concluded that:

- Wide Retail-MFNs deter entry and innovation in the PMI market and lead to higher premiums and commission fees.<sup>96</sup>
- Narrow Retail-MFNs have the potentiality of distorting competition by having a ‘*network effect*’ similar to wide MFN’s; and by removing a PMI provider’s own website as a restriction on a Platform behaviour. Nevertheless, due to the specific features of the PMI market, Narrow Retail-MFN’s are unlikely to have anticompetitive effects in such specific market<sup>97</sup>.

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94 Op.Cit.Gonzales-Diaz, F., & Bennett, M.(2015)P.28.

95 Ibid.

96 CMA, Private motor insurance market investigation final report.(2014).[https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final\\_report.pdf](https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf). P8-13.

97 Ibid.

- It found that the Platforms have legitimate justifications for Narrow Retail-MFN's since in absence of them, their credibility as effective means for consumers is undermined and therefore its mere existence could be threatened. Similarly, narrow MFNs could also be justified as a mean of reducing “*providers free-riding on PCWs’ investment, though there could be other mechanisms to prevent this*”<sup>98</sup>.
- Finally, there is no legitimate justification for Wide Retail-MFN, inasmuch these provisions offer “no pro-competitive effects over and above the effects of narrow MFN’s”<sup>99</sup>.

Given the above, the authority decided to prohibit the use of Wide Retail-MFN, and permitted the use of Narrow MFN in the PMI market<sup>100</sup>.

#### *d. Online Booking Investigations*

Several CA's around the EU have initiated investigations against the main online travel related booking Platforms (Booking and Expedia) in order to assess if their Retail-MFN Clauses were distorting competition. Amongst them, the preliminary decisions issued by CAs of Sweden, Italy, France and Germany<sup>101</sup> provide valuable insights for the discussion herein.

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98 Ibid.

99 Ibid.

100 CMA, Private motor insurance market investigation, Order.(2015)<https://assets.publishing.service.gov.uk/media/5509879f40f0b613e6000029/Order.pdf>

101 The UK CA, also initiated an investigation in the online booking market, however such investigation is of little value for this study since Retail-MFN was not the central issue of the investigation, and it did not assess the legality of Retail-MFN in the light of article 101. The decision was nullified on appeal by the CAT. For a more information see:Gonzales-Diaz, F., & Bennett, M.(2015).P.30.

The Italian, French, and Swedish CAs decided to close their investigations after accepting the same remedy packages offered by Booking.com, consisting on removing Wide Retail-MFN from their contracts for a period of five years. However, these authorities allowed the investigated Platform to maintain its Narrow Retail-MFNs because they “*would protect investments made by platforms from the free-riding of other operators*”<sup>102</sup>.

Nevertheless, given that these investigations were closed due to commitments, none of those CAs produced any definitive decision on whether Retail-MFN is an object restriction or not<sup>103</sup>.

The decision of the aforementioned CA's of permitting Narrow Retail-MFN in the market seems to be based on the existence of a legitimate justification (protect investments from free-riding), thereby indicating that such permissibility is based more on the exception of article 101(3) than on the fact that Retail-MFN is not an object restriction. However, the acceptance of the time-bound (5 years) commitment to remove Wide Retail-MFN, suggests that such authorities are more inclined towards considering Retail-MFN as an effect restriction than an object one, because, it makes no sense to put a time frame to a prohibition that is anticompetitive by object.

Conversely, the German CA rejected the commitments proposed by Booking.com because it considered that the period of five years was unacceptable. Instead, it argued that both Wide and Narrow Retail-MFN should be eliminated for good of the German online booking market<sup>104</sup>. Likewise, such authority was especially critic with the relaxed position of the Italian, French,

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102 Op. Cit. France /OECD. (2015). P9.

103 See joint pressrelaeaseat<http://www.agcm.it/en/newsroom/press-releases/2207-i779-commitments-offered-by-bookingcom-closed-the-investigation-in-italy-france-and-sweden.html>

104 HRS Case, BundeskartellantDecision.(2014) B9-66/10. English Translation.P.3.

and Swedish authorities because the economic evidence suggests that Narrow Retail-MFN can also have wide restrictive effects on competition. In its opinion, “the crucial question is not whether a narrow MFN is better than a wide MFN, but rather whether the narrow MFN (...) is compensated by efficiencies that meet the conditions set out in (...) article 101(3)”<sup>105</sup>. Similarly, it also acknowledged the possibility of treating Retail-MFN as an object restriction due to its similarity with RPM<sup>106</sup>.

Thus, although the German CA decided to leave open the object or effect qualification of the conduct, such authority advocated for a more strict position towards Retail-MFN and possibly to consider the practice as an object restriction to competition.

As it was shown above, whether Retail-MFN is an object restriction or not is still a contested matter. Certainly, the CAs investigating this conduct decided to leave this issue open, and commentators have been shy when it comes to making definitive statements in that regard. Significantly, some decisions and analysis suggest that there are opposite opinions on the matter, as it seems to happen with the French, Italian, and Swedish authorities in one hand, and the German CA in the other. The next chapter uses all the above-findings to offer a definitive position on this regard.

### 3. WHY RETAIL-MFN SHOULD BE TREATED AS AN OBJECT RESTRICTION

After reviewing all the relevant legal and economic materials, it is reasonable to conclude that Retail-MFN is a restriction to competition by object, as it will be argued below.

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105 Op.Cit.Germany OECD.P.9.

106 Op.Cit.France OECD.P.16.

*a. The main purpose of Retail-MFN reveals in itself a sufficient degree of harm to competition*

As it was explained, determining if an agreement is an object restriction requires the “two-step test<sup>107</sup>” (e.g. the “obvious restriction test<sup>108</sup>” and the sufficiency test). Retail-MFN is an obvious restriction to competition since its very purpose; its nature is contrary to the objectives of competition law. To put it in plain words, the purpose of Retail-MFN is to restrict the freedom of Suppliers to offer a better price in the market. It does not matter which of the aims of competition law it is taking into account, whether it is to protect consumers<sup>109</sup>, economic freedom, economic efficiency, competitors and/or competition as such<sup>110</sup>. Such purpose is intrinsically conflictive with those values, as it is further explained below.

To begging with, such clauses are designed to limit consumers’ choice and welfare by impeding them to have access to a better deal that would be available otherwise. Remarkably, this kind of agreements are usually hidden to consumers and combined with a “best price promise, whereby a retailer promises consumers that they won’t find cheaper prices anywhere else in the market”<sup>111</sup>. This misleads consumers to think that they are having the best deal possible, when the real intention of the clause is to horizontally increase the price on the competing Platforms.

Additionally, these clauses are intended to undermine economic freedom by restricting Suppliers’ capacity to offer better prices in the market. Importantly, restricting the economic freedom

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107 Op.Cit. Nazzini, R., & Nikpay, A.(2015).P.18.

108 Ibid.

109 See. Op.Cit. Wish, R., & Bailey, D.(2015).P20-21

110 SeeT-Mobile Netherlands and Others, C8/08, EU:C:2009:343.Paras38-39.

111 Op.Cit. Fletcher, A., & Hviid, M.(2014).P.6

to set prices has already been considered as a restriction by object by reiterative case-law<sup>112</sup>.

Moreover, the purpose of the agreement is granting a competitive edge to Platforms not by virtue of competition on the merits, but because the contract represents an artificial competitive restraint in the market which is a clear harm to economic efficiency. Furthermore, Retail-MFNs also harm competitors by limiting the capacity of Suppliers to set more attractive prices in the market, and because it is wished-for restricting the entry and expansion of competing Platforms that are willing to contest consumers by offering lower prices. Finally, such clauses are “suited and intended<sup>113</sup>” to limit the price competition among Platforms.

Those fundamental differences between the purpose of the agreement and the aims of competition law should be enough to consider that Retail-MFN is an “obvious” restriction to competition. Moreover, it is important to note that such dangers have been empirically supported by the economic literature and the case-law as it was showed in the previous chapter of this essay.

This also supports the sufficiency part of the test, since the purpose of the studied provisions, the economic literature, and the investigations’ findings provide enough grounds to consider that Retail-MFN poses a risk to competition of such a magnitude that there is no need to verify the actual effects on the market in every case. As it was explained above, even Retail-MFN clauses implemented by parties with low market power negatively affect competition.

The fact that Retail-MFN poses a “sufficient” degree of harm to competition is also supported by means of analogy with RPM, which, as it was explained before, has similar purposes and

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112 See. Commission decision IV/30.658 Polistil/Arbois (1984), cited in Op.Cit.King, S. (2015).

113 Op. Cit. HRS Case Bundeskartellamt decisión.P.55.

effects on the market, and has been consistently considered as a sufficiently harmful restriction to competition.

*b. The protection from free-riding is a legitimate justification but does not change the fact that Retail-MFN is anticompetitive by object*

It could be argued that Retail-MFN should not be considered an object restriction to competition due to the potential pro-competitive effects that these provisions bring to markets, specifically given their instrumental value for preventing free-riding<sup>114</sup>.

Yet, such an argument confuses the object test with businesses' justifications for entering into an anticompetitive agreement. As it has been settled by case-law, the existence of justifications for entering into an agreement does not preclude the possibility of such agreement to be found as anticompetitive by object<sup>115</sup>. Justifications are only important for assessing "whether the conditions under article 101(3) are met"<sup>116</sup>.

It is important to understand that article 101(1) provides the rules for determining whether an agreement harms competition. On the contrary, article 101(3) seeks to define if an agreement that harms competition, regardless if it is by object or by effect, should be allowed in the market because it generates sufficient efficiency gains<sup>117</sup>.

The fact that Retail-MFN could be important for preventing free-riding, and that free-riding is a legitimate concern of Platforms, by any means changes that the agreement has the explicit intention and unavoidable effect of restricting competition. Thus,

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114 See Op.Cit.Gonzales-Diaz, F., & Bennett, M. (2015).

115 See Op.Cit. C-67/13 P, Groupement des cartes bancaires.

116 Op.Cit. Nazzini, R., & Nikpay, A. (2015).P.8-15

117 Op.Cit. King, S. (2015).P. 85

preventing free-riding could be used as a justification for the conduct, but it does not controvert its problematic nature.

Indeed, the economic literature and the reviewed investigations analysed the prevention of free-riding as an economic efficiency of the agreement that could be used to justify the existence of the restriction. Likewise, in relation to RPM, the case-law and even the Guidelines on Vertical Restraints clearly state that avoiding free-riding has to be assessed on the grounds of article 101(3) TFEU<sup>118</sup>.

*c. Narrow-MFN as an object restriction to competition*

One complicated question is whether both Narrow Retail-MFN and Wide Retail-MFN should be considered as an object restriction. Some would argue that Narrow Retail-MFN are not an object restriction to competition inasmuch their effect is limited to the Supplier's website, thus the competition constraint of the price offered through all the other Platforms is not altered, and consumer choice is not significantly affected. From the object-test perspective, such opinion could be based on the argument that Narrow Retail-MFN does not entail a "sufficient degree of harm", i.e., it would fail to meet the significance part of the test.

Nevertheless, the object and nature of the agreement, the main criteria to consider whether it is an object restriction, are equal in the wide and the narrow versions of the agreement. Both are intended to prevent the Suppliers from offering a better price to consumers.

Furthermore, as it was acknowledged by the UK and the German CAS, a Narrow Retail-MFN "*still restricts competition between platforms because it eliminates the competitive pressure of the direct channel*"<sup>119</sup> and, as it was explained before, Narrow Retail-MFN can have wide effects on the market (See Chapter II-1(d).

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118 See, Commission's Guidelines on Vertical Restraints.Para.225.

119 Op.Cit. Germany /OECD.(2015).P.9.



Thus, in line with the German CAs opinion, it can be concluded that the “crucial question is not whether a narrow MFN is better than a wide MFN, but rather whether the narrow MFN (...) is compensated for by efficiencies that meet the conditions set out in(...) article 101(3)”<sup>120</sup>.

Hence, after reviewing the relevant economic and legal literature, it is reasonable to conclude that Retail-MFN should be considered as a restriction to competition by object in the light of article 101. The next chapter explores the implications of this conclusion and the importance of applying article 101(3) to cases of Retail-MFN.

### III. CONSEQUENCES AND THE IMPORTANCE OF ARTICLE 101(3)

The implications of categorizing Retail-MFN as a restriction by object are substantial. Whenever a conduct is considered anticompetitive by object, it is presumed to have negative effects on competition and the corresponding contract/clause is automatically doomed as contrary to article 101(1)<sup>121</sup>. Certainly, if an agreement is restrictive by object, the corresponding company can’t defend itself arguing the absence of negative effects<sup>122</sup>. Furthermore, the parties cannot benefit from the *de-minimis* rule, that only applies to cases of restrictions by effect, and which establishes that when “the impact of the agreement on trade (...) or on competition is not appreciable”<sup>123</sup> article 101 is not applicable<sup>124</sup>.

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120 Ibid.

121 C-56/64 - Consten and Grundig v Commission of the EEC [1966].Para.242-243.

122 Italianer, A.(2014). Director-General for Competition, European Commission The Object of Effects. *CRA Annual Brussels Conference – Economic Developments in Competition Policy*. Brussels.

123 C-226/11 Expedia v Autorité de la concurrence and Others, [2012].Para.16.

124 In addition, Retail-MFN may be subject to a stricter legal treatment. As it was mentioned above, Retail-MFN should be treated in the same manner as RPM, and

In the light of the TFEU, such harsh treatment should be balanced by the exception provided in article 101(3). According to said provision, the restrictive agreements that “*generate objective economic benefits that outweigh the negative effects of the restriction of competition*” are exempted from the prohibition of article 101(1)<sup>125</sup>. This rule does not exclude agreements restrictive by object.

In theory, article 101(3) can be applied to any clause or agreement that fulfils the cumulative criteria therein. Specifically, (i) the agreement “must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress” (Efficiency Gains); (ii) “Consumers (have to) receive a fair share of the resulting benefits” (Consumers’ Fair Share); (iii) “The restrictions must be indispensable to the attainment of these objectives” (Indispensability); and (iv) “The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question” (No Elimination of Competition)<sup>126</sup>.

Nevertheless, despite the apparent general applicability of article 101(3), in practice, it has become difficult if not impossible to benefit from such provision, particularly after the enactment Regulation 1 2003<sup>127</sup>. In fact, “the Commission has not issued any non-infringement decisions” based on article 101(3) since 2004<sup>128</sup>. Moreover, virtually all cases where the national CAs considered a defence based on article 101(3) have been dismiss-

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RPM are not only considered an object restraint to competition, but also a hard-core restriction. Therefore, at least in theory, Retail-MFN bear the risk of being included on the list of hard-core restraints to competition and be excluded from the block exemption provided for vertical agreements in VBER.

125 Commission Guidelines on the application of article 81(3) of the Treaty.

126 “[http://ec.europa.eu/competition/antitrust/legislation/art101\\_3\\_en.html](http://ec.europa.eu/competition/antitrust/legislation/art101_3_en.html)”

127 Bailey, D. (2016). Reinventing the Role of article 101(3) under Regulation 1/2003. P.1-3

128 Op.Cit. King, S. (2015).P245

sed<sup>129</sup>. The situation is so grave that it has been called the “*slow death of article 101(3)*”<sup>130</sup>.

In the case of Retail-MFN, the situation is specially complicated because there has only been one ruling analysing such clauses in the light of article 101(3), and the applicability of this exemption was dismissed. In this opportunity (the online booking case mentioned above) the German CA, so far the only authority that has analysed the free-riding defence of the Retail-MFN, considered that the parties thereto failed to demonstrate the fulfilment of all four conditions of such article<sup>131</sup>.

Specifically, concerning the first condition, viz., Efficiency Gains, the German CA considered that the parties did not prove that the free-riding risk was an actual hazard for them. In its opinion, the parties did not demonstrate the fulfilment of the three conditions established by Commission in order to prove that the investments of an undertaking are credibly threatened by the free-riding risk, namely, the investments must be relationship-specific, long-term and not recouped in the short run, and asymmetric<sup>132</sup>. In consequence, it affirmed that the free-riding risk is far from being a legitimate concern for all Platforms, and only credible in specific cases that comply the above-mentioned features. This clearly increases the difficulty of fulfilling the first condition of article 101(3), by adding an extra burden of proof, which is alien to the wording of this article.

In the same line, the German CA concluded that the parties failed to meet the second condition (Consumers Fair Share). It

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129 Op.Cit. Bailey, D. (2016).P.1-3

130 Lamadrid, A. ‘The slow death of article 101(3)’, blog of 28 October 2011, <http://chillingcompetition.com/?s=slow+death>. Also noted by Bailey.

131 Op.Cit. HRS Case, BundeskartellantDecision.(2014).

132 Op.cit. Germany /OECD.(2015).P.6.

argued that the parties did not satisfy the “very strict”<sup>133</sup> burden of proof applicable in cases where the “likely effect of the agreement is to increase prices for consumers”<sup>134</sup>, as occurs with Retail-MFN. Specifically, according to the German CA, the parties failed to prove that the “claimed efficiencies create real value for consumers that compensates for the adverse effects on prices”<sup>135</sup>. The difficulties behind the fulfilment of the second condition established by article 101(3) have been documented<sup>136</sup>. If in cases of Retail-MFN the CAs, including the Commission, decide to set an even severer standard of proof because it may represent higher prices to consumers, it could result in a factual impossibility to benefit from the exemption therein provided.

Similarly, the German CA dismissed the defence’s arguments on the fulfilment of the third condition, i.e., indispensability of the restriction, because it considered that Platforms could use other remuneration models to prevent free-riding, like charging a “fixed fee or two-part tariff”<sup>137</sup>. The authority also considered that it would not be “*unreasonable*” for Platforms to charge consumers for searching hotels’ information<sup>138</sup>. In consequence, Retail-MFN would never meet these criteria since, in the eyes of the German CA, changing the Platform business model and even charging consumers, as contradictory as it sounds, is preferable than the Retail-MFN.

Finally, the German CA found that the parties failed to fulfil the fourth condition (No elimination of competition), because

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133 Ibid.P.7.

134 Ibid.

135 Ibid. See also Commission Guidelines on the application of article 81(3) of the Treaty.Para.104

136 See.Op.Cit. Bailey, D.(2016).P.25.

137 Op.Cit. HRS Case, BundeskartellantDecision.(2014).

138 Op.Cit. HRS Case, BundeskartellantDecision(2014).P.7.

Retail-MFN would have cumulative effects that would have led to parity of prices across Platforms and foreclose of the market<sup>139</sup>. Nevertheless, since Retail-MFN have become a general feature among Platforms, it would be difficult for the parties to prove that there are not cumulative effects on the market.

Although the German CA denied the defence based on considerations of that specific case, its decision constitutes a grave precedent for Retail-MFN cases. Not only because is the only available decision on this matter, but also because, the findings of such authority are supported on the standard of proof established by the Commission<sup>140</sup>, which makes very likely that further cases will be decided accordingly.

Thus, although the reasoning and arguments presented by the German CA regarding the nature and effects of the Retail-MFN have a clear value and have been used in this document to demonstrate the anticompetitive object of Retail-MFN, the overly strict criteria used by such CA regarding article 101(3) in cases of Retail MFN are so difficult to meet that make such exemption a little more than a chimera. This situation is unacceptable; it contradicts the wording of article 101 and the reiterative case-law on the matter. Indeed, in consequence, well established legal principles like the applicability of article 101(3) to object restrictions, the presumption that vertical agreements raise less concerns than horizontal agreements, and that in the EU competition law there are not agreements that are *per se* anticompetitive (as occurs in the US) have become not much more than empty slogans in the case of Retail MFN.

Likewise, the additional requirements and the strict interpretation given to article 101(3) limit the freedom of undertakings to compete in the market with practices that, although restrictive

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139 Ibid.

140 Op.Cit. Guidelines article 81(3)

to competition, could have been deemed legitimate by virtue of the same provision given their positive impact in the market. Moreover, such way of applying the commented article hinders the efficiency of the markets by prohibiting agreements that could, overall, bring net efficiencies and promote competition.

Platforms involved in business negotiations have the “*pressing need to reach business decisions quickly and the widespread use of MFNs in numerous industries shows that they are a common tool that businesses rely upon*”<sup>141</sup>. In consequence, Retail-MFN represents a testimony of the urgency and importance to revive article 101(3) and make it a feasible opportunity for those cases in order to: “(1) reduce legal delays and transaction costs through providing guidance on potential legal issues in a manner which can be easily accessed, (2) reduce legal uncertainties (...), and (3) allow competition authorities to conserve their resources by eliminating non-problematic cases easily as a result of safe harbors identified by”<sup>142</sup> the application of article 101(3). It will be up for future academic studies to define what would be the optimal method to achieve the goal of making article 101(3) real again.

#### IV. CONCLUSIONS

Achieving a single digital market has been declared as one of the priorities of the “Europe-2020 strategy”<sup>143</sup>. Indeed, President Juncker has emphasized that digital integration would result on creation of new jobs, more options for consumers, better opportu-

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141 Gürkaynak, G.(August 2016). Most-favored-nation clauses in commercial contracts: legal and economic analysis and proposal for a guideline. European Journal of Law and Economics.P.132.

142 Ibid.

143 See, the single digital market at [https://ec.europa.eu/priorities/digital-single-market\\_en](https://ec.europa.eu/priorities/digital-single-market_en)

nities for entrepreneurs and access to a wide range of digital tools for business and Governments<sup>144</sup>. Clearly, such benefits will never be achieved if the rules governing e-commerce do not evolve at the same pace the new technology and digital markets do, and provide a clear, transparent, coherent, and uniform set of rules applicable to the digital market across the 28 members of the European Union<sup>145</sup>.

From the competition law perspective, the relevance of assessing the legality of Retail-MFN has been clear since the e-books case exposed their general application, the positive features that it can have on e-commerce, and their grave anticompetitive effects on the markets. Yet, almost six years later none of the CA's has dared to provide a definitive assessment on the legality of this kind of agreements, the Commission refrained to take proactive steps as to shed light on the matter, and the academic contributions are still limited.

This essay aimed at contributing to fill the existing gap on the legal treatment of Retail-MFN in the EU. Specifically, this essay argued that Retail-MFNs are a restriction to competition by object in the terms of article 101(1). Nevertheless, it is also argued that in the interest of the market, the undertakings, and the correct and fair application of article 101, the exception of article 101(3) should become a real possibility for Retail-MFN cases.

It falls outside the scope of this article to determine how the objective of reviving article 101(3) should be attained; i.e. changing the wording of the treaty, modifying the Commission Guidelines, waiting for case law or for an affirmative action by the Commission to bring clarity and modernize the interpretation of article 101(3). However, it will be up for future academic contri-

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144 Junker.J-C.(2016).Digital Single Market: Bringing down barriers to unlock online opportunities. available at [https://ec.europa.eu/priorities/digital-single-market\\_en](https://ec.europa.eu/priorities/digital-single-market_en)

145 Ibid.

butions to define what would be the optimal method to achieve the mentioned goal.

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