Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking

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I. Introduction

In the last 15 years, online intermediation has grown exponentially with the development and expansion of the Internet and digital marketplaces.[1] From the point of view of competition law, the existence of new kinds of anti-competitive behaviours typical of e-commerce has been generally excluded and there is a general consensus that traditional competition rules applied to bricks-and-mortar retailing should, equally, be implemented in online markets.

However, there are some aspects which distinguish digital markets from traditional ones and require particular attention. These aspects relate strictly to the main effects of e-commerce on competition, which scholars have typically identified as follows: (i) the reduction of search costs, due to the ready availability of information online; (ii) the modification of distribution costs, linked to the changes in the relationship between supplier and consumer and to the proliferation of intermediation and disintermediation; (iii) the expansion of the geographic range of transactions and (iv) the emergence of new forms of asymmetric information peculiar to e-commerce.[2] Moreover, online platforms, as typical examples of two-sided or multi-sided markets,[3] require particular attention, since most economic studies have been typically devoted to single-sided firms, and therefore their application to multi-sided markets requires adequate adjustment in order to avoid misleading results.[4]

Key Points

- One of the key concerns of competition authorities is the use by online platforms of some forms of Most Favoured Nation (MFN) clauses (also known as parity clauses), together with the adoption of the agency model.
- From recent investigations by several Member States on online travel agencies (OTAs) there emerges a general view in the EU that agreements including MFN clauses in their wide form violate competition law, whereas there is no unanimous approach to the narrow version of the same clauses.
- The application of Article 101 TFEU to these cases and the use of commitments decisions by many NCAs raise controversial questions.

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1 For an overview on this issue, see Organisation for Economic Co-operation and Development (hereinafter, OECD), *The Economic and Social Role of Internet Intermediaries*, April 2010.

2 See E Lieber and C Syverson, 'Online vs. Offline Competition', in M Peitz and J Waldfogel (eds), *Oxford Handbook of the Digital Economy* (Oxford University Press, 2012). See also OECD, *Competition Issues in Electronic Commerce* (2000); P Buccirossi, 'Background note', in OECD, *Vertical Restraints for On-line Sales* (2013), 18; C Cambini, N Meccheri and V Silvestri, *Competition, efficiency and market structure in online digital markets. An overview and policy implications*, (2011) *European Review of Industrial Economics and Policy* 2, <http://revel.unice.fr/eriep/index.html?id=3212&format=print> accessed 20 February 2016.

3 The terminology of two-sided and multi-sided markets derives from economic literature. The expression 'two-sided markets' appears in the seminal work of JC Rochet and J Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1 J Eur Econ Ass'n 990 (2003). Other Authors prefer to use the terminology of markets with two-sided platforms [see DS Evans, 'The Antitrust Economics of Multi-Sided Platform Markets' (2003) 20(2) JREG 325]. However, principles elaborated for two-sided markets also apply to multi-sided ones. Among the huge economic literature on two-sided markets, see also: B Caillaud and B Jullien, 'Competing cybermediaries' (2001) 45 Eur Econ Rev 797; B Caillaud and B Jullien, 'Chicken and Egg: Competition among Intermediation Service Providers' (2003) 34 RAND J Econ 309; G Parker and MW Van Alstyne, 'Two-Sided Network Effects: A Theory of Information Product Design' (2005) 51 Mgmt Sci 1494; M Armstrong, 'Competition in Two-Sided Markets' (2006) 37 RAND J Econ 688. For a broad overview on this topic, see DS Evans and R Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses', in RD Blair and DD Sokol (eds), *Oxford Handbook on International Antitrust Economics* [Oxford University Press (2015)], and University of Chicago Institute for Law & Economics Olin Research Paper No. 623, <http://ssrn.com/abstract=2185373> accessed 20 February 2016. In general, the fundamental features of two-sided markets are: distinct groups of customers who rely on each other and also on the platform to intermediate transactions between them; indirect externalities across groups of users and the non-neutrality of the price structure, meaning that the price structure of the platform affects the level of transactions [OECD, *Two-Sided Markets* (2009), 28 et seq.].

4 This has proved to be particularly crucial in the definition of the relevant market. In particular, in the case of two-sided platforms, it is fundamentally important to assess how many markets need to be considered. On this issue, see L Filistrucchi, D Geradin, E van Damme and P Affeldt, 'Market definition in two-sided markets: Theory and practice', (2014) 10 J Comp L & Econ 293 (distinguishing between two-sided transaction and two-sided non-transaction markets – the former being characterised by the existence of a transaction between the two sides and, consequently, by the applicability of a two-part tariff – and arguing that, in the case of two-sided transaction markets, eg credit cards, only one market should be defined, whereas in the case of two-sided non-transaction markets, eg media, two connected markets should be defined).

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In general, the platform, which reduces transaction costs thereby facilitating the matching of supply and demand, sells a different service to each of the two customer groups, the demand of each group depending on the demand of the other.[5] It typically internalises the indirect network effects arising between the customer groups, so that the value of the platform on one side and the number of users on the other side increase together.[6] These indirect network effects, which are typical of online intermediation, lead to the classic 'chicken-and-egg' problem for intermediaries, who are impelled to adopt price and product strategies aimed at finding a balance between their own interests and those of the other parties involved, the price structure being a decisive element.[7] The main challenge for a platform is to reach as many agents on both sides as are required to obtain a 'critical mass' in order to manage the indirect network effects.[8] As scholars have stressed, the dynamics of multi-sided platforms depend on the number of platforms that individual economic agents on each side use, on differences between the two sides in the number of platforms used and on the ability of an agent on one side to dictate the choice of platform for the other side. Thus, multi-homing behaviours (ie when one or more sides of the business can patronise more than one platform) have a crucial relevance and online intermediaries tend to design strategies in order to ensure the use of their own platforms by users.[9]

Despite this background, intermediation activity in digital markets has been the subject of wide-ranging literature up to now mainly in the field of economics. On the other hand, little work has been done by the legal scholarship on the competition law implications of this phenomenon and it has been developed only very recently as a consequence of some problematic cases involving platforms. As a matter of fact, recent case law testifies that one of the key concerns of competition authorities is the use by online platforms of a type of agreement generally traced to the category of Most Favoured Nation clause (MFN), typically included in B2B long-term contracts, where the supplier undertakes to guarantee the best price conditions to the intermediary concerned as compared with any other dealer.[10] The competitive assessment of such clauses (also known as parity clauses) is controversial in both traditional and digital markets. At first sight, they appear to offer potential benefits to consumers, at least in terms of price transparency and reduction of transaction costs; however, they also give rise to competition concerns, as they may serve to acquire or strengthen monopoly pricing. Their recurrence in the digital environment has revitalised an ongoing debate on the likely effects of these clauses on competition.

The article first analyses the business models adopted by intermediaries in e-commerce and the concerns that have arisen under competition law, with particular regard to the increasing use of some forms of MFN clauses. The analysis is conducted in the light of several cases in the field of online hotel booking brought before

5 DS Evans, 'Some Empirical Aspects of Multi-Sided Platforms' (2003) 2(3) Review of Network Economics 1; DS Evans and R Schmalensee, *Catalyst Code: The Strategies Behind the World's Most Dynamic Companies* (Harvard Business School Press, 2007).

6 This goes for positive indirect network effects. On this topic, see L Filistrucchi, D Geradin and E van Damme, 'Identifying Two-Sided Markets' (2013) 36(1) World Comp 33; Caillaud and Jullien, 'Competing cybermediaries', see fn 3, at 798. See also: Evans and Schmalensee, see fn 3, at 7 (according to which multi-sided platform acts as an economic catalyst which creates value as a result of solving a coordination and transaction cost- problem between the groups of customers); JC Rochet and J Tirole, 'Two-Sided Markets: A Progress Report' (2006) 37(3) RAND J Econ 645 [explaining that two-sided markets theory is related to the theories of network externalities (from which it borrows the notion that there are non-internalised externalities among end-users) and of (market or regulated) multi-product pricing (from which it borrows the focus on price structure and the idea that price structures are less likely to be distorted by market power than price levels) and that the starting point for this theory is that an end-user does not internalise the welfare impact of his use of the platform on other end-users]. Economic literature has identified two kinds of indirect network effects, ie usage externalities (which exist when two economic agents need to act together to use the platform to create value) and membership externalities (arising when the value received by agents on one side increases with the number of agents participating on the other side). On this point, see Rochet and Tirole, ibid; Evans and Schmalensee, see fn 3, 8.

7 Caillaud and Julienn, 'Chicken and Egg', see fn 3, 309–310 (clarifying that 'to attract buyers, an intermediary should have a large base of registered sellers, but these will be willing to register only if they expect many buyers to show up'); Rochet and Tirole, see fn 6 (identifying as a precondition for the existence of a two-sided market the fact that the platform may affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; 'in other words, the price structure matters, and platforms must design it so as to bring both sides on board'). See also B Jullien, 'Competition in Multi-Sided Networks: Divide-and-Conquer' (2011) 3(4) American Economic Journal: Microeconomics 35; Id., 'Two-Sided B to B Platforms', in *Oxford Handbook of the Digital Economy* (see fn 2).

8 Evans and Schmalensee, see fn 3, 9. In the model elaborated by Rochet and Tirole (see fn 3, 1007) another factor relevant for determining pricing is the presence of some categories of consumers, ie marquee buyers (buyers generating a high surplus on the seller side and making the platform more attractive for the sellers) and captive buyers (buyers who are loyal to their platform, independently of prices, eg because of long-term contracts or sunk-cost investments): the optimal pricing strategy in this case is to reduce the price to the former and increase it to the latter. On this point, see Evans, see fn 5, 197–198.

9 On multi-homing, see Evans and Schmalensee, see fn 3, 15–16. In general on multichannel strategies including pricing restraints established by operators in e-commerce retailing, see HW Friederiszick and E Glowicka, 'Competition policy in modern retail markets' (2015) Journal of Antitrust Enforcement 1.

10 The term Most Favoured Nation originates from international trade agreements, where it refers to a clause granting the contracting nations trading conditions equivalent to those granted to the most favoured nation. In contracts between companies, MFN clauses typically refer to price commitments, although they may also relate to other terms and conditions. These clauses are also known as most favoured customer (MFC) clauses or price parity clauses.

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national competition authorities (NCAs) for alleged violation of competition rules. The article then questions the theories of harm and the main critical issues deriving from such case law, highlighting the difficulties hidden in the adoption of a generalised approach in the competitive assessment of the clauses at issue.

II. Internet intermediaries, business models and types of MFN clauses

Standard MFN clauses used in traditional retailing and including the so-called best/low price guarantee (LPG) – typically combined with the promise to match (price matching) or beat (price beating) competitors' prices – have already been the subject of debate by scholars in the past.[11] The renewed attention to MFN clauses has been drawn, as mentioned before, by recent case law in digital markets, starting with *E-books*.[12] These arrangements are a typical tool used by intermediaries operating in digital marketplaces to ensure that users prefer to buy through their platforms.[13] In order to distinguish standard MFN clauses from those adopted by online platforms, different names have been proposed such as Across-Platforms Parity Agreements (APPAs),[14] Retail Price MFN[15] and platform MFN agreements.[16]

The successful adoption of MFN clauses depends on various factors, among which are the characteristics of the buyers (eg, degree of information and costs) and of the market (eg, degree of price transparency),[17] and their effects vary depending on their scope and on the business model adopted by the trading parties. With regard to digital markets, there are basically two types of MFN clause, according to whether the clause ensures that the price and terms quoted through the platform will not be higher than those available on the upstream supplier's website ('narrow MFN') or on other platforms or any other channel ('wide MFN'). With regard to the business models, the agency model is particularly widespread in the case of online platforms and it differs from the wholesale model: in the former, suppliers set final prices and the profits are shared among suppliers and resellers on the basis of pre-arranged percentages, whereas in the latter, suppliers fix wholesale prices which are subsequently marked up by resellers.[18] It is worth mentioning that in addition to these main models there exist several variations, including the so-called merchant model, in which the supplier sells an amount of goods or services at a pre-arranged price – typically below the normal price – to the reseller, who marks up the net rates and finalises the transaction.[19]

The adoption of parity clauses implies the existence of several platforms available to users and the possibility for the seller to be connected to a number of them (multi-homing). With regard to the economic justification of parity clauses, this can be identified in the protection of the investment sustained by the intermediary in order to build a reliable platform and to reduce the risk of free-riding.[20] In other words, they are designed to solve the hold-up problem typical of vertical settings minimising externalities and facilitating investments. Without protective measures such as MFN clauses, customers may use the platform in order to get information about the product or services and then subsequently finalise the transaction on the supplier's website or through other channels where there is a low price (free riding);

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11 Suffice it to recall some main works on this topic: I Ayres, 'How Cartels Punish: A Structural Theory of Self-Enforcing Collusion' (1987) 87 Colum L Rev 295 (observing that price-matching policies favour two of the conditions necessary to collude, ie detecting breaches of the agreement, and punishing firms that breach); MTL Sargent, 'Economics Upside-Down: Low-Price Guarantees as Mechanisms for Facilitating Tacit Collusion' (1993) 141 U Pa L Rev 2055 (affirming the strong anti-competitive effect of price beating); AS Edlin, 'Do Guaranteed-Low-Price Policies Guarantee High Prices, and Can Antitrust Rise to the Challenge?' (1997) 111 Harv L Rev 528 (asserting that the crucial element of such clauses is the possibility of operating a price discrimination between informed and uninformed customers, as a price-matching pledge widely advertised has direct anti-competitive effects on pricing incentives, both of the price-matcher and of his competitors); M Hviid and G Shaffer, 'Hassle Costs: The Achilles' Heel of Price-Matching Guarantees' (1999) 8 Journal of Economics & Management Strategy 489 (arguing that the dominant economic literature on price-matching guarantees has underestimated the impact of hassle costs, which are capable of reducing notably the effectiveness of such clauses and have dramatic consequences for equilibrium pricing). See also the empirical study on LPG conducted by M Arbatskaya, M Hviid and G Shaffer, 'On the Incidence and Variety of Low-Price Guarantee' (2004) 47 J L & Econ 307.

12 *United States v. Apple Inc., et al.*, 12 Civ. 2826 (DLC); EU Commission, case No. COMP/39.847 – *E-books*.

13 On the effects of intermediation on prices, see B Edelman and J Wright, 'Price Coherence and Excessive Intermediation', HBS Working Paper No. 15-030 (October 2014), <http://www.benedelman.org/publications/pricecoherence-2014-10-21.pdf> accessed 20 February 2016.

14 See the Report prepared for OFT by LEAR, *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements* (2012), available at http://www.learlab.com/pdf/oft1438_1347291420.pdf. The terminology of APPAs has also been adopted by OECD in the recent hearing on Across Platform Parity Agreements, 27–28 October 2015 (available at <http://www.oecd.org/daf/competition/competition-cross-platform-parity.htm>).

15 A Fletcher and M Hviid, 'Retail Price MFNs: Are they RPM 'at its worst'?', (2014) CCP Working Paper 14–5.

16 A Boik and KS Corts, 'The Effects of Platform MFNs on Competition and Entry' (2013), available at <http://economics.yale.edu/sites/default/files/corts_17-oct-2013.pdf>.

17 LEAR, see fn 14, 3.9.

18 The agency model is adopted, for instance, by Amazon, Apple, eBay, Booking. On this topic, see JP Johnson, 'The Agency Model and MFN Clauses' (2014), <http://ssrn.com/abstract=2217849> accessed 20 February 2016.

19 For instance, Expedia, which offers several services (such as hotels, air flights, cars for rent, package tours) adopts both merchant and agency models, distinguishing between merchant products and agency products.

20 Buccirossi, see fn 2, 23; LEAR, see fn 14, 103 et seq.

as a consequence, the platform cannot recoup its investments and is not incentivised to invest in improving the quality of its services (hold-up problem).[21] Among the positive effects associated with parity clauses, there are also the reduction of transaction costs (especially bargaining and search costs) and delays in contracting (by preventing consumers from delaying their purchases in the expectation of finding a lower price), in addition to information efficiencies deriving from price transparency.[22]

However, there are a number of competition concerns over the use of parity clauses by online platforms adopting the agency model.[23] Although they relate to vertical relationships, their main anti-competitive effects are realised on a horizontal level and concern the foreclosure of market entry for new resellers, the reduction of competition and the facilitation of collusion between resellers which is already favoured by the availability of information and price transparency typical of the Internet.[24]

In these conditions, there is a great incentive for platforms to increase fees imposed on suppliers (and, consequently, the final price).[25] A retailer will not be afraid to increase his fee, as the supplier is bound by the parity clause to charge him a price not higher than that charged to other resellers, so other platforms will also have fewer incentives to reduce their fees.[26] Moreover, if platforms agree on the fee level, free-riders will have less incentive to reduce fees deviating from the collusion due to the parity agreements, as such a reduction will be transferred to the users of other platforms. In particular, if the supplier has concluded this kind of agreement with several resellers, as a combined effect this will lead to the application of the same price on the various platforms. In addition, the traditional argument supported by literature against LPG applies, according to which these clauses may incentivise collusion and serve to acquire or strengthen monopoly pricing by preventing other retailers from competing on the market by offering lower prices, thereby limiting entry.[27]

These concerns mainly relate to the 'wide MFN' clauses, whose adoption under the agency model by leading platforms is likely to lead to uniformity in prices and terms across different platforms and may directly increase prices to consumers. On the other hand, there is no general consensus on the effects of narrow parity clauses, which grant the platform limited protection. According to some scholars, they would result in less intrusive restrictive effects: in particular, as 'narrow MFN' clauses concern only the relationship between a single supplier and a single platform, in this case each platform may be incentivised to compete by lowering its commission to obtain a lower price.[28] It follows, therefore, that several factors affect the consequences of parity clauses and there can be no presumption as to their effects, assessment of their anti-competitive outcomes requiring a case-by-case analysis. Empirical literature on the topic also supports this view.[29]

Several reasons may be adduced in order to explain the recurrence of parity clauses in digital markets. Importantly, successful platforms often have a strong contractual power over suppliers, as they give access to a significant number of typically loyal consumers, allowing

21 Widely on this topic, A Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce', working paper presented at OECD's hearing on Across Platform Parity Agreements, see fn 14, <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)11&doclanguage=en>, 4–5; and M Hviid, 'Vertical Agreements between Suppliers and Retailers that Specify a Relative Price Relationship between Competing Products or Competing Retailers', ibid, <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)6&docLanguage=En>, 33 et seq, accessed 20 February 2016.

22 JB Baker and JA Chevalier, 'The Competitive Consequences of Most-Favored-Nation Clauses' (2013) 27 Antitrust ABA 20 (arguing that there are three major categories of efficiency rationales: MFNs that mitigate 'hold up' problems, MFNs that counteract incentives to delay in contracting, and MFNs that reduce transaction costs; however, with regard to the reduction of transaction costs, the Authors explain that the MFN creates other costs, ie the costs of monitoring adherence to the agreement). On pro-competitive effects of MFN clauses, see also Ezrachi, see fn 21, 4 et seq.; ML Weiner and CG Falls, 'Counselling on MFNs After E-Books' (2014) 28 Antitrust ABA 68. For an analysis of effects of MFN clauses in two-sided markets, see also M Samuelson, N Piankov and B Ellman, 'Assessing the Economic Effects of Most-Favored-Nation Clauses' (2012), ABA Section of Antitrust Law, Spring Meeting.

23 Widely on this topic Hviid, see fn 21, 33 et seq. See also Ø Foros, HJ Kind and G Shaffer, 'Turning the Page on Business Formats for Digital Platforms: Does Apple's Agency Model Soften Competition?' (2013), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2317715> accessed 20 February 2016.

24 On horizontal anti-competitive effects of vertical restraints and of MFN clauses, see JB Baker, 'Vertical restraints with Horizontal Consequences: Competitive Effects of 'Most-Favored-Customer' Clauses' (1996) 64 Antitrust L J 517.

25 Fletcher and Hviid, see fn 15, 9 et seq.; Boik and Corts, see fn 16, 2 (warning that evaluating the effects of such clauses is very complex).

26 Fletcher and Hviid, see fn 15, 11; see also Boik and Corts, see fn 16, 8 (identifying two main effects, ie a 'squeezing the seller effect' and a 'softening competition effect').

27 In brief, LPG clauses seem to be dangerous for the creation of cartels as they may incentivise firms to cooperate. If a firm applies such a policy, other competing undertakings will have no choice but to offer an LPG in order to avoid the erosion of their market share: if they decide to lower prices aiming at recapturing lost customers, they would help the firm offering the LPG clause as the reduction of prices would increase the difference between the price set by that firm and the price offered by other firms, allowing customers to obtain a still lower price; otherwise, if they decide to imitate the strategy of the firm offering the LPG clause, they could set the higher price offered by that firm and in turn guarantee an LPG clause. In this case, there would be no difference in prices set by the firms concerned, so that the LPG clause would grant customers a reimbursement equal to zero and ensure firms' higher profits. For a complete analysis of low price guarantees and their relationship with APPAs, see Hviid, see fn 21, 23 et seq.

28 Ezrachi, see fn 21, 22 et seq.

29 Empirical literature on the topic has not been found to contain any evidence that MFN clauses have anti-competitive effects. See LEAR, see fn 14, 4.50.

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platforms to impose parity clauses as an unavoidable condition of service. The higher degree of market transparency plays a major role, as it implies lower monitoring and enforcement costs, making it easier to detect deviating conduct than in other contexts.[30]

From the perspective of competition policy, there are various knots to untie. Looking at the European context, currently there are a number of competition authorities from different Member States which are investigating such clauses. Moreover, given the current Sector Inquiry launched by the European Commission into e-commerce,[31] it is reasonable to expect the number of cases concerned to rise.[32] To date, existing case law in the EU has, in the main, concerned e-books,[33] price comparison websites (PCWs, in the field of motor insurance in the United Kingdom,[34] in the field of electricity and gas prices in Germany),[35] online travel agencies (OTAs)[36] and Amazon (which is currently the subject of an ongoing investigation by the European Commission with regard to e-books, whereas two previous investigations on Amazon Marketplace by the English and German NCAs have been closed).[37] A common feature in all of these investigations is that they involved parity clauses negotiated by a party who neither sells nor buys the products involved but earns a commission on sales executed on its platform. Moreover, they all resulted in the termination of the clauses, but there is only one formal prohibition decision adopted by the German NCA in the hotel online booking investigation up to now.

The following paragraph will focus precisely on the case of OTAs as an emblematic example of the various aspects which competition law assessment of the clauses at issue finds critical and which also reflect the outcomes of the different approaches adopted at EU and national levels.

III. Relevant case law: the investigations of OTAs as an emblematic example

OTAs constitute typical Internet intermediaries which have gained ground at the expense of brick-and-mortar shops. Their activity basically consists of the supply of final tourist services through the commercial promotion on their website of various offers available in the market, enabling customers to access a wide range of services (hotel rooms, airline tickets, package tours, etc.) via a unique platform. In a nutshell, on the one hand, these platforms provide separate services to consumers, mainly price comparison, search facility and product review; on the other hand, they give suppliers an attractive showcase and the opportunity to contact a large number of consumers. This two-fold function is a common feature of platforms as two-sided markets, whose main value lies in the facilitation of the transactions among economic agents such as upstream suppliers and downstream consumers.[38] In the case of OTAs, there is a high degree of heterogeneity among potential users, the costs for switching from one platform to another are generally low, and multi-homing is easy. In other words, travellers can easily search for services, such as hotels and flights, over more than one platform before booking, and providers (airlines, hotels, etc.) can easily be listed on several OTAs, thus the free-riding problem requires attention.[39]

With regard to business models, the benchmark is the agency model. It reproduces the traditional system of the travel agency, where the intermediary facilitates the transaction between the supplier of travel services and the buyer, earning profit from the sale fee. Applying this model to the hotel booking sector, which is the

30 On this topic, see I Vandenborre and M Frese, 'The Role of Market Transparency in Assessing MFN Clauses', 38 (3) World Comp 333 (2015). See also Fletcher and Hviid, see fn 15, at 8 (adding that, potentially at odds with the first rationale mentioned above, in some online markets there can be low search and switching costs, combined with relatively little loyalty to particular retail platforms and minimal capacity constraints; in this case vigorous price-based competition is more likely to occur between retail platforms than between offline retailers).

31 European Commission press release, 'Antitrust: Commission launches e-commerce sector inquiry', IP/15/4921, 6 May 2015, <http://europa.eu/rapid/press-release_IP-15-4921_en.htm> accessed 20 February 2016.

32 L Kjølbye, A Aresu and S Stephanou, 'The Commission's E-Commerce Sector Inquiry – Analysis of Legal Issues and Suggested Practical Approach' (2015) 6 (7) JECLAP 465.

33 See see fn 13.

34 See Competition and Markets Authority (CMA), 'Private Motor Insurance Market Investigation, Final Report', 24 September 2014, <https://www.gov.uk/cma-cases/private-motor-insurance-market-investigation#final-report> accessed 20 February 2016.

35 See Bundeskartellamt press release, 'Verivox Vows to Stop Using 'Best Price' Clauses', 3 June 2015, <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/03_06_2015_Verivox.html> accessed 20 February 2016.

36 See next paragraph of the paper.

37 See Bundeskartellamt press release, 'Amazon Abandons Price Parity Clauses for Good', 29 August 2013, <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html%3Fnn%3D3599398>; OFT press release 60/13, 'OFT Welcomes Amazon's Decision to End Price Parity Policy', 29 August 2013, <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-andupdates/press/2013/60-13> accessed 20 February 2016.

38 See, for instance, online platforms for dining such as OpenTable, which enables consumers (for free) to make, and restaurants (paying a fee) to accept, reservations for tables over the Internet. This example is made by Evans and Schmalensee, see fn 3, 4–6.

39 See J Haucap and T Stühmeier, 'Competition and Antitrust in Internet Markets', DICE Discussion Paper, in J Bauer and M Latzer (eds), *Handbook on the Economics of the Internet* (Edward Elgar forthcoming), 7 (arguing that, together with OTAs, search engine users can also easily switch away from one to another, whereas, switching costs between social networks such as Facebook are generally much higher because of strong direct network effects and the effort needed to coordinate user groups).

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subject of the recent case law, typically OTAs sell rooms on behalf of their hotel partners, receiving a standard commission from them for each booking that is made by customers, who are required to pay the selected hotel direct. The same mechanism generally also happens with meta-search engines or price comparison websites, which regularly only offer a price comparison function and establish contact between the connected hotel portals and the hotel customers.

As mentioned, platforms operating in the online hotel booking sector have recently been the subject of competition concerns both in the EU and in the United States, but with different approaches and solutions.

A. United Kingdom

In the European context, an initial investigation into the online hotel booking sector was launched in September 2010 by the Office of Fair Trade (OFT), after a complaint brought by a small OTA, Skoosh. The OFT issued a Statement of Objections 2 years later alleging that Booking.com, Expedia and InterContinental Hotels Group (IHG) had infringed competition law. In particular, the OFT found that Booking.com and Expedia each entered into separate agreements with IHG which restricted each OTA's ability to discount the rate at which room-only hotel accommodation bookings are offered to consumers. The OFT declared that such infringements are, by their nature, anti-competitive, in that they can limit price competition between OTAs and increase barriers to entry and expansion for OTAs that may seek to gain market share by offering discounts to consumers.[40] The OFT closed the investigation on 31 January 2014, accepting the commitments proposed by the defendants under which OTAs would be free to use their commission revenue or margin to fund discounts to consumers who meet certain criteria (ie Closed Group Members who have made at least one prior booking with the OTA concerned).[41] However, the decision adopted by the OFT has recently been quashed by the Competition Appeal Tribunal (CAT), which decided on the appeal brought by a meta-search website, Skyscanner, questioning the accepted commitments and their likely effects on competition and remitted it to the OFT's successor, the Competition and Markets Authority (CMA).[42]

It is worth noting that in its Statement of Objections, the OFT did not identify rate parity obligations as a distinct competition concern: the OFT stated that the existence of rate parity obligations was capable of reinforcing and exacerbating any prevention, restriction or distortion of competition arising from discounting restrictions, but it abstained from investigating the extent to which those obligations were capable of breaching competition rules. However, after the Italian, Swedish and French decisions dealt with in the following pages, the CMA has recently closed its investigation, declaring that the case is not currently an administrative priority, and has not taken any decision as to whether the competition rules have been infringed, announcing that it will continue monitoring the effects of the commitments approved by those NCAs in order to reach a final view on the matter.

B. Germany

On 20 December 2013, the German Bundeskartellamt prohibited the portal HRS from continuing to apply its best price clause and ordered the company to delete it from its contracts and general terms and conditions by 1 March 2014, insofar as the clause affected hotels in Germany. The German NCA defined the relevant product market as the market for the sale of hotel rooms via hotel portals, which in geographic terms was determined to cover all of Germany. Having excluded the possibility of an exemption in accordance with section 2(1) GWB/Article 101(3) TFEU and having stated that HRS fell outside Vertical Block Exemption Regulation (VBER) 30 per cent safe harbour,[43] the Bundeskartellamt identified three main competitive concerns deriving from parity clauses adopted by HRS: the restriction of competition between platforms, the increase of barriers to entry for new players and the potential negative effect also on the competition between hotels (as hotels could not react flexibly to the market conditions by differentiating prices across distribution channels and this might reduce incentives to lower prices in the first place). In its assessment, the Bundeskartellamt rejected the free-riding argument. Even if HRS invested a considerable amount of money in advertising in order to increase its visibility, an agreement that in practice had the same effects as a

40 Details of the investigation of the OFT are available at <http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/online-booking/ > accessed 20 February 2016.

41 In detail, under the proposed commitments: (i) OTAs and hotels may offer discounts, up to the level of their commission or margin, off the headline room rates in UK hotels to any EEA resident who has joined a 'closed group' and made a previous booking with that OTA or hotel at the headline rate and (ii) OTAs cannot publicise information about the specific level or extent of discounts outside the closed group. Skyscanner's appeal related primarily to this latter publicity restriction.

42 *Skyscanner Ltd v CMA* (2014) CAT 16.

43 Commission Regulation 230/2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices (2010) OJ L102/1.

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price-fixing agreement could not be defended on the grounds that it fostered competition in other non-price dimensions, in particular advertising. Most importantly, the indispensability requirement was not satisfied: the parties failed to demonstrate that MFNs were indispensable to the attainment of the claimed efficiencies and that remuneration models other than the commission model currently in use, and raising fewer competition concerns, were possible. As the market for bookings via OTAs is highly concentrated in Germany, with a few strong players accounting for 90 per cent of the bookings, the main concern of the Bundeskartellamt was to keep the market open for new platforms, but also, possibly, for alternative business models.

The decision was confirmed when the Düsseldorf Higher Regional Court rejected HRS's appeal. After that judgement the German authority issued a similar decision against Booking.com with regard to the use of best price clauses in its contracts with hotels in Germany, refusing the commitment offered by the OTA to replace its original MFN clause with a 'narrow' MFN, as had been accepted by Italian, French and Swedish NCAs in their investigations.[44]

C. Italy, France and Sweden

In May 2014, the Italian national competition authority (Autorità garante della concorrenza e del mercato, hereinafter AGCM) began an investigation into Booking.com and Expedia. In this case, the complaint was brought by Federalberghi, the association of hoteliers, with regard to the Best Price Guarantees offered by Booking.com and Expedia, who – thanks to their large market share – request high fees from hotels and bind them to the lowest tariff available on any other channel (online and offline).[45] As to the type of violation, AGCM referred to vertical restrictions being capable of significantly reducing competition on prices and supply conditions, both between platforms and different sale channels (OTAs, hotel websites, agencies). The Italian competition authority affirmed the anti-competitive nature of MFN clauses by which the price and the conditions of each specific offer made to consumers through Booking.com or Expedia are the minimum price and the best conditions available for that offer. In other words, the provision of such clauses by two of the leading platforms on the market would be capable of determining a greater downward inflexibility, both of the fees requested to hotels and of accommodation prices, to the detriment of final consumers.

The same concerns that parity clauses may restrict competition between the big OTAs in question and other OTAs, and hinder new booking platforms from entering the market are shared by other NCAs, such as those in France and Sweden. In these cases, the NCAs of Italy, France and Sweden have collaborated under the coordination of the EU Commission. Booking.com proposed commitments such as in the UK case, but, after market tests, it modified them, significantly reducing the scope of MFN clauses on prices, conditions and room availability. In a nutshell, under the final and accepted commitments, MFN clauses will only apply to prices and other conditions publicly offered by the hotels through their own direct online sales channels, whereas they will remain free to set prices and conditions on other OTAs and on their direct off-line channels, as well as in the context of their loyalty programs.[46]

As a consequence of these investigations, Booking.com has decided to implement throughout Europe the commitments agreed with the French, Italian and Swedish NCAs. Furthermore, Expedia, though holding a lower market share than Booking.com and supporting the compliance of such clauses with competition law, has adapted its policy to reflect these commitments, with the declared aim of facilitating the closure of all open investigations into such clauses on a harmonised pan-European basis. This change of policy has recently led the Italian NCA to close the investigation of Expedia too on the same grounds as those adopted for the decision on Booking.com.[47]

D. United States

A different approach has been adopted in the United States, where MFN clauses are generally considered by antitrust jurisprudence as pro-competitive.[48] In particular, in February 2014 the District Court of the Northern District of Texas, Dallas Division, decided the case *In re Online Travel Company (OTC) Hotel Booking Antitrust*

44 See Bundeskartellamt's press release of 23 December 2015, available at <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html>accessed 20 February 2016.

45 Autorità Garante della Concorrenza e del mercato (AGCM), proceeding No. I/779, 7 May 2014.

46 The commitments apply, as from 1 July 2015, to all bookings made by consumers with regard to hotels located in the countries concerned and will have a duration of 5 years. For details, see: AGCM, decision of 21 April 2015, <http://www.agcm.it/trasp-statistiche/doc_download/4809-i779chiusura.html>; Autorité de la Concurrence, Décision n° 15-D-06 of 21 April 2015, <http://www.autoritedelaconcurrence.fr/pdf/avis/15d06.pdf>; Konkurrensverket, case ref. No. 596/2013, decision of 15 April 2015, <http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_eng.pdf> accessed 20 February 2016.

47 See AGCM, decision of 23 March 2016, <http://www.agcm.it/concorrenza/intese-e-abusi/open/41256297003874BD/4AC063DE04DC3DB1C1257F92003FE656.html> accessed 22 April 2016.

48 See eg *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic* 65 F.3d 1406, 1415 (7th Cir. 1995).

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Litigation, regarding the class action against major US hotel chains and OTAs brought by consumers claiming the defendants had colluded through an industry-wide conspiracy to impose rate parity across room booking websites in order to eliminate intra-brand competition (ie within competition among each hotel's online distribution channels, including its own website and OTA-run websites).[49] There were several defendants in this case: the first group includes 12 collectively dominant hotel chains in the United States; the second group is made up of 9 OTAs (4 of which—Expedia, Orbitz, Priceline and Travelocity—accounted for 94 per cent of all OTA-hotel bookings in 2011); a third category of defendants is solely occupied by EyeforTravel, a travel industry news company that allegedly facilitated the price-fixing conspiracy in this case through its annual industry conferences. According to the plaintiffs, collusion was supported by at least two agreements: first, the OTA defendants entered into a horizontal agreement not to compete with each other; second, each hotel defendant and OTA defendant signed vertical RPM agreements providing Best Available Rate and MFN clauses aimed at granting that each OTA would not discount below each hotel website's published rate and that each hotel was providing each OTA with its lowest online rate. As a consequence, under this 'RPM scheme' the OTA began to offer a near-identical best price guarantee, knowing that it was the only price available on the market, even among competitors.

The Court dismissed the action, focussing on two essential points, ie the existence of an agreement or a collusion relevant for antitrust laws, and the misleading nature of Best Available Rate clauses. With regard to the first point, according to the Court, the defendants' parallel adoption of similar business strategies was not suspicious or suggestive of an agreement,[50] and common economic experience gives a simple explanation for the common interest of hotels and OTAs to conclude similar RPM agreements instead, that is the protection of their own businesses: for the hotels, an RPM agreement allows them to control the prices at which their rooms are sold online; for OTAs, the two-term RPM agreement, including the MFN clause, gives them an assurance that the minimum rate published will not be undercut by the hotel itself or an OTA competitor. With regard to the second point, the Court also challenged the argument, asserting the deceptiveness or unfairness of rate guarantees under the consumer protection statutes, agreeing with the defendants in arguing that the guarantees merely provide assurance to the customer that the prices offered are at least as low as any other published price, and then provide a remedy to the consumer if the price quoted cannot meet that assurance.

Finally, it is worth mentioning that the plaintiffs subsequently modified their original claim, dropping the hotels as defendants and directing their complaint solely to OTAs as entering into a per se unlawful horizontal agreement to fix prices and RPM agreements that unreasonably restrained trade. According to the changes made by the plaintiffs, rate parity agreements are a necessary tool to effectuate the underlying agreement not to compete between defendant OTAs. However, the Court considered once again the assertions of the plaintiffs as being too vague and failing to demonstrate the existence of a conspiracy.[51]

IV. The problematic application of Article 101 TFEU

Returning to the European context, many critical questions remain. First of all, uncertainties exist about the correct antitrust qualification of the subjects and the conduct under scrutiny in the case law mentioned above. Analysing the MFN clauses at issue in the context of vertical restraints, as NCAs did, involves some essential questions to be addressed.

A. Reseller or genuine agent?

A first problematic issue concerns the legal nature of Internet intermediaries, ie whether they should be considered as genuine agents or independent resellers. Competition rules generally reserve special treatment for agency agreements, both in the EU and in the United States.[52] In the European context, as clarified by the 2010

49 *In re Online Travel Company (OTC) Hotel Booking Antitrust Litigation*, Case No 3:12-cv-3515-B (N.D. Tex., 18 February 2014). The Court specifies that plaintiffs are expressly not alleging a horizontal conspiracy between the hotel defendants to restrain inter-brand competition on hotel room prices. It is worth recalling that the Supreme Court has clarified that 'the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result' [*Leegin*, citing *State Oil Co. v Kahn* 522 US 3, 15 (1997)].

50 According to the Court, evidences alleged by the plaintiffs are not judged as satisfying the standards set by the Supreme Court in *Twombly* [*Bell Atlantic Corp. v Twombly* 550 US 544 (2007)] for pleading a § 1 of Sherman Act conspiracy.

51 Order denying 137 Motion to Amend/Correct, 27 October 2014. The plaintiffs based their arguments mainly on the alleged suspect timing of the conduct under complaint. It is interesting to note that, with regard to the exclusion of the hotel as defendants, the Court affirms that '[a]t best, this amendment eliminates an inherent contradiction in the [Consolidated Amended Complaint]'s theory – hotels are no longer simultaneously victims and willing participants in the scheme'.

52 Suffice it to remember the Supreme Court's landmark rulings: *Dr. Miles Medical Co. v John D. Park & Sons* 220 U.S. 373, 404–406 (1911); *United States v. General Electric* 272 US 476 (1926). For a detailed analysis, see I Lianos, 'Commercial Agency Agreements, Vertical Restraints and the Limits of Article 81(1) EC: Between Hierarchies and Networks' (2007) 3(3)

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Guidelines on Vertical Restraints (VBER Guidelines), the determining factor in defining an agency agreement for the purposes of Article 101(1) is the financial or commercial risk borne by the agent: the agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal, in relation to market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken on the same product market.[53] In these cases, the agent operates as an auxiliary of the principal, so that these agreements are excluded from the scope of Article 101(1). Otherwise the agent is considered as an independent undertaking and the agreement with the principal is subject to common competition rules. This assessment is made case by case, the qualification given to their agreement by the parties or national legislation being irrelevant.[54]

However, even for genuine agents, clauses governing the agent–principal relationship may still infringe Article 101(1), in particular when the agency agreement facilitates collusion (that could, for example, be the case when a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals).[55] In any case, the application of such exception would require the proof of collusion, which has not been the case in the investigations examined.[56]

Far from being a purely academic issue, in the case of electronic platforms there are opposing views on this point.[57] Some authors consider the substantial market-specific investments and the fact that in the existing case law MFN clauses are requested by the platform which imposes an essential condition of the principal's pricing strategy would preclude a finding of a genuine agency relationship.[58] Similarly, as for regulators, at the EU level, in the words of the former Director-General for Competition, online booking platforms may be considered as resellers, due to the significant investment they have made in advertising, software and customer support.[59] The NCAs have generally not addressed this issue, with the exception only of the German one, qualifying the platform under investigation as the reseller arguing that MFN clauses do not restrict the conduct of the alleged agent, but rather that of the alleged principal, and emphasising the financial and economic risks borne by it. This approach gives rise to some doubts and no exhaustive answer on the legal qualification of the principal–agent relationship in an online setting seems, up to now, to exist. As some authors have stressed, where the intermediary, as for example in the case of OTAs, neither sells nor buys the products involved, but earns a commission on sales executed on its platform, it does not bear any risk with regard to the activity of the principal. This is the typical case recurring in online settings, where platforms do not usually undertake contract- or relationship-specific investments, but more generally invest in the improvement of the platform itself.[60] For these reasons they seem to be hardly assimilated to resellers.

B. Article 101 or Article 102?

The focus of the investigations conducted by NCAs is on the role of the OTAs: their market power is generally strongly stressed, although they are not identified as

Journal of Comparative Law & Economics 625 (highlighting that the theoretical basis of the non-application of Section 1 of the Sherman Act to price fixing clauses included in agreements between the principals and their agents – the so-called consignment exception – has never been clear and still persists notwithstanding the evolution of competition law standards on vertical restraints towards a more effects-based approach).

53 Commission Guidelines on Vertical Restraints [2010] OJ C 130/1 [hereinafter VBER Guidelines], §§12–15.

54 In several cases, the EU Commission has considered the inexistence of the conditions of a genuine agency agreement, whereas parties affirm the opposite: eg Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114–73 *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission* [1975] ECR-1663; Case C-266/93 *Bundeskartellamt v Volkswagen AG and VAG Leasing GmBH* [1995] ECR I-3477. On the theoretical justification for the special treatment reserved for agency agreements, see Lianos, see fn 52. It is worth noting that this issue has been the subject of a judgment of ECJ regarding travel agents in their traditional brick-and-mortar form: on that occasion, the Court stated that a travel agent must be regarded as an independent agent who provides services on an entirely independent basis; moreover, as he sells travel organised by a large number of different suppliers who in turn sell travel through a very large number of agents, a travel agent cannot be treated as an auxiliary organ forming an integral part of a tour operator's undertaking {Case C-311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801}. The German NCA referred to this judgment in its decision, but it is worth noting that recently, whether the agent acts for one or several principals is considered not material for the assessment under the VBER Guidelines (see §13). On this issue, with reference to the recent case law, see P Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2015) CCP Working Paper 15-12, 23–32.

55 VBER Guidelines, see fn 53, § 20.

56 Akman, see fn 54, 31–32.

57 M Bennett, 'Online Platforms: Retailers, Genuine Agents or None of the Above?' (2013) CPI, <https://www.competitionpolicyinternational.com/assets/Uploads/EuropeJune.pdf>; I Kokkoris, 'Expedia and Booking.com: Agent or Distributor?' (2012) CPI, <https://www.competitionpolicyinternational.com/assets/Uploads/Europe1-24-2013-final.pdf> accessed 20 February 2016.

58 Buccirossi, see fn 2, 30.

59 A Italianer, 'Competition Policy in the Digital Age', speech given at 47th Innsbruck Symposium, 'Real sector economy and the internet – digital interconnection as an issue for competition policy', 7 March 2014, <http://ec.europa.eu/competition/speeches/text/sp2014_01_en.pdf > accessed 20 February 2016.

60 Akman, see fn 54; and Kjølbye et al., see fn 32.

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holding a dominant position (either individual or collective), with the only exception of the French case, where the NCA merely mentions in a very general way the possibility that such conduct may also violate Article 102 TFEU. However, aside from the English case, the other investigations and the decisions taken by NCAs are directed against only one party to the agreement. This recalls the old problem of the scope of the concept of agreement under EU competition law. It is a well-established principle that an agreement requires the existence of a concurrence of wills between at least two parties of their common intention to conduct themselves on the market in a particular way[61] (including the participation, or at least the acquiescence of the other party, and the traditional principles on the concept of agreement under competition law being applied in the same manner in digital setting),[62] and that those who participate in an agreement cannot claim damages (except in the *Courage* case).[63] Thus, in the case of an agreement, hotels should not be considered as victims, but as willing participants, like OTAs; otherwise it would be more appropriate to consider such conduct as unilateral, to be judged anti-competitive only when OTAs hold a dominant position. It is interesting to note that the inherent contradiction in considering hotels simultaneously as victims and willing participants in the scheme has been also noted by the Court in the US case.[64] From this is derived the clear risk of a distortive interpretation of the concept of agreement, which has often been subject to a broad view by competition authorities (firstly, the Commission) allowing Article 101 TFEU to be applied to unilateral behaviour in the absence of evidence of a dominant position.[65]

It is true that the assessment of dominance in digital markets presents a very difficult task. There are two main elements to consider. Firstly, platform markets may be more concentrated than other industries, this deriving from network effects typical of two-sided markets, which often make large platform sizes indispensable in order to achieve efficient utilisation of the platform itself: this means that the existence of big player(s) is not automatically 'bad' in these markets, where the existence of one large marketplace is often more efficient, mainly in terms of search costs, than a situation where a large number of small marketplaces exist.[66]

Secondly, the tendency towards 'winner takes all' is frequent in digital markets, where competition often has a cyclical trend as successful platforms tend to acquire a significant, but frequently transitory, market power and maintain it by developing improvements in the innovation process. It is generally agreed that, although many of the key players in the digital economy are very large firms, durable dominance may be elusive in this context. Moreover, where multi-homing costs are low, such as in the case of the online travel sector, dominance is harder to acquire and maintain.

As a matter of fact, given the vigorous competition existing between different platforms in many digital markets, it can be hard to determine the point at which a firm may be considered dominant for competition law enforcement purposes. Where dominance cannot be established, an alternative approach is to address significant anti-competitive behaviour by non-dominant firms through provisions regulating unfair trade practices, such as §5 of the Federal Trade Commission Act in the United States, but no similar provision exists in the EU.[67]

However, it is questionable whether the application of Article 101 TFEU to the cases at issue is based on solid grounds or whether proceeding on the basis of an infringement of Article 102 would be more appropriate. In any case, a platform's significant market power appears to be the only explanation for a supplier to be induced to accept these clauses, unless the supplier benefits in some way from such agreements (for instance, achieving a form of reverse payment from the platform).[68]

C. Restriction by object or by effect?

There is also no unanimous view on whether the arrangements at issue should be considered restrictions by object or by effect. The OFT in its investigation found restrictions by object on OTA's ability to discount the room price; on the other hand, the German NCA affirmed that it is arguable whether MFN clauses bring about significant restraints of competition by object, whereas they certainly do so by effect.

The acknowledged existence of pro-competitive and anti-competitive effects of these clauses, and the absence of an established practice and literature on the topic have led some commentators to exclude the possibility

61 Joined Cases C-2/01 P and C-3/01 P, *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-00023; Case C-74/04 P *Commission v Volkswagen AG* [2006] ECR I-06585.

62 This principle has also been confirmed by a recent case concerning only an online travel booking system [Case 74/14 *'Eturas' UAB and Others v Lietuvos Respublikos konkurencijos taryba* (not yet reported)].

63 Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-06297.

64 See the Order denying 137 Motion to Amend/Correct, see fn 51. The Court notes that the Amended Complaint, excluding the hotel as defendants, removes this contradiction.

65 See Akman, see fn 54 (supporting the idea that the treatment of the cases at issue under Article 102 seems to be more appropriate).

66 See Haucap and Stühmeier, see fn 39, 4–5.

67 OECD, *The Digital Economy* (2012), 149.

68 OECD, see fn 2, 197.

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of considering them as anti-competitive by their nature. By contrast, other scholars have assimilated parity clauses at issue to a form of minimum resale price maintenance (RPM), as in the agency model the final price is fixed by the upstream supplier and not by the reseller, though the agreements in question do not fix a certain price, the upstream supplier is free to set it. According to this view, MFN clauses combine two elements, ie a vertical one, whereby an upstream firm sets final downstream retail prices, and a horizontal one, whereby the upstream firm sets identical retail prices across all downstream intermediaries/retailers; this is of major concern and makes the parity clauses at issue equivalent to the 'worst' of RPM.[69] The Commission, at least in the early stages of the OTA's investigations, has also stressed the importance of two elements arising from case law in the online hotel booking sector: first, the shifting of the balance of power in favour of the reseller; second, the combination of RPM with retail price parity clauses, resulting in a strong potentially anti-competitive effect.[70]

The assimilation of the MFN clauses at issue to RPM implies relevant consequences. From a strictly legal point of view, MFN clauses, as vertical agreements, are in principle covered by the Block Exemption Regulation, provided that the parties' market shares do not exceed 30 per cent of the relevant selling and buying markets.[71] However, the exemption from the application of Article 101(1) does not apply to RPM.[72] This recalls the divergence between the European approach, under which minimum price fixing is still considered per se illegal, and the US approach, where it is now subject to the rule of reason after the Supreme Court's decision in *Leegin*.[73] As a matter of fact, economic theory has demonstrated the existence of the pro-competitive effects of minimum price fixing and such an approach has been implemented in the United States. However, although this may suggest a need for a rethink of the presumption of illegality, at present the EU authorities still seem to resist adopting a more flexible approach.[74]

D. The commitments

The recent investigations into OTAs also confirm the current tendency at EU level to deal with cases in the digital economy by way of commitments decisions, a strategy which allows NCAs to address the cases in a short time but precludes a full assessment and leaves many questions untested, including the finding of a dominant position.

This tool has been used in all the cases examined, with the only exception being the German one. Unlike the other NCAs, the Bundeskartellamt considered the 'narrow MFN' proposed as not sufficient to eliminate the dangers for competition and, in fact, as having the same effects as 'wide MFN', since it argued that hotels may not be willing to always be at least as expensive as the most expensive OTA and are unlikely to punish OTAs that impose high commissions but are unavoidable trading partners (considering that OTAs still have the possibility of disadvantaging hotels that offer them worse conditions by lowering their ranking or excluding them from preferred-partner programs). In reality, the view that 'narrow MFN' would provide an adequate balancing formula has been supported in the literature,[75] but there is no general consensus over this issue.[76]

However, it is worth stressing that the lack of consensus over the efficiencies deriving from the 'narrow MFN' and the general absence of a clear assessment by competition agencies involved have critical consequences on the evaluation of the parity clauses and also, from a strictly legal point of view, on the effectiveness of the commitments and on legal certainty. This results in a very real danger, given that, after the commitments by Booking were accepted, the French Constitutional Council adopted legislation for online platforms banning restrictions on hoteliers' pricing freedom, ie banning all types of parity clauses (including those that were allowed under the commitments made binding against Booking by the French NCA), and similar provisions are under consideration in Italy.[77]

69 Fletcher and Hviid, see fn 15, 31–32 (arguing that Retail Price MFN clauses should be treated no less harshly than RPM under competition law). On this topic, see also L Atlee and Y Botteman, 'Resale Price Maintenance and Most-Favored Nation Clauses: The Future Does Not Look Bright' (2013) CPI Antitrust Chronicle, November (arguing, at 2, that MFN clauses require a complex assessment by antitrust authorities who must determine if these clauses can be assimilated to RPM).

70 Italianer, see fn 59 [arguing, at 10, that the combined use of RPM and the price parity clause: may eliminate intra-brand price competition (for the same room); may reduce the incentive for online travel agents to compete on commission and may create barriers for new online travel agents to enter].

71 Commission Regulation (EU) No. 330/2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, [2010] OJ L 102/1 (hereinafter, VBER, Articles 2–3). On the application of VBER and/or the individual exemption provided by Article 101(3) to two-sided platforms, see D Zimmer and M Blaschczok, 'Most-favoured-customer clauses and two-sided platforms' (2014) 5:4 JECLAP 187, 192 et seq.

72 VBER Guidelines, see fn 53, 47–48.

73 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

74 VBER, see fn 71, Article 4(a).

75 Ezrachi, see fn 21, 22 et seq.

76 See, eg Hviid, see fn 21, 42 (arguing that the main difference between the effects of wide and narrow APPAs would appear to be how compelling the free-rider argument is).

77 Article 133 of *Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques* (also known as *Loi Macron*). A similar provision has also been proposed in Italy and it is now subject to the approval of the Parliament.

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V. Final remarks

From the investigations analysed, there emerges a general view in the EU that agreements including MFN clauses in their wide form violate competition law, whereas there is no unanimous approach to the narrow version of the same clauses nor to the relevance to be accorded to the free-riding issue frequently raised in recent case law. The lack of a coherent view on these clauses is strictly related to the absence of a robust general theory on the matter, which in turn is reflected in the absence of an assessment by competition agencies in the majority of cases.[78]

This situation leaves many open questions. The acknowledged existence of pro-competitive and anti-competitive effects of MFN clauses would suggest that these cases should be examined on a case-by-case basis and that a generalised approach and regulatory interventions which may stifle innovation in digital markets, which are fast-moving by nature, should be avoided.[79] This view collides with the recent anomalous (and also disputable) interventions of national governments through *ad hoc* legislation, such as that in France, that lead to the risk of incorrect and unfair outcomes, with an appreciable reduction in legal and business certainty.[80]

It is also worth mentioning that, with the exception of the German NCA's decision against HRS, which has been confirmed by national judges, none of the other cases has been challenged in courts. Moreover, it also remains to be seen whether a European court would uphold the approach adopted by NCAs and whether it would consider MFN clauses as restrictions by effect or by object, also considering the actual trend towards a more restrictive interpretation of the 'object box', as established in *Groupement des cartes bancaires*.[81]

The need to address the issue of how to treat these clauses under EU competition law has become a priority. There is an ongoing general discussion, triggered by the Google case, on the power of big Internet platforms (such as eBay, Facebook, Apple and Amazon) and questioning the need to regulate them in order to guarantee higher user protection while maintaining incentives to innovate.[82] It would therefore be reasonable to expect the European Commission to provide guidance on these issues in the final results of the Sector Inquiry into e-commerce.

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78 This also recalls the doubts over the expertise of NCAs on these issues, as reported by the OECD (see fn 67, at 7).

79 See B Edelman and J Wright, 'A Symposium on Antitrust Economics of Multi-Sided Platforms: Price Restrictions in Multi-sided Platforms: Practices and Responses' (2014) 10 CPI 86 (arguing that a regulator seeking to intervene in such markets faces several challenges, as affected markets at issue are distinctively complex and involve several parties, and warning that platforms' price restrictions on sellers deserve a careful and critical look).

80 Along the same lines, see Ezrachi, see fn 21, 36.

81 Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission* [2014] (not yet reported).

82 European Parliament resolution of 19 January 2016 on the Annual report on EU Competition Policy (2015/2140(INI)).

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