IX. MFN CLAUSES IN COMPETITION LAW: INDIA'S LIKELY STANCE

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ABSTRACT

In 2019, the Competition Commission of India heard a complaint regarding price parity/Most Favoured Nation clauses imposed by MakeMyTrip on its hotel partners. As per this clause, hotels were to offer MMT their most favourable price on rooms, such that lower prices could not be offered on any other hotel booking platform or the hotel's own website. Even though the legality of these clauses has been a topical question internationally, this is the first time the CCI has been faced with the issue. Despite the abundant discourse on the topic, very few countries have taken a position on its legality thereby limiting India's ability to rely on international jurisprudence. In addition to this inherent limitation, this paper further presents two potential hurdles that the CCI may face in the analysis of these clauses; first, that MFN clauses being vertical agreements have to be afforded the rule of reason analysis per the Competition Act 2002, thereby eliminating reliance on the majority of the few countries that have made a legal determination. Second, the CCI's approach vis-à-vis similarly situated Resale Price Maintenance agreements has the potential to create issues of consistency in terms of the legality of MFN clauses. The paper ultimately concludes that India may rely most safely on the decisions taken by German Courts in establishing its own stance on price parity clauses through the adjudication of the MMT case.

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I. INTRODUCTION

A. Contextual background

Price parity clauses or Most Favored Nation ("MFN") clauses, although the subject of much discourse over several years in international jurisdictions have shot to prominence in the Indian context only recently. With the spur in e-commerce and the nascent but booming industry of online intermediaries that bridge the distance between sellers and end buyers, the competitive implications of MFN clauses are paramount. Recently, in 2019, the Federation of Hotel & Restaurant Associations of India ("FHRAI") filed information under Section 19(1)(a) of the Competition Act, 2002[1] ("Competition Act/Act") against MakeMyTrip India Pvt. Ltd. ("MMT"), Ibibo Group Pvt. Ltd. and Oravel Stays Pvt. Ltd. (MMT-Go case) alleging contravention of the provisions of Sections 3 and 4 of the Act.[2] The FHRAI alleged that MMT-Go had indulged in abusive practices *inter alia* imposition of price-parity clauses. As per the price parity clause, hotel partners were not allowed to sell their rooms on any other platform or on their own online portal at a lower price than that being offered on MMT-Go's platform.[3]

On examining the agreement that contained the MFN clause, the Competition Commission of India ("CCI") concluded that the price parity clause was 'wide' in nature. Given the dominance of MMT-Go, the CCI

[1] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §19(1)(a) [hereinafter *Competition Act, 2002*].
[2] FHRAI v. MMT-Go & Ors., 2019 SCC OnLine CCI 37.
[3] *Id.* at ¶12.

concluded that there existed a *prima facie* case for investigating the price parity clauses for alleged violation of Sections 3(4) and 4 of the Act.[4]

Following suit, in 2020, Rubtub Solutions Pvt. Ltd. also filed an information against MMT alleging contravention of the provisions of Sections 3 and 4 of the Act due to the imposition of MFN clauses.[5] The CCI observed that the price parity clause imposed in this case was similar to the one examined in the MMT-Go case. Consequently, the CCI clubbed both the investigations.[6]

B. Understanding MFN Clauses

MFN clauses are stipulations by which the sellers commit not to offer more favourable prices to any other online platform.[7] Thereby, such clauses restrict sellers from offering their goods or services at lower prices on other competing platforms.[8] By securing such favourable prices, the restriction imposing platforms attempt to guarantee the best available price for a given product to its consumers.

MFN clauses can be 'narrow' if they prohibit the supplier from offering a lower price on its own website while imposing no conditions vis- à-vis price on other platforms.[9] On the other hand, MFN clauses are 'wide' in

[4] *Id.* at ¶56.
[5] Rubtub Solutions v. MMT & Ors., case No. 01 of 2020, Competition Commission of India, https://www.cci.gov.in/sites/default/files/01-of-2020.pdf.
[6] *Id.* at ¶24.
[7] Ingrid Vandenborre & Michael J. Frese, *Most Favoured Nation Clauses Revisited*, 35(12) E.C.L.R. 588 (2014).
[8] Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176, 2178 (2018).
[9] *Evaluation support study on the EU competition rules applicable to vertical agreements in the VBER and the Guidelines*, Final Report, EUROPEAN COMMISSION (2020), p. 93.

nature, if they prevent the supplier from offering lower prices on their own website as well as on other competitor's sales channels/websites.[10] MFN clauses are generally imposed as a vertical restraint by a platform on the sellers selling through that platform.[11]

For years, platform MFN clauses, especially in the online hotel booking sector, have been the focus of several antitrust investigations around the world. In the Indian context, MFN clauses neither find a mention in the Competition Act nor have they been investigated by the CCI, prior to the decision given by the CCI in the present MMT-Go case. This decision is paramount as it will lay down the legal framework that deals with such clauses.

In this context, while deconstructing the concept of platform MFN clauses, this paper aims to conduct a detailed analysis of the existing, albeit conflicting jurisprudence in foreign jurisdictions, including the USA, EU, and the UK. Using the information and rationale adopted therein, this paper will explore India's likely stance in the imminent MMT-Go case and the online travel agency context as well as a more general context. This paper is primarily divided into five parts. **Part I** explores and analyzes the jurisprudence governing MFN clauses in USA, EU, and the UK. While distinguishing India's likely approach from other jurisdictions, this paper presents two arguments. **Part II** deals with the first argument that MFN clauses have to be analysed using the 'rule of reason' framework. Consequently, it highlights the restrictions that the CCI may face while looking to certain European countries in establishing its own position. Building off of the previous chapter, **Part III** explains the second argument wherein MFN clauses are compared to Resale

[10] *Id.*
[11] FHRAI v. MMT-Go & Ors., 2019 SCC OnLine CCI 37.

Price Maintenance agreements to better understand the former through the established position on the latter. **Part IV** elucidates India's likely stance on MFN clauses. **Part V** summarises the paper and provides a conclusion.

II. ANTITRUST ENFORCEMENT AGAINST MFN'S

Across the world, MFN clauses have shot to prominence in the online hotel booking industry and veered into insurance, e-books, etc. This section highlights recent decisions regarding MFN clauses and presents the different approaches taken by competition authorities the world over.

A. Position in the USA

1. Judicial determination of MFNs

The courts in the USA have generally regarded MFN clauses as competitively neutral or pro-competitive and generally unlikely to violate antitrust laws.[12] For example, in the case of *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield of Rhode Island*,[13] Blue Cross, a health insurer, initiated a policy as per which it would not pay a physician more than that which the physician was accepted from any other health care cost provider.[14] The US Court of Appeals stated that the "policy of insisting on a supplier's lowest price assuming that the price is not 'predatory' or below the

[12] Richard Wolfram Esq., *Most Favored Nations' (MFN) Clauses under the Spotlight: U.S. v. Blue Cross Blue Shield of Michigan — When Might Otherwise Competitively Neutral or Procompetitive MFN Clauses Violate the Antitrust Laws?*, KLUWER COMPETITION LAW BLOG (Oct. 3, 2020), http://antitrustconnect.com/2011/01/06/most-favored-nations-mfn-clauses-under-the-spotlight-u-s-v-blue-cross-blue-shield-of-michigan-when-might-otherwise-competitively-neutral-or-procompetitive-mfn-clauses/.

[13] Ocean State Physicians Health Plan v. Blue Cross & Blue Shield of Rhode Island, 883 F.2d 1101 (1st Cir. 1989).

[14] *Id.* at 1103.

supplier's incremental cost, tends to further competition on the merits and, as a matter of law, is not exclusionary."[15]

The Court held that the policy did not violate antitrust laws and that it would be absurd to argue that a policy that requires to pay the same amount for the same service is anti-competitive in nature.[16] Further, in the case of *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*,[17] the US Court of Appeals described MFN clauses as "standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favourably as any of their other customers."[18] Nevertheless, the Court did acknowledge that in some cases these clauses are misused to anti-competitive ends.[19]

Recently in *U.S. v. Apple*,[20] price parity clauses were used by Apple to collude with publishers to raise the retail prices of e-books. At the time when Apple launched its iBookstore, Amazon was the leading e-book retailer in the market. Amazon worked on a wholesale distribution model according to which Amazon paid the publishers a wholesale price and set the retail price itself.[21] As a result, Amazon was providing new releases and best-sellers to its customers at $9.99.[22] Apple's iBookstore, on the other hand, adopted an agency model such that publishers determined the retail prices.[23] The contract

[15] *Id.* at 1110.
[16] *Id.* at 1110.
[17] Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406 (7th Cir. 1995).
[18] *Id.* at 1415.
[19] *Id.* at 1415.
[20] U.S. v. Apple, No. 13-3741-cv (L) (2nd Cir. 2015).
[21] *Id.* at p. 12.
[22] *Id.* at p. 12.
[23] *Id.* at p. 23.

also contained an MFN clause which required the publishers to lower the retail price of each e-book in the iBookstore to meet any lower price offered by any other retailer.[24] Consequently, because of the MFN clause levied by Apple, the publishers forced Amazon to move to the agency model. This is because if Amazon continued with the wholesale distribution model and continued to sell e-books at $9.99, the publishers would be forced to sell the books at $9.99 in the iBookstore too and would have no control over the pricing.[25] The Appeals Court reaffirmed the Federal District Court's decision,[26] holding that Apple orchestrated a conspiracy among five major publishing companies to raise the retail prices of e-books.[27] Unfortunately, the legality of MFN clauses was not discussed in this case and the Court focused on the collusive strategy at play. The Appeals Court merely reiterated that MFN clauses are generally proper, but can be misused to anti-competitive ends in some cases.[28] Nevertheless, Apple was injuncted from imposing MFN clauses on e-book publishers.[29]

Further, in 2013, in *Re:Online Travel Company Hotel Booking Antitrust Litigation,*[30] consumers alleged that hotels and Online Travel Agencies ("OTAs") were engaging in an industry-wide conspiracy to uniformly adopt resale price maintenance agreements, containing a wide as

[24] *Id.* at p. 26.
[25] *Id.* at p. 28.
[26] U.S. v. Apple, 952 F. Supp. 2d 638 (S.D.N.Y. 2013).
[27] U.S. v. Apple, 13-3741-cv (L) (2nd Cir. 2015), p. 2.
[28] *Id.* at p. 67.
[29] *Id.* at p. 50.
[30] U.S. v. Apple, 997 F.Supp.2d 526, 532 (2014).

well as narrow MFN clause.[31] Unfortunately, the complaint was dismissed and the Court never analysed the competitive effects of MFN clauses.

2. Consent Decrees

Apart from the above-mentioned decisions, the Department of Justice ("DoJ") and the Federal Trade Commission have also challenged price parity clauses. They argued that these MFN clauses reduced competition, raised barriers to entry and expansion as well as discouraged entry.[32] However, these have not been judicially determined and have been settled by consent judgements, pursuant to which the defendant simply agreed to discontinue the use of such clauses in their contracts.[33]

Therefore, the trend in USA jurisprudence seems to be that earlier cases considered MFN clauses competitively neutral and even pro-competitive to some extent whilst also recognizing their potential to be misused. However, more recent cases have failed to decide the legality of MFN clauses on the basis of competitive effects or have alternatively concluded in consent decrees, thereby resulting in a lack of overall clarity.

B. Position in the EU

Various National Competition Authorities ("NCAs") in Europe and the European Commission ("EC") have investigated MFN clauses. However,

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[31] Re: Online Travel Company Hotel Booking Antitrust Litigation, 997 F.Supp.2d 526, 532 (2014), p. 5.
[32] U.S. & State of Michigan v. Blue Cross Blue Shield of Michigan, Civil Action No. 2:10-cv-15155-DPH-MKM, E.D. Mich.
[33] United States v. Medical Mutual of Ohio, Civil Action No., 1:98-CV-2172; United States v. Oregon Dental Service, Civil Action No. C95-1211 FMS; United States and Arizona v. Delta Dental Plan of Arizona, Inc., Civil No. 94-1793 PHXPGR; FTC v. RxCare of Tennessee, 121 F.T.C. 762 (1996); U.S. v. Delta Dental of Rhode Island, Civil Action No.96-113P.

a look at the decisional practice shows that there have been diverging approaches.

1. Decisional practice of the NCAs

The NCAs have primarily investigated the MFN clauses imposed by Booking.com and whether such clauses infringe Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") or equivalent sections of the national competition laws of member states. Article 101(1) of the TFEU prohibits all agreements which either by their object or effect, prevent, restrict or distort competition within an internal market. The analysis has consistently looked at wide and narrow MFN clauses separately while deciding their legality.

In 2013, the French, Italian, and Swedish Competition Authorities ('FCA', 'ICA' and 'SCA', respectively), conducted investigations into the price parity clauses imposed by Booking.com in its contracts with various hotels.[34] The MFN clause, being wide, required hotels to offer rooms on Booking.com at prices equal to or better than those offered on any other competitor's website or the direct sales channel of the hotel itself. The FCA, ICA, and SCA found that these wide price parity clauses reduced competition, created barriers to entry,[35] and foreclosed competition for smaller platforms

[34] *The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com*, EUROPEAN COMMISSION, https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-swedish-competition-authorities-accept-commitments-offered-bookingcom (last visited Oct. 3, 2020).

[35] Konkurrensverket Swedish Competition Authority, 2013 ref 596 ¶¶22-23 (Swed.), https://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_eng.pdf (last visited Oct. 6, 2020).

and new entrants because they were unable to differentiate on price.[36] Hence, these authorities concluded that the wide parity clauses contravened Article 101(1) of the TFEU. With respect to narrow price parity clauses, the SCA found that these clauses did not affect competition, instead, they led to increased competition between hotels.[37]

Ultimately, in April 2015, the three authorities accepted identical binding commitments from Booking.com whereby it agreed to delete the wide price parity clauses.[38] However, narrow MFN clauses were permitted.[39] Booking.com also announced that it would apply the terms of the commitments to all its hotel partners in Europe.[40] As of January 2016, the commitments were accepted by 25 competition authorities across Europe.[41]

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[36] Decision no. 15-D-06 of 21 Apr. 2015, Autorité de la concurrence, ¶130, https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/15d06.pd, (last visited Oct. 6, 2020).

[37] Konkurrensverket Swedish Competition Authority, 2013 ref 596 ¶¶25, 27 (Swed.), https://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_eng.pdf, (last visited Oct. 6, 2020).

[38] *The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com*, EUROPEAN COMMISSION, https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-swedish-competition-authorities-accept-commitments-offered-bookingcom (last visited Oct. 3, 2020).

[39] *21 2015, Online hotel booking sector*, AUTORITÉ DE LA CONCURRENCE, https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/21-april-2015-online-hotel-booking-sector (last visited Oct. 3, 2020).

[40] *Booking.com to Amend Parity Provisions throughout Europe*, BOOKING.COM, (Jun. 25, 2015) https://news.booking.com/bookingcom-to-amend-parity-provisions-throughout-europe/.

[41] *ACM is Positive about European Solution for Hotel Booking Website Booking.com*, AUTHORITY FOR CONSUMERS AND MARKETS, (Apr. 21, 2015), https://www.acm.nl/en/publications/publication/14188/ACM-is-positive-about-European-solution-for-hotel-booking-website-Bookingcom/; *Commission Secures 5-Year Commitments from Booking.com*, COMPETITION AND CONSUMER PROTECTION COMMISSION (Oct. 6, 2015) http://www.ccpc.ie/news/2015-10-06-commission-secures-5-year-commitments-bookingcom; *COMCO Prohibits Anticompetitive Contract Clauses by Hotel Booking Platforms*, COMPETITION COMMISSION (Nov. 6, 2015) https://www.news.admin.ch/message/index.html?lang=en&msg-id=59358; Ariel Ezrachi,

However, the competition concerns did not end there. In August 2015, despite the commitments, France adopted the Macron Law which completely prohibited the use of MFN clauses by OTA's in the hotel booking business, i.e., both wide and narrow variants.[42] Thereafter, Austria,[43] Italy,[44] and Belgium[45] followed suit and completely banned price parity clauses in the online hotel booking sector through domestic legislations.

In contrast to the rest of the European States, Sweden, and Germany diverged in their approach through judicial decisions.

2. Sweden

In 2016, Visita, a Swedish hospitality sector association, complained that the narrow MFN clauses imposed by Booking.com were anti-competitive in nature and violated Article 101(1) of the TFEU.[46] The Swedish Patents and Market Court ("PMC") concluded that the narrow MFN clauses could not be considered ancillary restrictions on the basis that these clauses were not included in the agreement when Booking.com first established itself in the market along with the fact that Booking.com was still active in countries where

The competitive effects of parity clauses on online commerce, 11(2-3) EURO. COMP. J., 488, 512 (2015).

[42] Macron Law, No. 2015-990, (France), Article 133.

[43] *Report on the Monitoring Exercise Carried Out in the Online Hotel Booking Sector By EU Competition Authorities*, EUROPEAN COMMISSION, (2016), https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf

[44] *Also Italy Prohibits Rate Parity Clauses of Online Booking Platforms by Law*, HOTREC, (Aug. 3, 2017), https://www.hotrec.eu/wp-content/customer-area/storage/1b22ccd9b3ba794b784a4fa707b2b688/Also-Italy-prohibits-rate-parity-clauses-of-online-booking-platforms-by-law-3-august-2017.pdf,.

[45] *Belgium the 5th country in Europe allowing for price setting freedom for hoteliers*, HOTREC, (Jul. 20, 2018), https://www.hotrec.eu/wp-content/customer-area/storage/fbe1a334b31509a99f2f3f1a3a75daaa/D-0718-203-DM-Press-Release-Belgium-parity-clause-ban.pdf.

[46] Visita v. Booking.com, PMT 13013-16, Patent and Market Court (2018).

MFNs had been banned.[47] Further, the PMC observed that hotels do have an incentive to differentiate prices between OTAs. Given the fact the price is an important means of competition for OTAs, the MFN clause thus creates barriers for new entrants and reduces competition in the OTA market.[48] Therefore, the PMC ruled that Booking.com's application of narrow MFN clauses had potential anti-competitive effects and violated Article 101(1) of the TFEU.[49] The Court also found that the conditions for an exemption under Article 101(3) of the TFEU did not exist.[50] Hence, Booking.com was injuncted from applying narrow MFN clauses.[51]

However, in 2019, the Swedish Patent and Market Court of Appeal ("PMCA") overturned the decision of the PMC and held that the Visita had not presented sufficient evidence to show that the narrow MFN clause infringed Article 101(1) of the TFEU.[52] The PMCA found that narrow price parity clauses are not by nature harmful to competition.[53] It ruled that Visita would have to not only present theories of possible economic harm as a result of the narrow MFN clauses but also factual evidence of its anti-competitive effects.[54] The PMCA concluded that Visita had not provided enough evidence to counter the fact that hotels refrained from price differentiation between OTAs for reasons other than the imposition of narrow MFN clauses.[55] This

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[47] *Id.* p. 37.
[48] *Id.* at p. 48.
[49] *Id.* at p. 58.
[50] *Id.* at p. 58.
[51] *Id.*
[52] Visita v. Booking.com, PMT 7779-18, Patent and Market Court of Appeal (2019) pp. 22, 25.
[53] *Id.* at p. 10.
[54] *Id.* at p. 18.
[55] Mark-Oliver Mackenrodt, *Price and Condition Parity Clauses in Contracts Between Hotel Booking Platforms and Hotels*, 50 INT'L REV. INTELLECTUAL PROPERTY & COMP. L 1131, 1137 (2019).

was further justified by a lack of price differentiation seen in hotels in France and Germany where narrow price parity clauses were prohibited.[56] The PMCA also held that the online hotel booking platform was an oligopolistic market and hence the high entry barriers were not necessarily due to narrow price parity clauses but were a common feature of platform markets.[57] Therefore, presently, narrow MFN clauses may be used in Sweden.

3. Germany

Ever since 2013, Bundeskartellamt, the independent German competition authority has been investigating MFN clauses imposed by HRS, Booking.com, and Expedia. In the HRS case, the Bundeskartellamt[58] and subsequently the Higher Regional Court Dusseldorf ('Higher Court') found wide MFN clauses to be anti-competitive.[59] The Higher Court stated that wide MFN clauses constituted an 'effective' restriction on competition because they disincentivise platforms from reducing commissions charged to hotels in return for lower rates.[60] Additionally, new entrants in the market are disadvantaged thereby resulting in market foreclosure.[61] The Higher Court also touched upon the criteria to be considered in the case of narrow MFN

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[56] Visita v. Booking.com, p. 20.
[57] *Id.* at p. 21.
[58] Hotel Reservation Service, B9-66/10, Bundeskartellamt (2013) pp. 2,3, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf%3F__blob%3DpublicationFile%26v%3D3.
[59] *HRS's 'best price' clauses violate German and European competition law - Düsseldorf Higher Regional Court confirms Bundeskartellamt's prohibition decision,* BUNDESKARTELLAMT (Jan. 1, 2015) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html.
[60] Booking.com BV, B9-121/13, Bundeskartellamt (2015), ¶ 166, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-121-13.pdf?__blob=publicationFile&v=2.
[61] *Id.* at ¶ 167; Hotel Reservation Service, VI-Kart 1/14 (V), Düsseldorf Higher Regional Court (2015) p. 109.

clauses. The threshold for anti-competitive effects was deemed to be a sufficient likelihood that prices, product volume, innovations, diversity, or quality of goods and services will be negatively affected.[62] In order to determine this, the agreement's effects on the existing economic, legal, and actual market and competition conditions must be thoroughly assessed.[63] Furthermore, the market position of the participants and competitors as well as existing hurdles for market entry would also play a role.[64]

Pursuant to Europe-wide Commitments in 2015, Booking.com substituted its wide MFN clauses for narrow MFN clauses in Germany *inter alia*. However, the Bundeskartellamt criticised this substitution on grounds that Booking.com envisaged the lack of wide clauses as the counterfactual scenario to narrow MFN clauses whereas the appropriate counterfactual scenario would be one without any parity clauses.[65] Therefore the anti-competitive effects of narrow clauses could not be balanced as advantageous in comparison to the more anti-competitive wide clauses in an effort to legitimise them.

The Bundeskartellamt observed that narrow MFN clauses curtail the pricing sovereignty of hotels since hotels cannot price their services as per their choice. Further, if a hotel were to exercise its right and lower prices on platforms other than the imposing platform, this would effectively imply that the prices on their own websites were not the most favourable in the market, which would be an economically impractical strategy.[66] As an additional

[62] Booking.com BV, at ¶168.
[63] *Id.*
[64] *Id.*
[65] *Id.* at ¶179.
[66] *Id.* at ¶ 190-191.

consequence, narrow MFN clauses result in new OTAs becoming unable to offer lower commissions to hotels in exchange for lower prices as the hotels will not want more favourable rates on other platforms as compared to their own websites.[67] This results in foreclosing competition and creates entry barriers for new OTA's. As a result, the Bundeskartellamt concluded that narrow MFN clauses restrain competition, hence are anti-competitive, and ordered their removal.[68]

On an appeal, the Higher Court in 2019, reversed the Bundeskartellamt's findings and allowed the use of narrow price parity clauses.[69] The Higher Court found that narrow MFN clauses do not fall under the prohibitions provided under Article 101(1) of the TFEU.[70] In annulling the Bundeskartellamt's decision, the Higher Court recognised that MFN clauses constitute ancillary agreements in a contract which itself is not anti-competitive. In the alternative, even if these ancillary MFN clauses have anti-competitive effects, they are nonetheless to be accepted if they enable the implementation of the antitrust-neutral contract.[71] Simply speaking, in a contract between an OTA and a hotel, the OTA provides the service of comparing and booking hotels to customers. In the event that the customer books a hotel from the OTA, the OTA charges a commission from the hotel. However, if the customer compares prices of different hotels on the OTA but ultimately books the hotel on the hotel's own website, the OTA will not get

[67] *Id.* at ¶194.
[68] *Id.* at p. 3.
[69] Booking.com BV, VI-Kart 2/16 (V), Higher Regional Court Dusseldorf (2019), https://oxcat.ouplaw.com/view/10.1093/law-ocl/cr256.case.1/law-ocl-cr256 ¶F3 (last visited Oct. 15, 2020).
[70] *Id.* at ¶F4.
[71] *Id.* at ¶H5.

any remuneration for its services, also called free-riding.[72] The narrow MFN clause was therefore a necessary ancillary to ensure that the OTA receives the commission it is entitled to on account of pre-fulfilment of its obligations vis-à-vis the contracting hotels.

Therefore, the Higher Court concluded that the ancillary narrow MFN clause is necessary, and that there could be no different phrasing of the clause that would be less anti-competitive and prevent free-riding effectively at the same time.[73]

4. Investigations conducted by the EC

MFN clauses have been investigated by the EC a few times, for instance the Films Studio case,[74] Apple e-books case,[75] and the Amazon e-books case.[76] However, all of the cases were closed due to commitments being offered by the defendants.[77] Hence there has been no judicial determination on the legality of MFN clauses.

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[72] *Id.* at ¶A4.
[73] *Id.*, at ¶H6.
[74] *Commission closes investigation into contracts of six Hollywood studios with European pay- TVs*, EUROPEAN COMMISSION, (Oct. 26, 2004), https://ec.europa.eu/commission/presscorner/detail/en/IP_04_1314.
[75] *Commission opens formal proceedings to investigate sale of e-books*, EUROPEAN COMMISSION, (Dec. 6, 2011), https://ec.europa.eu/commission/presscorner/detail/en/IP_11_1509,
[76] *Commission opens formal investigation into Amazon's e-book distribution agreement*, EUROPEAN COMMISSION, (Jun. 11, 2015), https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5166.
[77] *Commission accepts legally binding commitment from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-book*, EUROPEAN COMMISSION, (Dec. 13, 2013), https://ec.europa.eu/commission/presscorner/detail/en/IP_12_1367; *Commission accepts legally binding commitment from Penguin in e-books market*, EUROPEAN COMMISSION, (Jul. 25, 2013), https://ec.europa.eu/commission/presscorner/detail/en/IP_13_746; *Commission accepts commitments from Amazon on e-book*, EUROPEAN COMMISSION, (May 4, 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1223.

C. Position in the United Kingdom

In 2015, the Office of Fair trading ('OFT') investigated MFN clauses in the hotel sector and ultimately accepted commitments.[78] In a similar turn of events, the Competition and Markets Authority ('CMA') also closed the investigation in the Amazon e-books case after Amazon agreed to drop its MFN clauses in the United Kingdom ('UK') and EU.[79]

The most conclusive analysis of MFN clauses in the UK was in the CMA's final report in the Private Motor Insurance Company ('PMI') investigation. The CMA, while examining PMI's, found wide MFN clauses in their contracts with Price Comparison Websites (PCW's) to give rise to an Adverse Effect on Competition ('AEC').[80] Additionally, no pro-competitive effects of wide MFN clauses were identified.[81] The CMA consequently prohibited wide MFN clauses.[82]

However, the CMA found that even though narrow MFN clauses exhibit much of the same anti-competitive traits as wide clauses, they were unlikely to have a large impact on intra-brand competition.[83] Therefore, any anti-competitive effects would not ordinarily constitute an AEC. Additionally, the CMA identified pro-competitive effects of narrow MFN clauses including

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[78] *CMA closes hotel online booking investigation,* GOVERNMENT OF UK (Sept. 16, 2015), https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation.
[79] *Amazon online retailer: investigation into anti-competitive practices*, GOVERNMENT OF UK (Oct. 1, 2013), https://www.gov.uk/cma-cases/amazon-online-retailer-investigation-into-anti-competitive-practices.
[80] The Enterprise Act, 2002, (United Kingdom), §134(2); *Private Motor Insurance market investigation, Final Report*, COMPETITION AND MARKETS AUTHORITY (2014), ¶59-60.
[81] *Private Motor Insurance market investigation, Final Report*, COMPETITION AND MARKETS AUTHORITY (2014), ¶8.107.
[82] *Id.* at ¶9.
[83] *Id.* at ¶8.80.

that the credibility of PCW's as accurate would be questioned if lower prices were available on PMI providers' own websites.[84]

The CMA in its Market Study on Digital Comparison Tools looked into MFN clauses in the context of car/home insurance, energy, broadband, flights, and credit cards.[85] It observed that the legality of a narrow MFN clause would depend on the strength of the efficiency justifications in the relevant sector of their application.[86] The existing popularity of the platform, and the ease of consumers to obtain and compare prices, may constitute some relevant factors that depend on the sector.[87] For instance, in the PMI context, the efficiency justifications of narrow MFN clauses were sufficiently convincing to render them valid.

Recently, the CMA in yet another case pertaining to the home insurance sector found wide MFN clauses to infringe Article 101(1) of the TFEU.[88] In this case, CompareTheMarket ('CTM') which enjoyed 50% market share, imposed wide MFN clauses on all the insurers listed on its website. The CMA investigation found this to result in insurers being contractually unable to quote reduced prices on rival platforms. This subsequently dis-incentivised rival PCW's from lowering commissions.[89] On the other hand, CTM itself was ensured the lowest price and did not need to compete with rivals on merits, on account of the wide MFN in its contracts.

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[84] *Id.* at ¶8.97.
[85] *Digital Comparison Tools Market Study, Final Report*, COMPETITION AND MARKETS AUTHORITY (2017), ¶1.7.
[86] *Id*. at ¶4.98.
[87] *Id*. at, ¶¶4.98, 4.99.
[88] Summary of the CMA's decision, (Nov. 19, 2020), https://assets.publishing.service.gov.uk/media/5fb52495d3bf7f63d8c04de7/Summary_of_Infringement_Decision_-_19_Nov_2020.pdf, ¶1.
[89] *Id*. at, ¶9.

Expansion of rivals too was restricted because CTM used its network of MFN clauses to maintain and even strengthen its position in the PCW market.[90]

Therefore, in summation, there seem to be differential approaches in jurisprudence that are reflective of a lack of consensus internationally on the legality of MFN clauses. The MMT-Go case, presently before the CCI is therefore set to play a pivotal role in paving India's way forward.

III. ANALYSING PRICE PARITY CLAUSES IN THE INDIAN FRAMEWORK

Indian competition law is still in a nascent stage and often draws from the competition law of foreign jurisdictions. For instance, the CCI has often relied on EU and EC case laws.[91] Presently, while guidance may be sought from the USA, the CCI may not gain much insight because the USA has adopted differing stances yet has not provided a substantial legal analysis of the competitive effects of MFN clauses. Similarly, the EC too has not made a determination and has instead accepted commitments offered by the investigated parties. The NCA's of EU member states have also largely accepted commitments to not apply wide MFN clauses, given by OTA's who were being investigated.

Only six member states of the EU have taken a position on the legality of these clauses despite said commitments- France, Italy, Austria, and Belgium each of whom have enacted domestic legislation that prohibits the application of price parity clauses in their entirety in contracts of OTA's;

[90] *Id*. at, ¶9.

[91] Shamsher Kataria v. Honda Siel Cars India & Ors., Case no. 03 of 2011, Competition Commission of India, https://www.cci.gov.in/sites/default/files/03201127.pdf; Western Coalfields v. SSV Coal Carriers Ltd. & Ors, 2017 SCC OnLine CCI 45.

Germany, who by judicial determination, prohibited the use of wide MFN clauses and allowed narrow clauses by the OTA's that it investigated;[92] and Sweden, which accepted commitments pertaining to wide MFN clauses but has through judicial decisions determined narrow clauses as permissible.[93] Further, even the UK has taken a stance via judicial decisions, to prohibit wide MFN clauses while adopting a fact-sensitive approach in allowing narrow clauses.[94] In such a case, India's CCI is presented with the question of which authorities to turn to while making its own determination in the MMT-Go case at hand.

Although both the EC and the majority of EU states have accepted commitments, this does not amount to a determination of the legality of these clauses. Acceptance of commitments does not establish the lawfulness or unlawfulness of the practice in question,[95] it merely indicates the decision of the relevant NCAs in that their preliminary concerns are addressed and eliminated by way of the commitments.[96] Therefore India cannot look to the EC or the majority of EU members for a substantive direction on the subject. This leaves the CCI with the likely option of basing its findings on countries like France, Italy, Austria, Belgium, Sweden (narrow MFN clauses), Germany, and the UK who have gone beyond accepting commitments and

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[92] *Hotel Reservation Service*, *supra* note 58.
[93] Visita v. Booking.com, PMT 7779-18, Patent and Market Court of Appeal (2019) pp. 22, 25.
[94] *Digital Comparison Tools Market Study, Final Report*, COMPETITION AND MARKETS AUTHORITY (2017), ¶5.29.
[95] Hotel Reservation Service, *supra* note 58.
[96] Booking.com BV, B9-121/13, Bundeskartellamt (2015), p. 34, ¶109, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-121-13.pdf?__blob=publicationFile&v=2.

taken positive steps by establishing their stance on the legality of price parity clauses.

However, in relying on France, Italy, Austria, and Belgium, CCI will likely be confronted with two hurdles- *first*, that the underlying principles and jurisprudence of Indian competition law necessitates the adoption of the 'rule of reason' approach while analysing vertical agreements, thereby making a blanket prohibition of MFN clauses inconsistent with existing competition law. *Second*, India's existing position on Resale Price Maintenance ("RPM") agreements is likely to clash with a blanket ban on wide MFN clauses given the similarities between the two.

A. Assessment of vertical agreements under the Competition Act, 2002

As per the scheme of the Competition Act, there are two types of anti-competitive agreements – horizontal agreements and vertical agreements. Horizontal agreements are agreements between two or more enterprises that are at the same stage of the production chain and, in the same market.[97] Vertical agreements, on the other hand, are agreements between enterprises that are at different stages or levels of the production chain and, therefore, in different markets.[98] Horizontal agreements are *presumed* to have an adverse appreciable effect on competition ('AAEC') and hence are considered "*per se*" void, and in contravention of Section 3(1).[99] Vertical agreements, on the other hand, are void only if they cause or are likely to cause an AAEC.[100]

[97] Competition Act, 2002, §3(3).
[98] *Id.* §3(4).
[99] S.M. DUGGAR, GUIDE TO COMPETITION LAW, 32 (7th ed., Lexis Nexis, 2017); ABIR ROY, COMPETITION LAW IN INDIA: A PRACTICAL GUIDE, 26 (Kluwer Law International, 2016).
[100] Competition Act, 2002, §3(4).

Hence, vertical agreements are examined using the 'rule of reason' whereby they are assessed from a legal and economic perspective to determine whether they pose any real threat to competition.[101] In order to gauge whether the vertical agreement has or is likely to have an AAEC, the pro-competitive effects and the anti-competitive effects of the agreement are weighed against each other giving due regard to the factors in Section 19(3) of the Competition Act. Clauses (a)- (c) of Section 19(3) are factors which restrict the competitive process in the markets where the agreements operate (negative factors), while clauses (d)-(f) are factors which enhance the efficiency of the distribution process and contribute to consumer welfare (positive factors).

The existence of clauses (a)- (c) would normally indicate AAEC while the absence would normally indicate no AAEC.[102] On the other hand, the presence of the factors in clauses (d)-(f) would normally indicate no AAEC. However, the absence of the last three factors alone can neither determine AAEC nor establish efficiency justifications.[103] The probability and not the mere possibility of the agreement having an AAEC is the threshold requirement.[104]

Price parity clauses are vertical agreements and are to be analyzed under Section 3(4) of the Competition Act.[105] In countries such as France,

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[101] DUGGAR, *supra* note 100.
[102] Ghanshyam Das Vij v. M/s Bajaj Corp Ltd., 2015 SCC OnLine CCI 174.
[103] Automobiles Dealers Association v. Global Automobiles Ltd., Case no. 33 of 2011, Competition Commission of India, ¶12.9, http://www.cci.gov.in/sites/default/files/CaseNo33of2011_0.pdf.
[104]Automobiles Dealers Association v. Global Automobiles Ltd., Case no. 33 of 2011, Competition Commission of India, ¶12.7, http://www.cci.gov.in/sites/default/files/CaseNo33of2011_0.pdf.
[105] *Market Study on E-Commerce in India- Key Findings and Observations*, COMPETITION COMMISSION OF INDIA (2020), ¶96 [hereinafter "*Market Study*"],

Italy, Austria, and Belgium, there is a blanket ban on the use of both, narrow and wide MFN clauses by OTAs. Thus, this ban prohibits MFN clauses imposed by OTA across the board without considering the facts of particular cases. Considering that in India, vertical agreements are not *per se* void, the CCI is not likely to directly adopt the hardline stance of outright illegality as taken by the above-mentioned countries. It will be compelled to examine both, wide and narrow MFN clauses in each case before it, using the rule of reason approach under Section 19(3) of the Act. While analysing MFN clauses under Section 19(3) of the Competition Act, the following should be kept in mind in the backdrop of each case:

1. Competition concerns of MFN clauses

a. MFN clauses lead to exclusionary conduct

One of the ways for a new platform to differentiate itself and gain an advantage in the market is by competing on prices and adopting a low-price strategy (considering that it is not economic to compete on non-price factors). New entrants can attract sellers to list themselves on the platform by offering lower commissions thereby also attracting customers through lower prices.[106] However, if the seller is already committed under an existing price parity agreement, then the low-cost strategy is no longer available since the seller cannot set lower prices on the new platform without also lowering the price on the platform imposing the MFN. Therefore, there is a restriction on the

https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf.

[106] *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements*, LEAR, OFT REPORT OFT-1438, (2012), ¶6.54, https://www.learlab.com/wp-content/uploads/2016/04/Can-%E2%80%98Fair%E2%80%99-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf.

freedom of pricing. Further, if the incumbent platform has a significant market share, the entry for small/rival competitors becomes even harder.

However, one should take into account the development of events that would probably take place in the market if the agreement had not existed.[107] Therefore, the nature of the market should also be kept in mind while assessing whether the entry barrier is solely due to the MFN clause or is merely aggravated due to the MFN clause.

Apart from creating barriers to entry, MFN clauses also hamper the expansion of competing platforms. Rival platforms may also be disincentivised from competing on commission rates because even if they offer discounted commission rates to the supplier in exchange for lower prices, the MFN clause by the incumbent platform would prevent this outbreak of competition.[108] As a result, the MFN clause prevents rival platforms from competing aggressively on prices.

b. MFN clauses can lead to higher prices for consumers

An MFN clause guarantees to the consumer the most favourable price. However, this price may not reflect the lowest price at which the product can be made available, but in fact, could be an inflated price. Theoretical models

[107] MasterCard, C-382/12 P, EU: C: 2014: 2201, ¶¶161,165–166, http://curia.europa.eu/juris/document/document.jsf;jsessionid=BF9CCE8EDDD3669CF4996F0EC63487C8?text=&docid=157521&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3388381.

[108] *Evaluation support study on the EU competition rules applicable to vertical agreements in the VBER and the Guidelines, Final Report*, EUROPEAN COMMISSION, (2020), p. 101.

developed by prominent authors also show that MFN clauses can lead to higher prices for end consumers.[109]

For instance, consider that there are two platforms, A and B. Where Platform A increases commissions, the seller will also increase the price it charges through Platform A. Now if Platform A has additionally imposed an MFN clause on the seller, the seller will have to charge on Platform A, a price that is not higher than the price charged on any other platform. Therefore, the increased price will have to be spread over all other platforms thereby increasing the cost on Platform B as well. Owing to the uniformity in increased prices and no lower price being available on any other platform, there will be no substitution by buyers, and Platform A will not observe a reduction in sales.[110] This implies a greater incentive for the platform to raise the commission rates when an MFN clause is in place and this ultimately leads to a higher price being charged to the consumers. 111

The increase in prices due to MFN clauses has been observed by the UK CMA on two occasions. First, in the Provisional Findings Report in the PMI case, it was concluded that the MFN clause led to higher retail prices for consumers[112] and increased premiums for motor insurance to the customer.[113] Second, even in the CompareTheMarket investigation, it was observed that

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[109] Justin Johnson, *The Agency Model and MFN Clauses*, 84(3) REV. ECO. STUDIES, 1151, 1169 (2017); Boik, Corts, *The Effects of Platform Most-Favored-Nation Clauses on Competition and Entry*, 59 J. L. & ECO. 105, 107 (2016); Morten Hvvid, *Hearing on Across Platform Parity Agreements*, OECD, DAF/COMP (2015), ¶146.
[110] *Market Study, supra* note 106.
[111] *Id.*
[112] Justin Johnson, *The Agency Model and MFN Clauses*, 84(3) REV. ECO. STUDIES, 1151, 1170 (2017).
[113] *Private Motor Insurance Market Investigation Provisional Findings Report*, Competition Commission (2013), ¶10.14.

the wide MFN clause resulted in higher commission fees and higher retail prices to the detriment of consumers purchasing home insurance.[114]

c. MFN clauses facilitate coordination and collusion

A price parity clause can facilitate and sustain coordination or tacit collusion that exists between different platforms.[115] This is because the price parity clause disincentivises platforms from deviating from the collusive agreement, thereby sustaining the collusion. Consider that various platforms collude and set a uniform commission rate that is to be charged from sellers. Now suppose one of the platforms decides to deviate from the agreement and reduces its commission rate, it will consequently lead to a reduction in the price that the seller charges on the platform. However, if the seller is bound by an MFN clause imposed by the other platforms, the seller will be required to lower the prices on the MFN imposing platforms as well. Therefore, due to the MFN clause, the advantage and incentive of cheating and deviating from the consensus rate of commission is lost. Hence, it is easier to sustain the collusion.[116]

2. Pro-competitive effects of MFN clauses

In keeping with the rule of reason, the efficiency justifications of MFN clauses should also be considered.

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[114] *Summary of the CMA's decision,* (Nov. 19, 2020), https://assets.publishing.service.gov.uk/media/5fb52495d3bf7f63d8c04de7/Summary_of_Infringement_Decision_-_19_Nov_2020.pdf, ¶10.
[115] *Market Study*, *supra* note 106, ¶93; Morten Hvvid, *Hearing on Across Platform Parity Agreements*, OECD, DAF/COMP (2015)6, ¶89.
[116] *See Market Study*, ¶93.

a. MFN clauses prevents free riding

Platforms make several non-pricing related demand-enhancing investments such as creating user-friendly interfaces, service and quality, marketing and advertising, etc.[117] These expenses incurred by the platforms are only recovered through the collection of commissions from the sellers on every purchase made through that platform. Sellers stand to benefit from features of a superior quality platform to draw customer attention to its product.[118] However, the most efficient or profitable sales channel for them would remain their own, since it is commission-free.

By maintaining lower prices on their own channels, sellers induce consumers to use platforms as a tool to search, find and compare products from different sellers and then make their purchase through the individual seller of their choice. This disincentivises platforms from making these investments since such externalities undermine the investment and efficiency downstream.[119]

This parasitism through free-riding can be countered by wide MFN clauses when horizontal, whilst narrow parity clauses suffice to avoid vertical free-riding. Consequently, this results in significant pro-competitive effects such as minimisation of externalities and facilitating investments in non-pricing related demand-enhancing features.[120]

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[117] Pablo Solano Diaz, *Price Parity Clauses: Has the Commission Let Slip the Watchdogs of War*, 9 EUR. J. LEGAL STUD. 38, 50 (2016).
[118] *Market Study*, *supra* note 106, ¶94.
[119] Ariel Ezrachi, *The Competitive Effects of Parity Clauses on Online Commerce*, 11(2-3) EUR. COMP. J. 488, 491 (2015).
[120] *Id.*

b. MFN clauses prevent Hold up problems

In overcoming free-riding, MFN clauses also serve as barriers to the hold-up problem.[121] The hold-up problem emerges when one firm in a relationship is able to expropriate the returns from an investment made by another firm.[122] Specifically, if one firm makes an investment that has a risk associated with it, that firm is vulnerable to being "held up" for the value of that relationship-specific investment, thereby leading to under-investment.[123] The "relationship" referred to herein is in the nature of a co-dependent one where the contribution of one party is redundant in the absence of a specific contribution by the other. For instance, in the assembly of mobile phones, the manufacturer of the finished phone relies on the dimensions of the battery provided by the battery manufacturer. Now if the battery manufacturer proposes a new battery with newer technology or dimensions, the phone manufacturer will have to incur costs to alter its design to accommodate such a new battery. Where a phone manufacturer has already undertaken such expenses, the battery manufacturer is assured of the fact that the phone manufacturer will not back out of any contracts entered into between the two parties, since that would render the phone manufacturers' expenses redundant. In such a scenario, the battery manufacturer is in a better bargaining position and can charge the phone manufacturer a higher cost thereby making him susceptible to exploitation or "hold-up" by the battery manufacturer.[124] After recovering his own costs on this first phone manufacturer, the battery

[121] Ingrid Vandenborre & Michael J. Frese, *Most Favoured Nation Clauses Revisted*, 12E.C.L.R.588, 589 (2014).
[122] Haruvy E., et al. *Relationship-specific investment and hold-up problems in supply chains: theory and experiments*, 12 BUS RES, 45 (2019).
[123] *Id.*
[124] Baker, Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27(2) ANTITRUST L. J., 20, 21 (2013).

manufacturer is able to sell to subsequent phone manufacturers at lower, marked-down prices. This leads to the first phone manufacturer having to compete with other phone manufacturers who do not necessarily have better products or lower/more cost-effective production processes but simply the advantage of having purchased batteries at a lower price. 125 An MFN clause may provide the buyer (e.g., the manufacturer of finished phones, or the platform in the OTA context) with a degree of certainty that it will be able to recoup its sunk costs, by ensuring that it will not be given less favourable rates than other buyers. 126

c. MFN clauses lower transaction costs

An MFN clause reduces transaction and negotiation costs where long-term contracts are being entered into between hotels and platforms.[127] By offering an MFN clause at an early stage of negotiations, the platform is assured the most favorable price by the hotel and hence protracted price negotiations and periodic re-negotiations can be avoided.[128] Due to the reduced transaction costs, the final price to the end consumer may also be reduced, thus benefiting the consumers.[129] Further, the transparency of alternative bargains and the reduction of transaction costs have a positive effect in that they also reduce delays in transactions.[130]

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[125] Ingrid Vandenborre & Michael J. Frese, *Most Favoured Nation Clauses Revisited,* 12 E.C.L.R. 588, 589 (2014).
[126] *Id.*
[127]Diaz, *supra* note 122.
[128] Ingrid Vandenborre & Michael J. Frese, *Most Favoured Nation Clauses Revisited,* 12 E.C.L.R. 588, 589 (2014).
[129] *Id.*
[130] Diaz, *supra* note 122.

Giving due regard to the general anti-competitive effects and potential efficiency gains emanating from MFN clauses, the CCI is bound to consider the economic and other factors in arriving at its findings. This inherent structure of the Indian competition law framework constitutes the first reason that is likely to prevent the CCI from directly adopting the approach of France, Italy, Austria, and Belgium in imposing a blanket prohibition on MFN clauses. The second hurdle that the CCI is bound to face arises out of its approach towards RPM agreements.

IV. INDIA'S APPROACH TOWARDS RESALE PRICE MAINTENANCE AGREEMENTS

A. Relation between MFN clauses and RPM Agreements

Before highlighting the difficulties that India's approach to RPM agreements may create for the CCI in assessing MFN clauses, a pertinent question regarding the comparison of MFN clauses with RPM agreements must be answered. In answering this question, yet another reason comes to the fore, as to why India is likely not to directly import the position endorsed by France, Italy, Austria, and Belgium.

Under the Competition Act, RPM agreements have been defined to include "any agreement to sell goods on the condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged."[131]

[131] Competition Act, 2002, §3(4) Explanation(e).

On the basis of economic literature and industry practice, it has been argued that an RPM agreement essentially consists of two elements–a vertical element, whereby the supplier sets final retail prices; and a horizontal element, whereby the supplier sets *identical* retail prices across all platforms.[132] While the horizontal element is not tacitly assumed as a constituent of RPM agreements, it has been understood to exist as necessary to put into motion the efficiency gains of RPMs.[133] The horizontal element of RPM agreements results in the creation of a market environment similar to that created by the use of *wide* MFN clauses. This is because competitors are restricted from competing on price since both, wide MFN clauses as well as the horizontal element of RPM agreements have the tendency to lead to a uniform price across platforms. In such a case, no particular platform has a better rate than another.

While the interplay between wide MFN clauses and RPM agreements is not explicit, it can be observed in some instances. As per the ECs Guidelines on Vertical Restraints,[134] RPM can be achieved by indirect means such as linking the prescribed resale price to the resale prices of competitors. This captures the effects of a wide MFN clause. Furthermore, in the USA case of *Online Travel Company Hotel Booking Antitrust litigation*,[135] the RPM Agreement entered into by the defendants included two explicit aspects- *first*,

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[132] Morten Hviid & Amelia Fletcher, *Broad Retail Price MFN Clauses: Are they RPM "at its worst?",* 81 ANTITRUST L. J. 65, 92 (2016); In re: Alleged anti-competitive conduct by Maruti Suzuki India Limited (MSIL) in implementing discount control policy vis-à-vis dealers, 2019 SCC OnLine CCI 9.

[133] Hviid & Fletcher, *supra* note 132.

[134] *Guidelines on Vertical Restraints*, EUROPEAN COMMISSION (2015), ¶48, https://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf.

[135] Re: Online Travel Company Hotel Booking Antitrust Litigation, 997 F.Supp.2d 526, 532 (2014).

that each OTA would not discount below each hotel website's published rate, and *second*, that each hotel was providing each OTA with its lowest online rate.[136] Therefore, it can be observed that many times RPM agreements have the potential to contain an implicit wide MFN clause. In furtherance of that, these two vertical agreements can be seen as closely related. Building on this argument, the pro-competitive and anti-competitive effects of RPM agreements merit consideration since they are similar to that of MFN clauses.

1. Effects of RPM agreements

a. Competition concerns

It has been established that RPM may restrict competition in a number of ways.[137] *Firstly*, RPM agreements restrict entry and expansion of smaller distributors/retailers as it prevents price competition, and hence the distributors/retailers cannot enter the market at lower prices.[138] *Second*, all or certain distributors/retailers are prevented from lowering their sales price and can only resell at the stipulated price, and as a result, the direct effect is a price increase.[139] *Thirdly*, RPM agreements can facilitate collusion between RPM imposing sellers. Now since the final price at which distributors/retailers can sell goods is under the control of the RPM imposing sellers, the sellers can enter into a price-fixing agreement. Thus, any deviation from the agreement will be easily detectable and visible and therefore the incentive to cheat is reduced. Hence, the RPM makes it easier to sustain the collusive agreement.[140]

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[136] *Id.*
[137] Morten Hviid & Fletcher, *supra* note 132.
[138] *Guidelines on Vertical Restraints*, *supra* note 134, at ¶224.
[139] *Id.* at ¶224.
[140] Morten Hviid & Fletcher, *supra* note 132.

b. Pro-competitive effects

On the other hand, the primary efficiency gains of the horizontal elements of RPM agreements include the prevention of free-riding, especially in service-provision.[141] It is important to note that for sellers who apply RPM on retailers, the total volume of sales is important; whereas for the distributors/retailers, simply diverting competitor's sales to themselves is sufficient.[142] For this reason, sellers benefit more if retailers compete on factors other than price, as this increases total sales. In light of this, *firstly*, RPM agreements allow the retailers a certain margin that can be invested in higher pre-sales efforts thereby facilitating inter-brand competition. This efficiency gain becomes prominent in the context of complex technical products that require significant pre-sales services to optimise sales. For example, sellers whose products require trials and demonstrations benefit from these pre-sale efforts by retailers. The costs incurred through these pre-sale efforts are reflected in the final price paid by the end-user. However, other retailers that do not invest in these pre-sale efforts are able to undercut prices and subsequently free-ride on such efforts by other retailers. In such cases, an RPM agreement that pre-determines the minimum resale price prevents undercutting and encourages all retailers to undertake these higher costs which can be recovered through higher prices.[143] *Secondly*, where products do not require pre-sale efforts, an agreement that determines the resale price enables the retailers to undertake additional services such as free shipping, lower prices on complimentary products, etc. which ultimately increase the volume

[141] *Id.* at 91; Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960).
[142] Andrés Font-Galarza et al, *RPM Under EU Competition Law: Some Considerations From a Business and Economic Perspective*, CPI ANTITRUST CHRONICLE 6 (2013).
[143] *Id.*

of sales. *Lastly*, the prevention of free-riding can also be extended to promoting the entry of new, innovative products into the market. This is because in preventing other retailers from undercutting prices, the RPM agreement mitigates opportunity costs for those retailers that carry new, unknown products in the early stages and the risks associated therewith. [144]

Therefore, it is evident that the anti-competitive effects, as well as the proposed efficiency gains of both wide MFN clauses and horizontally effective RPM clauses, bear several similarities. This suggests that we can learn more about the former from the established literature on the latter.

2. Assessment of RPM Agreements

RPM agreements in India are void only if it causes or is likely to cause an AAEC.[145] Interestingly, under the Monopoly and Restrictive Trade Practices Act, 1969, RPM agreements were listed under restricted practices and were considered to be illegal.[146] However, the Raghavan Committee felt that despite the fact that in a number of countries, including the EU, RPM agreements are presumed to be anti-competitive, they should not be treated as illegal in India and should be judged under the rule of reason.[147]

Presently, RPM agreements are evaluated using the rule of reason approach keeping the factors listed in Section 19(3) in mind. While

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[144] *Id.*
[145]Competition Act, 2002, §3(4)
[146] Monopoly and Restrictive Trade Practises Act, No. 54, Act of Parliament (1969) §39.
[147] *Report of High-Level Committee on Competition Law*, GOVERNMENT OF INDIA, 2000 ¶4.4.1, https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf.

determining their validity, the CCI has looked into the effects of RPM on the market and has not adopted a *per se* approach to fixing resale prices.[148]

In the EU however, RPM agreements have been presumed by competition authorities to restrict competition by object or to be *per se* illegal.[149] They fall within the scope of Article 101(1) of the TFEU and give rise to the presumption that the agreement is unlikely to fulfill the conditions of exemption under Article 101(3) of the TFEU.[150] It is further considered a hard-core restriction to which the Vertical Block Exemptions Regulation ('VBER') (a regulation that exempts vertical agreements that meet certain conditions from Article 101(1) TFEU[151]) does not apply.[152] Therefore, the legislations passed by France, Italy, Austria, and Belgium banning MFN clauses by OTA's are consistent with their stringent approach to RPM agreements.

Since in India, RPM agreements are analysed using the rule of reason approach, there is no reason why wide MFN clauses also should not be analysed in the same manner. Therefore, the CCI is likely to not adopt the stringent approach of completely prohibiting MFN clauses, like that taken by the above-mentioned four countries. If the CCI were to adopt such a strict

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[148] Perna Parasher, *The Fixation with Fixing Resale Prices*, MONDAQ, (Oct. 2, 2017), https://www.mondaq.com/india/antitrust-eu-competition-/633522/the-fixation-with-fixing-resale-prices

[149] *Guidelines on Vertical Restraints*, EUROPEAN COMMISSION (2015), ¶224.

[150] *Id.* at ¶224.

[151] Commission Regulation (EU) No. 330/2010 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 [hereinafter referred to as Vertical Block Exemption Regulations], Article 2.

[152] *Id.* at Article 4(a).

approach and consider MFN clauses as illegal, there would be an inconsistency in the treatment of two similar agreements.

Therefore, to sum up, the CCI is likely to not rely on France, Italy, Austria, and Belgium.

This leaves Germany, Sweden (for narrow clauses), and the UK to be looked to for insight. Not only have each of these remaining countries endorsed their positions through judicial decisions but also, their position on MFN clauses is presently the same, i.e., wide MFN clauses are prohibited and narrow clauses are permitted. However, it is pertinent to note that the rationale to back the findings of the relevant NCA's substantially vary. While in Sweden, the PMAC's rationale for reversing the PMC's findings and permitting the use of narrow MFN clauses was hinged on a finding of insufficient evidence, the UK CMA decision was based on AEC specific to the insurance market such that wide MFN clauses were prohibited, and narrow were not due to absence of AEC.

Keeping in mind the fact that the legality of price parity clauses is very sensitive to the market context within which they exist, Germany's investigation into the Booking.com case serves as the closest precursor to the imminent MMT-Go case before the CCI. Furthermore, the German Higher Courts legal analysis pertaining *inter alia,* to necessary ancillary agreements facilitating an antitrust neutral contract, may prove beneficial for the CCI in its analysis. Therefore, out of the varied international jurisprudence on MFN clauses, the German approach and rationale seems to be the most appropriate and viable option for the CCI to rely on.

V. INDIA'S LIKELY STANCE ON MFN CLAUSES

A. Wide MFN clauses

In the HRS case, the German Bundeskartellamt looked at the anti-competitive effects of wide MFN clauses and subsequently prohibited their application by HRS.[153] Although HRS offered commitments to the Bundeskartellamt, it was opined that these temporary commitments would not serve as an adequate solution.[154] Unlike the NCA's of other EU members, the German courts considered establishing a precedent-setting effect by actually analysing the competitive effects of such clauses so as to permanently eliminate the serious concerns emanating therefrom. Therefore, in making its own judicial determination, the CCI may safely rely on the analysis conducted by the German courts wherein they analysed the anti-competitive effects as well as the efficiency justifications of wide MFN clauses, similar to the requirements under Section 19(3) of the Competition Act.

It is important to note however that the Bundeskartellamt's finding that prohibited HRS from utilizing wide MFN clauses was based on the fact that HRS enjoyed 30% of the OTA market share.[155] Had the market share of HRS been less than 30%, it would have become eligible for the exemption under the VBER.[156] In India, while examining agreements under Section 3 of the Competition Act, it is important to "analyse the market presence and position

[153] Hotel Reservation Service, supra note 58., B 9 - 66/10, Bundeskartellamt (2013.
[154] *Id.* at ¶14.
[155] Hotel Reservation Service, *supra* note 58.
[156] *Evaluation support study on the EU competition rules applicable to vertical agreements in the VBER and the Guidelines, Final Report*, EUROPEAN COMMISSION, (2020), p. 94.

of strength of the parties."[157] Although India does not have a specific market share threshold exemption such as that under the VBER, the CCI has adopted a *de minimis* doctrine which means that parties with a minimal market share entering into an agreement are not likely to cause an AAEC.[158] Therefore, by corollary, a party that has a significant market share is likely to cause an AAEC. In the MMT-Go case, the CCI made a *prima facie* finding that MMT-Go enjoys a market share of about 60% in the online intermediation market for hotel booking.[159] Hence considering this significant market share, it is likely that MMT-Go may cause an AAEC.

As for circumstances where the wide MFN imposing party being investigated does not hold a significant market share in the relevant market, the *de minimis* doctrine may indicate that an AAEC is not likely.

This inference is buttressed by the CCI's findings in cases concerning RPM agreements under Section 3. For instance, in *Ghanshyam Das Vij v. M/s Bajaj Corp Ltd.*,[160] the CCI considered the "market structure of FMCG products and particularly the hair oil segment" and stated that "consumers had various brands as options to choose from."[161] Bajaj did not hold the position of strength in the sector as other larger players were also present in the market.[162] Any RPM agreement was therefore not likely to affect the inter-brand competition and no AAEC was established. On the other hand, in the

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[157] ABIR ROY, COMPETITION LAW IN INDIA: A PRACTICAL GUIDE, 78 (Kluwer Law International, 2016).
[158] *Id.* at 20; Ghanshyam Das Vij v. M/s Bajaj Corp Ltd, 2015 SCC OnLine CCI 174, ¶77.
[159] *FHRAI*, ¶47.
[160] *Ghanshyam Das Vij*, ¶79.
[161] *Id.* at ¶79.
[162] *Id.* at ¶80.

Hyundai Motor India Ltd. case,[163] the CCI found that Hyundai was a significant player in the market[164] and by "fixing the resale price of Hyundai brand of cars…it foreclosed intra-brand competition for its dealers which resulted in AAEC."[165]

Therefore, it may be concluded that the market share of the platform imposing the wide MFN clause is an important factor to determine whether it causes an AAEC. However, it is also important that each case is analysed for AAEC against the factors mentioned in Section 19(3).

B. Narrow MFN clauses

Lastly, with respect to the narrow variant of MFN clauses, the general consensus across the EU, barring France, Italy, Austria, and Belgium seems to be that these clauses do not tend to affect competition as adversely as wide MFN clauses. While Germany allowed its use as a necessary ancillary agreement, Sweden allowed it on grounds of insufficient evidence of its anti-competitive effects. Additionally, the UK recognised its similarities with wide MFN clauses yet found that they did not amount to an AEC, thereby allowing them. Therefore, it may be said that narrow MFN clauses are less harmful and achieve some of the efficiency gains associated with MFN clauses.[166] Therefore in conducting its own analysis, the CCI may rely upon the lenient stance taken by the aforementioned countries in terms of narrow MFN clauses. However, the analysis will have to be on a case-by-case basis while keeping

[163] Fx Enterprises Solutions India Pvt. Ltd. v. Hyundai Motor India Ltd., 2017 SCC OnLine CCI 26.
[164] *Id.* at ¶91.
[165] *Id.* at ¶¶93-94.
[166] *Evaluation support study on the EU competition rules applicable to vertical agreements in the VBER and the Guidelines, Final Report*, EUROPEAN COMMISSION, (2020), p. 109.

in mind the factors mentioned in Section 19(3) of the Competition Act, market share of the platform concerned, and the cumulative effects if a large number of hotels contract with these platforms.

VI. CONCLUSION

The impending task before the CCI is one that holds much significance for the nascent but fast-growing e-commerce sector; and perhaps even more significant for the myriad small hotel owners operational in the country. A classic balancing of rights in the form of weighing the anti-competitive effects and the efficiency gains of price parity clauses is imminent. With free-riding, facilitation of investment by platforms, and the minimisation of externalities tipping the scales in favour of imposing platforms; barriers to new entrants, restriction on freedom of pricing, higher prices for customers, and the restriction of competition re-align the scales.

While various countries throughout the world have debated on the topical question of the legality of MFN clauses, they have also simultaneously demonstrated rampant inconsistency in their findings. These differential approaches have risen to prominence because they are reflective of countries' economic priorities and aspirations. While the USA has not analysed the actual competitive effects of these clauses, several European countries such as France, Italy, Austria, and Belgium have neglected to see the efficiency gains and imposed blanket legislative bans on the impugned clauses so as to restrict any form of price parity amongst OTAs. Differing significantly from the EU members who accepted commitments and/or imposed legislative prohibitions, Germany, Sweden (for narrow MFNs), and the UK pronounced judicial determinations. These decisions are perhaps the only ones that delved into an

analysis of the actual competitive effects of MFN clauses. From these judicial decisions, it can be inferred that wide MFN clauses are more anti-competitive than not and hence have been prohibited. On the other hand, narrow MFN clauses tend to encapsulate much of the proposed efficiency gains and therefore have not been held to be anti-competitive in nature.

In the Indian context, the CCI while adjudicating the MMT-Go case may look at the international jurisprudence of MFN clauses. In doing so, this paper concludes that if the CCI were to rely on countries prohibiting MFN clauses through legislations, it would be inconsistent with the existing competition law framework in India for two reasons- the rule of reason approach for analysing vertical agreements, and the established approach towards similarly placed RPM agreements. Hence, this may be avoided.

Amongst the countries that have determined the legality of MFN clauses through judicial decisions, it would be most beneficial to the CCI to turn to the analysis made by the German Courts considering that the decisions were made in the OTA context. The theories, legal analyses, and the competition concerns of MFN clauses as identified by the German Courts would help the CCI in conducting its own analysis of whether the MFN clause imposed by MMT is violative of Section 3 of the Competition Act. Considering the market strength of MMT-Go, and the recognised anti-competitive effects of wide MFN clauses, it is likely that the CCI may prohibit their use. With respect to narrow MFN clauses, it is likely that the CCI may adopt a lenient approach like most of the countries worldwide, and may not prohibit their use. However, one can only wait and see what path the CCI takes especially given the immense precedential setting effect of this investigation. This decision is pivotal for not only MFN imposing platforms whose business

models are at stake, but also for the hotel operators whose reliance on OTA's is unavoidable yet increasingly unviable as an economic strategy.