

# Most Favored Nation Clauses

Steve Cernak and Tal Chaiken, Schiff Hardin LLP,  
with PLC Antitrust

This Practice Note surveys the relevant antitrust statutes and recent enforcement actions involving most favored nation clauses (MFNs). It also offers practical tips for counsel analyzing an MFN under the antitrust laws.

Most favored nation clauses (MFNs), sometimes also referred to as most favored customer clauses, are agreements in which a supplier agrees to treat a particular customer no worse than all other customers (see *Standard Clause, General Contract Clauses, Most Favored Customer* ([www.practicallaw.com/8-510-7389](http://www.practicallaw.com/8-510-7389))). Under most MFNs, a seller agrees to provide a product or service to a buyer at a price no higher than the price it provides to any other buyer, now or during the term of the agreement. Contracting parties commonly use MFNs to:

- Reduce uncertainty about potential price fluctuations.
- Transfer risk of opportunism.
- Reduce the transaction costs of both initial and later bargaining.

While commentators and courts have found MFNs to be competitively benign in most circumstances, recent actions and comments by enforcement agencies have raised the possibility that MFNs may be found to be anticompetitive in several specific situations. This Note surveys those developments and discusses some of the risk factors that a company should consider when analyzing the legality of specific MFNs.

## ANTITRUST RISKS ASSOCIATED WITH MFNS

No court analyzing the competitive merits of MFNs has found them to be illegal under any antitrust law. Some courts, however, have approved antitrust enforcement agencies' negotiated settlements (consent decrees) that enjoined the use of MFNs because of the risk of anticompetitive effects given the specific facts of the case. The lack of litigated cases and the particularized facts underlying certain consent decrees can make counseling clients on MFNs difficult. Still, counsel can extract some risk factors from the cases and enforcement actions to provide guidance to companies considering MFNs.

MFNs can raise issues under:

- *Section 1 of the Sherman Act (Section 1)* ([www.practicallaw.com/9-502-0833](http://www.practicallaw.com/9-502-0833)) (see *Practice Note, US Antitrust Laws:*

This is just one example of the many online resources Practical Law Company offers.



To access this resource and others,  
visit [practicallaw.com](http://practicallaw.com).

*Overview: Section 1 of the Sherman Act: Agreements That Unreasonably Restrain Trade* ([www.practicallaw.com/9-204-0472](http://www.practicallaw.com/9-204-0472))).

- *Section 2 of the Sherman Act (Section 2)* ([www.practicallaw.com/7-502-0834](http://www.practicallaw.com/7-502-0834)) (see *Practice Note, Section 2 of the Sherman Act: Overview* ([www.practicallaw.com/6-521-8034](http://www.practicallaw.com/6-521-8034))).
- *The Robinson-Patman Act* ([www.practicallaw.com/0-502-0837](http://www.practicallaw.com/0-502-0837)) (see *Practice Note, Robinson-Patman Act Overview* ([www.practicallaw.com/7-508-5967](http://www.practicallaw.com/7-508-5967))).

## Demonstrating Procompetitive Benefits of MFNs under Section 1

Under Section 1, a court judges the legality of an MFN under the rule of reason and weighs its potential procompetitive and anticompetitive effects against each other (see *Practice Note, Analyzing Restraints of Trade Under the Rule of Reason* ([www.practicallaw.com/9-522-6396](http://www.practicallaw.com/9-522-6396))). The most obvious procompetitive benefit of an MFN usually is some assurance of lower prices to the buyer. The US Court of Appeals for the Seventh Circuit has described MFNs as a means for buyers to bargain for low prices and distinguished it from price-fixing (*Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995)). Other procompetitive benefits of MFNs include reducing:

- Uncertainty for the contracting parties when either:
  - market prices are in flux;
  - the parties do not expect prices to remain steady for the term of the agreement; or
  - a new product or arrangement makes it difficult to set an initial price.
- The risk of opportunism, such as when a buyer has made investments specific to a seller's products and uses an MFN to ensure that the seller does not exploit those investments by selling to others at a lower price.

Courts examining the merits of MFNs have found them to be procompetitive on balance because of these benefits.

### Theories of Competitive Harm Involving MFNs

In contrast to the courts, antitrust enforcement agencies, including the Antitrust Division of the *Department of Justice* ([www.practicallaw.com/9-382-3397](http://www.practicallaw.com/9-382-3397)) (DOJ) and the *Federal Trade Commission* ([www.practicallaw.com/1-382-3457](http://www.practicallaw.com/1-382-3457)) (FTC), and commentators, have developed theories of competitive harm caused by MFNs in certain situations, including:

- Collusion (see *Collusion*).
- Price stickiness (see *Price Stickiness*).
- Anticompetitive exclusion (see *Anticompetitive Exclusion*).

Parties and the courts have accepted some of these theories in consent decrees. Most of these theories involve unilateral or joint market power and the MFN is seen as a way to monopolize or maintain that market power in a way inconsistent with legitimate competition (see *Practice Note, Section 2 of the Sherman Act Overview: Monopolization* ([www.practicallaw.com/6-521-8034](http://www.practicallaw.com/6-521-8034))).

#### Collusion

MFNs can lead to tacit or explicit collusion on price among competitors in a few ways. When several sellers enter into MFNs with buyers, the competing sellers may agree with one another (tacitly or otherwise) not to discount prices to any of their customers. Any cheating on an agreement between those sellers on price is easier to detect and more costly because a discount for one buyer may need to be offered to many other buyers.

The antitrust enforcement agencies and courts are more likely to allege collusion if a large percentage of the relevant competitors, either buyers or sellers, adopt similar MFNs. For example, in *Starr v. Sony BMG*, the court found the adoption of similar MFNs by record labels representing more than 80% of the sales of music on the internet as evidence useful to support a Section 1 claim (592 F.3d 314, 323 (2d Cir. 2010)).

The presence of an MFN can also increase the likelihood of the direct or indirect exchange of pricing information between competitors, which may lead to explicit collusion on price. For example, where an MFN exists, a seller and buyer may discuss the prices offered by the seller to other customers, or, even worse, a seller may be incentivized to contact a rival, ostensibly to make sure it is complying with the MFN.

Further, a seller may agree to an MFN to signal to its competitors that it intends to not compete aggressively on price. If the rivals believe the seller intends to refrain from price-cutting to avoid the need to comply with an MFN and offer discounts to all buyers, then the rivals themselves might price less aggressively.

#### Price Stickiness

MFNs can also lead to price stickiness, even if there is no allegation of potential collusion or exclusion. A single seller

entering into an MFN with one buyer is less likely to lower its price to other actual or potential buyers if that action may result in a need to lower its price to the first buyer. This reluctance by the seller to compete on price increases as it enters into more MFNs.

#### Anticompetitive Exclusion

Theories of anticompetitive exclusion can arise under Section 1 but are more likely under Section 2, which deals with unilateral conduct. A plaintiff seeking to bring a successful Section 2 claim must show that the defendant both:

- Possessed monopoly power.
- Unlawfully monopolized or took steps to unlawfully acquire or maintain the monopoly, usually through exclusionary conduct.

(See *Practice Note, Section 2 of the Sherman Act Overview: Monopolization* ([www.practicallaw.com/6-521-8034](http://www.practicallaw.com/6-521-8034))).

Under a theory of anticompetitive exclusion, a monopolist entering into an MFN may be able to prevent rivals from cheaply or easily obtaining a necessary input or distribution method.

For instance, a monopolist manufacturer may reach an agreement with all its input suppliers in which they only sell to the monopolist's rivals at a price equal to or higher than the price they offer to the monopolist. Similarly, a monopolist seller may reach an agreement with its distributors that they only buy from the monopolist's rivals at a price equal to or higher than the monopolist's price. These MFNs may result in raising the costs of actual or potential rivals, damaging their ability to compete, especially their ability to distinguish themselves on cost.

In some cases, the MFN can effectively deny rivals inputs or distribution necessary to compete with the dominant manufacturer or supplier. In *United States v. Delta Dental of Rhode Island*, the court denied a motion to dismiss where an insurer with agreements with 90% of the state's dentists entered into MFNs that obligated it to pay each dentist only the lowest price charged to any rival insurer (943 F. Supp. 172, 179-80 (D.R.I. 1996)).

#### MFN Price Discrimination Claims under the Robinson-Patman Act

MFNs can result in price discrimination claims under the Robinson-Patman Act, which generally prohibits the sale of the same commodity to two competing buyers at different prices if the effect is injury to competition.

For example, a seller may violate the Robinson-Patman Act if compliance with an MFN triggers the sale of commodities to competing buyers at different prices. For instance, a seller might lower its price to Buyer A to comply with an MFN and match a lower price offered to Buyer B. That price, however, might now be lower than the seller's price to Buyer C, who competes with Buyer A. For a more detailed explanation of the Robinson-Patman Act and its defenses, see *Practice Note, Robinson-Patman Act: Overview* ([www.practicallaw.com/7-508-5967](http://www.practicallaw.com/7-508-5967)).

## ANTITRUST AGENCY ENFORCEMENT

Historically, the FTC and DOJ rarely challenge contracts containing MFNs, but when doing so, have generally focused on agreements in the healthcare industry. None of those challenges has resulted in a court opinion invalidating an MFN. However, some have resulted in consent decrees prohibiting an MFN's enforcement.

For instance, in *United States and State of Arizona v. Delta Dental Plan of Arizona, Inc.*, the DOJ and the State of Arizona negotiated a consent decree with Delta Dental banning enforcement of an MFN in agreements entered into by the defendant with 85% of the dentists in the state (94-1793 PHXPGR, 1995 WL 454769 (D. Ariz. May 19, 1995)).

Similarly, in *FTC v. RxCare of Tennessee*, the FTC negotiated a consent order with RxCare, a pharmacy group that included nearly all pharmacies in Tennessee and provided the pharmacy network for nearly 90% of Tennessee's Medicaid recipients and over 50% of all Tennessee residents (121 F.T.C. 762 (1996)). The consent order prohibited the enforcement of an MFN that required pharmacy members of RxCare to offer any lower reimbursement rate than it accepted from third parties to all RxCare contracts in which it participated.

Enforcement agency interest in potential anticompetitive effects from MFNs has increased in the Obama Administration, resulting in two high-profile cases:

- *United States and State of Michigan v. Blue Cross Blue Shield of Michigan* (see Box, *US and State of Michigan v. Blue Cross Blue Shield of Michigan*).
- *United States v. Apple, Inc.* (see Box, *United States v. Apple, Inc., E-Book Litigation*).

### Agency Consideration of the Proper Antitrust Treatment of MFNs

Activity initiated in mid-2012 suggests that the antitrust agencies are actively determining the proper antitrust treatment of MFNs, including by focusing on their anticompetitive and procompetitive effects.

Agency Consideration of the Potential Anticompetitive Aspects  
An April 2012 speech given by then acting Deputy Assistant Attorney General for the DOJ, Fiona Scott-Morton, focused on the potential anticompetitive aspects of MFNs. Scott-Morton referred to MFNs as a type of contract that references rivals (CRR) (see *Fiona Scott-Morton, Deputy Assistant Attorney General for the DOJ Antitrust Division, Speech at Georgetown University Law Center Antitrust Seminar, Contracts that Reference Rivals (April 5, 2012)*).

## UNITED STATES AND STATE OF MICHIGAN V. BLUE CROSS BLUE SHIELD OF MICHIGAN

In 2010, the DOJ and State of Michigan, as joint plaintiffs, sued BCBSM, a health insurance provider, for entering into MFNs with Michigan hospitals in violation of Section 1 of the Sherman Act and Section 2 of the Michigan Antitrust Reform Act. The health insurer/buyer, BCBSM, had agreements with well over half of the healthcare providers in the state. Many of those agreements contained MFNs requiring the hospitals to charge BCBSM no more than they charged other health care buyers.

In addition, several of those agreements, including some with key hospital systems and even some with all the hospitals in a given community, contained so-called MFN-plus clauses. These clauses required the healthcare provider to charge some or all other health insurers more than the hospital charged BCBSM, typically by a specified percentage differential. In some agreements, the differentials reached 40%.

### The DOJ's Complaint

The DOJ's complaint alleged that the combination of both types of MFNs and the market power of BCBSM resulted in higher prices for Michigan healthcare consumers and the exclusion of potential BCBSM competitors. In particular, the complaint alleged that BCBSM's MFNs cause anticompetitive harm by:

- Reducing the ability of other health insurers to compete or excluding the competing health insurers from the market completely.

- Deterring or preventing competitive entry and expansion into the health insurance market.
- Raising Michigan residents' health insurance premiums.

### Denial of BCBSM's Motion to Dismiss

BCBSM filed a motion to dismiss, challenging the complaint on four independent grounds, including failure to plead a cause of action for antitrust violations. Denying the motion to dismiss, the US District Court for the Eastern District of Michigan held that the plaintiffs plausibly alleged that the MFNs unreasonably restrained trade, the only element in dispute between the parties. The District Court rejected BCBSM's claims that the complaint did not:

- Allege plausible anticompetitive effects.
- Sufficiently define the product and geographic markets.
- Allege BCBSM's market power in specific regions.
- Allege plausible antitrust harm.

(See *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665 (E.D. Mich. 2011) (order denying motion to dismiss).)

### UNITED STATES V. APPLE, INC., E-BOOK LITIGATION

In 2012, the DOJ filed suit against Apple, Inc. and five of the six largest US publishers Hachette, HarperCollins, Simon & Schuster, Penguin and Macmillan, alleging a violation of Section 1 through agreements on the pricing of the publishers' e-books on Apple's iBookstore. The DOJ alleged that the publishers colluded to:

- Raise e-book prices.
- End competition among e-book retailers.
- Limit price competition among the publisher defendants.

According to the complaint, the publishers were concerned that the prices charged by Amazon when it resold the publishers' e-books were so low that they:

- Harmed the reputation of the books.
- Drove down the prices for physical book counterparts sold on Amazon and elsewhere.

(See *United States v. Apple, Inc., et al., No. 12-cv-2826 (S.D.N.Y. Apr. 11, 2012)*.)

#### Agency Model Agreements

The DOJ alleged that Apple, as a retailer, had entered into agency model agreements with each of the five publisher defendants. Under the agency model, each publisher remained the owner of the book and set the price on the retailer's website. The retailer received a commission on the sale of each book sold on its site. These agreements were in stark contrast to the wholesale model agreements that had previously dominated the market, in which publishers sold to retailers and retailers sold to consumers.

The DOJ alleged that the publisher defendants and Apple acted collusively to diminish the market share held by Amazon, which dominated the e-book market at that time. As alleged by the DOJ, the MFN was a key part of the hub-and-spoke conspiracy in which the publishers reached and enforced an agreement among themselves in their separate but coordinated agreements with Apple. The complaint alleged the individual agreements between Apple and the publishers implementing the agency model contained MFNs making the retailer the agent of the publisher. Because of this, the retailer was unable to set the retail price, unlike the practice under the wholesale model, the prior arrangements for selling e-books. Instead, the publishers determined the retail prices according to predetermined pricing rules, which included:

- A retail price MFN.
- Maximum retail price grids.
- A 30% commission payable to Apple.

The result, according to the suit, was an increase in the price of e-books to consumers.

#### DOJ Consent Decree

The DOJ and three of the publisher defendants (Hachette, HarperCollins and Simon & Schuster) reached a settlement at the

time of the filing of the complaint and then proposed a consent decree to the US District Court for the Southern District of New York (SDNY). The consent decree, in part, requires the publisher defendants to terminate any contracts with e-book retailers that contain price MFNs and prohibits them from entering into agreements with e-book retailers that include price MFNs for five years.

In December 2012, and February 2013, the last two publishers, Penguin and MacMillan respectively, reached an agreement with the DOJ on similar terms (see *United States v. Apple, Inc., et al., No. 12-cv-2826, Proposed Final Judgment as to Defendants The Penguin Group, a Division of Pearson PLC, and Penguin Group (USA), Inc. (Dec. 18, 2012)* and *United States v. Apple, Inc., et al., No. 12-cv-2826, Proposed Final Judgment as to Defendants Verlagsgruppe Georg von Holtzbrinck GmbH & Holtzbrinck Publishers, LLC d/b/a MacMillan (Feb. 8, 2013)*).

Litigation is proceeding against Apple, the remaining non-settling defendant.

#### SDNY Review of the Consent Decree

The DOJ must submit all proposed consents to a federal court for approval under the Tunney Act. In September 2012, following a Tunney Act proceeding, the SDNY approved the DOJ's settlement with Hachette, HarperCollins and Simon & Schuster.

In concluding that the settlement was in the public interest, the SDNY implicitly rejected Apple's argument that the MFN clauses were, in fact, limits on publisher pricing and served a procompetitive purpose. In its opinion, the SDNY considered and rejected four categories of criticism leveled at the consent decree in 868 public comments (over 90% of which opposed both the enforcement action and settlement terms).

First, while the SDNY recognized that third-party stakeholders, such as brick-and-mortar bookstores, might be harmed by entry of the settlement, it held that the Sherman Act is not designed to prevent harm to those stakeholders. The SDNY reasoned that it had no power to protect third-party stakeholders from Amazon's lower prices.

The SDNY concluded that while each tool employed by the defendants, such as agency contracts, price MFNs and collective behavior, was not, in itself a violation of the antitrust laws, the combination of the three was a violation. It then held that the settlement was appropriate because it addressed each of these individually legal actions to prevent an illegal combination of the actions.

The SDNY determined the government had provided sufficient factual foundation that prices in the e-book market increased following the defendants' conduct, despite several public comments from booksellers demonstrating that their e-book prices decreased in the wake of agency contracts.

The SDNY held that even if Amazon had been engaging in predatory pricing to cement its monopoly (which is the non-settling defendants' position), the defendants' collusive behavior was unjustified.

Scott-Morton stated that CRRs are anticompetitive only in certain fact patterns, often including:

- Use by a single firm with market power.
- Widespread use in an oligopolistic industry.

The only procompetitive aspect of MFNs mentioned in the speech was their ability to more quickly and easily reflect current prices in markets with volatile pricing.

Following the speech, the FTC and DOJ held a joint workshop in September of 2012 on the proper antitrust treatment of MFNs. The agencies considered the competitive effects of MFNs, hearing the arguments of several speakers, including both economists and lawyers. The speakers presented circumstances on when MFNs might harm competition. Those circumstances, which seem to be prevalent in many markets involving healthcare, include:

- Market power of physician groups, hospital systems or insurance companies as either sellers or buyers.
- Provider costs representing a large percentage of total costs to health insurers.

#### Agency Consideration of Procompetitive Benefits

Private antitrust practitioners advocating for the use of MFNs at the antitrust agencies' MFN workshop described the extensive use of MFNs across industries for many years with seemingly no anticompetitive effects in most circumstances. The agencies may consider this argument in deciding on the proper treatment of MFNs under the antitrust laws. The agencies have not yet issued a report from this workshop.

## STATE ENFORCEMENT

State enforcement agencies and legislatures have taken action when they thought MFNs harmed competition. For instance, state attorneys general have joined the federal agencies in certain lawsuits, such as the Michigan Attorney General joining the DOJ's 2010 suit against Blue Cross Blue Shield of Michigan (BCBSM) (see *Box, United States and State of Michigan v. Blue Cross Blue Shield of Michigan*).

The attorneys general of forty-nine states, the District of Columbia and five territories and commonwealths also filed and settled e-books litigation on terms similar to those of the DOJ. States, such as Washington and Idaho, also have enacted prohibitions against the use of MFNs in agreements in the healthcare industry in hopes of preventing:

- Oligopolistic pricing.
- Exclusion of potential rivals.

## PRIVATE LITIGATION

As with enforcement by the federal agencies, private parties rarely challenge MFNs, but when doing so have mainly challenged agreements in the healthcare industry. The issues and analysis of those private cases have been similar to those in cases brought by enforcement agencies.

## Private Litigation in the Healthcare Industry

Two examples of challenges by private parties that reached appellate courts are:

- *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield*, 883 F.2d 1101 (1st Cir. 1989).
- *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951 (10th Cir. 1990).

More recently, two private parties, Aetna, Inc. and Shane Group, Inc., also have filed suit against BCBSM for antitrust injury resulting from the same MFNs at issue in the DOJ's case (see *Aetna Inc. v. Blue Cross Blue Shield of Michigan*, No. 11-15346, 2012 WL 2184568 (E.D. Mich. June 14, 2012) and *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, No. 10-14360, 2012 WL 5990219 (E.D. Mich. Nov. 30, 2012)).

## Private Litigation Outside the Healthcare Industry

*Turik v. Expedia, et al.*, a private litigation involving MFNs outside the healthcare industry, was filed in August 2012 in California (No. 12-4365 (N.D. Cal. Aug. 20, 2012)). This putative class action alleges violations of Section 1 and various state law provisions. Since then, similar cases making the same allegations have been filed in numerous courts around the country.

In *Turik*, the plaintiffs allege that online travel agent defendants, such as Expedia and Travelocity, conspired with each other and with the hotel defendants to ensure the prices for hotel rooms available online were the same across all sites. According to the complaint, each of the online travel agent defendants wanted to be able to advertise that its prices for hotel rooms are the lowest available online. To be able to make that guarantee, each of the online travel agent defendants entered into individual agreements with each of the hotel defendants in which the hotel defendants agree to ensure that no other online travel agents offer the same room at a lower rate.

The alleged result is higher and more uniform prices for hotel rooms, at least those sold through online distribution, and the exclusion of potential new online travel agents willing to offer lower rates. The class action has been consolidated into a multi-district litigation in the US District Court for the Northern District of Texas under the name *In re: On-line Travel Company (OTC)/ Hotel Booking Antitrust Litigation*, MDL No. 2405, 2012 Westlaw 6554428 (J.P.M.L. Dec. 11, 2012).

## ENFORCEMENT IN EUROPE

The competition laws of the European Union (EU) and its member states are not identical to those in the US. However, they are similar enough in the MFN area that like concerns have been raised in Europe in at least two matters involving MFNs. The European Commission (EC) initiated an investigation into the pricing of e-books on Apple's iBookstore in 2011. The arrangements by Apple and the publishers in Europe mirrored those in the US. In December 2012, the EC obtained legally binding commitments from Apple and most of the publishers that prohibit use of MFNs (see *Box, EU E-Book Settlement*).

Regarding the online travel class action, the UK's Office of Fair Trading (OFT) issued a Statement of Objections in September 2012 regarding the arrangements between some online travel agents and hotels for hotel room pricing. Again, the arrangements in the UK mirror those that are the subject of private litigation in the US (see *Private Litigation Outside the Healthcare Industry*).

At about the same time, the OFT issued a report on its concerns regarding MFNs and other similar agreement clauses. Additionally, an OFT official participated in the FTC and DOJ workshop on MFNs. For more information regarding these actions by OFT, see *Box, OFT Online Travel Agents Decision*.

### CONSIDERATIONS FOR ENTERING INTO MFNS AND PRACTICE TIPS

As with all matters judged under the rule of reason, counseling clients on the antitrust risk of entering into an MFN depends on the facts. However, the lack of recent case law on MFNs, especially outside the healthcare industry, makes counseling even more difficult. Still, some factors common to the matters challenged by the enforcement agencies and private litigants and identified by FTC and DOJ workshop participants provide some guidance.

The imposition of an MFN by or for the benefit of a party with a high market share will likely raise red flags. Several of

the healthcare cases that led to litigation or consent decrees involved an insurer or a group of healthcare providers with a high market share. The enforcement agencies can easily make a claim that the MFN will exclude potential competitors if a high market share exists.

Even when no individual party has a high market share, antitrust risks are higher if MFNs are widespread across several parties which together account for a large share of the market. The e-books and online travel agent cases provide good examples. These cases raise the possibility of explicit or implicit collusion among competitors using MFNs, perhaps resulting in higher or stickier prices than would otherwise exist.

In addition to showing the absence of any anticompetitive effect, a firm should be able to explain the solid procompetitive benefits of any MFN it implements, particularly if the expected or actual result of the MFN is higher prices for consumers. Counsel should understand the potential anticompetitive effect of any MFN as well as understand the client's business justification for that clause. A procompetitive explanation offered by the client and supported in contemporaneous documents should give counsel greater confidence that this MFN will not become one of the unusual cases that raise antitrust concerns.

### EU E-BOOK SETTLEMENT

In December 2011, the EC initiated antitrust proceedings against international publishers Hachette Livre (France), HarperCollins (USA), Simon & Schuster (USA), Penguin (UK) and Verlagsgruppe Georg von Holtzbrinck GmbH (Germany). The decision to open the proceedings was based on the concern that, with the assistance of Apple, these publishers had entered into agency agreements for the sale of e-books restricting competition in the EU, namely by limiting retail price competition.

The agency contracts between the publishers and Apple were concluded in January 2010. As in the contracts entered into in the US that were the subject of enforcement action, the contracts made the retailer, here Apple, the agent of the publisher (see *Box, United States v. Apple, Inc., E-book Litigation*). Because of this, the retailer was unable to decide on the retail price, unlike the practice under the wholesale model, the prior arrangements for selling e-books. Instead, the publishers determined the retail prices according to predetermined pricing rules, which included:

- A retail price MFN.
- Maximum retail price grids.
- A 30% commission payable to Apple.

The MFN provided that each publisher would have to lower the retail price to match other retailers offering a lower price for the same e-book. The EC saw the MFN as a commitment device to ensure that the publishers had the same financial incentives to force other retailers, such as Amazon, to switch to the agency

model. These pricing rules, according to the EC, were suspected of being part of a global strategy designed to prevent lower retail e-books prices, resulting in the maintenance of high prices.

In December 2012, the EC announced the acceptance of legally binding commitments from Apple and four of the publishers for the sale of e-books (*European Commission, Case COMP/C-2/39.847 Ebooks (EC MEMO/12/983, December 2012)*). These commitments include:

- The termination of all agency agreements concluded between Apple and the publishers.
- The termination of other agency agreements containing similar restrictions concluded with retailers other than Apple.
- A two-year cooling-off period on restricting the ability of e-book retailers to set retail prices for e-books.
- A five-year ban on retail price MFN clauses in all e-books agreements.

The remaining publisher, Penguin, continues to negotiate a settlement.

To find a global solution for this case, the EC worked closely with the DOJ. The Commission settled this matter quickly to end possible violations and restore competition in this new and fast-growing market (see *European Commission Memo, Antitrust: Commission accepts legally binding commitments from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-books (December 13, 2012)*).

## OFT ONLINE TRAVEL AGENTS DECISION

In July 2012, the UK Office of Fair Trading (OFT) issued a Statement of Objections (SO) alleging that Booking.com B.V. (Booking.com), Expedia Inc. (Expedia) and InterContinental Hotels Group plc (IHG) infringed competition law in relation to the online supply of room-only hotel accommodation by online travel agents (see *OFT, Case CE/9320/10 (Press release 65/12, July 2012)*).

The OFT formally initiated and conducted the investigations in 2010 after a small online travel agent submitted a complaint alleging that various hotel chains prevented it from offering discounted rates for room-only accommodation. The OFT alleged in its SO that Booking.com and Expedia had both entered into separate anticompetitive arrangements with IHG to restrain the online travel agent's ability to offer lower rates on room-only hotel accommodation. Restricting the ability of online travel agents to offer discounted rates could both:

- Limit price competition among them.
- Increase barriers to both entry and expansion of smaller competitors.

Because the SO is a provisional proposed infringement decision and not an infringement finding, it allows the parties to make written and oral representations responding to its allegations before the OFT makes its final decision.

To date, the OFT has not published the SO. It has, however, made public pronouncements that show that it does not see this matter as the only instance when MFNs might cause competitive harm.

More generally, in September 2012, the OFT published a report regarding the competition implications of price relationship agreements (see *OFT Report, Can "Fair" prices be Unfair? A Review of Price Relationship Agreements (Sept. 2012)*). The report focuses on:

- Agreements across sellers, where the price a seller promises to charge depends on the price charged by competing sellers.
- Agreements across customers (or MFNs).
- Third-party agreements, where the end buyer is not a party to the agreement and does not determine the price it pays.

The report concludes that many price relationship agreements can have a softening effect on competition under theories similar to those alleged by the US antitrust agencies (see *Theories of Competitive Harm Involving MFNs*).

OFT Director Nelson Jung also spoke at the joint FTC and DOJ workshop on MFNs and discussed the OFT's and EU's recent actions regarding MFNs (see *Nelson Jung, Price Relationship Agreements in the UK and EU: a retail MFN Enforcement Gap (Sept. 10, 2012)*). Jung made clear that, like their DOJ counterparts, the UK and EU agencies intend to remain vigilant against the use of MFN clauses in circumstances that may harm consumers.

For the links to the documents referenced in this note, please visit our online version at <http://us.practicallaw.com/9-523-4495>.

For more information on this topic, search for the following resources on our website.

Practice note: overview

- *Corporate Transactions and Merger Control: Overview Corporate Transactions and Merger Control: Overview* (<http://usld.practicallaw.com/topic9-507-2799>)
- *Robinson-Patman Act: Overview Robinson-Patman Act: Overview* (<http://usld.practicallaw.com/topic7-508-5967>)
- *Section 2 of the Sherman Act: Overview Section 2 of the Sherman Act: Overview* (<http://usld.practicallaw.com/topic6-521-8034>)

**Practical Law Company** provides practical legal know-how for law firms, law departments and law schools. Our online resources help lawyers practice efficiently, get up to speed quickly and spend more time on the work that matters most. This resource is just one example of the many resources Practical Law Company offers. Discover for yourself what the world's leading law firms and law departments use to enhance their practices.

To request a complimentary trial of Practical Law Company's online services, visit [practicallaw.com](http://practicallaw.com) or call **646.562.3405**.