

# DOJ/FTC Workshop

## MFN Provisions and Antitrust Policy

Mark Whitener

Senior Counsel, Competition Law & Policy

General Electric Company

September 10, 2012



GE imagination at work

# MFNs and antitrust – scenarios

## Typical buy-side MFN

- Contractual commitment to back up sellers' proffer that buyer will receive (equal to) best available price
- May be more frequently used when prices are in flux; products/transactions are homogeneous; contracts are longer-term; one party faces/perceives greater risk
- Which “comparable” deals trigger MFN rights can be complex, esp. when products/transactions are differentiated
- Enforceability of MFN rights can be uncertain – may be supported by audit rights – info exchange issues manageable (e.g., 3<sup>rd</sup> party audits)
- Market power-based theories of competitive harm reasonably well understood – require rule of reason analysis
- Typical MFNs are likely to be pro-competitive or benign – especially in the absence of market power – and may be justified even when large buyers/sellers are involved

# MFNs and antitrust – scenarios

## “First movers”

- Initial dealings involving a new product/arrangement can face uncertainty that inhibits efficient transactions – one or both parties lack confidence in striking initial price
- MFN provides commitment to adjust pricing as market develops – lessens risk to first movers
- Large player on one side of transaction can give counterparty additional reasons to seek an MFN
- Scenario: powerful supplier in new space; no established market price; first-mover buyer seeks MFN to obtain more competitive pricing as market evolves
- Scenario: buyer, not supplier, is powerful, and seller seeks MFN. Sell-side MFN is nominally “price-up” – but is that the effect? Compare to theories of competitive harm applied to MFNs obtained by powerful buyers



# MFNs and antitrust – scenarios

## MFNs supporting legitimate interdependence

- Efficient arrangements may involve agreements in which multiple participants make interdependent commitments to a common customer/supplier/innovator:
  - to commit to the activity/innovation provided that a critical mass of necessary participants is obtained
  - to fund the activity on comparable terms
  - to promote and deploy the resulting products
- MFNs can promote legitimate activities where a JV or other direct integration among competitors may not be the most efficient business form
- Rule of reason approach should, as always, focus on identifying a specific theory of competitive harm – whether premised on single-firm dominance or coordinated effects – with full consideration of efficiency justifications

# MFNs and antitrust – conclusions

- MFN provisions can be supported by various legitimate justifications, and typically are pro-competitive or competitively benign
- MFNs' effectiveness can vary; potential for competitive concerns in implementation usually can be dealt with
- Some theories of competitive harm from MFNs are reasonably well-understood – generally involving firms with market power, and often involving non-standard MFN features (e.g., “MFN-plus” provisions)
- MFNs require a full rule of reason analysis – there is no basis for categorically viewing MFNs more suspiciously than other vertical restraints – unduly restrictive policies regarding MFNs could inhibit efficient arrangements