

Developing Administrable MFN Enforcement Policy

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*Note: These slides are intended for educational purposes only.
They do not necessarily reflect all the relevant issues*

J. Baker Summary: Ways MFNs May Harm Competition

- Collusive Theories
 - Facilitating coordination
 - Dampening competition
- Exclusionary Theories
 - Raising rivals' /entrants' costs
- Increase Seller Bargaining Power

J. Chevalier Summary: Potential Efficiencies from MFNs

- Opportunism
 - Hold-up on relationship-specific investments
 - Contractual rigidity
- Transaction cost reduction
 - Switching/information costs
- Time inconsistency
- Quality commitment
- Risk reduction/distribution



Efficiencies can manifest differently in across types of MFNs, markets, industries, etc.

A. Gavil Summary: Visualizing the ROR Framework

First Principles

Does the MFN arise in a context that indicates it has the potential for significant anticompetitive effects?
(What are the relevant factors?)

Nature of Anticompetitive Effect

Collusive

Exclusionary

Mechanism of Anticompetitive Effect

In what ways will the MFN facilitate coordinated interaction?

How might the MFN impact rival? Enough to also impair competition?

Cognizable Justifications?

What are the efficiency justifications for MFNs?
Do they differ by type of anticompetitive effect?

Illustrative Evidence of Harmful Effects

- Upstream Effects
 - Increased input costs to buyers without MFNs
 - Increased input costs, even to buyers with MFNs
- Downstream Effects
 - Increased/maintained supra-competitive prices
 - Entry deterred; smaller rivals exit or shrink
 - Innovation deterred
- Comparisons could be:
 - Over time (before/after)
 - Across markets with/without MFNs

***Required proof under rule of reason
related to theory of harm***

Illustrative Evidence of Beneficial Effects

- Lower prices
 - Evidence of discounts extended
- Additional transactions
- Efficient longer term contracts adopted
- Increased investment and new product innovation
- Delays avoided

***Relevant evidence related to
specifics of efficiency claims***

Illustrative MFN Characteristics Checklist

More Worrisome

- Jointly adopted by horizontal agreement
- Provided by large sellers with market power
- Provided by most likely maverick
- Received by largest buyers
- Multiple MFNs with high market coverage
- Highly significant input
- Airtight MFN, w/ audit rights/penalties
- Retroactive MFN; larger penalties
- MFN-plus
- Only claimed rationale is: largest buyer “deserves” lowest price
- Only rationale is: “we did not care about the price, only that we did not pay more than others.”

Less Worrisome

- Provided only by smaller sellers that lack market power
- Received only by smaller buyers
- Unconcentrated markets
- Input with close substitutes
- Part of long-term contract with locked-in assets
- Monopolist seller and non-competing buyers (*TBD*)
- Significant risks of opportunism and delay that would deter investment
- Input has uncertain value for innovative new product, with resulting hold-out problem
- Involves promise of full product line, not the lowest price