

Hotel online bookings and “MFN” clauses: can online platforms demand the best deal?

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Most favoured nation (MFN) clauses have come under the close scrutiny of EU competition authorities in connection with the hotel online booking sector. The *Bundeskartellamt*, as well as the competition authorities of France, Austria, Hungary, the UK, Switzerland, Sweden, Ireland, Australia and the US, have been or currently are investigating a number of hotel online booking platforms on account of the inclusion of these types of clauses in their contracts with hotels. This development in Europe indicates that MFN clauses can often be regarded as anti-competitive.

1. What is an MFN clause?

MFN clauses, which appear in vertical agreements between suppliers and distributors, generally consist of an undertaking by the supplier to offer the distributor a price or rate no higher than the lowest offered to other clients. In the hotel online booking sector, an MFN clause obligates the hotel to always give the platform with which it has signed the clause the best price for hotel online bookings, the highest number of available rooms (maximum capacity) and the most favourable room booking and cancellation conditions.

2. Are they legal or illegal?

Inasmuch as clauses contained in vertical agreements (agreements between operators at different levels of the marketing chain), Regulation 330/2010 (the Block Exemption Regulation) must be considered within the scope of the European Union. Pursuant to this regulation, vertical agreements are exempt from the prohibition against anti-competitive

agreements when the parties thereto have a lower than 30% market share and provided they do not contain certain types of hard-core restrictions set out in the regulation. If such conditions are not met, the agreement shall not be exempt and its efficiency-enhancing effects and whether these outweigh the anti-competitive effects must be assessed.

In the hotel online booking sector, MFN clauses can restrict competition in various ways:

- They raise barriers to entry by new competitors insofar as they prevent new platforms from offering hotel rooms at lower prices. This could dampen competition as it complicates the entry of new competitors.
- The existence of several agreements with MFN clauses has the cumulative effect of aligning prices among competitors. The use of such clauses can support collusive actions by standardizing different hotel online booking platforms' prices and commercial terms.
- They restrict competition among hotel online booking platforms insofar as they prevent lower prices being offered on other platforms.
- They discourage hotels from reducing their prices as discounts offered to a third party must also be offered to the clients benefitting from the MFN clause.
- They reinforce market positions and can even lead to abuse of a dominant position,

depending on the platform's market share. The market power of the platform in question must therefore be taken into account in any assessment of the possible anti-competitive effects.

MFN clauses can, however, offer potentially positive effects: to start with, these clauses appear to favour competition insofar as the final client may be guaranteed the lowest possible price.

MFN agreements may also offer buyers a certain degree of protection against price increases and permit buyers to reduce negotiation costs as well as the cost of researching the market to verify if they are obtaining the best possible price.

Parties to agreements containing MFN clauses must take care to evaluate them from a competition law standpoint, verifying if they are exempt pursuant to the Block Exemption Regulation or, if not, whether the agreement's efficiency gains sufficiently outweigh any potential anti-competitive effects of the MFN clause. Agreements containing MFN clauses must therefore be assessed on a case-by-case basis at an early stage in order for the companies not to be fined by competition authorities. The burden of proving that the MFN clauses' positive effects outweigh the restrictive effects lies with the contractual parties.

3. Recent European cases concerning MFN clauses

3.1. *HRS Case*¹. MFN clauses in Germany: prohibition- no possible exemption.

On 20 December 2013, the *Bundeskartellamt* banned HRS (Hotel Reservation Service) from using MFN clauses and ordered it to remove such clauses from its contracts as a remedy to restrictions on competition among hotel online booking websites. During the course of the investigation, HRS offered a range of commitments that were ultimately rejected as insufficient by the competition authority, which ended up banning such clauses.

According to the *Bundeskartellamt*, MFN clauses constitute anti-competitive vertical agreements in breach of article 1 of the German Competition Act (GWB) and article 101(1) of the Treaty on the Functioning of the European Union (TFEU)² in the hotel online booking sector, which in this case encompassed all of Germany.

The *Bundeskartellamt* considered that, as HRS' market share in Germany exceeded 30% since 2009, agreements between HRS and hotels could not benefit from the safe harbour provided in the Block Exemption Regulation and any efficiencies resulting from such agreements should be assessed to see if they outweigh the restrictive effects of the MFN clauses. This assessment led to the conclusion that the latter violated article 101(1) of the TFEU.

In effect, according to the German competition authority, these types of clauses restrict competition among existing online websites as they dissuade them from offering lower prices or from competing through marketing strategies, and also prevent the entry on the market of new booking platforms. They also restrict the hotels' ability to set their prices independently or innovate with attractive offers such as, for instance, last-minute rates. Nor would the agreement have been exempt if HRS' market share had been lower than 30%, as the MFN clause is a hard-core restriction on account of its subject matter and anti-competitive effects, which exclude application of the Block Exemption Regulation.

Following the *Bundeskartellamt's* decision against HRS, investigations were opened into other online booking platforms such as Booking.com and Expedia. In the Booking case, Germany also rejected commitments offered by the company, considering them insufficient to reverse the collusive impacts of the clause.

¹ http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf?__blob=publicationFile&v=3.

² "The implementation of the MFN clauses agreed between HRS and its hotel partners infringes section 1 GWB and Art. 101 (1) TFEU and sections 19 and 20 GWB".

3.2. *BOOKING CASE. MFN clauses in France³, Sweden⁴ and Italy⁵: acceptance of commitments.*

The European Commission encouraged the Member States' national competition authorities to investigate the use of these clauses by hotel online booking platforms, with the EC leading the investigations. It has coordinated three national investigations into Booking.com, but has not opened one of its own.

Booking proposed a number of commitments within the framework of the investigations, namely the following:

- a) Abandonment of MFN clauses in connection with price parity, booking conditions and availability.
- b) A commitment to not implement equivalent measures.
- c) Preparation of a report for the competition authorities due by 1/7/2016,

regarding its compliance with the above commitments.

Booking.com has finally undertaken to cease applying such clauses not only in these three countries but in the whole European Economic Area as of 1 July 2015 and for five years. Booking's commitment to not apply these clauses will open up the market, giving hotels the opportunity to offer lower prices and different booking policies to other online booking platforms.

In light of the above, we recommend that the inclusion of these types of clauses be analysed from a competition law point of view in order to verify their validity or, where appropriate, adapt them in order to avoid any legal risk arising from the competition authorities' stance. Violations of competition law lead not only to the invalidity and non-enforceability of the clause in question, but can also result in significant fines.

³ France:

Décision n.º 15-D-06 du 21 avril 2015 sur les pratiques mises en œuvre par les sociétés Booking.com B.V., Booking.com France SAS et Booking.com Customer Service France SAS dans le secteur de la réservation hôtelière en ligne.
<http://www.autoritedelaconurrence.fr/pdf/avis/15d06.pdf>

⁴ Sweden:

Decision of the Swedish Competition Authority, no. 596/2013, 15 April 2015.
http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom-commitment.pdf
http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_eng.pdf

⁵ Italy:

Decisione dell'Autorità Garante della Concorrenza e del Mercato, 21 April 2015.
http://www.agcm.it/trasp-statistiche/doc_download/4809-i779chiusura.html