

Most-Favoured-Nation (MFN) Clause in the Czech Republic

The Czech Competition Act does not explicitly address MFN (price parity) clauses, however, such clauses, both wide and narrow, were analyzed by the Czech Office for the Protection of Competition (the "NCA") in 2018 in a decision concerning Booking.com.

In this decision, the Competition Office prohibited the use of wide MFN clauses, which provided that partner hotels were prohibited from offering their services for a lower price or on better terms on their websites or other reservation portals. By including this clause in its contracts, Booking.com prevented competition from developing in the market, and thus prevented consumers from obtaining more favourable prices and booking conditions for short-term accommodation. Booking.com was fined approx. EUR 340,000.

By the time of the decision, however, Booking.com had already abandoned the use of wide MFN clauses and adopted the use of narrow MFN clauses, i.e. clauses ensuring that any potential customer will be offered the same or a better price when using the Booking.com platform as compared to the price listed on the website of the specific hotel (however, not on other reservation portals). The NCA thus simultaneously examined the compatibility of the narrow MFN clauses with national competition law. Ultimately, the NCA concluded that it could not be proven at present that the narrow MFN clauses have such tangible negative effects that they have led or could lead to distortions in competition in the relevant markets and therefore do not constitute prohibited agreements within the meaning of the Czech Competition Act.

In assessing the impact of narrow MFN clauses on competition, the Competition Office considered in particular: (i) the percentage of bookings that were in reality affected by the clause and (ii) the overall nature of the business relationship between Booking.com and the hotels. The NCA's investigation showed that the portion of bookings made through the own websites of hotels was lower than 10 %. In addition, one-third of the hotels were found to apply uniform prices and conditions across all distribution channels, while the remaining two-thirds either did not comply with the narrow MFN clause or set identical prices and conditions as a result of their own decisions.

The NCA thus concluded that only one-third of the bookings out of the 10 % were affected by the narrow price parity clause. Given this low percentage of affected bookings, the NCA determined that the anticompetitive effects of the narrow MFN clauses were not substantial. However, the NCA also noted that the period under investigation was rather short (July 2015 to July 2016) and it is, therefore, possible that the NCA's conclusions will be reconsidered over a longer period of time.

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Considering the overall nature of the business relationship between Booking.com and the hotels, the NCA also highlighted the benefits that Booking.com brings to hotels and consumers. Booking.com itself invests in advertising, platform innovation, and search functions making its services available to a wide range of consumers through language alternatives and allowing consumers to compare hotels. According to the NCA, small and medium-sized hotels would not be able to ensure such efficiency in booking accommodations without the use of booking platforms, given their limited resources.

The NCA's investigation also showed that the commission system through which Booking.com charges a commission for each transaction concluded through the Booking.com platform is considered optimal by most hotels. Hotels found that a pay-per-click system where Booking.com would charge the hotel a certain amount for each access to the presentation of their accommodation on the Booking.com platform would be disadvantageous for them.