

Most-Favoured-Nation (MFN) Clause in France

Regarding the French commercial code, **automatic MFN clauses** are prohibited under article L.442-3.

L.442-3 of the commercial code (*non-official translation*) :

- « *Clauses or contracts which allow any person practicing production, distribution or services activities :*
[...]
b) To benefit automatically from most favored conditions conceded by the co-contractor to this person's competitors
[...]
Are null and void. »

In other words, whether or not competition is affected, **automatic MFN clauses** are null and constitute a restrictive practice. This remains true whatever the object of the clause, be it prices, commercialization conditions etc.

Non-automatic MFN clauses could be prohibited under the article L.442-1 of the commercial code, **if they instigate an imbalance in the parties' rights and obligations.**

L.442-1 of the commercial code (*non-official translation*) :

- « *Any person practicing production, distribution or services activities is responsible and forced to repair the damage caused by the act, in the scope of commercial negotiations, or in the scope of the conclusion or the execution of a contract :*
[...]
b) Of submitting or attempting to submit the other party to obligations creating an imbalance in the rights and obligations of parties».

In other words, whether or not competition is affected, MFN clauses instigating an imbalance in the parties' rights and obligations, just as any other type of clauses instigating an imbalance in the parties' rights and obligations, could be deemed illegal and constitute a restrictive practice.

Finally, MFN clauses can also be deemed illegal if they have an anti-competitive effect under the assessment of article L.420-1 and L.420-2 of the French commercial code, which prohibits respectively concerted practices and abuse of a dominant position.

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Among very few cases regarding MFN clauses in French case law, the "Expedia" case seems to be the most noteworthy one (see Paris Court of Appeal, case n°15/18784, 21st of June 2017 and French Court of Cassation, case n°17-31.536, 8th of July 2020).

- The clause, contained in several contracts between hotels and an online platform, rooms, that entails automatical aligning of the commercial conditions (price and room availability) on the best conditions provided to competitors of the platform, was declared null and void according to article L.442-6-II d) of the commercial code (which was the current article L.442-3 of the same code).
- The combination of MFN clauses and other clauses conceding favours to the platform were instigating an imbalance in the parties' rights and obligations according to the Paris Court of Appeal. This part of the judgement was reversed later on by the French Court of Cassation, due to a misunderstanding by the Court of Appeal regarding the meaning of one of the clauses. The French Court of Cassation did not take position regarding whether or not MFN clauses could constitute a violation of article L.442-1 of the commercial code. The case was sent back to the Paris Court of Appeal, the new decision is eagerly expected.

The French Competition Authority had already issued a decision regarding similar practices perpetrated by online reservation platforms in 2015. The anti-competitive effects of MFN clauses in this case were confirmed. Assessment under articles L420-1 and L.420-2 of the French commercial code, as well as under articles 101 and 102 of the TFEU, suggested such clauses could possibly be qualified as concerted practices and/or abuse of dominant position. The case, however, did not progress any farther, as the authors took commitments (which included the removal of all MFN clauses) that were considered important enough by the French Competition Authority to avoid further anti-competitive effects (see French Competition Authority, decision 15-D-06, 21st of April 2015).