

# Most-Favoured-Nation (MFN) Clause in Germany

MFN ("Most Favourite Nation") clauses are agreements whereby one party grants the most favourable conditions of supply to the other party. MFN clauses are set by reference to other supply agreements and typically refer to prices, but can also stipulate delivery or payment conditions.

- **The Assessment of MFN Clauses under German Law:**

MFN clauses **do not constitute a restriction of competition under German law per se, but are rather to be assessed on a case-by-case basis**, particularly since their competitive effects can lead to harm to competition as well as to promotion of competition.

However, so-called **genuine MFN clauses**, which restrict the pricing of one party **in relation to a third party**, amount to a **restriction of competition** and are prohibited under German law, provided they also have a noticeable impact on the market (Sec. 1 German Act against Restraints of Competition - 'ARC'). Such noticeable impact on the market may be given when competitors of a company benefiting from a MFN clause cannot improve their position on the market or when 'newcomers' are hindered from entering the market. Nonetheless, such MFN clauses can still be **exempted** from the prohibition of Sec. 1 ARC according to Sec. 2 (1) or Sec. 2 (2) ARC (VBER).

In **non-genuine MFN clauses**, the supplier commits to **offering its contracting party** constantly the most advantageous price (out of the prices offered to its other customers).

**Overall**, MFN clauses may constitute a **restriction to competition when** they bind the supplier in such manner, that its flexibility regarding individual pricing is severely limited and when de facto the clauses indirectly fix the selling prices. These MFN clauses may, however, be exempted according to Sec. 2 (1), (2) ARC.

- **In particular: MFN clauses in agreements with online platforms operators**

MFN clauses used in agreements between suppliers and operators of online brokerage platforms have become particularly relevant as they were **subject to multiple proceedings both before the German Federal Cartel Office ('FCO') as well as before German Courts**. In this type of MFN clauses (which also be referred to as '**(price) parity**' or '**best price**' clauses), the supplier commits to the operator of the platform to not offer better terms and conditions for its goods or services on its own website (or also on other platforms).

Such **MFN clauses do not necessarily have to be related to prices**, they can also refer to product or packaging material, **as shown by the recent FCO 'Amazon'-case**.

- **The FCO 'Amazon Marketplace' case (case no. B 2 88/18, summary published on 17.07.2019)**

In accordance with the so-called parity requirement in the agreements, the sellers had to provide Amazon (as marketplace operator) product material of the same high quality as the one they used for other sales channels. This made it difficult for the sellers to set themselves apart from Amazon Marketplace by providing for higher quality in other sales channels or in their own online shops. The proceedings were terminated by the FCO, as Amazon amended its general terms of business and promised further alterations. Following the proceedings, **Amazon also committed to adjusting its terms not just for the German marketplace (amazon.de) but also for all European marketplaces**.

# Most-Favoured-Nation (MFN) Clause in Germany

- **Wide vs narrow price parity clauses – different approach under German Law**

- **Wide price parity clauses:** The supplier commits to not offering its goods or services at more advantageous conditions within its own direct distribution channels or on different platforms. **The FCO as well as German courts** have ruled that **wide price parity clauses constitute a restriction to competition, violate Sec. 1 ARC, and are therefore prohibited**. In the meantime, it is stated as well by law that the wide price parity clauses can not be **exempted** from the prohibition of Sec. 1 ARC according to Sec. 2 (2) ARC, Art. 5 (1) lit. d) VBER.

Relevant case law:

**Decision of FCO of 20.12.2013 case no. B9 66/10 ('HRS'-case):** The most favoured customer clauses in the contracts concluded between the HRS, a hotel booking online platform and its hotel partners obliged the hotels to always offer their lowest room price, maximum room capacity and most favourable booking and cancellation conditions available on the Internet via the HRS portal. Starting March 2012, the hotels were even prohibited from offering guests better conditions if they booked directly at the hotel's reception desk. **The FCO found that such a clause was infringing antitrust law, prohibited HRS from continuing to apply its MFN clause, and ordered it to delete it from its contracts and general terms and conditions.**

**Decision of Higher Regional Court of Düsseldorf on 9.01.2015 case no. VI-Kart 1/14 (V):** The Court essentially confirmed the ruling of the FCO and held that the MFN clauses **constituted a restriction of competition**.

- **Narrow price parity clauses:** The supplier commits to not offering its goods or services at more advantageous conditions within its own direct distribution system, but remains free to offer better conditions on different brokerage platforms. **Narrow MFN clauses are not per se prohibited** – as also can be seen in the German 'Booking.com' case law:

**FCO, Decision of 22.12.2015 case no. B9-121/13:** The FCO ruled that the narrow MFN clause used by Booking.com infringed antitrust law and asked the platform operator to remove the clause from its contracts and its terms and conditions.

**Higher Regional Court of Düsseldorf, Decision of 4.6.2019 case no. VI-Kart 2/16 (V):** The Court decided against the FCO. It held the clause for a side agreement necessary for a fair and balanced exchange of services in an antitrust neutral contract. Therefore, the Court ruled that the clause fell outside the scope of the prohibition pursuant to Sec. 1 ARC.

**German Federal Court of Justice (FCJ), Judgment of 18.05.2021, case no. KVR 54/20:** The FCJ annulled the decision of the Higher Regional Court and ruled **that the narrow MFN clause used by Booking.com was violating antitrust law** and not an antitrust neutral side agreement. Furthermore, the Court did not rule on the application of the vertical block exemption regulation (Reg. 330/2010 VBER), due to the market share threshold of 30 % being exceeded by Booking.com.