

Most-Favoured-Nation (MFN) Clause in Italy

Legislation Italian provision on MFN clauses in the tourist-accommodation sector

In August 2017, the Italian legislator approved Law no. 124/2017 (the so-called Annual Law on market and competition - «Legge annuale per il mercato e la concorrenza»); pursuant to Article 1, para. 166, thereof:

“Any agreement by which a tourist-accommodation enterprise undertakes not to charge final customers, by any method and any instrument, prices, terms and any other conditions that are better than those practiced by the same enterprise through third parties is null and void, regardless of the law governing the contract”.

Therefore, in Italy, with particular regard to the agreements involving tourist-accommodation operators, MFN clauses are the object of an absolute prohibition, including both ‘wide’ and ‘narrow’ MFN clauses.

The said provision, which is sometimes referred to as ‘Anti-Booking provision’, was adopted in the framework of the Annual Law on market and competition 2017, after a long debate, started in 2015. During such debate, the then President of the IAA had expressed criticism on the formulation chosen by the Italian legislator, stating that the absolute prohibition laid down in the provision would be disproportionate and that a prohibition of the sole ‘wide’ MFN clauses would have been more suitable for achieving the objective of making the hotel sector more competitive.

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Italian case law on MFN clauses

In Italy, the issue of MFN clauses was examined by the Italian Antitrust Authority (IAA), in particular, with regard to the hotel sector and online reservation systems.

In case **I779 - Mercato dei servizi turistici - Prenotazioni alberghiere on line**, the IAA scrutinised the MFN clauses inserted in contracts with hotels by the two main On-line Travel Agencies (OTA), i.e. Booking and Expedia.

The proceedings at issue were opened and brought in parallel by the IAA, the French *Autorité de la concurrence* and the Swedish *Konkurrensverket*, while the German *Bundeskartellamt* adopted an autonomous (and stricter) approach.

The clauses at stake included, in particular:

- (i) **MFN clauses** aimed at preventing the partner hotels from offering their facilities at better prices and/or conditions through other OTAs, and more generally through any other online and offline channel, otherwise they would have been 'downgraded' in the ranking system of the Booking and Expedia websites;
- (ii) **'Best Price Guarantees'** clauses, through which Booking and Expedia guaranteed to the end-users that the offer available on their platforms was the most advantageous one, thus obligating the partner hotels to match any other better offer that could be found online.

At the outcome of the proceedings, the IAA, by two separate decisions:

- accepted and made binding the commitments offered by Booking (decision no. 25422 of 21 April 2015); and
- closed the investigation relating to Expedia, stating that there was no need to proceed with the case, since Expedia had amended its MFN clauses, in line with Booking's commitments (decision no. 25940 of 23 March 2016).

The **commitments** offered by Booking (and then endorsed also by Expedia) consisted, in essence, of:

- (i) an amendment to the **MFN clauses**, which were transformed **from 'wide' to 'narrow'**, thus becoming applicable only to the prices and offers made by the partner hotels through their – online and offline – channels, and not anymore to the prices and offers made to other OTAs and through any other 'indirect' sales channel (such as traditional travel agencies, tour operator, and so on); and
- (ii) an amendment to the **'Best Price Guarantees' clauses**, which were **made applicable only in case of breaches of the 'narrow' MFN clauses**.