

Most-Favoured-Nation (MFN) Clause in Poland

MFN clauses are assessed by the Polish Competition Authority (“**PCA**”) as potentially restricting competition.

However, if the shares of the parties to the agreement in a relevant market do not exceed 30 %, the MFN clause is subject to exemption from the prohibition on anticompetitive agreements under Polish Vertical Exemption Regulation.

Case law

In fact, the only publicly known case in which the PCA challenged MFN clauses is a case of online booking services. As part of a preliminary investigation initiated in 2014, the PCA examined the terms and conditions of cooperation between hotels and owners of online booking services. The PCA analysis showed that the disputable clauses were used by the owners of four brokerage services operating in Poland: Booking.com (booking.com), Hotel Reservation Service (hrs.pl), Expedia Lodging Partner (expedia.com) and eTravel (hotele.pl). All four businesses committed to abandon the provisions questioned by the PCA.

As part of the investigation, the PCA disputed the so-termed “wide MFN” clause on the basis of which a booking platform was guaranteed that the price, availability of rooms, and other conditions offered by it would be at least as favourable, or equally favourable, as those offered in any other online or offline distribution channel, as such clauses may have prevented consumers from booking at a lower price or on more favourable terms through other sites, or directly at the accommodation site, even in cases of a high availability of rooms.

By contrast, there were no PCA objections to the so-termed “narrow MFN” by which the price, availability of rooms, and other conditions offered by the service could not be less favourable than those offered on the website of a facility. All four businesses voluntarily abandoned the use of the clauses indicated by PCA and a penalty was not imposed on any of them.

During the proceedings, the PCA cooperated with other European competition authorities and the European Commission within the framework of the European Competition Network. Indeed, the MFN issue was also simultaneously investigated in other countries which included Germany, France, Sweden, and Italy.