

COMMENT

Italy introduces a legislative ban on price-parity clauses in the booking sector

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Law No.124 of 4 August 2017 has introduced a statutory ban on price parity clauses (aka Most Favored Nation, or “MFNs”) in agreements between booking platforms (aka Online Travel Agents, or “OTAs”, when they operate online) and hotels; the ban has entered into force on 29 August 2017.

MFNs are clauses through which booking platforms impose to affiliated hotels to refrain to offer more favourable rates or booking terms on the hotels’ own direct channels or on competing third parties’ platforms.

The statutory ban on MFNs is set forth in art.1, para.166 of the law, which states that:

“Any agreement through which a firm operating in the hotel and tourist-hosting sector undertakes not to offer to final users, in any way or by any means, prices, terms or conditions which are more favorable than those offered by the same firm via third parties is null and void, regardless of the law applicable to the agreement”.

This legislative provision is part of a wider set of reforms aimed at opening the national market to more competition in various sectors. The law, including the provision banning MFNs in the hotel sector, was announced in February 2015 and underwent years of debates. During this time, the President of the Italian Competition Authority (the AGCM) openly and formally criticised with the Parliament the proposed ban on MFNs

on the ground that it might be unnecessary and disproportionate to the aim of improving competition in the hotel booking industry—and thus incompatible with EU law—because it would also prevent Online Travel Agents to limit the ability of affiliated hotels to offer more favourable conditions to final customers through their own website or other direct channels.

MFNs which only prohibit affiliated hotels to offer more favorable conditions over their own website, and do not prevent the hotels from quoting lower fees on competing OTAs, are referred to as “narrow MFNs”. Conversely, MFNs which also prohibit affiliated hotels to quote lower fees on third parties’ OTAs are referred to as “wide MFNs”.

Notably, narrow MFNs have been deemed compatible with competition law (namely, with art.101 TFEU on the prohibition of anti-competitive agreements) in the context of specific investigations simultaneously carried out by the Italian, French and Swedish competition authorities in 2014—under the supervision and co-ordination of the European Commission—against Booking.com. Conversely, the same authorities have maintained that wide MFNs contained in agreements between OTAs and affiliated hotels might be contrary to art.101 of the TFEU. Indeed, said investigations were closed without a finding of infringement after the firms formally committed with the authorities to refrain from enforcing or introducing wide MFNs in agreements with affiliated hotels, though remaining free to impose narrow MFNs to affiliated hotels.

The rationale to permit narrow MFNs resided in the consideration that such clauses are likely indispensable and proportionate to the objective of removing the threat that hotels free-ride on the OTAs’ investments aimed at improving the service for consumers and at widening the affiliated hotels’ visibility and customer base. Indeed, if hotels are permitted to offer more advantageous rates on their own websites, customers will have a high incentive in using OTAs to only search—for free—suitable hotels, to then revert to the selected hotel’s website for booking, thus depriving the OTAs of the commission fee by which they remunerate their investments.

Nonetheless, little after the closing of the French, Swedish and Italian competition agencies’ investigations (which have been endorsed by the European Commission) and despite their identical outcome, France and (later on) Austria have introduced by law an absolute ban on MFNs in the hotel booking sector, thus prohibiting both narrow and wide MFNs. Italy, as said, followed with a similar initiative and, apparently, has disregarded the recommendation of the AGCM. In fact, the wording of the statutory ban—though not crystal clear—does not seem circumscribed to wide MFNs only. Switzerland has also approved a ban on narrow MFNs recently. In Germany, individual decisions prohibiting both narrow and wide MFNs as contrary to art.101 (or correspondent national provisions) have been issued in 2013 and 2015 against, respectively, HSR and booking.com. Reportedly, formal complaints have been filed with the European

Commission against France alleging that the absolute ban is in contrast with EU fundamental principles on competition and free circulation of services within the Single Market.

It is therefore worth saying that any attempt by hotels to enforce the statutory ban on narrow MFNs—thus offering better booking terms on their own direct channels than those offered through affiliated OTAs despite having undersigned MFNs in their agreements—might still be reprimanded or sanctioned by the OTAs. Indeed, OTAs could argue that such a statutory ban is void and unenforceable for contrariety with overriding principles stemming from EU law, namely the prohibition of restrictions to the free circulation of (digital and non-digital) services within the Single Market. Remarkably, the case law of the Court of Justice of the EU has consistently held “restrictive” of such freedom (and thus prohibited and void) a State measure (including

law provisions) which makes it unnecessarily “less attractive” to provide certain services in a Member State because of the disproportion of that measure with respect to the public aim which is intended to achieve.

Interestingly, in April 2017 competition agencies of several Member States (Italy, France, Sweden, Belgium, Czech Republic, Hungary, the Netherlands plus the UK), in co-ordination with the European Commission, have published a first joint monitoring report on empirical effects on competition in the online hotel booking sector generated by MFNs before and after the modification or removal thereof was introduced. The results of the report—though neither conclusive nor definitive—might be used to substantiate or contest either the positions on whether an absolute ban on MFNs is fit for purpose or, rather, goes beyond what is indispensable to attain more competition in the hotel booking sector.