CLIENT BRIEFING

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MOST FAVOURED NATION CLAUSES BACK IN FAVOUR?

COMPETITION APPEAL TRIBUNAL UPHOLDS COMPARE THE MARKET'S APPEAL OF CMA DECISION

On 8 August, the UK Competition Appeal Tribunal (CAT) unanimously upheld Compare the Market's appeal of the Competition and Market Authority (CMA) decision that Compare the Market's historical use of wide retail parity obligations, known as Most Favoured Nation (MFN) clauses, infringed competition law. The CAT held that the CMA had failed to show that Compare the Market's wide MFNs had anti-competitive effects.

This judgment reopens the debate on the treatment of wide MFNs – despite the condemnation of such provisions by multiple authorities in recent years, the CAT's assessment injects nuance. The CAT's judgment suggests that wide MFNs should not be ruled out as red flag infringements without carefully considering whether they have an anti-competitive effect. This is a case-by-case assessment and there is no presumption that these provisions are unlawful.

The CMA challenges wide MFNs

In November 2020, the CMA found that price comparison website Compare the Market (CTM) had infringed competition law through its historical use of wide MFNs in its contracts with a number of home insurance providers. The specific clauses in question prevented home insurers from quoting lower prices than those offered on CTM on either their own site or other price comparison sites (as compared to narrow MFNs which would relate only to prices and other conditions on direct channels without restricting the freedom to price lower on other sales channels). In the CMA's view, these wide MFNs had the appreciable effect of preventing, restricting or distorting competition by: (i) reducing competition between both price comparison sites and home insurers competing on these sites; and (ii) restricting the ability of CTM's rival price comparison websites to expand, thereby enabling CTM to reinforce its market position. As a result of these findings, the CMA imposed a fine on CTM of £17.9 million.

CTM filed an appeal against the CMA's decision in February 2021. 18 months later, on 8 August 2022, the CAT issued its judgment, ruling in CTM's favour and annulling both the CMA's decision and its penalty.

The CAT challenges the CMA on the effects of wide MFNs

The CAT found that evidence of the anti-competitive effects of the wide MFNs was limited and anecdotal and the CMA relied heavily on theory or bare assertion, with no significant reference to quantitative evidence. The CAT noted that the mere fact that the clauses were complied with is not sufficient to demonstrate their anti-competitive effect. In the CAT's view, there was no reliable evidence to conclude that the existence of the wide MFNs had any adverse effect on premiums or commissions. The CAT considered that it is unlikely that the wide MFNs had any effect on maintaining premiums or commissions at a higher level than they otherwise would have been. In reaching this conclusion, the CAT pointed to the substantive quantitative evidence adduced by CTM, including econometrics, highlighting the importance of robust quantitative analysis when assessing effect. The CAT noted that wide MFNs only inhibit "*intra*-brand" competition, where the same product (i.e., the home insurance offered by a home insurance provider) is priced differentially across different price comparison websites – they do not hinder "*inter*-brand" competition, where different products (i.e., home insurance offered by multiple home insurance providers) compete against each other.

What does this mean for the future of MFNs?

In the last decade, the use of retail MFNs by online marketplaces and price comparison sites has been the target of a number of antitrust enforcement cases and market studies in Europe – indeed, the CMA launched its investigation into CTM on the basis of evidence found in a market study into digital comparison tools. In 2012 and 2013, authorities in the UK and Germany investigated the use of wide MFNs on Amazon Marketplace, and the CMA prohibited wide MFNs in the private motor insurance market following a market investigation in 2014. In August 2020, Booking.com and Expedia agreed to extend commitments not to impose wide MFNs, which they had given five years earlier following investigation by the French, Italian and Swedish national competition authorities. Apple and Amazon have both given similar

commitments to the European Commission in relation to e-books.

As outlined in this briefing, wide retail parity clauses are included in the list of "hardcore restrictions" in the CMA's Vertical Agreements Block Exemption Order (VABEO) – that is, they are presumed to be illegal as opposed to simply being excluded from the benefit of the exemption. This is a more restrictive approach to wide MFNs than that adopted by the EU in its Vertical Agreements Block Exemption Regulation (VABER), which excludes wide retail parity provisions from the benefit of the exemption but does not designate them as "hardcore restrictions". However, the Digital Markets Act adopted by the European Parliament in December 2021 goes further than both block exemptions in respect of large online platforms designated as "gatekeepers", banning their use of both wide and narrow parity clauses altogether. Narrow MFNs have previously generally been treated positively by national competition authorities given their associated efficiencies, but the German Federal Court of Justice has gone as far as to condemn such clauses, finding in May 2021 that narrow MFNs previously used by Booking.com until 2016 restricted competition.

Given this historically robust opposition to wide MFNs from regulators, as well as recent scrutiny even of narrow MFNs, the CAT's overruling of the CMA's decision reopens the debate. The CAT's judgment highlights that proving that these clauses restrict competition is not straightforward. The CAT demonstrated that provisions treated in block exemptions as "hardcore restrictions" are not in themselves to be treated as "object" infringements that are presumptively unlawful without the need to prove anti-competitive effects. This case shines a light on the difficulties of proving "effects" infringements for competition authorities and litigants. It will be interesting to see if the CMA is discouraged from pursuing these cases in the future – for now, it has until 16 September 2022 to apply for permission to appeal the CAT's judgment.

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