

MFN clauses could breach competition law

November 2018

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Overview

On 2 November 2018, the Competition and Markets Authority (**CMA**) issued a statement of objections (**SO**) to ComparetheMarket, one of the largest price comparison websites in the UK. The SO sets out the CMA's [provisional finding](#) that the company has **breached UK and EU competition law by use of so-called “most favoured nation” (MFN) clauses in contracts with home insurance providers**. The CMA has found that the clauses restricting home insurers to quote lower prices on rival sites may ultimately lead to higher premiums for customers.

ComparetheMarket will now have the opportunity to respond to the CMA's provisional findings before the authority makes a final decision. Should the CMA, in its final decision, find that the company has breached Chapter I of the Competition Act 1998, and union law under Article 101(1) of the Treaty on the Functioning of the European Union (**TFEU**), by use of anti-competitive agreements, the company risks a fine of up to 10% of its annual worldwide group turnover.

Digital comparison tools market study

In September 2016, the CMA launched a **market study into digital comparison tools (DCTs)**, such as price comparison websites that help consumers compare and choose between different product and service offerings. As part of its study, the CMA examined whether “wide” and “narrow” MFNs could limit the competitive constraint on and between DCTs and affect their benefits for customers.

MFN clauses limit the price at which a supplier can offer a product through alternative sales channels. Under *narrow* MFN clauses, suppliers agree not to set lower prices through their own websites compared to prices offered on the DCT imposing the MFN, without specifying conditions for the sales through other rival channels. *Wide* MFNs, on the other hand, restrict a supplier from charging lower prices on their website, as well as through any other sales channel, including other DCTs.

In its [final report](#) published in September 2017, the CMA found that narrow MFNs may in some circumstances have the potential to restrict competition. Still, there were generally no indications that they would have such effects in the sectors assessed during the market study which were those in which DCTs did, or could, have an important influence on consumers' decisions, namely car insurance, home insurance, energy, broadband, flights, and credit cards. However, **wide MFNs were found likely to be anticompetitive by softening competition between DCTs and leading to higher prices for consumers**.

During its market study, the **CMA found wide MFN clauses in contracts between one DCT, notably ComparetheMarket, and a number of home insurers**. Since the authority believed there to be reasonable grounds to suspect that these agreements could restrict competition between DCTs, and result in higher prices for consumers, it **opened an investigation** into ComparetheMarket and its use of MFN clauses.

Statement of objections

In the SO, the CMA has **provisionally found that ComparetheMarket has breached competition law by preventing home insurance providers from offering lower prices elsewhere**, i.e. by imposing wide MFN clauses. In particular, the CMA has found that the relevant MFN provisions can result in **worse home insurance deals and higher premiums for customers**, as the clauses prevent rival DCTs and channels from winning customers by offering cheaper prices than ComparetheMarket. During the CMA's investigation, ComparetheMarket contacted home insurers to inform them that it would not enforce the clauses. Nonetheless, as the clauses were not removed from the contracts, the CMA's concerns remained.

Since the SO presents the CMA's *preliminary* findings, ComparetheMarket will have an opportunity to respond to the CMA's concerns and provide further evidence, before a final decision is made. Nevertheless, should the CMA still find a breach of competition law, ComparetheMarket could face a fine of up to 10% of its global turnover.

Comment

In recent years, **MFN clauses in online markets**, especially relating to hotel bookings and travel services, have been a **focus for competition authorities in Europe**, both on a Commission level as in a number of Member States. Last year, the European Commission adopted a decision in its investigation into Amazon's distribution agreements with e-book publishers, whereby Amazon committed not to enforce the MFN clauses in question. Similarly, the hotel-booking platform Booking.com has been under scrutiny in a number of Member States, including Germany, France, Italy and Sweden, for its widespread use of MFN clauses. As such, the CMA's ongoing investigation into ComparetheMarket's restrictive clauses is part of an **overall trend in EU competition law and price-comparison websites should expect to face increased scrutiny** from the authorities going forward. It is perhaps surprising that ComparetheMarket did not offer commitments to make changes to its MFN clauses (as others have done), or that the CMA rejected such an offer if one were made. Either way, the case may suggest the CMA taking a tougher stance on MFNs compared to competition authorities in other Member States. If so, that may signal an approach to issues that the CMA may adopt post-Brexit when it will have the ability to investigate alleged breaches of competition law in parallel with the European Commission.

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