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Imposing Most Favoured Nation Clauses? Okay, now pay a fine to the tune of £17.9 million

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On 19 November 2020, the Competition and Markets Authority ("**CMA**"), the UK competition watchdog, announced it has issued an infringement decision finding that BGL (Holdings) Limited, BGL Group Limited, BISL Limited (collectively, "**BGL**") and Compare The Market Limited ("**CTM**") infringed the Competition Act 1998 ("**the Act**") and Article 101 of the TFEU[1] as a result of the use of most favoured nation ("**MFN**") clauses in contracts relating to home insurance products.

As a result of such contravention, BGL was fined £17.9 million.

Most favoured nation clauses, also known as price parity clauses, or most favoured customer clauses, which appear in vertical agreements between suppliers and distributors, generally consist of an undertaking by the supplier to offer the distributor a price or rate no higher than the lowest price offered to other distributors.

The genesis of this matter relates to the use of MFN clauses in relation to home insurance products on price comparison websites.

CTM operates a price comparison website ("**PCW**") under the domain name comparethemarket.com. The CMA found that BGL's use of retail MFN clauses was preventing home insurers from quoting lower prices on rival sites and other channels.

In its decision, the CMA found that, between 1 December 2015 and 1 December 2017, BGL through its operation of the CTM PCW was a party to agreements with 32 home insurers that contained clauses, known as wide MFN clauses, which restricted the prices the home insurers were permitted to quote on PCW's. By preventing the relevant home insurers from offering lower prices on rival PCW's than on CTM, the agreements had the effect of:

- preventing, restricting or distorting competition between PCWs; and
- preventing, restricting or distorting competition between home insurers competing on PCWs.

We have previously written on the full meaning and status of MFN clauses (click here). This case presents a demonstrative example of the anti-competitive arising from the usage of MFN clauses. In particular, this case demonstrates that MFN can restrict competition in various ways, including, *inter alia*, –

- they raise barriers to entry insofar as they prevent new entrants into the market from offering lower prices;
- the existence of several agreements with MFN clauses, has the cumulative effect of aligning prices amongst competitors; and
- they could reinforce market positions and lead to an abuse of dominance depending on market shares.

In the terms of reference for the initiation of a market inquiry into the digital platform markets in South Africa, the Competition Commission ("**the Commission**") identifies MFN clauses as being anti-competitive. The Commission states that MFN clauses have been prevalent across PCW's such as travel aggregators and many intermediated services such as food delivery.

The Commission recognises that the effect of these MFN clauses is to reduce competition on price or commission between new platforms and incumbents, reducing the scope for competitive rivalry to attracting consumers where the incumbent has a distinct advantage. Also that, wide MFNs are associated with high prices. Furthermore, that a number of international platforms operating in South Africa have been found to use such clauses in other jurisdictions to the detrimental effect of the travel industry and consumers.

Companies wishing to include MFN clauses in their agreements should take into consideration competition law, lest it wishes to be confronted with the might of the law like BGL.

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[1] Treaty on the Functioning of the European Union ("**TFEU**").

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