

# Most-Favoured-Nation (MFN) Clause in the United Kingdom

MFN clauses are usually assessed pursuant to Chapter I of the CA98; but also under Chapter II if MFN clauses are imposed or effectively enforced by a dominant supplier. Notably, wide retail MFN clauses are a hardcore restriction for the purposes of the UK vertical agreement's block exemption, which causes the block exemption not to apply. Other MFN clauses are capable of benefitting from the block exemption. Where the block exemption does not apply, individual assessment is required.

## Major case law:

- **Private motor insurance market investigation (2014)** - The CMA considered MFNs in agreements between price comparison websites and private motor insurers as part of its market investigation into private motor insurance. The CMA decided to impose a remedy banning MFNs, other than narrow MFNs.
- **Auction services (2017)** - The CMA investigated a number of practices used by ATG Media, a provider of live online bidding platforms in the UK, under Chapter I and Chapter II of the CA98. These practices included preventing auction houses from obtaining a cheaper online bidding rate with other platforms for their bidders through MFN clauses. ATG Media offered commitments to cease these practices for a period of 5 years and these commitments were accepted by the CMA.
- **Price comparison website: use of most favoured nation clauses (2020)** – The CMA found that BGL had infringed Chapter I of the CA98 by using wide MFN clauses in its contracts with a number of home insurance providers selling through its price comparison website, ComparetheMarket. The CMA considered that these clauses prohibited the relevant insurers from offering lower prices on rival price comparison websites and imposed a fine of £17.9m on BGL. BGL has appealed the CMA's decision and judgment is pending.

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## Guidance Papers

The CMA's guidance to accompany the UK vertical agreements block exemption, issued in July 2022, includes a section on MFNs. The guidance confirms that, with the exception of wide retail MFNs, which are treated as hardcore restrictions, the block exemption is capable of applying to all other types of MFNs.

Where the block exemption does not apply, the CMA's guidance confirms that individual assessment is required. The guidance provided is as follows:

- **Wide retail MFNs** - Where an agreement includes a wide retail MFN, that agreement is presumed to restrict competition and thus to fall within Chapter I of the CA98. It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions for exemption from Chapter I. However, it is open to parties to seek to demonstrate in an individual case that the agreement qualifies for exemption.
- **Narrow retail MFNs** – In certain circumstances, narrow retail MFNs may harm competition by (i) replicating the effects of wide retail MFNs or (ii) lessening or eliminating competition from the direct channel. This may allow intermediaries to maintain a higher price for their services, leading to higher retail prices for the intermediated products on all sales channels. Where restrictive effects arise, narrow retail MFNs are more likely to fulfil the conditions for exemption than wide retail MFNs. This is primarily because their restrictive effects are generally less severe than those of wide retail MFNs and therefore more likely to be outweighed by efficiencies.
- **MFNs relating to non-retail conditions** – Wide or narrow MFNs imposed by intermediaries relating to the conditions under which products are offered to businesses in upstream business-to-business markets may disincentivise competition between intermediaries in a similar way as retail MFN obligations. It is also necessary to take into account the conditions of competition downstream between the buyers of the intermediated products. By contrast, MFNs relating to the conditions under which products are purchased as inputs by manufacturers, wholesalers or retailers do not directly affect the conditions under which they compete downstream, with the main potential concern being that the incentives of input suppliers to compete may be reduced.