ALERT MEMORANDUM

UK Courts Identify Territorial Limits on the CMA's Investigatory Powers

March 13, 2023

On 8 February 2023, the Competition Appeal Tribunal (the "**CAT**") and the High Court (together with the CAT, the "**Courts**") handed down an important concurrent judgment regarding the territorial limits of the investigatory powers of the Competition and Markets Authority (the "**CMA**") under the Competition Act 1998 (the "**Act**").[1]

The Judgment has significant implications for businesses with operations in the UK in the context of CMA antitrust investigations. The effect of the Judgment, which is currently under appeal, is that:

a) If a group has a non-UK ultimate parent, the parent and its non-UK subsidiaries[2] cannot be required to respond to an information request under section 26 of the Act from the CMA ("**Section 26 Notice**"), provided that they have no "*UK territorial connection*" (see discussion below).

b) All UK subsidiaries of a group to which the CMA addresses a Section 26 Notice must respond, even if they are not specifically named in that notice.

c) All non-UK subsidiaries of a group whose ultimate or intermediate parent is UK-domiciled could be required to provide documents and information responsive to a Section 26 Notice.

If the Judgment is upheld on appeal, the likely implications are that:

a) The CMA will have to consider carefully how, and to which companies, it targets its Section 26 Notices.

b) Parties may be able to hold back information from disclosure to the CMA where that information is not in the control of a group company with the necessary UK nexus.

c) If a party intends to rely on this territorial "defence", it must take care to identify what information (if any) can legitimately be withheld from disclosure. It must also weigh the merits of withholding

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1 *Bayerische Motoren Werke AG v Competition and Markets Authority* [2023] CAT 7 (the "**Judgment**").

2 Provided that these non-UK subsidiaries do not have a UK intermediate parent: see (c) below.

information from the CMA, in circumstances where that same information might in any event have to be produced to agencies in other jurisdictions.

Background and proceedings

The CMA launched an investigation into suspected anti-competitive conduct relating to the recycling of end-of-life vehicles against carmakers BMW and Volkswagen ("**VW**").[3]

As part of its investigation, the CMA issued notices to BMW and VW, requiring them to produce certain documents and information relating to its investigation pursuant to section 26 of the Act (the "**Notices**").

The Notices were addressed to BMW's and VW's UK entities (BMW UK Ltd ("**BMW UK**") and Volkswagen Group United Kingdom Limited ("**VW UK**")), as well as their German parents (Bayerische Motoren Werke AG ("**BMW AG**") and Volkswagen Aktiengesellschaft ("**VW AG**")). The Notices were in the following form (the notice to VW was materially similar): [4]

> *"This is a formal notice (the "Notice") issued by the [CMA] under section 26 of the Competition Act 1998 (the "Act") to:*
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> *BMW (UK) Ltd (company number 01378137) ("BMW"), its ultimate parent company, Bayerische Motoren Werke AG, and any other legal entities within the same undertaking (together, "BMW Group").."*

The question of whether BMW UK and VW UK complied with the Notices did not arise for determination and it appears that both entities provided documents held by them or were otherwise under their control to the CMA in response to the Notices.

BMW AG and VW AG resisted the Notices insofar as they related to documents and information held by them but not by their respective UK subsidiaries, on the basis that there was no legal obligation on them to so do and that the CMA did not have the power to require them to respond to the Notices.

The cases came before the Courts in different ways but were heard jointly: [5]

— In BMW AG's case, the CMA had issued a penalty notice against it (comprising a £30,000 fine and a daily £15,000 fine) for failure to comply with the Section 26 notice. [6] BMW appealed against the imposition of the penalty to the CAT; and

— In VW AG's case, VW AG sought judicial review of the CMA's decision to issue a Section 26 Notice against it in the High Court.

By consent of the parties and the High Court's agreement, the case was allocated to Mr. Justice Marcus Smith, who sits concurrently as (i) the President of the CAT alongside two other members in respect of BMW's appeal and (ii) a High Court judge in respect of VW's judicial review. [7]

Judgment

a) The interpretation of "person" in section 26(1)

The Courts noted that the cases turned on the meaning of "*any person*" in section 26(1) of the Act, which provides:[8]

> *"For the purposes of an investigation under section 25, the CMA may require <u>any person</u> to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation."* (emphasis added)

[3] The European Commission carried out unannounced inspections into the same sector "*in coordination with*" the CMA: "*Antitrust: Commission carries out unannounced inspections in the automotive sector*", 15 March 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1765

[4] Judgment, paragraph 16.

[5] Judgment, paragraphs 29 and 30.

[6] Penalty Notice addressed to Bayerische Motoren Werke AG, Suspected anti-competitive coordination in relation to the recycling of end-of-life vehicles Case 51098, 6 December 2022 (the "**BMW Penalty Notice**").

[7] Accordingly, the judgment in VW AG's case is that of the President's alone as a High Court judge, although it is the same as the judgment of the three-person CAT: Judgment, paragraph 82.

[8] Judgment, paragraph 32.

The CMA contended that the definition of "*person*" in section 26(1) included an "*undertaking*" (discussed below) pursuant to section 59 of the Act which provides that, in Part 1 of the Act (under which section 26(1) falls): [9]

> *"'person', in addition to the meaning given by the Interpretation Act 1978, includes any undertaking."* [10] (emphasis added)

BMW and VW, on the other hand, argued that this construction would produce "*such wantonly broad and far-reaching extraterritorial effects that Parliament could not possibly have intended this outcome*". [11] Effectively, they argued that the words "*includes any undertaking*" should not apply to section 26(1).

b) The presumption against extraterritorial effect in statutory interpretation

Citing case law before the Supreme Court, the Courts identified the existence of a presumption against extraterritorial effect for the interpretation of legislative instruments. This translates into a rule of construction that every statute should be interpreted "*so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law*". [12]

Specifically, it would usually be "*both objectionable in terms of international comity and futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom.*" Thus, "*in the absence of any indication to the contrary, a court will interpret legislation as not being intended to affect such people.*" [13]

The Courts' discussion of BMW's and VW's different approaches in relation to their UK entities compared with their German parents helped illustrate these principles:[14]

- BMW UK and VW UK considered themselves obliged to comply with the Notices because they "are legal persons sufficiently connected with the United Kingdom to be within the territory of the United Kingdom, and so subject to the laws of the United Kingdom".
- In the Courts' view, these entities have a "*UK* territorial *connection*" as they are "*companies registered in the United Kingdom*".
- Given that "*UK territorial connection*", if and to the extent they controlled documents or information responsive to the Notices beyond the territory of the UK, BMW UK and VW UK also accepted that there would be an obligation to produce such documents or information.
- By contrast, the Courts held that (other than the CMA's "*undertaking*" contention) "*no such connection existed*" insofar as BMW AG and VW AG were concerned.
- The Courts, however, declined to enter into a precise delineation of what constitutes "*UK territorial connection*", save to state in a footnote that "*BMW AG and VW AG were outside the territory of the UK*" and as such "*there was no UK territorial connection*". [15]

The CMA, however, argued that its contention was consistent with these principles on the following grounds: [16]

- A "*person*", for the purposes of section 26 of the Act, includes an "*undertaking*";
- In so far as the presumption against extraterritoriality goes, in the cases of both BMW and VW, a legal person that is part of their respective undertakings had a "*UK territorial connection*"; and

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9 Judgment, paragraph 33.

10 The principal definition of "person" is set out in the Interpretation Act 1978, which provides that: "*In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule*" (Section 5) and "*'Person' includes a body of persons corporate or unincorporate.*" (Schedule 1)

11 Judgment, paragraph 34.

12 Judgment, paragraphs 67-68. The Courts cited *(KBR Inc) v. Director of the Serious Fraud Office* [2021] UKSC 2, which itself cited *R (Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26, as the authority for this presumption.

13 Judgment, paragraph 67.

14 Judgment, paragraphs 59-60.

15 Judgment, footnote 35.

16 Judgment, paragraph 61.

— It followed that the obligation to produce documents and information extended to those parts of the undertaking outside the UK.

c) The implications of adopting the CMA's contention would be far-reaching

The Courts noted that an "*undertaking*" is an "*autonomous concept*" that designates an "*economic unit*". A number of legal persons can be treated as a single undertaking for the purposes of competition law, for example, for fining purposes. [17]

If the CMA's construction were to be adopted, it would lead to the far-reaching outcome that "*a single section 26 notice, addressed to an undertaking*" would "*trigger an* obligation *to respond in every single legal or natural person within that undertaking"* so long as *"a single legal or natural person within that undertaking had a UK territorial connection.*"[18]

The Courts considered this construction to be "*aggressively territorial*" (original emphasis) and, accordingly, "*the presumption against extraterritorial effect is fully engaged*". [19]

d) The Courts ruled against the CMA based on the impossibility of serving an undertaking

Having set out the framework for statutory interpretation and the underlying considerations, the Courts ruled against the CMA by reference to the mismatch between: [20]

— the economic concept of an "*undertaking*", against which the service of proceedings or notices is "*not possible*" and "*makes no legal sense*"; and

— a legal person within an undertaking, against which service should be made.

The Courts found that this alone "*fatally undermines*" the CMA's construction (which logically envisaged the possibility of a Section 26 Notice being addressed to an undertaking alone) because "*none of the mechanics necessary for bringing a notice to the attention of a responsible person exist in the case of an undertaking*". [21]

Should the Courts have stopped at this point, one might conclude therefore that "*person*" could not be defined as including an "*undertaking*" for the purposes of section 26(1) of the Act. As can be seen below, however, the Courts did not adopt this approach.

e) "*Person*" can extend to an "*undertaking*" but only entities with a "*UK territorial connection*" need to respond to a Section 26 Notice

Having concluded that the CMA's construction was unsustainable, the Courts stated that: [22]

> *"The term 'person' can expressly extend to the 'undertaking', but that does not absolve the CMA from directing the section 26 notice to a specific natural or legal person within the undertaking."*

In effect, the Courts ruled that:

— The CMA's construction was wrong insofar as its contention entailed that a Section 26 Notice could be solely addressed to an undertaking; but

— The term "*person*" can, as the CMA contended, extend to an "*undertaking*" for the purposes of section 26(1) of the Act.

Helpfully, perhaps in recognition of the "*by no means straightforward*" nature of the issue, the Courts went on to provide practical guidance on the effects of its judgment as a whole: [23]

— Where the CMA serves a Section 26 Notice on a UK entity but the notice is "*clearly addressed*" to the entirety of the undertaking to which the entity forms part, the UK entity must provide to the CMA all responsive documents and information within its control, "*including those documents held abroad and via controlled subsidiaries*".

17 Judgment, paragraphs 46-48.
18 Judgment, paragraph 72.
19 Judgment, paragraphs 71 and 73.
20 Judgment, paragraphs 75-76.
21 Judgment, paragraphs 76-77.
22 Judgment, paragraph 78.
23 Judgment, paragraph 78.

— The UK entity must also notify all the other entities within the undertaking of the notice.

— The notice to the UK entity would trigger an obligation to respond by all other UK entities within the undertaking because they have a "*UK territorial connection*",

— Other entities within the undertaking that do not have a "*UK territorial connection*" need not respond to the notice.

Analysis

This is a complex judgment and the Courts' reasoning is not always easy to follow. The Courts themselves recognised this, noting that the issue is "*difficult*" and "*by no means straightforward*". They also indicated that they would be minded to grant permission to appeal should the CMA seek it (and the CAT has since granted it in respect of BMW AG's case).[24]

The practical example provided by the Courts towards the end of the judgment goes some way towards alleviating the uncertainty meanwhile. Nevertheless, there remain a number of open questions:

a) What constitutes "*UK territorial connection*" that imposes on entities within an undertaking the obligation to respond to a Section 26 Notice?

This issue is significant as the Courts held that the service of a Section 26 Notice that is addressed to the entire undertaking on a UK entity would trigger an obligation to respond by all other entities within the undertaking that have a "*UK territorial connection*".

The Courts declined to provide a precise delineation of what constitutes "*UK territorial connection*", other than to say that companies registered in the UK would definitely satisfy this requirement. The Courts' conclusion that BMW AG and VW AG lacked such connection appears to be based entirely on the fact that they are incorporated outside the UK. This is notwithstanding the fact that they both have UK subsidiaries and arguably carry on operations in the UK through them.

The Courts did not specify whether there are ways that a legal person could satisfy the "*UK territorial connection*" requirement other than through incorporation in the UK.

By analogy, in exercising its enforcement powers under the Enterprise Act 2002 (the "**Enterprise Act**"), in order to establish jurisdiction over non-UK parents of a group, the CMA is also required to identify a specific legal person and determine whether it has the necessary territorial links with the UK. In *Akzo Nobel v. Competition Commission*[25], the Court of Appeal had to decide on the meaning of "*carrying on business in the UK*" in section 86(1) of the Enterprise Act.[26] In that case, the Court upheld the Competition Commission's[27] finding that Akzo Nobel N.V., a Dutch-incorporated company that had no place of business in the UK, carried on business in the UK on the basis that:[28]

— It conducted "*strategic and operational* management" of the manufacturing and sales business carried out by its subsidiaries in the UK; and

— The "*residual responsibility*" of the UK subsidiaries only consisted of "*relatively low-level matters*".

Nevertheless, the Court of Appeal in *Akzo Nobel v. Competition Commission* was, of course, concerned with a different statutory provision (with different purposes and wording). The Courts might therefore well be entitled to give "*UK territorial connection*" a more restrictive meaning tied to either UK incorporation (or having a place of business in the UK) within the context of their interpretation of section 26 of the Act.

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24 Judgment, paragraph 81.

25 [2014] EWCA Civ 482.

26 Section 86(1) of the Enterprise Act relates to the CMA's enforcement jurisdiction within the UK's merger control framework and provides that: "*An enforcement order may extend to a person's conduct outside the United Kingdom if (and only if) he is …a person carrying on business in the United Kingdom.*"

27 The Competition Commission is one of the predecessors of the CMA, alongside the Office of Fair Trading.

28 *Akzo Nobel v. Competition Commission*, paragraphs 16-19 and 37.

b) What would be the position if the company being served is UK-domiciled and is the parent company of a worldwide network of entities?

The Courts held that a UK entity served with a Section 26 Notice must provide to the CMA all responsive documents and information "*in its own control, including those documents held abroad and via controlled subsidiaries*".

The Courts did not define what constitute "*controlled subsidiaries*". It is thus unclear whether "*control*" is to be defined by reference to the Enterprise Act and whether "*material influence*" would be sufficient to establish "*control*" for these purposes.[29]

If one takes a broad reading of what constitutes "*controlled subsidiaries*", this could in some cases (where the ultimate or intermediate parent company is UK-domiciled) trigger the obligation to produce responsive documents and information by all or substantially all entities within an undertaking. Might there still be scope for the foreign entities to argue that the presumption against extraterritoriality should absolve them from the need to respond in these cases?

* * *

The CMA confirmed on the same date of the Judgment that it would seek permission to appeal the Courts' judgment to the Court of Appeal, stating that the CMA "*need[s] effective tools to investigate suspected unlawful conduct and ensure robust enforcement*" and that, since its investigations increasingly "*involve cross-border, multi-national organisations*", the Courts' judgment "*substantially risks undermining [its] ability to investigate, enforce against and deter anti-competitive conduct that harms consumers, businesses and markets in the UK.*"[30]

In making the above statement, the CMA likely had at the top of its mind the fact that, post-Brexit, it is no longer able to avail itself of the cooperation mechanisms of the European Competition Network, a fact also noted in the CMA's penalty notice against BMW AG.[31]

On 8 March 2023, the CAT granted the CMA permission to appeal in respect of BMW AG's case[32] and the matter will now be heard by the Court of Appeal.

In the meantime, parties receiving Section 26 Notices should :

— Think carefully about which companies in their groups are required to respond.

— To the extent that they intend to rely on the territorial "defence", take care to identify what information (if any) they can legitimately withhold from disclosure to the CMA.

— Consider the merits of withholding information from the CMA if that same information might in any event have to be produced to agencies in other jurisdictions (*e.g.*, the European Commission which launched an investigation into the same sector in the present case).

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29 Enterprise Act 2002, section 26.

30 CMA update on High Court and Competition Appeal Tribunal (CAT) judgment, 8 February 2023, available at https://www.gov.uk/cma-cases/suspected-anti-competitive-conduct-in-relation-to-the-recycling-of-end-of-life-vehicles#notice-of-penalty

31 BMW Penalty Notice, paragraph 5.7.

32 It is unclear whether the High Court has also granted permission to appeal in respect of VW AG's judicial review case as the Order has not been made public. It is unlikely, however, that the position would differ in that case.