

CLIENT ALERT

The UK competition authority issues first ever fine on foreign company for non-compliance with a written demand for information

December 12, 2022

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The Competition and Markets Authority (CMA) has fined Germany-based BMW AG for failure to comply with a written information demand. The fine, which includes a fixed fine of £30,000 plus a daily fine of £15,000, was imposed in relation to an ongoing UK cartel investigation into the recycling of old or written-off vehicles.

The fine is notable as it is the first imposed on a foreign company for non-compliance with a written information demand issued under section 26 of the Competition Act 1998, which empowers the CMA to obtain information that it considers relevant to its investigation from a range of sources such as the businesses under investigation, their competitors and customers.

The fine is also the first daily penalty the CMA has ever issued – the amount will continue to accumulate until BMW AG complies with the information demand. According to the penalty notice, the CMA considered that a daily fine was “*necessary to incentivise prompt compliance*” by BMW AG.

BMW is reportedly considering appealing the CMA fine. Among other things, BMW argues that the CMA’s position runs counter to the recent UK Supreme Court judgment in *KBR v SFO*, which confirmed that the SFO did not have power to compel a foreign company to produce documents held outside the UK under the Criminal Justice Act 1987. An appeal would test whether similar reasoning may apply in relation to information demands under the Competition Act.

The CMA’s penalty notice contains the following summary of the legal reasoning underpinning its penalty decision:

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- The CMA's power to request information under section 26 of the Competition Act was intended by Parliament to have extraterritorial effect. This aligns with the CMA's extraterritorial enforcement powers. Consequently, the CMA's power to impose penalties for non-compliance with a written demand for information issued under section 26 applies to any addressee of the demand, including a foreign company.
- The CMA can demand information from an 'undertaking', not solely a legal person. The legal obligation to comply with a demand for information therefore falls on all legal persons forming part of the undertaking to whom the demand is addressed – including BMW AG. Further, the CMA argues that as the BMW Group undertaking is present in the UK through BMW UK, a demand for information on BMW Group is not extraterritorial.

The penalty notice states that another foreign company under investigation has already launched a judicial review challenge against the CMA's section 26 demand for information. It appears that in the context of this ongoing challenge, the CMA did not see fit to fine this company (which remains unnamed). According to BMW AG's penalty notice, this parallel challenge is currently at the pre-permission stage.

The CMA takes a similar approach to its power to issue information requests to foreign parties in its merger control and market study investigations, which is derived from different legislation (ie the Enterprise Act 2002). Such requests are increasingly onerous and commonly include extensive requests for internal documents held in other jurisdictions.

Any challenges to the CMA's power to compel foreign companies to comply with its written demands for information and documents in cartel cases will also be of interest to parties that deal with the CMA in merger cases and market investigations. A successful challenge may affect the CMA's approach to demanding information from foreign companies in other areas of the CMA's work.

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