UK competition authority has no power to demand information from foreign companies with no territorial connection to the UK, says English court

February 14, 2023

AUTHORS

Philipp Girardet | Rahul Saha | Addiped Cheng

In December last year, we reported that the UK competition authority, the CMA, issued its first penalty decision addressed to a foreign company for refusing to comply with the CMA's demand for information and documents under section 26 of the Competition Act 1998 (***s26 Notice***). The CMA imposed a fine on German automobile manufacturer BMW AG in connection with an ongoing cartel probe by the CMA into the recycling of old or written-off vehicles.

BMW AG appealed the CMA's penalty decision to the UK's Competition Appeal Tribunal (***CAT***). Separately, Volkswagen AG (***VW AG***), which had also received a similar s26 Notice from the CMA in connection with the same cartel probe, brought a judicial review challenge against the CMA in the High Court. As the two cases turned on the same issues, they were heard together and resolved with a single judgment, with Mr Justice Marcus Smith sitting in a dual-capacity as President of the CAT for BMW AG's appeal, and as High Court judge for VW AG's judicial review challenge.

In a judgment handed down on 8 February 2023, the CAT held that the CMA did not have the power to compel foreign entities such as BMW AG and VW AG to produce information and documents held abroad. The judgment notes that the CMA's interpretation of its powers was "*aggressively extraterritorial" and "very likely to undermine comity between nations"*.

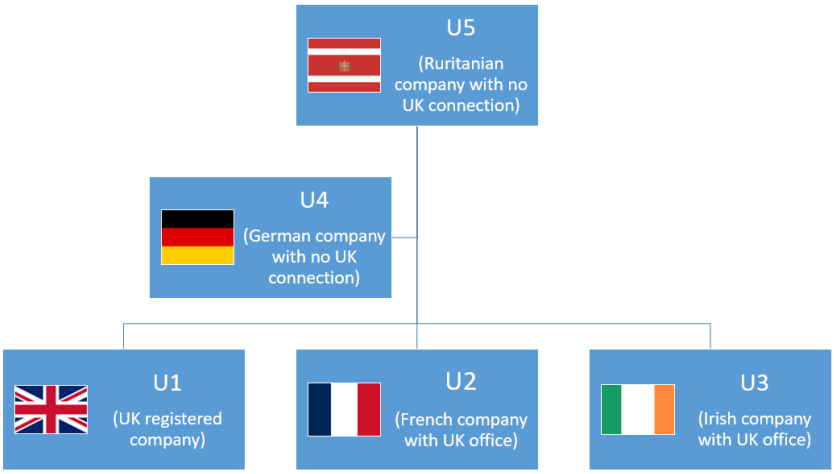
Following BMW AG and VW AG's success, the CMA has said that it will appeal the judgment.

The case turned on the issue of whether the CMA can, as it contends, demand documents and information from an "undertaking", an economic concept under competition law which may include any number of foreign-domiciled companies with no offices, branches or other territorial connection to the UK.

The CAT noted that an extension of the CMA's power to demand documents and information from undertakings could create a multitude of problems flowing from the fact that an undertaking is different from the legal structure of a group.

In particular, the CAT noted that most undertakings these days are "*more often than not*" international, and a foreign jurisdiction is "*unlikely to be impressed*" by the CMA's "*aggressively extraterritorial*" exercise of its powers. The CAT also pointed out that as a matter of due process, a legal notice must be served on a legal entity, not an economic concept such as an undertaking, and companies may not actually know the true extent of the undertaking to which they belong.

To illustrate this, the CAT provided the following example to illustrate the scope and limits of the CMA's s26 powers in the context of a cross-border undertaking:



The CAT held that a s26 Notice must be served on a legal entity with a sufficient territorial connection to the UK, ie U1, U2 or U3, but not U4 or U5. In addition, the CMA may address the Notice to the entire undertaking. If it does so:

- The entity on which the notice was served (eg U1) must notify the other legal entities which form part of the same undertaking that it has received the notice.
- U1, U2 and U3, being legal entities with a UK connection, are then obliged to provide to the CMA any responsive documents and information within their own control. Subject to any local law rendering such production impossible, this includes documents held abroad, eg in a warehouse of documents held in France and Ireland.
- Importantly, U4 and U5, which have no UK connection, are not obligated to respond to the notice.

The CAT acknowledged that there will be "*difficult borderline cases*" where the question of what precisely constitutes a "UK territorial connection" could be determinative, but refused to enter into a "*precise delineation*" of a hypothetical case.

Given the significance of this development for the CMA's ability to investigate cross-border conduct affecting competition in the UK, the CMA confirmed its intention to appeal in a public response to the judgment:

> *We are disappointed with today's judgment. We need effective tools to investigate suspected unlawful conduct and ensure robust enforcement under the Competition Act. Increasingly, our investigations involve cross-border, multi-national organisations, and today's judgment substantially risks undermining our ability to investigate, enforce against and deter anti-competitive conduct that harms consumers, businesses and markets in the UK.*
>
> *Given the importance of today's judgment, we will be seeking permission to appeal.*

For now and until these matters are finally settled by the English courts, foreign-domiciled parties need to carefully assess how to respond to any demands by the CMA for documents and information held outside of the UK.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Philipp Girardet
+44 20 3580 4717
pgirardet@willkie.com

Rahul Saha
+44 20 3580 4741
rsaha@willkie.com

Addiped Cheng
+44 203 580 4932
acheng@willkie.com