

Kluwer Competition Law Blog

Two Edges of Europe Cross Lines: The CMA Fines BMW AG for Failing to Comply with an Information Request

Erdem Aktekin, Helin Yüksel, Mehmet Mikail Demir (ACTECON) · Sunday, January 15th, 2023

Introduction

The Competition and Markets Authority (“CMA”) of the UK has fined Germany-based Bayerische Motoren Werke Aktiengesellschaft (“BMW AG”), the ultimate parent company of the BMW Group, for failure to comply fully with a written information request without reasonable excuse through its decision of 6 December 2022 (“CMA Decision”). The fine includes a fixed amount of GBP 30,000 plus a daily amount of GBP 15,000, which will continue to accumulate until BMW AG complies with the information request.

To provide a legal background, the information request was issued in relation to an ongoing cartel investigation regarding the take-back, dismantling, and recycling of end-of-life vehicles (“ELVs”) in the UK. As for the purposes of any investigation, the CMA has the right to require any person to produce to it a specified document or to provide it with specified information that it considers relates to any matter relevant to an investigation under Section 26 of the Competition Act 1998 (“CA98”). CA98 also provides that where the CMA considers that a person has, without reasonable excuse, failed to comply with a requirement to provide information, it may impose a penalty of such amount as it considers appropriate, under Section 40a CA98.

Through the decision, the CMA has given an opportunity to discuss how two different competition authorities located on the edges of Europe have brought similar approaches to similar problems.

As one may recall, the Turkish Competition Authority (“TCA”) also imposed administrative fines on the Turkish subsidiaries of five international financial institutions for not providing the information requested from them with its decision of 2 July 2020 and numbered 20-32/397-179 (“TCA Decision”). The CMA’s approach rejecting the claim that the information request made to BMW AG was *ultra vires* has similarities to the TCA’s approach, yet it also differs in certain aspects. In the following sections of this article, the CMA Decision will be analysed and compared in detail to the TCA Decision with specific importance placed on how these two regulators interpreted the single economic entity principle.

Background of the CMA Decision

In March 2022, the CMA launched an investigation into suspected anti-competitive coordination

between players in the automobile industry involving the BMW Group. The CMA suspected that undertakings and associations of undertakings participate, or had participated, in anti-competitive coordination in relation to the take-back, dismantling, and recycling of ELVs in the UK since at least 2002. On 1 April 2022, the CMA issued a notice to BMW UK Limited (“**BMW UK**”), its ultimate parent company, BMW AG, and any other legal entities within the same undertaking (i.e., the BMW Group) specifying information and documents required to be produced pursuant to Section 26 CA98. Although the nature of the requested information is not explicitly stated in the decision, it can be deduced that the information request concerned individuals who had been involved in the recycling functions at the BMW Group (also at BMW AG) and had participated in the meetings of an industry association.

Following the issuance of the notice, BMW’s legal representatives and the CMA entered into discussions. BMW’s legal representatives raised the concern that the CMA was acting *ultra vires*, as it cannot oblige a foreign company to produce the requested information, and consequently, no associated penalty can be enforced for the lack of compliance with the request against BMW AG as “*a company domiciled in Germany which does not have a branch in or operate in the UK.*” BMW’s legal representatives also made clear that BMW UK will continue to cooperate fully in so far as the questions of the CMA relate to the employees of BMW UK while noting that BMW UK does not have the right to call on documents from BMW AG.

BMW alleged that the notice had been unlawful due to the general principles of extraterritorial effect and lack of jurisdiction to issue it. It invited the CMA to withdraw the notice on the basis that it was *ultra vires*. In response, the CMA stated that the notice required the BMW Group and all legal entities forming part of that undertaking to produce the specified documents and information. Consequently, the CMA issued a provisional decision to BMW AG, which included its intention to impose a penalty for failure to comply with the information request.

Arguments of BMW AG

The main aspects of the issues raised by BMW AG in response to the provisional penalty decision can be categorized as follows:

- *Arguments on extraterritoriality.* BMW AG argued that Section 26 CA98 does not give power to the CMA to require a company established outside of the UK to produce information and documents located outside of the UK. The presumption that “*legislation does not have extraterritorial effect unless otherwise specified explicitly*” also was highlighted by referring to the Supreme Court judgment in *KBR Inc v Serious Fraud Office*. [1] While BMW’s legal representatives indicated that the CMA does not have *vires* to issue BMW AG with the Section 26 Notice, they further added that it does not have *vires* to impose a penalty under Section 40A CA98 in respect of non-compliance with the notice.
- *Arguments on reasonable excuses for not providing information.* BMW AG argued that the issue of whether the CMA can exercise its power to issue an information request under CA98 bears legal uncertainty and BMW AG has a reasonable basis to hold a position that the CMA acts *ultra vires* until the conclusion of judicial review. The risk of breaching data protection obligations under German and European law also was raised by BMW AG in that manner.

The CMA's Legal Assessment

First, the CMA considered that Section 59 CA98 gives the term “*person*” also the meaning of “*undertaking*.” Therefore, an information request may be issued in respect of an undertaking, and not merely a legal person. Accordingly, as an undertaking, the BMW Group is a “person” under CA98, and BMW AG forms a part of that undertaking.

The CMA also made clear that “[...] *The obligation on the undertaking to comply with the Section 26 Notice encompasses all legal persons forming part of the undertaking.*” That being said, the CMA also highlighted that since the BMW Group is present in the UK through its subsidiaries, the issue of extraterritoriality also does not arise.

Furthermore, the CMA holds that whether or not the BMW Group is present in the UK, the presumption against extraterritorial application does not exist in its power to issue an information request in any case and Section 26 Notice is not *ultra vires*. Since the CMA's enforcement powers should be exercised over conduct that may affect trade in the UK, its investigatory powers, including information requests, should be applied to any undertaking, wherever situated, to achieve the purpose of CA98.

In terms of BMW AG's arguments on the potential breach of data protection law, the CMA determined that since the information request is not *ultra vires*, data protection law should not preclude BMW AG to comply with it. It was further indicated that BMW AG had not made any effort to comply with the German and European data protection laws such as seeking informed consent from relevant individuals.

Consequently, the CMA rejected the arguments of BMW AG and imposed a fixed fine of GBP 30,000 plus a daily fine of GBP 15,000 for failing to comply with the information request without reasonable excuse.

Comparison of the Approaches of the CMA and the TCA

The judgments of the two competition authorities share the common problems of “*Who should be the subject of the information request?*” and “*Can data protection concerns be qualified as a reasonable excuse to not comply with the information request?*” With regard to the first question, both decisions emphasized the single economic entity principle and the effects doctrine. The TCA stated that it is possible to issue a notice addressing the subsidiary located in Turkey for the purposes of addressing the undertaking that subsidiary is part of, as per the single economic entity principle. Therefore, as per the TCA's approach, a notice to the subsidiary in Turkey to be delivered to the parent undertaking in a foreign country is sufficient to be deemed that it is directed to the parent undertaking since they form a single economic entity and are indeed the same “*undertaking*”.

In contrast, although an almost identical approach was adopted in both decisions, the information request was issued directly to the parent company by the CMA, i.e., to BMW AG, not to the subsidiary located within the country. Thus, the monetary fine was imposed on BMW AG directly in the CMA Decision, whereas the TCA issued information requests to the Turkish subsidiaries and imposed monetary fines on the Turkish subsidiaries. One could argue that based on different approaches adopted by the CMA and the TCA, issuing the information request and imposing a fine

directly on the subsidiary located within the authority's jurisdiction would be more effective in terms of enforcing any payment, given this also would be consistent with the interpretation of the single economic entity found in the decisions.

In terms of the second question, neither the CMA nor the TCA accept merely citing the data protection law as a reasonable excuse to not comply with the information request. For example, the TCA has stated that “[...] *in order to not violate the relevant national or supranational data protection rules, such anonymisation could be applied to the limit that it does not hinder the preliminary investigation process*”. As explained above, the CMA took a similar view and stated that it did not observe BMW AG's efforts to seek alternative mediums to comply with the information request, such as, for example, asking for consent from the individuals whose personal data will be shared.

As a final note, the TCA Decision since has become subject to judicial review. The applicants have claimed that the requested information is not in their possession and therefore the request should be addressed to the parent company via the procedure stipulated in the national notification law. Although the first instance court annulled the TCA Decision, the Regional Administrative Court upheld it.

Conclusion

The power to request information is one of the key tools that enable competition authorities to obtain evidence and further information during competition investigations. Obtaining information from the companies located outside the area where the relevant competition authority resides solely depends on information requests since the on-site inspection option is not available. In light of the above, it could be argued that both the CMA and the TCA are dedicated to preserving the effectiveness of this tool by effectively applying the single economic entity principle and effects doctrine in competition law.

Both decisions reveal that there is not much room in competition law when it comes to complying with the competition authorities' information requests addressed to a single economic entity. Nevertheless, we can consider that the discussion on the competition authorities' power over the entities located abroad will continue in both the UK and Turkey through the judicial process.

[1] In *KBR Inc v Serious Fraud Office*, KBR Inc, which is a company domiciled in the United States, challenged the legality of an information request served by the Serious Fraud Office in connection with an ongoing fraud investigation. The Supreme Court acknowledged the presumption against extra-territorial effect and noted that “*unless the contrary intention appears, domestic legislation is generally not intended to have extra-territorial effect nor intended to be inconsistent with established rules of international law and comity. That presumption can be displaced by clear words and intent*”.

The Supreme Court also indicated that KBR Inc. did not have a registered office or fixed place of business in the UK. BMW AG argued that the nature of the notice issued by the CMA was

identical to the circumstances in the Supreme Court's decision on KBR.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

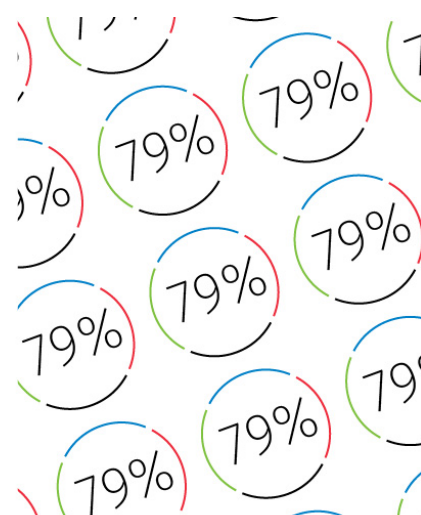
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Sunday, January 15th, 2023 at 9:00 am and is filed under [Anticompetitive agreements](#), [Information exchange](#), [Turkey](#), [United Kingdom](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.

