

# Kluwer Competition Law Blog

## UK CAT Puts The Brakes on the CMA's Extra-territorial Investigation Efforts into BMW and Volkswagen

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On 8 February 2023, the CAT upheld claims by both BMW and Volkswagen confirming that the CMA cannot compel responses to information requests from companies with no territorial connection to the UK.

### CMA Investigation

In March 2022, the CMA [opened](#) an investigation into suspected anti-competitive conduct in relation to the recycling of end-of-life vehicles. The European Commission (EC) [simultaneously announced](#) that it was carrying out dawn raids and issuing requests for information in respect of the same suspected practices in Europe.

In the context of its investigation, the CMA issued a series of requests for information across the sector. These included a formal request for information (**Section 26 Notice**) addressed to both BMW (UK) Ltd (**BMW UK**) and its parent company, BMW AG, which is incorporated and domiciled in Germany with no branch or office in the UK.

Under Section 26 of the [Competition Act 1998 \(CA98\)](#), the CMA can require “*any person*” to produce specified documents or information related to any investigation, as well as specifying a deadline for the production of such materials. Failure to comply with a Section 26 Notice can be subject to penalty. The Section 26 Notice required the production of documents by BMW UK and BMW AG and “*any other legal entities within the same undertaking*”.

On 15 March 2022, the CMA conducted a dawn raid at the premises of Volkswagen Group United Kingdom Limited (**VW UK**). Afterwards, the CMA also sought to require the production of documents and information from VW UK, its parent company Volkswagen AG (**VW AG**), also a German incorporated and domiciled company with no branch or office in the UK, and any other legal entities forming part of the VW group via a Section 26 Notice.

Although there was clearly some level of coordination between the CMA and the EC, not least given the harmonised timing of the agencies’ respective dawn raids, the CMA is yet to conclude a formal memorandum of understanding with the EC. This means that information cannot (yet) be shared between DG Competition and the CMA, even in the context of parallel investigations. In

other words, the CMA has no means of probing information held by European companies outside of its CA98 powers.

### **Actions brought**

BMW UK did comply with its Section 26 Notice, insofar as it related to documents within its control, but asserted that it did not have the ability to access or call for any documents held by its parent, BMW AG, or any other group company domiciled outside the UK. In December, the CMA, therefore, issued a penalty notice to BMW AG based on its failure to comply with the Section 26 Notice imposing a £30,000 fixed penalty and a daily penalty of £15,000. BMW AG appealed the imposition of that penalty to the Competition Appeal Tribunal (CAT). Likewise, VW AG – which had not been fined for failure to respond to the Section 26 Notice – sought judicial review of the CMA’s decision to issue it with a Section 26 Notice at all. [1]

### **Extra-Territorial Scope of Section 26**

Although separate, both actions concerned substantially the same question (and were therefore dealt with in one single judgment): do the CMA’s investigative powers under Section 26 have an extra-territorial application? The answer to that question effectively turns on what is meant by “any person” in Section 26 of the CA98 where it provides that the CMA “*may require any person to produce*” specified documents or information.

The CMA sought to argue that so long as it can make a Section 26 request of “*any person*” this must include “*any undertaking*”. That interpretation is derived from the CA98 itself, which makes clear that a “*person*” can include “*any undertaking*”. [2] The extension of the CMA’s interpretation was that a Section 26 Notice addressed to any undertaking would affect all legal (or natural) persons within that undertaking, wherever they were situated, provided only that a part of that undertaking had some territorial connection to the UK.

This was described as a “*muscular*” interpretation that would inevitably render section 26 “*aggressively extraterritorial*” (CAT Judgment, para 71). However, it was ultimately rejected by the CAT, which held that although the concept of “*any person*” can extend to an undertaking, the CMA is not absolved from needing to direct a Section 26 Notice to a legal or natural person within an undertaking, not least given the requirements of due process (para 76). In other words, the CMA powers mean that a Section 26 Notice can be made to an undertaking, but only via a natural or legal person with a sufficient territorial connection to the UK. Although not cited, the CAT’s approach to the presumption against extraterritorial effect is in line with the Opinion of Sir Gerald Fitzmaurice in his *Separate Opinion in Barcelona Traction in the International Court of Justice* (para 70).

If such Notice is addressed to the undertaking as a whole, via an appropriate legal person, there is an obligation on the addressee to inform all the constituent elements, i.e. group companies, of the Notice. Whether these will individually be obliged to respond, however, will depend on whether (considering their status as legal persons) they have a UK territorial connection.

Based on this reasoning, the CAT held that no Section 26 Notice sent to BMW AG or VW AG

could be effective, holding that “[t]here is, quite simply, no such power” (para 80). The CAT noted that the issues were complex and difficult and looked carefully at Parliament’s intention when the CA98 was enacted.

## Key Takeaways

The most immediate effect of the judgment is that parties can expect to see Section 26 Notices (and likely informal RFIs) addressed to undertakings as a whole, albeit via legal persons with a UK territorial connection. The undertaking will then have an obligation to inform all constituent elements (e.g. group companies) of the Notice. However, only those with a UK territorial connection will be obliged to respond.

The CAT declined to delineate precisely what constitutes a “UK territorial connection”, explicitly acknowledging that there “will be difficult borderline cases which we want to avoid” (CAT Judgment, para 59). Certainly, UK-registered entities will fulfil that brief; entities with UK branches or operations likely will too. However, as the CAT identified, there will certainly be cases around the fringes and recipients of Section 26 Notices should not necessarily assume that they fall within the scope without first considering their links to the UK. This will be particularly relevant where voluntary compliance is not a cost-free or risk-free exercise. This was the case for BMW AG, for example, as it claimed it would have risked breaching German and EU data protection laws by providing the requested information voluntarily.

The CAT also helpfully made clear that the CMA’s ongoing efforts to conclude international agreements for mutual assistance in antitrust investigations have little, if any, impact on the extraterritorial limits of section 26. Even the conclusion, therefore, of a formal memorandum of understanding with the EC will not extend the CMA’s powers, although it would allow information sharing between the agencies, which should satiate the CMA’s appetite, at least in part.

It is worth noting, however, that the CAT was also clear that were the CMA minded to seek permission to appeal, it would be inclined to grant that permission (para 81). The CMA has already announced its intention to do so. This is well in line with a broader overall trend in CMA enforcement that has seen the CMA aggressively pursue infringements of procedural orders. Indeed, according to government plans to strengthen the CMA’s enforcement toolkit, the CMA is expected to be granted enhanced investigative powers. These include the ability to impose higher penalties for failure to comply with information requests, of up to 1% of a businesses annual worldwide turnover and impose fixed penalties of up to £30,000 on individuals.

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[1] Both actions were heard by the Court concurrently and settled via the same judgment, with the President of the CAT sitting as a Justice of the High Court for the purposes of determining the judicial review claim.

[2] “Person” is defined in Section 59 of the Competition Act as having the meaning given by the Interpretation Act 1978 and including “any undertaking”.

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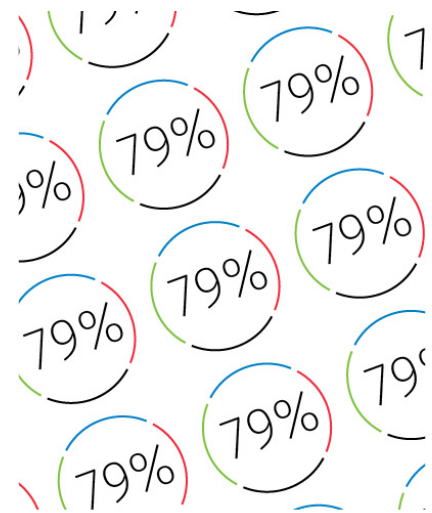
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