United Kingdom

ANTI-COMPETITIVE PRACTICES

Judgment—enforcement—procedural powers—extraterritorial information-gathering—comity—Digital Markets, Competition and Consumers Bill

Cartels; Competition and Markets Authority; Extraterritoriality; Foreign companies; Investigations; Notices; Parent companies; Requests for information; Subsidiary companies; Undertakings

Court of Appeal upholds Competition and Markets Authority's extraterritorial information-gathering powers

In a unanimous judgment, the Court of Appeal ("CoA") reaffirmed that the Competition and Markets Authority ("CMA") has the power to require "any person", including foreign companies with no territorial connection to the UK, to provide documents and information that it considers to relevant to an investigation by notice under s.26 of the Competition Act 1998 ("CA98"). The CoA considered that denying the CMA this ability would result in a "*gaping lacuna*" in the CMA's ability to perform its statutory functions.

Background

Following its launch of an investigation into suspected anti-competitive arrangements for recycling end-of-life vehicles, the CMA issued s.26 notices to BMW UK (based in the UK) and any other entity forming part of the same undertaking, including BMW AG (based in Germany, with no UK branch or office). BMW AG refused to respond to the notice on the basis that the CMA did not have the power to require it to respond, and that voluntary compliance with the notice could give rise to a risk of breaching data protection laws. The CMA imposed the statutory maximum penalty on BMW AG for failure to comply.

Separately the CMA exercised its powers under CA98 s.27 and conducted a dawn raid at VW UK's premises. Following the dawn raid, the CMA sent a s.26 notice to VW UK as well as its parent company, VW AG (which has no UK branch or office). VW AG also refused to respond to the notice on the grounds that the CMA did not have the power to compel a non-UK company to produce documents that were located overseas.

BMW AG appealed the imposition of the penalty and VW AG sought judicial review of the CMA's decision.

The Competition Appeal Tribunal's (CAT) single judgment

Given the common issue of law—the extraterritorial power of the CMA—the CAT decided the cases together and, in February 2023, issued a single judgment, in which it held that the decision to issue a notice and to impose a penalty (in the case of BMW) in respect of overseas companies without a UK presence was ultra vires CA98 s.26. Specifically, the CAT found that:

- the CMA's interpretation that a "person" within s.26 CA98 should include any "undertaking" is "*fatally undermined*", given that an undertaking is an economic concept separate to that of a legal or natural person. The CAT therefore considered that the CMA is only able to direct such requests at a legal or natural person within the undertaking.
- The reference to "any person" in CA98 s.26 implied a restriction to documents and information that could be obtained from a person, who has the obligation to inform the other entities within the undertaking, as long as those entities have a "UK territorial connection", in order to respect the presumption against extraterritoriality. Thus any entity without a UK territorial connection has no obligation to respond to any s.26 notice served on the UK entity in the same undertaking.

The CMA's appeal

The CMA took the case to the CoA and won on both grounds.

1. Extraterritoriality

The CMA argued that the general presumption against extraterritorial application of statutes was rebutted in this case. The CoA considered that Parliament must have intended for s.26 to have extraterritorial scope, assessing a range of points including:

- *The lack of express limitations in scope*: any agreements between undertakings located in a third country without a UK presence that are "intended to be implemented in the UK", are within the scope of the prohibition. These express terms of s.2 CA98 confirm the extraterritorial effect. Section 25, which awards the CMA the power to investigate where there are "*reasonable grounds for suspecting*" an effect on trade in the UK, is also acknowledged to have extraterritorial effect. Given that s.26 falls under the umbrella of these sections, the CoA held that it was Parliament's intention for s.26 to also have such effect.
- *Context and purpose*: given the increasingly international nature of cartels, which exploit modern technology, it is necessary for regulators to require investigatory and enforcement powers and be able to take action overseas to protect their domestic markets. The CoA also noted that the CA98 was expressly modelled on the equivalent regime under EU law, under which the European Commission frequently sends information requests demanding that EU subsidiaries of a non-EU parent provide information on behalf of the entire undertaking. The CoA omitted to mention, however, that the Commission's power to do so is not uncontested, having been the subject of a number of (ultimately unresolved) challenges.[1]
- *Comity*: the CoA agreed with the CMA's argument that, although there are practical limitations in taking action against a foreign entity, these difficulties should not have any bearing on whether Parliament intended the CMA to be granted those powers in the first place.
- *Effectiveness and practicality*: the CoA considered it obvious for the CMA to need to be able to exercise its powers against foreign entities in order for the CMA to be able to perform its statutory function. In an increasingly digital era, businesses could otherwise achieve immunity from investigation by moving their anticompetitive conduct offshore.

2. Undertaking

The CMA separately argued that the reference to "any person" in s.26 CA98 captured all documents held by all entities within the undertaking.

Amongst other considerations, the CoA looked at inferences to be drawn from the choice of wording on whom the obligation rests in CA98 (e.g. "person", "undertaking", "individual" and so forth), as well as stating that CA98 s.59 encompasses "any undertaking" in the definition of "person". Additionally, the CoA considered that "any person" was expressly used as a wider term than other options used throughout the CA98.

[1] See, *e.g.*, Case T-227/18, *Microsemi Europe and Microsemi v Commission, OJ* 2018 C190/39 and Case T-140/07, *Chi Mei Optoelectronics Europe and Chi Mei Optoelectronics UK v Commission, OJ* 2007 C155/28

Again the CoA also considered the legislative purpose when considering the scope of an undertaking, and articulated that were the CMA not able to investigate outside of the UK, it would become "*largely toothless when confronting international cartels*".

Implications

The CoA's judgment confirms that the CMA has the power to compel foreign businesses, even those without a "UK territorial connection", to provide information and documents upon request if relevant to an investigation. The CMA has evidently welcomed the CoA's judgment. Section 26 notices are a vital tool by which the CMA may carry out its investigations into allegedly anti-competitive practices, and the CMA's chief executive Sarah Cardell has expressed that the judgment "*strengthens the CMA's ability to investigate, enforce against and deter any anti-competitive conduct that harms consumers, businesses and markets in the UK*". In fact, the judgment itself highlights that it would create "*a perverse incentive for conspirators to move offshore to organise cartels directed at harming the United Kingdom market*" were the CMA not be able to gather information from overseas.

In practice, the judgment simply gives earlier judicial conformation of a position that will be confirmed legislatively later this year: the Digital Markets, Competition and Consumers Bill (DMCC Bill) expressly provides for the CMA's information gathering powers to extend to foreign persons. That Bill will also increase the fines that the CMA can impose for non-compliance: up from of £30,000 (as well as daily fines of £15,000) to 1% of a business' annual worldwide turnover (and daily penalties up to 5% of daily worldwide turnover).

Rani Chowdhary
Associate, *Clifford Chance LLP*

United Kingdom

ANTI-COMPETITIVE PRACTICES

Competition and Markets Authority—Statement—enforcement—restrictive business practices—medicine manufacturers—price-sharing—combination therapy treatment—negotiation framework—investigation not prioritised

Anti-competitive practices; Competition and Markets Authority; Negotiations; NHS; Pharmaceutical services; Statements

CMA to deprioritise enforcement action against competing combination therapy treatment providers in negotiation with the NHS

The United Kingdom's (UK) Competition and Markets Authority (the "CMA") has released a statement (the "Statement") confirming that it will not prioritise enforcement action under the Competition Act 1998 (CA98) against price-sharing between competing medicine manufacturers who have followed a new combination-therapy-specific negotiation framework proposed by the Association of the British Pharmaceutical Industry (the "ABPI"). The goal of the ABPI framework and the CMA's Statement is to encourage companies to negotiate agreements that would make new combination therapies available to UK patients.[1]

Background

Combination therapy is where two separate medicines (typically, a 'backbone' treatment and an 'add-on' treatment) are used in combination to treat disease. According to the ABPI, combination treatments often generate better health outcomes and can have broad potential use-cases. By way of example, over half of ABPI members' oncology pipeline currently consists of combination therapies.

[1] Competition and Markets Authority (CMA), "Combination therapies: prioritisation statement" (17 November 2023), available at: *https://www.gov.uk/government/publications/combination-therapies-prioritisation-statement*.