

THE CMA CANNOT COMPEL FOREIGN PARENTS WITH NO UK CONNECTION TO PROVIDE INFORMATION

The UK Competition Appeal Tribunal (**CAT**) has ruled that the Competition and Markets Authority (**CMA**) has no power to compel responses to information requests from foreign parent companies with no connection to the UK, other than their UK-based subsidiaries. The judgment will significantly hamper the CMA's ability to investigate conduct that has anticompetitive effects in the UK, but which is planned or carried out abroad.

FOREIGN FORAY FRUSTRATED

In its judgment in *BMW v. CMA* of 8 February 2023, the CAT ruled that the CMA had acted outside its powers when it asserted that the German company BMW AG had an obligation to respond to an information request sent by the CMA in the course of its investigation into anticompetitive conduct relating to take-back, dismantling and recycling of end-of life vehicles. Consequently, BMW was not liable to pay the fixed penalty of £30,000 and a daily fine of £15,000 that had been imposed by the CMA for BMW's refusal to comply.

The CMA's notice under section 26 of the Competition Act 1998 (**CA98**) had been addressed to both BMW AG and its UK subsidiary BMW (UK) Ltd. It was not disputed that the notice was binding on BMW (UK) Ltd, and that entity complied fully with it. However, the UK subsidiary noted that it did not have the ability to access or call for any documents held by BMW AG or any other group company domiciled outside of the UK. BMW AG, for its part, refused to comply with the notice because it had been advised that the effect of a 2021 ruling by the Supreme Court in *R (KBR Inc) v. Director of the Serious Fraud Office* was that it had no obligation to comply, and because voluntary compliance would have risked breaching German and EU data protection laws.

The CAT's judgment

It was accepted that BMW AG had no branch or office in the UK, or indeed any other connection with the UK other than its UK subsidiary. The question was therefore whether Parliament had intended for the CMA's powers to extend to such legal entities. In line with the Supreme Court's *KBR* judgment, the CAT noted that UK legislation was not to be interpreted as extending to persons outside the UK, in the absence of any indication to the contrary. The CMA contended that such an indication could be found in the definition of a "person" in section 59 CA98 which, in a departure from the usually-applicable

definition, included not only "a body of persons corporate or unincorporate" but also an "undertaking". As the concept of an undertaking under competition law denotes a single economic entity comprising all legal entities within a corporate group, the CMA argued that Parliament must have intended for it to have powers to compel the disclosure of information from any legal entity that formed part of an undertaking, provided at least one group company was sufficiently connected to the UK.

The CAT disagreed. It was vital for due process, said the CAT, that the concept of an undertaking be rendered into a legally comprehensible form, on the basis of the legal entities that form part of it. The extension of the definition of a person to include an undertaking did not absolve the CMA from directing its section 26 notice to specific natural or legal persons within the undertaking. And those specific persons are only obliged to respond, ruled the CAT, if they have a UK territorial connection.

The CAT considered that outcome to be consistent with the comparable regime for bringing civil actions for damages for CA98 breaches, and with the principle of comity between nations, and there were no clear-cut contrary indications from various materials concerning the Parliamentary drafting, enactment and amendment of CA98.

Implications

The CAT's judgment will significantly hamper the CMA's ability to investigate conduct that has anticompetitive effects in the UK, but which is planned or carried out abroad. In particular, post-Brexit the CMA can no longer rely on the cooperation of competition authorities in the EU to gather information on its behalf, and international mutual assistance agreements to replace those cooperation structures have not yet been agreed. The CMA has already stated that it will seek permission to appeal.

Businesses operating in the UK should note, however, that UK subsidiaries and other group companies with a sufficient UK connection remain bound by the CMA's information gathering powers, and that the CAT's judgment confirmed that this extends to any documents or information located outside the UK that are under their direct or indirect control.

CONTACTS



Sue Hinchliffe
Partner

T +44 20 7006 1378
E sue.hinchliffe
@cliffordchance.com



Nelson Jung
Partner

T +44 20 7006 6675
E nelson.jung
@cliffordchance.com



Elizabeth Morony
Partner, Head of Global
Antitrust Litigation Group

T +44 20 7006 8128
E elizabeth.morony
@cliffordchance.com



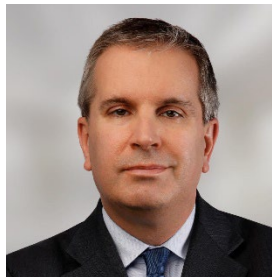
Alex Nourry
Partner

T +44 20 7006 8001
E alex.nourry
@cliffordchance.com



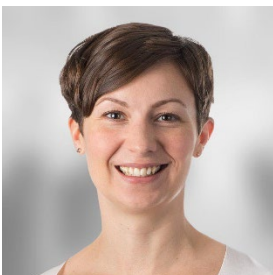
Greg Olsen
Partner, Head of London
Antitrust Practice

T +44 20 7006 2327
E greg.olsen
@cliffordchance.com



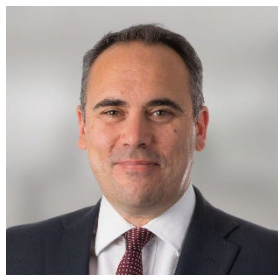
Matthew Scully
Partner

T +44 20 7006 1468
E matthew.scully
@cliffordchance.com



Jennifer Storey
Partner

T +44 20 7006 8482
E jennifer.storey
@cliffordchance.com



Luke Tolaini
Partner

T +44 20 7006 4666
E luke.tolaini
@cliffordchance.com



Samantha Ward
Partner

T +44 20 7006 8546
E samantha.ward
@cliffordchance.com

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www.cliffordchance.com

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London, E14 5JJ

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