Agreements restricting competition prohibited by art.4 of Law No. 4054 may be exempted from the application of art.4 only if all the conditions in art.5 of Law No. 4054 are met. In the first paragraph of art.5 of Law No. 4054, the conditions for exemption are listed as follows: "a) ensuring new developments and improvements or economic or technical progress in the production or distribution of goods and the provision of services; b) consumer benefit; c) not eliminating competition in a significant part of the relevant market; and d) not restricting competition more than is necessary to achieve the objectives in subparagraphs (a) and (b)." The Board concluded that the anti-competitive behaviour arising from the contracts concluded by the parties for customer allocation did not meet any exemption conditions in the case and the contracts could not receive individual exemption within the framework of art.5 of Law No. 4054.

As a result, the Board decided that the agreement between the parties constituted an infringement of art.4 of Law No. 4054, and accordingly imposed administrative monetary fines of TL 2,918,622.95 on Transorient and TL 242,136.45 to Tunaset. As explained above, no monetary fine was imposed on Biopharma, the applicant party, due to it fulfilling all the conditions required under the leniency regulation and it benefiting from active co-operation. The decision is significant as it displays the Board's in-depth assessment procedure for cartel allegations, with a focus on how customer allocation agreements are evaluated, how non-compete clauses found under mergers and acquisitions can also be applied under an investigation context, and how the Board conducts an effects-based analysis regarding anti-competitive acts.

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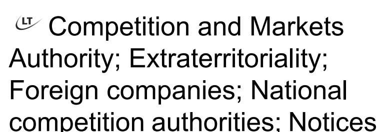
UK

ANTI-COMPETITIVE PRACTICES

Judgment—investigation—information notice under s.26 CA98—extraterritorial effect—whether foreign parent companies with no UK connection compelled to respond—whether "UK territorial connection"—held no obligation to respond—implications


Competition and Markets Authority; Extraterritoriality; Foreign companies; National competition authorities; Notices

Competition Appeal Tribunal rules that the Competition and Markets Authority cannot compel foreign parent companies with no UK connection to respond to information requests

The Competition Appeals Tribunal (CAT) found that any notice sent under s.26 (s.26 notice) of the Competition Act 1998 (CA98) to foreign parent companies of BMW (UK) Ltd (BMW UK) and Volkswagen Group United Kingdom Ltd (VW UK) is ineffective and that the Competition and Markets Authority (CMA) cannot oblige such foreign parent companies to respond to a s.26 notice.

Background

In connection with its investigation into suspected anti-competitive arrangements for recycling end-of-life vehicles, the CMA issued a s.26 notice to BMW UK (based in the UK) and BMW AG (based in Germany). BMW AG refused to comply with the CMA's s.26 notice, on the grounds that it was not obliged to do so and voluntary compliance with the notice could give rise

to a risk of breaching German or European Union (EU) data protection laws. The CMA subsequently imposed a penalty on BMW AG for failure to comply with the s.26 notice. BMW AG appealed the imposition of the penalty.

A similar set of facts also applied to VW UK and its parent company, Volkswagen Aktiengesellschaft (VW AG). VW AG sought judicial review of the CMA's decision to issue it a s.26 notice.

The CAT considered both cases together,[1] given that the underlying question was substantially the same: whether s.26 notices have extraterritorial effect.

The CAT's judgment (Judgment[2]) focused on two key points:

- the meaning of a "person" within s.26 CA98 and whether that definition includes "undertakings"; and
- whether s.26 CA98 has extraterritorial effect.

Judgment

The CMA's assertion that s.26 CA98 has extraterritorial effect was based on two points. First, s.59 CA98 states that a "person" should be interpreted to include any "undertaking", for the purposes of Part 1 CA98 (within which s.26 is located). Second, while there is a general presumption against the extraterritorial effect of UK legislation,[3] this presumption is greatly diluted when considering the conduct of UK nationals or UK registered companies abroad.[4] Taking these two points together, the CMA argued that, where parts of an *undertaking* are present in the UK, extraterritorial effects of UK law in respect of that undertaking are natural and non-controversial. In the present case, as parts of the Volkswagen and BMW *undertakings* are based in the UK (VW UK and BMW UK), the CMA asserted that the *undertaking as a whole* (including VW AG and BMW AG) should comply with the s.26 notice. It was not in question that BMW UK and VW UK had complied in full with their s.26 notices. The CAT also established that, with the exception of forming part of an *undertaking*, part of which was present in the UK (i.e., BMW UK and VW UK), neither BMW AG nor VW AG had a "UK territorial connection".

A person or an undertaking

The CAT stated that there is a mismatch between the notion of an undertaking, which is an economic concept and not a matter of law, and the concept of a legal or natural person. In the context of a legal process, the economic concept of an undertaking must be "translated" to the legal concept of a natural or legal person.[5] The CAT found that such a translation is *vital* for due process and as a result, the CMA's construction of s.26 CA98 is *fatally undermined*.[6]

The CAT explained that, in English law, civil claims are brought against natural or legal persons and the claimant would need to establish jurisdiction against *each person*.

Extraterritorial effect of section 26 CA98

The Judgment explained that a s.26 notice can be made to an undertaking (provided it is served on a natural or legal person with sufficient connection to the jurisdiction) and, assuming that the s.26 notice is sufficiently clearly

[1] Including the President of the CAT, considering VW AG's request for judicial review in his capacity as a High Court Judge.
[2] *Bayerische Motoren Werke AG v Competition and Markets Authority 1574/10/12/22* (the Judgment).
[3] *R. (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153 cited at [67] of the Judgment.
[4] *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2; [2022] A.C. 519, cited at [60] of the Judgment.
[5] Judgment at [76].
[6] Judgment at [77].

addressed to the undertaking as a whole, the person receiving the s.26 notice has an obligation to inform the other entities within the undertaking of the notice.[7]

However, those other entities within the undertaking are only obliged to respond to the s.26 notice if they have a "UK territorial connection" (that arises from reasons other than simply being part of the undertaking in question). If those other entities do not have a "UK territorial connection", the presumption against extraterritoriality applies and there is no obligation to respond to the s.26 notice.[8]

Implications

The Judgment confirms that the CMA does not have the power to compel legal persons to respond to a s.26 notice where those persons do not have a "UK territorial connection". However, the CAT intentionally did not determine what constitutes a "UK territorial connection" for all purposes.[9] Given that a foreign company's compliance with a s.26 notice, when not obliged to do so, could come into conflict with other obligations (such as data protection rules), businesses will need to carefully consider the extent to which they may have a "UK territorial connection". Where such a connection exists, the CAT made it clear that the CMA's information gathering powers extend to any documents or information located outside the UK that are under the company's direct or indirect control.

This Judgment will also materially impact the CMA's ability to investigate anti-competitive practices that affect the UK, but that may be carried out abroad. In particular, following the UK's exit from the EU, the CMA can no longer rely on co-operation with European competition authorities to gather information on its behalf and mechanisms are not yet in place to replicate that co-operation.

The CMA has already expressed its intention to appeal the Judgment[10] and the CAT has stated that, if requested, it would be minded to grant the CMA permission to appeal.[11]

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US

ANTI-COMPETITIVE PRACTICES

Proposed federal rules—employment—near complete ban on non-compete agreements—exception to rule

Anti-competitive practices; Constitutionality; National competition authorities; Non-competition covenants; United States

Federal Trade Commission takes major step to curtail non-compete agreements

On 5 January 2023, the Federal Trade Commission (FTC) proposed a rule that would ban most non-compete agreements for American workers. In its announcement, the FTC estimated that the rule, if enacted, "could increase wages by nearly $300 billion per year and expand career opportunities for about 30 million Americans."

The FTC's proposed rule follows a sweeping executive order that President Joseph Biden issued on 9 July 2021 to, among other things, encourage the FTC "to consider … exercis[ing] the FTC's statutory rulemaking authority

[7] Judgment at [78]–[79].
[8] Judgment at [79].
[9] Judgment at [59].
[10] CMA, "Suspected anti-competitive conduct in relation to the recycling of end-of-life vehicles", available at: *https://www.gov.uk/cma-cases/suspected-anti-competitive-conduct-in-relation-to-the-recycling-of-end-of-life-vehicles*.
[11] Judgment at [81].