

UK Competition Regulator Cannot Compel Foreign Companies To Respond to Information Requests

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On February 8, 2023, the UK Competition Appeal Tribunal (CAT) and the High Court held in a joint ruling that the Competition and Markets Authority (CMA) does not have the power under section 26 of the Competition Act 1998 (CA98) to compel documents or information from a foreign-domiciled person with no UK connection.

This was an important test case for the CMA's investigatory powers. The power to compel documents and information is one of the key tools that enables the CMA (and the UK sector regulators with concurrent competition law powers) to gather evidence and information during competition investigations. Following the UK's departure from the European Union (EU), the CMA has been committed to pursuing more high-profile cases with an international dimension; cases that would have previously been reserved to the European Commission (EC).¹

The ruling will make it more difficult for the CMA to carry out these cross-border competition investigations. The CMA has announced that it will seek permission to appeal the judgment to the Court of Appeal.

Background to the Legal Challenges

On December 6, 2022, the CMA imposed administrative fines on a German-incorporated and domiciled company for having failed to comply with a formal information request (known as a section 26 notice) during an ongoing investigation by the CMA into suspected anti-competitive coordination in relation to the recycling of end-of-life vehicles. The CMA and the EC opened parallel competition investigations in March 2022.

The CMA's section 26 notice required the production of certain documents and information from the German parent company, its UK subsidiary, and any other legal entities forming part of the same "undertaking". The CMA said that this was necessary because it suspected that information relevant to its investigation was held by employees in the UK and abroad.

The UK subsidiary fully complied with the section 26 notice. The parent company, however, did not comply and challenged the CMA's jurisdiction to compel information from "a company domiciled in Germany which does not have a branch in or operate in the UK".² The CMA imposed the maximum statutory penalty on the parent company for failure to comply with the section 26 notice and that company appealed the imposition of the penalty to the CAT.

Separately, another party to the investigation which was issued with a section 26 notice similarly objected to the CMA's demand for material from its German-domiciled parent company, and sought to judicially review the CMA's decision in the High Court.

The statutory appeal and the claim for judicial review were heard together, with the claim for judicial review allocated to the president of the CAT to determine in his capacity as a High Court judge.

¹ CMA Annual Plan 2022/23, paragraph 2.59

² Case 51098, Penalty Notice dated 6 December 2022, paragraph 2.4

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Statutory Interpretation of Section 26 CA98

The two actions raised essentially the same question: Do the CMA's powers under section 26 CA98 apply to foreign-domiciled companies with no UK presence? This, the CAT explained, was a question of statutory interpretation.

Under section 26, the CMA may require "any person" to produce specified documents or information. The CMA's main argument was that the definition of "person" in section 26 expressly includes an "undertaking". Therefore, according to the CMA, it was Parliament's intention that a section 26 notice addressed to an undertaking would oblige all persons within the undertaking to respond, including any persons based outside of the UK, provided that part of the undertaking was present within the UK.

Key Points of the Judgment

Both legal challenges succeeded. It was held that the CMA had acted outside its powers (*ultra vires*) when it claimed that the foreign-domiciled companies with no UK connection had an obligation to comply with a section 26 notice. Specifically:

- **The presumption against extraterritoriality applies.** UK legislation should be interpreted as not applying to persons outside the UK in the absence of any contrary intention by Parliament.
- **The requirement of territoriality applies to each person within the undertaking, not to the undertaking as a whole.** An undertaking may, and frequently does, consist of several natural or legal persons in different jurisdictions (*e.g.*, subsidiaries and a parent company). Where a section 26 notice is clearly addressed to the undertaking as a whole, there is an

obligation on the addressee to inform all constituent elements of the undertaking (*e.g.*, other group companies) of the notice. However, only persons within the undertaking with a UK connection (*e.g.*, UK subsidiaries) can be compelled to produce documents and information in their direct or indirect control, including any documents held abroad. Any persons within the undertaking with no UK presence would not be obliged to comply with the statutory notice.

Implications for Future Cases

This was the first time that the extraterritorial reach of the CMA's statutory information gathering powers in the context of competition investigations had been challenged. Post-Brexit, the CMA can no longer access the enforcement co-operation mechanisms provided by the European Competition Network of competition authorities to obtain overseas documents and information. Even in cases such as this, where the CMA is carrying out an investigation in parallel with the EC, the current lack of a formal competition cooperation agreement means that confidential information related to open investigations cannot be shared between the two authorities.

The outcome of the CMA's appeal will be closely watched. As the digital industry is growing and markets are becoming increasingly global, the joint ruling of the CAT and High Court will, if upheld, clip the CMA's wings at a time when it is seeking to take on complex international cartel and abuse-of-dominance cases. It will also be interesting to see whether the UK Government seeks to address the jurisdictional reach of the CA98 in the Digital Markets, Competition and Consumer Bill that is expected to be presented to Parliament soon.