Neutral citation [2023] CAT 7

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1574/10/12/22

AND

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Claim No: CO/2721/2022

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

8 February 2023

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH
(President of the Competition Appeal Tribunal)

Siting as a Tribunal in England and Wales and as a Justice of the High Court of England and Wales

MICHAEL CUTTING
TIM FRAZER

Sitting as a Tribunal in England and Wales

BETWEEN:

BAYERISCHE MOTOREN WERKE AG

Appellant

- and –

THE KING

on the application of

VOLKSWAGEN AKTIENGESELLSCHAFT

Claimant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent / Defendant

Heard at Salisbury Square House on 26-27 January 2023

JUDGMENT

APPEARANCES

Sarah Abram KC and Andrew McIntyre (instructed by Norton Rose Fulbright LLP) appeared on behalf of the Appellant.

Brian Kennelly KC and Jason Pobjoy (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Claimant.

Tristan Jones and Richard Howell (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent/Defendant.

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A. SECTION 26 OF THE COMPETITION ACT 1998 AND THE RELEVANT STATUTORY FRAMEWORK

(1) Competition law infringements

1. Section 2(1) of the Competition Act 1998 precludes “agreements between undertakings” which “may affect trade within the United Kingdom” and “have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom”. Section 2(3) provides that the prohibition “applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom”. This is referred to in the 1998 Act as the “Chapter I prohibition” and it is concerned with the control of anti-competitive cartels or collusive arrangements, whether these are covert or overt.

2. Section 18(1), together with section 18(3), of the Competition Act 1998 prohibits “any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position within the United Kingdom in a market”, where that conduct “may affect trade within the United Kingdom”. This is referred to in the 1998 Act as the “Chapter II prohibition” and it is concerned with the control of monopoly or significant market power.

(2) Extraterritorial effect of the Chapter I and Chapter II prohibitions

3. It is well-established that the Chapter I prohibition has a degree of extraterritorial application. Case 89/85 *Re Wood Pulp Cartel: A Ahlstöm v. Commission*[1] concerned an (alleged) price fixing cartel between producers of wood pulp located outside the EU who sold products to customers within the EU. The Court of Justice of the European Union (as it is now known, here the “CJEU”) held that such an agreement fell within the territorial scope of Article 101 of the Treaty on the Functioning of the European Union because it was implemented (i.e. had effects) within the European Union. If the prohibition applied only to agreements entered into within the European Union, it could be

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[1] ECLI:EU:C:1988:447

evaded. In Case C-413/14 P *Intel Corporation v. Commission*,[2] the CJEU held that conduct taking place outside the European Union will be subject to European Union competition law if it is foreseeable that the conduct will have an immediate and substantial effect in the European Union. *Wood Pulp* and *Intel* are, of course, both decisions of the CJEU, and the United Kingdom is no longer a part of the European Union. Nevertheless, *Wood Pulp* <u>pre-dates</u> the United Kingdom's exit from the European Union, and was considered when the Chapter I prohibition was being passed into law.[3] Equally, *Intel* is relevant for consideration by virtue of section 60A of the Competition Act 1998.

4. Of course, the extent of the Chapter I prohibition's territorial effect will have to be read in light of section 2(3), which provides that the prohibition "applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom". That may or may not be narrower than *Intel*,[4] but that is not a point that need be determined in this Judgment and we do not do so.

5. The position as regards the Chapter II prohibition is similar.[5] It is perfectly possible for conduct on the part of one or more undertakings, outside the territory of the United Kingdom, which amounts to the abuse of a dominant position, to affect markets within the United Kingdom and affect trade within the United Kingdom.

(3) Investigations and decisions by the Competition and Markets Authority ("CMA")

6. The CMA may conduct an investigation where it has reasonable grounds to suspect that there is, or was at some relevant time in the past, an agreement that may affect trade within the United Kingdom, and has as its object or effect the prevention, restriction or distortion of competition within the United Kingdom (i.e. that the Chapter I prohibition may have been infringed). The CMA may

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[2] ECLI:EU:C:2017:632.
[3] See, for example, the DTI's White Paper, *Opening Markets: New Policy on Restrictive Trade Practices*, July 1989, Cm727 at [2.11]; and a consultation paper, also by the DTI, *Implementing the Government's Policy for Competition Law Reform: A Consultation Document*, March 1996, [2.48].
[4] See *Epic Games v. Apple* [2021] CAT 4 at [88].
[5] *Ibid.*

also conduct an investigation where it has reasonable grounds for suspecting that the Chapter II prohibition has been infringed.[6]

7. At the conclusion of an investigation, the CMA may make a decision that the Chapter I and/or the Chapter II prohibition has been infringed, provided it first gives written notice to the person or persons likely to be affected by the proposed decision and gives them a chance to make representations.[7]

8. Where the CMA has made such a decision, it may give directions to such person or persons as it considers appropriate to bring the infringement to an end.[8] If a person fails without reasonable excuse to comply with such a direction, the CMA may apply (to the appropriate court) to compel compliance.[9]

9. Additionally, the CMA may require an infringing undertaking to pay a penalty to it, provided the CMA is satisfied that the infringement has been committed intentionally or negligently by the undertaking.[10]

(4) Investigatory powers

(a) The CMA's investigatory powers

10. Since this Judgment concerns the extraterritorial scope of the CMA's investigatory powers under section 26 of the Competition Act 1998, it is appropriate to set out the relevant provisions fully. There are, however, other powers vesting in the CMA, which it is appropriate to identify at this stage.

(b) Section 26 of the Competition Act 1998

11. Section 26 provides:

> (1) For the purposes of an investigation, the CMA may require any person to produce to it a specified document, or to provide it with specified

[6] Section 25 of the Competition Act 1998.
[7] Section 31 of the Competition Act 1998.
[8] Sections 32 and 33 of the Competition Act 1998.
[9] Sections 34 and 59 of the Competition Act 1998.
[10] Section 36 of the Competition Act 1998.

information, which it considers relates to any matter relevant to the investigation.

(2) The power conferred by subsection (1) is to be exercised by a notice in writing.

(3) A notice under subsection (2) must indicate –

(a) the subject matter and purpose of the investigation; and

(b) the nature of the offences created by sections 43 and 44.

(4) In subsection (1) "specified" means –

(a) specified, or described, in the notice; or

(b) falling within a category which is specified, or described, in the notice.

(5) The CMA may also specify in the notice –

(a) the time and place at which any document is to be produced or any information is to be provided;

(b) the manner and form in which it is to be produced or provided.

(6) The power under this section to require a person to produce a document includes power –

(a) if the document is produced –

(i) to take copies of it or extracts from it;

(ii) to require him, or any person who is a present or past officer of his, or is or was at any time employed by him, to provide an explanation of the document;

(b) if the document is not produced, to require him to state, to the best of his knowledge and belief, where it is.

(c) Other investigatory powers

12. Other powers, which we will not set out *in extenso* here, but whose existence we note, include:

(1) A power to ask questions: section 26A.

(2) A power to enter business premises without a warrant: section 27.

(3) A power to enter business premises under a warrant: section 28.

(4) A power to enter domestic premises under a warrant: section 28A.

B. BMW'S APPEAL

(1) The Appellant

13. The Appellant in the first of the two sets of proceedings before us is Bayerische Motoren Werke AG ("BMW AG"), which is a company incorporated and domiciled in Germany. It has no branch or office in the United Kingdom.

(2) Commencement of the investigation and the section 26 notice

14. On 15 March 2022, the CMA sent a letter addressed to BMW (UK) Ltd ("BMW UK") and its parent company BMW AG, stating that it had launched an investigation under section 25 of the Competition Act 1998 into suspected anti-competitive conduct relating to take-back, dismantling and recycling of end-of-life vehicles.

15. On 1 April 2022, the CMA issued a section 26 notice (the "BMW section 26 Notice") requiring production of certain documents and information. The BMW section 26 Notice was addressed to:

> BMW (UK) Ltd and Bayerische Motoren Werke AG

16. The body of the BMW section 26 Notice states:[11]

> This is a formal notice (the "Notice") issued by the [CMA] under section 26 of the Competition Act 1998 (the "Act") to:
>
>> BMW (UK) Ltd (company number 01378137) ("BMW"), its ultimate parent company, Bayerische Motoren Werke AG, and any other legal entities within the same undertaking (together, "BMW Group").
>
> You should read this Notice and the accompanying explanatory note at Annex 3 very carefully.
>
> **If you intentionally or recklessly destroy or otherwise dispose of, falsify or conceal documents required to be produced under this Notice, or if you provide false or misleading information in response to this Notice, you may be committing a criminal offence. Failure to comply with a**

[11] Emphasis in original.

> **requirement under this Notice, without reasonable excuse, may also result in the imposition of a civil financial penalty. Further details are set out below and in Annex 2 to this Notice.**
>
> If you are in any doubt about your legal rights and obligations under this Notice you may wish to consult your legal adviser.
>
> **You should not disclose or discuss this Notice, its contents (including annexes), or the existence of this investigation with any other individual or corporate entity other than your legal adviser without prior agreement of the CMA.** The information disclosed to you in this Notice includes "specified information" as defined in section 238(1) in Part 9 of the Enterprise Act 2002. Disclosure of "specified information" to any other person, and use for a purpose not permitted under Part 9 of the Enterprise Act 2002, may constitute a criminal offence under section 245 of the Enterprise Act 2002. Offenders are liable on summary conviction to imprisonment for a term not exceeding three months or to a fine of any amount or to both; or on conviction on indictment to imprisonment for a term not exceeding two years or to an unlimited fine or both.

17. BMW UK and BMW AG have each taken steps (of which they have notified the CMA) to ensure potentially relevant documents are preserved.[12] BMW UK has further sought to comply fully with the requests made of it in the BMW section 26 Notice,[13] and the question of whether BMW UK has complied with its obligations under the BMW section 26 Notice does not arise for determination in the Judgment.

18. BMW UK, however, asserts – and for the purposes of the appeal we assume to be right – that "BMW UK does 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 that are the subject of the Section 26 Notice."[14]

19. On 24 May 2022, BMW AG wrote to the CMA stating that it would not be responding further to the BMW section 26 Notice because it had been advised that the CMA did not have the power to require it to respond to a section 26 notice. Voluntary compliance with the BMW section 26 Notice (i.e. responding whilst asserting that the CMA had no power to compel a response) was in itself not a cost-free or risk-free course, because it (BMW AG) would risk breaching

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[12] See paragraph 16 of BMW AG's Notice of Appeal.
[13] See paragraph 17 of BMW AG's Notice of Appeal.
[14] Paragraph 17 of BMW AG's Notice of Appeal.

its obligations under German and EU data protection law by providing such information "voluntarily".[15]

(3) Penalty against BMW AG

20. On 4 November 2022, the CMA issued a provisional penalty notice pursuant to section 40A of the Competition Act 1998. The provisional penalty notice was addressed to BMW AG, and sent to a Dr Huett, a lawyer employed by BMW AG. BMW AG provided comments on the provisional penalty notice by the requested deadline of 11 November 2022. On 6 December 2022, the CMA issued a penalty notice, addressed to BMW AG and sent (by email) to Dr Huett.

(4) The appeal

21. BMW AG appeals the imposition of the penalty to the Competition Appeal Tribunal and (because of the daily rate of the penalty) sought an expedited hearing. Although the Notice of Appeal is dated 16 December 2022, it has been possible to list the substantive hearing of BMW AG's appeal on 26 and 27 January 2023. We are grateful to the parties for their considerable efforts in ensuring that the hearing took place as smoothly and efficiently as it did.

22. The essential issue arising out of the appeal is the question of whether section 26 gives the CMA the power to oblige BMW AG to respond to the notice. We put the issue as narrowly as this because, although the issue might be framed as a question of the extraterritorial effect of section 26, questions of extraterritoriality are rarely clear-cut or "bright-line". We will articulate in greater detail the issues that this question gives rise to when we have described the history of the other matter that is before us, namely the judicial review brought by Volkswagen Aktiengesellschaft ("VW AG"). We should also say that BMW AG raise other points regarding the penalty imposed on them by the

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[15] See the substance of paragraph 18 of BMW AG's Notice of Appeal. Although the assertion of specific infringement of German law was withdrawn, and the possibility of actual infringement was not argued before us, the risk of an infringement of local law in order to comply with an extraterritorial provision of the law of the United Kingdom is a matter relevant to the presumption against extraterritoriality, to which we will come. Accordingly, the general point – irrespective of whether it arises in the present case – is important, and one to be borne in mind.

CMA, which arise if the question of the scope of section 26 is resolved against BMW AG. We address these points to the extent necessary more specifically in Section J below.

C. THE JUDICIAL REVIEW BROUGHT BY VW AG

(1) The Claimant

23. The Claimant, VW AG is, like BMW AG, a German company. VW AG has various subsidiaries, including Volkswagen Group United Kingdom Limited ("VW UK"). Like BMW AG, VW AG is incorporated and domiciled in Germany. It has no branch or office in the United Kingdom.

(2) Commencement of the investigation and the section 26 notice

24. On 15 March 2022, the CMA handed, during the course of an inspection carried out under section 27 of the Competition Act 1998, a case initiation letter to VW UK and a notice under section 27 of the Competition Act 1998, one of the provisions referenced in paragraph 12 above, giving the CMA the power to enter business premises without a warrant. The letter and the section 27 notice were sent to VW AG rather later, on 29 April 2022. However, VW AG was named in the section 27 notice.

25. Pursuant to that notice, the CMA entered the premises of VW UK within the territory of the United Kingdom. No steps were taken in respect of premises outside the United Kingdom. There was further communication regarding the section 27 notice, which is not material for the purposes of this Judgment. It is, however, worth noting that – even though the section 27 notice was never enforced extraterritorially – the CMA does not seek to suggest that VW AG was or is required to do anything (more) under the section 27 notice.

26. By a section 26 notice dated 29 April 2022, the CMA required production of certain further documents and information from VW UK, VW AG and any other legal entities forming part of the same undertaking. It is to be inferred that the CMA had not been able to obtain these documents and this information from

VW UK;[16] and that these are materials held outside the United Kingdom and not susceptible of production by VW UK. The section 26 notice (the "VW AG section 26 Notice") was in similar terms to the BMW section 26 Notice described in paragraph 16 above.

(3) The claim for judicial review

27. VW AG seeks to judicially review the CMA's decision to issue the VW AG section 26 Notice. Such decisions are judicially reviewable in the High Court; unlike the case of the penalty imposed on BMW AG where an appeal lies to this Tribunal, the Competition Appeal Tribunal has no jurisdiction in this case.

28. Yet the essential question raised by the judicial review is exactly the same as that raised by BMW AG in its appeal – namely, the "extraterritorial" effect of notices made under section 26 of the Competition Act 1998.

29. With the consent of the parties, and the agreement of the Judge in Charge of the Administrative Court, the claim for judicial review was allocated to the President to determine in his capacity as a High Court Judge. As in the case of BMW AG's appeal, VW AG's judicial review raises questions beyond the "extraterritoriality" question. These arise even if the question of the scope of section 26 is resolved against VW AG. We address these points to the extent necessary in Section J below.

(4) The hearing of the claim for judicial review

30. The hearing of VW AG's claim for judicial review occurred at the same time as the hearing of BMW AG's appeal, for obvious reasons of efficient case management and the avoidance of potentially inconsistent results. We are again grateful to the parties for their considerable efforts in ensuring that the hearing took place as smoothly and efficiently as it did.

[16] See paragraph 9 of VW AG's Statement of Facts and Grounds.

D. A SINGLE JUDGMENT

31. The question of whether a single judgment or two judgments would be appropriate in order to dispose of the issues that arise was a matter of brief discussion at the hearing. We consider it makes sense, rather than issuing two judgments of a broadly similar, but necessarily duplicative, nature, to render a single judgment (this Judgment) determining both proceedings. We have, however, been conscious that whilst the appeal is a matter for the three-person Tribunal constituted in the Competition Appeal Tribunal, the claim for judicial review is a matter for the President (sitting as a Justice of the High Court) alone. Although we have adopted a uniform mode of expression throughout (we will generally refer to "we" and "us" and not "me" and "I"), we have maintained separate consideration of the matters before us. However, we heard exactly the same arguments and read exactly the same documents, because the issues in both sets of proceedings are, if not identical, then so similar as to render any attempt at segregation pointless. We have reached a common view on the common issues. The judgment of the Tribunal is unanimous, and the judgment of the President in the claim for judicial review is the same as that of the Tribunal.

E. STRUCTURE OF THIS JUDGMENT

(1) A summary of the argument

32. As will become apparent, the central point which this Judgment must resolve involves the true meaning of the words "any person" in section 26(1) of the Competition Act 1998. It will be necessary, first, to explain in precise detail the meaning given by the 1998 Act to these words. The question is what, exactly, does the Act understand by a "person". More particularly, the question is whether the Act so defines a person as to embrace the concept of an "undertaking" as a person. The concept of an undertaking is well understood in European Union law, but (absent clear statutory direction) the concept of "undertaking" does not confer on that entity any legal personality and (again, absent specific provision) lawyers in the United Kingdom would not regard an "undertaking" as a person.

33. The essence of the CMA's contention was that if the 1998 Act was read in accordance with its express provisions (including, for this purpose, the definition of "person" as including an "undertaking"[17]) then the "extraterritorial" effect of section 26 followed as a matter of course. Indeed, the CMA went so far as to suggest that the effect of the definition of "person" was such as to render the section 26 Notices in this case as only peripherally or marginally extraterritorial; and the presumption against extraterritoriality, if it applied at all, applied only with weak effect.

34. Although, on the papers submitted before the hearing began, it appeared that BMW AG and VW AG were in fundamental disagreement with the CMA's contention, the position – after hearing oral argument over two days – was inevitably more nuanced (as is usually the case when one has the benefit of careful oral submissions).[18] Although it would be wrong to say that Mr Kennelly, KC (VW AG's leading counsel) or Ms Abram, KC (BMW AG's leading counsel)[19] ever formally accepted that the CMA's contention was the natural first reading of the 1998 Act, that is analytically the best way to understand the substance of the dispute between the parties. It was BMW AG's and VW AG's contention that the construction advocated for by the CMA produced such wantonly broad and far-reaching extraterritorial effects that Parliament could not possibly have intended this outcome. Because – as we shall describe – there existed (at least according to BMW AG and VW AG) a statutory provision permitting the Competition Appeal Tribunal to derogate from what would otherwise be the true meaning of "person",[20] the essence of BMW AG's and VW AG's argument was that the outcome contended for by the CMA was such that a different construction of the 1998 Act was not merely desirable or preferable, but was necessary by reason of the extraordinary extraterritorial effects achieved by the CMA's construction of the 1998 Act.

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[17] Although the 1998 Act does not define what is meant by an "undertaking".

[18] The oral hearing was listed for 1½ days, but that was to accommodate the President's other commitments. The plan was always to sit long days, and the effect of this was to cram two days hearing into the 1½ days listed. We are grateful to the parties and to the Tribunal's staff for enabling this.

[19] We reflect here the order in which we were addressed.

[20] We will expand upon this, but the point was that section 5 of the Interpretation Act 1978 provides that certain words and expressions are to be construed in a certain way, "unless the contrary intention appears".

(2) Structure

35. This is, then, very much a case that begins and ends with statutory interpretation, but where the correct interpretation is very much informed by the question of how far, if at all, Parliament intended section 26 to have extraterritorial effect.

36. We turn, therefore, to the statutory provisions concerning the meaning of "person" in section 26 and elsewhere in the 1998 Act: Section F below. Thereafter, we consider the meaning of "undertaking", which is added into the meaning of "person", but not defined in the 1998 Act: Section G below. Having set out these foundations to the CMA's case, we then turn (in Section H) to the CMA's contentions regarding section 26, expanding upon the argument we have summarised above. Section I then considers the contentions of BMW AG and VW AG that even if the CMA's construction of section 26 was on the face of it correct, that construction was displaced because a "contrary intention"[21] had been evinced by Parliament. Finally, Section J sets out how we propose to dispose of the proceedings that are before us.

F. THE DEFINITION OF "PERSON" IN THE 1998 ACT

37. Section 26, as we have seen, entitles the CMA to require "any person" to produce to it a specified document. Section 26 – together with a number of other sections in the 1998 Act – falls within Part 1 of the Act. Section 59 provides for the interpretation of Part 1 and states that "[i]n this Part":

> "person", in addition to the meaning given by the Interpretation Act 1978, includes any undertaking

38. "Person" is thus principally defined in the Interpretation Act 1978. Section 5 of that Act provides:

> In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule.

39. Schedule 1 itself states:

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[21] Within the meaning of section 5 of the Interpretation Act 1978, a provision we will come to.

> "Person" includes a body of persons corporate or unincorporate.

40. The definition is not exhaustive. The use of the word "includes" means that whilst (absent contrary intention pursuant to section 5) a "person" can be "persons corporate or unincorporate", other entities can also fall within the meaning of "person". The purpose of section 59 of the 1998 Act is to force into the definition that which would not normally belong – an "undertaking". When we come to consider the meaning of an "undertaking", it will become clear why one would not normally regard an "undertaking" as a person.

41. We consider that the effect of section 59 of the 1998 Act is to re-write the meaning of "person" for the purposes of Part 1 of the 1998 Act so that:[22]

> "Person" includes a body of persons corporate or unincorporate and an undertaking.

42. That means that the provision permitting derogation from the statutory definition – section 5 – continues to apply. However, we consider that a court would have to tread with remarkable care and be extremely confident as to the existence of a contrary intention if it were minded to delete "undertaking" from the meaning of "person" when used in Part 1 of the 1998 Act. That is because Parliament has expressly forced the issue and expanded the meaning of "person" specifically to include an "undertaking".

43. So far as Part 1 of the 1998 Act is concerned, the following points can be noted:

    (1) Section 59 serves to expand the definition of "person" but does not introduce the concept of "undertaking" into the Act where something narrower than the term "person" is intended. Thus, both the Chapter I and the Chapter II prohibitions – following the law of the European Union – use the term "undertaking" to define their scope. The Chapter I prohibition refers to "agreements between undertakings"[23] and the Chapter II prohibition refers to "any conduct on the part of one or more undertakings".[24] Generally speaking, where "person" is used in Part 1,

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[22] Emphasis added.
[23] See section 2(1) of the 1998 Act.
[24] See section 18(1) of the 1998 Act.

it is a term that includes, but is not limited to, an undertaking. In short, "person" has a core meaning (a body of persons corporate or unincorporate and an undertaking) with the potential of adding to that meaning.

(2) That being said, there are examples from within Part 1 of the 1998 Act where the term "person" is clearly being used in a narrower sense than the expanded Interpretation Act 1978 definition. Section 27 of the 1998 Act provides for a power in the CMA to enter business premises without a warrant. Section 27, to be clear, falls within Part 1 of the 1998 Act, so the extended definition applies. Section 27(5) provides:[25]

> An investigating officer entering any premises under this section may –
>
> …
>
> (b) require any person on the premises –
>
> (i) to produce any document which he considers relates to any matter relevant to the investigation; and
>
> (ii) if the document is produced, to provide an explanation of it;
>
> (c) require any person to state, to the best of his knowledge and belief, where any such document is to be found…"

Since only a "natural person" (i.e. a human being) will be able to do the things required by this section, were it to matter, "person" in section 27(5) would likely be construed narrowly in this way and so the statutory provision derogated from because there would be a contrary intention.

44. We turn, next, to the meaning of an "undertaking".

[25] Emphasis added.

G. THE MEANING OF "UNDERTAKING"

(1) The "undertaking" as the "unit of account" of competition law

45. The concept of an undertaking forms the basic "unit of account" for European Union and United Kingdom competition law. As we have seen, it is undertakings that commit breaches of the Chapter I and Chapter II prohibitions;[26] and, where such a breach has been found to exist, it is the undertaking that is penalised. Thus, section 36 of the 1998 Act provides:

> (1) On making a decision that an agreement has infringed the Chapter I prohibition, the CMA may require an undertaking which is a party to the agreement to pay the CMA a penalty in respect of the infringement.
>
> (2) On making a decision that conduct has infringed the Chapter II prohibition, the CMA may require the undertaking concerned to pay the CMA a penalty in respect of the infringement.

(2) The meaning of "undertaking"

46. The concept of an undertaking is undefined in the 1998 Act. It constitutes "an autonomous concept of EU law".[27] Although, no doubt, in future, the understanding of what is an undertaking will be developed by the courts of the United Kingdom, for present purposes the law of the European Union constitutes the best source for defining this term.

47. Referring to Whish and Bailey,[28] an undertaking may best be defined as any entity engaged in economic activity. In other words, an undertaking is an economic entity. There is a single undertaking, and not several undertakings, even if as a matter of law the economic entity consists of several natural or legal persons.

48. What this means is that there is a mismatch between the notion of an economic entity (which, quite fundamentally, is not a matter of law) and the law of persons. That mismatch will be of significance in many areas, and it is

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[26] See paragraphs 1 and 2 above.
[27] *Sumal SL v. Mercedes Benz Trucks Espana SL*, [2021] Bus LR 1755 at [38].
[28] Whish and Bailey, *Competition Law*, 10th ed (2021) at 354*ff*.

unnecessary to list them all. But a few examples will assist in order to make the point:

(1) The Chapter I prohibition applies – as we have seen – to (amongst other things) "agreements between undertakings". An agreement between two persons (natural or legal) within the same undertaking cannot constitute an infringement of the Chapter I prohibition.[29]

(2) In *Sainsbury's v. MasterCard*, this Tribunal (differently constituted) considered the meaning given to the concept of an undertaking, and the difficulties in mapping persons (as understood by law) onto the economic entity "unit of account".[30] Quoting from that decision:

> 356 An undertaking therefore designates an economic unit, rather than an entity characterised by having legal personality…
>
> 357 Because the focus of EU law is on the economic, rather than the legal, nature of an entity, a number of individual legal bodies can be treated as a single undertaking for the purposes of competition law.
>
> 358 Thus, a single undertaking may comprise a parent company and its subsidiary, provided that the relationship between them is such that they form a single economic entity. Equally, an employee (obviously a natural person in his or her own right) will typically be part of the undertaking that employs him or her. Similarly, an independent contractor and the person engaging that contractor can be a single undertaking…
>
> 359 The basic definition of an undertaking…is uncontroversial. The concept is neutral as regards legal personality, and does not seek to define itself by reference to the legal persons that might comprise it.

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[29] Whish and Bailey, *ibid.*, 355.

[30] *Sainsbury's Supermarkets Ltd v. MasterCard Incorporated*, [2016] CAT 11 at [351]*ff* (where the notion of an "undertaking" is examined in detail); and [361]*ff* (where the problem of dealing with questions of attribution is considered). Although this case has had a long history and process through the courts of the United Kingdom – up to the Supreme Court and back again – this part of the decision remains good law, at least for this purpose.

H. THE CMA'S CONSTRUCTION

(1) The importance of Parliamentary intent

49. In light of the foregoing, the CMA's construction – and their contentions in support of that construction – can briefly be set out.

50. Provided an Act of Parliament states the position clearly enough, the legal concept of what is a "person" can be expanded or contracted at Parliament's will. To this extent, therefore, whilst the law of persons may inform the meaning of "person" when used in an Act of Parliament, what Parliament says "person" means governs; and if Parliament has chosen to expand or contract the "normal" meaning of "person", then that is Parliament's business and it is the role of the courts to apply that which has been enacted.

(2) The decision in *R v. L*

51. That is a proposition which we obviously accept. To the extent that authority is required for that proposition – and we do not think it is – the CMA referred us to the decision of the Court of Appeal in *R v. L*.[31] The case is interesting – and worthy of consideration – because it concerned the criminal liability of an unincorporated association, an entity which (as a matter of English law) is <u>not</u> a person. Before the Court of Appeal, the question was whether – for purposes of criminal liability – an unincorporated association was not a "person" within the meaning of the Interpretation Act 1978 because – in relation to the statutory offence here under consideration – Parliament had evinced a contrary intention within the meaning of section 5 of the Interpretation Act 1978.[32] The Court of Appeal described the issue, or the problem, in the following terms:[33]

> The Crown submits that the 1991 Act demonstrates such a contrary intention, viz that "person" in section 85 does not include an unincorporated association, because the Act does not contain a specific provision making such an association criminally responsible in its own name. In the absence of such a specific provision, says the Crown, the ordinary common law principle that an unincorporated association is no more than a collective noun for its members

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[31] [2008] EWCA Crim 1970.
[32] At [20].
[33] At [21].

> must prevail. There are, it is suggested, too many practical difficulties in the judge's decision to the contrary. In particular, this Act does not, we are reminded, contain any provision for adapting the procedure of the courts to a non-natural person, so that there would be difficulties, it is suggested, in taking a plea, or in committing the association to the Crown Court for trial, or in enforcement of a penalty if convicted.

52. In this case, notwithstanding these difficulties as articulated by the Crown, the Court of Appeal concluded that there was no contrary intention, and that (confining themselves to this offence only) an unincorporated association could be guilty of that offence.[34]

53. The details do not matter – for this case is, on its facts, far removed from the present. *R v. L* certainly is not binding authority in this case that there is no contrary intention displacing or altering the statutory meaning of "person" in section 26 of the 1998 Act. But it is valuable authority in showing that an entity very far removed from the sort of "person" the law of persons would recognise, can nevertheless be a "person" in a given case, if the law is clear enough.

54. The CMA's short point was that here the law was not merely clear, but unequivocal: "person" includes an "undertaking".

(3) Implications and unpacking of the CMA's point

55. We say the following to make the CMA's contentions explicit.

56. BMW AG and VW AG are both legal persons that are part of wider undertakings which we will refer to respectively as the "BMW Undertaking" and the "VW Undertaking".

57. Also part of the BMW Undertaking and the VW Undertaking are the legal persons we have described as "BMW UK" and "VW UK".

58. It is common ground that BMW UK and VW UK are obliged to comply with the section 26 notices that have been issued to them. Indeed, we should note for the record that BMW UK and VW UK have been scrupulous in doing so, and

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[34] At [29] and [30].

that no complaint is made against these legal persons in respect of their compliance in regard to the BMW section 26 Notice and the VW AG section 26 Notice.

59. That is because (to articulate the position of the BMW Undertaking and the VW Undertaking) BMW UK and VW UK are legal persons sufficiently connected with the United Kingdom to be within the territory of the United Kingdom, and so subject to the laws of the United Kingdom. We propose to use the term "UK territorial connection" to describe those cases where, as a matter of the law of the United Kingdom, a person is subject to the territorial jurisdiction of the United Kingdom. Thus, a company registered in the United Kingdom will be within the jurisdiction, and that was the basis on which BMW UK and VW UK considered themselves obliged to respond to the BMW and VW AG section 26 Notices. We do not, however, propose to delineate for all purposes what constitutes a "UK territorial connection",[35] save to state that no such connection existed in the case of BMW AG and VW AG apart from the CMA's contentions regarding "undertakings" that we have set out above.

60. It was also common ground that if and to the extent that BMW UK or VW UK controlled documents or information responsive to the BMW section 26 Notice or the VW AG section 26 Notice (as the case may be) beyond the territory of the United Kingdom then – depending on the precise circumstances – there would be an obligation on BMW UK or VW UK to produce those documents or that information. Again, we are reluctant to enter into a precise delineation of what is a hypothetical case, but some further exploration of this point is required:

(1) In *R (KBR Inc) v. Director of the Serious Fraud Office*,[36] the Supreme Court considered the extraterritorial scope of investigative provisions

[35] There is no need to do so, and we suspect that there will be difficult borderline cases which we want to avoid. It is simply necessary to note that, apart from the "undertaking" argument advanced by the CMA, BMW UK and VW UK were within the UK and had a UK territorial connection, whereas BMW AG and VW AG were outside the territory of the UK, such that there was no UK territorial connection. We use the rather cumbersome term "UK territorial connection" in preference to "within the territory" or "within the UK" because that is a term that applies more naturally to natural persons than corporations; but even in the case of natural persons, transient physical presence can give rise to difficult issues.
[36] [2021] UKSC 2.

similar to these, and it was a decision on which – entirely unsurprisingly – all parties placed considerable reliance. For present purposes, we would only observe that the Supreme Court recognised that the interpretative presumption against extraterritorial effect was significantly attenuated when considering legislation in respect of the conduct of nationals abroad.[37] As a result, the Supreme Court did not consider legislation requiring a legal person with sufficient connection to the United Kingdom to produce documents held by them abroad to be particularly problematic:[38]

> In the present case we are not concerned with jurisdiction over the conduct abroad of a UK national or a UK registered company. Indeed, it was common ground between the parties that if the addressee had been a British registered company section 2(3) would have authorised the service of a notice to produce documents held abroad by that company.

(2) Without wishing to be overly-prescriptive in the present case – because the issue does not arise before us – it is important to gain a general understanding of the implications of this. Were (hypothetically speaking) either BMW UK or VW UK to hold a physical warehouse of documents abroad, then (subject to any complications about local law rendering such production impossible) BMW UK and/or VW UK would be obliged to produce such documents pursuant to a section 26 notice to them. The same would likely apply were the hypothetical warehouse of documents to be under the control of a subsidiary service company itself under the control of BMW UK/VW UK.

(3) The hypothetical examples can be multiplied – but the law of diminishing returns rapidly sets in. The point is that presence within the territory of a natural or a legal person (i.e., where a UK territorial connection exists) can have quite significant extraterritorial effects which do not – for good reason – trouble the courts; nor affront comity between nations; nor trigger in any strong way the presumption against extraterritoriality.

[37] At [23].
[38] At [26].

61. The reason we are exploring the extended effects abroad of the presence of a natural or legal person within the jurisdiction is because the CMA's point was that these extended effects also applied where the person the target of the section 26 notice was an undertaking. The CMA's point was that a section 26 notice addressed to the BMW Undertaking or to the VW Undertaking would affect all legal or natural persons within the undertaking, wherever situate, provided only a part of the undertaking (here BMW UK and VW UK) had a UK territorial connection. This, according to the CMA, was not particularly controversial, nor particularly extraterritorial, once one accepted that:

(1) A "person", for the purposes of section 26, expressly includes an undertaking;

(2) A legal person, part of an undertaking, was unequivocally within the jurisdiction; and

(3) The effects we have described in paragraph 60 should apply, *mutatis mutandis*, to those parts of the undertaking outside the jurisdiction or territory of the United Kingdom.

62. In this way, even though neither BMW UK nor VW UK can command documents or information from BMW AG or VW AG, because parts of the BMW Undertaking and parts of the VW Undertaking have a UK territorial connection, that fact enables a section 26 notice to require the whole undertaking to respond.

63. We appreciate that certain technical points could be taken to the drafting and handling of the BMW and VW AG section 26 Notices in this case. It might be said that the CMA's thinking could have been better articulated, and the precise persons the target of the notices (namely, the undertakings and not the legal persons) more clearly stated. We do not propose to spend time considering such technicalities. We consider that the BMW section 26 Notice and the VW AG section 26 Notice to be sufficiently clearly drawn so as to have the effects contended for by the CMA provided that the CMA's construction of section 26 and the 1998 Act generally is correct. That, we consider, is the real question

before us, and there is no need to articulate or resolve technical arguments that go to form and not to substance.

(4) Preliminary conclusion on construction and more "muscular" versions of the CMA's case

64. Set out in this way, the force of the CMA's argument is obvious. The crucial question – to which we will now turn – is whether the provisions of the 1998 Act evince a "contrary intention" within the sense of section 5 of the Interpretation Act 1978, such that a different reading must apply.

65. In considering this point, we are very conscious that although the presumption against extraterritoriality is important (and we consider it further below), this is fundamentally a question of statutory construction, and if Parliament has rebutted the presumption, then that is an end of it.

66. Before proceeding to that question, we should deal briefly with what the CMA called the more "muscular" versions of its case. Essentially, these turned on an argument that "any person", whether extending to an undertaking or not, was sufficiently wide to embrace persons outside the territory of the United Kingdom even where there was no UK territorial connection at all. We do not propose to spend very much time on these points. They seem to us to be obviously wrong;[39] and, more to the point, these contentions lie *a fortiori* the CMA's primary case, such that if that primary case fails, so too must the more "muscular" versions.

[39] As *R (KBR Inc) v. Director of the Serious Fraud Office* itself shows, it is very easy to read into wide words like "any person" a territorial limit; given the existence of the presumption, reading into such a phrase like "any person" a territorial limitation is the most natural reading.

I. THE EXISTENCE OF A "CONTRARY INTENTION"

(1) The presumption against extraterritorial effect

67. The Supreme Court articulated the presumption very clearly in *R (KBR Inc) v. Director of the Serious Fraud Office*.[40] The words of Lord Rodger in *R (Al-Skeini) v. Secretary of State for Defence* were cited with approval:[41]

> Behind the various rules of construction, a number of different policies can be seen at work. For example, every statute is interpreted, "so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law": *Maxwell on the Interpretation of Statutes*, 12th ed (1969), 183. It would usually be both objectionable in terms of international comity and futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom. So, in the absence of any indication to the contrary, a court will interpret legislation as not being intended to affect such people. They do not fall within "the legislative grasp, or intendment", of Parliament's legislation, to use Lord Wilberforce's expression in *Clark v. Oceanic Contractors Inc…*

68. *Bennion* articulates the presumption in *staccato* terms:[42]

> Unless the contrary intention appears, an enactment is taken not to apply to people and matters outside the territory to which it extends.

69. Although, of course, the presumption must be considered more specifically according to the context in which it may apply – it is, after all, a guide to the interpretation of legislative instruments, and in particular Acts of Parliament – we consider that it is a mistake to seek to convert the presumption into some kind of matrix in which the presumption is classed as "strong", "weak" or "middling". Mr Jones, who appeared for the CMA, and who advanced the CMA's contentions with conspicuous skill, sought to limit the operation of the presumption in precisely this way, by suggesting that the presumption is weak or even not applicable in this case because of the point articulated in paragraph 60 above, where we note that a company with a UK territorial connection may be affected in its extraterritorial operations.

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[40] [2021] UKSC 2 at [21]*ff*.

[41] At [22]. Lord Rodger in *Al-Skeini* is cited as [2007] UKHL 26 at [45].

[42] Bailey and Norbury, *Bennion on Statutory Interpretation*, Lexis Nexis Butterworths 7th ed (2017), [4.8]

70. The fact is that the operation of the presumption is a nuanced one that is dependent on the terms of the statute being construed, and in particular the effects of that construction in terms of the reach of the United Kingdom's jurisdiction over persons not having a UK territorial connection. The presumption should not be confined or limited in its effect *ex ante*, without reference to the specific provision being construed.

(2) The extraterritorial effect in this case

71. We have no doubt that the CMA's construction renders section 26 of the 1998 Act aggressively extraterritorial. Because an "undertaking" is economic in conception, and because economic entities (particularly these days) will, more often than not, be international, and straddle and cross territories and borders, that is inevitable.

72. The consequence of the CMA's construction – from which Mr Jones did not shy – was that a single section 26 notice, addressed to an undertaking, would trigger an obligation to respond in every single legal or natural person within that undertaking, provided only that a single legal or natural person within that undertaking had a UK territorial connection. As we have said, this is aggressively extraterritorial, as may be demonstrated by the following example:

    (1) We are going to suppose an Undertaking, *U*, comprising multiple legal persons in various jurisdictions. *U(1)* has a UK territorial connection with the United Kingdom, as do *U(2)* and *U(3)*. *U(4)* and *U(5)* however have no such connection (apart from being in the same undertaking as *U(1)* to *U(3)*). Their sole connection is (in the case of *U(4)*) with the European Union – say Germany – and (in the case of *U(5)*) with Ruritania.[43]

[43] We do not consider that there is any distinction to be drawn between *U(4)* and *U(5)*, but we have selected an example from within the European Union to underline the point that we do not consider territorial connection with the EU to render the position of a person (natural or legal) any different from a Ruritanian person (natural or legal).

(2) The CMA serves a section 26 notice on *U*. Clearly, in order to be effective, the notice will have to be brought to the attention of a natural or legal person, for an undertaking (being an economic entity) does not have the important attributes of legal persons like companies which enable service and the like. Undertakings do not have registered offices or officers. This is an issue we will be returning to, as it is (to our mind) very significant to the question of construction. For the present, we will assume that the notice is brought to the attention of and served[44] on *U(1)* (an entity with a UK territorial connection), although our understanding of the CMA's case is that service on one of the entities without a UK territorial connection – *U(4)* or *U(5)* – would suffice.

(3) The CMA contends that service of the notice on *U(1)* – provided it makes clear that the notice is directed to the undertaking *U* and not to the legal person *U(1)* – triggers without more an obligation on not merely *U(1)*, but *U(2)*, *U(3)*, *U(4)* and *U(5)*, to respond to the notice. So far as the entities with a UK territorial connection are concerned – *U(2)* and *U(3)* – the effect is not extraterritorial, but it is onerous, because *U(2)* and *U(3)* are put under an obligation to comply without any kind of communication to them from the CMA. The burden of communication falls on *U(1)*, and if (for whatever reason) *U(1)* does not discharge it, *U(2)* and *U(3)* are nevertheless obliged to respond, because they are part of *U*, and it is *U* that is the "person" to whom the notice is directed.

(4) So far as the entities without a UK territorial connection are concerned – *U(4)* and *U(5)* – the effect of the notice is plainly extraterritorial and very likely to undermine comity between nations. A foreign jurisdiction is unlikely to be impressed by the imposition of an obligation on a legal entity operating solely in its jurisdiction to provide an administrative

[44] We do not intend to imply that formal service, as in the case of court proceedings, would be necessary. Section 26 does not actually specify how the notice is to be brought to the attention of a "person", save to say (in section 26(2)) that the power is "to be exercised by a notice in writing". We shall, for the sake of convenience, refer to the "serving" of a notice, but are using that term in an informal sense.

authority in another jurisdiction (under threat of sanction) with documents and information.

(5) A further problem – relevant to the intra- and extra-territorial effect of the notice – is that *U(1)* may not actually know the true extent of undertaking *U*. An undertaking is, as we have repeatedly emphasised, an entity economic in conception, and the number of natural and legal persons falling within the undertaking may be uncertain.[45] This is especially the case since a corporate group may comprise or be part of different undertakings, depending on the economic activities of each of its component persons. That reflects the difference between an economic entity and the legal structure of a group.

(6) Suppose *U(5)* decides not merely to decline to provide documents responsive to the notice to the CMA, but actually to destroy them. That – within the United Kingdom – would be a criminal offence under section 43 of the 1998 Act. In this context, it seems to us that the logical outcome of the CMA's case is that in relation to a notice to *U*, that *U(5)*'s infringement of section 43 would cause *U(1)* (amongst others) to be in breach.[46] This is a curious kind of reverse extraterritorial effect, where something done outside the jurisdiction creates an infringement of the criminal law within the jurisdiction.

(7) In any event, even if *U(4)* and *U(5)* simply decline to respond to the notice, the CMA may impose a penalty on these entities (which is what happened in the case of the BMW Undertaking, where a penalty was imposed on BMW AG) or on *U(1)*. *U(1)*, *U(4)* and *U(5)* are, after all, all part of *U*, the "person" the subject of the notice.

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[45] See for example, *Merson Electric Co and others v Morgan Crucible Company PLC* [2011] CAT 4, particularly [38] to [52].

[46] The offence refers to "persons", presumptively including "undertakings". In the case of a notice addressed to an "undertaking", if one part of the undertaking breaches the law, the undertaking is responsible, and that criminal responsibility affects every other part of the undertaking, because undertaking is a unitary, albeit economic, concept. We accept that a court would strain against such an outcome; but that is an indication towards a contrary Parliamentary intention in relation to the CMA's construction.

73. We are sure that other examples of extraterritorial effect could be articulated, but we are equally sure that the foregoing shows that the extraterritorial implications of the CMA's contention are considerable, and that the presumption against extraterritorial effect is fully engaged.

(3) Other factors relevant to construction

74. Before we re-visit the question of construction in light of the extraterritorial effects of the CMA's submissions, we should identify various other matters, going to construction, which were adverted to by the parties. We can do so briefly, because they were not (in our judgement) in any way material to the outcome:

(1) *The intentions of Parliament.* We were shown various materials concerning the drafting, enactment and amendment of parts of the 1998 Act, in particular as regards the extension of the term "person" to include "undertaking". None of these materials was sufficiently clear-cut (either way) to assist on the question of construing section 26.[47]

(2) *The practice of the European Commission.* Even if this practice has been unequivocal – in that the European Commission either clearly regarded itself as having or as not having an extraterritorial jurisdiction – we doubt if such practice would assist in informing the separately framed powers of the CMA under the 1998 Act in general, and section 26 in particular.

(3) *The prior practice of the CMA.* This case appears to be the first time the "extraterritorial" effect of section 26 has been raised. The fact that this is the first time since 1998 seems to us to be entirely neutral in terms of how section 26 is to be construed. Equally, the fact that the CMA is seeking international agreements for mutual assistance in investigations

[47] For this reason, there is no need to consider questions of admissibility. Had we found these materials influential on our decision, admissibility is something we would have had to consider further.

seems to us to say little, if anything, about the construction of section 26.

(4) *The territorial scope of the Chapter I and Chapter II prohibitions.* As we have noted, both prohibitions have a degree of extraterritorial application.[48] We consider that this would suggest that the powers, in the CMA, to investigate infringements of these prohibitions to be similarly extraterritorial. However, the extent to which such considerations can have a material bearing on the construction of section 26 seems to us to be verging on the minimal, for these reasons:

(i) Investigation precedes any finding of infringement. An investigation may find no infringement at all. There is no necessary correlation between the powers needed to investigate an infringement and the infringement itself.

(ii) It follows that extensive extraterritorial powers may be required to investigate a purely domestic infringement and *vice versa*.

(iii) We quite appreciate that broad investigatory powers are (from the point of view of enforcement) desirable. But – as in *KBR* itself – such desirability does not translate easily into a factor to construe a power as having extraterritorial effect.

(4) Construction (again)

75. As we have noted, the meaning of "undertaking" is economic. The undertaking is the "unit of account" (as we term it) of competition law. Undertakings infringe competition law; and undertakings are punished for such infringements.

76. The problem with an <u>economic</u> unit of account is that when legal process is engaged, a process of "translation" needs to take place, whereby an economic concept is rendered into a legally comprehensible form. Such translation is vital

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[48] See paragraphs 3*ff* above.

for due process. As we have noted,[49] none of the mechanics necessary for bringing a notice to the attention of a responsible person exist in the case of an undertaking, and in the example we used in paragraph 72 it was necessary to identify which natural or legal person within *U* should be served with the section 26 notice. It is not possible – it makes no legal sense – to seek to "serve" undertaking *U*.

77. This, in our judgement, fatally undermines the CMA's construction of section 26. The reason why is best understood by reference to an analogy which is buttressed by a significant amount of authority and practice in this jurisdiction. The analogy is the commencement of private actions seeking damages as a result of an infringement of one or both of the Chapter I or Chapter II prohibitions. More specifically:

(1) It is trite that an infringement of competition law can trigger not merely a penalty, but a civil action for damages.[50] In other words, an infringement of the Chapter I or Chapter II prohibition triggers a claim against any and all undertakings implicated.

(2) If the CMA's approach were right, it would be possible to commence a civil action (for breach of either the Chapter I or the Chapter II prohibition) against the <u>undertaking</u>. After all, the relevant provisions refer <u>not</u> to persons, natural or legal, but to "undertakings".

(3) But civil claims against undertakings are unknown in English law. Civil claims are brought against natural or legal persons. That is for very good reason: the rights of defence entitle any person claimed against to defend their position. Reverting to the example at paragraph 72 above, suppose undertaking *U* were implicated in an infringement of the Chapter I prohibition. A claim could not be brought against *U*: rather, the claimant would have to establish jurisdiction against one or more of the natural and/or legal persons comprising *U*. In the case of this example, *U(1)*,

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[49] See paragraph 72(2) above.
[50] For a detailed exposition of the (uncontroversial) law in this area, see *Sumal SL v. Mercedes Benz Trucks Espana SL*, [2021] Bus LR 1755.

U(2) and *U(3)* – having a UK territorial connection – could be joined easily (i.e., without service out of the jurisdiction). Equally, no doubt *U(4)* and *U(5)* could be joined as necessary and proper parties to the proceedings (but only because there is jurisdiction, as of right, against *U(1)*, *U(2)* and *U(3)*). The details do not matter: the point is that jurisdiction would have to be established against each defendant, and each defendant would be entitled to take such jurisdictional objections as they were advised it was in their interests to take.[51] The same is true as regards substantive liability. It would be entirely wrong for an admission of liability by *U(3)* in some way to bind *U(4)* or *U(5)*.

(4) Thus, it is clear that the "translation" of the economic entity that is the undertaking into a legally recognisable person occurs at the outset of the civil process. If the CMA were right in its construction, then our civil processes would operate very differently on the plane of the undertaking rather than according to the jurisdictional status of the individual natural or legal persons comprising the undertaking. To put the point another way, the rules that determine whether a given defendant is susceptible to the jurisdiction of the United Kingdom turn on the UK territorial connection applied to each natural or legal person within the undertaking, and not to the undertaking viewed as a whole.

78. So it is in the case of section 26 of the 1998 Act. The term "person" can expressly extend to the "undertaking", but that does not absolve the CMA from directing the section 26 notice to a specific natural or legal person within the undertaking. Provided the notice makes clear – and the clearer the words, the better – that the notice is directed not merely to the addressee, but to the undertaking as a whole, then it seems to us that the following is the case. Again, for the sake of exposition, we refer to the example in paragraph 72 above:

(1) Suppose a section 26 notice is served on *U(1)*, but is clearly addressed to the entirety of undertaking *U*. *U(1)* would be obliged to provide to the CMA the documents and information responsive to the notice in its own

[51] See, for instance, *Merson Electric Co and others v Morgan Crucible Company PLC* [2011] CAT 4.

control, including those documents held abroad and via controlled subsidiaries.[52] This follows from the fact that the notice is addressed to, *inter alios*, *U(1)*.

(2) Additionally, because the notice is addressed to *U*, *U(1)* would be obliged to notify the rest of *U* of the notice. This is not as onerous as it seems, because (as we understand it) it is standard practice for the CMA to require persons in the position of *U(1)* to provide this information anyway. If – in the specific case – the requirement is onerous, we would expect constructive dialogue between the CMA and *U(1)*.[53]

(3) Moreover, the notice to *U(1)* would be sufficient to trigger an obligation to respond in *U(2)* and *U(3)* because they have a UK territorial connection. The same would not be the case for *U(4)* or *U(5)* because they do not have a UK territorial connection. To oblige them to respond to the notice would be to give section 26 extraterritorial effect.

79. This approach respects the extended meaning of "person" in section 26, such that a section 26 notice can be made to an undertaking; but only via a natural or legal person with sufficient connection to the jurisdiction. Provided the notice is clearly addressed to the undertaking, there is an obligation to inform all constituent elements of the undertaking of the notice. Whether those constituent elements are themselves obliged to respond to the notice depends on whether – considering their status as natural or legal persons, and disregarding their position as a part of an undertaking – they have or do not have a UK territorial connection. If they do, then they must respond as if the notice were directed to them specifically. If they do not, then the presumption against extraterritoriality applies, and there is no obligation to respond.

[52] We do not consider that this would follow if the notice were served in *U(4)* or *U(5)*, because they have no sufficient connection with this jurisdiction.

[53] Of course, if the CMA behaved unreasonably or in a procedurally improper way, a claim for judicial review would lie.

J. DISPOSITION

80. For the reasons we have given, the appeal (by BMW AG) and the claim for judicial review (by VW AG) are to be disposed of in the following way:

    (1) We declare that no section 26 notice – whether directly or indirectly sent to BMW AG or VW AG – is effective. Any assertion of an obligation in these companies to respond is *ultra vires* section 26. There is, quite simply, no such power.

    (2) Accordingly, the appeal of BMW AG succeeds to this extent only. We say nothing about any consequential matters, which will be a matter for further argument. Accordingly, the additional points noted in paragraph 22 above are not dealt with in this Judgment, and to the extent they remain live, will have to be subject of further submission.

    (3) Permission to bring a claim for judicial review against the CMA is given to VW AG, and that claim for judicial review succeeds. We do not consider it necessary to make any order beyond the declaration at paragraph 80(1) above, but would be prepared to hear argument on this point if necessary. Again, the judicial review succeeds to this extent only, and any other matters are left over to further argument.

81. We leave it to the parties to frame an order. We express the hope that, the critical matter of dispute having been determined, all consequential matters can be resolved by agreement. Should it assist, we should say (without prejudice to further argument, were BMW AG and VW AG to wish to make such argument) that if the CMA were to seek permission to appeal, we would be minded to give that permission. The issue of construction that we have determined – as is clear from the foregoing – was by no means straightforward; and the competition community as a whole ought to be grateful to all of the parties in having this difficult issue resolved.

82. So far as the appeal of BMW AG is concerned, this decision is unanimous. So far as the claim for judicial review is concerned, this decision is the judgment of the President, sitting as a Justice of the High Court, alone.

Sir Marcus Smith President of the Competition Appeal Tribunal Justice of the High Court of England and Wales	Michael Cutting	Tim Frazer

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 8 February 2023