

Penalty Notice

Section 40A of the Competition Act 1998

Suspected anti-competitive coordination in
relation to the recycling of end-of-life vehicles
Case 51098

Bayerische Motoren Werke AG

06 December 2022

1. Notice of a penalty

1.1 Pursuant to section 40A(9) of the Competition Act 1998 ('**CA98**') and section 112 of the Enterprise Act 2002 ('**EA02**'),¹ the Competition and Markets Authority (the '**CMA**') hereby gives notice of the following:

1.1.1 that on 6 December 2022 the CMA imposed a penalty on Bayerische Motoren Werke Aktiengesellschaft ('**BMW AG**') under section 40A CA98 (the '**Administrative Penalty**') because BMW AG has, without reasonable excuse, failed to comply fully with the requirements imposed on it by the CMA through a written notice issued on 1 April 2022 pursuant to section 26 CA98 (the '**Section 26 Notice**') requiring the provision of specified documents and information by 19 April 2022;

1.1.2 the Administrative Penalty is:

(a) a fixed amount of £30,000; and

(b) a daily rate of £15,000;

1.1.3 BMW AG is required to pay the fixed penalty amount in a single payment by close of banking business on 3 January 2023, by cheque or bank transfer, to an account specified to BMW AG by the CMA;

1.1.4 BMW AG may pay the fixed penalty amount earlier than the date by which it is required to be paid;

1.1.5 the daily penalty will start to accumulate on the day this penalty notice is served on BMW AG and, unless the CMA determines an earlier date, will cease to accumulate at the beginning of the earliest of:

(a) the day on which the requirements of the Section 26 Notice to produce specified documents and information initially sought by 19 April 2022 are satisfied; or

(b) the day on which the CMA makes a decision that the prohibition imposed by section 2(1) CA98 has been infringed or terminates its investigation without making such a decision;

1.1.6 BMW AG is required to pay the daily penalty amount in a single payment by close of banking business, by cheque or bank transfer, to an account specified to BMW AG by the CMA, no later than 28 days after the date on which the amount payable ceases to accumulate;²

¹ Section 112 EA02 applies by virtue of section 40A(9) CA98.

² Section 40A(7) CA98 sets out the various days on which the amount payable will cease to accumulate.

- 1.1.7 BMW AG may pay the daily penalty amount earlier than the date by which it is required to be paid;
- 1.1.8 pursuant to section 112(3) EA02, BMW AG has the right to apply to the CMA within 14 days of the date on which this notice is served on BMW AG for the CMA to specify different dates by which the fixed and daily penalties are to be paid;
- 1.1.9 pursuant to section 114 EA02, BMW AG has the right to apply to the Competition Appeal Tribunal against any decision the CMA reaches in response to an application under section 112(3) EA02, within the period of 28 days starting with the day on which BMW AG is notified of the decision;
- 1.1.10 pursuant to section 114 EA02, BMW AG has the right to apply to the Competition Appeal Tribunal within the period of 28 days starting with the day on which this notice is served on BMW AG in relation to:
 - (a) the imposition or nature of the Administrative Penalty;
 - (b) the amount or amounts of the Administrative Penalty; or
 - (c) the date or dates by which the Administrative Penalty is required to be paid; and
- 1.1.11 where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal against the decision, the CMA may recover the penalty and any interest which has not been paid. In England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA.

2. Factual background

- 2.1 On 15 March 2022, the CMA opened an investigation under section 25 CA98 into one or more suspected anti-competitive agreements or concerted practices between undertakings, and/or decisions by associations of undertakings, (the **‘Investigation’**), involving the BMW Group. The CMA has reasonable grounds to suspect that undertakings, including the BMW Group, and associations of undertakings, participate, or have participated, in anti-competitive coordination in breach of section 2 CA98 in relation to the take-back, dismantling and recycling of end-of-life vehicles (**‘ELVs’**) in the United Kingdom and that such anti-competitive arrangements have been in place since at least 2002. This includes suspected anti-competitive arrangements involving (i) vehicle manufacturers refraining from competing with respect to the use of recycled materials in the manufacture of new vehicles and to the recyclability and recoverability of vehicles when they reach the end of their life, including through limiting public statements on these issues; and (ii) vehicle manufacturers refraining from paying third parties to take back, dismantle and recycle ELVs. The CMA has reason to suspect that important aspects of the arrangements were agreed abroad before being implemented in the UK.³
- 2.2 On 1 April 2022 the CMA issued the Section 26 Notice to BMW (UK) Limited (**‘BMW UK’**), its ultimate parent company, BMW AG, and any other legal entities within the same undertaking (which were collectively referred to in the Section 26 Notice as the **‘BMW Group’**) specifying information and documents required to be produced pursuant to section 26 CA98. The Section 26 Notice required the BMW Group to provide a written outline of the steps taken to preserve documentation by 8 April 2022, and to provide specified documents and information by 19 April 2022.⁴ Additional specified documents and information were also required, with the CMA to specify the time and place for production at a later date. For the avoidance of doubt, the CMA has made no decision to impose a penalty in relation to the specified documents and information, the time and place for provision of which was to be provided at a later date. The consequences for the BMW Group and individuals of failing to comply with the production request (civil financial penalties) were set out in writing in the Section 26 Notice, as was the nature of the offences under sections 43 and 44 CA98 (for destroying or falsifying documents and providing false or misleading information respectively).
- 2.3 The lawyers representing BMW UK and BMW AG provided details of the steps that BMW Group had taken to preserve documentation as was required by 8 April 2022 of the Section 26 Notice. They also noted that BMW AG is the subject of a European Commission investigation in respect of ELVs and that BMW AG, as part

³ The European Commission has launched a parallel investigation into this matter.

⁴ Annex 1 of the Section 26 Notice contained two typographical errors stating this information was required by 8 April 2022. The correct date of 19 April 2022 was provided in the remainder of the correspondence.

of that investigation, had taken steps to identify and preserve documents for current and former employees. These employees were responsible for the recycling functions at BMW AG and had participated in relevant meetings of an industry association. In relation to UK individuals, the legal representatives indicated that BMW Group had taken certain steps to identify relevant individuals.

- 2.4 A conference call took place on 14 April 2022 between the CMA and BMW's legal representatives to discuss progress in relation to the Section 26 Notice. The legal representatives set out that BMW expected to provide the documents and information requested in questions 4 to 8 of the Section 26 Notice by the deadline of 19 April 2022. However, the legal representatives also stated BMW AG's position that the Section 26 Notice and any associated penalty could not be enforced against BMW AG as 'a company domiciled in Germany which does not have a branch in or operate in the UK' and sought explanation of the basis for the CMA's contrary position. The CMA said that this would be discussed in a planned conference call the following week.
- 2.5 On 19 April 2022, the BMW Group provided a response to the information requested under 'Category 2' of the Section 26 Notice. The response included answers to all of the 'Category 2' questions in so far as they related to BMW UK employees, but only partial answers in so far as they related to BMW AG employees.
- 2.6 A further conference call took place on 28 April 2022 between the CMA and BMW's legal representatives. The legal representatives stated that BMW AG did not have a firm position on responding to the Section 26 Notice due to the question around jurisdiction and may comply voluntarily. The CMA case team stated that the CMA would not be concerned if BMW wished to respond to the notice whilst reserving its position on this point. In response to reference to the case of *R (on the Application of KBR, Inc) v Director of the Serious Fraud Office*⁵ ('KBR'), the CMA case team explained its view that the specifics of the KBR case were different, and that KBR did not establish the jurisdictional scope of section 26 notices under the CA98. The CMA also noted that the CA98 applies to any arrangement which has been implemented in the UK. BMW's legal representatives indicated BMW AG was considering whether BMW AG would provide the documents and information requested in the Section 26 Notice voluntarily.
- 2.7 On 12 May 2022, BMW's legal representatives emailed the CMA and explained that, following prior concerns that the German Works Council may object to the provision of information under the Section 26 Notice, the Works Council and Data Protection Office had indicated they were willing to approve a targeted search over the documents of individuals who had been involved in the relevant matters.

⁵ [2021] UKSC 2.

BMW's legal representatives noted that BMW AG continued to reserve its legal position in respect of jurisdiction.

- 2.8 BMW's legal representatives stated in an email dated 20 May 2022 that BMW AG was continuing to engage with its data protection law advisers as regarded the provision of information requested in the Section 26 Notice under 'Category 2' and would provide an update early in the following week.
- 2.9 On 24 May 2022, BMW's legal representatives wrote to the CMA to state that BMW AG would not be responding further to the Section 26 Notice on the basis that BMW AG had been advised that the CMA does not have the power to require BMW AG (a company domiciled in Germany) to respond to section 26 notices and that BMW AG would risk breaching its obligations under German and European data protection law by providing additional information to the CMA. On the same day, the legal representatives sent another email to the CMA to state that BMW UK would continue to cooperate fully in the investigation including by responding to section 26 notices but noting that BMW UK does not have the right to call on documents from BMW AG. On 6 September 2022, BMW UK provided a response to the information and documents requested under 'Category 3' of the Section 26 Notice, consisting of 128 documents.
- 2.10 On 27 May 2022, the CMA wrote to BMW's legal representatives noting that the deadline to produce certain information and documents requested through the Section 26 Notice had passed and stating that it would expect BMW AG to explain in writing the reason for its failure to comply with the Section 26 Notice but making the CMA team available for a call as suggested by BMW's legal representatives.
- 2.11 A conference call between BMW's legal representatives and the CMA took place on 14 June 2022 during which the legal representatives requested that the Section 26 Notice be withdrawn in respect of BMW AG, on the basis that it was unlawful. BMW's legal representatives stated that although BMW AG had taken steps to preserve all material that might be potentially relevant to the Section 26 Notice, it did not consider voluntary compliance as a viable option. The CMA noted that in order to consider its position and next steps it needed to understand whether BMW AG had a reasonable excuse for not responding to the Section 26 Notice. The legal representatives explained the reasons why BMW AG considered that the Section 26 Notice was unlawful, referring to general principles of extraterritorial effect and KBR. The legal representatives also stated that the reason for BMW AG not responding to the Section 26 Notice was based on its position that the CMA lacked jurisdiction to issue it and not on data protection concerns, which were considered a secondary issue.
- 2.12 On 22 June 2022, BMW's legal representatives sent a letter to the CMA stating, again, that BMW AG would not respond to the Section 26 Notice. It referred to KBR and indicated that in its view that case was materially identical to the

circumstances of BMW AG. BMW's legal representatives indicated in the letter that BMW AG's view was that the Section 26 Notice should be issued to a person, not to an undertaking, and again invited the CMA to withdraw the Section 26 Notice on the basis it was *ultra vires*. The legal representatives also reiterated that BMW AG would not be responding to the Section 26 Notice until the legal question of whether the CMA had the power to require BMW AG to respond had been resolved.

- 2.13 On 4 August 2022, the CMA wrote to BMW's legal representatives. It stated that the Section 26 Notice required production by the BMW Group and thus required all legal entities forming part of that undertaking to produce the specified documents and information. The CMA pointed out that 'person' in section 26 CA98 extends to undertakings. The CMA referred BMW's legal representatives to section 59 CA98. Section 59 CA98 is headed 'Interpretation Part 1' and states that in Part 1 the word 'person' in addition to the meaning given by the Interpretation Act 1978 includes 'any undertaking'. The CMA also set out its position that the reasoning in KBR does not apply as the jurisdictional issue addressed in that case does not arise in these circumstances where the BMW Group to whom the Section 26 Notice is addressed is present in the United Kingdom. The CMA also set out the consequences of not complying with the Section 26 Notice under section 40A CA98.
- 2.14 On 19 October 2022, the CMA wrote to BMW's legal representatives informing them that the CMA was proceeding to prepare a provisional penalty notice to impose administrative penalties under section 40A CA98 and seeking confirmation whether the legal representatives were instructed to accept service of any provisional and final penalty notice on the BMW Group.
- 2.15 BMW's legal representatives responded on 25 October 2022 setting out that given BMW AG's position that the CMA lacks *vires* to issue it with the Section 26 Notice, it also considered the CMA to lack *vires* to impose an administrative penalty for failure to comply fully with the Section 26 Notice. The legal representatives also sought clarification in respect of the entity on behalf of whom the CMA sought confirmation of its instructions to accept service, noting that the BMW Group is not a legal person capable of entering into contractual relations.
- 2.16 Following a conference call between the CMA and BMW's legal representatives on 27 October 2022 to discuss the content of the letters of 19 and 25 October 2022, the CMA wrote again to BMW's legal representatives on 28 October 2022. The CMA noted its disagreement with BMW AG's position with respect to *vires* and confirmed that the CMA was seeking confirmation whether the legal representatives were instructed to accept service of any provisional and final penalty notice on behalf of BMW AG.

2.17 On 2 November 2022 BMW's legal representatives wrote to the CMA confirming they had 'instructions to accept service of a provisional penalty notice on behalf of BMW AG (so that BMW AG can understand and respond to its content which is currently unknown) subject to the CMA's agreement that: (a) this is without prejudice to BMW AG's right to challenge whether a provisional penalty notice can be validly served; and (b) this does not prejudice BMW AG's position in respect of any final penalty notice'. As BMW's legal representatives had not provided unequivocal confirmation of instructions to accept service, the provisional penalty decision was issued directly to BMW AG.

3. The CMA's provisional decision

- 3.1 Following careful consideration of all the relevant circumstances of the case and having regard to *Administrative penalties: Statement of Policy on the CMA's Approach* (CMA4, the '**Guidance**'), the CMA provisionally concluded that BMW AG had, without reasonable excuse, failed to comply with a requirement imposed on it under section 26 CA98 and that it was appropriate in this case to impose a penalty on BMW AG. In accordance with paragraph 5.2 of the Guidance, on 4 November 2022 the CMA gave BMW AG notice of its intention to impose a penalty under section 40A CA98 including the reasons, proposed approach and the nature and level of the proposed penalty (the '**Provisional Decision**'). The CMA informed BMW AG that should it wish to make representations on the Provisional Decision, such representations should be submitted by 5pm on 11 November 2022.

4. BMW AG's representations

- 4.1 On 11 November 2022, BMW's legal representatives wrote to the CMA in response to the Provisional Decision setting out BMW AG's representations on the Provisional Decision (the '**Representations**').
- 4.2 The CMA has carefully considered the Representations. The Representations included the following submissions in relation to the Provisional Decision and the reasoning for it:
- 4.2.1 'The CMA is acting *ultra vires* in seeking to require a company incorporated and situated entirely outside of the UK jurisdiction to produce information and documents located outside of the jurisdiction under section 26 CA98'. The Representations repeated BMW AG's position that issuing it with the Section 26 Notice was 'inconsistent with the well-established principles of English statutory construction that legislation does not have extraterritorial effect absent express provision to the contrary and with the judgment of the Supreme Court' in KBR. Further, the Representations stated that '[t]he presumption against extraterritorial effect is supported by the fact that the power under section 26 CA98 was originally backed by criminal sanctions'.
- 4.2.2 BMW AG also submitted '...that prior to Brexit, there were reciprocal arrangements in place which allowed the CMA to obtain information and evidence from other competition authorities in respect of foreign-domiciled entities. It would be unusual and unnecessary for those reciprocal arrangements to have been entered into if Parliament had intended the CMA's evidence gathering powers under the CA98 to have extraterritorial application'.
- 4.2.3 The Representations stated that as the CMA does not have *vires* to issue BMW AG with the Section 26 Notice, it does not have *vires* to impose a penalty under section 40A CA98 in respect of non-compliance with the Notice.
- 4.2.4 '... the CMA is also acting *ultra vires* in seeking to impose a penalty under section 40A CA98 on a company domiciled outside the UK. In the absence of express provision to this effect, section 40A, like section 26, does not have extraterritorial application'.
- 4.2.5 'BMW AG has a "reasonable excuse" for not responding to the Section 26 Notice'.
- (a) The Representations state that the issue of whether the CMA can exercise its powers under section 26 or section 40A CA98 is one of

significant legal uncertainty and there is a reasonable basis for BMW AG's position that the CMA does not have *vires* to exercise these powers outside the UK. Further, that BMW AG is 'exercising its legal right to challenge the scope of the CMA's powers'.

- (b) The Representations 'note that the disputed point of law with respect to the CMA's power to issue a section 26 notice to a company domiciled overseas is currently the subject of a judicial review application' brought by another subject of the Investigation, and that 'any judgment in that application will be highly material to this case'.
- (c) The Representations further state that 'complying fully with the Section 26 Notice would put BMW AG at serious risk of breaching its obligations under German and European data protection law if its interpretation of the extraterritorial scope of the CA98 is correct. Until the law on this point is judicially determined, BMW AG therefore cannot respond to the Section 26 Notice' (emphasis in the original).

4.2.6 The imposition of a daily penalty is disproportionate and excessive in the circumstances of the case.

- (a) The Representations state that the imposition of a daily penalty seeks 'to discourage BMW AG from exercising its right to challenge the CMA's legal position by appealing the penalty - effectively denying BMW AG's access to justice' and would 'penalise BMW AG for the length of time that it would take the Competition Appeal Tribunal ('CAT') to list a hearing of the appeal and deliver judgment on the legal point in dispute regarding the *vires* of the CMA' (emphasis in the original).

4.2.7 The imposition of the maximum available fixed penalty is disproportionate and excessive in the circumstances of the case.

- (a) The Representations state that 'BMW AG has engaged with the CMA throughout the process ... and explained the legal basis for its position. In addition, BMW AG has confirmed that document preservation measures are in place and that it will respond fully to the Section 26 Notice if the legal position is resolved in the CMA's favour'.
- (b) The Representations state that imposing the maximum available fixed penalty provides 'no scope to impose a greater penalty in respect of truly egregious conduct - for instance, deliberate and wilful concealment or destruction of documents'.
- (c) The Representations dispute that the present absence of documents from BMW AG has '*potential for significant harm to the CMA's*

investigation'. The Representations state that 'the only "harm" to the CMA's investigation that could possibly result from BMW AG's position would be a delay to allow a court to resolve this matter' either in the ongoing judicial review (referred to at paragraph 4.2.5 (b) above) or in any challenge brought by BMW AG. The Representations further state 'If the CMA had real concerns that such a delay would cause significant harm to its investigation, we would have expected it to act more quickly in taking action against BMW AG'.

4.2.8 The CMA is not affording BMW AG equal treatment with other subjects of the Investigation.

(a) The Representations submit that BMW AG understands that the CMA has not imposed a penalty on another subject of the Investigation taking the same position as BMW AG in respect of notices issued under section 26 CA98. The Representations state 'It would be entirely inequitable to treat BMW AG differently by imposing a penalty on BMW AG for not responding to the Section 26 Notice on precisely the same basis as' another subject of the Investigation who has not received a penalty.

4.3 Following the Provisional Decision and the Representations, the CMA has considered further whether the imposition of an administrative penalty of a fixed amount of £30,000 and a daily rate of £15,000 is appropriate in this case and sets out its reasoning in this regard at paragraphs 5.21 to 5.28 below.

4.4 In accordance with paragraphs 5.2 and 5.9 of its Guidance, the CMA's General Counsel's Office has been consulted on the reasons for the proposed approach to and the level of the Administrative Penalty.

5. Legal assessment

- 5.1 Section 40A CA98 provides that where the CMA considers that a person has, without reasonable excuse, failed to comply with a requirement imposed on the person under section 26 CA98, it may impose a penalty of such amount as it considers appropriate.
- 5.2 The CMA concludes that the statutory requirements for imposing a penalty under section 40A CA98 are met (see paragraphs 5.3 to 5.13 below) and that the imposition of a fixed penalty of £30,000 and a daily rate of £15,000 is appropriate and proportionate in this case (see paragraphs 5.21 to 5.28 below).

Statutory requirements for imposing a penalty under section 40A

- 5.3 BMW AG is a person within the meaning of section 40A(1) and section 59(1) CA98 and has failed to comply with a requirement imposed on it by the Section 26 Notice. As set out above, it is not disputed that BMW AG has not fully responded to the Section 26 Notice.
- 5.4 For the reasons set out below the CMA considers that BMW AG has no reasonable excuse for the failure to respond fully to the Section 26 Notice.
- 5.5 The CMA does not agree with BMW AG's contention that the Section 26 Notice is *ultra vires* and that the CMA does not have jurisdiction to require information from BMW AG. The CA98 makes clear that a section 26 notice may be issued in respect of an undertaking, and not merely a legal person. As an undertaking, the BMW Group therefore is a 'person' for the purposes of section 26 of the Act within the meaning given to that term in section 59 of the Act, and BMW AG forms part of that undertaking. The obligation on the undertaking to comply with the Section 26 Notice encompasses all legal persons forming part of the undertaking. Further, the BMW Group undertaking is present in the United Kingdom through BMW UK. That being so, the issue of extraterritoriality does not arise.
- 5.6 In any event, whether or not the BMW Group is present in the United Kingdom, the CMA is of the view that the Section 26 Notice is not *ultra vires* because section 26 of the Act has extraterritorial application. The CMA considers that Parliament's intention to give extraterritorial effect to section 26 CA98 is implied by the scheme, context and subject matter of the CA98. In particular, the extraterritorial application of that section is necessary in order to align the CMA's investigatory powers with its powers to enforce the prohibition set out at section 2 CA98. These enforcement powers apply to any undertaking, wherever situated, if its conduct may affect trade in the United Kingdom, has as its object or effect the prevention, restriction or distortion of competition in the United Kingdom, and is or was implemented, or intended to be implemented, in the United Kingdom. Without the extraterritorial

application of section 26 CA98, the purpose of the CA98 could not effectually be achieved.

- 5.7 Nor does the CMA agree with BMW AG's submission that the CMA's statutory powers fall to be construed with reference to former provisions for criminal penalties or arrangements for practical co-operation with Member States of the EU which applied prior to the UK's exit from the European Union. First, the position at common law is that a repealed enactment (in this case a section or part of a section of the CA98) is to be treated as if it never existed. Second, the fact that, prior to EU Exit, the CMA may have been able to avail itself of the cooperation mechanisms of the European Competition Network does not demonstrate that section 26 CA98 does not empower the CMA to require undertakings that are wholly or partially based outside the UK to produce documents and information which the CMA considers relate to any matter relevant to an investigation.
- 5.8 On the basis that the Section 26 Notice applies to BMW AG, the CMA considers that it follows that the statutory scheme to impose a penalty also applies to BMW AG. Construing the legislation as a whole, section 40A CA98 applies to entities which are required to comply with a request under section 26 CA98. Further, the CMA notes that the statutory provisions which apply to the application and enforcement of section 26 (including section 126 EA02) envisage enforcement against overseas companies.
- 5.9 In the circumstances, the CMA does not agree with BMW AG's contention that the CMA lacks the *vires* to impose a penalty on BMW AG under section 40A CA98.
- 5.10 As regards BMW AG's arguments based on legal uncertainty, for the reasons given in paragraphs 4.2.5, the CMA considers that the meaning and effect of the legislative scheme are clear. BMW AG's reliance on authority does not address the distinct position under CA98 under which investigatory and enforcement action may be taken against undertakings, as distinct from individual companies. The CMA does not consider that BMW AG's disagreement with those arguments (nor the arguments made by another entity in separate proceedings) is of itself indicative of legal uncertainty, nor does it agree that the applicable legal provisions are unclear. BMW AG is entitled to take a position as to the meaning of the applicable legislation, but to the extent that its view is incorrect, it follows that BMW AG has failed to comply with a mandatory legal requirement without any lawful basis.
- 5.11 Further, it is not correct to say that BMW AG is exercising a legal right to challenge the CMA. No legal proceedings by BMW AG seeking to challenge the CMA's *vires* to issue the Section 26 Notice have been served on the CMA. BMW AG has merely prepared correspondence and representations seeking to dissuade the CMA from imposing any penalty. BMW AG must have appreciated that if those representations were rejected, as they have been, it was at risk that a penalty

would be imposed. Indeed, BMW AG was repeatedly reminded by the CMA in correspondence of the potential consequences of failing to comply with the Section 26 Notice, and on 19 October 2022 was put on notice of the CMA's intention to issue a provisional penalty notice.

- 5.12 Whilst the CMA acknowledges that there is an ongoing judicial review challenging its *vires* to issue a notice under section 26 CA98 to a company incorporated and situated outside of the UK, the mere fact of those proceedings having been brought by another subject of the Investigation, which are presently at pre-permission stage, is not sufficient to establish that this is an area of legal uncertainty.
- 5.13 Lastly, the CMA is not persuaded by BMW AG's contention that 'complying fully with the Section 26 Notice would put BMW AG at serious risk of breaching its obligations under German and European data protection law'. This is predicated on BMW AG's contention that the CMA does not have jurisdiction under section 26 CA98 to require information from BMW AG. As acknowledged by BMW AG in the Representations '...BMW AG was able to obtain approval from the Works Council to carry out a targeted search in relation to the Section 26 Notice but that approval was subject to the CMA having the power to require BMW AG to carry out such a search'. However, 'BMW AG concluded that the CMA did not have the power to require it to respond to the Section 26 Notice. On that basis, BMW AG would risk breaching its obligations under German and European data protection law by providing additional information to the CMA'. For the reasons set out in paragraphs 5.5 to 5.7, the CMA does not accept that the Section 26 Notice is *ultra vires* and for that reason also does not accept that data protection law precludes BMW AG from complying with the Section 26 Notice. Further, the CMA observes that BMW AG has not, to its knowledge, sought alternative avenues of compliance with German and European data protection law, such as seeking informed consent from relevant individuals.

Potential for harm and delay

- 5.14 The CMA notes the confirmation from BMW AG that documents and information that fall within the scope of the Section 26 Notice have been preserved in order for provision in circumstances where the CMA's *vires* to issue the Notice is confirmed by a competent Court or Tribunal. However, the CMA considers that the BMW Group is likely to hold information and documents, in addition to those provided by BMW UK, that are highly relevant to the facts under investigation. This is because the CMA suspects that important aspects of relevant arrangements implemented in the UK were agreed abroad. In particular, the CMA suspects that relevant discussions and meetings took place involving individuals employed by BMW AG (or its non-UK subsidiaries) under the auspices of a European trade association of which the BMW Group was a member. The CMA therefore considers that relevant information is likely to be held by individuals employed by BMW AG (or its non-UK

subsidiaries).⁶ In these circumstances, the CMA anticipates that the delay in providing the documents and information will have an adverse impact on the Investigation, which involves several subjects. The extent of the adverse impact is difficult to assess in the absence of specified information and documents from the entirety of the BMW Group, and whilst receipt of specified information and documents from other subjects of the Investigation is continuing.

- 5.15 Further, in the circumstances of this investigation BMW AG's failure to provide all of the information sought in the Section 26 Notice by 19 April 2022 also prevented the CMA from progressing to determining a methodology for the provision of information and documents requested under 'Category 3' of the Section 26 Notice and setting a date for the production of such documents and information. We therefore do not accept that BMW AG's preservation of the material mitigates the harm to the CMA's investigation. The CMA cannot progress its investigation as it considers necessary and appropriate until the requested information is received. BMW AG's decision to withhold the information is accordingly a direct constraint on the progress of the Investigation. Nor has BMW AG taken positive or proactive steps to enable its legal arguments to be resolved in order that delay to the Investigation be avoided or mitigated.
- 5.16 The CMA does not accept BMW AG's contention that the time taken to impose the Administrative Penalty suggests that no significant harm may result from a delay in provision of the information and documents pending a court decision on the matter of the CMA's *vires*.
- 5.17 The CMA notes that there is no statutory time limit for imposition of an administrative penalty under section 40A CA98. In any event the CMA does not accept that there has been undue delay in imposing the Administrative Penalty.
- 5.18 First, the CMA has finite resources allocated to the Investigation, and, in parallel to making the decision to impose the Administrative Penalty on BMW AG, the CMA was also preparing its response to the judicial review proceedings brought by another subject of the Investigation, as well as progressing what is a large and complex investigation including by considering information and documents provided by other subjects.
- 5.19 Second, as set out in paragraphs 2.3 to 2.17, the CMA has since April 2022 engaged in extensive discussions and correspondence with BMW's legal representatives. Throughout, the CMA has carefully considered, and responded to, a variety of points made by BMW's legal representatives in various written and oral submissions. The CMA then put BMW on notice of its intention to issue a

⁶ In paragraph 5 of its submission of 19 April 2022, BMW explained that 'a specialist recycling function within BMW AG, known as [REDACTED], has holistic responsibility for BMW Group recycling matters and strategy including ELVs. This team is also responsible for BMW's implementation of applicable ELV regulation including the creation and publication of legally required recycling information. Members of this team are also responsible for overseeing the recycling strategy and its implementation in specific markets, including the UK'.

provisional penalty decision (see paragraph 2.14), and subsequently proceeded to issue the Provisional Decision in accordance with its Guidance and provided BMW AG with an opportunity to make representations. The fact that the CMA has (i) engaged with submissions made by BMW's legal representatives and explained why BMW AG is required to comply with the Section 26 Notice and (ii) followed processes designed to safeguard the procedural rights to which BMW AG is entitled does not suggest that no significant harm results to the Investigation from BMW AG's ongoing refusal to comply with the Section 26 Notice.

Equality of treatment

5.20 The CMA does not accept BMW AG's representation that the CMA is treating BMW AG differently from the subject of the Investigation which has challenged the CMA's *vires* to require it to produce information and documents under section 26 CA98 by way of an application for judicial review. In particular, BMW AG has not sought to challenge the CMA's *vires* to issue the Section 26 Notice before a competent judicial body. BMW AG is therefore clearly in a different position.

The appropriateness of imposing the Administrative Penalty

5.21 Having had regard to its statutory duties and the Guidance, and having carefully considered the Representations, the CMA considers that the imposition of a fixed penalty of £30,000, and a daily rate of £15,000 is appropriate and proportionate in this case.

5.22 The CMA considers that the imposition of a daily penalty alongside a fixed penalty is necessary to incentivise prompt compliance with the Section 26 Notice, so that the Administrative Penalty imposed on BMW AG is directly related to the time it takes the BMW Group to comply fully with the request.

5.23 The CMA does not agree that imposing a daily penalty has the effect of discouraging BMW AG from exercising its right of appeal against the Administrative Penalty. The CMA notes that, whilst the relevant legislation does not provide for suspension of accrual of the daily rate, it would be open to BMW AG, when lodging an appeal, to make an application for the Competition Appeal Tribunal to vary the imposition of the Administrative Penalty whilst an appeal is ongoing, including a stay of the accrual of a daily penalty. Further, the CMA notes that BMW AG has significant financial resources. BMW AG is the ultimate parent company of the BMW Group, whose BMW Group Report 2021 indicated a worldwide turnover of €111,239m.⁷ The CMA therefore does not consider that accrual of a daily penalty at the level of the maximum permitted under the legislative scheme for the duration of any appeal will cause financial disadvantage to BMW AG or deter BMW AG from seeking to test points of law before the courts.

⁷ [BMW-Group-Report-2021-en.pdf \(bmwgroup.com\)](#)

- 5.24 The CMA also does not agree that imposing the maximum fixed penalty is disproportionate and excessive. With respect to BMW AG's representation that imposing the maximum fixed penalty allows 'no scope to impose a greater penalty in respect of truly egregious conduct - for instance, deliberate and wilful concealment or destruction of documents', the CMA notes that such conduct is a criminal offence under section 43 CA98.
- 5.25 The CMA further refers to the Guidance which sets out at paragraph 4.11 that '[t]he CMA will assess all the relevant circumstances of the case in the round in order to determine a penalty that is reasonable, appropriate and thus proportionate in the circumstances. The CMA is likely to set penalties towards the upper end of the relevant statutory maxima for the most serious failures to comply and/or where it is necessary to do so having regard to P's size and financial position'.
- 5.26 In this case the CMA has had regard to:
- 5.26.1 **The intentional nature of the breach** - BMW AG is aware of the requirement imposed on the BMW Group to produce documents relevant to the CMA's investigation (as specified in the Section 26 Notice); the obligation was clearly set out in the notice and there was communication with the CMA and BMW AG's legal representatives prior to the breach. BMW AG's decision not to comply fully with the Section 26 Notice, as the ultimate parent company of the BMW Group, has frustrated the purpose of the Section 26 Notice to effect the production of information and documents relevant to the CMA's investigation.
- 5.26.2 **The potential for significant harm to the CMA's investigation** - Failing to provide information and documents pursuant to the Section 26 Notice has the potential fundamentally to undermine the purpose of the notice, leave the CMA with an incorrect or incomplete understanding of the facts, and may mean that the CMA is ultimately unable to take effective enforcement action. This is dealt with in detail at paragraphs 5.14 to 5.19 above.
- 5.26.3 **Continuation or cessation of the failure** - The BMW Group has not complied fully with the notice and continues in its non-compliance. With the exception of documents and information provided by BMW UK, the information and documents requested have not been provided to the CMA within the deadlines set out in the Section 26 Notice. Since BMW AG's legal representatives' letter on 24 May 2022 indicating BMW AG will not be responding to the notice, BMW AG has continued to maintain this position.
- 5.27 The CMA has additionally had regard to the size of, and administrative and financial resources available to BMW AG, when deciding the appropriate penalty to

impose. As set out at paragraph 5.23 a fixed penalty of £30,000 and a daily rate of £15,000 is reasonable in the light of BMW AG's significant size and financial position. On the contrary, the CMA considers that any lower level of fine would fail to have a sufficient deterrent effect on BMW AG and also more generally on other businesses who may be subject to similar requests for information.

- 5.28 Considering the factors listed at paragraphs 5.26 in the round, the CMA has therefore concluded that a fixed penalty of £30,000 and a daily rate of £15,000 is appropriate and proportionate in this case.

Juliette Enser

Senior Responsible Officer

6 December 2022

Competition and Markets Authority