Neutral Citation Number: [2023] EWCA Civ 1506

Case No: CA-2023-000581 & CA-2023-000582

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION (ADMINISTRATIVE COURT)
MR JUSTICE MARCUS SMITH
CO/2721/2022

AND ON APPEAL FROM
THE COMPETION APPEAL TRIBUNAL
MR JUSTICE MARCUS SMITH, MICHAEL CUTTING & TIM FRAZER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2024

Before :

THE CHANCELLOR OF THE HIGH COURT
(Sir Julian Flaux)
LORD JUSTICE COULSON
and
LORD JUSTICE GREEN

- -

Between :

000581	**Competition and Markets Authority**	**Defendant / Appellant**
	- and -	
	Rex on the application of Volkswagen Aktiengesellschaft	**Claimant / Respondent**
	&	
000582	**Competition and Markets Authority**	**Appellant**
	- and -	
	Bayerische Motoren Werke AG	**Respondent**

- -
- -

Marie Demetriou KC, Tristan Jones & Richard Howell (instructed by **CMA Legal Service**) for the **Appellant**
Brian Kennelly KC & Jason Pobjoy (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Respondent Volkswagen Aktiengesellschaft**
Sarah Abram KC & Andrew McIntyre (instructed by **Norton Rose Fulbright LLP**) for the **Respondent Bayerische Motoren Werke AG**

Hearing dates: Wednesday 1st & Thursday 2nd November 2023

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Approved Judgment

This judgment was handed down remotely at 12 noon on Wednesday 17th January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Julian Flaux, Chancellor of the High Court, Lord Justice Coulson, Lord Justice Green:

A. Introduction

1. This is the judgment of the Court. The appeal is from the single judgment of 8th February 2023 ("*the Judgment*") of the Competition Appeal Tribunal ("*CAT*") and the High Court (collectively *"the Court"*). Permission to appeal was given by the Court. Both proceedings raise the same issue of statutory construction and were joined for hearing and judgment. The facts concern statutory notices served by the Competition and Markets Authority ("*CMA*") on German parent companies, their indirect subsidiaries in the UK, and any other legal entities forming part of the same "*undertaking*", to produce documents and information relating to an alleged cartel. The notices were challenged by the German parent companies and were set aside by the Court. The CMA appeals. Bayerische Motoren Werke AG (*"BMWAG"*), and Volkswagen Aktiengesellschaft (*"VWAG"*) are respondents to the appeal. Two main issues arise.

2. The first is whether the powers of investigation and enforcement available to the CMA under Part I Competition Act 1998 ("*CA 1998*") can be exercised extraterritorially i.e. against entities physically located outside the UK. This raises an issue of statutory interpretation of section 26 CA 1998 which confers a power on the CMA to issue a notice to "*any person*" requiring them to provide information and evidence. The Court held that notwithstanding the ostensible breadth of section 26 it was to be construed as precluding extraterritorial effect and the notice could only be served upon a natural or legal person or entity with a connection to the territory of the UK. The result of this was that the CMA had no power to serve the notices upon the German parent companies.

3. The second concerns the phrase "*undertaking*" in Part I CA 1998. The expression "*any person*" in section 26 is defined by section 59(1) to include an "*undertaking*". This is a well understood phrase and relates to an economic entity or unit comprising all of the natural and legal entities within the unit. According to long established case law an undertaking has joint and several liability and responsibility for compliance with private and public and regulatory obligations for all its component entities. In this case, the UK subsidiaries say that they have no access to the information and evidence sought because, in traditional company or contract law terms, they have no power to compel production from other entities in the wider undertaking. The Court agreed and held that the CMA had legal power only to serve upon entities with a connection to the UK and even then, such entities were required only to provide information and evidence in their possession or over which they had legal control. The effect was to preclude the CMA from being able to compel production of documents or other material held abroad even where it was able to serve a notice upon an entity with a sufficient connection to the UK.

B. Legal Framework

4. There are a number of statutory provisions relevant to this appeal.

Section 2 CA 1998 – The Chapter I Prohibition

5. Section 2(1) CA 1998 prohibits "*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 as the "*Chapter I prohibition*" and it is concerned with the control of anti-competitive cartels and other collusive arrangements.

Section 18 CA 1998 – The Chapter II Prohibition

6. Section 18 CA 1998 prohibits "*any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position*", where that conduct "*may affect trade within the United Kingdom*". This is referred to as the "*Chapter II prohibition*".

Section 25 CA 1998: Power of the CMA to investigate

7. Section 25 CA 1998, entitled "*Powers of CMA to investigate*", empowers the CMA to conduct investigations where it has "*reasonable grounds*" for suspecting that the Chapter I and/or Chapter II prohibitions have been infringed. Section 25, in material part, provides:

> "(1) In any of the following cases, the CMA may conduct an investigation.
>
> (2) The first case is where there are reasonable grounds for suspecting that there is an agreement which—
>
> (a) may affect trade within the United Kingdom; and
>
> (b) has as its object or effect the prevention, restriction or distortion of competition within the United Kingdom.
>
> …
>
> (4) The third case is where there are reasonable grounds for suspecting that the Chapter II prohibition has been infringed.
>
> …
>
> (6) The fifth case is where there are reasonable grounds for suspecting that, at some time in the past, there was an agreement which at that time—
>
> (a) may have affected trade within the United Kingdom; and
>
> (b) had as its object or effect the prevention, restriction or distortion of competition within the United Kingdom.
>
> ….
>
> (12) It is immaterial for the purposes of subsection (6) whether the agreement in question remains in existence.

Section 25A CA 1998 – Power of the CMA to publish notice of investigation

8. Section 25A, entitled "*Power of CMA to publish notice of investigation*" empowers the CMA, where it decides to conduct an investigation, to publish a notice which indicates and summarises the matter being investigated and identifies any undertaking whose activities are being investigated as part of the investigation. At the conclusion of an investigation, the CMA may decide that the prohibitions have been infringed. In such a case, the CMA must give written notice to the person(s) likely to be affected by the proposed decision and provide them with a chance to make representations (see section 31 CA 1998). Where the CMA makes a decision, it may give directions to such person(s) to bring the infringement to an end (see sections 32 and 33 CA 1998). If a person fails without reasonable excuse to comply with such a direction, the CMA may apply to the appropriate court to compel compliance (see section 34 CA 1998). The CMA may also impose a financial penalty provided it is satisfied that the infringement has been committed intentionally or negligently (see section 34 CA 1998).

Section 26 CA 1998: Investigations: powers to require documents and information

9. To allow the CMA to effectively conduct investigations, Parliament enacted various powers of investigation which include Section 26 CA 1998, the provision at the heart of this appeal.

10. Section 26, entitled "*Investigations: powers to require documents and information*" gives the CMA the power to require the production of documents or information by "*any person*" for the purposes of an investigation. This provides as follows:

> "(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 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."

Section 59 CA 1998 and the Interpretation Act 1978 – the definition of "person"

11. Section 26 empowers the CMA to require "*any person*" to produce to it a specified document. A "*person*" is defined under section 59(1) CA 1998 which is drafted to include an "*undertaking*":

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

12. No definition of "*undertaking*" is provided. Section 5 of the Interpretation Act 1978 states:

> "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."

Pursuant to Schedule 1 a "*person*" is defined as including "*a body of persons corporate or unincorporate*." The combined effect of section 59(1) and Schedule 1 is to define "*person*" as:

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

Penalties

13. Pursuant to section 40A CA 1998, entitled "*Penalties: failure to comply with requirements*", the CMA has the power to impose a "*penalty*" upon "*a person*" who "*without reasonable excuse"* fails to comply with a section 26 notice. It follows from the statutory definition of "*a person*" that a penalty may be imposed upon an "*undertaking*":

> "(1) Where the CMA considers that a person has, without reasonable excuse, failed to comply with a requirement imposed on the person under section 26, 26A, 27, 28 or 28A it may impose a penalty of such amount as it considers appropriate.

> (2) The amount may be—
>
> (a) a fixed amount,
>
> (b) an amount calculated by reference to a daily rate, or
>
> (c) a combination of a fixed amount and an amount calculated by reference to a daily rate.
>
> (3) A penalty imposed under subsection (1) must not—
>
> (a) in the case of a fixed amount, exceed such amount as the Secretary of State may by order specify;
>
> (b) in the case of an amount calculated by reference to a daily rate, exceed such amount per day as the Secretary of State may so specify;
>
> (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, exceed such fixed amount and such amount per day as the Secretary of State may so specify.
>
> (4) The fixed amount specified for the purposes of subsection (3)(a) or (c) may not exceed £30,000.
>
> (5) The amount per day specified for the purposes of subsection (3)(b) or (c) may not exceed £15,000."

14. In addition, the CA 1998 creates criminal offences in relation to section 26. Sections 43 and 44 create offences liable to summary conviction and/or conviction on indictment for "*destroying or falsifying documents*" (section 43) or providing "*false or misleading information*" (section 44) if required to produce documents under, *inter alia,* section 26 CA 1998.

C. Factual background

15. The facts can be summarised as follows.

The CMA Investigation

16. BMWAG and VWAG, the respondents, are incorporated in Germany and have no UK branch or office. However, both own and control indirect subsidiaries incorporated in the UK: Volkswagen Group United Kingdom Limited (*"VWUK"*), and BMW (UK) Limited (*"BMWUK"*). The CMA alleges that VWUK and BMWUK form part of an "*undertaking*" with their respective parent companies for the purpose of the CA 1998. On 15th March 2022, the CMA commenced an investigation under section 25 CA 1998 into suspected anti-competitive agreements by vehicle manufacturers and trade associations. This related to the take-back, dismantling and recycling of end-of-life cars or vans in the UK ("*end-of life vehicles"*). The CMA suspects that both the VWAG and BMWAG undertakings were party to a cartel. It believes that certain important aspects of the cartel were "*agreed abroad before being implemented in the UK*". The European

Commission commenced a parallel investigation on the same date. Both the CMA and European Commission investigations are continuing.

BMW

17. On 15th March 2022, the same day as the investigation commenced, the CMA sent a letter addressed to BMWUK and BMWAG stating that it had launched the above investigation. On 1st April 2022, the CMA issued a section 26 notice requiring production of certain documents and information. The notice is a detailed document. It requires production of evidence and information relating to such matters as the identities of persons involved with the product in question, notes, minutes and records of meetings relating to the alleged cartel, and communications both before and after such meetings between relevant personnel. It was addressed to: "*BMW (UK) Ltd and Bayerische Motoren Werke AG and any other legal entities within the same undertaking (together, "BMW Group")*".

18. The body of the Notice stated:

> "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 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."

19. BMWUK and BMWAG stated that they would take steps to ensure that potentially relevant documents were preserved.

20. BMWUK purported to comply with the request. It stated, however, that it did "*…not have the ability to access or call for any documents held by BMWAG or any other group company domiciled outside of the UK that are the subject of the Section 26 Notice.*"

21. On 24th May 2022, BMWAG wrote to the CMA stating that it would not be responding further because it had been advised that the CMA did not have the power to require it to respond. It added that voluntary compliance was neither cost nor risk-free, because in so doing it risked breaching its obligations under German and EU data protection law.

22. On 4th November 2022, the CMA issued a provisional penalty notice pursuant to section 40A CA 1998 addressed to BMWAG. The company provided comments on the provisional penalty notice by the requested deadline of 11th November 2022. On 6th December 2022, the CMA issued a penalty notice, addressed to BMWAG which was sent to Dr Huett, a lawyer employed by BMWAG. The notice recorded the imposition of an "*Administrative Penalty*" of a fixed amount of £30,000 and a penalty of £15,000 to be paid on a daily basis pending compliance. In paragraphs [5.3] – [5.6] the CMA summarised its legal position on the central issues of extraterritoriality and joint and several responsibility:

> "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."

23. By Notice of Appeal dated 16th December 2022 BMWAG appealed the imposition of the penalty to the CAT on the basis that section 26 notices do not have extraterritorial effect. BMWUK was not a party to the appeal.

VW AG

24. On 15th March 2022 the CMA, exercising powers under section 27 CA 1998, empowering the CMA to enter business premises without a warrant, conducted an on-the spot investigation (a "*dawn raid*") at the premises of VWUK in the UK during which it handed over a section 25 case initiation letter. VWAG was named in the section 27 notice. It was sent the section 25 letter and the section 27 notice on 29th April 2022. No steps were taken to conduct on-the-spot investigations in respect of premises outside the United Kingdom.

25. Following the dawn raid on VWUK, the CMA sent a section 26 notice dated 29th April 2022 which required production of certain further documents and information from VWUK, VWAG and any other legal entities forming part of the same undertaking. The section 26 notice was addressed to VWUK. It recorded the position of VWUK which was that information sought by the CMA was not accessible from the premises of VWUK and therefore was not within the remit of the investigatory powers of the CMA. The letter included a formal section 26 notice requiring the "Volkswagen Group" defined as "*Volkswagen Group United Kingdom Limited, it ultimate company Volkswagen AG and any other legal entities forming part of the same undertaking*" to produce specified documents and/or provide specified information as set out in the notice.

26. VWAG objected to the notice, *inter alia*, upon the basis that the CMA did not have *vires* under section 26 to compel a foreign company to produce documents that were

located overseas. On 27th July 2022, VWAG filed an application for permission to seek judicial review of the VW section 26 Notice as it related to VWAG. VWUK was not a party to the judicial review.

D. The Judgment

The absence of extraterritorial effect

27. The Court found in favour of BMWAG and VWAG. The expression "*any person*" in section 26 CA 1998 was subject to an implied limitation that documents and information could be obtained *only* from a person with a UK territorial connection because it had to be interpreted consistently with the interpretative presumption against extraterritoriality. The CMA had argued that the expression "*any person*" embraced persons outside the territory of the United Kingdom having no territorial connection to the UK but the Court declined to spend "*very much time*" upon the submission because it was "*obviously wrong*" (Judgment paragraph [66]). According to case law it was "*very easy*" to read a territorial limit into wide words such as "*any person*". This was the "*most natural reading*" of the statutory language (Judgment footnote [39]). The CMA's argument was "*aggressively extraterritorial*":

> "72. The consequence of the CMA's construction … 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 …"

28. The Court set out examples of circumstances where, if the CMA was correct, it could issue a section 26 notice having extraterritorial effects (paragraph [72(1)-(7)]). These showed that the position of the CMA: undermined comity between nations; gave rise to the consequences that an entity within an undertaking might not even know the true extent of the undertaking to which it belonged; and would leave foreign jurisdictions unimpressed by the imposition of an obligation upon a legal entity operating solely within its jurisdiction to provide an administrative authority in another jurisdiction, under threat of sanction, with documents and information. In paragraph [74] the Court held that extrinsic material otherwise admissible as a guide to interpretation of legislation was not clear-cut either way, and the practice of the Commission was equivocal but, in any event, it was doubtful whether it assisted in informing the "*separately framed powers of the CMA under the 1998 Act in general, and section 26 in particular*".

29. The Court held (at paragraph 74[4]) that the fact that the prohibitions in sections 2 and 18 CA 1998 were extraterritorial had "*minimal*" bearing upon the question of construction:

> "(4) *The territorial scope of the Chapter I and Chapter II prohibitions*. As we have noted, both prohibitions have a degree of extraterritorial application. 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."

The limited meaning of "undertaking"

30. The Court's detailed reasoning is found in paragraphs [72]-[79]. In paragraph [72] the Court set out a series of hypothetical examples to demonstrate the perceived difficulties associated with extraterritorial effect. These postulated that the CMA served a section 26 notice upon an "*undertaking*" comprising a multiplicity of entities located both within and external to the UK. The Court assumed that the notice was brought to the attention of, and served upon, an entity with a UK territorial connection.

31. If the CMA was correct, an obligation was imposed upon all the entities within the undertaking to respond, even if they lacked any connection to the UK. This was "*onerous*" because they were placed under an obligation to comply without any kind of communication to them from the CMA and the effect of the notice was extraterritorial with the adverse consequences summarised above. Moreover, if an entity based outside the UK failed to comply with its duty to respond this would enable the CMA to impose a penalty on *other* entities within the undertaking, including upon the entity with the UK territorial connection, even though it was not ultimately responsible for the breach. All of this demonstrated that the presumption against extraterritorial effect was "*fully engaged*".

32. The problem with the concept of an "*undertaking*" as a basic economic unit was that when legal process was engaged, a process of translation had to occur whereby the undertaking could be rendered into a legally comprehensible form (Judgment paragraph [76]). Such translation was "*vital*" for "*due process*". It was "*not possible*" and made "*no legal sense*" to seek to serve an "*undertaking*". This "*fatally*" undermined the CMA's construction of section 26 (Judgment paragraph [77]).

33. The fact that "*person*" extended to "*undertakings*" in the legislation did not absolve the CMA from the duty to direct a section 26 notice to a specific natural or legal person within the undertaking (Judgment paragraph [78]). Provided this was done certain

consequences would flow which were exemplified by a further hypothetical example which assumed that a section 26 notice was addressed to an "*undertaking*" but served upon an entity with a sufficient connection to the UK. The effect in law upon the UK entity would be that it was "…*obliged to provide to the CMA the documents and information responsive to the notice in its own control, including those documents held abroad and via controlled subsidiaries*". Because the obligation upon the UK entity was limited to the production of documents and information within *its* control, if that entity provided only those documents, and no other, it would not be in breach of section 26, even though documents relating to the undertaking as a whole were not provided.

34. A notice addressed to an "*undertaking*", but served upon a UK entity, did trigger a duty upon the latter to notify the rest of the undertaking of the notice and any other entity having a UK territorial connection would also have a duty to respond. But, importantly, there was no obligation upon any other part of the undertaking not having a UK territorial connection. To oblige them to respond would be wrongly to accord extraterritorial effect to section 26. The Court summarised its conclusions at paragraph [79]. The duty to respond to a section 26 Notice was limited to those with a UK territorial connection "*disregarding their position as part of an undertaking*".

35. The result was that the Court held that the section 26 notices were ineffective against VWAG and BMWAG. By an order dated 8th March 2023, it granted a declaration to that effect in the VWAG Judicial Review and quashed the penalty the CMA had imposed upon BMWAG.

E. The Grounds of Appeal

36. The CMA appeals the Judgment on two grounds:

> Ground 1 - Extraterritoriality: The presumption against extraterritorial application is rebutted. Parliament deliberately created substantive prohibitions in sections 2 and 18 of CA 1998 with extraterritorial reach. The substantive prohibitions are directed at undertakings which Parliament knew often operate across national borders. It intended that infringements of sections 2 and 18 by undertakings located abroad but which affected the United Kingdom market should be effectively investigated through section 26. The deliberate extraterritorial application of sections 2 and 18 would be frustrated if section 26 did not also have extraterritorial effect; and/or
>
> Ground 2 - Undertaking: In the alternative, the presumption against extraterritorial application was at least rebutted in the case of an undertaking present in the UK by the express words of section 26 read with section 59(1) CA 1998. The reference to "*any person*" in section 26(1) of CA 1998 captured all documents held by all members of any undertaking where any member of that undertaking was present in the UK.

F. Ground I: Extraterritoriality

The CMA's arguments

37. The CMA argues that the Court erred in concluding that an obligation under section 26 CA 1998 could only be imposed upon persons with a territorial connection to the United

Kingdom. Section 26 had to be read in the light of sections 2 and 25 which set out the basic prohibition on cartels and the enforcement regime. Parliament made clear that both had extraterritorial effect. Section 26 implements both sections 2 and 25 and, it followed, had equal extraterritorial effect. This intent was also clear from Parliament's choice of subject or target of the section 26 power. When Parliament used the word "*any*" it meant "*any*" person wherever situated anywhere the world. And when Parliament chose the word "*person*" it included any "*undertakin*g". There was no scope for any interpretative presumption against extraterritoriality. Parliament was well aware that cartels operated across borders and sheltered offshore to minimise the risk of detection and evade sanction. To avoid this risk Parliament intended that infringements of the prohibitions should be effectively investigated, enforced and deterred. Section 26 was one of the only means by which suspected breaches committed by undertakings located abroad, which exerted harmful actual or potential impacts upon UK markets and consumers, could be effectively investigated. If the ability of the CMA to use this power was limited in the manner described by the Court, it would be substantially weakened in the performance of its statutory task of investigating and suppressing illegal conduct. The CMA rejected the submission that its powers would be exercised in a manner colliding with international law or comity. The approach chosen by Parliament was one adopted elsewhere in the world. In particular, the EU regime of competition law enforcement provided the model for UK law and embraced extraterritoriality. The CMA relied upon case law at the EU level to show that the regime was sufficiently flexible to adapt to guarantee fundamental rights and problems such as comity.

The relevant principle of interpretation

38. In determining whether a legislative measure has extraterritorial effect a court must, so long as its language allows, apply an interpretive presumption *against* extraterritoriality. The scope and effect of that presumption was considered in *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 ("*Al Skeini"*). There, at paragraph [11], in relation to the scope of the Human Rights Act 1998, Lord Bingham endorsed an observation in Bennion, Statutory Interpretation, 4th edition, 2002 at page 282 section 106, that: "*unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom*"[1]. Lord Rodger stated (paragraph [45]):

> "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... 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

[1] As noted in *R (Marouf) v Home Secretary* [2023] UKSC 23 at paragraph [38] the current version is to similar effect: See Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed, (2020) at section 6.10.

> "*legislative grasp, or intendment*", of Parliament's legislation…."

39. These principles were applied by the Supreme Court to the investigatory powers of the SFO in *Regina (KBR) v Director of the Serious Fraud Office* [2021] UKSC 2 ("*KBR*"). The presumption was described there as the "*starting point"* (paragraph [21]) for a consideration of the scope of the legislative measure. The Court cited approvingly from *Al-Skeini* and similar judicial sentiment dating back to the start of the 20th century when it appears that the presumption was, even then, well established. Other cases, subsequent to *KBR*, also indicate that the presumption is the juridical starting point for any exercise in interpretation: See e.g. *R (Marouf) v Home Secretary* [2023] UKSC 23 paragraphs [23] – [41]. The approach adopted by the Court in *KBR* provides useful guidance. The following points seem especially relevant.

40. *Express intention*: When Parliament intends legislation to have extraterritorial effect express provision to that effect is "*frequently provided*". In *KBR* (paragraph [28]), the Court referred to three measures whose statutory language indicated an intent to create extraterritoriality. Section 134 of the Criminal Justice Act 1988 criminalised torture if committed in the United Kingdom "*or elsewhere*". Section 72(1) of the Sexual Offences Act 2003 criminalised any act done by a person in a country or territory outside the United Kingdom which constituted an offence under the law in force of that country or territory and which would constitute a sexual offence had it taken place in this jurisdiction. In each instance, Parliament used language making clear that a foreign act was subject to domestic legislation. Section 12(2)(b) of the Bribery Act 2010 criminalised conduct occurring outside the United Kingdom if any act or omission done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom and where the person had a close connection with the United Kingdom. This latter provision was viewed in *KBR* as having "*particular relevance*", and as indicating a Parliamentary intent to create extraterritorial effect, because the conduct in question formed part of a relevant offence if done in the United Kingdom and the actor had to meet defined criteria establishing a close connection with the United Kingdom (paragraph [28]). For the avoidance of doubt, the fact that an Act is expressly stated to extend to England and Wales only is irrelevant since that concerns the distinct question of the extent of the legislation and provides only that it forms part of the law of England and Wales. It says nothing about whether the legislation has extraterritorial effect (paragraph [29]). In *KBR* the judicial task was framed in the following way:

> "27. The question for consideration is whether Parliament intended to confer on the SFO power to compel a foreign company to produce documents held abroad, on pain of a criminal penalty in this jurisdiction. The answer will depend on the wording, purpose and context of the legislation considered in the light of relevant principles of interpretation and principles of international law and comity."

41. *Implied intent*: An extraterritorial intent can be implied though the threshold for such a conclusion is relatively high.

42. *Relevant policy considerations*: The following considerations might be relevant in determining intention: (i) the purpose, scheme, context and subject matter of the

legislation (paragraphs [29] and [32] of *KBR*); (ii) the practicability of enforcement (paragraph [29]); (iii) whether the purpose of the legislation could be effectually achieved without extraterritorial effect (paragraph [31]); (iv) the legislative history of the statute as indicating whether Parliament intended that the extraterritorial purpose of the legislation could be achieved by *other* legislative means (paragraph [32]); (v) the impact upon comity (paragraph [24]); and (vi) the nature of the law being enforced and whether it was criminal or civil. There can be overlap between these considerations on the facts of any given case.

43. *Variable intent*: In ascertaining intention it did not follow that all provisions in a statute necessarily were intended to have the same territorial ambit (paragraph [29]).

44. *Own nationals*: The presumption might apply weakly ("*if it applies at all*" – see paragraph [30]) in the case of a national of the UK. International law recognised a legitimate interest on the part of the state in legislating in respect of the conduct of their nationals abroad. Nationals travelling or residing abroad remained within the personal authority of their state of nationality which, consequently, could legislate with regard to their conduct when abroad subject to limits imposed by reason of the sovereignty of the foreign state.

Section 2(1) CA 1998

45. We turn to our conclusions. In our judgment, Parliament intended section 26 CA 1998 to have extraterritorial effect. This can be seen from a careful analysis of the scheme, context and purposes of sections 2, 25 and 26 and from the choice of key words in those provisions.

46. It is common ground that section 2(1) CA 1998, which contains the prohibition on restrictive agreements between undertakings, decisions by association of undertakings or concerted practices, is extraterritorial. The prohibition on the abuse of a dominant position in section 18 CA 1998 is, similarly, capable of exerting extraterritorial effect.

47. The section 2 prohibition has extraterritorial effect because it includes within its ambit, agreements between "*undertakings"* which "*may*" affect trade within the United Kingdom and which have as their "*object or effect*" the prevention, restriction or distortion of competition within the United Kingdom. An agreement between undertakings physically located in, for example, the USA, Canada and Japan with no physical presence in the United Kingdom but which is targeted upon the United Kingdom market is therefore within the scope of the prohibition.

Implications of the phrase "implemented" in section 2(3) CA 1998

48. A clear indication of intention is found in section 2(3), pursuant to which the prohibition applies "*only*" if the agreement, decision or practice "*is or is intended to be implemented in the United Kingdom*". The combined effect of section 2(1) and (3) is that, for instance, a cartel between undertakings in the USA, Canada and Japan, none of whom have any physical presence in the UK, which is "*intended*" to be implemented <u>in</u> the United Kingdom (but which has not yet been) is within the scope of the section.

49. The inclusion of a requirement of implementation in section 2(3) was deliberate and intended to render in express and concrete terms the test for extraterritorial effect found

in EU law. The seminal case on territorial effect, which explained the relevance of the use of implementation as a triggering condition, is the judgment of the CJEU in Cases 89/85, 104/85, 116-117/85 & 125-129/85 *A Ahlstrom OY and others v Commission* [1998] 4 CMLR 901 ("*Woodpulp"*). There the CJEU held that the territorial link between equivalent prohibitions under EEC law and the territory of the Common Market arose through *implementation* within the Common Market. The facts concerned an appeal against a Commission decision imposing penalties upon a cartel of suppliers of wood pulp, the vast majority of whom were located outside the Common Market in Canada, the US, Sweden and Finland. The appellants argued that the decision was incompatible with the principle of territoriality under public international law. The Court disagreed:

> "16. It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the Common Market, consists of conduct made-up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practise was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.
>
> 17. The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the community in order to make their contacts with purchasers within the community.
>
> 18. Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognised in public international law."

A rule based upon implementation did not contradict international law (paragraphs [19] and [20]).

50. The *Woodpulp* principle is only implicit under EU law. It is nowhere set out expressly that for extraterritorial effect to occur there must be implementation in the EU. In the CA 1998, in contrast, the position is made explicit. In this respect our attention was drawn to the consultation document issued by the Department of Trade and Industry in March 1996 preceding enactment of the CA 1998 entitled "*Tackling Cartels and the Abuse of Market Power: Implementing the Government's Policy for Competition Law Reform*". In paragraph [2.48] the document explains that the lynchpin for the territorial bite of the prohibitions under domestic law was to be implementation within the United Kingdom. Other admissible pre-legislative material makes clear that the CA 1998 was drafted to be consistent with EU law. That much is common ground. In our judgment use of the concept of implementation was intended, by Parliament, to indicate the existence of extraterritorial effect.

Intention and the umbrella in section 25 CA 1998

51. The next provision is section 25. This is found in Chapter III of Part 1 CA 1998 and is entitled "*Investigation and Enforcement*". Part I contains a series of investigatory and enforcement powers conferred upon the CMA. It covers such matters as: the power to require the provision of documents and information (the section 26 power in issue in the present appeal); the power to ask questions; the power to enter business premises with or without a warrant; the use that can be made of statements made by a person in response to requirements imposed upon them pursuant to other provisions in a prosecution; the taking of decisions following an investigation; the enforcement of commitments given by any person; the giving to any person of appropriate directions to bring an infringement to an end; the enforcement of directions; interim measures; penalties; the recovery of penalties, etc.

52. Section 25(2) is an umbrella provision and is foundational to the exercise of the subsequent powers in Part I CA 1998. Under section 25 the CMA is given a power ("*may*") to conduct an investigation where there are "*reasonable grounds for suspecting*" that there is an agreement which "*may*" affect trade within the United Kingdom and which has as its "*object or effect*" the prevention, restriction or distortion of competition within the United Kingdom. It is, once again, common ground that section 25 has extraterritorial effect and applies to entities which are wholly offshore.

53. Sections 2 and 25 thus use language indicating that both the prohibitions and the investigation and enforcement regimes are extraterritorial. The principle that they be coterminous is logical and guides the interpretation of the investigative and enforcement powers elsewhere in Part I CA 1998. It reflects the position under EU law. In Joined Cases C-204/00P and others *Aalborg Portland A/S and others v Commission* [2004] ECR I-403 ("*Aalborg*") the Court summarised well established case law. The case concerned a cartel for the production and supply of cement. The Court emphasised that cartels caused substantial harm to markets and to consumers (paragraph [53]). The "*aim*" of investigatory powers was to ensure that the competition prohibitions were applied ensuring that wrongdoers were discovered and sanctioned. The Court observed that, to avoid punishment, cartels often operated clandestinely "*in a non-member country*" i.e. extraterritorially:

> "55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum."

Section 26 CA 1998

54. We turn now to the provision in dispute. The respondents argue that whilst sections 2 and 25 are extraterritorial, section 26 is not. With respect we disagree. Section 26 is but one of the investigatory and enforcement powers found in Part I. It is concerned with the issuance of requests for information and disclosure of documents. It starts with the words: "*for the purposes of an investigation"*. It then proceeds to say that the CMA: *"may require any person to produce to it a specified document, or to provide it with specified information which it considers relates to any matter relevant to the investigation".* The obligation is imposed upon "*any person*", which (pursuant section

59) includes an "*undertaking*". No territorial limits are imposed upon the persons who may be subject to the exercise of the section 26 power. *Prima facie,* the section brings within its embrace a person located outside the jurisdiction. It is not in dispute that the "*investigation*" referred to is that contemplated under section 25 which itself is linked to the enforcement of the prohibitions in sections 2 and 18. The requirement in section 26(2) that the CMA serve upon a person required to disclose a notice which, *inter alia,* sets out the "*substance*" of the investigation relates back to the existence of "*reasonable grounds for susp[icion]*" under section 25, which includes where the entities involved operate off-shore.

55. Put another way, section 26 falls under the umbrella of section 25 which is extraterritorial and facilitative of the prohibition in section 2, which is also extraterritorial. The section 26 power thus proceeds from, and is an implementation of, two separate building blocks *both* of which are extraterritorial. Nothing in the language used in section 26 indicates an intention on the part of Parliament to limit its territorial effect. We observe that the Court, in the Judgment, did not consider the role section 26 played in the context of the combined effect of sections 2 *and* 25 CA 1998. Standing back, for section 26 not to be extraterritorial there would need to be some clear indication, in legislative form, that section 26 was intended by Parliament to have a different territorial ambit to sections 2 and 25. There is however no such articulation of contrary intent and, in our judgment, it follows that Parliament intended section 26 to have the same territorial effect as sections 2 and 25.

Policy considerations: The scheme of enforcement, context and purpose.

56. We turn next to policy factors of the sort identified in *KBR* and other case law. We start with scheme, context and purpose. These factors overlap but lead to the same end-conclusion, in support of extraterritoriality. A theme permeating the respondents' submissions assumed that Parliament intended the scheme of enforcement in the CA 1998 to work perfectly, such that, if deficiencies could be identified when applied extraterritorially, that was evidence that Parliament did not intend the scheme to work in that way. Ms Abram KC, for BMW, submitted that the arguments of the CMA could lead to extraordinary results. Assume, she said, the CMA was investigating a cartel perpetrated by an undertaking in the EU with multiple subsidiaries located all around the world including in Asia. If the CMA could serve a section 26 notice against an "*undertaking*" then non-responding subsidiaries, in (say) Japan, would be at risk of penalties even if they were unaware of the investigation and/or that they held information which might turn out to be relevant. The practical consequences of a broad extraterritorial jurisdiction were, she contended, exorbitant and unacceptable.

57. We reject this analysis as unreflective of reality. It is important to stand back. Cartels are, characteristically, covert and ever more international, as the CJEU pointed out in *Aalborg* (*ibid*) paragraph [55], page 1466B – D of the report. Increasingly, exploiting modern technology, illicit communications between competitors are conducted by burner phones and across encrypted channels. Information is kept close to the chest to minimise the prospect of detection which carries with it the risk of huge financial penalties and claims for damages, including in United Kingdom collective actions. We do not accept the suggestion that Parliament is unaware of the realities of life. A long time ago, Lord Denning, in an early cartel case in the United Kingdom, (*Registrar of Restrictive Trading Agreements v WH Smith and Son and others* [1969] 1 WLR 1460), famously observed – albeit not in a case concerning extraterritoriality – that Parliament

was well aware of the lengths cartelists would go in order to suppress evidence of their connivance:

> "In construing the Restrictive Trade Practices Act 1956, it is useful to remember the mischief which was aimed at. At one time traders used to come to restrictive agreements between themselves which were contrary to the public interest. They used to get together so as to seize all the trade for themselves, to keep up prices for their own selfish profit, to shut out any newcomers who might cut prices, and so forth. In order to get rid of such practices, Parliament required that all restrictive agreements should be registered and said they were to be void unless they were proved to be in the public interest. It put a duty on traders themselves to register the agreements. But it is obvious that some traders would not do their duty. People who combine together to keep up prices do not shout it from the housetops. They keep it quiet. They make their own arrangements in the cellar where no one can see. They will not put anything into writing, nor even into words. A nod or a wink will do. Parliament was well aware of this. So it included not only an "agreement" properly so-called, but any "arrangement" however informal."

58. All competition authorities worldwide face the same conundrum[2]. Their statutory duty is to preserve the integrity of their domestic markets and protect consumers; yet, to perform that task regulators frequently have to focus their fire power upon actors located abroad where, if they seek enforcement, they might confront a variety of legal and practical problems. This is not a new phenomenon. It came to the fore following the assertion of extraterritorial competence in US antitrust law (under the Sherman Act 1890) by the Supreme Court in the early part of the 20th century.[3] How do legislatures

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[2] The conundrum has long been the subject matter of academic and professional commentary: See, for example, Neale and Stephens "*International Business and National Jurisdiction*" (OUP, 1988) which describes antitrust law as the best illustration of the problem of national public interest risking conflicting with issues of international sovereignty.

[3] So, for example, in *United States v The American Tobacco Co* 221 US 106 (1911) the US Government charged that 29 individual and 67 corporate defendants "*were engaged in a conspiracy in restraint of Interstate and foreign trade in tobacco*." Amongst the defendants were two British companies, the Imperial Tobacco company and the British American Tobacco company. In giving judgement Chief Justice White focused upon the wrongful purpose of the parties. He stated: "*The history of the combination was so replete with the doing of acts which it was the obvious purpose of the Sherman Act to forbid, that the defendants were liable, including the foreign corporations insofar as by the contracts made by them they became co-conspirators in the combination...*". The assertion of extraterritorial jurisdiction was accompanied, procedurally, by the conferral of broad investigative powers upon the antitrust authorities, including in relation to demands for evidence (See e.g. Neale and Stephens (*ibid*) page 133.) Foreign jurisdictions, including the United Kingdom, took a variety of steps to mitigate the effects of the assertion of extraterritorial competence. For example, the United Kingdom Parliament enacted the Protection of Trading Interests Act 1984 to prevent the

square the circle? They achieve this by conferring broad extraterritorial regulatory and investigatory powers which can be exercised in undiluted form within their territorial jurisdictions, but which are exercised with circumspection and pragmatism when dealing with undertakings physically located elsewhere. This is the model found within EU law.

59. The CA 1998 is modelled upon its EU counterpart. The settled practice of the Commission is an illustration of how it works in practice. The Commission has long possessed a legislative power to issue requests for information ("*RFI*") to "*undertakings*". It does so upon the basis that an "*undertaking*" is an indivisible entity so that service of an RFI upon one limb or component of the "*undertaking*" is service upon the undertaking as a whole. Yet, the Commission is cognisant of the fact that the untrammelled exercise of its investigative and enforcement powers upon the international stage could collide with the sensitivities of international law. In 1997 the Commission issued a document entitled "*Dealing with the Commission: Notifications, complaints, inspections and fact-finding powers under Articles 85 and 86 of the EEC Treaty*". In section 3.1, headed "*Investigations: General comments*", the Commission explained that whilst it had broad powers of investigation these had to be exercised in a manner compatible with international law:

> "The Commission has only limited powers to obtain information from firms situated outside of the EEC. Under international law, the Commission is not empowered to conduct investigations outside the bounds of its territorial competence if they would impinge upon the national sovereignty of the non-member country in whose territory it was purporting to act. Accordingly, on-the-spot inspections of firms based in third countries are out of the question. In such cases, the community can - and does - send out requests for information, but it cannot impose sanctions if a firm fails to comply. One option open to the Commission is to direct a request for information to a subsidiary of a non-EU firm which is based in the EU."

60. In a similar vein, in evidence provided by the Commission to a Global Forum organised by the OECD, on 30th November 2018, in relation to the Commission's practice (under Article 18 of Regulation 1/2003) in issuing RFI's, the Commission explained that it possessed the power to require undertakings to provide it with all necessary information but that it had to recognise the practical difficulty of seeking to extract, upon a compulsory basis, information from undertakings located outside the EEA. The solution adopted was to exercise the power against entities present in the jurisdiction upon the basis that, given the breadth of the concept of undertaking, an entity in the EEA was treated, in law, as having *access* to documents held elsewhere within the undertaking, even if physically held outside the jurisdiction:

> "The Commission may send RFIs to undertakings located inside and outside of the EEA. In practise however, the Commission has so far refrained from enforcing procedural fines or periodic penalty payments on companies outside the EEA. To effectively

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enforcement, in the domestic courts, of treble damages judgments which the US courts were empowered to award for infringements of anti-trust law.

> use its investigative powers, the Commission frequently resorts to sending the RFI to an EU subsidiary of the non-EU undertaking requesting the subsidiary to provide the information on behalf of the entire undertaking, including all connected undertakings such as the ultimate parent company and its subsidiaries."

61. In 2019 the legislature (the European Parliament and Council) enacted Directive EU 2019/1 the purpose of which, according to its title was "*to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*". This, in Article 8, affirmed the power to issue RFIs upon the basis that the addressee has *access* to material from within the undertaking, wherever situated:

> "8. Member States shall ensure that national administrative competition authorities may require undertakings and associations of undertakings to provide all necessary information for the application of Articles 101 and 102 TFEU within a specified and reasonable time limit. Such requests for information shall be proportionate and not compel the addressees of the requests to admit an infringement of Articles 101 and 102 TFEU. The obligation to provide all necessary information covers information which is accessible to such undertakings or associations of undertakings."

62. Parliament was well aware of these complications when it decided, quite deliberately, to follow the EU model in the CA 1998 and when it conferred upon the CMA broad powers exercisable *in principle* upon an extraterritorial basis provided it was part of an investigation into conduct that was implemented in the United Kingdom and related to an agreement between undertakings which had, at the least, an object or effect of restricting competition within the United Kingdom. In our judgment the scheme, context and purpose of section 26 CA 1998 support the conclusion that Parliament intended it to have extraterritorial effect.

Comity

63. The answer to arguments that the CMA's interpretation collides with comity is also found in the discussion above. In *KBR* (Judgment paragraph [24]) comity was described as "*less than a rule of international law*" and (by reference to Crawford, Brownlie's Principles of Public International Law, 9th ed (2019), page 21) as a "*species of accommodation: it involves neighbourliness, mutual respect, and the friendly waiver of technicalities*". The creation of a power to be exercised with comity in mind is the legislative solution adopted at the EU level and is one which the CMA, in argument before the Court, said was a defining feature of the UK regime (the "*may*" in section 26(1)). It is, in our judgment, an eminently apt device to enable regulators to address, flexibly, issues of comity if and when they arise. Ms Demetriou KC, for the CMA, explained how comity worked. She acknowledged candidly that, notwithstanding the existence of broad investigatory powers, it was "*out of the question*" that the CMA would for instance ever seek to conduct an on the spot investigation (a dawn raid) at the premises of an undertaking physically located outside the jurisdiction. Equally, she did not shirk from acknowledging that there could be difficulties in the exercise of

mandatory powers of enforcement or sanction against a foreign undertaking which failed to comply with a statutory request for information. Such practical difficulties were simply the stuff of a regulator's life. But they had no bearing upon whether Parliament *intended* the CMA to have those powers in the first place. She emphasised that it was precisely because of these realities that the broad definition of "*person*" and "*undertaking*" in the CA 1998 was critical. It enabled the CMA, for example, to take investigative and enforcement action against natural and legal entities present in the jurisdiction for conduct of the wider undertaking elsewhere.

64. We agree with this. The respondents' arguments ignore facts of life which Parliament has all along plainly understood. We refer back to the dictum of Lord Denning about Parliament's presumed knowledge about the intentions of cartelists when enacting the RTPA 1956. The same applies to the CA 1998 which was based upon the EU model. When considering the scheme, context and purpose of the legislation no inference can be drawn that Parliament intended to avoid extraterritorial effect simply because, in exercising investigative and enforcement powers, there was a theoretical risk to comity.

Effectiveness and practicality

65. We deal with this briefly. If the CMA is denied the ability to exercise section 26 extraterritorially, and is limited to exercising it only against legal entities physically connected to the United Kingdom, a gaping lacuna in the effectiveness of the CMA to perform its statutory function would arise. We have already pointed out that the CMA recognises that it cannot, realistically, use certain powers extraterritorially (such as the power to conduct dawn raids). The CMA explained that section 26 was a critical part of its investigative armoury; if it could not use that power against foreign entities, then its ability to perform its statutory task would be badly compromised. In response to a criticism from the respondents that there was no evidence that the CMA in fact needed this power, Miss Demetriou KC informed us, upon instructions (bearing in mind the confidentiality of such investigations), that the CMA "*frequently*" exercised the section 26 power extraterritorially. In our view the need for such jurisdiction is self-evident. The absence of such a power would create a perverse incentive for conspirators to move offshore to organise cartels directed at harming the United Kingdom market and they would be more or less immune from investigation. In the digital era this would be easy to achieve. It does not require evidence for this to be acknowledged as true. Indeed, it was viewed as obvious over 30 years ago (in the pre-digital age) by the CJEU in *Woodpulp (ibid)* when the Court observed that if the applicability of the prohibitions depended upon the place where the agreement, decision or concerted practice was formed, "*the result would obviously be to give undertakings an easy means of evading those prohibitions*" (paragraph [16]).

Legislative History

66. In *KBR* the court, citing earlier authority (*R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at paragraph [8]), stated that legislative history was relevant to determining the intent of Parliament. In paragraphs [32]-[45] the Court summarised the extensive corpus of domestic legislation which developed a structure permitting the United Kingdom to participate in international systems of mutual legal assistance in relation to both criminal proceedings and investigations. The Court observed, in paragraph [45]:

> "Of critical importance to the functioning of this international system are the safeguards and protections enacted by the legislation, including the regulation of the uses to which documentary evidence might be put and provision for its return. These provisions are fundamental to the mutual respect and comity on which the system is founded.... It is … inherently improbable that Parliament should have refined this machinery as it did, while intending to leave in place a parallel system for obtaining evidence from abroad which could operate on the unilateral demand of the SFO, without any recourse to the courts or authorities of the state where the evidence was located and without the protection of any of the safeguards put in place under the scheme of mutual legal assistance."

67. There is no legislation enacted by Parliament evidencing an intention upon its part to create an equivalent, parallel, system of competition law enforcement such that there was no need for the investigatory and enforcement powers in the CA 1998 to be extraterritorial. The respondents drew our attention to the MOU formally signed in September 2020 between the CMA and competition authorities in the US, Australia, New Zealand and Canada. This provided for an exchange of information of learning and experience between the authorities. In section 4 the parties contemplated the conclusion of a Model Agreement pursuant to which mutual investigative assistance might be requested and offered. A model was set out in the Annex thereto, though in fact no such agreement was ever entered into. The MOU is administrative, not legislative. It tells one nothing about the intention of Parliament. The absence of any legislative initiative of the sort which existed in *KBR* can be taken as an indication that Parliament intended the CA 1998 to be the source of *all* relevant powers of investigation and inquiry, whether applicable in the UK or elsewhere.

The presumption against the extraterritoriality of criminal sanctions

68. When first enacted the CA 1998 created criminal sanctions for refusing to comply with statutory requests for information subject only to the existence of a defence of reasonable excuse. The existence of a criminal sanction was however removed from the Act and in its place section 40A creates a civil regime of penalties. The respondents argue that it is the statutory provision as first enacted that is relevant and rely heavily upon the judgment of the Supreme Court in *Serious Organised Crime Agency v Perry* [2013] 1 AC 182. There, SOCA commenced proceedings in England for a recovery order under the Proceeds of Crime Act 2002 seeking to deprive Mr. Perry and others of assets obtained in connection with his criminal conduct wherever in the world those assets were situated. The Court held that the power sought to be exercised was not extraterritorial and that there was a strong presumption against the extraterritoriality of criminal sanctions.

69. The CMA argues that Parliamentary intent must be ascertained taking due account of amendments that it makes to legislation over time. It is the statutory framework that exists at the time of the impugned decision that reflects the relevant legislative purpose. It also cites the judgment of the Court of Appeal in *R (Jimenez) v First-tier Tribunal Tax Chamber* [2019] 1 WLR 2956 in which the court held that a statutory power upon HMRC to issue a notice requiring a UK taxpayer resident outside the UK to provide information for the purpose of checking his tax position, was lawful and not limited by

a restriction upon extraterritoriality. The Court in *KBR* did not hold that *Jimenez* was wrongly decided. It distinguished the case upon the basis (a) that the power was limited to the purpose of checking the taxpayer's tax position and was necessarily exercisable only in relation to someone who was or might be liable to tax in the United Kingdom; and (b), non-compliance with the notice was not made a criminal offence such that the "*presumption that a statute should not be construed as making conduct abroad a criminal offence had no application*" (paragraph [58]).

70. In paragraph [46] of *KBR* the Court emphasised that judicial decisions concerning the effect of different statutory provisions could be "*instructive by way of analogy*" but needed to be approached with some caution because they were concerned with different statutory schemes, enacted for different purposes and operated in different contexts.

71. On the facts of *this* case, where other factors so clearly point in one direction, we do not draw much assistance from the authorities cited to us. To apply the note of caution emphasised in *KBR*, they were addressing different statutory schemes, were enacted for different purposes, and were operated in very different contexts. The present version of the CA 1998 no longer imposes criminal sanctions. In terms of Parliamentary intent, we should look at the statutory regime as it stood as of the date of the decisions being challenged, as reflecting Parliament's contemporaneous purpose. At that point if the respondents failed to comply with the section 26 notices the sanction would be by way of civil penalty. We do not view the fact that the CA 1998, as initially enacted, contained a criminal law sanction as determinative of the issue, leading to a conclusion that the power is not extraterritorial.

Safeguards

72. In *KBR* it was held that the existence of safeguards could provide an indication of legislative intent. If safeguards were included that might indicate that Parliament recognised the intrinsic difficulties of enforcing abroad and sought to ameliorate and overcome those obstacles, indicating an intention to make extraterritoriality work. The most important safeguards in the present case include: (i) the power but not the duty to act extraterritorially; (ii) that before a section 26 notice can be issued there must be reasonable grounds for suspecting an infringement; (iii) that a notice must be served upon the undertaking in question identifying the substance of the investigation thereby enabling it to exercise rights of defence; (iv) that there is a reasonable excuse defence for non-compliance; (v) that sanctions for non-compliance are civil not criminal; (vi) that a notice and/or sanctions can be judicially challenged; and (vii), that leave of the court would be needed for the CMA to seek to enforce abroad a civil judgment debt, arising from a failure to pay a financial penalty.

73. The question for us is not whether these safeguards are adequate. It is only as to what, if anything, they indicate about legislative intent. It is possible to say that there are safeguards in existence which enable a foreign entity to protect its rights, just as the respondents have done in the present litigation. It is also possible to say that the safeguards are comparable to those existing under EU law, which is extraterritorial. It is however unclear whether they provided much insight into the question of intent. The safeguards apply equally to undertakings based in the UK and are in large measure designed to ensure that the power is not used capriciously, that all addressees are told the substance of the investigation being undertaken against them, that all have rights of defence and challenge, and, that sanctions are civil not criminal. None relates uniquely

to extraterritoriality. It is possible that the downgrading of criminal to civil sanctions for failure to comply was a reflection of a desire to overcome issues relating to enforcement abroad of foreign penal statutes; but there is no clear admissible evidence that this was in fact the basis for the amendment to the Act.

Conclusion on Ground I

74. In conclusion it is our judgment that section 26 has extraterritorial effect. We allow the appeal on Ground I.

G. Ground II: "Undertaking"

The issue

75. Ground II, as became clear during the hearing, concerns the position of the UK subsidiaries. It focuses upon the nature of the legal obligations which can, lawfully, be imposed upon a UK entity.

76. As explained in paragraphs [30]-[35] above the Court concluded that the effect of a section 26 notice was limited to requiring an entity with a sufficient connection to the UK to provide documents or other information within its physical or legal control, and not, therefore, documents or information held elsewhere within the broader undertaking of which it was not in a position to disclose or compel production. The Court justified these conclusions on the basis of the need to construe the CA 1998 to avoid extraterritorial effect, and because it considered that, from a procedural perspective, it was essential that notices be served upon natural or legal persons. The Court accepted that the concept of an "*undertaking*" was, in domestic law, to be construed in a manner identical to that under EU law and therefore treated as a single entity groups which comprised several different legal entities (Judgment paragraph [47]). But the Court then arrived at an end result which stripped the concept of undertaking of its defining characteristic of joint and several liability or responsibility.

77. The nub of the dispute is whether, in the CA 1998, Parliament intended to do away with this defining feature of joint and several liability and responsibility, otherwise inherent in the meaning of "*undertaking*" as understood in case law? Two main issues are raised. First, whether a section 26 notice can be served upon an "*undertaking*", as opposed to a natural or legal person? Secondly, and in any event, whether the obligation extends only to those documents or other information under the legal or physical control of the addressee of the notice, or whether it applies more broadly to documents and other information held by the undertaking? The submissions on the appeal fell under the following headings: (i) inferences to be drawn from the statutory language used in Part I CA 1998; (ii) the implications of EU law on "*undertaking*"; (iii) the relevance of the requirement to protect fundamental rights; (iv) legislative purpose; (v) implications relating to service of the notice; (vi) implications for comity; and (vii) inferences to be drawn from the way in which civil actions were commenced. We take each in turn.

Inferences to be drawn from the statutory language used in Part I CA 1998

78. By virtue of section 59 CA 1998 "*person*" includes "*any undertaking*" (see paragraphs [11] – [12] above). Accordingly, when the Act permits an obligation to be imposed upon "*a person*" it includes imposition upon the relevant "*undertaking*".

79. Since a section 26 notice can be served upon "*any person*", the CMA is thereby empowered to serve such a notice upon an undertaking. The expression "*any*" is, by its nature, unlimited. Without substantial rewriting, it does not mean any person with a territorial connection to the United Kingdom. "*Undertaking*" was not defined in the CA 1998 because it was a well understood concept of EU law and Parliament intended that it was the phrase to bear a meaning consistent with EU law[4]. It was for these reasons described, correctly, in the Judgment as the "*basic unit of account for both European Union and United Kingdom competition law*". The Court agreed that EU law was the best source of definition for UK law and that it was an "*autonomous concept*" (Judgment paragraph [45]). There is therefore no dispute as to the meaning of "*undertaking*". The expression connotes any entity engaged in economic activity. As is, again correctly, stated in the Judgment: "*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"* (Judgment paragraph [47]).

80. Parliament carefully differentiated between the different subjects of the obligations in Part I CA 1998. It variously uses "*person*", "*undertaking*", "*individual*", "*officer*", etc. This is a strong indicator that, when Parliament used the expression "*any person*" or "*undertaking*", it intended those phrases to bear their defined statutory meaning and not to be diluted into some lesser meaning.

81. There are a number of occasions when Parliament selected a different subject upon whom to impose Part I obligations, such as an "*individual*" or "*officer*". For example, section 26A, concerning "Investigations: power to ask questions", confers a power upon the CMA to give notice "*to an individual who has a connection with a relevant undertaking requiring the individual to answer questions with respect to any matter relevant to the investigation*". In order for the CMA to exercise this power it must give a copy of the notice to each relevant "*undertaking*" with which the individual has a current connection at the time the notice is given to the individual. A further example is section 34 on "Enforcement of directions". This empowers the CMA to seek a court order requiring a person to comply with a direction under sections 32 or 33. An order

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[4] The Explanatory and Financial Memorandum submitted to Parliament (HL Session 1997-98) states:

> "The Bill makes provision for strengthening competition law by introducing two main prohibitions. The first (the Chapter I prohibition) is in respect of agreements or concerted practices between undertakings or decisions by associations of undertakings (together referred to as "agreements") which have as their object or effect the prevention, restriction or distortion of competition within the UK. The second (the Chapter II prohibition) is in respect of the abuse by an undertaking or undertakings of a dominant position in the UK. … The Chapter I and Chapter II prohibitions are closely based on Articles 85 and 86 of the EC Treaty. Provision is made for the prohibitions to be interpreted in accordance with EC case law. As a result, a number of terms in the Bill such as "undertaking" are not defined. Their meaning will be that given by EC law. This is to enable the two regimes to apply in a consistent manner."

of the court may provide for the costs of or incidental to the application to be borne by the person in default (thereby also including the undertaking) or "*any officer of an undertaking who is responsible for the default*".

82. In contrast Parliament uses "*person*" or "*undertaking*" widely throughout Part I CA 1998. Section 26 is but one example. Another is section 27(3)(a) where Parliament determined that an "*undertaking*" can be an occupier of premises. Section 31, concerning decisions following an investigation, imposes a duty upon the CMA, if it proposes to make a decision, to give written notice to the "*person*" likely to be affected by the proposed decision and permit that "*person*" an opportunity to make representations. Section 31E, concerning enforcement of commitments, arises in relation to the enforcement of a commitment that any "*person*" has accepted but then, without reasonable excuse, fails to adhere to. Section 35, concerning interim measures, confers a power upon the CMA where it considers that it is necessary as a matter of urgency for the purpose of preventing significant harm to a particular person, or protecting the public interest, to give written notice to a "*person*" that it proposes to take interim measures giving that "*person*" an opportunity to make representations. Section 36, concerning penalties, confers a power upon the CMA to require "*an undertaking*" which is a party to the agreement to pay the CMA a penalty in respect of the infringement. That power accrues where the CMA is satisfied that the infringement "*has been committed intentionally or negligently by the undertaking*". Section 37, concerning recovery of penalties, empowers the CMA to recover from the "*undertaking*", as a civil debt due to the CMA, any amount payable under the penalty notice which remains outstanding.

83. In our judgment, Parliament deliberately chose whom to impose duties and obligations upon and carefully differentiated between those cases when it wished to capture the "*undertaking*" and those when it did not. When it used the expression "*any person*" or "*undertaking*" it intended to impose an obligation upon the widest possible array of entities. Section 26 is imposed upon "*any person*" which includes "*undertaking*" and there is no basis for reading down "*any person*" so that it means any person who is a natural or legal person having a proper connection to the UK. That would be not so much an exercise in purposive construction as a radical rewrite.

The implications of EU law on "undertaking"

84. Next, in our judgment, Parliament intended the phrase "*undertaking*" in the CA 1998 to bear the same meaning as its EU equivalent. Nothing in logic, policy, case law or legislative history supports the proposition that Parliament intended the concept of "*undertaking*" to be understood as shorn of its defining characteristic of joint and several liability and responsibility as firmly established under EU law. Indeed, the Court explicitly endorsed the notion that the term as understood in domestic law was to be construed consistently with EU law (Judgment paragraph [46]). A recent judgment of the CJEU confirming that joint and several liability and responsibility is a pivotal characteristic of the term is Case C-882/19 *Sumal SL v Mercedes-Benz Trucks Espana SL* (6th October 2021) EU:C:2021:800 ("*Sumal*") paragraphs [31]-[67]. This was a

judgment of the Grand Chamber. It cited 10 principal authorities[5] on the scope of the concept of "*undertaking*" and these authorities cite earlier decisions to the same effect.

85. A Commission decision found that truck manufacturers participated in an illegal cartel. The claimant purchased trucks from a subsidiary of an addressee of the decision. It brought national proceedings against the subsidiary claiming losses caused by the cartel as a whole and relied upon the dispositive value of the Commission decision. The action was dismissed upon the basis that the defendant subsidiary had not been referred to in the Commission decision and it could not therefore be binding against that defendant. A reference was made to the CJEU asking, in essence, whether the victim of an infringement committed by a parent company could seek compensation from a subsidiary for the resulting loss upon the basis that it was part of the same undertaking, even though the subsidiary was not referred to in the decision. The CJEU held that the concept of "*undertaking*" was an "*autonomous*" concept of EU law which bore the same meaning whether applied in a regulatory or a civil damages context (paragraph [38]). It covered an economic unit comprising entities forming a unitary organisation of personal, tangible and intangible elements, that pursued a specific economic aim upon a long term basis, even if in law those units were several natural or legal persons (paragraph [41]). The phrase was a deliberate legislative choice in preference to "*company*" or "*legal person*" (paragraph [39]). The concept of an "*undertaking*" entailed the application of joint and several liability among the entities of which the economic unit, or undertaking, was made-up at the time the infringement was committed (paragraph [44]). Where the victim of an anti-competitive practice relied upon a finding by the Commission in a decision addressed to a parent company the claimant could therefore invoke the civil liability of the subsidiary, provided the subsidiary comprised a single economic unit, or undertaking, with the parent. It also followed that Article 101 TFEU precluded a national law which provided for the possibility of imputing liability for the conduct of one company to another company only where the second company controlled the first company.

86. It is an important judgment. We cite relevant paragraphs:

> "39. It is clear from the wording of Article 101(1) TFEU that the authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, who is liable to be punished by application of that provision,

[5] The principal authorities cited were: (i) *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204 (14 March 2019) paragraph [47]; (ii) *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257 (10 April 2014) paragraph 123 and 124: (iii) , *Commission* v *GEA Group*, C-823/18 P, EU:C:2020:955 (25 November 2020) paragraphs 62 and 63; (iv) *Imperial Chemical Industries* v *Commission*, 48/69, EU:C:1972:70 (14 July 1972) paragraph 140; (v), *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784 (14 December 2006) paragraph 41); (vi), *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536 (10 September 2009) paragraphs 54 and 55; (vii), *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314 (27 April 2017) paragraphs 47 and 48; and (viii), *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389 (1 July 2010) paragraphs 84 and 86; (ix) *Villeroy & Boch* v *Commission*, C-625/13 P, EU:C:2017:522 (6 January 2017) paragraph 150; and (x), *Commission* v *GEA Group*, C-823/18 P, EU:C:2020:955 (November 2020) paragraph 61.

rather than other concepts such as those of 'company' or 'legal person'. Moreover, the European Union legislature used that concept of 'undertaking' in Article 23(2) of Regulation No 1/2003 to define the entity on which the Commission may impose a fine in order to penalise an infringement of EU competition rules…

40. In the same way, it follows from Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union … and in particular from Article 2(2) thereof, that the same legislature defined the 'infringer' upon whom it is incumbent, in accordance with that directive, to provide compensation for loss caused by the infringements of competition law attributable to that 'infringer', as being 'an undertaking or association of undertakings which has committed an infringement of competition law'.

41. In so doing, EU competition law, in targeting the activities of undertakings, enshrines as the decisive criterion the existence of unity of conduct on the market, without allowing the formal separation between various companies that results from their separate legal personalities to preclude such unity for the purposes of the application of the competition rules … .The concept of 'undertaking', therefore covers any entity engaged in an economic activity, irrespective of the legal status of that entity and the way in which it is financed, and thus defines an economic unit even if in law that economic unit consists of several persons, natural or legal… . That economic unit consists of a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind in Article 101(1) TFEU…

42. When such an economic unit infringes Article 101(1) TFEU, it is for that unit, in accordance with the principle of personal responsibility, to answer for that infringement. In that regard, in order to hold any entity within an economic unit liable, it is necessary to prove that at least one entity belonging to that economic unit has committed an infringement of Article 101(1) TFEU, such that the undertaking constituted by that economic unit is to be treated as having infringed that provision, and that that fact is recorded in a decision of the Commission which has become definitive … or established independently before the national court concerned where no decision as to the existence of an infringement has been adopted by the Commission.

43. It is thus clear from the case-law that the conduct of a subsidiary may be attributed to the parent company in particular

> where, although having a separate legal personality, that subsidiary does not determine independently its own conduct on the market, but essentially carries out the instructions given to it by the parent company, having regard especially to the economic, organisational and legal links between those two legal entities, with the result that, in such a situation, they form part of the same economic unit and, hence, form one and the same undertaking responsible for the conduct that constitutes an infringement … . Where it is established that the parent company and its subsidiary are part of the same economic unit and thus form a single undertaking, within the meaning of Article 101 TFEU, it is therefore the very existence of that economic unit which committed the infringement that decisively determines the liability of one or other of the companies making up that undertaking for the anticompetitive conduct of the latter.
>
> 44. On that basis, the concept of an 'undertaking' and, through it, that of 'economic unit' automatically entail the application of joint and several liability amongst the entities of which the economic unit is made up at the time that the infringement was committed (see, to that effect, as regards joint and several liability for fines, judgments of and the case-law cited)."

87. In a similar vein, with particular regard to RFIs, in *Aalborg* (*ibid)* at paragraphs [61] and [62], the CJEU explained that the concept of "*undertaking*" was important to the "*effectiveness*" of investigations. The Commission was entitled to compel "*an undertaking*" to provide "*all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in that undertaking's possession*". The relevant regulation conferring the power to collect information imposed the duty on the "*undertaking*" which meant that it had to be "*…prepared to make any information relating to the object of the inquiry available to the Commission*".

88. In our judgment the use of "*any person*" and "*undertaking*" in section 26 CA 1998 was intended by Parliament to incorporate joint and several liability and responsibility and preclude the jurisprudentially inconsistent argument that service upon a subsidiary was insufficient to enable that subsidiary legally to have "*access*" to documents held by an entity higher up or elsewhere in the corporate chain over which it had no corporate, contractual or other legal control. Since an "*undertaking*" is an indivisible entity, decisions upon compliance are internal decisions of the "*undertaking*". We reject the submission of the respondents that the CA 1998 reflects the classic principle of separate legal personality enshrined in *Salomon v Salomon and Co Ltd* [1897] AC 22. To the contrary the concept of discrete legal personality was rejected by Parliament in its adoption of the broad definition of "*person*" as incorporating an "*undertaking*".

The relevance of the need to protect fundamental rights

89. The respondents next cite various authorities which, they say, indicate that, contrary to the above analysis, even under EU law, notice can only be served on, and effective against, a discrete legal entity. The principal cases are: (i) *Sumal* (*ibid*); (ii) Case C-

176/99P *ARBED SA* [2003] ECR I-10710 ("*ARBED"*); and (iii), Case C-97/08P *Akzo Nobel NV v Commission* ECLI:EU:C:2009:536 ("*Akzo Nobel*").

90. We disagree. The three cases support the proposition that because the concept of *"undertaking*" is broad, attracts joint and several liability and responsibility, and has potentially serious consequences for the undertaking and its component parts, fundamental rights must be observed. Such rights will play a part, for example, in ensuring that notices which trigger a duty on addressees to respond are served in a manner ensuring that they are brought properly to the attention of the entity concerned, that the nature of the underlying allegation is clearly specified, and that adequate reasons are given. Contrary to the respondents' argument, the need for protection of fundamental rights is a consequence of the breadth of the concept of "*undertaking*"; not, as the respondents would have it, cause for its abnegation. We take each case in turn.

91. *Sumal*: The facts have been summarised at paragraph [85] above. The relevant additional facts are that, when sued in the national court for damages based upon the dispositive effect of a prior decision addressed to the purported parent, the defendant subsidiary argued, as a matter of EU law, that it was not, on the facts, part of the overall undertaking and the domestic court was not therefore bound by the Commission decision. It had been unable to defend its position during the Commission procedure leading to the decision relied upon. It had not been served with the Statement of Objections. It had not been accorded a chance to make representations to the Commission. The CJEU held that the principle that an undertaking was an indivisible entity with its component parts entitled a victim to bring an action for damages without distinction against either the parent company subject to the infringement decision by the Commission or against a subsidiary of that company which was not referred to in the decision, where those companies together constituted a single economic unit. However, the CJEU added an important rider:

> "67. In the light of the foregoing, the answer to the first to third questions is that Article 101(1) TFEU must be interpreted as meaning that the victim of an anticompetitive practice by an undertaking may bring an action for damages, without distinction, either against a parent company who has been punished by the Commission for that practice in a decision or against a subsidiary of that company which is not referred to in that decision, where those companies together constitute a single economic unit. *The subsidiary company concerned must be able effectively to rely on its rights of the defence in order to show that it does not belong to that undertaking and, where no decision has been adopted by the Commission under Article 101 TFEU, it is also entitled to dispute the very existence of the conduct alleged to amount to an infringement."*

This shows that where a person alleges that they have been wrongly classified as part of an undertaking, in a decision said to be binding, they are entitled to exercise due and fair process to make good their defence. But that does not contradict the essential premise that applies if the defence fails, and the person is found to be part of the undertaking. In such a case it can then be made liable upon the basis of joint and several

liability. The respondents' analysis wrongly turns a defence to joint and several liability into a conclusion that it does not exist at all.

92. *ARBED:* The Commission issued a Statement of Objections to Trade ARBED ("*T*"), a sales company selling steel beams upon a commission basis for its parent company ARBED SA ("*A*"). The final decision was addressed to A and imposed a financial sanction calculated upon the turnover of A, not T. During the administrative procedure, the Commission did not serve the proceedings upon A, nor permit it to have access to the file, nor allow it to make submissions, nor advise A of its intention to impose a penalty upon A using *its* (not T's) turnover as the basis for computation. In paragraph [19] the Court emphasised that in proceedings involving sanctions, observance of the rights of defence was a fundamental principle of law to be complied with even if the proceedings in question were administrative in nature. In this context in paragraph [21] the Court stated:

> "21. Given its importance, the statement of objections must specify unequivocally the legal person on whom fines may be imposed and be addressed to that person..."

This judgment does not assist. The Commission would have been entitled to impose liability upon A for the infringing conduct of T, *provided* that A's rights of defence had been properly observed, which they were not (see paragraphs [19]- [24]).

93. *Akzo Nobel:* The respondents cite paragraph [57] where the Court stated:

> "The infringement of Community competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 60, and Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *August Koehler and Others* v *Commission* [2009] ECR I-0000, paragraph 38). It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations."

It is argued that this establishes that an investigative or enforcement measure can only ever be addressed to a single natural or legal person and precludes such a person being liable or responsible for the acts of its parents or others in an undertaking. We disagree. The case concerned the liability of a parent for the conduct of its subsidiary. In paragraph [58], the Court drew out the consequences of joint and several liability. Settled case law confirmed: "… *that the conduct of a subsidiary may be imputed to the parent company*…" where the subsidiary carried out in all material respects the instructions of the parent. In paragraph [57], the Court explained that, because fines could be imposed upon a parent company, a Statement of Objections had to be served upon that person. The judgment is about procedural rights and (like *Sumal* which followed and cited it) is an illustration of the principle that, if a person is at risk of a sanction, they must have addressed to them the case they have to meet. As is evident from the quotation from paragraph [57] of the judgment set out above, the Court cited with approval the judgment in *August Koehler.* Paragraphs [33]- [38] of that judgment make this point clearly.

94. We have no difficulty in concluding that, in the exercise of section 26 powers, the CMA must act in accordance with fundamental rights, including rights of defence. That is however a far cry from limiting the power so that it can only ever be exercised against one component of a wider undertaking. We add that in the present case there is no suggestion that any procedural right has been violated. It is clear from the notices sent in the present case that the obligation of production applied to the undertaking as a whole. Both the UK subsidiaries were served as addressees of the section 26 Notices and they were brought to the attention of the German parents. The German parent companies have exercised their right of access to a court and to a fair and objective adjudication of their challenges. All knew full well the nature and extent of the obligations being imposed upon them, the reasons for the notices, and the consequences of non-compliance.

Legislative purpose

95. Other policy considerations lead to the same conclusion. These include the need to ensure effectiveness and avoid creating easy routes to avoid and circumvent enforcement of the prohibitions. If the respondents are correct, the CMA would become largely toothless when confronting international cartels. It could not exercise investigatory powers outside the UK. And in relation to subsidiaries or other entities of cartelists operating within the UK, it could only request information and evidence over which they had physical or legal control. If this is the law, no rational cartelist would ever operate its conspiracy save from offshore locations and ensuring that no inculpatory evidence was to be found *in* the UK.

Implications relating to service of the notice

96. The Court considered that the modalities of service were relevant. The court concluded that it was neither possible nor made legal sense to seek to serve an "*undertaking*": see paragraphs [32] and [33] above. Section 26 does not specify how the notice is to be brought to the attention of a "*person*". The only requirement, set out in section 26(2), is that it is "*to be exercised by a notice in writing*." We do not consider this to be relevant. There is no inconsistency between (i) the law requiring, for the purpose of ensuring observance of fundamental rights, that, as a matter of practice, the CMA should serve section 26 notices upon a natural or legal person from within the undertakings, or, in some other way ensuring that the entities comprising the undertaking have the notice properly brought to their attention; and (ii), the duty of compliance being upon the undertaking as a whole in accordance with the principle that an undertaking is indivisible. The former ensures procedural fairness; the latter ensures that markets and consumers can be effectively protected. The Court alluded to the possibility, in our view theoretical, that were the CMA to be able to serve the notice upon the undertaking as a whole it might bring the notice to the attention of an entity which was unaware of the extent of the undertaking to which it belonged. We are not aware of the CMA ever having exercised its power in such a manner. However, if this did occur and it was raised as a genuine response to an alleged failure to comply it might, on the facts, amount to a reasonable excuse defence. Were such an improbable scenario to arise there might also, arguably, be a violation of the undertaking's fundamental right to have a potentially penal notice brought to its attention. Such a notice might be set aside.

Implications for comity

97. There is no inevitable collision with comity. We do not repeat what we have already said in paragraphs [63] – [64] above. Section 26 confers a power, not a duty. We conclude that the conferral of a power is a perfectly appropriate means of enabling a decision maker to exercise its discretion in a manner which observes principles of comity. As was explained in submissions, the CMA seeks to exercise the power taking account of international sensitivities. This is a pervasive fact of life for competition law regulators the world over and was recognised by the CMA in argument and is fully reflected in the public utterances of the EU Commission.

Inferences to be drawn from the way in which civil actions are commenced

98. The Court observed (Judgment paragraph [77(2)(3)]) that if the CMA was correct, it would be possible to commence a civil action against an undertaking even though civil actions against undertakings were unknown in English law. We do not understand the significance of the point. Civil actions are routinely brought against "*undertakings*" for breach of competition law. It might be that such claims are brought formally against legal and natural persons who form a component part of the wider "*undertaking*"[6], but that is a procedural device under the CPR. In the body of any pleading the claimant must, to found a valid claim for breach of statutory duty, plead that the defendants either comprised (collectively) a single undertaking or were components of the "*undertakings*" and liable for its conduct. The position as a matter of procedural law has no bearing upon the much broader question concerning the exercise of powers of investigation against "*undertakings*". To conclude otherwise permits the tail of subordinate procedural regulation to wag Parliament's dog.

99. In *Sumal* (*ibid*), at paragraph [50], the CJEU held, applying the principle of joint and several liability upon which the concept of an "*undertaking*" was based (see paragraph [49]), that there was "*nothing to prevent, in principle, a victim of an anti-competitive practice from bringing an action for damages against one of the legal entities which make up an economic unit and thus the undertaking which, by infringing Article 101(1), caused the harm suffered by that victim*". And in paragraph [58] the CJEU stated that: "*…the principle of personal responsibility does not preclude the possibility... that a finding of such an infringement should be definitive with regard to a subsidiary company since... it is for the economic unit which constitutes the undertaking that has committed the infringement to answer for it*". In our judgment the same applies to section 26 CA 1998.

Conclusion on Ground II

100. The phrase "*any person*" in section 26 is expressly defined to include "*undertaking*". This incorporates the concept of joint and several liability and responsibility in both a private and public law sense. It is therefore open to the CMA to exercise section 26 powers against any entity (whether located inside or outside of the United Kingdom). It can, for example, exercise its power against a natural or legal person, an "*undertaking*", or a combination thereof. When it serves a notice upon an entity, it does so upon the basis that the entity has access to all the documents and information of the

[6] There was some dispute between the parties as to whether it was possible under the CPR to launch a claim against an "*undertaking*", as opposed to individual natural or legal entities who were component parts of the undertaking. We did not hear full argument upon the point and do not need to resolve it in order to determine this appeal.

undertaking as a whole. It is not open to the entity to raise by way of defence that it has no power, for example in traditional company or contract law terms, to compel the production of documents or information from elsewhere within the undertaking. Whether there is compliance is to be viewed by reference to the undertaking as a whole since decision making is a matter internal to the undertaking. Importantly, the exercise of the section 26 power is always subject to a requirement upon the CMA to respect fundamental, including procedural, rights. In the present case the CMA adopted what, in our view, was a sensible course of action which was, in each case, to serve the notice in a manner bringing it to the attention of the UK subsidiaries and the German parents making it also clear that it applied to the legal entities comprising the undertaking as a whole. There has been no suggestion that this formulation violated any procedural or other fundamental right. It served to ensure that those responsible for compliance with the notice had it brought to their attention, and it also made clear that the obligation of production related to documents, evidence and other material held by the undertaking as a whole. We allow the appeal of the CMA in relation to Ground II.

H. Disposition

101. For all the above reasons we allow the appeal against the single Judgment of the CAT and the High Court.