

COMPETITION APPEAL TRIBUNAL SETS A HIGH BAR FOR CMA RAIDS AT DOMESTIC PREMISES

On 7 December 2023, the Competition Appeal Tribunal (CAT) published a [judgment](#) confirming the higher level of scrutiny that applies to the Competition and Markets Authority's (CMA) power to enter and search domestic premises. The ruling, in which the CAT refused the CMA's request for a warrant in respect of a private residence, was made public after the CAT refused to grant an application by the CMA for the judgment to be kept closed.

This briefing discusses the key points of interest and implications from this case.

BACKGROUND

Under the Competition Act 1998, there are three cases where the CMA may apply to the CAT for the issue of a warrant to enter and search business or domestic premises. This ruling deals with the specific case whereby the CAT may issue a warrant if it is satisfied that there are reasonable grounds for suspecting:

- that there are documents on the premises which the CMA has the power to require to be produced; and
- where, if those documents were required to be produced, they would not be produced but rather would be concealed, removed, tampered with or destroyed.¹

The CAT's judgment focuses on the second limb of the above test.

The CMA had applied for three warrants to enter and search business premises, which were all granted by the CAT. However, the CAT declined to issue the fourth warrant sought by the CMA, to raid an individual's private residence in Scotland.

The ruling, which was handed down on 12 October 2023, was recently made public following the CMA's [unsuccessful application](#) to keep the judgment closed - making the CAT's reasoning publicly available. The CAT judgment does not name the companies or the individual concerned, and does not elaborate on the CMA's evidence or substance of the investigation.

KEY POINTS OF INTEREST

The "higher order of scrutiny" that applies to the CMA's power to raid domestic premises

The CAT was satisfied that the second limb of the above test was met in respect of the warrants sought for business premises. The CAT accepted that the CMA could rely solely on the secrecy of the alleged cartel conduct as the reason why documents may be concealed, removed, tampered with or destroyed within business premises - noting that the CMA is entitled to a "*strong following wind*" in this regard.

As regards the CMA's request for a warrant to raid domestic premises, however, the CAT applied a different (higher) standard when considering whether the second limb of the test was met:

- The CAT noted that a warrant in relation to domestic premises requires a "*higher order of scrutiny*" under Article 8 of the European Convention on Human Rights (as incorporated in the Human Rights Act 1998) and generally.
- The CAT found that (as regards the named individual) the inference from the suspected existence of a secret cartel of the possible destruction or concealment etc. of documents was not, of itself, sufficient to justify the issue of a warrant to raid domestic premises. Rather, something more to "*suggest a propensity to destroy*" needs to be asserted by the CMA in

¹ Sections 28 and 28A, Competition Act 1998 (as amended).

evidence when seeking a warrant to raid domestic premises. This is particularly the case where the premises are occupied by others and the warrant's proposed scope is wide-ranging.

The CAT further noted that the adverse risks of not issuing a warrant in this case were considered low because the focus was on the individual's electronic devices, in respect of which:

- if the devices were sought by the CMA and then disappeared or sustained deletions, inferences could be drawn which would be “*very hard to rebut*”. Interestingly, the CAT noted that such inferences would be drawn against the individual concerned but also the undertakings they are or were part of; and
- permanently deleting electronic data can be difficult, according to the CAT, in the “*modern electronic world*”.

The CMA's application to keep the judgment confidential

The CMA had applied for the CAT's judgment to remain closed. In refusing the CMA's request, the CAT found that the CMA had not sufficiently articulated why any part of the closed judgment could prejudice the investigation or any further execution of the warrants.

“There is nothing identified by the CMA in this case to lay in the balance against the principle of open justice, which in this case must prevail.”

The CAT remarked that the CMA's power to enter premises under warrant constitutes a considerable intrusion into private life and that the “*exercise of these powers must, in all cases, be closely justified*”.

On that basis, the CAT noted that the publication of appropriately redacted open judgments was “*peculiarly important*” in such cases, including to ensure that guidance is available for future cases as a “*guideline judgment*”.

The CAT also rejected the CMA's argument that there was a public policy reason for keeping the judgment closed in that, were the reasoning in the judgment to be followed, it would be more difficult for the CMA to obtain warrants in respect of domestic premises.

COMMENT

The CMA has previously signalled that, to reflect current flexible and home working practices, it is willing to use its existing powers to conduct dawn raids at private residences. This case, which also concerned the CMA's first UK-wide warrant application before the CAT, raises the bar for the CMA's exercise of those powers, as compared to its powers to search business premises.

In particular, the CAT ruling will likely make it challenging for the CMA to obtain a warrant to inspect domestic premises in the absence of specific evidence showing why the individual in question would have a “propensity” for the destruction or concealment of documents.

The Digital Markets, Competition and Consumers Bill, which is expected to receive royal assent next year, will also enhance the CMA's dawn raid powers in domestic settings - in particular, by giving the CMA the power to “seize and sift” documents (see [this edition](#) of our Competition and Regulatory newsletter for further information). However, even with these new powers, the CMA will still have to overcome this initial (higher) hurdle of obtaining a warrant. It therefore remains to be seen how the CAT's ruling will affect the CMA's strategy and appetite to seek warrants in respect of domestic premises going forwards.

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